THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Edwards J.

Appeal No. 183/2014

The People at the Suit of the Director of Public Prosecutions

V

P.M.

Appellant

Judgment of the Court delivered on the 21st day of December 2015 by Mr. Justice Edwards.

Introduction
1. In this case the appellant appeals, in the first instance, against his conviction by a jury in the Dublin Circuit Criminal Court on the 20th of May, 2014, on three counts on the indictment before them, namely encouraging or knowingly facilitating the production of child pornography contrary to s. 5(1) of the Child Trafficking and Pornography Act 1998 (count no. 2); sexual exploitation of a child contrary to s.3 of the Child Trafficking and Pornography Act 1998, as substituted by s. 3(2) of the Criminal Law (Human Trafficking) Act 2008 (and as amended by s. 6 of the Criminal Law (Sexual Offences)(Amendment) Act 2007) (count no. 3); and child cruelty contrary to s. 246 of the Children Act 2001 (count no. 4).

2. On the 31st of July, 2014, the appellant was sentenced to five years imprisonment, with the last twelve months thereof suspended, on counts 2 and 3, respectively; and to three years imprisonment on count no. 4. All sentences were to date from the 31st of July, 2014, and were set to run concurrently. In the event that he is unsuccessful in his appeal again his convictions, the appellant also appeals against the severity of his sentences. However, this judgment deals only with his appeal against his convictions.

The Grounds of Appeal
3. The appellant relies upon three grounds of appeal:

> 1. The trial judge erred in law and in fact in admitting evidence, namely:
>
> (a) A cautioned written statement of the 11th day of June, 2010, made at [a named] garda station.
>
> (b) Notes of an interview conducted on the 23rd day of June at [the said named] garda station.
>
> 2. The trial judge erred in law and in fact in failing to direct an acquittal on counts 2, 3 and 4 on the indictment laid against the accused.
>
> 3. The verdict of the jury on counts 2, 3 and 4 was, in all the circumstances, perverse.

The Facts of the Case
4. On the 10th of June, 2010, a member of An Garda Siochána stationed at a Dublin suburban garda station, was approached by a member of the public who had found a mobile phone crushed on the road. Amongst the remnants of this mobile phone was an SD card which appeared to be undamaged. The member of the public concerned had kept the SD card intending to make use of it himself. However, when he had inserted the SD card into his own mobile phone he found that disturbing images were stored on it. These were of an ostensibly sexual nature and involved an adult and a very young child. The member of the public recognised the child, who was living in his locality, and immediately proceeded to the said garda station to report what he had discovered.

5. Following the said report, the gardaí commenced an immediate criminal investigation. Recognising that the case also raised child protection issues that might potentially require urgent action, they also made the HSE aware of the facts in so far as they were known. It was rapidly confirmed that the child in the images on the SD card was *"A"*, the then four year old daughter of the appellant and the appellant's ex-partner *"T"*.

6. On the following day, the 11th of June, 2010, the HSE sought, and successfully obtained, an interim care order under the Child Care Act 1991 in respect of "A". The appellant and *"T"* were both in attendance at the District Court for the interim care order hearing. The appellant's mother was also present. At the conclusion of the hearing, the appellant was approached by Garda Inspector Mary Delmar and by Garda David L'Estrange, and was asked if he would be willing to make a cautioned statement to assist with the investigation. The appellant agreed to do so, and he and his mother then accompanied Garda L'Estrange back to their home address, from where, a short time later, the appellant further travelled to a garda station in south County Dublin accompanied by Garda L'Estrange and, another garda, Detective Garda Denis Sheahan.

7. The reason for going to the appellant's home address in the first instance was that a search of that premises by gardaí was then underway pursuant to a warrant that had been obtained from the District Court under s. 7 of the Child Trafficking and Pornography Act 1998.

8. On arrival at the said garda station, the appellant was taken to an interview room. The member in charge of the garda station was not informed of the appellant's presence in the garda station. It was explained to the appellant in the interview room by Detective Garda Sheahan that he was not under arrest, and that he was free to leave at any time. It was further explained to the appellant that he was entitled to consult with a solicitor if he wished. The appellant was further cautioned in the normal way. When asked if he

understood the caution, he indicated that he did; then, upon being invited to do so, the appellant signed the written record of the caution that had been administered to him. The appellant proceeded to make a statement under caution, the subsequent admissibility of which was unsuccessfully challenged in the course of a *voir dire* at the appellant's subsequent trial.

9. The said cautioned statement was in the following terms (save for such redactions as have been considered necessary by this Court to protect the anonymity of "*A*"):

> *"Cautioned statement [P. M.], [D.O.B. provided], [Address provided], made to D/Garda Denis Sheahan and Garda Dave L'Estrange on 11/6/2010 after being cautioned. "You are not obliged to say anything unless you wish to do so but anything you do say will be taken down in writing and may be given in evidence". Statement taken at [a named] Garda Station. Do you understand the caution? P. M.: Yes Signed: [P.M.'s signature].*
>
> *My name is [P.M.] and I am presently living at [a specified address] with my mother. I have been living there for the past two and a half years. On weekends my daughter [A] stays with me and my mother. [A] is four years old and she sleeps in the same bedroom as me when she stays. There are two single beds. Sometimes she sleeps with my mother in her room. [A]'s mother is [T] who is 26 years old and originally from [a specified place] but is now living at [a second specified address]. She is living there for the past two years. [T]'s mother and her family have moved from [the previously specified place] and are now living at [a third specified address]. It's on the [a named] Road in [a suburb of Dublin]. Myself and [T] are split up for about three and a half years. [A] stays during the week with her mother [T] in either [the second or the third specified addresses]. Previous to a year ago I used to stay an odd night in [the second specified address] with [T] and [A]. I used to stay about one night a week. I would sleep in a single bed in the same room as [T] and [A]. [A] was three years old at that time. On some occasions I would baby sit [A] on her own and other times all three of us would be in the same room. When I would be sleeping in the single bed [T] and [A] would sleep together in the double bed in the room. 1 remember one morning in the later half of 2009 I was in bed. I was naked from my waist down. I might have been wearing a tee shirt. There were covers over me and [A] came into the room. I can't remember if she had her clothes on. She pulled off the covers from the bed I was in and I was naked from my waist down. I could see that [T] was at the cud of the bed videoing with her phone. [A] was grabbing me by my penis and I was screaming at [T] to get her out. [A] was also squeezing my balls. I was full awake and lying back on the bed. I was aroused and I can't remember whether I had an erection or not. [T] was filming while this was going on. I wasn't enjoying it as [A] started to squeeze my balls and [A] is my daughter and I knew it wasn't right. I remember when I turned over that [A] then started smacking me on the bum with her hand. I didn't ask her to smack me on the bum. My daughter [A] could have put her mouth around my penis but I didn't realise what she was doing. When I previously said I was aroused I misunderstood this word. I should have said I was angry. I was not sexually excited. I asked [T] to take her out of the room. All this went on for about 30 seconds. I tried to stop her myself but she wouldn't stop. [T] filmed all this between [A] and myself on her mobile phone. It was either a Nokia or a Sony Ericson. I don't know why she was filming it. When [T] finished she started to say that she would put the pictures of me nude up at [a named branch of] Superquinn. My daughter [A] has caught me by my penis lots of times before. This was when I would be going to the toilet or getting out of the shower. I would say in total about five times. When I would be in the toilet in [the second specified address] I would lock the door but [A] would open it from the outside. She would then come in and grab my penis and say "I am after grabbing your hose and you are after pissing all over the floor". [A] is talking since she is one years of age. When she was grabbing my penis it started when she was between two and a half and three years of age. [T] my ex-girlfriend would have seen this going on. I never put my penis near [A]'s vagina. I can't recall my penis ever being in her mouth. But on the day [T] was filming us it could have been. [A] hurt my balls and I don't know whether it was by biting them or squeezing them. I have previously stated that from time to time I used to stay in [the second specified address] and on some of these times I would have sex with [T]. [A] could have come in and out of the room when we were having sex or she might have been asleep in the single bed in the same room next to us. 1 can't recall if [A] ever grabbed me by my penis when I was erect. I never asked [A] to ever put her mouth around my penis or to touch me anywhere in my privates. The only times I am naked is when I go to the shower or in bed. The only pictures that I can recall taken of me naked were ones which [T] might have taken of me coming out of the shower. I have never seen the video that [T] filmed in [the second specified address] of myself and [A]. After the filming I got out of the bed and gave out to [T] for not stopping [A]. I also gave out to [A]. I tried to stop her but she pushed me away. I have had this statement read over and it is correct. I do not wish to add or change anvthing in this statement*
>
> *Signed: [P. M.'s signature]*
>
> *Witnessed: D/Garda Denis Sheahan"*

10. The appellant was then arrested twelve days later on the 23rd of June, 2010, by Detective Sergeant Peter Woods on suspicion of having committed an offence under s. 3 of the Child Trafficking and Pornography Act 1998, following which the appellant was brought to the same garda station at which he had made his statement on the 11th of June, 2010, and was presented to the member in charge of that garda station. Detective Sergeant Woods briefed the member in charge, who then decided to detain the appellant pursuant to s.4 of the Criminal Justice Act 1984 for the proper investigation of the offence for which he had been arrested.

