**THE COURT OF APPEAL**

**[151/13]**

**The President**
**Donnelly J.**
**Edwards J.**

**BETWEEN**

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

**RESPONDENT**

**AND**

**BRIAN SHAUGHNESSY**

**APPELLANT**

**JUDGMENT of the Court delivered on the 31st day of October 2023 by Birmingham P.**

**Introduction and Background**

**1.** The matter before the Court has had a long and complex history. On 22nd March 2013, following a trial which had commenced on 19th March 2013, the appellant was found guilty by a majority verdict of a count of rape. The rape charge that the appellant faced related to events that had occurred on 26th July 2010.

**2.** By way of brief background, it should be explained that the complainant in the case was a 17-year-old part-time employee of a hotel owned by the appellant. In addition to being a part-time employee of the hotel, she also acted from time to time as babysitter to the appellant's children. The events in controversy occurred in the presidential suite of the hotel. At trial, the case for the prosecution was that, in that suite, the appellant forced himself upon the complainant and penetrated her. At trial, the appellant did not give evidence, but when interviewed by Gardaí – the contents of that interview were put before the jury – he had denied the allegation of rape, but had accepted that kissing and cuddling had occurred. On 10th June 2013, the appellant was sentenced to a term of six years imprisonment, with one year of the sentence suspended. There was also provision for suspension of a further year of the sentence if the appellant participated in the Better Lives programme. The appellant did not avail of this additional period of suspension.

**3.** Following a change in legal representation – this would be far from the last such change – a notice of appeal, dated 10th October 2013, was delivered. The relevant section of the notice of appeal stated as follows:

> "The conviction was unsafe and unsatisfactory and ought to be quashed in that:
>
> (i) The trial was unsatisfactory in all the circumstances.

(ii) The [appellant] has also instructed that his previous legal representation failed in numerous material aspects, to adequately or properly prepare and conduct his defence case thereby rendering the conviction unsafe and unsound. These grounds of appeal are filed following a change of solicitor and counsel; as a result, it is not appropriate at this stage to particularise this ground of appeal as it is not possible, at this time, to fully and responsibly advise the [appellant] in relation to this issue and fully advance it as a ground of appeal. The [appellant] expressly reserves the right to further particularise and amplify this ground of appeal.

(iii) The [appellant] reserves his rights (*inter alia,* in light of ground (ii) above), to adduce new or additional evidence in the course of the hearing of the appeal as same may be necessary to properly present his appeal.

. . .

(vii) The [appellant] expressly wishes to reserve the right to modify whether by way of amendment, deletion, or addition these grounds of appeal when he has been fully advised in relation to this appeal by his new legal team which has not yet been done at the time of drafting due to the preliminary stage of the appeal."

Thereafter, the appellant sought leave by way of a notice of motion to particularise ground (ii) as follows:

"The Appellant's defence was not presented in a satisfactory manner during the course of his trial having regard to material and instructions provided by the Appellant to his legal team prior to and during the course of the trial."

Particularisation of ground (ii) was permitted.

**4.** The matter came before this Court on 27th February 2020, and this Court delivered judgment on 9th April 2020 ([2020] IECA 95). The Court identified the grounds being relied on as being those set out at (i) and (ii), as particularised above. For completeness, it should be said that there was also an issue in relation to how corroboration had been dealt with at trial, but this aspect is no longer live. This Court considered in detail arguments that had been advanced relating to the ineffectiveness of legal representation, conducting a comprehensive review of the relevant evidence, and concluded that the appellant had failed to demonstrate that the manner of the defence at trial rendered the conviction unsafe.

**5.** The appellant sought leave and was permitted to bring a further appeal to the Supreme Court.

**6.** The Supreme Court judgment ([2021] IESC 18) addressed the question of how an appeal in which an issue has been raised as to whether a trial was unsatisfactory and a verdict unsafe because of ineffective representation should proceed. The point was made that an appellate hearing, where there was an issue as to the effectiveness of representation, should not be allowed to morph into a tripartite contest. The Supreme Court set out between paras. 44 and 48 of the judgment what procedure should be followed. The judgment then offered a summary and addressed what was seen as the contest in the present case. For ease of reference, we will set out here that section of the judgment:

"**Summary**

49. The accused who alleges incompetence of representation at trial denying him or her a trial in due course of law bears a heavy burden of proof. To reiterate: in our legally aided system, with a free choice of lawyers, it is to be assumed that legal representation at trial is of at least a competent standard. That is what is expected; and a contrary case must be demonstrated by the accused. At a preliminary level, such an allegation must raise a serious issue. What is concerned must be more than a hindsight reanalysis of how perfection of approach might have improved on competence. Criminal trials are full of ups and downs. A point must be identified which potentially demonstrates how a trial went wrong because of some serious want of competence. To use the words of Keane CJ [in] *The People (DPP) v McDonagh* (2001) 3 IR 411 at 425, the papers lodged must demonstrate at least the potential for demonstrating 'such a degree of incompetence or disregard of the accused's interests as to create a serious risk of a miscarriage of justice'. There is no necessity to proceed further than a consideration of whatever papers are lodged if it is clear that no realistic case has been made out by an accused that there was incompetence of this level. On analysis by an appellate court, if there is no such realistic case, the application should go no further.

50. If the potential for such a high level of incompetence is initially found to be present, any evidence on which it is based should be analysed as to whether that evidence is believable. There must be credible evidence. That credible evidence may be assessed in the light of such factors as the degree of delay in making the case, the detail with which a claim is made and the extent of any necessary disclosure that ordinarily would be expected. Where there is a contest as to, for instance, drunkenness in court or not, or any claimed failure to pursue an important and central factual instruction with relevant witnesses, and that is explained by the accused's former lawyers or is denied, it will be for the appellate court to consider whether, on ordinary principles, evidence should be heard, in the ordinary way, to resolve a primary clash as to fact. That evidence must be assessed as to credibility. If no credible case is made out whereby a factual scenario potentially amounting to incompetence is actually made out on the evidence, the application should go no further.

51. If a credible case is made out, an appellate court should analyse in the light of the evidence at the trial whether the appellant has made out a sufficient case whereby it may realistically be ruled that the level of incompetence was such that thereby the accused was denied a trial in due course of law. If not, the conviction stands.

**The Contest Here**

52. Having been convicted in March 2013, Brian Shaughnessy changed his solicitors and the new firm put in a notice of appeal dated 10 October 2013 asserting that 'his previous legal representatives failed in numerous material aspects, to adequately or properly prepare and conduct his defence'. That notice of appeal continues that on review by the new lawyers, this will be further particularised. If the point was that the complainant was in the presidential suite for two hours but his instructions in that regard were ignored, that could perhaps have been then stated. To the holding notice of appeal, if it might be properly so called, by motion of 3 December 2019, two grounds were sought to be added:

that Mr [Willie] Greene's [the barman/night porter's] evidence was incapable of amounting to corroboration; and that the accused's 'defence was not presented in a satisfactory manner during the course of his trial having regard to material and instructions provided' by him 'prior to and during the course of the trial.' His accompanying affidavit is dated 28 November 2019. That affidavit claimed that Brian Shaughnessy had instructed his legal team as to the alleged importance of times and that this had been ignored. He claims that he had, pre-trial, met his legal team and told them the time the key was validated for entry to the presidential suite. He said that, at trial, his then senior barrister had put it to the young woman in cross-examination 'that she had been in the room for half an hour and failed to put the issue of the two-hour period to her.' Nor was this issue of two hours raised with any other witness, he asserts. Mr Greene, however, in cross-examination had indicated the time the key was validated but, it is claimed, too little was made of this. He claims to have protested to the senior barrister that this was important but was ignored. Implicit is that the complainant should have been cross-examined on the two-hour timeframe in the presidential suite and not on the basis of the accused's own statement to gardaí putting the timeframe at 45 minutes approximately. At no stage in the affidavit does the accused say that he and the young woman had been in the presidential suite for two hours and nor is any account given by him as to how that time was spent. Implicit in his assertion is that immediately on receiving the key, he and the young woman went up to the suite, but how the timeframe supposedly unfolded is left unspoken. On the appeal to this Court, any apparent shortcomings in the evidence for the accused were sought to be supplemented by instructions on the spot. That does not suffice. All the material evidence must be laid before the court. Furthermore, it was asserted on appeal that all attendances taken from the accused were no longer on the file of his current solicitor. What happened to these documents and what is now available must be explored.

