



**THE COURT OF APPEAL**

**Record No. 222/2015**

**Mahon J.  
Edwards J.  
Hedigan J.**

**BETWEEN/**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**- AND -**

**TV**

**APPELLANT**

**JUDGMENT of the Court delivered on the 22nd day of June 2017 by Mr. Justice Mahon**

1. The appellant was convicted by a jury at the Central Criminal Court of twenty five sexual offences. Eighteen were of rape contrary to common law and as provided for in s. 48 of the Offences Against the Person Act 1981 and s. 2 of the Criminal Law (Rape) Act 1981, as amended by s. 21 of the Criminal Law (Rape) (Amendment) Act 1990. Seven were of rape contrary to s. 4(1) of the Criminal Law (Rape) (Amendment) Act 1990. Concurrent sentences of fifteen years were imposed in respect of each of the counts, to date from the 18th June 2015.

2. The appellant has appealed both his conviction and his sentence. This judgment relates to solely to his conviction appeal.

3. The appellant is a Lithuanian national aged thirty six years. He and his family have lived in Ireland since mid 2004 including his wife, whom he married in 2001, and his children one of whom, his daughter, VV, is the complainant. She was born on the 31st August 2001, and is now aged approximately fifteen years.

4. In April 2012, when VV was approximately eleven years old, she disclosed to a friend that she was being sexually assaulted by her father. A teacher in the complainant's school was informed, and the HSE was notified within days. An investigation was then undertaken by the HSE and the gardaí. The complainant was immediately removed from the family home. She was medically examined at the sexual assault treatment unit in Galway. The gardaí searched the family home under a search warrant and certain items were seized, including two vibrators. The complainant was interviewed on a number of occasions by appropriately trained specialist interviewers. The appellant was arrested on the 15th May 2012 and was interviewed on three occasions while in custody on the same date. Further statements were taken from the complainant and from her foster mother.

5. The offences occurred between 2008 and 2012 when the complainant was between seven and eleven years old. She alleged that the appellant routinely raped her on a weekly basis with most offences taking place in the family car.

6. The appellant's grounds of appeal as lodged are as follows:-

(i) The learned trial judge erred in law and in fact or in a mixture of both law and fact in admitting into evidence further to a prosecution application to do so, the evidence of the complainant, VV, under s. 16(1)(b) of the Criminal Evidence Act 1992 pertaining to interviews conducted with the said party by specialist interviewers (Garda Debbie Kyne and Garda Karen Powell) in Sligo upon:-

(a) 11th May 2012

(b) 1st July 2012

(c) 3rd May 2013

(ii) The learned trial judge erred in law or in fact in determining that it was appropriate for the specialist interviewers to introduce into the said interview environment for the purposes of commencing the said interviews, disclosures which had been made outside of the said interviews and in advance of same during the currency of what was described as a clarification meeting undertaken with the complainant, and the said specialist interviewers (Garda Karen Powell and Garda Fiona Reilly) upon the 3rd February 2012 wherein disclosures were made to the particularities which included:-

(a) that the defendant's privates touched the complainant's privates,

and

(b) on a journey in the defendant's motor vehicle and on another occasion in a bedroom.

(iii) The learned trial judge erred in law or in fact in failing to accede to a defence application to, either, direct the accused man not guilty on all counts on the indictment or, in the alternative, to stay the indictment against the accused man in circumstances where a manifest unfairness had arisen, a real prejudice presented to the accused man in receiving a fair trial in accordance with his constitutional entitlements, the said unfairness presenting in circumstances where the prosecution had and were in a position to advance evidence of the complainant when recounting the allegations within what is suggested was a period of, with reference to the indictment, six days of the alleged incident being the 28th / 29th April 2012 as particularised as count 28 on the said indictment. However, when the defence sought to cross examine the complainant herein the quality of the evidence deteriorated and the capacity of the complainant to recollect the

particularity of detail was such as to create an obvious and insurmountable impediment to cross examination in circumstances where on a multiplicity of occasions the complainant professed to have no particular recollection of the incidents themselves.