11. The member in charge informed the appellant in ordinary language as to the offence for which he had been arrested and his rights under the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Siochána Stations) Regulations 1987. In addition, the appellant was provided with a Form C72S (a written notice of his rights) which was read over to him, and the contents of which were also explained to him in ordinary language, including his right to have access to, and consult with, a solicitor. The appellant expressly declined to have any person notified of his presence in the said garda station.

12. The appellant was interviewed under caution in the course of his said detention by Detective Sergeant Peter Woods and Garda Brian Jennings. The interview commenced at 10:34 a.m. and continued until 12:31 p.m. on the 23rd of June, 2010. It took the form of a question and answer session, and was both video and audio recorded.

13. Prior to the commencement of the interview the appellant was informed that it was going to be electronically recorded, and he was given a notice in writing for the purposes of regulation 5(1)(b) of the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997, which was read out to him and explained in ordinary language. When asked if he understood the caution, he indicated that he did, and when also asked if he understood the said notice, he again indicated that he did. Upon being invited to do so, he signed a written record of the caution that had been administered to him, and he further signed acknowledgements in writing that he had been told about his rights, that he had been given a form C.72S the contents of which had been explained to him and that he had also been given a regulation 5(1)(b) notice the contents of which had been explained to him.

14. During the course of this lengthy interview, the video recording with accompanying audio recovered from the SD card was played to the appellant, and he was questioned extensively about it. The interview contained the following exchanges (inter alia):

Extract 1:

"Q. Can you tell me who is the male on the video?

A. That's me.

Q. Who is the child on the video?

A. [A] [surname].

Q. That's your daughter?

A. Yeah.

Q. Can you tell me who is recording the video?

A. That's [T] [surname] recording the video.

Q. And she is the mother of [A]?

A. Yeah.

Q. Can you tell who the female voice is?

A. It's [T] [surname]'s voice.

Q. Where was she when she was recording it?

A. Standing at the bedroom door. I was in the single bed on the left hand side and she was on the right hand side of the room, just at the doorway. I don't know if the room is still like that.

Q. We'll go back to the start of it under the covers and you can see a bare bum. Are you having sex with [T]?

A. No. I'm in bed on my own and [A] pulls the covers off me and starts grabbing … [A] comes in and they pull the covers off me and starts grabbing me, you know. [T] is telling [A] what to do, you can hear her.

Q. I'm going to play it and slow it down. It is hard to see but that appears to be a bum.

A. Yeah.

Q. A bare bum, is that you?

A. Yeah.

Q. What's this?

A. A duvet.

Q. What does [T] say just there?

A. Smile for the camera.

Q. What does [A] say there?

A. Wait and she'll do it.

Q. What does she mean by that?

A. Grabbing me by the penis or some grabbing me by the penis or something.

Q. Is that a normal occurrence?

A. No. As I said in the statement, when she comes into the toilet grabbing it, [T] tells her to do it.

Q. Who is that face?

A. That's me."

Extract 2

"Q. You appear to be smiling there and your arm was behind your back. You seem to be enjoying yourself and sexually aroused, is that fair to say?

A. Yeah, it could have been [T].

Q You can't say, you don't know like. Hear that, "wait I'll do that"?

A. Yeah.

Q. You were lying face down when [A] says "wait, I'll do it"?

A. Yeah.

Q. The next shot of you turn over lying face up.

A. Yeah.

Q. You heard that noise from [A]. Whatever noise she is making, whatever she is doing and at the same time you look to have a look of satisfaction on your face, is that fair to say?

A. Yeah.

Q. Would it also be fair to assume from the noise that [A] made and the look of satisfaction on your face that she is doing something to your penis or balls or something?

A. I don't know whether it was my penis.

Q. Or your balls. Is that what it looks like?

A. That's what it looks like.

Q. It looks to me something is being done that you were enjoying and from [A] making noise somebody is doing something and you have a look of satisfaction on your face. I'm not trying to put a slant on it that isn't on it.

A. Yeah, that's fair to say.

Q. Do you see where [A]'s head is? It's down at your privates. Her head appears very close to your penis?

A. Very close. You can actually see her hand reaching out and grabbing it, my penis. [T] could have been at it and then she went to do it, you know.

Q. You can be heard making the noise ah?

A. Yeah.

Q. You said let go?

A. Yeah.

Q. What was that about?

A. To get her away from me, to get her off me, to get her to let go?

Q. Let go what?

A. My penis.

Q. What did you say there?

A. Telling [T] to tell her to stop.

Q. What's [A] doing?

A. She's biting my penis. You can see it on the video there.

Q. And [T] can see all this happening?

A. Yeah.

Q. She is videoing it while [A] was at your penis.

A. She told the child what to do a while ago.

Q. You said ah as in ouch?

A. Ouch, she is hurting me. You can hear [T] in the background as well, she is watching.

Q When you say she is hurting me?

A. [A].

Q. Did you see that there? That looks like a hand. [A] is laughing there. Just before you see her hand and mouth at your penis she appears to be sucking on your penis at that point?

A. Yeah.

Q. Is that what is in the video?

A. This is what it appears to be.

Q. You saying let go, ah, [T], tell her let me go.

A. I'm telling [T] to, she might have been biting me. I'm saying ah, it's hurting me.

Q. But appears she is moving her head up and down on your penis, is that what is happening?

A. You can't see it.

Q. From your memory of it?

A. My memory is I was in bed half asleep."

Extract 3

"Q. At one point there did you look to have a look of satisfaction on your face?

A. I did, yeah.

Q. Can you tell me is that sexual satisfaction?

A. Yeah, but I didn't know who was doing it to me.

Q. That's fair enough. I accept that but do you accept that you were sexually aroused?

A. Yeah.

Q. That appears to be your penis in her hand and in her mouth around it as well; is that right?

A. That's what it looks like.

Q. What was [A] doing at the end of the video?

A. Slapping me on the arse.

Q. What does [T] say?

A. She is telling her to stop.

Q. Why didn't she tell her to stop before that? When [A] was at your penis … When [A] was at your penis with either her hand or her mouth did [T] say anything?

A. She never said anything. She told her to grab my penis.

Q. [T] or [A] or you did not seem overly shocked or amazed by this incident. Is this the first time this happened?

A. This was the first time with me anyway.

Q. Wouldn't it be fair to say that she had played or grabbed your penis in some shape or form?

A. She grabs my penis when I'm trying to go to the toilet. She's be grabbing it and I be holding it trying to push her away with the other hand. As I said before, [T] would be telling her what to do as well.

Q. Do you accept that you could have rolled away or got away from her much earlier than you did?

A. I accept that. As I said in my statement, when I woke up properly I told her not to do it and gave out and ate the head off [T] and I told [A] not to be doing that. I corrected her and I left the apartment after that."

The Voir Dire

15. In the course of the *voir dire*, which had been concerned with two issues i.e., firstly, whether the appellant should be allowed to have the assistance of a legal advocate during the trial and, secondly, whether the statement of the 11th of June, 2010, and the record of the interview conducted on the 23rd of June, 2010, should be admitted in evidence before the jury, the Court heard evidence from a number of psychologists concerning the appellant's mental abilities.