53. This affidavit of Brian Shaughnessy was replied to by his then solicitors in an affidavit of 26 February 2020. This affidavit was made, it is asserted, 'without sight of the original file'. Where is that file? The trial solicitors claimed to have no original instructions sheet or set of attendances as to the accused's account. The original solicitor said all 'reasonable and necessary steps' had been taken in defence of the accused. The statement to the gardaí of the accused said there had been talk in the presidential suite about the accused's marital difficulties, that he had bought the young woman several alcoholic drinks in the bar downstairs, and that this private matter was what was to be further discussed in the upstairs accommodation. The relevant timeframe was of a key being prepared, that being given to the accused in the bar and of Mr Greene being unaware as to when the young woman and the accused left the bar. When they went to the presidential suite, the instructions of Brian Shaughnessy stated that there was kissing or shifting, touching and the young woman went after him in a sexual way, that he did nothing more than cuddle. In the next few days, the complainant had resigned any employment in the hotel and had not ever again spoken to the accused. The prosecution did not make the case, the affidavit states, that the rape had occurred at a particular time, or between any two definite points in time. The jury had evidence of the texts, on the defence case sent after the alleged rape

by the young woman but nothing to do with that, and of the taxi requests and times was central. The solicitor said that the accused was 'very engaged in the case and the meetings we had were very lengthy and detailed.' The accused, he claimed, expressed during the trial how well matters were going. There is no detail as to what information was available beyond recollection, and that several years later, the solicitor had to consult with counsel 'and thrall (sic) through my computer records to enable' the preparation of that affidavit of 26 February 2020 answering that of the accused.

54. There was delay in crystallising the time point. In the affidavits of the accused there is no explanation of why he or the young woman were in the presidential suite, and if the key was given to him immediately upon it being prepared, if they went up to the room immediately, she not apparently having finished her drink, and how the time was spent in the presidential suite. Brian Shaughnessy's delay in raising the time point may or may not be a factor contributing to either a lack of relevant papers being disclosed or as to what were the actual instructions and as to whether these were ignored and were central to his case. No comment is made on any of this. As this case was set out, however, it is manifestly not possible to decide whether or not counsel for the defence was actually incompetent without more evidence pertaining to the instructions actually given or what the accused's version of events entails. This is a genuine contest and thus requires that an appellate court should hear oral evidence focused on this point.

**Result**

55. A serious matter has been raised as to whether there was an issue as to times and whether there was a failure to follow the accused's instructions. That serious issue having been raised, the next issue is whether it is supported by credible evidence. A contest of a stark nature has been joined on this. No appellate court could assess that issue of whether there was any failure to follow a central factual instruction without hearing oral evidence. On the resolution of the credibility of that oral evidence for the prosecution and the defence, the next issue is whether on whatever evidence, if any, an appellate court finds to be credible, a case has been made out by the accused that there has been that degree of incompetence of representation as to amount to a denial of the right of an accused to a trial in due course of law under Article 38.1 of the Constitution.

56. This case is far off that resolution. What is apparent, however, is that an issue has been raised by the accused as to which there is a factual contest. If, and this cannot be resolved by this Court, the accused had instructed his lawyers that he and the complainant had left the bar immediately upon the key being prepared, and that, in consequence, he and the young woman had spent two hours in the presidential suite, and that the time in the presidential suite had been spent in a particular manner, under the rule in *Browne v Dunn* (1893) 6 R 67, HL approved in *McDonagh v Sunday Newspapers Ltd* [2018] 2 IR 1 and the subject of useful guidelines in *The People (DPP) v Burke* [2014] IEHC 483, that would ordinarily have had to have been put to the complainant. This does not require either a parroted repetition of the instructions of the accused or that the accused formulate questions to be asked, but it does require that the essential factors in defence that a witness contradicts be put to that witness. As to the time point, it was not put to Mr

Greene that the key was delivered immediately upon it being prepared, nor that the accused and the young woman left the bar immediately and spent two hours in the presidential suite. As to what this may or may not indicate, or as to what the former solicitors for the accused's notes and attendances may demonstrate, if found, is not a matter for comment.

57. There is a stark clash of accounts that is not capable of being resolved on the current papers. Evidence from the accused needs to be tested as to credibility on hearing oral testimony. As to whether any contrary instruction or different factual scenario was put to his former lawyers, requires their evidence as led by the prosecution. Such attendances and notes as are directly relevant, and in respect of which privilege is impliedly waived, subject to issues as to third parties as set out above, should be part of the prosecution reply. Further searches should be made.

58. Thus the matter should be returned to the Court of Appeal, the applicable test having here been set out. A potential issue has emerged, as to which this Court is not in a position to judge and can make no comment. This hinges on the credibility of any evidence of the accused and the resolution of any factual matter in reply on oral evidence by both sides. Depending on the resolution of that factual contest, it may be necessary for the Court of Appeal to consider was there such a failure of competence in representation as to deny the accused a trial in due course of law."

**7.** On foot of the decision of the Supreme Court, this matter has returned to this Court. This judgment should be read in conjunction with the judgment of the Supreme Court as well as the earlier judgment of this Court. When the matter came back before this Court, somewhat late in the day, it was indicated on behalf of the appellant that there was a preference for a Court that would be differently constituted to that which dealt with the first appeal. Despite the lateness of the request, the appellant has been facilitated in that regard. Before addressing the arguments that have been advanced in the course of this latest appeal, it is appropriate to recap on the evidence at trial and the versions of events that were available for consideration. We refer to "versions" available for consideration notwithstanding that it is the case that the appellant did not give evidence. He did set out an account of what he says occurred when interviewed by Gardaí. The "versions" that we will now set out are taken for the most part from the evidence of the complainant and then from a memorandum of interview conducted by Gardaí with the appellant.

**The Complainant's Evidence**

**8.** In her evidence, the complainant explained that she was 20 years of age, and that she had grown up in a town in the west of Ireland where she had lived with her parents and two sisters. She explained that she had got to know the appellant when she was aged 15 or 16. She got to know him because he was friendly with her father. At the time of giving evidence, she was studying nursing at university. The hotel that was being referred to in the course of the case was open about a year. In May 2009, the complainant secured part-time employment at the hotel with the assistance of her father. The employment involved working in an indoor play area for children. That summer, she worked in the play area and continued doing so at weekends following her return to school in September 2009. From July 2009 onwards, she would babysit the appellant's

children. She worked again in the play centre in the school holidays of 2010. On the night of 25th July 2010, there was a staff party at the hotel. She went to the party with a girl of her own age who had recently started working in the play area. They arrived at the hotel at about 11pm. As soon as they arrived, they met the appellant. At that stage, he was in the large bar in the function area, and he bought drinks for the complainant and her companion. The complainant and her companion went to have a look around, and after a period, returned to the bar area where the appellant offered to buy the complainant another drink. Initially, she declined, but after some persuasion, agreed to another drink being bought. At one point, the appellant was speaking to a cousin of the complainant who worked at the hotel and bought the cousin and complainant a drink. At one stage, the complainant was asked to come to the assistance of the young woman with whom she had come to the party. At that point, the complainant's companion was sitting on the floor at the entrance of the nightclub and was getting sick. The complainant rang an uncle of hers who was a taxi driver. The complainant did not depart in the taxi, though that may have been intended, but the appellant said, "[c]ome in for another drink", and another employee of the hotel said, by way of encouragement, "[a]h sure come in, it's only early".