7. The appellant has challenged the decision of the learned trial judge to admit the three specialist interviews. The basis of the objection to the admissibility of these interviews is stated in the appellant's oral submissions to be as follows:-

(a) Interview 1 (conducted the 11th May 2012, approximately one week following a clarification meeting conducted on the 3rd May 2012).

*The entirety of the complaint made by the complainant at a clarification meeting was introduced to the complainant one minute and nine seconds into the free narrative stage of the first interview thereby contaminating the content of the interview.*

(b) Interview 2 (conducted 1st July 2012, approximately three days following a clarification meeting conducted on the 28th June 2012).

*During the second interview the interviewer introduces the allegation of oral interference of the complainant for the first time referable to an off camera conversation between the complainant and the specialist interviewer.*

(c) Interview 3, (conducted 3rd May 2013 following two clarification meetings conducted within two weeks beforehand, on the 16th April and the 26th April 2012).

*A period of twelve months expired before a third interview was arranged not as a result of new disclosures but as a result of a direction from the DPP. Before the third interview takes place the entirety of the first and second interviews are played to the complainant thereby contaminating the content of the interview.*

8. The relevant provisions of s. 16(1) of the Criminal Evidence Act 1992 provide as follows:-

*(b) a video recording of any statement made during an interview with a member of An Garda Síochána or any other person who is competent for the purpose:*

*(i) by a person under 14 years of age (being a person in respect of whom such an offence is alleged to have been committed, or*

*(ii) by a person under 18 years of age (being a person other than the accused) in relation to an offence under:-*

*(I) section 3(1), (2) or (3) of the Child Trafficking and Pornography Act 1998, or*

*(II) section 2, 4 or 7 of the Criminal Law (Human Trafficking Act 2008),*

*shall be admissible at the trial of the offence as evidence of any fact stated therein of which direct oral evidence by him would be admissible;*

*Provided that, in the case of a video recording mentioned in para. (b) the person whose statement was video recorded is available at the trial for cross examination.*

9. Section 16(2) of the Act of 1992 provides as follows:-

*"(a) Any such video recording or any part thereof shall not be admitted in evidence as aforesaid if the court is of opinion that in the interests of justice the video recording or that part ought not to be so admitted.*

*(b) In considering whether in the interests of justice such video recording or any part thereof ought not to be admitted in evidence, the court shall have regard to all the circumstances, including any risk that its admission will result in unfairness to the accused or, if there is more than one, to any of them.*

10. Section 16(3) of the Act of 1992 provides as follows:-

*(3) In estimating the weight, if any, to be attached to any statement contained in such a video recording regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise."*

11. The complainant was the subject of recorded interviewing by specialist victim interviewers pursuant to s. 16(1)(g)(i) of the Act of 1992 on the 11th May 2012, the 1st July 2012 and the 3rd May 2013. Separate clarification meetings took place shortly in advance of each of the interviews. They were not recorded, but handwritten notes relating to them were compiled. The interviews themselves formed the basis of the indictment.

12. It is maintained on behalf of the appellant that the said interviews were undertaken, in relation to specific aspects of them, in breach of the Good Practice Guidelines (2003). The purpose of the Guidelines is stated in their introduction to be as follows:-

*"The main purpose of these Good Practice Guidelines is to assist those making a video recording of an interview with a complainant where it is intended to submit the recording as evidence of the trial of the offence in accordance with s. 16(1)(b) of the Criminal Evidence act 1992. Such are recording can provide a very valuable, early record of the complainant's account, result in fewer requests to repeat his/her account to others and perhaps spare him/her from having to recount evidence to the court in person."*

13. Paragraph (xi) Introduction to the Guidelines is headed "These guidelines are advisory, not mandatory". The paragraph goes on to provide as follows:-

*"It is a matter entirely for the court to decide whether a video recording is admitted as evidence. The fact that a video recording does not comply with these guidelines should not, of itself, affect its admission into evidence by the court. On*

