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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

FRANCIS PATRICK HYNES

**Mr Neil Connor QC with Mr Simon Reid (instructed by the Public Prosecution Service)
for the Prosecution**

**Mr Desmond Fahy QC with Mr Stefan Rafferty (instructed by McHugh Lynam Solicitors)
for the Appellant**

Before: Keegan LCJ, McCloskey LJ and Maguire LJ

KEEGAN LCJ

Introduction and Reporting Restrictions

[1] The appellant was convicted of one count of rape, contrary to Article 5(1) of the Sexual Offences (Northern Ireland) Order 2008. This was following a trial at Omagh Crown Court which took place between 26 February 2020 and 10 March 2020 before His Honour Judge Sherrard, the trial judge. Leave to appeal conviction was granted on one ground by the Single Judge, Horner J. The complainant in this case is entitled to anonymity as she is protected by section 1 of the Sexual Offences (Amendment) Act 1992. Therefore, no matter shall be published which might lead to her identification.

[2] The Bill of Indictment contained two counts, namely one count that on 4 October 2008 the appellant intentionally raped the complainant by way of penetration of the vagina. The second count was one of an attempted rape, contrary to Article 3(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and Article 5(1) of the Sexual Offences (Northern Ireland) Order 2008. The particulars of that offence were that on the same date 4 October 2018 the appellant intentionally penetrated the anus of the complainant. In both cases the particulars

were that the complainant did not consent to the penetration and that the appellant did not reasonably believe that the complainant consented.

[3] The jury was directed to find the appellant not guilty of the second charge of attempted anal rape. However, the jury convicted the appellant of the first charge of vaginal rape by a unanimous verdict. On 11 September 2020 the appellant was sentenced to six years' imprisonment in relation to the offence for which he was convicted.

Grounds of Appeal

[4] Two grounds of appeal are relied upon by the appellant:

- (i) The failure of the prosecution to secure and review the content of the complainant's mobile phone and social media activity was a failure properly to investigate and a breach of the requirements of section 23 of the Criminal Procedure and Investigations Act 1996 which resulted in an unfair trial of the appellant.
- (ii) The verdicts of the jury guilty on count 1 and not guilty by direction of the trial judge on count 2 were inconsistent.

[5] In examining these grounds of appeal the court bears in mind that the test in relation to appeal is whether or not the conviction is safe. In that regard the court bears in mind the appellate test as stated by Kerr LCJ in *R v Pollock* [2004] NICA 34. At paragraph 32 of that judgment, he set out the following principles to be distilled from the authorities:

"1. The Court of Appeal should concentrate on the single and simple question 'does it think that the verdict is unsafe?'

2. This exercise does not involve trying the case again. Rather it requires the court, where conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.

3. The court should eschew speculation as to what may have influenced the jury to its verdict.

4. The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal."

[6] The court also considers that there is a matter of principle involved in this case given that it concerns disclosure obligations in a rape trial. Therefore, the outcome will have an effect on this and other cases in this jurisdiction.

Summary of Factual Background

[7] Both the appellant and complainant are in their twenties. The appellant and complainant did not know each other prior to this event. They independently attended a house party in Enniskillen in the early hours of the morning on 4 October 2018. It is common case that everyone present at the party, including the appellant and the complainant, had been drinking alcohol and consuming cocaine. The case made by the prosecution was that in the morning after the party around 10am, the complainant who had gone to sleep in an upstairs bedroom of the house owner, woke up to find the appellant having sex with her. She said that she had gone upstairs to a bedroom to get some sleep, and that a male friend of hers had joined her. The complainant said that she had been asleep on her stomach and woke up to the appellant penetrating her vagina with his penis. She said she tried to push him off and told him to get off her. The prosecution case was that the complainant's skirt had been pulled up; her tights had been ripped open at the back; and her underwear had been pushed to one side. The complainant made the case that the appellant said something to the effect of 'you love it' when she was trying to get him to stop. After pushing him off, the prosecution said that the appellant withdrew his penis from her vagina and then attempted to insert his penis into her anus, however there was no actual penetration of the anus.

[8] The case made was that none of this sexual activity occurred with the consent or permission of the complainant. The appellant was alleged to have then left the room and gone downstairs while the complainant tried to waken her best friend who was lying asleep next to her. She said that she was unable to do so. The complainant went downstairs and when there she challenged the appellant about what had happened. The complainant then ordered a taxi to take her home, however whilst travelling in the taxi she asked the taxi driver to take her to the police station in Enniskillen instead. There she made her complaint and thereafter she attended the Rowan Centre for medical examination.

