THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

Record No: 2016/108

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

L.D.

Appellant

JUDGMENT of the Court delivered 27th February, 2018

by Mr Justice Edwards.

Introduction
1. The appellant, L.D., was charged with a single offence of defilement of a child contrary to section 2(1) of the Criminal Law (Sexual Offences) Act, 2006 at his (the appellant's) home on a date unknown between the 1st of January 2010 and the 4th of July 2011. The trial the subject matter of this appeal commenced before the Dublin Circuit Criminal Court on the 11th of January 2016 and concluded on the 14th of January 2015. The appellant was found guilty of the offence by unanimous verdict of the jury.

2. The matter was adjourned for sentence to the 22nd of January 2016 initially, and thereafter to the 11th of April 2016 when a sentence of two and a half years was imposed which was wholly suspended in its entirety for a period of two years.

3. The appellant now appeals against his conviction only.

The Relevant Facts
4. The appellant was born on the 5th of August 1994 and was 15 or 16 at the time of the offence. The complainant, R.B., was born in September 2000 and was 10 or 11 years old when the incident occurred. R.B. did not report the matter to anyone until he told his mother, P.B., approximately a year later on the 1st of July 2011. He was then interviewed by Specialist Garda interviewers on the 1st of September 2011.

5. The appellant and the complainant lived in the same housing estate and were friends until the incident. The complainant told the specialist interviewer that before the incident took place he was sitting on the appellant's bed playing Playstation while the appellant was on the bed reading. At p. 18 of the transcript of the specialist interview he gave the following evidence in relation to how the incident began:

> *A. I don't know what day it was, it was late and he asked me to go into his house and I said yeah and I was in there for about five minutes and his Ma was saying she was going to the shop so L.D. just said okay. I was playing his PlayStation, I think I was playing a football game and L.D. was saying: "I know how to do sex." I was like "Okay, I don't really care." He was like: "will I show you?" I was like: "No." He was like: "Why?" I was like: "Because that is sick." He was like: "Why, is there poo on your ass?" I was like: "No." He was: "Then why won't you do it." I goes: "Because that is dirty." He goes: "So." I goes: "I am not letting you do it." He goes: "You are not getting out of the house." I goes: "what happens when your Ma comes back?" He was like: "Then you can go." I goes: '"I will just wait." He says: "I will get me dogs in", because he has real vicious dogs*
>
> *Q. Okay.*
>
> *A. That is really all I can remember other than when he got his willy up my bum.*

6. Asked at pp. 29 – 32 of the transcript to give further information as to his and L.D.'s respective positions on the bed, the following exchange occurred:

> *Q. Okay, all right. So where were you in the room when that happened?*
>
> *A. Um, on the bed.*
>
> *Q. On the bed. What way was your body on the bed?*
>
> *A. Um, I can't remember that either .*
>
> *Q. You can't remember, okay. What way were your clothes?*
>
> *A. My trousers were down that and that's it.*
>
> *Q. Your trousers were down. How did they get down?*
>
> *A. He made me pull them down.*
>
> *Q. Okay. So your trousers were down, did you have any underwear on?*

A. Yeah

Q. Where were they?

A. Down as well.

Q. Okay. You said he made you pull them down. How did he do that?

A. He was forcing me to still kind of pushing me.

Q. Still kind of pushing you, okay. So you know the way you said you were on the bed. Do you remember when you were on the bed, what could you see?

A. The telly and a bit of the window, some posters on the wall.

Q. What were the posters of?

A. Man U, I think.

Q. Okay. Could you see anything else?

A. No.

Q. Could you see L.D.?

A. Yeah, he was, like, sitting kind – nearly next me.

Q. Sitting nearly next to you, okay. What way was your body on the bed?

A. Like just sitting here like this.

Q. Okay. At that stage were your pants up or down?

A. Up.

Q. They were up. So then when your pants were down, what way was your body on the bed?

A. Um, I can't remember that.

Q. Was it on the bed or was it somewhere else?

A. I don't know.

Q. You don't know, okay. So, you said about L.D., okay, you said that he stuck his willy up your bum. Where was L.D. when he did that?