*the contrary, it was the clear intention of the Oireachtas that such video recordings should be admitted unless, in the opinion of the judge, to do so would be contrary to the interest of justice. The guidelines are, therefore, advisory but should be followed whenever practicable to try to ensure that a video recording will be accepted in a criminal court. Therefore, while we recommend that the principles stated in these Guidelines be followed in all instances where it is decided to record a complainant's evidence, we recognise that all aspects of the Guidelines may not be appropriate in every case. In other cases, a complainant's account may have been video recorded for purposes other than criminal proceedings (e.g. civil proceedings or therapy). The question of whether such video recording may be tendered in evidence under the Act is a matter for the court to decide."*

14. The basis of the criticism of the admissibility of the first interview conducted on the 11th May 2012 is the introduction by one of the specialist interviewers shortly after the commencement of the narrative section of the interview of a reference to an allegation of inappropriate sexual behaviour by the appellant and which had been alleged by the complainant in the course of the clarification meeting approximately one week earlier. The length of this first interview was approximately one hour and forty five minutes.

15. This criticised prompt to the complainant accurately replicated the words of the complainant as spoken to the interviewing gardaí at the "clarification" meeting of the 3rd May 2012 and recorded in writing. Garda Powell in evidence confirmed that this was the only allegation made by the complainant against her father at that meeting. It was in any event sufficient to warrant a recorded interview with the complainant, which followed on the 11th May 2012.

16. Notes of what was discussed at the unrecorded clarification meeting of the 3rd May 2012 purport to quote the complainant stating the following:-

*"My dad touched my privates in my bed more than twenty times in ... car, on way to C. His privates touched my privates."*

17. The specialist interview of the 11th May 2012 in its introductory phase covered very general topics in relation to school, life at home, interests and questions designed to satisfy the interviewers that the complainant understood the difference between telling the truth and lying. Approximately twenty minutes after its commencement and prior to the complainant herself making any allegation against the appellant, the aforesaid allegation made by the complainant in the course of the clarification meeting is repeated by one of the specialist interviewers, Gda. Kyne, addressed the complainant as follows:-

*"And remember you said to us "my dad touched my privates in bed and in the car on the way to C., his privates touched my privates", do you remember telling me that."*

18. The complainant replied "Yeah". Gda. Kyne then said "ok, tell me all about that", to which the complainant responded "Well tell me about what". Gda. Kyne then said "Tell me everything about that. Do you understand what I just asked you" to which the complainant replied "No, a bit". Gda. Kyne then repeated:-

*"You remember you said "my dad touched my privates in my bed and in the car on the way of C.. His privates touched my privates". Tell me what you mean by that."*

19. The complainant responded "having sex". The conversation then continued. The complainant elaborated on this particular allegation, as well as dealing with other matters.

20. Over the remaining period of the interview the complainant referred to other instances of being raped and sexually assaulted by the appellant. These events took place *"mostly in the car, sometimes in bed"*. She recalled details of the first occasion when she was raped by the appellant, and which she said took place in their house. She also referred to being raped for the first time in a car and which she described as a Lithuanian van owned by her father and which he had brought with him into this country from Lithuania. She also described in some detail how the appellant lay on top of her in bed in her bedroom and raped her. The detail and clarity of the information relating to the sexual abuse provided by the complainant in the course of the first interview was remarkable. No direct prompting of any particular incident took place, other than the single incident of prompting complained of. The general impression gleaned from reading the first interview is that it was free flowing, voluntary, informative and frank.