16. The Court heard evidence from two psychologists called on behalf of the appellant, a Ms. Niamh O'Connor and a Dr. Patrick Randall, both of whom are with the firm known as Forensic Psychological Services (FPS), and both of whom had conducted a joint assessment of the appellant's mental abilities. The Court was told that they had measured the appellant's intellectual abilities using the WAIS-IV assessment tool and had determined that his cognitive functioning was in the borderline range. His overall IQ, measured at 71, was at the third percentile meaning that 97% of the population of same aged peers would have performed better than he did on the tests employed. He was said to be particularly weak in respect of verbal instructions and verbal comprehension.

17. Ms. O'Connor, in particular, opined that while he could readily answer explicit or direct questions, he would have difficulty if he was asked more nuanced questions and was likely to provide a confirmatory response because he wouldn't have understood the full question. He would be seen as somewhat compliant, not wanting to be seen not to know how to answer. Ms. O'Connor found it unsurprising that the appellant had been very agreeable to taking part in garda interviews and had declined to have a solicitor or anybody else made aware of his presence in the garda station. She stated that he would have wanted them to like him and to view him in a positive light, and would therefore have been compliant in any regard on that occasion.

18. In addition, Ms. O'Connor stated that the appellant was not an abstract thinker in any sense of the word, and only understood concrete ideas. He was not analytical in any respect. He was very black and white in his thinking and was unable to see the grey

areas in-between.

19. The FPS psychologists had concluded that the appellant was a vulnerable person due to his low level of intellectual functioning, although this would not necessarily have been obvious to a lay person who might overestimate his abilities on the basis of his presentation.

20. The Court also heard evidence from Dr. Kevin Lambe, a consultant clinical psychologist called on behalf of the respondent. Dr. Lambe told the Court that he had also tested the appellant's cognitive functioning, using the WAIS-IV tool, and had obtained results similar to those found by Ms. O'Connor and Dr. Randall. However, because of what he described as "the high stakes issues" both for the appellant and the child concerned, he decided, in accordance with what he said was recommended in forensic psychological literature, to administer a second alternative cognitive functioning test using the Stanford-Binet V assessment tool. In addition, since it was suggested in the FPS report which had been provided to him that the appellant might have a tendency to be compliant, he had further assessed the appellant using two Gudjonsson suggestibility tests, GSS1 and GSS2. Finally, as there was also a concern about whether the appellant could have assimilated and understood written notices given to him by Gardaí, he assessed the appellant's reading and written comprehension abilities using the wide range achievement test, WRAT 4, which is a reading test and sentence comprehension test of international renown.

21. Dr. Lambe found that the appellant's cognitive functioning was low average, rather than borderline, when measured with the Standford-Binet assessment tool. This had yielded an overall IQ measurement of 88, as opposed to that of 73 when it was assessed by him using the WAIS-IV tool or that of 71 when it was assessed by the FPS psychologists using the WAIS-IV tool. He stated that intellectual disability is defined by an overall IQ score of 69 or below. Borderline begins at 70 and ends at 79, while low average begins at 80 and ends at 89. Moreover, using the WRAT 4 tool, Dr. Lambe had recorded a reading ability score placing the appellant at the 21st percentile and a sentence comprehension standard score placing the appellant at the 16th percentile, both of which put him in the low average rather than the borderline range. Overall, Dr. Lambe was satisfied to place the appellant at the 25th percentile, which is within the low average range.

22. The Court heard that in the course of his assessment of the appellant's overall cognitive functioning, and as a subset of that the appellant's information processing capacity, reading ability and sentence comprehension ability, Dr. Lambe had asked the appellant to read out the legal caution at the top of the statement which he had made on the 11th of June, 2010, and the appellant had done this without difficulty. Dr. Lambe had then further asked the appellant to explain in his own words the meaning of the caution. The appellant had responded: *"Whatever you say they are going to write it down and use it as evidence when you go to court, when you go to court they will show what I say and show the tape to the judge."*

23. Dr. Lambe had initially regarded this response as indicative of a good understanding of the caution and had approached it in that way in his report. However, it was pointed out to Dr. Lambe in cross-examination that the appellant's response had related solely to the second part of the caution and failed to address at all the first part of the caution, which relates to a suspect's right to silence. The transcript records the following exchange between counsel for the appellant and the witness:

> *"Q. … you were quite emphatic about the issue of the caution and you complimented him, I think it's at page 14 of your report, paragraph 17.1, the explanation which he made I noticed twice today that you commended him for his comprehension and facility in that but in that quote that you have at paragraph 17.1 is there not something missing? You see isn't the first part of the caution an abstract idea, "You are not obliged to say anything unless you wish to do so"?*
>
> *A. Very well observed.*
>
> *Q. Well, I am accustomed to it. And can I ask you this isn't that actually the really abstract part of the caution isn't it? It's his understanding of his right to speak or not to speak. Did he give you any of that?*
>
> *A. No, he didn't.*
>
> *Q. Okay. And did you note that deficit in his understanding?*
>
> *A. It's not something I thought about.*
>
> *Q. I see.*
>
> *A. It didn't occur to me.*
>
> *Q. But isn't that the whole point of a caution is to alert a person to the fact that they are not obliged, using that rather old fashioned construction, to say anything?*
>
> *A. That's true.*
>
> *Q. All right. So, can we take it therefore that far from demonstrating his ready understanding of the caution, that demonstrates that he didn't understand it and couldn't even explain that to you and you didn't pick it up either?*
>
> *A. It seems not."*

24. Addressing the issues of compliance and suggestibility, Dr. Lambe found, using the Gudjonsson suggestibility tests GSS1 and GSS2, that the appellant was no more suggestible than a normal person. However, he did have raised compliance scores suggesting that he was more compliant than a normal person.

25. Dr. Lambe concluded that there was nothing in the appellant's clinical presentation to suggest that he had low IQ, and he opined that the appellant did not have an intellectual disability and that intelligence was not a vulnerability in his case. He further stated that while the appellant's compliance score was elevated, it was not a significant factor of itself that would impact the reliability of the interviews.

26. In respect of the admissibility issue, the case was advanced on behalf of the appellant that, having regard to the appellant's low overall level of cognitive functioning and his tendency to be compliant, the Court could not be satisfied beyond reasonable doubt, on the evidence before it, that his admissions had been truly voluntary and that they had been made in circumstances where he had had

a full appreciation of his rights, including his right to silence.

27. In response, counsel for the respondent had contended that the appellant was not under any intellectual disability and that the evidence did not support the suggestion that he was vulnerable. He had been fully cautioned and apprised of his rights on both the 11th of June, 2010, and the 23rd of June, 2010, and in both instances had indicated at the time, both orally and in writing, that he had understood them. He had made no complaints whatever concerning the manner in which he had been treated, and he had not at any stage sought to positively assert, either to any of the psychologists who had assessed him or by giving evidence himself in court, that he had failed to understand his rights or the cautions administered to him. On the contrary, he had repeatedly confirmed to the psychologists that what he had told the Gardaí on both occasions was true and correct.

