THE COURT OF APPEAL

[246/19]

The President

Edwards J.

Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

"BOY B" (A MINOR)

APPELLANT

JUDGMENT of the Court delivered on the 29th day of July 2022 by Birmingham P.

1. On 18th June 2019, following a trial which began in the Central Criminal Court on 29th April 2019, the appellant ("Boy B") was found guilty of the murder of Ana Kriégel. In the aftermath of the conviction, the appellant lodged a Notice of Appeal raising the following three grounds:

   (i) that the trial judge erred in law and in fact in not summarising the evidence of the father of the appellant for the jury during the course of his charge when requested to do so;

   (ii) that the trial judge erred in law and in fact in refusing to allow the evidence of a psychologist, Dr. Colm Humphries, to go before the jury in a situation where the prosecution, in their closing address to the jury, relied heavily on the interviews of the appellant and the "truths, half truths and lies" of the appellant during his interviews;

   (iii) that the trial judge erred in law and in fact in refusing an application on behalf of the appellant to exclude statements of opinion which emanated from Gardaí during the course of the final interview conducted with the appellant.

2. The appeal was assigned a date for hearing in the ordinary way, save that the Court was minded to prioritise the case given the appellant's youth. Shortly before the appeal was due to come on for hearing, there was an application to adjourn the pending appeal. The application was made by a new legal team and not the team that had represented the appellant at trial.

3. By Notice of Motion dated 2nd March 2022, the appellant sought to amend the Notice of Appeal to include the following additional grounds:

   (iv) that the trial judge erred in law and in fact in refusing to permit manslaughter go to the jury as a permissible verdict;

   (v) that the trial judge erred in law and in fact in failing to give a corroboration warning pursuant to the provisions of s. 10 of the Criminal Procedure Act 1993;

   (vi) that the trial and conviction is unsafe in circumstances where there now exists material evidence not available at the appellant's trial that could have had a significant bearing on the deliberations of the jury insofar as it related to the admissibility and/or reliability of the interviews conducted by An Garda Síochána with the appellant at a time when he was thirteen years of age and could have resulted in a not guilty verdict, and having regard to all the circumstances, it is necessary, in order that justice be done and be seen to be done, that leave be granted to adduce the fresh evidence sought to be adduced.

4. The Notice of Motion also set out that the appellant was now seeking an order pursuant to s. 33(1) of the Courts of Justice Act 1924 (as amended) permitting the appellant to adduce fresh evidence of a Professor Susan Young, as set out in her reports dated 8th February 2021 and 10th December 2020, and a Professor Gísli Guðjónsson, as set out in his report dated 14th February 2022.

5. When the motion was listed for hearing, it was agreed – on foot of a suggestion from the Director – that the focus of attention should be on the application to introduce new evidence. It was pointed out that the application to introduce new evidence was a substantive matter, and that if leave were granted by the Court, it would then be necessary to consider whether oral evidence was going to be required, whether the experts would be cross-examined, and also the question of the involvement of further experts might arise, whereas all other matters referred to in the Notice of Motion could conveniently be dealt with during an appeal hearing. Thus, this judgment deals with the application to adduce fresh evidence. To put the application in context, it is necessary to say something about the background to the trial.

Background

6. As is widely known, the appellant stood trial alongside a contemporary. The prosecution case against the appellant was that he had aided and abetted the murder of Ana Kriégel, in that he assisted or helped in facilitating it. At trial, the evidence was that on 14th May 2018, at approximately 16.55, the appellant had called to Ana's home. She left in his company, and they headed on foot in the direction of St. Catherine's Park. The last sighting of Ana was at 17.14, walking across a field in St. Catherine's Park.

7. At 21.00 that evening, Ana's parents went to Leixlip Garda Station when she had not returned home. At that point, she was reported missing. Gardaí called to the appellant's home as they had been informed that Ana was last seen in his company. The appellant informed Gardaí that he had accompanied Ana to St. Catherine's Park earlier in the evening and that he had last seen her at about 17.40 in the park, walking in the direction of her home. At this point, he did not inform Gardaí that they had been in the company of the co-accused in the park.