A. Um, I think he was behind me.

Q. Okay, he was behind you. How did you know it was his willy?

A. Um, 'cos I go: "What are you doing to me?" And he goes, he said he is sticking his willy up my bum.

Q. Okay. Did you see him do any of that?

A. Um, yeah.

Q. What could you see?

A. Him pulling his trousers a bit.

Q. Okay. What could you see when he pulled down his trousers?

A. Um, I could see his willy.

7. He was later again asked questions regarding his and the appellant's positions:

Q. … do you remember you told me there that L.D. was standing behind you?

A. Yeah.

Q. When L.D. was standing behind you, where were you?

A. I think I was on the bed.

Q. You think you were on the bed. Do you remember were you standing up or sitting down or lying down on the bed?

A. I think I was sitting.

Q. You think you were sitting, okay. You know when you said L.D. put his willy in your bum, what way was your body then when that happened.

A. I can't remember.

8. The complainant was also questioned as to how the penetration occurred and how it made him feel. There was no suggestion of any pain by the complainant:

Q. Okay, so. How did his willy get in your bum?

A. I think he put it up it.

Q. You think he put it up it, okay. When that happened, R.B., how did that make you feel?

A. Horrible.

Q. In what way did you feel horrible?

A. That I was dirty.

Q. Okay. Anything else?

A. No, that's all I can remember.

…

Q. Okay. And when he said he put his willy in your bum, what happened when his willy was in your bum?

A. Um, nothing.

Q. Did he put his willy in your bum and leave it there or did anything else happen?

A. No, I think he took it out and put it in again.

Q. Okay. Tell me more about that?

A. He put it in and out and then in and out, like lots of times.

9. Before the complainant was cross examined regarding the evidence he gave to the specialist interviewer, the trial Judge made the following comments to the jury:

JUDGE: She just -- and she's doing her job, I think it's important that you should understand that too. She's representing Mr D and she's entitled to ask those questions, okay. So, she'll start now, thank you.

10. At the close of the case the defence made a submission of no case to answer under the second limb of Lord Lane C.J.'s test in *R. v. Galbraith* [1981] 1 WLR 1039 that the prosecution evidence, taken at its highest, was so weak, tenuous and contradictory that no jury could properly convict on it. In particular, counsel for the defence emphasised the lack of reported pain upon penetration, the repeated use of the words "I think" by the complainant during the Specialist Garda interview, and his evidence that he was sitting at the time of the incident which would have made the penetration physically impossible. The submission was dismissed by the trial Judge in the following terms:

JUDGE: Thank you. Thank you for taking me through the principles in Galbraith with which most of us are familiar and there certainly is evidence under the heading number 1 and the question is whether there's sufficient evidence for me to allow this matter to go to a jury and I'm satisfied that there is. It may not be perfect, there might be discrepancies. The defence say that there isn't any evidence on the issue of penetration. There is some evidence, it may not be perfect, as I say, and on methodology it does raise a difficulty for a jury, I accept that, but I am required under the case law to favour letting matters go to a jury rather than arriving at a decision myself on the evidence and that's what I propose to do and let them deal with the evidence as it is imperfect and all as it may be.

11. At close of trial the trial Judge charged the jury in the following terms:

"The prosecution case, the chief witness is R.B. who at the time of this offence was aged nine or 10 and his evidence, and I'm only going to touch upon the details in a very summary fashion, because it hasn't been a long case and you will have heard enough of the detail from the counsel and you'll recall it yourself, but essentially his evidence is that he was in a neighbour's house. His neighbour is L.D. He's older, he's tall, he's heavy is how he's described, a discussion on sex started up. He finds himself, according to the evidence, in a fearful situation, the door is locked, he'd like to leave, there's dogs. He'd like to get out. He wonders about getting on the bed and he's asked about poo and he finds himself with his trousers down, whether he takes them down himself or somebody else takes them down, he's told to take them down or takes them down himself, there's various versions. He says he saw L.D.'s willy. L.D. at some stage was behind him. He put his willy in his anus, in his bum is the word he used, and eventually in the interview with the garda, he eventually gives more detail about all of that and says that he put it in and out but that it did not last for a long time, it lasted for a short time and that he felt horrible afterwards.