21. The appellant maintains that the introduction of this information to the complainant was an inappropriate prompt to her in relation to the particular allegation and that its introduction tainted the entire of the first and subsequent interviews to the extent that they should have been rendered inadmissible in evidence. It is argued on behalf of the appellant that the Good Practice Guidelines were severely breached by the interviewer's introduction of this information. . A number of them were specifically referred to in support of this contention, including:-

*"3.13. At the outset, great care should be taken by the interviewer to avoid indicating to the complainant that the interviewer is aware of the nature of the complaint and to use any such information merely to cross check for him/herself the information from the complainant."*

And

(referring specifically to phase one / the free narrative account):

*"3.18. This is the core of the interview and the interviewer's role is to act as a facilitator, not a interrogator. The complainant should be encouraged to give the account at his/her own pace. Only the most general open ended questions should be asked in this phase, for e.g. "Is there anything that you would like to tell me"... every effort must be made to obtain information from the complainant which is spontaneous and free from the interviewer's influence."*

*"3.19. Appropriate open ended prompts such as "Did anything else happen?" should be used to encourage the flow of narrative. Verbs like "tell" and "explain" are likely to be useful. Prompting is quite in order provided it is neutral, for example, the use of the words "and then what happened?". The interview should not imply positive evaluation by the use of such words as "right", "good". The prompts used at this stage should not include information known to the interviewer concerning relevant events which would have not yet been mentioned by the complainant. The interviewer needs also to be aware of the danger of intentionally or unintentionally communicating approval or disapproval, through inflections of the voice or facial expressions. Prompts should not be overused."*

*"3.34. It is particularly important to proceed through this phrase step by step and that the interview is not tempted to*

get to what he/she may consider to be the heart of the matter by asking what a court may later consider to be prejudicial leading questions."

"3.53. The answers to leading questions may be inadmissible at the trial and therefore such questions should not be asked in the course of making the video recording. In the course of a criminal trial, leading questions will not normally be allowed other than questions in relation to undisputed facts or matters that are merely introductory. The same rules of evidence must equally apply to the questioning of a complainant in the making of a video recording as at the criminal trial."

22. The appellant's counsel, Mr. Bowman S.C., made an application to exclude as inadmissible the entire of the first interview 1. He argued, *inter alia*:-

"...(After) the timeframe of a minute and nine seconds and four questions, the entirety of the "allegation" is actually put to this young girl and I respectfully submit, and I am alive to the observations of the court which is that - well, its not to be conducted as a direct examination, my concern is that that's the exact intent of the legislature and it's exactly why a separate training program is designed for the specialist interviewers and it is exactly why Gda. Powell confirmed the breakdown that one of the weeks appears to be addressing itself to matters of law ... these are not spontaneous as identified within the guidelines as being the manner in which they should be forthcoming and the guidelines, if they are clear about one thing, is that you are not to sit there and introduce the entirety of these allegations ... It most certainly shouldn't happen at the outset and that unfortunately I respectfully submit contaminates the balance of the interview because thereafter what follows is a discussion of all matters touched upon at that stage of the interviews. It discusses the private under private, in the bed, in the car, in C. and it is lamentable that more obvious avenues of approach were not taken before anybody could suggest that the matter that been exhausted and in my respectful submission that contaminates the balance of interview number 1 in those circumstances."

23. Indeed, Mr. Bowman's application, while specifically referring to the aforesaid prompting of the complainant early in the course of the narrative section of the first interview, was that this prejudicial material contaminated all three interviews. He submitted to the learned trial judge:-

"The first interview continues as a seamless narrative pushed forward by the momentum of that single disclosure. If there was a second and discreet disclosure which then manifested as a result of other appropriate verbal prompts I would then have to accept the fact that well we can slice this down the middle and the first six allegations of vaginal or whatever abuse go in because they emanate directly from the inappropriate prompt but the second part of the interview is absolutely fine because the young girl now was speaking about abuse and moved on to something which was entirely discreet. The first interview is irredeemable associated exclusively with that disclosure. That's all that's discussed and it is in the second interview we see the introduction of the oral and it is in the third interview that we receive - the second interview that the issue of the vibrator is introduced. So if there was a seamless break in it absolutely but in my respectful submission it all flows from that introductory narrative introduced not by the young girl spontaneously but as a result of the introduction by the specialist interviewer and again the mischief which is sought to be prevented is clearly set out lest we misunderstand that and it is reinforced by virtue of the fact that we were even told to be very careful about introducing this material because the young complainant is particularly susceptible to suggestion.."