**9.** After a while, the appellant called the complainant over to where he had been sitting on his own. According to the complainant, there was some general conversation about how the boys were getting on, how her father was and how the night was going. The appellant bought the complainant a drink, a vodka and orange. At that point the appellant said, "[c]an I talk to you as a friend and not as an employee[?]". The complainant's response was to say "[y]eah, of course". At that point, she said she had not drunk any of her drink, she was just wetting her lips out of politeness, she did not want any more. The appellant said there were too many people around and suggested that they would go to another bar, variously referred to as the residents' lounge or the "Lir Bar", to talk. An employee that she named as Mr. Willie Greene, the barman/night porter was working behind the bar. At that point, both of them had vodka and orange drinks. The complainant and the appellant were then joined briefly by the hotel manager and his fiancée who departed after a short conversation. The appellant then said, "[d]o you know, are you sure you want to be my friend?" to which the complainant responded, "of course I'm going to be your friend". The barman/night porter was coming and going. The appellant said, "do you know, would you mind if we go somewhere else to talk, I'm still, you know, kind of conscious that there's people listening[?]", to which the complainant responded, "no problem". The appellant then asked the barman/night porter for a room key and a bottle of wine. The transcript records:

> "So Willie [the barman/night porter] came in, and Brian asked him for a key for a room and a bottle of wine. And I hadn't actually drunk my vodka and orange, again, it was the same, just wetting my lips. And that was fine, and we went and got in the lift there behind reception…
>
> So then we got up to the fourth floor, and you can see there where we would have come out of the lift…
>
> We turned right and came down the corridor, so we came down, and we went into the presidential suite. Now, I opened the door, Brian was holding the bottle of wine and the two glasses… I had the -- yes, he handed me the key and I opened it the door."

**10.** The complainant sat on the couch and took off her boots. The bottle of wine was on the table in front of him. She turned on the television. He was very quiet, and she just thought, "whatever this is, it's big", she thought, "why am I sitting here, I'm 17, do you know, why is this man confiding in me[?]". She said she was sitting there, and he was quiet, and he told her to "shut the fuck up". He repeated this remark and then pushed her down on the couch. He pushed her down, and then he was on top of her, had her by the shoulders and his full weight was on top of her. He moved his hands down to her pants, opened the button of her pants and pulled them down. The complainant described how "… if you kind of open your legs you can't get the pants down" and that she did that and felt completely exposed. She closed her legs and that is when he pulled off her pants. He then pulled down her underwear and she described him penetrating her. The complainant struggled and was able to become upright. She asked him "[w]hat about your wife and kids[?]". She pulled her clothes back on. As she was getting dressed, he said "I'll call you a taxi". She said she did not want a taxi.

**11.** In the course of her direct evidence, she was asked by prosecution counsel "[h]ow long did all this take, how long were you in the presidential suite, do you estimate?", to which she responded, "[n]o idea. I mean, like, I walked in there and it was more or less straight away that things happened, like, you know, that I kind of left him for a few minutes, you know, in the idea that he was finding this courage or whatever to say --". She said that she was not there long; about 20 minutes to half an hour. When she left, she tried to compose herself in the lift. She was a little bit distressed, more in shock than anything. Later, in direct examination, following a lunch break, she was asked how soon after the attack she described did she leave the presidential suite, and she responded, "I literally got up and pulled up my pants and put my shoes on and went…". She was asked what time she left the presidential suite and she said she did not know exactly, but it was roughly around 5am. She said when she went down, she could see Mr. Greene, the barman/night porter. She walked until she thought he could not see her anymore, at which point she ran and went home. She was due in work the following morning and she went in late. She noted that she had two missed calls from the appellant while working in the play area. Later, her phone rang again, she answered it and it was the appellant, who asked her if she got home okay, and she said she did and hung up the phone. She continued working that day. That evening, she received a text from her best friend, with whom she had a conversation. On 30th July, she wrote a letter of resignation.

**12.** In the course of cross-examination, it was suggested to the complainant that the appellant had never said anything to her in the nature of whether he could talk to her as a friend rather than an employee. Counsel suggested to the complainant that she and the appellant had gone to the presidential suite and that there was some hugging, but that it never reached the stage of sexual intercourse. It was suggested to her that she had made sexual advances to the appellant, placing her hand on his trousers and touching his penis, that the encounter lasted a period of seconds, certainly no more than a few minutes, and that the appellant was very tired and was not interested in sexual activity at the time. At one stage in the cross-examination, she was asked "how long do you stay -- do you say you were in that room?", and she responded, "I genuinely don't know, it's a really -- an estimate to say 20 minutes, half an hour". To this, counsel responded, "[y]es. Well, I have [to put it] to you that it was about half an hour?". She was then

asked, "[d]id you make any texts from the -- from the room?" and she responded that she was not entirely sure. When it was again suggested to her that she had texted on a number of occasions while in the room, she said she did not see any problem with that. She was asked whether it was the case that the barman/night porter downstairs made a number of phone calls for taxis at the request of the appellant, and she did not dissent. She commented that the appellant had telephoned the barman/night porter, and she had said she did not want a taxi called. She did not know how many times the appellant had contacted the barman/night porter, or over what period, though she said that it was not a long period of time. Later in the cross-examination, counsel said "[b]ut in any event, what I suggest is that after the attack you've described, you stayed in the room for the best part of half an hour, made three texts, and Mr. Greene, the barman/night porter downstairs made several phone calls for taxis". She was asked whether anything like that had happened, and she said not that she was aware of. She knew that the appellant had rung the barman/night porter about a taxi, but she would not have thought there was such a lengthy period of time. Asked about the time when she was messing around with the television and how long that had taken, she said that she did not know, it was nearly three years ago, but she would have thought not long. She did not recollect making any attempt to text in the room after the attack. She knew that she did make a phone call on her way home, but while she did not remember texting, she could have, and counsel should not get her wrong. When it was suggested to her that there were three texts before she met Mr. Greene, the barman/night porter, on the way out, she said she was not saying that did not happen, she was 17 at the time, and the first thing someone does when they pick up their phone is that they are constantly on the phone. It was suggested to her that after the attack, which counsel said had not happened, she had remained in the room, made three texts, and the appellant telephoned down more than once to get a taxi, and that it was the best part of half an hour after the attack that she left the room. Her response to that was that was not how she remembered it. She then added that, having said that, it was four or five months later before she told this as a full story, so she was not going to fight with counsel on that one. She accepted that the thrust of her evidence, when questioned by prosecuting counsel was that after the attack, she had put her boots back on and left almost immediately.

**13.** It was suggested to the complainant that it was a highly unlikely state of affairs that she would be attacked in the way she says she was attacked and would remain in the room long enough to send three texts, or for the appellant to make the number of phone calls that he made over a period of time. Her response to that was to say that the three texts did not take a long time to send, they might have been spaced out texts, but that she was in shock, and she would not be surprised if she did in fact spend a few minutes there. She said she understood completely where counsel was coming from, in that in normal circumstances, one is going to run straight from one's attacker, but it was the betrayal of trust and the complete confusion she found herself in which meant she would not be surprised if she had remained.

**14.** At another point in the cross-examination, counsel asked "[b]ut in the circumstances of this savage attack out of the blue…by somebody you trusted, surely the last thing in the world you would want to do is make a text to somebody?". Later, counsel asked her "[n]ow, when you went into the suite, that's the presidential suite, things turned nasty at a certain point in time --?". She confirmed that was so. Counsel said, "I take it that wasn't straight away?", and she responded

"no". Asked whether things were pleasant enough to begin with, she said that when they went into the room, the appellant was quiet and tense. He poured a glass of wine for her. She said he was not speaking to her, it was just nothing. She thought he was lost in thought, perhaps wondering how he was going to say what he was going to say.