And a year later approximately he blurts this out to his Mum or he blurts a version out to his Mum and he doesn't recall exactly what he told her and you'll remember in the video that he initially gave a very quick version and then it was all expanded in following discussion with the guard and you might wonder what kind of a version do you give to your Mum in an evening when you're crying in your jim jams on the couch, what words do you use? What does she hear? She says she's hysterical when she hears the allegation, her world is collapsing round her, she goes out, she rings the guards. She rings her husband who lives elsewhere, her former -- R.B.'s Dad who lives elsewhere and he arrives quick time and you can be sure that there were questions and answers. What would you do if a child or someone you knew made that complaint? Would you remember everything, do you think? You'd be asking them stuff, do you remember what you're told? In any event, I raise these things just to highlight that there are discrepancies in the evidence but there may be reasons for them too.

And R.B.'s own evidence that he was embarrassed and he was nervous and afraid in telling these matters, how do you say it, how to say it is what he said and in answer to a different version that he gave to his Dad of some aspect, how do you say things like that to your Dad. So, there are some discrepancies, but ask yourself the circumstances under which versions are told, what people recall. Mum has heard something and then she talks to the guards and it might be something different from what R.B. gives in evidence in certain aspects and look at the circumstances and look at who's been talked to and then ask yourself are they material anyway and how do they arise? Do they arise from questions or are they voluntary statements like the discussion with the guard?

And defence counsel raised an issue about the detail and how much she made of the devil is in the detail and that's true, but the details can also be very revealing about credibility, about what happens and what cases, about circumstances, about facts and there were a lot of details, details about dogs and scratching at doors and questions about poo and you might ask yourself would a nine or 10 year old make that up, was the question asked and if it was asked why was it asked? I don't know, these are all things that you might like to think about.

And there are details missing. There are, as defence counsel has said, gaps in what position was R.B. in at the time? He sit he was on the bed, sitting, he said that L.D. was behind him and then at other times he said he couldn't recall exactly when pressed what position he was in. He didn't remember then was another of his answers. And you might recall his earlier evidence is how do you say things and embarrassment and his mother's evidence about blocking things out and when a child says they can't recall does that mean -- is it child speak for I can't bring myself to say it? I don't know. Does the same apply for the absence of detail on whether or not he was sore, and what he sore, what he felt, is there a shame factor here? How often have we heard of abuse cases where a victim is made feel guilty and we know that R.B. has been in counselling and he was young and I don't know the reason for the absence of detail and it has been raised by counsel and it is something which you'll be thinking about. It is a matter for you and then you need to ask yourself how has that arisen? Is it material? And you'll deliberate upon all those matters yourselves.

And there was a delay of one year in -- of one or more years, in fact. It's not entirely clear. Defence counsel said could it be two years and he said well, it could be. His own version was around a year is my note of the evidence and then you ask yourself is there a right time to tell a parent about things like this. What moment do you pick? The day it happens, how are you feeling on that day if it did happen? Or do you wait for an opportune time and a quiet evening when nobody else is around and is the delay material, because the delay has legal consequences in terms of people's recollection and things like that, which I'll touch upon later, but that's something you might like to think about. And, as I say, the defence case, he said this did not happen and I direct you to -- or I suggest that you read the question and answers with L.D. because that is essentially his evidence in this matter."

Grounds of Appeal

12. The appellant appeals his conviction on five grounds as set out in the Notice of Appeal. They are as follows:

1) The learned trial judge erred in commenting to the jury immediately prior to the cross examination of P.B. that counsel for the appellant was *"only doing her job"*;

2) The learned trial Judge erred in law and in fact in refusing the appellant's application for a directed verdict of not guilty at the close of the prosecution case;

3) The learned trial Judge erred in law and in fact in not applying the appropriate legal principles in determining the appellant's application for a directed verdict of not guilty and in erroneously finding that there existed an effective presumption in favour of allowing such cases to proceed to be determined by the jury;

4) The learned trial judge erred in law and in fact in commenting on the evidence of the complainant in the case in charging the jury and in particular in providing explanations for aspects of the complainant's evidence which were without any evidential basis and which were adverse to the appellant;

5) The learned trial judge erred in law in failing to grant the appellant's application for a discharge of the jury, which application was made on the basis that the comments of the learned trial judge on the evidence had created a serious and irreparable unfairness to the appellant.