The trial judge's ruling

28. The trial ruled as follows on the admissibility issue:

> *"In deciding the issue of voluntariness of the statement of the interview and its statement and interview and its admissibility, the onus lies on the prosecution to prove its voluntariness. I have had the benefit of watching the interview and I have carefully considered all of the evidence, including that of the psychologists and their assessments and testing of Mr. M. Dr. Lambe concludes that the tests carried out by him, and I think in particular the WRAT 4 shows Mr. M could have read the C 72 S formal notification of electronic recording and that he understood the caution. He recited the caution to Dr. Lambe, albeit he missed the all important first line, you're not obliged to say anything, however at no stage during the assessment process with either of the experts did Mr. M state that any of the information he gave to the gardaí was incorrect, apart from not understanding the word arouse, or that he did not know he could have remained silent. He, in fact, stated to Dr. Lambe that he was treated well in custody and he did not dispute the accuracy of his statement. In my view, this was a relevant factor to be taken into account as at no time has Mr. M raised any issue about what he said at any time or his lack of understanding at the time he made his statement.*
>
> *The defence have highlighted the failure of Mr. M to fully recite the legal caution and, in fact, there's no doubt that he omitted a very significant part of it that relates to his right to remain silent. However, in my view, it is significant that Dr. Lambe himself, an expert and highly trained psychologist with considerable experience in the criminal law process, did not spot the missing line of the caution or bring it to Mr. M's attention or indeed the Court's attention. It was very clear to me that it was only when Dr. Lambe was cross examined on the missing part of the legal caution that he realised for the first time that he himself had missed it and that Mr. M had missed it also. I do not attach any great weight to the fact that Mr. M could not fully recite the caution to Dr. Lambe in the circumstances.*
>
> *In relation to the initial statement which Mr. M gave to the gardaí before he was arrested, I accept that there may have been some questions asked by the interviewing gardaí, given the manner in which the statement is written and I have a concern in relation to Garda L'Estrange's recollection in evidence in this regard, but I do not consider this to be fatal to its admission. I do not accept that the duties performed by the member in charge, Sergeant McDonnell, were not properly carried out although the custody records indicate they were carried out within 11 minutes or so and I accept the evidence of Sergeant McDonnell in this regard. I do not believe the caution was not properly given or that the mandatory procedures were not properly followed. The questions asked in the interview, although often of a leading nature, were asked in simple, clear and straightforward terms and it is clear from the video of the interview that Mr. M was given plenty of time to process the question and information and to respond. Of significance is also Mr. M's results on the WRAT 4 test which Dr. Lambe states indicates that Mr. M would have had the capacity to read and to understand the C 72 form and the notification regarding electronic recording. Dr. Lambe also observed the interview and Mr. M's behaviour and demeanour and indeed he studied the questions and answers and asked Mr. M about them. I accept the evidence of Dr. Lambe that Mr. M demonstrates an ability to say no to many questions and holds his position when the evidence is not clear. I accept the opinion of Dr. Lambe that the contents of the interview were not the result of suggestibility and compliance. In my view, I'm satisfied beyond reasonable doubt that there's no evidence of unfairness or oppression, either in respect of the statement or interview, and that they should be admitted."*

The first ground of appeal: the voluntariness of the admissions

The submissions of the parties

29. Counsel for the appellant contends that it is *"notable"* that Detective Garda Sheahan, who had accompanied Garda L'Estrange in interviewing the appellant on the 11th of June, 2010, was not called by the prosecution. The evidence of Garda L'Estrange was that, bar perhaps an introductory phrase or two, the contents of the cautioned statement were entirely the appellant's own words, and indeed he exhibited some impatience at the contrary suggestion. Counsel for the appellant has contended that any reasonable construction of this document inevitably leads to the inference, manifest on the face of it, that there were copious questions. It was submitted that the cautioned statement was therefore not a free flowing narrative as Garda L'Estrange had sought to suggest but rather was the product of cross-examination. This, it was contended, was inappropriate, particularly in circumstances where there was some evidence that the appellant was suggestible and where it was common case that the appellant had a tendency towards compliance. It was suggested that such a procedure, *per se*, raised a question mark as to the voluntariness of the resulting statement, but quite apart from that it was an inherently unfair procedure.

30. Reliance is also placed on the fact that, notwithstanding the evidence of Garda L'Estrange that the appellant was told that he was not under arrest, that he was free to leave and that he was entitled to a solicitor, none of these things are acknowledged anywhere in the document. Moreover, it is of concern that the member in charge was never told that a suspect was making a cautioned statement in his garda station.

31. In addition, it is contended that the evidence does not establish that the appellant understood the caution but in fact suggests the contrary. Counsel for the appellant has submitted that, leaving aside the differences between the doctors as to the appellant's abilities, the evidence of Dr. Lambe was unequivocally to the effect that, at the time of his assessment, the appellant ostensibly did not understand the first part of the caution, namely that he had a right to silence. It is contended that if the caution is not understood then the proof of voluntariness is not there.

32. In this context, the appellant places reliance on the words of Kennedy C.J. in *Attorney General v Cleary* (1938) 72 I.L.T.R. 84 (at pp. 85/86) where he remarked that:

> *"…the sense of that caution, and every limb of it, must be conveyed to the mind of the person to whom it is addressed,*

otherwise it ceases to be a caution, and ceases to have any value whatever."

33. In response, counsel for the respondent, while not taking issue with the short passage quoted as a statement of the law, does not accept that there is a legal obligation on the part of the communicator of a caution to conduct an investigation as to what, if anything, the cautioned person understands of the material that has been imparted to him in circumstances where there is nothing to suggest, or intimate, to the communicator that the cautioned person may have had any difficulty in understanding that which has been conveyed.

34. It was submitted that, notwithstanding the explanation provided by the appellant to Dr. Lambe as to his understanding of the meaning of the caution, absent clear outward signs of the appellant not being in a position to engage with the gardaí and to confirm his understanding of matters, a garda who properly cautions an accused (as, it was submitted, had been done in the present case) cannot be expected to seek to go behind a positive confirmation of understanding such as was given by the appellant in the present case.

35. Counsel for the respondent further suggested it to be significant that, at no point prior to Dr. Lambe (who was called by the respondent) giving his evidence, did the appellant ever suggest that his out of court statements were not voluntary on the basis that he had failed to understand the caution administered to him on either occasion. Indeed, counsel for the respondent suggested that the voir dire was principally concerned, firstly, with whether it was appropriate to appoint a legal advocate for the appellant and, secondly, with the voluntariness of the appellant's out of court statements by virtue of his alleged suggestibility and tendency towards compliance, caused by his level of intellectual functioning. Indeed, it was said, the appellant's experts had focussed mainly on suggestibility and compliance against the background of them having assessed the appellant's cognitive functioning as being in the borderline range.

36. Counsel for the respondent submitted that the change in the appellant's attack on the statement (and also the record of the subsequent interview while in s. 4 detention) only occurred when Dr. Lambe (instructed by the respondent) gave evidence, in accordance with what he had previously reported, concerning an exercise conducted in the course of his psychological assessment of the appellant, in which he had asked the appellant to read the words of the caution and indicate, in layman's language, his understanding of what it meant. It was true that in providing his explanation, the appellant had omitted to explain the portion pertaining to his right to silence, and that this omission had not been picked up by Dr. Lambe at the time. However, that having been said, the appellants' experts had raised no specific concerns in their report, or in their testimonies in the course of the *voir dire*, about the appellant having possibly failed to understand the caution. The height of any concern expressed by them was a general one that, because of being borderline in terms of his cognitive functioning, the appellant might have difficulty with abstract thinking; however, in that regard, no reference was made to the legal caution or to the component thereof dealing with the right to silence.

37. Counsel for the respondent has suggested that it is also of significance that at no point has the case been made on behalf of the appellant to the effect that he believed he was obliged to answer questions put to him by Gardaí. The point is further made that the appellant has never said either that he did not understand the caution or that he believed he was obliged to answer questions. It was submitted that, in considering whether the prosecution has satisfied it to the standard of beyond reasonable doubt that the impugned admissions were voluntary, a court is entitled to take account of the absence of any such evidence, though no adverse inference could be taken from the fact that the appellant had, as was his right, chosen not to give evidence on the voir dire. To take into account the absence of positive evidence from the appellant that he did not understand the caution, or that he believed that he was obliged to answer questions, is not to treat the appellant as bearing a burden of disproving on the voir dire the voluntariness of the impugned admissions. It is merely to appreciate that the court is confined in making its assessment to such relevant evidence as has actually been adduced and such inferences as might properly be drawn from such evidence.

38. It was submitted on behalf of the respondent that when this Court considers all of the evidence, including the evidence of the investigating Gardai; the psychologists called by both sides; the contents of the cautioned statement made on the 11th of June, 2010; the contents of the records (both electronic and written) of the interview conducted on the 23rd of June, 2010; and the various acknowledgements signed by the appellant in respect of his rights and entitlements, it is clear that it was open to the trial judge to conclude that the accused understood the caution on both occasions. It was submitted that the ruling of the trial judge discloses no error in principle or error of law.