[9] The appellant denied raping the complainant or attempting to anally rape her. He accepted that there was sexual intercourse between him and the complainant, but he maintained that it was consensual. The appellant attended the police station voluntarily later the same day and was interviewed and gave a detailed account to that effect. The appellant's case was that he had gone upstairs to get some rolling tobacco from the complainant as they had run out of cigarettes at the party which was continuing downstairs. His case was that the complainant had previously been rolling cigarettes at the party. He said he stood at the bottom of the bed and shook the complainant's leg to try and waken her to ask for the tobacco and when he did so she invited into the bed beside her. He said he got into the bed only because she asked him to do so and that when he did, the two of them lay next to each other in

spooning position with the appellant lying behind the complainant. He said that the third person in the bed the male friend was lying to the other side of the complainant asleep.

[10] The appellant said the complainant was moving herself suggestively against his penis in a grinding manner before she then pulled her tights down. He understood this to mean she wanted to have sexual intercourse with him and so he pulled down his tracksuit bottoms and began to have sex with her. He also said that the complainant told him to shush before telling him to get out within a minute of all of this happening. He said he stopped and withdrew his penis, pulled his tracksuit bottoms up and left the room and went back downstairs.

[11] From the above summary of the factual background provided above the following salient and undisputed facts emerge. These parties were unknown to each other. They were both at a party. This event took place in the morning in a bedroom.

[12] The contested point in the case was whether or not there was consent to sexual intercourse.

Conduct of the Trial

[13] There are two aspects to the conduct of the trial which are relevant to this appeal as they both involve disclosure issues. Disclosure was considered at both the pre-trial and trial stage and forms the substance of the first ground of appeal. As a result, it is important to examine how disclosure was dealt with at the two stages. To start there must be consideration of the pre-trial stage.

[14] At this stage the lawyers acting for the appellant sought disclosure of all relevant material from the complainant's mobile phone and her social media activity. The request was signposted by the appellant in his defence statement. The court was made aware of the appellant's request for further material from the date of the first court appearance which was the arraignment on 26 September 2019. It is true that requests for this material were repeatedly made in correspondence over the course of several months which this court has considered, and this issue was the subject of a number of pre-trial review hearings in the case.

[15] It is apparent from the appellant's skeleton argument that the overarching submission was "that the experience of criminal courts in the digital age was that mobile phones and social media accounts were a potential source of relevant and disclosable material in all types of criminal cases." The position, it was contended, was potentially more pronounced where the allegations were of a sexual nature. Aside from this general proposition the appellant relied on a reference made by the complainant in her Achieving Best Evidence "ABE" interview with police, where she said that she had accessed Facebook in connection with the allegation she had made and that she had done so with a friend. This is described as a trigger by the

appellant to seek further disclosure of material of this type which might have assisted him in his defence or undermine the case against him.

[16] Disclosure was also sought via correspondence sent by the appellant's solicitors from 1 October 2019. This was considered by the judge on an ongoing basis. The response of the Public Prosecution Service "PPS" to the initial request is dated 4 October 2019. It is instructive as it says:

"I am required by section 3 of the Criminal Procedure and Investigations Act 1996 to disclose to you any prosecution material which has not previously been disclosed, and which, in my opinion, might undermine the case for the prosecution or assist the case for the defence."

In relation to the request the specific response was:

"No material from the complainant's mobile phone or social media has been obtained by police."

[17] When further requests were made in relation to this in correspondence of 4 October 2019 the PPS replied:

"The complainant's phone was not seized by police. This was not seized as there was no indication that it contained material of evidential value to the case. Both parties were unknown to each other before the night in question and neither referred to their mobile phone during their evidence. As neither party referred to social media, police saw no justification for any social media accounts to be examined. As the complainant's mobile phone was not seized, it is not in the possession of police and therefore is unavailable for analysis."

[18] Further correspondence was sent by the appellant's solicitor as a result of which the PPS reply given above was reiterated in email correspondence of 14 November 2019. Thereafter, by correspondence of 15 November 2019 the appellant's solicitors signalled an intention to obtain all relevant material by way of a third party disclosure application. In pursuit of this the appellant's solicitor asked the PPS for details of the complainant's mobile service provider and the complainant's mobile phone number and full details of social media accounts. A formal application was made under section 2 of the Criminal Procedure and Investigations Act 1996 dated 18 December 2019.

[19] The reply to the section 8 application by the PPS responds to the defence application in four core paragraphs as follows:

- “(a) The complainant’s mobile phone was not seized by police at the time of the initial complaint. The handset has not been examined by police. No materials in relation to communications to and from the mobile exist. Police have since advised that the complainant is no longer in possession of the handset she had at the time.
- (b) The complainant’s social media accounts were not examined by the police at the time of the initial complaint. No materials in relation to communications sent to and from the complainant’s social media accounts exist.
- (c) The mobile telephone of the complainant was not seized or examined as it was not believed that this was a reasonable line of enquiry. Neither party were known to each other before the night in question. The complainant went directly to Enniskillen Police Station to make a complaint after the incident occurred. The basis upon which the defence seek details of the complainant’s mobile telephone provider and any communications contained within her phone are entirely speculative. At present there is no evidence to suggest that there is any material on the complainant’s mobile phone which would undermine the prosecution case or assist the defence.
- (d) The defence seek access to the complainant’s social media account based on an assertion by her during ABE that she sees the defendant in a picture on Facebook and was told his name. The investigating officer has confirmed verbally that the complainant did not view the picture on her Facebook account but on that of a friend. Statements have been sought from the complainant and the friend in relation to this and will be served once received.”