Discussion and Analysis

13. For convenience counsel for the appellant has, in her submissions, dealt with grounds 2) & 3) together under the heading "Refusal of the Appellant's Application for a Directed Verdict". She has also grouped grounds 4) & 5) together under the heading "Comments by the Learned Trial Judge", while dealing with ground 1) on its own under the heading "Comments by the Trial Judge Prior to the Evidence of the Complainant". We propose to adopt the same approach.

Ground 1) "Comments by the Trial Judge Prior to the Evidence of the Complainant"

14. It was submitted that it was inappropriate for the trial judge to seek to apologise in advance of cross-examination for the questions which were to be asked on behalf of the appellant, and that it created a substantial impression of deference to the complainant's position. It is conceded that in and of itself this complaint, even if upheld, would not merit the quashing of the conviction in this case. However, the Court is asked to take it into account with the other grounds.

15. In reply it was submitted on behalf of the respondent that the trial judge did not cross the line with her remarks and in no way endorsed the complainant or showed inappropriate deference to him. We were referred to *The People (Director of Public Prosecutions) v Morrissey* [1998] WJSC-CCA 5863, at 5879 where the former Court of Criminal Appeal stated:

"A trial judge is entitled to put a witness at his or her ease and in particular a witness who is giving evidence by video-link since they are clearly persons of tender years. They need re-assurance"

16. We consider that it is important to appreciate the full context in which the trial judge said what she said. The incident complained of occurred at the very start of day two of the trial and is recorded on page one of the transcript of that day as having unfolded as

follows:

> *REGISTRAR: Number 58, Bill 895/2012, DPP v. L.D., trial continuing.*
>
> *JUDGE: Thank you, good morning, ladies and gentlemen of the jury, we're about to resume now and we'll commence with the cross examination.*
>
> *COUNSEL: Yes. Yes, Judge.*
>
> *JUDGE: Of Mr B so can we beam him up, so to speak. Good morning, this is Judge McDonnell. Can you -- you can see some people I think, can you?*
>
> *WITNESS: Yes, I can see you there.*
>
> *JUDGE: Great, okay. Well, you'll shortly be seeing [Counsel] who's going to cross examine you and I'll explain to you what cross examination is, as I do with every witness who's going to be cross examined who hasn't been in court before as I assume you haven't, she's required to ask you questions about the evidence which has been given in the video tape that we saw yesterday and so she may be putting to you a different set of facts, a different set of scenarios. She'll simply be questioning you about that evidence and you can agree or disagree with her; do you understand that?*
>
> *WITNESS: Yes.*
>
> *JUDGE: She just and she's doing her job, I think it's important that you should understand that too. She's representing Mr D and she's entitled to ask those questions, okay. So, she'll start now, thank you.*

17. It seems to us that the quotation relied upon from *Morrissey* is entirely apposite, as what the full context reveals is that the trial judge's remarks in this case were entirely directed towards putting the witness at ease, and they were not in any way the showing of deference to the witness or the endorsement of the witness.

18. In the circumstances, we dismiss this ground of appeal without hesitation.

Grounds 2) & 3) - "Refusal of the Appellant's Application for a Directed Verdict"

19. The application for a direction was based on two pillars:

> a) That the evidence in chief of the complainant raised a substantial issue as to whether the act alleged had in fact been proven; and
>
> b) That the account of the act provided in evidence by the complainant was so unreal, so lacking in the detail of its commission and so troubling insofar as any detail is provided, as to amount either to an impossibility or an utterly incredible narrative.

20. Point a) was concerned with the first leg of *Galbraith*, namely sufficiency of evidence, and in that regard was focussed on whether there was sufficient evidence of penetration of the complainant's anus by the accused, as penetration is an essential ingredient of the offence of which the accused was charged. The defence case was that the evidence before the court on that issue was simply insufficient to allow the charge to be left to the jury. In particular, the defence relied on the fact that the complainant neither felt nor, because he was approached from behind, saw himself being penetrated. Moreover, he had said in answer to questions asked in cross-examination *"I* **thought** *he put it up"* and that *"I* **think** *he took it out and put it in again"* (this Court's emphasis). It was also suggested that the absence of any evidence of pain or distress having been suffered by the complainant tended to negative any suggestion of actual penetration.