Analysis and decision on the voluntariness issue

39. The appellant has raised a number of issues in respect of his overarching contention that the trial judge could not, on the evidence before her, have been satisfied to the standard of beyond reasonable doubt that the admissions made by the appellant, on the 11th of June, 2010, and on the 23rd of June, 2010, respectively, were voluntary. Certain of those issues, such as the appellant's understanding of the cautions administered to him and the notifications to him of his rights, are common to both the taking of the statement and the conduct of the question and answer based interview. Others are specific to one or other event.

40. As the Court understands it, two basic complaints are made in respect of the statement of the 11th of June, 2010. These seem to be as follows: firstly, that the trial judge ought to have had a doubt as to the voluntariness of this statement because on the whole of the psychological evidence, including the evidence of the respondent's witness Dr. Lambe, it was a reasonable possibility that the appellant had not understood the caution administered to him; and, secondly, even if it was voluntary, the statement was taken in such unfair and unsatisfactory circumstances that it ought to have been excluded in any event on *"Shaw"* principles.

41. At the outset it is important to say that the fact of the appellant being cautioned on either occasion was never an issue. There was clear evidence before the trial judge from Garda L'Estrange as to the administration of the appropriate caution by Detective Garda Sheahan in the case of the statement, and from Detective Sergeant Woods as to the administration of the appropriate caution by himself and Garda Jennings in the case of the question and answer based interview. The fact of the appellant having been so cautioned is corroborated in both instances by the appellant's signatures on the relevant written records. In addition, it is also recorded on video and audio tape in respect of the question and answer based interview. Moreover, it was never suggested in the course of the *voir dire* that the appellant was not cautioned on a relevant occasion, or that there was anything wrong with the form of any caution administered. There was also uncontested evidence before the trial judge that, on both occasions when the appellant was cautioned, he was asked if he understood the caution, and he indicated that he did.

42. The appellant's complaints, such as they are, are based on an alleged failure on the part of the prosecution to negative a possibility that the appellant might not have understood the caution administered to him, notwithstanding him saying that he did. The possibility is said to arise from the evidence led from the appellant's psychologists that his cognitive functioning was borderline, that he was not an abstract thinker and that he was by times suggestible; from the evidence of all of the psychologists that he had a

tendency to be compliant; and from the evidence of Dr. Lambe that when the appellant was asked in the course of a clinical assessment to explain in his own words the meaning of the caution, he had only addressed the second component of the caution and had not addressed, at all, the first component thereof relating to the right to silence.

43. As against that, the trial judge had uncontroverted evidence that the caution was properly administered, that on both occasions the interviewers had been careful to enquire from the appellant as to whether he understood, that he had signed written acknowledgments of understanding, and that, in the case of the interview conducted while the appellant was in detention, there was a video and audio recording of his acknowledgment of understanding. In addition, the psychological evidence was by no means all one way: there were stark conflicts concerning, firstly, the level of the appellant's cognitive functioning, with Dr. Lambe suggesting that he was in the low average range rather than the borderline range; and, secondly, whether the appellant was vulnerable to the degree suggested. It was a matter for the trial judge to resolve those conflicts. She was the person best placed to do so having heard the psychologists give their evidence viva voce and submit to a testing of their opinions in the crucible of cross-examination.

44. Further, the trial judge would have had to take account of the fact that it was never put to any of the gardaí concerned with the interviewing of the appellant on either occasion that they would have had cause to be concerned as to a possibility that he might not have understood. Nor was it put to any of those gardaí that the appellant had not in fact understood the cautions administered and, in particular, that he would not have understood, and did not in fact understand, that he had a right to silence. Moreover, no direct evidence had been adduced to suggest that the appellant had not understood, at the time of being interviewed, that he enjoyed a right to silence. Instead, the Court was being invited to infer from the circumstantial evidence relied upon by the appellant that this was a possibility the dispelling of which the trial judge could not have been satisfied of to the standard of beyond reasonable doubt.

45. This Court has considered the trial judge's ruling on the voluntariness issue and considers that it discloses no error of principle. The trial judge took into account all of the factors rehearsed above. It is manifest that she resolved the conflict as between the psychologists by preferring the evidence of Dr. Lambe, to which she repeatedly referred, stating *(inter alia): "Having carefully considered the evidence and submissions of the parties I accept the evidence of Dr. Lambe in relation to his conclusions that Mr. M's cognitive functioning is not at such a level that he requires or should have the benefit of a legal advocate at all times during his trial"* and *that "Dr. Lambe concludes that the tests carried out by him, and I think in particular the WRAT 4 shows Mr. M could have read the C 72 S formal notification of electronic recording and that he understood the caution".* (this Court's emphasis)

46. The trial judge further expressly noted that *"at no stage during the assessment process with either of the experts did Mr. M state that … he did not know he could have remained silent"*, and further that *"at no time has Mr. M raised any issue about … his lack of understanding."* It was legitimately open to the trial judge *to conclude, as she did, that in the circumstances of the case it was inappropriate to attach "any great weight to the fact that Mr. M could not fully recite the caution to Dr. Lambe."*

47. In circumstances where the trial judge had so concluded, and there being no other evidence to support a suggestion of lack of understanding or appreciation of the right to silence, it was indeed possible for the trial judge to be satisfied beyond reasonable doubt, as she clearly was, that the appellant had in fact understood and appreciated his right to silence. We find no error of principle with respect to how the trial judge dealt with the complaints related to the cautioning of the appellant.

48. The Court wishes to add some comments in respect of the contention advanced on behalf of the respondent that, absent clear outward signs of a suspect not being in a position to engage with the gardaí and to confirm his understanding of matters, a garda who properly cautions such a suspect cannot be expected to seek to go behind a positive confirmation of understanding by the suspect. We agree with that contention. However, the mere fact that a suspect exhibits no outward signs of mental frailty or particular vulnerability, and asserts that he understands a caution or notification given to him, will not automatically dispose of a suggestion, subsequently raised, that the suspect did not in fact understand. The critical issue for a court will always be whether or not a purported caution or notification was effective, and not merely whether procedures were properly followed. Evidence from relevant gardaí concerning the absence of outward signs of a problem, the proper following of procedures and their receipt of positive confirmation of understanding from the suspect will all be highly relevant to any enquiry as to the factual position concerning that suspect's actual state of understanding at the material time, but in a given case there might well be other relevant evidence tending to support one or other contention of which account must also be taken.

49. While the Court takes due note of, and agrees with, the quotation relied upon from *Attorney General v. Cleary*, it bears commenting upon that the former Chief Justice was endorsing an observation by the trial judge that a caution requires to be administered with care and appropriate solemnity because *"it is a caution in substance and essence".* A slightly fuller quotation serves to better convey the particular concern that was being addressed by the trial judge in that case:

> *"I say that on another point the judge makes an observation with which the Court is in happy agreement. He says that though this caution has been reduced to the terms of a formula, and as such is subject to the danger of parrot-like repetition, it is not sufficient merely to repeat it, because it is a caution in substance and essence, and it is essential that the words shall not be glibly uttered or rapidly spoken, but the sense of that caution, and every limb of it, must be conveyed to the mind of the person to whom it is addressed, otherwise it ceases to be a caution, and ceases to have any value whatever."*

50. There is no concern about the manner in which the cautions were administered in the present case. That having been said, there can be no question but that a caution must always be efficacious, and that requires communicating to the suspect a true understanding of its import. As was said by the Court of Criminal Appeal *in The People (Attorney General) v. Durnan (No. 2)* [1934] I.R. 540 at 548, *"it is no idle formula."*

51. It is necessary at this point to consider the complaint that even if the statement made on the 11th of June, 2010, was voluntary, the circumstances in which it was taken were so unfair that the Court ought not to have admitted it. The central complaint in that regard is that there are said to be strong grounds, manifest from the wording and language of the document itself, for believing that it was not in fact the product of an uninterrupted narrative, but rather was the result of cross-examination. Related to this is the fact that the only evidence adduced in relation to the taking of this statement was that of Garda L'Estrange who testified, incredibly according to counsel for the appellant, to the effect that apart from answering one or two questions asked in clarification, the statement was the product of an uninterrupted narrative offered by the appellant. Further, the case was made that in circumstances where Garda L'Estrange's testimony was, according to the appellant's side, manifestly unreliable as to the circumstances in which the statement was generated, the Court should have looked with circumspection on his assertion that Detective Garda Sheahan had informed the appellant that he was not under arrest, that he was free to leave, and that he was entitled to a solicitor. Much was made of the fact that none of these steps allegedly taken are mentioned in the heading to the statement. Nor was the appellant asked to sign any acknowledgement either of his receipt of any of this information or of his comprehension of any of this information. The appellant's counsel has commented adversely on the failure to call Detective Garda Sheahan to corroborate Garda L'Estrange's

account, and also on the failure of either interviewing garda to make the member in charge aware of the appellant's presence in the garda station. The suggestion is that cumulatively all of these alleged infirmities resulted in an interview that was conducted in circumstances that failed to observe the minimum standards of fairness mandated by the Constitution, and that the trial judge should have excluded the statement notwithstanding its technical voluntariness, adopting the approach in *The People (Director of Public Prosecutions) v Shaw* [1982] I.R. 1.