24. Mr. Bowman further clarified his application to this extent. He submitted to the learned trial judge that in the event that the first and second interviews were to be deemed inadmissible he would seek to have the third one also deemed inadmissible for an additional reason. He explained his position thus:-

"What I would be doing is I would be relying on certain portions of those interviews for cross examination reasons, yes. Now, whether or not that requires them to be played, I don't think it does, but I don't want to, in the event that I'm successful, be met by the prosecution saying well you never told us you were going to put the contents of the third interview. ... because it would be on the basis of a prior inconsistent statement and that would be nothing other than cross examining on a statement made out of court which discloses material inconsistencies between different positions of the complainant ..."

25. In her submissions to the learned trial judge, Ms. O'Leary S.C. on behalf of the respondent argued that the matter put to the complainant in the first interview and which is the focus of the appellant's complaint was but one incident, or as she put it "a very small part of the entirety of the allegations as disclosures went on".

26. The learned trial judge proceeded to consider in some detail the content of the second and third interviews, at least to the extent it was relevant to the application made by Mr. Bowman. He described the second interview as "free flowing". He considered the explanation of Gda. Kyne to references in that interview as being linked to matters discussed earlier between herself and the complainant. In relation to the third interview, the learned trial judge could not see how it was tainted or undermined in any way by anything that had occurred previously.

27. Specifically, in relation to the prompting of the complainant in the first interview, and which is the focus of the complaint by the plaintiff, the learned trial judge said:-

"..Of course the initial question in an interview wasn't a leading question but in any event the guidelines are merely that, even if I am wrong about that proposition. Was there spontaneity as contemplated by 3.8? Was it free from the interviewer's influence? Yes. The prompts, at 3.19 it says "use at this stage should not include information known to the interviewer concerning relevant events which have not yet been mentioned by the complainant". Now, they were mentioned. It was mentioned. .. I take the view that the earlier mention is, as it were, something which can be legitimately regarded as analogous to a mention in the interview itself when it is of such a limited character."

28. The second interview took place on the 1st July 2012, almost six weeks after the first interview. Following the introductory stage which, as in the first interview, took approximately twenty minutes, a question asked by the garda interviewer as to why the complainant was living with foster parents immediately prompted the response from the complainant:-

"I am living with T and G because my dad did something to me which is wrong and it's really bad."

29. There then followed an interview session of almost two hours and thirty minutes in duration, in the course of which the

complainant provided graphic detail of various types of illegal sexual contact, including sexual assault, rape and oral rape.

30. Objection to the admissibility of the second interview is very much based on the criticism levelled at the first interview, and it is clear from the submissions made by Mr. Bowman, particularly to the learned trial judge, that the strength of the basis of his objection to the admissibility of the second interview is weaker than that relating to the first interview. For example, Mr. Bowman stated (p. 80, Day 3):-

*"Now, that having been said difficult considerations may well apply in the second interview, but there is no doubt but after we move through the beginning of the first interview the second interview which the court will observe there is no difficulty identifying appropriate prompts, and again I don't mean to be critical, but by the same token they are observations I am bound to make."*

31. He also said:

*"..In the second interview again, as I say, it is introduced in a far less controversial manner but my real concern is that this is the first time and again it is a matter for the court. It may not be ultimately, but there must be a real concern over the circumstances where the oral allegation emanated from. .."*

32. The focus of the objection to the admissibility of the second interview is the raising by the garda interviewer of the allegation of oral interference of the complainant for the first time and that such was referable to an off camera conversation between the complainant and the specialist interviewer.

