



## THE COURT OF APPEAL

**The President  
Mahon J.  
Edwards J.**

**Record No.: 197/13**

**Between/**

**The Director of Public Prosecutions**

**Respondent**

**- and -**

**K. D.**

**Respondent**

### **Judgment of the Court delivered on the 10th day of November 2016 by Mr. Justice Mahon**

1. The appellant was convicted on 23rd April, 2013 of the offence of engaging in a sexual act with a child that was under the age of fifteen years of age contrary to s. 2(1) of the Criminal Law (Sexual Offences) Act 2006, following a five day trial at Dublin Circuit Criminal Court which commenced on 15th April 2013. On 15th July 2013 the appellant was sentenced to three years imprisonment, suspended for a period of five years. This appeal is against conviction.
2. The evidence was of a sole act of defilement when the complainant was six years old. It occurred on a date unknown between 2005 and 2006 and involved penile anal penetration of the appellant's six year old niece. The appellant was the complainant's uncle and was fourteen years old at the time of the offence. He was seventeen years and four months old at the date of his arrest.
3. It is contended on behalf of the appellant that the learned trial judge erred in law or in fact in admitting into evidence matters emanating from interviews conducted by An Garda Síochána with the appellant. The said interviews were conducted in the absence of a parent or guardian in circumstances where the member in charge deemed such attendance inappropriate. The member in charge provided instead for the presence of Patrick O'Byrne, a peace commissioner to act as a "responsible adult" during the currency of the investigative interviews with the appellant, who was at all material times a child. It is contended that the learned trial judge erred in circumstances where Mr. O'Byrne had testified to the fact that he did not perceive his function as a "responsible adult" extended to seeking to exercise the right of requesting access to legal representation on behalf of the appellant.
4. The appellant was arrested on 26th January 2009 on suspicion of having committed an offence some three to four years earlier. He was taken to Mayorstone Garda Station, and his father arrived there soon after. The appellant and his father were introduced to the member in charge, Sgt. McMahon. Gda. McCarthy then sought to have the appellant detained under s. 4 of the Criminal Justice Act 1984. At 8.45 a.m. on 26th January 2009, Sgt. McMahon acceded to Gda. McCarthy's application to detain the appellant under s. 4. Sgt. McMahon went through the notice of rights and all the rights contained in the C. 72 form with the appellant and his father. They were then informed of the appellant's right to a solicitor and the fact that they could seek to exercise that right at any point, but none was sought or requested at any stage.
5. Because he perceived the appellant to be a potential witness in the case, Gda. McCarthy requested Sgt. McMahon to exclude the appellant's father from the proposed interviewing of the appellant. This request was acceded to. Mr. O'Byrne, a peace commissioner, was then contacted and he proceeded to accompany the appellant at interview in the role of "responsible adult". He had previously acted in this capacity on a number of occasions. Mr. O'Byrne was unknown to the appellant and on arrival at the garda station simply introduced himself to him. Otherwise there was no other discussion between them.
6. The appellant was interviewed on three occasions by Gda. McCarthy and Det. Gda. Crowley. Mr. O'Byrne was in attendance for all interviews. On several occasions during the interviewing process, Mr. O'Byrne left the room to use the toilet and on one occasion to make a personal telephone call. During those periods, the appellant remained in the interview room with the gardaí.
7. In his first interview, the appellant denied all wrongdoing. In the second interview, the appellant made admissions, and he affirmed those admissions in the third interview. There was evidence that in the course of all interviews the appellant was visibly upset and cried. Gda. McCarthy described the appellant as having been co-operative and having answered all questions put to him.
8. Mr. O'Byrne gave evidence to the effect that he had acted on many occasions as a "responsible adult" for over twenty years. He saw it as his role when acting in this capacity to protect the interviewee's rights to ensure that he was not in any way abused by the gardaí. He said that he would "*just sit and observe that there is no interference, wrongly to the person I am observing*". He did not suggest to the appellant that he should have a solicitor, nor did he see it as part of his function to so suggest "*because the guards would have already asked him or her had they seen a solicitor*". He acknowledged, however, that if it was his seventeen year old son he was accompanying on such an occasion he would see it as prudent to obtain the services of a solicitor on his behalf.
9. On the second and third day of the trial, a voir dire was conducted on the issue of the admissibility of the statements made by the appellant at interview. In the course of that *voir dire*, the learned trial judge viewed extracts from the videos of the interviews. Central to the argument being made on behalf of the appellant is that the interviews should be deemed inadmissible as evidence because of the failure of Mr. O'Byrne to seek the retention of a solicitor on behalf of the appellant or to advise the appellant himself to do so.
10. In the course of his ruling, the learned trial judge remarked as follows:-