52. It requires to be observed that the evidence in the trial concerning Detective Garda Sheahan informing the appellant that he was not under arrest, that he was free to leave, and that he was entitled to a solicitor was all one way. While it is true that none of these steps are mentioned in the heading to the statement, nor was the appellant asked to sign any acknowledgement either of his receipt of any of this information or of his comprehension of any of this information, there was no evidence whatever of any failure to communicate the matters in question to the appellant. Moreover, it was not put to Garda L'Estrange that there had been any such failure.

53. The Court was asked to attach some significance to the fact that, in contradistinction to communication of the information that the appellant was not under arrest, that he was free to leave and that he was entitled to a solicitor, the administration of the caution had been recorded and acknowledged in writing. It seems to this Court that in considering that dichotomy regard has to be had to the fact that, by virtue of the need to be seen to be complying with the Judges' Rules, it is a longstanding Garda practice to incorporate a record of the caution mandated by those rules into the heading of a written statement about to be taken from a suspect, and to request the suspect to acknowledge having had the caution administered to him by signing immediately below that record. While perhaps as a matter of prudence a strong case could be made for now doing likewise with respect to the information that a suspect is not under arrest, is free to leave and is entitled to a solicitor, the communication of these important pieces of information is not specifically required by the Judge's Rules (although there can be no gainsaying that such communication may be otherwise required by law and that it is certainly required to be demonstrated if such a statement is to be admitted at trial as a voluntary statement).

54. In this Court's view, the failure to record the communication of the information in question in the heading to the statement was not a breach of any required procedure and neither had the potential to, nor did it, give rise to any unfairness to the appellant. If the fact of communication of the information in question had been challenged, it might have been more difficult for the prosecution to satisfy the Court that it was in fact communicated than it would have been if such a record had been created. However, there was never an issue as to the fact of communication of the information in question in the present case. The evidence was all one way.

55. Linked to the last argument was the suggestion that while the evidence as to the fact of communication of the information in question was all one way, that evidence comprised the testimony of Garda L'Estrange who was, it was said, manifestly unreliable having regard to the inherent implausibility of his testimony concerning how the statement was generated. In that regard, the Court notes that while the trial judge did express some reservations concerning Garda L'Estrange's testimony concerning how the statement was generated, and was satisfied that some questions had been asked by the interviewing gardaí contrary to what the witness had maintained, she concluded that this was not fatal to the statement's admission. It is clearly to be inferred that, in so holding, she was not rejecting the entirety of Garda L'Estrange's testimony as unreliable and lacking credibility, but merely his insistence that the statement was a narrative and not the product of questioning. It does not automatically follow that merely because a witness is found to be lacking in reliability and credibility in respect of one aspect of his testimony, his testimony on other matters must necessarily also be rejected. There is absolutely no suggestion that the trial judge had any concerns for the reliability or credibility of any other aspect of Garda L'Estrange's testimony. As the trial judge was best placed to assess the reliability and credibility of the witness on these issues, it is not for this Court to interfere with her assessment.

56. This brings us to the manner in which the statement was generated. As stated, the trial judge did reject Garda L'Estrange's testimony concerning how the statement was generated, and was satisfied that some questions had been asked by the interviewing gardaí contrary to what the witness had maintained, but ultimately had concluded that this was not fatal to the statement's admission. Was that an error in principle on her part, as counsel for the appellant maintains?

57. It is necessary to consider what occurred in the context of the Judge's Rules. Rules 1 and 2 cover the questioning of persons who are not in custody, which was the situation of the appellant on the 11th of June, 2010. Rule 1 provides that when a police officer is attempting to discover the author of a crime, he may put questions to any person, whether suspected or not, who he thinks might be able to provide useful information. Rule 2 provides that when a police officer has made up his mind to charge a person, he should first caution that person before asking him any questions or any further questions as the case may be.

58. Rules 3-7, inclusive, cover the taking of voluntary statements from persons in custody. It is of significance that the appellant was not in custody on the 11th of June, 2010, when he gave his voluntary statement, and so technically Rules 3-7 did not apply to the taking of that statement. By the same token, if he had been in custody Rule 7 would have applied, which provides that a person who has made a voluntary statement should not be cross-examined or questioned about it except for the purpose of removing any ambiguity.

59. Thomas O'Malley in his work entitled *The Criminal Process* (Dublin: Round Hall, 2009) comments with respect to Rule 7 (at para. 19.44):

> *"As the terms of the rule indicate, what is prohibited is the practice of interrupting the making of a voluntary statement with challenging questions, as appears to have occurred in Attorney General v. Lanigan [1958] Ir. Jur. Rep. 59. It certainly does not prohibit the adoption of a question and answer format. [reader referred to footnoted authority i.e., People (DPP) v McCann [1998] 4 I.R. 397 at 409]"*

60. The Court has considered in detail the contents of the statement taken on the 11th of June as well as the detailed cross-examination of Garda L'Estrange by counsel for the appellant in the course of the voir dire. The structure of it is highly suggestive that it may not have been entirely a free flowing narrative but rather that at least some of it was the product of a question and answer format, and that was clearly the view of the trial judge too. It is manifest from the use of *"Garda speak",* and from the phrasing of certain sentences, that some questions were very likely asked by the interviewers that incorporated a premise to which the appellant was invited to respond. It is likely that whatever response was received was merely a *"yes"* or *"no"* to the premise in the question, but that the response was recorded as a narrative that incorporated the premise in the question. That having been said there is nothing in the cross –examination of Garda L'Estrange, save with respect to the circumstances in which the appellant came to make a correction concerning his use of the word arousal, to suggest any inappropriate challenging of the appellant by the Gardaí concerning the accuracy of his account. In that regard, Garda L'Estrange was adamant that the correction was volunteered by the appellant on the basis that he had obviously reflected on what he had said earlier.

61. There was no breach of the Judge's Rules in the manner in which the statement was taken, because the appellant was not in

custody. However, that is not dispositive of the issue of whether the circumstances in which this statement was taken were unfair. While the adoption of a question and answer format was not prohibited, if - as seems likely - questions and answers were used to generate a record that was framed as though it was an uninterrupted narrative, it raises a number of concerns. To say the very least of it, taking a statement in this way has the potential to be unfair to an interviewee and is therefore not good practice.

62. First, it is not good practice because the record generated is not a fully true, or verbatim, reflection of what occurred. Secondly, it only tells half the story. The record is constructed from answers given to questions, and the reader does not know exactly what questions were asked, or how any premise within a question might have been framed. Thirdly, excessive interruption of the interviewee may disrupt his train of thought or deflect him in his narrative and cause him to overlook something. Fourthly, if the questioning is aggressive, challenging or argumentative the interviewee may be intimidated and put off his stride, and possibly inhibited from saying something important that perhaps might exculpate him or indicate that his involvement was less culpable than it might otherwise appear.

63. All of that having been said, whether the taking of any particular statement was in fact unfair will depend on the circumstances of the particular case. To some extent, the risks associated with the procedure might be leavened by the reading back of the finished product to the interviewee so that he can satisfy himself as to its accuracy and completeness, and by offering him the opportunity to make any alterations or additions that he might wish to make. Both of these things were done in the case of the appellant in this case. In addition, there is no suggestion that any questioning of this appellant was aggressive, challenging or argumentative. Indeed, the appellant has stated repeatedly to his psychologists that he was treated well by the gardaí during this interview. While there was a conflict in the psychological evidence as to whether the appellant was a particularly vulnerable interviewee because of the level of his cognitive functioning (which was itself in dispute) and his tendency towards compliance, the trial judge resolved that conflict by preferring the evidence of Dr. Lambe. Dr. Lambe had opined that that the appellant did not have an intellectual disability and intelligence was not a vulnerability in his case. He had further stated that while the appellant's compliance score was elevated, it was not a significant factor of itself that would impact the reliability of the interviews.