33. Specifically in relation to the application to exclude the second interview, the learned trial judge stated:-

*"..It's the reference in any event to the mouth. I think we all know what we are speaking about here and the form of words used undoubtedly indicated a prior conversation about and indeed the fact that it was mentioned by one of the gardaí. Now, the garda witness who dealt with this matter, Garda Kyne, was very candid in relation to this matter. She was completely open about this matter. She referred to a reference to, how shall we put it, something of that kind, that is my shorthand for her rather imprecise reference to what precisely was said outside the interview before it commenced and also her conception that it had been mentioned at the clarification meeting without being written down. I believe her evidence in that regard and that what this constitutes as a reference by the child to a prior - to prior brief references raised initially by her on this topic and in any event, taking it in its full context, it doesn't undermine the free flowing nature of the material which emerged. One can imagine rationally speaking cases were such - any explicit reference of the type referred to in the first interview would in fact undermine the free flowing narrative or would place a judge in a case in a position of difficulty or doubt."*

34. The objection to the third interview is based on the fact that a period of many months had expired since the second interview, and that the third interview did not arise as a result of any new disclosures being made, but rather on the basis of a request from the respondent, and that the complainant was shown the recording of the first and second interviews prior to embarking on the third.

35. On the following day of the trial, the learned trial judge gave his ruling in relation to the appellant's application. His decision was to admit the interviews into evidence. In the course of his very comprehensive ruling he explained in some detail the purpose and intent of s. 16 and the different stages necessarily undertaken in the course of conducting clarification meetings and specialist interviews of a child complainant in order to achieve the essential goal of the legislation. The learned trial judge went on to say:-

*"The next step was in an interview which lasted I think one hour and forty six minutes, after about twenty minutes a reference to the allegation made in a clarification meeting. It was a bald allegation. It was referred to at a given stage. It was in response to the series of we will call questions or comment of the complainant repeated and it seems to me that this was a perfectly sane and rational way of introducing the topic which was the subject of the meeting. Now, because of the suggestibility which has been established of complainants in respect of allegations of this kind it might perhaps be argued that a more opaque approach is or a more indirect approach is appropriate for the purposes of seeing whether or not a free flowing narrative will follow because the core desideratum is to ensure that insofar as allegations are made, they come from the complainant uninfluenced by anybody else and that's what she says is free flowing in the fullest sense. It is obvious to me, notwithstanding the use of a reference to what has been said at the clarification meeting eight days before, taken the totality of what was said, that it was in a completely free flowing narrative. No further reference was made in explicit terms by the gardai to the allegation made to them eight days before. It was plainly, as a matter of reason, going to be the starting point for what was to be discussed. The fact of a reference to what both - everybody knew was the reason for their presence cannot in my view on the evidence in this case or does not undermine the free flowing nature of the narrative which followed. ...The real issue is whether, taking it in its totality, it can be concluded that it was a free flowing narrative however it started. In my opinion the starting point was a legitimate one. In my opinion thereafter there was no question of, as it were, hammering home this previous complaint made to these gardaí which she could not but have been aware of some eight days previously. So, looking at the totality of the interviews and having regard to the totality of the circumstances I am satisfied that there was a free flowing narrative and that the fact of this reference didn't in any way taint what has been said and that been so no real risk, in the sense to which I have described it, of any injustice arises."*

36. The learned trial judge ruled, correctly in this court's view, that there was nothing wrong in the complainant being shown the content of the first and second interview in advance of her third interview. He said:-

37. *"There were perfectly entitled to show the tapes because that was for her the equivalent of giving her her statement. They left it at no more than asking her whether they would wish to clarify or add anything and she didn't do so."*

#### **Discussion and decision**

38. The first twenty minutes or so of the first interview might be described as general chit chat between an adult and a young child. There is no criticism by the appellant of anything said in this phase of the interview. This preliminary exchange was obviously designed to put the complainant at ease and to facilitate a free flowing narrative on her part. However, it was necessary, at some point, to move the discussion from general chit chat to the essential purpose of the interview, which was to record any allegations of sexual misconduct on the part of the appellant and which had been referred to, or hinted at, in the course of the earlier confirmation meeting. Not to have moved from that earlier phase to the more important phase would have rendered the exercise useless.