**15.** Counsel explored with her the suggestion that his client had twice said "shut the fuck up", and the complainant confirmed that when this was said the second time, it was then that things turned nasty. Asked how long she was in the room before things turned unpleasant, she said she did not know, and that he was just sitting for some time. Pressed as to when they had gone to the room, how she had taken off her boots and switched on the television, as to whether she could help, and as to how long before the appellant first told her to shut up, she said she did not want to say how long because it would be a guess. Counsel explained to her that he was asking in the context of wondering why she did not leave when things got unpleasant. Counsel asked her if the attack occurred; he was suggesting to her that it lasted a short time, and she said she accepted that. Counsel clarified they had been talking a few minutes at the most, and she said yes.

**The Appellant's Account at Interview**

**16.** Following his arrest during the course of the investigation, the appellant was interviewed by Gardaí on 22nd December 2010. In response to questions, he began by giving an account of the evening of 25th July 2010, from the start of the evening. There was a staff party, including a barbecue, karaoke and a disco. He was in charge of the barbeque and cooked for the staff. When the party was nearly over, he was talking to the complainant, and she was talking to him. He was going upstairs to get a drink and she said she would come up with him. There was nothing happening in the bar so he asked her if she wanted to come upstairs for two glasses of wine and she said she would. They chatted upstairs. They were talking about the play centre and how it was going for her, and they talked about the children and the appellant's wife. He got emotional at that stage as he and his wife had been going through a tough time. At that stage, the complainant held his hand, they talked for another while, and then they had a "small shift". After that, the complainant held his hand, rubbed his back and opened the button of his trousers. They chatted for another while and then they had another "shift". He asked her twice did she want a taxi home and she said no. She was texting someone on the phone for about ten minutes and then she left. He did not have sex with her that night. He said the barbecue finished around 1.30am, and when that finished, the complainant had come with him to the Lir Bar. There were not many people there and not much happening, so he asked her upstairs for a drink. They got a bottle of wine and two glasses and went upstairs. The appellant stayed in the bedroom of the presidential suite that night. When they went up with the bottle, he drank some of it and the complainant drank a bit. Asked did he drink much, he said not a lot, just talked. About the suggestion that when they went into the room, he had said "shut the fuck up", he said that that was not true, and that he would expect that if he had said that to someone, they would leave the room. Asked did he kiss her, he responded that he was upset with what had happened with his wife and the complainant gave him a hug and a cuddle, just a hug, nothing sexual. He said that after she opened the button of his pants, they "shifted" for about three minutes, and he said to her "you need to get home". The

appellant said the complainant was on her phone for ten minutes and then left, and that they left on good terms. He said that when she opened the button on his pants and touched his penis, nothing else happened and he did not want it to. She was not touching his penis for long, for less than a minute, and he was not aroused. She was happy to be there, having a glass of wine. As extracts from the complainant's statement were put to the appellant, he stated they were untrue, that there had been nothing sexual that occurred, they were just having a cuddle, nothing more. Later in the interview, he was asked "[f]rom the time ye went up to the room to the time she left how long was it?", and he responded "[t]o the best of my knowledge three quarters of an hour".

**17.** In the course of the second interview, which largely covered the same ground, the appellant said that when she left the room, she was not upset and there was no way he saw her upset. Again, in the second interview, he said there was a good ten minutes when she was there and could have run from the room and did not (the reference to ten minutes appears to be a reference to ten minutes post-activity on the couch). Towards the end of that interview, when it was pointed out to him by Gardaí that this was a serious allegation and that the complainant had run from the hotel upset, the appellant's response was to say, "[s]he didn't run from the room upset. She stayed 10 minutes or so and then left."

**Some Comments on Timing**

**18.** Insofar as the issue of how long the complainant and the appellant spent together in the presidential suite is now of central significance in the context of this appeal, we would draw specific attention to what each had to say on the subject. It is an issue that was dealt with in some detail in both the earlier decision of this Court in relation to the appeal against conviction, and by the Supreme Court. We would draw attention to paras. 45 and 47 in the judgment of this Court (Kennedy J., [2020] IECA 95), and paras. 48 and 49 dealing with the evidence of Mr. Greene, the barman/night porter, and also the sections of the judgment of the Supreme Court (Charleton J., [2021] IESC 18) headed "The defence and prosecution accounts" at para. 4 and "Summary" to be found starting at para. 17.

**19.** We begin by observing that the statement of evidence of the complainant, as it appeared in the Book of Evidence, which was what was available to the parties before trial, does not provide a time at which the complainant and the appellant went from the Lir Bar to the presidential suite. The only time that features in the narrative of events is that she says she passed "… Willie [Greene] on the way out down at reception. This was at about five o'clock in the morning. He said 'goodnight' to me. I said goodnight. I kind of walked and then ran out of the hotel. I walked home." The narrative offered as to how they came to be in the presidential suite and what occurred when there is in these terms:

> "Brian asked Willie [Greene] for a key of a room and when Willie came in with the key, he asked Willie for a bottle of wine and we went upstairs. Brian brought me to the 4th floor to the Presidential Suite. At this stage I was still thinking what was he going to tell me and how would I react and how was I going to get out of drinking the bottle of wine with him. I'm pretty sure I opened the door of the room as he was carrying the wine. Then we went in and sat on the couch in the room. He was sitting on the couch beside me. He wasn't saying much and when I spoke to him he would tell me to 'shut the fuck up'. It felt

awkward but I didn't take offence as I thought he was just trying to get the courage to say whatever he wanted to say. I started flicking through the channels and started chatting about what was on the telly. He poured a glass of wine for himself and a glass of wine for me too. I didn't drink mine. I asked what time it was or something like that and he told me again to 'shut the fuck up'. This time I knew he meant it. Then he pushed me down on the couch and kissed me on the lips. He was rough. Then I struggled to get up and he told me again to 'shut the fuck up'. I was lying on the couch and he was lying on top of me. He was holding me down by the shoulder. Then he let go and opened my trousers. He was still on top of me. I was struggling to get out from under him. I opened my legs to stop him getting my trousers down but then I felt exposed so I closed my legs and he pulled off my trousers. I had taken off my boots when we came into the room. I had purple heels on earlier but I had changed to the boots down in the disco as the heels were hurting me. I was kicking and struggling with him and he pulled down my panties. He pulled [them] down to just above my knees. He had his jeans open at this stage. I didn't notice at all him opening his jeans. And then he put his penis inside me, into my vagina. It was uncomfortable and a little bit painful. While this was going on I was asking him [to] stop and he was just saying 'shut the fuck up'. I kept struggling and he kept moving his hips and was moaning saying 'Mmmm'. While this was happening he was saying 'Come into the bedroom, come into the bedroom' and I kept saying 'No'. Then I took everything in me and I pushed him back and said 'What about your wife and kids?' He didn't look at all phased. It didn't seem to bother him. I said to him 'I'm meant to be there for your kids' or something like that. Then I managed to get up and get dressed and he just sat on the couch. It felt like hours when he was doing this to me but it could have been just three or four minutes. I don't know, I've never had sex before but I don't think he came. When I was putting my boots [on] he said he would call a taxi that he didn't want me to walk home alone but I said I would walk. As I was walking out of the room, he called me back and told me he loved me. I passed Willie on the way out down at reception. This was about five o'clock in the morning. He said 'goodnight' to me. I said goodnight. I kind of walked and then ran out of the hotel. I walked home".

In relation to this statement, we would observe that while the complainant does not offer even an approximate time for when they entered the presidential suite or how long they spent there, we think it fair to say that anyone reading the account or hearing such an account delivered would form the view that the time spent in the suite was not long, that untoward activity took place quite soon after arrival, and that the complainant left the suite, and indeed, the hotel, soon after the activity ceased, it being about 5am when she passed the barman/night porter on the way down at reception. We should explain that we have access to the statement of the complainant as it appears in the Book of Evidence because it was exhibited by the appellant in the course of an affidavit sworn on 17th December 2021.