[20] This response is dated 2 January 2020. There is further correspondence following this which ultimately ends by reason of correspondence from the PPS indicating that any details of the complainant’s mobile network provider and mobile telephone number is not information that is in the possession the police or the PPS therefore that line of investigation was not open.

[21] The case then proceeded to trial. This is the next stage when disclosure issues were also raised. Counsel have helpfully provided a chronology of the sequence of evidence and applications during trial which is summarised as follows. The trial started on 26 February 2020 when the jury were sworn in. On 27 February 2020 evidence-in-chief of the complainant was heard and there was cross-examination. The resumption and completion of cross-examination continued and completed on 3 March 2020. On that date as a result of questions asked by senior counsel for the defence the issue of the use of a mobile phone by the complainant after the incident became an issue.

[22] The transcript of the cross-examination has been examined by the court. The relevant portion of this is as follows:

“Q. When you finished with the police and the doctor did you carry on your day as if nothing had happened?

A. No.

Q. Did you make any contact with a family member or friend?

A. I had my friend come meet me. The - the police dropped me off at my house and my friend was waiting outside my house when I go there.

Q. How did you[r] friend know to meet you there?

A. I contacted her earlier in the day.

Q. How did you do that?

A. By phone.

Q. Using your phone?

A. I think I might have used the phone in the police station because I could not get a signal.

Q. And did you contact her using - did you contact her or anyone else using your mobile?

A. Not while I was in the police station, I don't think.

Q. Alright. When you left the police station then?

A. When we were in the car on the way to Antrim, I messaged my boss to let her know I wasn't going to work.

Q. Anybody else?

A. Just her and my friend.

Q. So on - on - on that evidence, you contacted your friend about this but not your partner?

A. Yes.

Q. Now, were you - you were aware that, in the course of this case being prepared for court that some enquiries were being made in relation to your phone.

A. Yes."

[23] Defence counsel continues by asking questions about the phone in particular:

Q. Right, but the position is, isn't it, that the phone is now not available?

A. No, its broken.

Q. And you have a new phone?

A. Yes.

Q. Do you have the same number?

A. Yes.

Q. And then, what - what happened then, and the - the jury will probably pick this up, but just to be fair to you, that what happened after you met the doctor on 4 October which I have dealt with, by putting that account that you gave to her, then you spoke to the police on 8 October, isn't that right?

A. Yes.

Q. And you were making an allegation of rape?

A. Yes.”

[24] Defence counsel then cross-examined the complainant about some inconsistencies in her account and during questioning he also asked the following questions:

“Q. Had you made any arrangement or had any conversation with your boyfriend the previous day or night about what time you planned to be home at?

A. No not really.

Q. At some point, did you have the thought process that I need to tell my boyfriend where I am?

A. While I was at the house? - What do you mean?

Q. The following morning, when - when you haven't come home?

A. He - he was - sorry, he was already at work.”

[25] On 3 March 2020 at the conclusion of the complainant's evidence the trial judge directed the jury to acquit of the second charge of attempted anal rape. Subsequent to this defence senior counsel also raised an issue with the judge in the absence of the jury. He phrased this as follows:

“I didn't raise this point immediately because Your Honour was giving a legal direction to the jury at the conclusion of the complainant's evidence but the latter portion of the complainant's evidence, in my respectful submission, gives rise to an issue in relation to a continuing duty of disclosure on the part of the prosecution and it is back to this issue in relation to the mobile phone. It is now established on her evidence that notwithstanding the fact that she did not have the same handset at a point a couple of months after this incident, she did have the same number and she has now given an account to the jury that she made a complaint or potential evidence of first complaint to a civilian other a police officer/employee of the Police Service in relation to the circumstances of the events of 3rd into the 4th of October.

[26] There followed a discussion between counsel and the judge. In the course of his submissions senior prosecuting counsel said:

“I have to say because I think it is just something of a non-point. But in any event it is not the first account that the witness has given to a civilian and in any event there is no distinction in terms of whether it is a civilian or a police officer or whatever, that is an artificial distinction. The first account according to the witness is that she made a telephone call to the same person whilst in the police station she believes via police phone because she could not get a signal: that was the first account of this particular witness. Her evidence is clear Your Honour, in my respectful submission, is that what she was essentially doing was updating her friend as to what was happening and she said as much that she was indicating that she was in a police car heading to Antrim. ... The idea that there would be something said in the text, this is somewhat is going to be examined at the Rowan Centre having made a complaint of rape so it has to be seen in that context.”