64. It is also clear that the trial judge was much influenced, and in this Court's view legitimately so, by the repeated acknowledgments and assertions made by the appellant to both his own psychologists, and also to Dr. Lambe, that he had been well treated on both occasions that he was in the garda station; that he had understood his rights; that what he was recorded as having said to the gardaí both in his statement made on the 11th of June, 2010, and in the record of his subsequent interview while in detention on the 23rd of June, 2010, was all true, accurate and correct; and that he had indeed told the gardaí these things. The trial judge specifically alluded to the appellant's said acknowledgments during her ruling, stating *"at no stage during the assessment process with either of the experts did Mr. M state that any of the information he gave to the gardaí was incorrect, apart from not understanding the word arouse, or that he did not know he could have remained silent. He, in fact, stated to Dr. Lambe that he was treated well in custody and he did not dispute the accuracy of his statement. In my view, this was a relevant factor to be taken into account as at no time has Mr. M raised any issue about what he said at any time or his lack of understanding at the time he made his statement."*

65. It is this Court's assessment that the trial judge was careful in her assessment of the fairness of the procedures adopted and in her deliberations as to whether or not the evidence should be excluded even if it was voluntary, as she had in fact found. In the Court's view, the conclusions arrived at by the trial judge, namely that the admissions were in fact voluntary and that it was appropriate to admit them notwithstanding her reservations concerning the evidence of Garda L'Estrange in relation to how the interview on the 11th of June, 2010, was conducted, were legitimately open to her on the evidence, and her ruling discloses no error.

66. The challenge to the voluntariness of the evidence of admissions made in the course of the interview on the 23rd of June, 2010, was primarily focussed, firstly, on the appellant's ability to assimilate and comprehend the rights of which he was informed by the member in charge; secondly, on the efficacy of the caution administered at the start of this interview; and, thirdly, on his ability to properly understand the substantive questions that were asked of him in the course of the interview itself, in circumstances where it was contended that satisfactory demonstration of the existence of such understanding was a necessary precondition to any acceptance by the Court of the voluntariness of the answers provided.

67. Dealing with the first of these issues, counsel for the appellant complained in written submissions that:

> *"[w]hen arrested on 23rd June and brought down to the Garda Station, Mr. M did not seek a solicitor, or anyone else and was processed with unusual speed Sergeant McDonald read over the C72 then put it in ordinary language, explained Mr. M's rights and particularly, insofar as access to a solicitor – 'that if he did not wish to exercise the right then, he would not be precluded thereby from later doing so' the reason why he was being searched, filled in the paperwork in total on the custody record, received information from the arresting officer, ordered the accused's detention and placed the accused in an interview room for the purpose of being photographed and finger printed to which he had consented – all of this within eleven minutes. Mr. M apparently consented to everything and asked no questions, nor made any requests."*

68. The trial judge specifically addressed these complaints stating *"I do not accept that the duties performed by the member in charge, Sergeant McDonnell, were not properly carried out although the custody records indicate they were carried out within 11 minutes or so and I accept the evidence of Sergeant McDonnell in this regard. I do not believe the caution was not properly given or that the mandatory procedures were not properly followed"* and that *"[o]f significance is also Mr. M's results on the WRAT 4 test which Dr. Lambe states indicates that Mr. M would have had the capacity to read and to understand the C 72 form and the notification regarding electronic recording."*

69. It is this Court's assessment that the trial judge's ruling on this aspect of the case also discloses no error. The conclusions she arrived at were evidence based and were legitimately open to her on the evidence that she had heard.

70. In so far as this ground also embraces the efficacy of the caution administered before this interview, the same complaints were made in respect of it as were made in respect of the caution administered at the time of the earlier interview. The trial judge dealt with the cautions administered on both occasions on a rolled-up basis in her ruling, and this Court has already indicated that it finds no error of principle with respect to how the trial judge dealt with the complaints related to the cautioning of the appellant.

71. Turning then to the third facet of the appellant's complaint in respect of the interview conducted on the 23rd of June, 2010, this is based on the appellant's alleged vulnerability as an interviewee having regard to his mental abilities, and implicitly contends that the conduct of interview was unfair and oppressive for a person with such vulnerabilities. As pointed out earlier, the trial judge resolved the conflict in the psychological evidence by preferring the evidence of Dr. Lambe. Dr. Lambe had opined that the appellant did not have an intellectual disability and that intelligence was not a vulnerability in his case.

72. The trial judge dealt further with this aspect of matters stating:

> *"The questions asked in the interview, although often of a leading nature, were asked in simple, clear and straightforward terms and it is clear from the video of the interview that Mr. M was given plenty of time to process the question and information and to respond. Of significance is also Mr. M's results on the WRAT 4 test which Dr. Lambe states indicate that Mr. M would have had the capacity to read and to understand the C 72 form and the notification regarding electronic recording. Dr. Lambe also observed the interview and Mr. M's behaviour and demeanour and indeed he studied the questions and answers and asked Mr. M about them. I accept the evidence of Dr. Lambe that Mr. M demonstrates an ability to say no to many questions and holds his position when the evidence is not clear. I accept the opinion of Dr. Lambe that the contents of the interview were not the result of suggestibility and compliance. In my view, I'm satisfied beyond reasonable doubt that there's no evidence of unfairness or oppression, either in respect of the statement or interview, and that they should be admitted."*

73. It is again this Court's assessment that the trial judge's ruling on this aspect of the case also discloses no error. She approached the issue carefully and conscientiously. The conclusions she arrived at were evidence based and were all legitimately open to her on the evidence that she had heard.

The second ground of appeal: that a direction should have been granted

The submissions of the parties

74. The appellant made a number of fairly narrow and focussed submissions in support of this ground.

75. It was submitted that the jury had been given charge of trying him on four counts and that the appellant had been acquitted on one count, but convicted on the remaining three. The count on which he was acquitted was a count of producing child pornography, contrary to s. 5(1) of the Child Trafficking and Pornography Act 1998 (count no. 1). The counts in respect of which he was convicted were the three counts the subject matter of this appeal, namely counts of encouraging or knowingly facilitating the production of child pornography (count no. 2); sexual exploitation of a child (count no. 3); and child cruelty (count no. 4). The relevance of this is that counsel for the appellant, in applying for a direction, had complained about a lack of specificity in the charges; for example, with respect to what was alleged to be the explicit sexual activity at the core of several of the child pornography components of certain of the charges, and with respect to what was specifically said to constitute the alleged production, encouragement, causation or facilitation of the alleged child pornography at issue. It had been suggested that it would be unsafe to allow the case to go to the jury in circumstances where it was not clear what portion of the recorded material was being relied upon. It was implicit in the submission that for jurors to be left without any indication concerning what exact evidence was being relied upon as comprising the ingredients of the offences was unsatisfactory and that it had the potential to result in jury speculation, or the drawing by the jury of inappropriate inferences, or to confuse the jury. In the result, all counts having been allowed to go to the jury, the jury acquitted the appellant of one count and convicted him of the remaining three counts. It is seemingly being suggested that these verdicts now justify a concern that some or all of the matters apprehended by counsel for the appellant at the time of the application for a direction may in fact have come to pass.

76. In his application for a direction, counsel for the appellant went in some detail through each charge, and its relevant ingredients, and submitted that on the evidence the ingredients of those charges were not made out.