**20.** As to the account, as put forward by the appellant during the course of his interviews, we would draw attention to the response to the specific question, "[f]rom the time ye went up to the room and to the time she left how long was it?", which was, "[t]o the best of my knowledge three-quarters of an hour. She spent ten minutes on the phone before she left". We also draw attention

to the second interview, when responding to a suggestion on more than one occasion that she had run from the hotel, the appellant responded "[s]he didn't run from the room. There was a good ten minutes where she was there that she could have run from the room and she didn't". Repeating this in slightly different terms, he said, "[s]he didn't run from the room upset. She stayed 10 minutes or so and then she left".

**The Evidence of Mr. William Greene, the Barman/Night Porter**

**21.** To complete the picture that emerged at trial, we will refer briefly to the evidence of Mr. Greene, the barman/night porter, who gave evidence on two occasions on Day 2. In direct examination, he told the Court that it would have been late, late enough, when he saw the appellant. He could not say exactly, but it was the early hours of the morning, 3am or 4am, and that was the best estimate he could give. Mr. Greene saw the appellant at 3am or 4am with the complainant. He served them a drink and they sat at the bar drinking. The stage was reached when there were only these two customers. He did not feel he needed to be there to keep the place secure, as the appellant was the owner, so he went off to try and get his jobs done. When he came back, the appellant asked for a room key; he thinks the presidential suite key, he could not say that for sure, but the appellant would often stay there and would often ask for a key. He would put the time he locked up the bar as being approximately an hour after the 3am or 4am time he had given for when he had first seen the appellant. He got a couple of calls looking for a taxi from whatever room the appellant was in, but it was late and it was a small town, so there were no taxis available. He was definite there were two calls, possibly three, possibly more.

**22.** According to Mr. Greene, the complainant came down later that night, and she said "[c]an you get a taxi, Willie[?]" By the time he left down whatever he had been carrying, she had left, so he followed her into the foyer. He was asked did he notice how the complainant was when she was there standing at reception, and he responded "[w]ell, she was -- she seemed kind of maybe a bit panicked, that mightn't be the right word, but she was in a hurry to get out the door… she was quite keen to leave after asking for a taxi…". Asked about the manner of her leaving, he answered "[q]uickly". He did not really know how else to describe it, it was very brief. He indicated that she left the front door open as she went, so he followed her, and that she had run or walked fast at least, down towards the exit of the hotel grounds. In cross-examination, he explained the procedure for cutting keys. He was asked whether the time at which a key was cut was recorded, and he responded he did not know, but he would assume so. He agreed that the phone records seemed to indicate the first time he called for a taxi was 5.07am, and the last time was 5.41am.

**23.** Mr. Greene was recalled in the afternoon for further cross-examination by defence counsel. The appellant said that this occurred at his instigation. He says that not only did counsel have to be pushed into probing the issue which he wished pursued, but counsel was confused as to the source of the information. When recalled at this stage, Mr. Greene stated that the records available established that a room key for room 415, the presidential suite, had been cut at 3.23am on 26th July 2010. In re-examination, he stated a number of keys had been cut, but nothing turned on that. More significantly, counsel asked him whether he had given the appellant the key in the Lir Bar, and he confirmed that was the case, and that he then left and did not see the appellant again, so he did not know how long after that the appellant stayed in the Lir Bar. Given

how significant the issue of room key cutting has become, it is of some note that the issue of the time of cutting was not raised when the witness was first called to give evidence, but was only dealt with subsequently when there was an application to have the witness recalled.

**24.** On the now key question of time spent in the suite, it will be noted that two different propositions were put to the complainant. At one stage, counsel put it to her that she was in the room for 30 minutes. This happened when the complainant, in answer to a question asking how long she said she was in the room, replied "I genuinely don't know, it's a really -- an estimate to say 20 minutes, half an hour". At another point in the cross-examination, it was put to the complainant that after the "attack", she had remained for half an hour.

**Closing Speeches**

**25.** The final section of the trial which merits review is what was said by defence counsel in the course of his closing address and the response it drew. In the course of his address, he identified a number of areas where he suggested there were question marks about the evidence of the complainant, including the means of access to the hotel for the complainant and her companion, how long after their arrival the karaoke was going on and other matters. However, he majored on the question of how long the complainant and the appellant had been in the presidential suite, and he did so in these terms:

> "Now, the question and I would submit to you ladies and gentlemen, the big question in this case is this -- and we're dealing here with hard facts -- if [complainant referred to by her first name] was cajoled up to this room as suggested by the prosecution, and if, as she said, things remained pleasant for a short period of time and then turned nasty, and she accepted that the attack would have lasted for some minutes, what is she doing staying in the room for as long as she did on the objective evidence, afterwards? And this can be established, in my submission, it's one of the few things in the case which can be established as hard facts. William Greene cut the key at 3.34 am. And then you remember his evidence that he goes off and goes about his business and he comes back and [the complainant] and Mr Shaughnessy are gone… [Mr. Greene] cut it, the first key at 3.23 and then he went off about his business, and when he comes back to [t]he Lir Bar , Mr Shaughnessy and [the complainant] are gone, and he cuts his next key at 3.34. Now, that would suggest very strongly, ladies and gentlemen, that [the complainant] and Mr Shaughnessy were in the room by that time, by 3.34 or thereabouts. And the phone calls then that come down to Mr -- Mr Greene to make phone calls, he says he made about 20 calls. But certainly, he certainly made many calls, and the last phone call is 5.41 am, the last phone call for a taxi. And he thinks he got two, at least maybe three calls from Mr Shaughnessy to get taxis. Now, this raises the question, this is the question: what was [the complainant] doing -- what was [the complainant] doing in that room all that time if she'd been attacked, because her own evidence was that after the attack she left almost immediately, but the only delay was to put her pants back on and her boots. And that as she's going out then, he's on the phone. But on one occasion, she says he's on the phone which is on the table in the corner. And then later she seemed to say that he was back sitting on the couch. But at that stage, she leaves, and this is just after the attack. But

yet, the objective evidence suggests that she was in the room for a much longer period of time after the attack, because Mr Greene didn't see her until he had finished with the phone calls. So this is very, very difficult, I would suggest to you, ladies and gentlemen, this evidence is difficult to reconcile with [the complainant's] account of what happened. In fact, I would submit to you it's impossible to reconcile it. She can't be right in her description that they went into the room, a few minutes later things turn nasty, then the attack, and then she leaves. That's a very short period of time. She can't be in the room for as short a period of time as that if the records as to the phone calls and as to the cutting of the keys is correct. And there's no suggestion that that evidence is not correct. In my submission to you, ladies and gentlemen, those records, those electronic records are not lying, they are hard facts. They are the truth, the objectively establishable truth. And they do not accord -- they are completely out of harmony with [the complainant's] account of the event. These records cannot be correct if [the complainant] is telling the truth, the whole truth and nothing but the truth. And I would submit to you, ladies and gentlemen, that this is the problem, and this cannot be described as peripheral I would submit to you, on any reasonable view. The question as to whether [the complainant] went in to the hotel by the front door or another door, I concede may be peripheral. The karaoke evidence, I would submit, well if it's peripheral, it's still troubling. This evidence is difficult. I would submit to you, ladies and gentlemen, that the Irish expression 'Níl aon dul as' is appropriate to this evidence, there's no way round this evidence. And the only conclusion that can be drawn from this evidence is that [the complainant] has not given a reliable account of what happened in the room."