[27] There was a further quite extensive discussion during which prosecution counsel said that the complainant could be made available for further examination by the defence. In parallel with that the prosecution made some enquiries in relation to the messages. Ultimately, the messages were provided on 4 March 2020 prior to the resumption of evidence to the defence.

[28] It is clear from the transcript of trial that defence counsel also made the case that these WhatsApp messages had been self-selected. He said:

“I think, Your Honour, I obviously am now in a position where I can look at these texts but it does seem to me Your Honour that they do require a statement to either exhibit them or to provide a record of the circumstances in which they were obtained because it appears that they have been self-selected by the complainant unless an officer was with the complainant when the messages were downloaded.”

[29] Then there was further discussion as a result of which senior defence counsel said

“Can I say I don’t have any settled position in relation to that one way or another. It is a matter for my friend whether he brings her, I am not saying one way or another.”

[30] Ultimately senior defence counsel did not apply to have the complainant called again to give evidence on this issue. A further prosecution witness was called Detective Constable McMahon. His evidence-in-chief and cross-examination included examination of the WhatsApp messages that had been provided and so the evidence was heard before the jury. The particular point that was before the jury from these messages was that in the 5 page of the WhatsApp messages the appellant had said to her friend that her boyfriend would start work at 2:30 and that contradicted the account given in evidence by the complainant that he was not at home when she was leaving the party house in a taxi.

[31] There was no application to stay the proceedings or for abuse of process and counsel proceeded to make closing speeches to the jury. As part of closing to the jury the defence raised inconsistencies in the complainant's evidence which were broadly focussed on her account of how her tights had been ripped. The defence also made a case that she was not credible given that the charge of attempted anal rape could not be made out and that the disclosure of the texts showed an inconsistency in terms of her recount of whether her boyfriend was at home or not. This the defence said added force to the defendant's case that this was in fact a consensual sexual event which the complainant had lied about to save face with her boyfriend.

[32] The prosecution also made closing submissions and the judge then charged the jury. In charging the jury it is readily apparent that the judge took some care to explain the circumstances of the entire evening and. In the charge the judge laid out some issues in relation to the evidence. It is important to record this in two respects. First, in relation to the texts this is what he said:

"Now you will remember, however, that after this exchange and after the complainant had given her evidence the prosecution disclosed text messages in which the complainant said that her boyfriend was home until 2:30 and Mr Fahy urged you to reflect on this and question why the complainant had not told you the truth about her boyfriend being at home and you of course, ladies and gentlemen, may wish to consider whether this impacts on your view of her truthfulness.

The complainant accepted that that she had contacted her friend but not her boyfriend. She also accepted that she had contacted work and indeed that this was the same place that her boyfriend worked too. The officer in charge told you that there had been an investigative decision not to seek the complainant's phone but accepted that she had not been asked by police if the phone had been used in the wake of the allegation but he agreed that the

complainant's texts had ultimately shared in the course of the trial is relevant. He agreed that the complainant had said in evidence that her boyfriend was at work but that her texts said as "he must be home as he starts work at 2:30." He also accepted that she had said that she did not want him to know yet. However, you have had access to all the messages ladies and gentlemen, and you will remember that before the texts I just reminded you about, the complainant said I feel disgusted can't get those few moments out of my head, what am I meant to tell her boyfriend."

[33] Second, the judge faithfully set out the defence case as follows:

"Now, for his part Mr Fahy asked you to remember that the burden of proof rests on the prosecution. He also asked you to remember that the standard of proof is high and that the prosecution has an obligation to prove its case beyond reasonable doubt. He also reminded you, of course, ladies and gentlemen, as did Mr Connor and as I have done, that this is not a court of morals. Mr Fahy said that none of the experts could assist you regarding the question of consent and that the evidence effectively came down to the complainant and the defendant. He contended that the prosecution case had fallen apart and focused on two particular aspects of the case to justify that; first of all the complainant's change of position regarding the tights being ripped and her underwear moved to the side, and secondly the complainant's evidence not containing evidence of the attempted anal rape that had been originally alleged, and he said that both of these issues went to her credibility and he asked you then to find her not a truthful witness on the basis of this.

He reminded you of the complainant's evidence that she was exaggerating the few minutes it took for her to realise what was happening, saying that she had seen a problem here and changed her evidence in the few minutes to accommodate that. He also reminded you that the complainant had said her boyfriend was at work whereas the text said he wasn't starting until 2:30 and again he asked you to question her truthfulness with regard to that. He contended that the complainant had regretted what had happened and was worried that she would be found out and reminded you that the friend was right

beside the complainant and could have been awoken according to the friend's own evidence."