*"...no such request for a solicitor was made by the father, by the son, the accused, or by either or both of them together in the booking in or advising of rights process. No request appeared to have been made at any stage during the interviewing of the accused though there were breaks of at least two major moments between interview 1 and 2, and 2 and 3. Consequently, whether or not what occurred in regards to the mind of Mr. O'Byrne amounts to a potential denial of rights, it doesn't arise in the particular instance as no recourse was sought to a solicitor by either the parent and / or*

*the accused person, the suspect, during the course of his detention. Whether, on his evidence, and this is a matter that cannot be got about, it would seem to me on this issue, the accused in court today says that the single reason why he said the inculpatory things he did was that he had been offered or suggested a matter of a threat during the ten minute interval that was unsurveyed by camera between interview 1 and 2 to the effect that if he contested his guilt he would risk three years detention in St. Patricks Institution. That was a single reason on oath in court today, and he said the things he did say that inculcate him in this offence and nothing else."*

11. He also stated:-

*"I am satisfied that no threat was issued to Mr. D. in the terms that he suggests and that for those reasons that what occurred during the second and third interviews was fair, without inducement or threat and represents evidence properly obtained by members of An Garda Síochána during the course of this interview and are therefore admissible in evidence and available to the jury for their consideration."*

12. Section 61 of the Children Act 2001 provides that persons under eighteen years of age cannot normally be questioned or asked to make a written statement in relation to an offence, or be asked to make a written statement, unless a parent or guardian is present. Section 61(1)(b) provides that where a parent or guardian is not available, the questioning can only take place, or a written statement be taken, in the presence of another adult (not being a member of An Garda Síochána) nominated by the member in charge. The only qualification to this prohibition is provided in s. 61(2) of the Act which permits questioning in the absence of a parent or a guardian or other adult where delay might involve a risk of death or injury, a serious loss of or damage to property, destruction of or interference with evidence or escape of accomplices. Other provisions of the Act provide for the exclusion of a parent or guardian in the course of such questioning with the authority of the member in charge, in specific circumstances.

13. Section 60 of the Children Act 2001 provides as follows:-

*"60(1) Where a child who is in custody in a Garda station has asked for a solicitor, the member in charge of the station shall notify the solicitor or cause him or her to be notified accordingly as soon as possible.*

*(2) ...*

*(3) Subsections (1) and (2) shall also apply in relation to a request for a solicitor for the child by any parent, guardian, adult relative, any adult reasonably named by the child or other adult (not being a member of the Garda Síochána) who is present, in accordance with section 61(1)(b), during the questioning of the child or the taking of a written statement."*

14. Section 60(3) of the 2001 Act refers to a request for a solicitor for the child by ... other adult . . . during the questioning of the child or the taken of a written statement".

15. The section clearly refers to the right to request a solicitor after the interview process has commenced, and during its continuance, and it suggests that this is a matter for "any parent, guardian, adult relative, any adult reasonably named by the child or other adult ..".