**26.** When defence counsel concluded his closing speech, prosecution counsel indicated she had an application to make. She had three criticisms; it is the second of these that is relevant at this stage. Counsel dealt with it as follows:

"[S]econdly, I say that the -- there's a misconstruing, if I might put it that way, of this [name of hotel] Hotel record, [w]hich again was not put to Mr Greene. He refers to the entry on the 26/7 at 3.23, which is room 415, the presidential suite. And the evidence of Mr Greene was he gave Mr Shaughnessy that card in [t]he Lir Bar and he went away about his business, and he didn't see Mr Shaughnessy again. [Senior Counsel for the defence] has then extrapolated from that, that by 3.34, which is when there's an entry saying 'key assigned, reception' and I don't know what that means, that Mr Shaughnessy must have gone to the presidential suite by that time. There is no evidence of that. Any key that's issued is issued at reception. And there is no evidence, Mr Greene wasn't asked that, about, 'When you came back at 3.34, was he gone?' And so there's an unfair extrapolation to try and convey the impression that they were in the presidential suite for longer than the evidence suggests. [The complainant] herself said she thought a half an hour. It's interesting that in Mr Shaughnessy's memo of interview, he says 45 minutes. If what [Senior Counsel for the defence] is now extrapolating from, it's over --- it's nearly two hours. So, it's a misconstruing of the evidence that's in the case in my submission, and I'd be asking the Court to put it right."

Having heard this protest, in relation to the time in the suite issue, the judge said "[i]t's a matter for the jury, the times are a matter for the jury".

**27.** This issue was given what might be described as a light touch by the trial judge in the course of his charge. He first reviewed the evidence of Mr. Greene, the barman/night porter, and then observed:

> "And you'll recollect, Mr Foreman, I just might as well mention it here, that in the closing, one of the -- in the closing address yesterday, [Senior Counsel for the defence] may have invited to you consider a timeframe. And that while it may have been possible in terms of the interpretation of the evidence, it wouldn't be correct to say that the evidence established that particular time. In other words, you'll recollect that while Mr Greene cut the key for the presidential suite at 3.23 am, he gave it to Brian Shaughnessy in [the hotel bar], and he said -- told you that whenever he returned to the bar, they weren't there at the time. Then again, I suppose in all of this context, you have to remember about what I said about drawing inferences and what the law says about that in relation to interpretations of the evidence."

**28.** We would simply observe that where counsel for the defence, in his closing speech, would appear to have gone wrong was in suggesting the fact that a further key was cut at 3.34am **established** that the appellant and complainant had left the Lir Bar by that stage. Our understanding is that the cutting of another key at 3.34am, a key unconnected with the events in issue at the trial, said nothing about where the complainant and appellant were at that time. That being said, we have already indicated we feel the evidence on this issue is at least open to the reasonable inference that the key and bottle of wine were brought promptly to the hotel owner after he had made a request, and that on receipt of the key and bottle of wine, they promptly left the bar and went to the fourth floor. Certainly, we think there could have been no objection if the jury was addressed on the basis that this was what appeared to emerge from the evidence of the complainant.

**29.** It may be noted that while we have not seen the statement from Mr. Greene as it appeared in the Book of Evidence, there seems to have been an acceptance that his evidence did not entirely come up to proof from the prosecution perspective, and that it might have been more damning from the defence perspective than it actually was.

**30.** So far as the key cutting issue is concerned, it appears that the first mention of key cutting was in the consultation with junior counsel that took place prior to the appellant being interviewed by Gardaí. It appears that at that stage counsel's interest was not so much in when the key was cut as in at what time the key card was used to open the door. The appellant in his affidavit of 17th December 2021 says that, unfortunately, it was not possible to ascertain the time at which the door was opened "due to the efflux of time". While it appears to be the situation that the time at which the suite door was opened was never ascertained, it is the case that, in the course of an email sent by the appellant on 1st February 2017 to Mr. Andrew Vallely, solicitor, he made reference to the fact that he had given a "salto" door opening timesheet to his trial lawyers, however, this does not seem to be the case.

**Events since the Judgment of the Supreme Court**

**31.** Since this matter was returned to this Court, there have been a number of developments. This began with the appellant swearing an affidavit on 17th December 2021. This is a lengthy document, running to some 30 pages, with 41 exhibits. There was also a short affidavit from Ms. Siúna Bartels, the appellant's current solicitor, relating to her receipt of the file from previous solicitors, and the fact that following the Supreme Court's judgment, as advised by counsel, she had provided the Director with a copy of the full file. An affidavit was sworn by Mr. Gearoid Geraghty, solicitor, who had been the solicitor for the appellant at trial, in response to the affidavit of the appellant of 17th December 2021. In addition, an affidavit was sworn by Mr. Charles Foley, solicitor, a brother-in-law of the appellant, on his behalf. Mr. Foley had consulted with the appellant, along with counsel, in advance of the interviews conducted with the appellant by Gardaí. The appellant, Mr. Foley and Mr. Geraghty were cross-examined on their affidavits before this Court. Having heard the oral evidence, the Court put the matter back for a period to afford the parties time to submit written submissions, and then, on receipt of the written submissions, the parties were given a further opportunity to make additional oral submissions.

**32.** A number of matters emerge as a result of that exercise. It is clear that since the conviction, the appellant has consulted with numerous solicitors. In his affidavit, he lists: Fahy Bambury McGeever Solicitors; Ms. Joanne Kangley, Solicitor; Madden & Finucane, Solicitors, Belfast; Ms. Sarah Ryan, solicitor, Limerick; Partners at Law Solicitors; S. Bartels & Co. Solicitors. Apart from the solicitors listed, it is also clear that the file was sent by the trial solicitor to Mr. Darragh Robinson, solicitor, partner in Sheehan & Co., who forwarded the papers to Ms. Catherine McAleer, solicitor of Fahy Bambury McGeever. In addition, the appellant appears to have consulted two other firms of solicitors in relation to the possibility of bringing a civil action against his former legal advisers, and he also made complaints to the Law Society and the Bar Council. Remarkably, it would appear that the complaint, insofar as it related to junior counsel at trial, involved allegations of conflict of interest, linked in some way to the fact that counsel's late father, a solicitor, had a money-related dispute with the appellant's father going back some 40 years. As the appellant moved from solicitor to solicitor, he seems to have been determined to pursue the issue of inadequacy of counsel. He remains so determined despite being advised on many occasions that he had no case in that regard, some of those so advising being members of the Inner Bar who would be regarded as pre-eminent in the field of criminal defence.

**33.** The appellant's solicitor at trial was a solicitor of considerable experience, having practised in the area of criminal law for upwards of 30 years. He confirmed it was his practice at pre-trial stage to keep notes and attendances. The significance of this is that, with the exception of detailed attendances relating to the sentencing phase, no such attendances have emerged. Asked about this by counsel for the appellant, Mr. Geraghty said that those notes and attendances went with the file to the first firm of solicitors that took up his file. The whereabouts of the notes and attendances remain unknown, but it does seem unlikely in the extreme that notes and attendances were not kept.

**34.** What emerges from the affidavits and the oral evidence is that the appellant says that following his conviction he was extremely dissatisfied with the manner in which his "two-hour-plus" defence had been presented, and that as a result, he believed he had not received a fair trial. The appellant stresses that this is not a defence that has been formulated or created late in the day,

and the question of the time spent in the presidential suite was always a matter of concern. He refers to the contact he had with solicitor and junior counsel – though not the solicitor and junior counsel who subsequently appeared for him at trial – in advance of his interviews with Gardaí. The junior counsel at that stage was making the point that there were many areas that required to be explored and was giving directions in that regard. The appellant also makes the point that from the time of service of the Book of Evidence, with the assistance of his secretary, who had a background as a legal secretary, he was very proactive in putting together lists of questions and observations for consideration by his legal team. While the documentation exhibited undoubtedly shows a high degree of interest in the timetable of events on the night in question, what is absent is any specific assertion that he and the complainant spent upwards of two hours together in the presidential suite, along with instructions to set about establishing that conclusively. Of note, also absent is any indication of what it is suggested was happening during the period the complainant and the appellant spent together in the presidential suite; on this view of events, a significant and lengthy period of time.