8. There followed a number of engagements between the appellant and Gardaí, during the course of which he brought them on the route that he claimed to have travelled on 14th May 2018. There followed an extensive search, and at approximately 13.00 on 17th May 2018, Ana's body was found in the main farm building of the vacant buildings known as Glenwood House at Clonee Road. Her body was naked, save for a pair of socks. She had visible injuries and there was a length of branded tape wrapped around her neck. Her clothing was scattered around the room, and her phone, which had been damaged, was found nearby. A post-mortem examination was conducted by the then State Pathologist, Professor Marie Cassidy, who was of the view that the cause of death was blunt force trauma to the head and neck. Professor Cassidy noted a small tear at the entrance to the vagina and a fresh tear in her hymen, which indicated, at least, attempted vaginal penetration.

9. The scene at Glenwood House was the subject of a forensic examination. Several areas of blood spatter were located in the room where the body was found. Also located in the room was a piece of wood measuring 92cm, which, upon analysis, was found to have the victim's blood on it. On 24th May 2018, the appellant was arrested on suspicion of murder. He was detained and interviewed on five separate occasions. The account he offered of events changed significantly during the course of the five interviews. It may be noted that Gardaí had carefully prepared for the detention. Arrangements were in place to ensure that no other prisoner would be in the Garda station to which the appellant was being brought. The arrest was by appointment to ensure that the appellant's mother and solicitor would be available to accompany him during the detention. A room, as distinct from the more usual cell, was made available to the appellant and his mother in the Garda station.

10. Initially, the appellant told Gardaí that he had called to Ana's house, and appeared to be acting as an emissary, bringing her to meet his co-accused, "Boy A" in the park to sort out their relationship issues, but he denied ever going to Glenwood House. The appellant provided details of the route he took in the park. However, in the fourth interview, which commenced at 10.12 on 25th May 2018, he told Gardaí that he was going to "retell the story". He explained that he told Gardaí a "fake story" because he could not really remember initially the route he took, so he made it up, and then he thought he could not go back on that version, so he stuck to the story. Eventually, during the fifth interview, which commenced at 13.39 on 25th May 2018, he accepted that he had in fact gone to the house with Ana, that he gave Ana over to Boy A (naming Boy A), that he was there to support Boy A, and that he had seen his co-accused flip Ana onto the floor, remove some

of her clothing and choke her. The appellant said that he ran away at that point and heard Ana screaming. He acknowledged that there had been two rolls of Tescon-branded tape in the shed at his house. When Ana's body was discovered, there was a length of Tescon-branded tape wrapped around the neck of the deceased.

11. On 25th May 2018, the appellant was released without charge. He was subsequently re-arrested on 7th July 2018. At that stage, Gardaí had seized and forensically examined items of clothing, including a mask, described as a "zombie mask", found in the backpack of the co-accused, which had Ana's blood on it. On this occasion, the appellant was interviewed three times, and again, his account of events altered during the course of the detention. In the second interview, commencing at 13.46 on 7th July 2018, the appellant acknowledged that he had in fact seen his co-accused wearing the zombie mask on 14th May 2018. Up to that point, he had denied seeing the co-accused with the mask, instead describing to Gardaí his co-accused's blank stare. The appellant told Gardaí that about a month before the incident, the co-accused had asked him if he wanted to kill someone. When the appellant asked the co-accused who he wanted to kill, the co-accused had replied "Ana Kriégel". The appellant said he did not think the co-accused was being serious about that. In the final interview, which began at 19.09, the appellant told Gardaí that he was scared of his co-accused framing him.

The New Psychological Reports

12. The appellant's current solicitors came on record in March 2020. At that stage, a date for the hearing of the appeal had been fixed for 24th April 2020, but that date was vacated on their application. In June 2020, the solicitors made contact with Professor Gísli Guðjónsson, Emeritus Professor of Forensic Psychology in the Institute of Psychiatry, Psychology and Neuroscience in London, requesting that he would review the Garda interviews of the appellant. The Professor was unable to accept the commission due to other commitments but recommended that contact be made with Professor Susan Young of Psychology Services in the United Kingdom. Professor Young provided a report in December 2020. The report included an analysis, critical in tone, of the report that had been prepared by Dr. Colm Humphries, and which the original team had sought to have admitted at trial. A further report was provided by Professor Young in February 2021, which was of the view that the interviewing of the appellant was "inadequate and/or inappropriate". It appears that on receipt of the second report, counsel advised that there should be further contact with Professor Young with a view to asking her to deal with certain issues. However, as she was apparently involved with another lengthy case, this took some time, and ultimately, the report was prepared by Professor Guðjónsson. This report included a contention that the appellant's mind had been substantially overborne by the interviewers' "heavy and relentless challenges".