16. Regulation 12(6) of the Treatment of Persons in Custody Regulations provides as follows:-

*"Where an arrested person asks for a solicitor, he shall not be asked to make a written statement in relation to an offence until a reasonable time for the attendance of the solicitor has elapsed."*

17. Regulation 13(3) of the said Regulations provides as follows:-

*"Where a request for the attendance of a solicitor is made during the questioning by the parent or guardian, spouse, adult relative or other adult present, Regulation 12(6) shall apply as if the request had been made by the arrested person."*

18. As the appellant was seventeen years and four months old at the time of his arrest and interviewing by the gardaí, there was an obligation on the gardaí to permit the appellant to be accompanied by a parent, guardian or other adult ("the responsible adult"). No issue is taken by the appellant in relation to the decision of the member in charge not to permit the appellant's father to attend with him in the course of being interviewed, nor with the decision to request a peace commissioner, Mr. O'Byrne, attend such interviewing as a responsible adult. It is also accepted that the appellant and his father were informed by the member in charge of the appellant's right to a solicitor and that they could exercise that right at any time. In the event, a solicitor was not requested by the appellant or his father at that time. Finally, it is accepted that the responsible adult, Mr. O'Byrne, accompanied the appellant in the course of his interviews, (albeit with occasional toilet and telephone breaks), and that he did not at any time request a solicitor on the appellant's behalf.

19. Mr. O'Byrne gave evidence in the course of the trial as to the circumstances in which he was engaged to act as responsible adult, and as to what transpired in the course of the interviews. He said he had acted in a similar capacity on a number of occasions previously. He did not know the appellant. He confirmed that if it had been the case that his own son, of seventeen and a half years old, was arrested he would think it prudent to obtain the services of a solicitor.

20. Mr. O'Byrne said he had no particular recall of attending the interviews with the appellant. He had attended at a number of such interviews over the previous twenty years. He did so at his own expense and from a "sense of duty" to help out the State and the people who were being interviewed. He understood his role as a responsible adult was to ensure that "the interview is conducted properly and that there is no undue verbal or physical assaults being interviewed". He said he was unable to recall any inducements being made to the appellant in the course of the interviews.

21. On the issue of contacting a solicitor on behalf of a child being interviewed by the gardaí, Mr. O'Byrne stated as follows:-

*"Normally, judge, that's the function for the gardaí, and in nearly all cases at the beginning of the interview they've asked the prisoner or the defendant "have you seen a solicitor? Do you want a solicitor or are you okay?" Mr. O'Byrne stated that in his view it was not the responsibility of the responsible adult sitting in on the interview to have any function in regard to seeking a solicitor."*

22. The following extract from Mr. Sammon S.C., counsel for the appellant's cross examination of Mr. O'Byrne is relevant:-

*Q. But what about the other rights. Like a person has a right not to be beaten in a garda station.*

*A. Correct*

*Q. And I am not suggesting that or anything like it concerned in this case?*

*A. That's correct.*

*Q. But what about the other rights of young persons whose interviews you might in sitting in.*

*A. Well, as I understand they have the right to remain silent.*

*Q. Yes.*

*A. And not to answer any questions.*

*Q. Yes?*

*A. And maybe to request a solicitor or a doctor or whatever they may at that time.*

*Q. Yes, and would you see yourself as being given that you are replacing in this situation the father of this then juvenile, would you see yourself as standing in the shoes of the father?*

*A. I am there to protect the witness.*

*Q. And would you think that it might be appropriate to suggest to the guards well, I think that they, Joey, Joe Bloggs, so to speak, the suspect here, that he should get a solicitor? Would you say that to the guards?*

*A. No.*

*Q. Why not?*

*A. Because the guards would have already asked him or her had they seen a solicitor.*

*Q. So you would not see that as part of your functions at all?*

*A. No.*

*Q. Right. And I hope this is .. you don't take offence at this, but is this entirely voluntary? So there is no remuneration for this I take it?*

*A. Correct"*

23. And when earlier examined by Ms. Gearty S.C., on behalf of the respondent, Mr. O'Byrne agreed with the following question put to him.