[34] As part of case management of the appeal this court made further enquiries about exactly how the late disclosure came about and additional statements were admitted. To that end a statement was filed from Detective Constable McMahon in relation to disclosure issues. In that he stated that on 3 March 2020 he was in attendance at the trial at Omagh Crown Court and a matter was raised in relation to the sending of text messages to a friend during the complainant's journey to the Rowan Centre. He said that on 4 March 2020 he recalled that counsel requested that he make contact with the complainant and obtain the messages. He said that he spoke to the complainant and requested them and received an email from her containing screenshots of the messages she was referring to during her evidence. He said he then made copies and handed them to prosecution counsel. He said he was not able to check if this was the totality of the messages as the complainant was not physically with him at this stage – she was on her way home. He said that he recalled asking her if she would be available to return to the court for further examination in relation to this evidence and he recalled her stating that she was willing to do so.

[35] In a second statement of 28 October 2021 DC McMahon said that he wished to clarify that during October or November 2019 he was asked by the PPS to find out if the mobile phone of the complainant was available to be examined by police. He said he spoke to the complainant who informed him that she no longer had this handset as she had changed phones since the incident occurred. He said that the PPS was aware of this. He said he believed that this was done verbally at a hearing before trial.

[36] A statement was also filed by the complainant of 1 November 2021. In that statement the complainant referred to the trial. She said that during the time period between the incident and the trial commencing she was asked by DC McMahon if she was still in possession of the mobile phone which she had when the incident took place. She said she was unsure of the exact detail this conversation took place on there were so many phone calls it was difficult to remember but she said:

"I do recall that I informed him that I wasn't in possession of the mobile phone as it had broken and I got a new one. When I was giving evidence at the trial an issue was raised about text messages I had sent to a friend while on my way to Rowan. I was contacted by DC McMahon when I had finished giving evidence, he asked if I was able to look back through my current mobile phone to see if these messages had transferred across. He had suggested that it was possible because my phone at the time of the incident was an Apple iPhone and my new phone was an Apple iPhone that the messages would

have transferred between the two phones. I looked back through my text message history with my friend and was able to recall the messages I sent her. I believe this is because I signed into my new phone with my Apple ID and this transfers of the previous content of my old phone to my phone. I then took screenshots of the message content from 1 October 2018 to 18 October 2018 and emailed these to DC McMahon.”

[37] This is background in which these two grounds of appeal are put before the court. Leave has been granted on the first ground of appeal which is considered next.

Consideration of the grounds of appeal

Ground 1: Unfair trial due to disclosure failures

[38] The prosecution in any criminal case has a duty to serve all evidence which it intends to adduce at the trial of the defendant and this applies to all evidence either evidence that would assist the prosecution or assist the defence. The statutory impetus for disclosure is found in the Criminal Procedural and Investigations Act 1996 (“the 1996 Act”) and the Code of Practice which is made under this Act which is mandated by section 23.

[39] It is of course settled law that the duty of disclosure is significant and also that there is an ongoing duty of disclosure throughout a trial on the prosecution. The 1996 Act and the Code of Practice are supplemented by guidelines which were published by the Attorney General in December 2013 and updated in 2020.

[40] The point at issue is an important point of principle with repercussions for the conduct of rape and other trials in this jurisdiction and so it was important to examine the position in Northern Ireland during this appeal. In clarifying the position in Northern Ireland, the PPS replied as follows:

“The Attorney General’s Guidelines on Disclosure (2013 and 2020) are intended to apply to criminal cases in England and Wales. That said, there is much within the guidelines that would be considered good practice and regard is had to them within this jurisdiction. However, there are some aspects of how criminal procedure and how disclosure is addressed in England and Wales that do not apply in Northern Ireland. Outside of this and where processes are similar the guidelines are generally followed and the general approach to reasonable lines of enquiry is considered to be similar. While the PPS and PSNI have a disclosure manual from 2015, more recent

and detailed guidance to prosecutors on reasonable lines of enquiry issued this year by way of formal staff instruction. A copy of that staff instruction, which makes clear the approach set out by the Court of Appeal (England and Wales) should be applied by police and prosecutors in this jurisdiction is enclosed for the information of the court.”

[41] The staff instruction document referred to above has been considered by the court and is dated June 2021. A number of points are worthy of replication as they appear by way of instruction as follows:

“The examination of mobile phones belonging to the complainant is not a requirement as a matter of course in every case. There will be cases where there is no requirement for the police to take the media devices of a complainant or others at all, and thus no requirement for even a logic examination to be undertaken. Examples of this would include sexual offences committed opportunistically against strangers or historical allegations where there is considered to be no prospect that the complainant’s phone will retain any material relevant to the period in which the conduct is said to have occurred and/or the complainant through age or other circumstances did not have access to a phone at the time.”

[42] This document also refers to the English Court of Appeal in the case of *Bater-James and another* [2020] EWCA Crim 790 which provides guidance in this area. This case is now an important statement of the law and is discussed in *Rook Sexual Offences Law and Practice* 6th Edition at paragraph 18.109 to 18.111. Drawing from the case four issues of principle are helpfully articulated in that text as follows:

“(i) The First Issue of Principle: Identifying the circumstances when it becomes necessary for the investigators to seek details of a witness’s digital communications and thereafter to disclose material to which they access.