39. Essentially, in relation to the first interview, the issue is whether the prompt complained of fundamentally undermined the purpose

of the interview as to render it properly inadmissible.

40. The appellant maintains that the said introductory prompt was highly prejudicial and amounted to a blatant breach of the relevant Guidelines. It is submitted on behalf of the respondent that such an interpretation is not sustainable when one looks at the full account given by the complainant in the course of the interview and the extent of the manner in which she elaborated in considerable detail on this initial bare assertion. The learned trial judge took the view that the manner in which this initial prompt was made by the interviewing garda "was a perfectly sane and rational way of introducing the topic which was the subject of the meeting..". He also correctly remarked that nothing further was stated in explicit terms by the gardaí in relation to that allegation in the course of that or subsequent interviews with the complainant. This initial prompt cannot be considered in isolation. Taken on its own, it arguably amounts to a breach of the Guidelines, but the matter cannot stop there. What was said at this relatively early stage of the interview must be considered in the context of the entire of that interview and indeed the subsequent interviews, and the fact that a prompt of some nature had to be given in order to move the conversation from general chit chat to a more focussed discussion. What was stated is placed very much in perspective when the entire of what was said by the complainant, in that and subsequent interviews, is considered.

41. While evidence introduced at trial pursuant to the s. 16 procedure essentially takes the place of evidence in chief in a conventional trial, there are important distinctions as between them. The former is unsworn information elicited with the assistance of trained interviewers dedicated to the task of facilitating a would be child witness to tell his or her story in circumstances which would otherwise make that process difficult, impossible or otherwise unsatisfactory. The latter is sworn information elicited in the course of examination by a lawyer in a courtroom for, essentially, the purpose of supporting or proving an allegation of wrong doing. Where the difference evaporates is when the evidence adduced in both processes are subject to cross examination by lawyers, or by an accused personally, if not legally represented.

42. Importantly also is the fact that the learned trial judge had the opportunity of viewing the recording of the three interviews. He had the opportunity to assess the body language and demeanour not only of the complainant herself, but also the interviewing gardaí. Matters such as voice tone, pressure to respond or any apprehension or hesitancy on the part of the complainant to answer questions was evident to the learned trial judge.

43. The admission into evidence of such video recorded statements conducted pursuant to s. 16 of the Act of 1999 is a matter for decision by the trial judge subject to the interests of justice and the right to a fair trial. In his book *Sexual Offences (2nd Edition)*, Prof. O'Malley distinctly summarised the basis upon which a trial judge should make the decision, on p. 417, when he states:-

*"When making such a decision, the court must have regard to all the circumstances, including any risk that the admission of the recording will result in unfairness to the accused. When estimating the weight, if any, to be attached to a statement contained in such a recording, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise."*

44. In *Donnelly v. Ireland* [1998] 1 I.R. 321, the Supreme Court affirmed that the constitutional concept of a fair trial in Ireland "undoubtedly involves the rigorous testing by cross examination of the evidence (against the accused)".

45. In the instant case, the learned trial judge's decision to admit the content of the three specialist interviews was a decision with which this court cannot find fault. The carefully reasoned decision was taken after the learned trial judge viewed the interviews. Furthermore, and importantly, the complainant was robustly and comprehensively cross examined by the appellant's experienced senior counsel. For these reasons, this ground of appeal must fail.

46. A further ground of appeal in this case is based on the issue of the reliability of the complainant as a witness, coupled with the vagueness or lack of particularity with which many of the sixty four counts on the Indictment were based. It is further contended on behalf of the appellant that he was at a disadvantage because of the length of time between the interviews and the cross examination of the complainant. In this regard the case of *R. v. Malicki* [2009] EWCA CRIM 365 is cited as an authority. However, in that case the facts were very different to the present case, and the child in *Malicki* was only six years old, significantly younger than the complainant in this case. Further, *Malicki* concerned a single allegation of a sexual assault and there was a concern that the complainant, when giving evidence at trial, was merely repeating the details of her allegation made in the course of a significantly earlier video recorded interview and which she saw shortly before the trial. In the instant case the allegations in the first two interviews were many in number, thereby reducing the possibility or likelihood of merely repeating details from those interviews in a third interview.