**35.** The appellant points out his interest in the timetable of events, and that this was an issue to which he attached considerable importance, and says this is illustrated by the fact that at the first meeting with counsel on 27th February 2013, he brought and handed over documentation. The documentation handed over was elaborated upon by the appellant in the course of his evidence and has been provided to us by way of an appendix to the legal submissions delivered during the course of the present appeal. At this stage, the appellant is adamant that the so-called two-hour-plus defence, if properly raised, would have been of considerable significance. At a number of points in the documentation, he engages with the various legal advisers he has consulted in the nearly ten years since his conviction and speaks of the evidence proving his innocence; proving that the complainant was telling lies. It seems difficult, indeed impossible, to see that any of the points, individually or cumulatively, could ever have proved the innocence of the appellant, but one must constantly remind oneself that there was never any obligation on the appellant to prove his innocence.

**36.** For his part, Mr. Geraghty says the contention on the part of the appellant that a two-hour-plus time window was an essential element of his instructions and should have been put to the witnesses in the case, and that the failure to do so represented a failure on the part of his legal team to follow his instructions, is simply incorrect. He says, without qualification, that the two-hour-plus defence is something that came to the appellant after the conviction and did not form part of his instructions or strategy for trial. He refers to the fact that the appellant was interviewed by Gardaí in December 2010, having obtained legal advice from solicitor and counsel before interview. Mr. Geraghty says the appellant makes the case that, having considered the matter further, and having reviewed the Book of Evidence, his recollection was enhanced, and that he now believes he was in the presidential suite with the complainant for a period far in excess of 45 minutes, closer to more than two hours. He comments that "…this is utter nonsense and is an attempt by the [appellant] to explain away the position he originally adopted in the case in the context of his interview with Gardaí".

**37.** Later, in the course of the affidavit, Mr. Geraghty puts it in these terms:

> "I say the timeline regarding how long the parties were in the Presidential Suite was fixed by the [appellant's] own admissions in interview. This was simply part of the fabric of the case. It would have been a nonsense to have run the case in a way at variance with this position and would have left the [appellant] open to the obvious observation that he was lying when he nominated the 45-minute time period in the room or was lying when he suggested it was a longer period."

**38.** When cross-examined on his affidavit, Mr. Geraghty was adamant there was never any discussion of a two-hour defence prior to or during the trial or between trial and sentence, but he was prepared to accept that the importance of the time of the cutting of the electronic key was mentioned. While he was sure the issue was raised by the appellant, he did not raise it as a matter of significant importance. In the course of cross-examination, the trial solicitor also said the appellant was advised on many occasions that there was a significant difficulty in departing from his original statement to the Gardaí and giving a different narrative before the Court – in particular, before the jury – where it would be left open to the jury to conclude that the account the appellant was now giving was in conflict with his original account and was an account made up to persuade the jury with regard to the times when he had already told Gardaí in a voluntary statement that the complainant was in the room for 45 minutes. It was put to Mr. Geraghty that neither of the affidavits he had sworn made any reference to the fact that there were discussions with the appellant about the difficulties that arose from the fact that, when interviewed by Gardaí, he had told them that he and the complainant were in the presidential suite for about 45 minutes. It was further suggested that neither was this a point that was made in any of the correspondence the solicitor had with his client.

**39.** The complaint that the appellant did not have adequate legal representation, and that his trial was rendered unsatisfactory as a result, comes down to a complaint that the length of time spent by the complainant and appellant together in the presidential suite was not highlighted and simply was not dealt with properly by the appellant's legal team, and in particular, by his Senior Counsel. In advance of trial, the appellant's legal team had information about the time at which the key for the presidential suite was cut and about the time when the complainant left the hotel. Exploration of the issue was potentially circumscribed somewhat by the fact that the appellant, when interviewed by Gardaí, had estimated the time spent in the presidential suite at 45 minutes and had spoken of the fact that the appellant had said that after the "small shift", they chatted, the complainant was on her phone for ten minutes and then she left.

**40.** In summary then, that the appellant and the complainant were in the presidential suite of the hotel for a period was not in dispute. What was in dispute was what occurred in the presidential suite; that was the central dispute between the parties. Another issue on which there would not appear to have been agreement, and which is central to the present appeal, was the length of time spent in the presidential suite. The appellant's criticism of his defence team relates to how the question of timing, specifically, the amount of time spent in the presidential suite, was dealt with by his lawyers. He says this was not dealt with effectively and in accordance with his instructions, and had it been, the outcome of the trial would, or certainly might have, been different.

**Discussion**

**41.** Charleton J. began his summary of the issues in the case with an observation that:

> "The accused who alleges incompetence of representation at trial denying him or her a trial in due course of law bears a heavy burden of proof. To reiterate: in our legally aided system, with a free choice of lawyers, it is to be assumed that legal representation at trial is of at least a competent standard."

At a later point in the summary, Charleton J. quotes from Keane C.J. in *DPP v. McDonagh* [2001] 3 IR 411 at 425, who had spoken of "such a degree of incompetence or disregard of the accused's interests as to create a serious risk of a miscarriage of justice". It is of interest that when discussing how contests are to be resolved, Charleton J. gives an example of, for instance, drunkenness in Court; this is perhaps an indication of how significant shortcomings on the part of an advocate would have to be before a conclusion could be reached that what had taken place at trial was not in fact a trial in due course of law. We draw attention to these observations so there can be no doubt about the fact that the burden of establishing that one was denied a trial in due course of law by reason of inadequacy of representation is indeed a heavy one. Keane C.J. had spoken about a degree of incompetence or disregard of the accused's interests. In this case, we do not believe there is even a hint of a suggestion of a disregard of the appellant's interests, rather, it seems that the height of the appellant's case is a complaint that the so-called two-hour-plus defence was not pursued adequately, or indeed pursued at all. We refer to the so-called two-hour-plus defence, but it is not in doubt that this is a phrase that entered the lexicon of this case only in relatively recent times and formed no part of the language of the case back in 2013 when the trial took place.

**42.** This appeal turns almost exclusively on the question of how leading counsel for the defence did or did not deal with the question of the duration of time spent in the presidential suite by the complainant and the appellant. In considering how that issue was to be addressed, in the ordinary way, the starting point for the defence legal team would be the papers made available by way of the Book of Evidence and disclosure. That documentation would show that the complainant had not committed to any particular timeframe in terms of a precise, or even an approximate, time when they reached the hotel bedroom, or to a duration of stay. It is the case that the narrative provided was suggestive of a condensed or fairly brief stay. The papers show that the appellant had been less reticent in committing to a timeframe. In interview, he said from the time he went up to the room to the time she left, it was, to the best of his knowledge, three-quarters of an hour. On occasions, he indicated there were ten minutes when the complainant could have run from the room – the reference to ten minutes appearing to be in relation to ten minutes post-activity, whatever nature that activity took.