That the request to inspect digital material must have a proper basis. A reasonable ground for believing that it might reveal material which is relevant to the investigation is sufficient, however applications should not be granted for fishing expeditions. What constitutes a reasonable line of enquiry will depend on the facts and issues of each case, including any potential defence. Where a reasonable line of enquiry exists, investigators

should consider ways of accessing the information that does not require taking possession of the complainant's devices, disclosure should only occur when the material meets the test in the CPIA.

Reference is made to *Oliver v CB* [2021] EWCA Crim 790 following *R v H* [2004] UKHL 3 and considering *McPartland (Ciaran)* [2019] EWCA Crim 1782.

(ii) The second issue of principle: When a properly founded request is made, how should the review of the witness's electronic communications be conducted?

Investigators should adopt an incremental approach first deciding whether they need access to the complainant's device at all, and if so, how much access they require that is whether it is necessary to have access to the entirety of the device or just limited areas such as an identified string of messages/emails or particular social media postings. Depending on what material needs to be examined, screenshots may be more appropriate than a full download of the contents of the device. Where a full download is unavoidable, this should be done with minimum inconvenience to the complainant, where the volume of material is extensive, key word searches using specific terms may be more appropriate, in line with *R v R* [2015] EWCA Crim 1941 and the more recent guidance from the CPS and Attorney General the court recommended liaising with the defence to arrive at a comprehensive set of agreed search terms and data parameters. To avoid breaches of confidentiality, disclosed material should be subject to appropriate redaction.

(iii) The Third Issue of Principle: What reassurance should be provided to the complainant as to ambit of the review and the circumstances of any disclosure of material that is relevant to the case?

The court stated that a complainant should be given a short and straightforward explanation of the following matters:

- (i) the defendant does not have a general right to examine the content of a witness's digital device;

- (ii) the police will only examine the contents of such devices in pursuit of a reasonable line of inquiry;
 - (iii) the length of time the witness will be without their device;
 - (iv) a refusal to co-operate with the police request may make it impossible to pursue an investigation, a summons may be issued or a trial may have to be stopped;
 - (v) the device will only be copied or examined to the extent necessary to pursue the reasonable line of enquiry, using focus searches, and the witness will be informed which areas will be reviewed;
 - (vi) material will be provided to the defence only if it meets the strict test for disclosure and any unnecessary personal details or irrelevant information will be redacted;
 - (vii) The witness will be consulted as to the regularity and extent of any contact with the investigators regarding the disclosure process; and
 - (viii) If the device is not handed over the witness must not delete any material from it.
- (iv) **The fourth issue of principle: What is the consequence if the complainant refuses to permit access to a potentially relevant device or if the complainant deletes relevant material?**

The reasons for refusal should be carefully considered and an investigator must consider whether any further reassurance may be appropriate. If the witness maintains their opposition, the court will need to consider issuing a summons. When material has been deleted, the adequacy of the trial process, particularly through cross-examination of the witness and the use of appropriate judicial directions, should be taken into account before allowing a stay on the basis that a fair trial would be impossible. Reference *Warren v Attorney General of Jersey* [2012] 1 AC 22 and *R v D* [2013] EWCA Crim 1592 and *Douglas Hewitt* [2020] EWCA Crim 1247, where a

decision to refuse a stay was upheld on appeal, the judge having been entitled to find that the trial process could accommodate any prejudice which arose. The court should not attempt to guess the significance of the un-accessed material but rather should assess whether the trial process can sufficiently compensate for its absence. The reasons for non-co-operation will be an important factor for the jury to take into account.

[43] This case and the commentary upon it that has been outlined above encapsulates the current law in England and Wales emanating from the Court of Appeal. Whilst not binding this decision is persuasive and this court sees no reason to depart from it and it has not been suggested that we should. Therefore, this court will apply the guidance from *Bater-James* in this jurisdiction which we summarise as follows. This case reiterates the fact that there is no absolute rule in relation to the disclosure of digital material. What constitutes a reasonable line of enquiry will depend on the facts and issues of each case. There should be an application of proportionality to the exercise and also if there is any prejudice any court must consider whether or not that is compensated for within a trial process.

[44] The point in this case is that because of the failure to disclose or the lack of disclosure the appellant has not been afforded a fair trial. Fair trial rights apply in criminal law and to the issue of disclosure. This area was considered by the Supreme Court in the case of *Macklin* [2015] UKSC 77. In particular, at paragraph [13] the court said:

“13. As the European Court of Human Rights explained in *Edwards v United Kingdom* (1992) 15 EHRR 417, the question whether a failure of disclosure has resulted in a breach of article 6(1) has to be considered in the light of the proceedings as a whole, including the decisions of appellate courts. This means that the question has to be approached in two stages. First, it is necessary to decide whether the prosecution authorities failed to disclose to the defence all material evidence for or against the accused, in circumstances in which a failure to do so would result in a violation of article 6(1). If so, the question which then arises is whether the defect in the trial proceedings was remedied by the subsequent procedure before the appellate court.”