*"And I think that you were there when the guards explained to him that you would be there to supervise the interview and to see that his rights were protected. Is that correct?"*

24. Mr. O'Byrne confirmed to Ms. Gearty that he witnessed nothing unusual or oppressive in the course of the interviews and that he was happy that the rights of the appellant had been fully afforded to him by the gardaí. He described the treatment of the appellant by the gardaí as *"perfect, normal"*.

25. Central to the submissions made on behalf of the respondent is that firstly, the appellant and his father had been offered the opportunity to contact a solicitor before the commencement of the interviews, and that offer had not been taken up, and secondly, that the manner in which the interviews were conducted did not suggest of any interference with the rights of the appellant. Furthermore, the videos of the interviews had been viewed by the learned trial judge and he was satisfied that nothing in them suggested any wrongful interference with the rights of the appellant.

26. Ms. Gearty has argued that even if Mr. O'Byrne was, while acting in the capacity as responsible adult, erroneously of the belief that it was not his function to request the attendance of a solicitor, the circumstances of the interview and the manner in which it was conducted were such as did not reasonably require a solicitor. By that we understand that had Mr. O'Byrne understood his function to include a responsibility to request a solicitor at any stage on behalf of the appellant during the interview process, if he felt it appropriate or necessary to so do, he would not have made such a request because he did not have any concern as to the manner in which the interviews were conducted. In making this submission the Court was again reminded of the fact that the learned trial judge saw the videotaped interviews and was not concerned that they had been conducted otherwise than fairly.

27. However, a request for a solicitor might still arise in circumstances where, notwithstanding the conduct of the interview being conducted in an exemplary fashion, an appellant or as in this case the responsible adult might deem it appropriate to contact a solicitor for advice on, for example, the right to remain silent.

28. Furthermore, the evidence in this case indicated that the appellant was in a distressed and tearful state during the interview process. Whilst that in no way establishes that the appellant was under undue pressure from the line of questioning or the general atmosphere in the interview room, or indeed that the presence of, or contact with, a solicitor might have alleviated his distress, it, at a minimum, begs the question whether or not a request for a solicitor might have been prudent, or reasonable. The circumstances in this case were that a young person being interviewed had relied on his right to silence in his first interview, and then in his second interview was ostensibly manifesting a change of mind and exhibiting a willingness to answer questions after all. Consideration might well have been given by the responsible adult, alert to his responsibility in this respect, to requesting at that point that a solicitor should attend so that the child could be afforded the opportunity to consult with and obtain professional advice before being interviewed further.

29. The evidence from Mr. O'Byrne appears to be quite clear. He did not believe it was his function or responsibility to ask for a solicitor or to consider asking for a solicitor in circumstances where, as he assumed to be the case, the appellant's entitlement to a solicitor had been discussed with the appellant and his father prior to the commencement of the interviews, and prior to his involvement. It was simply not something that was in his mind, even as a possibility, in the course of the interviews.

30. Mr. O'Byrne undoubtedly had the right to seek a solicitor on behalf of the appellant at any stage during the interviewing process. The fact that he did not consider it to be his place to make such a request because of his assumption that the option to request a solicitor had been canvassed prior to the commencement of the interviewing process rendered him in this Court's view incapable of fulfilling the role of responsible adult as contemplated by, and provided for in, s. 60 of the Act of 2001.

31. It was preferable that Mr. O'Byrne be advised of his right to request a solicitor on behalf of the appellant any time *during the questioning* of the appellant. It is impossible to speculate whether or not a solicitor would have been sought by Mr. O'Byrne, had the matter been explained adequately to him, but there is reason to believe that he would have adopted what he described as the prudent approach if the appellant had been his son.

32. For the reasons stated the court will quash the conviction, and will hear submissions on the issue of whether or not to order a re-trial.