13. The grounding affidavit in relation to the motion to adduce the additional evidence, comments:

"[t]he evidence was not known at the time of the trial and is such that it could not reasonably have been known or acquired at the time of trial. The fresh evidence is credible, both in isolation and by reference to the other evidence at trial and both has, and might have had, a material and important influence on the result of the trial in the context of both the admissibility and/or reliability of the interviews with the Appellant relied on by the prosecution in support of guilt."

14. There are some aspects of the reports of Professor Young which are slightly surprising. By way of example, on a number of occasions, there is a reference to prosecution counsel, a Mr. Colgan. In fact, Mr. Colgan SC was the lead defence counsel for Boy B. At one point, where it would seem to have been intended to refer to the prosecution, there is a reference to "the Crown". The conclusion of the report of 10th December 2020 is in these terms:

> "Dr. Humphries' report is of exceptionally poor quality, the methodology applied is inappropriate, it is highly speculative, lacks objectivity, and the concluding remarks seem subjective and inappropriate. In my view, his findings and report should be relied upon."

15. In fact, as is pointed out by the Director in the course of written submissions, it seems clear that the word "not" was omitted and that what the author intended to say was that, in her view, the findings of Dr. Humphries' report should not be relied upon. It is perhaps slightly surprising that a report that is so critical of a fellow professional's report contains such errors.

The Application before this Court

16. The application to admit new evidence is opposed by the Director who argues that the admission of fresh evidence would not be justified. She relies on the decision in DPP v. Cronin (No. 2) [2006] IESC 9 in this regard. The Director contends that the appellant has not come anywhere near addressing the Willoughby threshold (DPP v. Willoughby [2005] IECCA 4) as adopted by the Supreme Court in DPP v. O'Regan [2007] 3 IR 805.

17. It is an unusual feature of this application that what is sought to do is to introduce new evidence with a view to challenging the admissibility of what was said by the appellant in the course of a number of interviews during two separate detentions. There was no challenge whatsoever to those interviews at trial despite it having been open to the appellant and his advisers to do so. It would have been open to them to commission a report from Professor Young and Professor Guðjónsson, had they wished to do so, and in fact they did commission a report. Apart from commissioning experts to address the issue of voluntariness at trial, it was also open to the appellant to give evidence and raise issues about the voluntariness of the interviews, but he did not do so, and perhaps more remarkably, to this day, has not done so. Instead, issues are raised in the reports of the

two experts who have now been consulted by the present legal team, and while there is no doubt that they are very capable indeed and certainly in the case of Professor Guðjónsson, internationally renowned, they have never met the appellant for interview. However, it is the case that the newly consulted experts are critical of the performance of Dr. Humphries and the former solicitors and former legal team.

18. From the outset, it must have been clear to all involved that what the appellant had to say during interview was of major evidential significance. A decision was required as to how the defence would deal with the contents of the interviews. That decision would inevitably be heavily dependent on what instructions were forthcoming from the appellant. However, the decision was not taken against the background of what the appellant had to say alone, because the appellant's mother and his solicitor were present throughout. At no point during the trial was it suggested that the responses to questions from the appellant were coerced, or anything other than voluntary. The appellant's position was that, while lies were initially told, he eventually presented a true picture of what had occurred, the true picture being that he was an observer or eyewitness and not a participant. In particular, this was the position adopted during the final interview on the occasion of the second arrest and detention. On that occasion, there was no question of the appellant making admissions.

19. Any suggestion that the appellant had buckled during interview and had succumbed to a situation where he was providing an account which was not a voluntary one was negated by the fact that, in June 2018, he provided a similar explanation to his friend accounting for his presence at the location of the crime, as well as an account of his observations of the co-accused engaging in a violent attack on Ana.

20. One must appreciate how radical the request to admit new evidence is. This is not simply a question of seeking to adduce new evidence addressed to what was in issue at trial. Rather, what is in issue is that the appellant seeks to set at naught the way the trial was run on his behalf. More than three years after the trial, the appellant seeks to run an entirely different case. He does so despite the fact that there has never been any suggestion of inadequate legal representation provided to him by the solicitor, junior or senior counsel who represented him at trial. This Court finds itself in complete agreement with the Director's submission that the application to adduce new evidence does not come anywhere near satisfying the Willoughby principles.

21. It is for these reasons that the application to admit new evidence must be refused.