[45] The European Court observed that it was not within its province to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, that it was for those courts to assess the evidence before them. These observations were repeated in *Mansell v United Kingdom* [2003] 36 EHRR CD 221 where the non-disclosure of material evidence in the trial proceedings was held to have been

remedied by the Court of Appeal's examination of the impact of the non-disclosure upon the safety of the conviction.

[46] This application of this approach is seen in a domestic context in the case of *McInnes v HM Advocate* [2010] UKSC 7. At paragraph [19] of that decision Lord Hope explained:

"19. Two questions arise in a case of this kind to which a test must be applied. The first question is whether the material which has been withheld from the defence was material which ought to have been disclosed. The test here is whether the material might have materially weakened the Crown case or materially strengthened the case for the defence. If that test is satisfied the question then arises as to the consequences of the non-disclosure. The test is whether, taking all the circumstances of the trial into account, there is a real possibility that the jury would have arrived at a different verdict."

[47] In the course of argument Mr Fahy made the case that there should have been disclosure from the outset. In the alternative he made the case that the late disclosure led to a position where the defence was prejudiced because the nature of the defence cross-examination would have been different if the disclosure had been provided in advance. Mr Fahy had to accept that he did not apply to have the complainant give further evidence and be tested herself on the evidence that was provided. He accepted that it was put before the jury through the evidence of Detective Constable McMahon and that the judge provided a specific charge in relation to it. It is also apparent and obvious that defence counsel did not make any application for an abuse of process or a stay of proceedings. It is in this context that the arguments must be assessed.

[48] The first point to determine is whether or not the pre-trial process was fair to the applicant in that disclosure was not provided and whether or not this offends the prosecution duty and ultimately leads to an unfair trial. Having considered all of the evidence on this the argument is unsustainable. In reaching this conclusion it is important to reiterate that these parties in a rape case were unknown to each other. The issue of mobile phone conversations was not raised by either in evidence. The ABE reference was to an entirely different species of observation of Facebook in relation to a matter which was not controversial in this trial, namely identification of the defendant.

[49] It is quite wrong of the defence to have asserted that in a digital age the provision of mobile phone communication should in some way be automatic. This would potentially have a chilling effect on trials of this nature. A similar error was made in the case of *McPartland* which has been referred to above where Thirlwall LJ said at paragraph [44] as follows:

“It was suggested on behalf of the defence in the course of argument that it is now entirely usual practice in cases involving allegations of sexual assault, that the mobile phone of a complainant should be examined. This is not and should not be thought to be correct. What is a reasonable line of enquiry depends on the facts of each case. On the facts here it is questionable whether it was reasonable to ask X to hand over her phone at all. But even if it were reasonable there was no basis for analysis beyond that which was done, in the light of the evidence from the friends.”

[50] This authority along with *Bater-James* is clear and leads to the irresistible conclusion that there is no basis for the argument that there was a failure pre-trial to provide relevant disclosure which has led to an unfair trial. The PPS position was correct. Any contrary practice would be inimical to the principles now established in relation to the provision of digital material in trials of this nature.

[51] The only realistic point in this case relates to the fact that there was late disclosure at trial of some WhatsApp messaging between the complainant and her friend. The issue clearly arose during cross-examination and it relates to a conversation with a friend after the police station. The question arises whether this was relevant material which could have undermined the prosecution or assisted the defence.

[52] In considering the transcript of the complainants evinced it is not readily apparent that this was evidence of any materiality. It is clear that defence counsel's application was on the basis that the complainant had made a first complaint to someone else. However, that was not correct. The height of the evidence was that the complainant had contacted a friend after she spoke to police and on her way to be examined by doctors at the Rowan centre. Therefore, it is entirely understandable why the prosecution said that disclosure was a “non-point.” It looks like disclosure was provided by the prosecution out of an abundance of caution but it certainly was not on the basis that the complainant had made a first complaint to a friend which was not disclosed. This context is of particular significance.

[53] An argument is now made that the disclosure became relevant during the trial because it assisted the defence in relation to attacking the credibility of the complainant by virtue of the fact that she was untruthful about whether her boyfriend was at home after these events occurred. This is a very difficult argument to sustain because the defence effectively made choices about how to run the case. If such an argument were to succeed it would set a dangerous precedent in criminal cases.

[54] There is ample legal authority that if a free choice is made by counsel as part of a strategy that that cannot impact upon a fair trial. *Archbold Criminal Law Practice* paragraph 7.83 deals with this point. There, reference is made to a case of *R v Davies* [2018] EWCA Crim 327 where a conviction for robbery was found to be safe by the Court of Appeal in England and Wales where counsel had made a tactical decision with the defendant's agreement, not to apply to discharge the jury after the victims named a person relied on by the defendant in his alibi as an additional suspect. The court found that it was a decision that could reasonably have been made in the circumstances and was not incompetent.