**43.** Pre-trial, the defence legal team were aware that the key for the presidential suite had been cut at 3.23am and also aware that there had been calls for taxis between 5.07am, the time of the first call, and 5.41am, the time of the last call. It is also clear that, prior to trial, the defence legal team would have been aware that the appellant had, by that stage, deduced or concluded that he had spent significantly longer in the suite than he had indicated to Gardaí – upwards of two hours as distinct from 45 minutes. We say deduced or concluded because there does not appear to be any indication that the appellant's detailed memory of what had occurred in the suite had

improved post-Garda interview. It is a striking feature of this case that even at this point in time, after the preparations for trial, after the trial, after the first appeal to this Court, after the hearing in the Supreme Court, after the preparations for this present appeal, and now, even after the appeal has concluded after two days of hearings, no explanation has been offered by the appellant as to what he said was occurring during the period of time – which, on his account, was substantial – that they were in the suite. The Supreme Court, in the course of its judgment, at para. 52, pointed out that at no stage in his affidavit had the appellant said that he and the young woman had been in the suite for two hours, and nor had any account been given as to how that time was spent. Despite the admonition and the implicit criticism contained in the Supreme Court judgment, even now, the furthest the appellant has gone is to say at para. 93 of his affidavit of 17th December 2021 that he has reread the full memoranda of interviews with the Gardaí, which was a question and answer session, and he says that this was "a true account of what occurred in the room over a period of approximately two hours". He acknowledges in that affidavit that he did state in interview that to the best of his recollection, he and the complainant were in the room approximately three quarters of an hour, but observes that the interview took place approximately five months after the events, and that he is now certain that he spent much longer in the room than he had stated to Gardaí. Implicit in the case the appellant now seeks to make is that the period of time spent there, significant as the calculations would suggest it was, is inconsistent with the narrative presented by the complainant. However, the appellant appears to ignore the fact that if this is so, it is equally so that a substantial period of time, in excess of two hours, is not only inconsistent with the estimates he gave to Gardaí, but is inconsistent with the narrative he provided as to what had occurred. If the complainant's account was a condensed one, then so, too, was his account.

**44.** What use was made of the issue and what use could or should have been made of the issue? It was established in evidence that the suite key was cut at 3.23am. It is true this was ascertained only when the barman/night porter was recalled to give evidence for a second time. There was no attempt to establish that when the key was handed over, along with the bottle of wine and two glasses, the appellant and complainant immediately vacated the area where they had been and went to the suite. If that was to be done, it could only really have been done through the complainant. From the advocate's perspective, there was probably much to be said for leaving well enough alone. A direct question might well have drawn a response that the complainant was uncertain whether or not they moved on immediately, or conceivably, though perhaps less likely, a response might have been drawn that there was some time lag as either or both of them took more of the drink they had been having or finished it.

**45.** The fact that the timespan bookended by the key cutting and the final call for the taxi did not seem consistent with what appeared to have been a condensed narrative provided by the complainant was a point made in the closing address by defence counsel. It is true he overstated his case in that regard, and in doing so, fell into error by referring to the cutting of a second key, a key cutting unrelated to the events in controversy, suggesting that the cutting of the second key positively established that the lounge had by then been vacated and that the complainant and appellant had moved on to the presidential suite. The manner in which the issue was dealt with by defence counsel drew protest from prosecution counsel. However, while she was entitled to protest

that the evidence relating to the cutting of the second key did not justify the use being made of it, the point remained that significant time had passed between the cutting of the key for the suite and the phone call seeking a taxi.

**46.** In terms of the time spent in the suite, the focus of the defence legal team was on the period spent in the suite after the activity engaged in, whatever its precise nature, had come to an end. It seems to us that the focus on this issue was understandable. It mirrors an issue that had been canvassed by the appellant when interviewed by Gardaí: he had made the point that during a period of ten minutes, a distress call could have been made from the suite, or the complainant could simply have left, if distressed. Remaining around, he said, and continues to say, is not at all what was to be expected of someone who had been subjected to a violent rape as described. Echoing this approach, counsel asked the complainant, why, if she had been subjected to the ordeal she had described, she would have stayed around sending text messages. Insofar as time was spent in the suite post-ending of the incident, establishing this opened the way for counsel to make the argument that the timeline was less consistent with the incident as described by the complainant, and more consistent with a limited incident of a consensual nature, such as had been described by the appellant.

**47.** As to the overall time spent in the suite, in a situation where it appears that defence counsel did not have available to him an alternative account, provided by his client, of what had occupied the time, the scope for probing this issue effectively was limited.

**48.** Whether what occurred on the sofa was an act of rape, as the complainant described, or was limited intimacy of a consensual nature, as the appellant had offered, on neither account would this have taken long. What, if anything else, was happening? What could defence counsel do? If there had been instructions to the effect that a particular television programme was watched or a particular film viewed, or that there had been detailed discussion focused on a particular topic, that was something which could usefully be explored, but absent an ability to put a proposition as to how the time was spent, scope for probing the issue was limited. Counsel did get the complainant to agree that the "attack" she was describing had lasted a short time, a few minutes at the most. Counsel raised with her that she was indeed saying the appellant had twice said to her to shut up, and that it was after the second such occasion that matters turned nasty. Again, the point counsel was making was an obvious one, and again, it was a point which mirrored what the appellant had to say when being interviewed by Gardaí. The complainant dealt with questions about why she had not left the room when told that she should shut up by explaining that it was after this was said a second time that the appellant had forced himself upon her; when it was said the first time, she had not been unduly concerned, believing the appellant was asking her to be silent and not to interrupt him as he was trying to say something to her.

**49.** Seeking to stand back at this remove from trial, the sense one has is that the issue of the so-called two-hour-plus defence has acquired a much greater significance in the mind of the appellant than the issue had before trial. In saying that, it is not to ignore the fact that it appears that pre-trial, the appellant was fully engaged with the trial process and was seeking frequent and detailed consultations. There seems little doubt that he was on top of the documentation in the case and was raising issues and making suggestions. We are in no doubt that he was focused on the fact that there was a significant time gap between the cutting of the presidential suite key and

the making of telephone calls looking for a taxi, and this certainly suggested, if it did not quite positively establish, that a significant period of time was spent in the suite. However, in our view, the significance of the actual time spent in the suite was considerably diminished in circumstances where the appellant was not putting forward a specific account of what was taking up the time.

**50.** The appellant is critical of his legal team, in particular of his Senior Counsel at trial. However, counsel adduced in evidence when the presidential suite key was cut. While the actual time at which the parties entered the presidential suite was never established, in effect, the trial proceeded on the basis that after the key was cut, it, along with the bottle of wine and two glasses, was delivered by the barman/night porter, and that at this point, the appellant and complainant made their way to the suite. From a defence perspective, it was not an unsatisfactory state of affairs. It was not a situation one could be sure of improving upon by raising the issues specifically in cross-examination of the complainant, and indeed, there had to be a concern that any cross-examination on the issue would do more harm than good. The state of the evidence enabled counsel to address the jury on the basis that the timetable which emerged with reference to the key cutting and the telephone calls was inconsistent with the complainant's narrative, a point he made with some force in his closing address. It is true that he somewhat overplayed his hand by referring to the time at which a second unrelated key was cut, but nonetheless, the basic point was laid before the jury.

**51.** The other area the cross-examination focused on was that the untoward activity that occurred shortly after arrival in the suite and that the activity did not last long. Counsel focused on the fact that if the appellant had behaved in the unpleasant and aggressive manner described, telling the complainant to shut up, it was to be expected she would have left the room rather than staying on the sofa in the suite. Again, counsel established that after the physical interaction between the parties – that there had been physical interaction was not in dispute – some time passed. What was in dispute was the nature of the physical interaction, and what it is suggested was significant was that the complainant had not left, when leaving might have been expected. Counsel might have placed greater emphasis on the question of time, but we cannot believe the manner in which the defence was conducted represented a disregard for the interests of the appellant, and that is not really suggested, nor do we believe it was conducted with such a level of incompetence as to deny the appellant a trial in due course of law. We do not believe that a greater emphasis on the time issue could have had any material effect on the outcome of the trial. Indeed, we are of the view that what has been presented is no more than "a hindsight reanalysis of how perfection of approach might have improved on competence" ([2021] IESC 18, Charleton J., para. 49).

**Decision**

**52.** We have not been persuaded that the trial was other than one in due course of law, that the trial was unfair or that the complaints made about the performance of the legal team lead to a conclusion that the conviction is unsafe.

**53.** Accordingly, we must dismiss the appeal.