77. In relation to count no. 2, it was submitted, *inter alia*, that there required to be unambiguous evidence of encouragement, and the encouragement had to be for the production of the child pornography. Proceeding upon a surmise that the explicit sexual activity relied upon was that at 1: 04 (minutes/seconds) on the recording, it was submitted that there was no such unambiguous evidence, that demonstrably it was T who was doing the production, that Mr. M did try to stop the said activity, that without the said activity there could not be child pornography, and that the child was acting at the behest of the mother and not of the father. Counsel posed, and poses, the rhetorical question: how can an accused that is captured on video as saying *'stop, let go'* be held to have encouraged or produced child pornography? It was suggested that this question particularly arose for consideration where such a protest could be seen, as in the present case, to precede the most obviously sexually explicit material recorded. Counsel for the appellant suggested, and suggests again to this Court, that the answer to that question should have been *"No"* and that the case should have been withdrawn from the jury.

78. In relation to count no. 3, it was submitted, *inter alia*, that there required to be evidence of the accused inviting, inducing or coercing the child to engage or participate in any sexual, indecent or obscene act, and that there was no such evidence. It was submitted that, on the contrary, the appellant had twice said in one form or another *"stop"* or *"let go".* It was submitted that it would be perverse of the jury to convict on count no. 3 in circumstances where there was ample evidence that another person did the act, that is to say T, and where it appeared that the real complaint was in fact that the appellant could have rolled away earlier.

79. The basis for the latter assertion is to be found in the record of the interview with the appellant on the 23rd of June, 2010, where a question was asked, and an answer was received, as follows:

> *Q "Do you accept that you could have rolled away, or got away from her much earlier than that?*
>
> *A I accept that."*

Arising out of this, counsel for the appellant rhetorically posed the following additional conundrum: If the prosecution case was that the accused could have rolled away, or got away from her much earlier than he did, per the leading question in the accused's interview, at what stage ought this to have happened for the accused to avoid liability? Indeed, was it possible at all for these serious offences to be committed by omission rather than act? Counsel for the appellant suggested to the Court below, and suggests again to this Court, that the answer to that question should have been *"No"*, and that it inexorably followed that the case should have been withdrawn from the jury.

80. In relation to count no. 4, it was submitted, *inter alia*, that there was simply no evidence of wilful ill-treatment, neglect or exposure (in the normal sense of exposure to the elements) of A and that, on the indictment as framed, it required to be demonstrated that at least one of those things had occurred in order for there to be a conviction. On that basis, the trial judge was asked to withdraw count no. 4 from the jury, and it is again suggested to this Court that a direction should have been granted.

81. In response to the application, the trial judge ruled as follows:

"JUDGE: Very good, the defence have applied for a direction in relation to all four charges on the submission that there's no evidence or at best a small amount of evidence of very short duration to go to the jury and that it would be unsafe in the circumstances to allow the matter proceed before the jury. I accept that there must be evidence of explicit sexual activity in respect of counts 1 and 2 and that those words are to be given their ordinary common meaning. Both sides agree that guidance may be obtained from the Canadian courts and the decision in R v. Sharp where McLachlan CJ stated that the question is not what was in the mind of the creator or the possessor but whether a reasonable observer would perceive the person in the reputation as being the prescribed age and engaged in explicit sexual activity and as to the meaning of explicit sexual activity, she concluded that it referred to: "acts which, viewed objectively, fall at the extreme end of the spectrum of sexual activity, acts involving nudity or intimate sexual activity represented in a graphic and unambiguous fashion with persons under or depicted as under 18 years of age. The law does not catch possession or visual material depicting only casual sexual contact like touching, kissing or hugging since these are not depictions of nudity or intimate sexual activity. Certainly a photo of teenagers kissing at summer camp will not be caught. At its furthest reach, the section might catch a video of a caress of an adolescent girl's naked breast, but only if the activity is graphically depicted and unmistakably sexual." They were her words.

In my view, it is clear that the words graphically depicted and unmistakably sexual are significant in the meaning of explicit sexual activity and it is the test of the reasonable observer. I accept that the accused has to be proved to have known what was being filmed and in applying the Galbraith principles that there must be evidence that a properly charged jury could find that the images are of an explicit sexual nature which the accused was aware of being captured on video. In relation to count 1, there must be evidence of Mr. M knowingly producing child pornography and production is given its ordinary meaning. It's not simply directing and includes the making, manufacturing or creating and production in relation to images and production in relation to images is their creation. It is a matter for the jury to decide whether he was producing it or indeed whether he was trying to stop it occurring. In my opinion, there is sufficient evidence to support the elements of the offences in relation to counts 1 and 2 and it is for the jury to consider the entire video clip and the circumstances and context in which it was taken in reaching their determination and the entire one minute 47 seconds is relevant in this regard. In relation to count 3, in my opinion there is sufficient evidence for the jury properly charged to safely convict and it is for the jury again to decide the level, if any, of Mr. M's involvement and whether they are satisfied that he sexually exploited the child and I accept that they must consider the actus reus and the mens rea of Mr. M in that regard. All of the concerns in relation to the duration of the alleged child pornography, his alleged participation and his alleged state of knowledge are all matters within the domain of the jury and I'm satisfied there's sufficient evidence to allow the jury to decide these issues.

In relation to count 4, it appears correct to say that it is not suggested that Mr. M assaulted the child. The complaint is that he wilfully ill treated, neglected or exposed the child on the evidence and it is a matter for the jury to decide if the necessary elements of the offence have been made out but I am satisfied there is sufficient evidence to allow the jury to so decide."

82. Counsel for the respondent has submitted that this Court should uphold the trial judge's ruling as being correct and as disclosing no error of principle.

83. He has submitted that the acquittal on count no. 1 is readily explicable on the basis that the jury had been explicitly told that counts 1 and 2 were alternatives.

84. He has further submitted that insofar as the appellant had asserted in his submissions that the respondent *"avoided any emphatic case about what was or was not child pornography"*, it was the respondent's case that the video comprising one minute and forty seven seconds could only be considered in its entirety, that the entire video constituted child pornography and that it would be completely artificial to direct the jury to focus upon, and only consider, a two or four second clip thereof. It was submitted that the jury was entitled to consider that which the video depicted in picture and sound, and indeed the out of court statements made by the appellant in respect of the foregoing, namely:

(a) the manner in which the video began;

(b) the appellant's state of undress, including his being naked from the waist down;

(c) the comments made during the course of the video;

(d) the fact and nature of the physical contact between the child and the appellant;

(e) the length of time for which the sexual activity continued;

(f) the expression on the appellant's face and his verbal statements during the foregoing;

(g) the admissions made by the appellant, namely that he was not without blame in respect of what was on the video, that he could have rolled away or got away from the child much earlier than he did, and that he got some sexual satisfaction from that which was being done to him.

85. Indeed, it was submitted, the evidence was that the accused was aware that the activity was being filmed, and the video showed him lying back and allowing it to happen in a relaxed state. He made no effort to intervene or to protect his child, other than asking the child's mother to stop towards the end of the video when the child was hurting him.

86. In so far as the complaint based upon the question and answer extracted from the interview of the 23rd of June was concerned, it was submitted that, in focussing on that single question and answer, counsel for the appellant had completely ignored the balance of the custodial interview and indeed the video of the offending behaviour itself.

87. The Court agrees with the submissions made by counsel for the respondent and considers that the trial judge was correct: firstly, in her assessment that there was sufficient evidence on all of the charges to allow them to go to the jury; and, secondly, that in so far as there were aspects of the evidence that were, depending on the jury's view of that evidence, potentially inconsistent with the prosecution's case, or potentially favourable to the accused, it was a matter for the jury to assess that evidence and to determine what weight to attach to it in the light of the evidence as a whole. The judge would only have been obliged to withdraw the case from the jury if she was satisfied that no jury, properly instructed, could convict on the available evidence. She was not so satisfied, correctly in this Court's view, and properly allowed the case to proceed to the jury.

The third ground of appeal: the jury's verdicts were perverse.
88. The case for the appellant in support of this argument relies on the submissions concerning alleged insufficiency of evidence advanced in support of the second ground of appeal. As this Court has expressed itself satisfied that there was sufficient evidence on each of counts 2, 3 and 4 on which a jury, properly instructed, could convict the appellant, it follows that the appellant also cannot succeed on this ground of appeal.

Conclusion
89. This Court is satisfied that, for the reasons stated, it is not in a position to uphold any of the appellant's grounds of appeal. That being the case, the Court is satisfied that the appellant's trial was satisfactory and that his conviction is safe. The appeal against conviction is therefore dismissed.