21. With all due respect to the arguments made on behalf of the appellant, these were issues for the jury to resolve. Sight cannot be lost of the complainant's evidence in chief in which he had said: *"Um, he, got his willy and … stuck it up my bum".* Moreover, when asked by prosecuting counsel: *"Where was L D when he did that?"*, he replied *"Um, I think he was behind me".* He was then asked: *"Okay, he was behind you. How did you know it was his willy?"*. He then replied: *"Um, 'cos I go: 'What are you doing to me?' And he goes, he said he is sticking his willy up my bum."*

22. In our assessment we consider there to be enough cogency and clarity in what the complainant had said in his evidence in chief to justify the case being allowed to go the jury, when measured against the yardstick of sufficiency of evidence. We therefore agree with the trial judge's ruling in that regard. In so ruling, we are saying nothing for the moment about the quality of the evidence adduced on behalf of the prosecution. This requires to be separately considered as it formed the basis of the further application to have the case withdrawn from the jury based upon the second leg of *Galbraith.*

23. The arguments addressed to the quality of the evidence are again based upon the complainant's expressions of a lack of certitude, the absence of evidence of pain or distress, and are further based upon: "the manner in which the complainant describes, or in truth is entirely incapable of describing, even the rudimentary details of how the offence is allegedly committed. He initially tells the interviewers that he can't remember his position when the alleged act was carried out or even whether he was on the bed or elsewhere. The issue is then returned to on page 34, at which point he states that he was seated. This is patently a physical impossibility and the difficulty is clearly in the minds of the interviewing Gardaí who press the issue in careful and appropriate terms leading the complainant to revert to not being able to remember what position his body was in, or even whether he was standing up or sitting down" (quotation taken from the appellant's written submissions).

24. It is suggested that the evidence which the Court was required to take at its height for the purposes of the application is therefore that the complainant thinks the appellant inserted his penis into his anus because the appellant spoke words to him to that effect, that the complainant reports no pain, sensation or discomfort of any kind, and that he may have been sitting when this occurred but ultimately that he can't remember where he was or whether he was seated, standing or otherwise. Counsel for the appellant submitted that the quality of the evidence for the prosecution was so poor, tenuous and weak that the case ought not to be allowed to go to the jury.

25. It was further suggested that the account of the complainant, though including an opening and stark allegation of the offence, ultimately telescoped in examination in chief down to merely thinking that it happened, whilst his account of how it happened

oscillated between his not being unable to remember or providing on the other hand a physical description which was a logical impossibility. Counsel for the appellant has referred us to the decision in *The People (Director of Public Prosecutions) v. Buckley* [2007] 3 IR 745 in support of her contention that withdrawal of the case was required in those circumstances.

26. The trial judge disagreed, and we have quoted her ruling earlier in this judgement. In essence, while she acknowledged that there were infirmities in the evidence, she felt that these raised issues that it was appropriate for the jury to resolve, and she refused the application for a direction. We consider that the trial judge's ruling was correct. Further, we do not consider that the Buckley case in fact supports the proposition advanced, if anything it supports the contrary conclusion.

27. In so far as it was suggested that the trial judge failed to apply the appropriate legal principles in determining the appellant's application for a directed verdict of not guilty and erroneously found that there existed an effective presumption in favour of allowing such cases to proceed to be determined by the jury, we reject those suggestions.

28. We are satisfied that the trial judge correctly applied the law in *R. v. Galbraith* [1981] 1 WLR 1039, and that her ruling was in accordance with what this Court has said in *The People (Director of Public Prosecutions) v. M.* [2015] IECA 65. In that case we sought to address a commonly held misapprehension that the second limb of Lord Lane's celebrated statements of principle in *R v. Galbraith* represents authority for the proposition that a case must be withdrawn from the jury if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies. We emphasised that it is not authority for that proposition. This Court went on to say at paras. 48 – 51:

> *"On the contrary, the emphasis in Galbraith is on the primacy of the jury in the criminal trial process as the sole arbiter of issues of fact. What Lord Lane was in fact saying in Galbraith was that even if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies, it is for the jury to assess that evidence and make of it what they will, unless the state of the evidence is so infirm that no jury, properly directed, could convict upon it. Accordingly, what Galbraith is in fact concerned with is fairness.*
>
> *Moreover, implicit in the Galbraith principles enunciated by Lord Lane, is that withdrawal of a case from a jury should be an exceptional measure, to which resort should only be had for the purpose of avoiding a manifest risk of wrongful conviction.*
>
> *This Court considers that the matter is well put in the following quotation from Archbold, Criminal Pleading Evidence & Practice 2014 at page 484, where the authors state:*
>
> > *'In making the judgment in line with the second limb of Galbraith, as to whether the state of the evidence called by the prosecution, taken as a whole, is so unsatisfactory, contradictory or so transparently unreliable, that no jury, properly directed, could convict, the judge must bear in mind the constitutional primacy of the jury and not usurp its function.'*
>
> *Further, in The People (Director of Public Prosecutions) v M. (Unreported, Court of Criminal Appeal, 15th February, 2001) Denham J, as she then was, provided the following exegesis, with which we fully concur, concerning how the Galbraith principles ought properly to be applied:*
>
> > *'If there is no evidence that an element of the crime alleged has been committed, the situation would be clear. The judge would have to stop the trial. However, that is not the case here. If a judge comes to the conclusion that the prosecution evidence taken at its highest is such that a jury properly directed could not properly convict it is his duty to stop the trial. However, that is not the case here. Here there is lengthy evidence from the complainant in which there are some inconsistencies. These inconsistencies are matters which go to issues of reliability and credibility and thus, in the circumstances, are solely matters for the jury. The learned trial judge was therefore correct in letting the trial proceed. These are matters quintessentially for the jury to decide. However, if the inconsistencies were such as to render it unfair to proceed with the trial then the judge in the exercise of his or her discretion should stop the trial. However, that is not the situation here. On the facts and the law the learned trial judge did not err in refusing to withdraw the count in respect of the sexual assault from the jury at the conclusion of the prosecution case.'*

29. While there were infirmities in the complainant's evidence, these were all well within the scope of the jury to resolve. There was nothing unfair about allowing this matter to proceed to the jury. We therefore dismiss these grounds of appeal.

Grounds 4) & 5) - "Comments by the Learned Trial Judge"

30. We have taken the trouble to quote extensively from the trial judge's charge to the jury earlier in this judgment, so as to place complaints made under this heading in their full context.

31. Counsel for the appellant draws our attention to the fact in closing the case to the jury, she placed significant weight on the weaknesses, internal inconsistencies, failures of memory and incredible aspects of the complainant's account. Emphasis was also placed on the evidence of the complainant's mother P.B. She confirmed in evidence that when the complainant spoke to her about the allegation, he had said that *"L.D. put his thing at you know where"* and that when she had asked him whether this hurt he had said that he didn't know. She took no issue in cross examination with the notes made at the time by Garda Callanan of the Garda's conversation with her and in particular that she had told Garda Callanan *"put penis at bottom, wasn't sore".* Of particular note, P.B. had acknowledged that she told the Gardaí that she had asked the complainant *"did he put it in and he said yes"* but that she had opined to the Gardaí in her statement that *"that's the part where I think R might be confused".*

32. In the appellant's written submissions, which were amplified by counsel at the oral hearing of this appeal, the following is advanced:

> "The most dangerous aspect of the Court's comments is the manner in which all of the contradiction, lack of memory, illogicality and doubt of the complainant's evidence was dealt with in the charge. The learned trial Judge, it is submitted, found these gaping and fundamental problems in the prosecution evidence (which she had herself identified in refusing to grant a direction as *raising "a difficulty for the jury"*) to merit no more than a prosaic nod in the direction *of "details missing"* and *"gaps".* That one of the gaps or missing details was the complainant twice going no further than that he thought the offence had been committed merited no mention whatever by the Court, the summary of his evidence …

being instead a reel of highlights which bore little resemblance to the evidence as given.