[55] In this case there is no suggestion that counsel was incompetent. Rather, the point is that counsel made an informed choice. In *R v Sami* [2018] EWCA Crim 552, counsel's decision to adduce evidence of the defendant's previous convictions, to call a co-accused as a witness and not to correct an alleged omission from the defence statement were not unreasonable or outside the range of decisions open to competent counsel. It was counsel's responsibility to make forensic decisions and to devise strategy. Hence, the issue of counsel being in some way disadvantaged does not gain any traction when looking at this case as a whole. It is apparent that from the outset defence counsel made a robust attack on the complainant's credibility. Therefore, there can be no argument that this has led to an unfair trial.

[56] Of critical significance is the following steps which were taken within the trial process namely:

- (i) the prosecution conducted further inquiries in relation to the messages once the issue arose;
- (ii) the complainant cooperated with the police throughout;
- (iii) the prosecution provided the messages to the defence prior to the resumption of the evidence;
- (iv) the prosecution offered to make the complainant available for further evidence and the defence chose not to cross examine the complainant further;
- (v) the prosecution called DC Mc Magowan who have evidence and was cross examined about the messages that had been provided; and
- (vi) further, the contradiction between the messages and the complainants' evidence was before the jury, defence counsel referred to it in their closing speech and the jury appropriately directed upon the issue by the trial judge.

[57] Any unfairness now relied on did not result in any application to recall the complainant or an abuse of process application. This is significant because the defence could have made a case to the trial judge that the defendant could no longer receive a fair trial. If any alleged deficiencies could be properly remedied within the

trial process such an application would presumably fail. However, therein lies a crucial point. Where the issue of disclosure arises within a trial process that is the obvious place for it to be addressed before a trial judge who has an intimate knowledge of the evidence and how the case has proceeded. Although the defence chose not to make any such application it appears in substance that this is in effect the application being made in the appeal court. In other words the complaint of unfairness now made could have made within the trial but was not. Not having utilised the in trial safeguards available it is difficult to see how the same point before the Court of Appeal could sustainably impugn the fairness of the trial and more fundamentally the safety of the conviction.

[58] The issue of unfairness affecting trial outcomes has been examined in a number of cases in the arena of stay applications including *Boardman* [2015] EWCA Crim 175 and *DS and TS* [2015] EWCA Crim 662. These cases highlight the fact that applications of this nature are inherently suited to the trial process.

[59] It would also be wrong of this court to engage in speculation about what missing documents or witnesses might show. This court cannot speculate about un-accessed material. The core issue for the jury in this case was consent or otherwise. The jury could assess the complainant's credibility by virtue of assessing her evidence alongside that of the appellant and the content of the WhatsApp messages to her friend and the erroneous evidence about her boyfriend being home.

[60] The additional statements obtained by this Court of Appeal and referenced at 31-34 do not contain matters of concern and nothing that could not have been established at trial had the defence taken up the offer for further questioning of the complainant. They certainly do not provide any basis for questioning the safety of the conviction. At its height the argument is that police practice could have been better. It is also important to note that the complainant herself cooperated fully in providing a statement for this Court of Appeal.

[61] In conclusion, the irresistible finding of this court is that the appellant was not prejudiced in any way and the jury simply reached a verdict having considered the evidence in this case of both the appellant and the complainant. Therefore, this ground of appeal must fail.

Ground 2: Inconsistent Verdicts

[62] This ground was not pursued with great vigour by Mr Fahy given the law in this area. In fact, during the course of argument, Mr Fahy argued that the ground was really a discrete aspect of the disclosure ground rather than a standalone ground. That argument in itself is unsustainable but in any event we find this ground is unarguable. Leave to appeal was refused on this ground.

[63] In *R v Dhillon* [2011] 2 Cr App R 10 Elias LJ stated at paragraph 33:

“It is notoriously difficult successfully to challenge a jury’s verdict on the grounds that inconsistent verdicts have been returned. We have been referred to a number of authorities which in our view establish the following principles.”

[64] In this jurisdiction this area has also been examined in *R v J* [2012] NICA 39, *R v H* [2016] NICA 41 and *R v Murphy* [2021] NICA 16. The jury’s not guilty verdict was upon direction of the trial judge. This was after the complainant’s evidence was given and was uncontroversial. It was not something that was left to the jury and so it is unarguable that the jury reached an inconsistent verdict because, in effect, they were not determining the guilt of the appellant on the second charge. Therefore, this ground of appeal must fail.

Overall Conclusion

[65] The appellate test in *R v Pollock* is whether the conviction is safe. Neither ground of appeal establishes that this conviction is unsafe. It is quite clear that there was no unfairness occasioned to the defence given the way this case proceeded. The appeal against conviction is dismissed.