47. It is well established in this jurisdiction that the issue of the reliability of a witness is primarily a matter for the trial judge on which to adjudicate. In its judgment in *DPP v. MB* [2016] IECA 333 this court said:-

*".. the jury in this case had had the benefit of a lengthy, detailed and robust cross examination by Mr. Peart of Mr. B. The learned trial judge in her charge to the jury recounted the evidence of Mr. B and the extent to which that evidence was sought to be undermined in cross examination. It was well within their competence to accept or reject all, or parts of, Mr. B's evidence as to what he believed he saw over thirty years previously. Equally, the jury were well aware that Mr. B was recounting events of many years previously, and at a time when he was aged four or five years old."*

48. In the instant case there was a detailed and robust cross examination of the complainant. While there were many occasions when she was unable to recall detail, or could not recall particular events, or said that she did not know the answer to a question, equally there were many other instances when she gave details in a very clear and unequivocal manner. Her evidence effectively went both ways, and ultimately it is properly a matter for a jury to decide on the reliability of that evidence.

49. In this case, the learned trial judge firmly directed the jury on this aspect of the case, in the following terms:-

*"So, that of course - there is also the issue of the alleged suggestibility on the part of young people or children, either generally or in the particular circumstances of this case where there were an ongoing series of disclosures and there is also, of course, the fact of the delayed allegations. These are the reasons why the issues, in addition to those I have already referred to, why I give you that corroboration warning, saying to you at the same time that it doesn't import of any higher level of proof if you were to consider convicting and I'm saying to you that you are perfectly entitled to do so, even with - without corroboration."*

50. Towards the conclusion of his charge, the learned sentencing judge addressed the jury thus:-

*"...I have sought to elaborate the general principles so to speak which arises in what we the lawyers shortly call old cases and I have also sought to identify what appeared to me to be factors relevant in the present case to the issue ok, and you can see as a matter of reason, that in - in the ordinary course of events memories would be deemed on any view in relation to where one might have been or indeed in terms of the complainant's point of view about what actually occurred which will give rise to issues of accuracy or reliability apart altogether from credibility which of course is a separate thing and in this particular instance it seems both because of I think it is fair to say the age but also the lapse of time, it is well, certainly, if you were to accept the veracity of the answers from the child that she did not remember, then you have a situation where unsurprisingly there is in fact, a issue about recollection due to lapse of time, as well perhaps as the fact that she is a child, but it is nonetheless a factor in the case.*

*You will also bear in mind of course by definition that the extent to which the evidence can be tested and engaged with is rendered more difficult when one is dealing with a witness who - who is seeking to recount events going back a long distance and of course again, that is a handicap for the defence which could never be held against the defence. So, if you like, you must make allowance so to speak for those potential difficulties in analysing the evidence. Again, a tool to ensure that if you reached the end conclusion on some or one of the accounts that the accused was guilty, he would have got it right so to speak.*

51. In the court's view, great care was taken by the learned trial judge to advise and direct the jury to exercise caution in their assessment of the evidence, and in particular the complainant's evidence, given that it related to matters which occurred during her younger childhood years and because of the fact that a considerable period of time had elapsed between the events complained of and the hearing of the case. The jury were well capable of understanding this advice and these directions and of the need to proceed with caution. There is no reason to believe or suspect that the jury acted otherwise. Indeed the verdicts handed down by the jury indicate that they gave particularly close consideration to the evidence in that in respect of a number of counts there were verdicts of not guilty. (The learned trial judge directed that verdicts of not guilty be returned in respect of a number of additional counts).

52. This ground of appeal is also refused. As all grounds of appeal have been rejected, the Court must dismiss the appeal.