Having characterised the defence case in this way, the Court then went on to offer the jury an explanation for these aspects of the complainant's evidence which had no basis at all in evidence, which borrowed inaccurately from other unrelated evidence in the case and which was delivered in the language of the counsellor rather than that of an impartial tribunal. The jury were invited to ask themselves whether all of the aspects of the case which the complainant could not remember were merely *"child speak for I can't bring myself to say it?".* In briefly dealing with the issue of how a nine or ten year old child who has been anally penetrated by a 15 or 16 year teenager never once complains of pain or exhibits any adverse *sequelae*, the Court wondered aloud in the following terms:

> *"Does the same apply for the absence of detail on whether or not he was sore, and what he sore, what he felt, is there a shame factor here? How often have we heard of abuse cases where a victim is made feel guilty and we know that R.B. has been in counselling and he was young and I don't know the reason for the absence of detail and it has been raised by counsel and it is something which you'll be thinking about."*

Had counsel for the Director sought in more dry and neutral terms to propose an extra evidential reason for a host of difficulties and problems in the evidence of the complainant, this would have gone far beyond the realm of robust advocacy and would have led inevitably to a discharge of the jury. For the Court do so, and to do so in the language used, amounts to a powerful invitation to the jury to speculate on matters far beyond the evidence and do so in a manner squarely adverse to the appellant."

33. The submissions continue:

> "….in and of themselves the comments of the Court in dealing with the evidence of the complainant's mother and the references in his evidence to conversations with his father (though entirely unwelcome from a defence point of view) may not be a sufficient basis to seek a discharge of the jury. However, it is submitted that in looking at the overall context in which the Court invited the jury to deal with problems in the complainant's evidence, those other aspects are highly relevant. In particular, the reference to *"what kind of a version do you give your Mum in an evening when you're crying in your jim jams on the couch, what words do you use"* provides a context for the latter comments which is partial in its content and utterly inappropriate in its tone. Of its own motion the Court introduced the language of the nursery to gently sweep aside any emphasis the jury may have placed upon the differing accounts given by the complainant. Furthermore whilst the Court invited the jury to dismiss any such issues as understandable in the context of a mother and child interaction of great pathos, she never actually reminded the jury what those issues were. That in particular the complainant appears to have given his mother an account inconsistent with the actual offence having been committed was not dealt with by the Court nor were the jury reminded that on foot of same the complainant's mother had actually opined to the Gardaí that she felt the complainant was confused on the fundamental issue of penetration."

34. In support of her arguments, counsel for the appellant again refers us to *The People (Director of Public Prosecutions) v Morrissey* [1998] WJSC-CCA 5863, and in that regard she relies upon the substantive issue that was determined in that case, namely that a judge must not appear to give a witness his or her "seal of approval". In that case the trial judge had inappropriately told the complainant that she was *"a brave little girl"*, and the Court of Criminal Appeal was concerned that doing so *"must have influenced the jury in coming to its verdict."*

35. Counsel for the respondent makes the following points. The trial judge in charging the jury does preface the fact that she was only going to touch upon the details in a very summary fashion and in doing so refers to the fact that *"there's various versions"* and the fact that *"…eventually in the interview with the garda, he eventually gives more detail about all of that and says that he put it in and out but that it did not last for a long time, it lasted for a short time and he felt horrible afterwards."*

36. She makes the further point that although the trial judge poses certain questions to the jury, in doing so she indicated that she raised these things just to highlight that there were discrepancies in the evidence. She raised questions specifically in the context of pointing out that there were *"things the jury might like to think about", "details missing"* and *"gaps in the evidence".*

37. It was submitted that in reviewing the evidence of the complainant's mother the trial judge did refer to and highlight the different versions of accounts given, the absence of detail of how it occurred, and how it felt; and while the lack of memory was not specifically referred to it was covered in the context of different versions. It was further submitted that the contradictions, illogicality and doubt of the complainant's evidence were adequately addressed by the trial judge and the jury were reminded by the trial judge of the issues raised by defence counsel in this regard.

38. It was submitted that the trial judge's comments must be read in the overall context of her charge to the jury. The trial judge in her charge was entitled to pose questions of fact for the jury to answer in their assessment of the evidence.

39. In her closing remarks the trial judge warned the jury that because they were dealing with a child and events which were not recent, with dates that are unspecific they need to be all the more careful in scrutinizing the evidence. They were reminded of the fact that memories fade and recall can be effected in relation to specifics. They were warned to assess the credibility of witnesses *"…in particular R because he is the main witness in this case in terms of credibility, watching his evidence and oral testimony and decide what weight to give it and you can accept all or none of it and decide whether or not he was credible or not, taking into account how he gave his evidence and the nature of the evidence and the circumstances of it."*

40. The trial judge specifically referred to the cross-examination and the number of times the complainant had been unsure. She told the jury to *"arrive at a decision according to the evidence and only the evidence … in order to find a person guilty of a charge then a jury must be sure that he the person is guilty".*

41. It was submitted that the trial judge had a right to comment. The language used by the trial judge was to relate the facts of the case to the jury and the jury were sufficiently warned not to speculate on matters beyond the evidence. The trial judge specifically told the jury not to speculate and to act only on the evidence before them. It is submitted that in summing up the trial judge identified issues raised by the defence in the course of cross-examination and posed questions for the jury to answer, which she was entitled to do.

42. Further, the Trial Judge was requisitioned about her reference to embarrassment and the "shame factor". In response to the requisition the trial judge recharged the jury as follows:

"I referred that there were details which were missing and specifically with reference to the position of R.B. at the time when the alleged incident is meant to have occurred and I reminded you of some of the evidence in this context, one part being how to say these things and that was in the context of him talking to his mother about the incident, the alleged incident and I also referred to how do you tell things that are embarrassing and that was in the context of him narrating the alleged incident to his Dad and so that whole embarrassment factor coloured his discussion with them is essentially what I was saying but that – in case you were – you thought that I might suggest that that also transferred into his interview with gardai, that's not the case, there was no evidence of his being embarrassed about matters when speaking with the gardai in the controlled environment in which he spoke to them in the video and I simply just wanted to alert you to the fact that he never made any reference to being embarrassed in speaking to the guards in relation to the matter. So that's really it, in case you felt that that embarrassment was evidence given in relation to his interview with the guards, that evidence was never given".

43. Counsel for the respondent further contends that the circumstances of the *Morrissey* case were entirely distinguishable from those of the present case. She submitted in conclusion that that there is no real danger that the Trial Judge's remarks may have influenced the jury and did not render the trial unfair or unsatisfactory.

44. The complaints about the judge's comments in the course of her charge may be summarised as suggesting that in both the language she used, and the tone she adopted, the trial judge would have been, or putting it less strongly, might have been perceived by the jury as endorsing the witness's evidence, and commending it to them. Cases involving child witnesses represent one area in which judges need to be sure-footed and to step warily if deciding to offer commentary on a complainant's evidence. We consider that that the trial judge was perfectly entitled to comment on the complainant's evidence but that it might have been better if the trial judge had adopted a more conventional style of commentary in this case.

45. However, viewing the charge in the round, and particularly in the light of the judge's efforts to draw the jury's attention to the defence being run, and evidence potentially relevant to that, which provide clear evidence of efforts on her part to achieve balance in her charge; and also having regard to the correction made following the requisition that was raised, we are satisfied that the notional line was not in fact ultimately crossed in this case. We do not consider that in all the circumstances of the case the judge's comments would have been perceived by the jury as endorsing the complainant. Her style of charge was certainly different and unusual from that which this Court frequently encounters. It took the form of posing a myriad of questions, and indeed reasonable questions, for the jury to consider engagement with.

46. Where she strayed into danger was when she urged them to pose questions as though they were in the shoes of the complainant. Questions such as *"what kind of a version do you give to your Mum in an evening when you're crying in your jim jams on the couch, what words do you use?"* and *"how do you say things like that to your Dad"*. We are completely satisfied that in the circumstances of this case the trial judge had no intention of seeking to influence the jury as to their view of the complainant, and we do not believe that ultimately she did so. However, her particular style of charging the jury, that involved inviting the jury to pose questions as though they were in the shoes of the complainant is not one that we would commend, as it carries with it the danger that over close identification with the plight of the complainant could be construed as endorsement. However, we are satisfied that there was neither actual endorsement in this case nor do we consider that the circumstances were such as to possibly give rise to a perception by a member of the jury of endorsement of the complainant by the trial judge. It would have been clear to the jury, as it is to us, from the overall structure and content of the charge that the trial judge was striving to be balanced and fair, and was not favouring either side, consciously or unconsciously. In the circumstances we are not disposed to uphold grounds 4) & 5).

Conclusion

47. We are satisfied that the appellant's trial was a satisfactory one, and that the verdict is a safe one.

48. The appeal is dismissed.