THE COURT OF APPEAL

NO REDACTION NEEDED

[229/16]

The President
McCarthy J.
Kennedy J.

BETWEEN

THE DIRECTOR AT THE SUIT OF THE PUBLIC PROSECUTIONS

RESPONDENT

AND

N.R. (OTHERWISE KNOWN AS N.O'R.)

APPELLANT

JUDGMENT of the Court delivered (via electronic delivery) on the 20th day of April 2021 by Birmingham P.

1. Following a 33-day trial in the Central Criminal Court, the appellant was convicted, on 20th May 2016, of nine counts of rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990 and one count of child cruelty contrary to ss. 246(1) and (2) of the Children Act 2001. His partner had stood trial alongside him.

2. The trial was remarkable by reason of its duration, but also by reason of the fact that the complainant gave evidence over nine days, six of these being taken up with cross-examination. The complainant gave evidence by video link from the Old Bailey in London in the presence of an English High Court judge and had the assistance of an intermediary.

3. At the start of the trial, and before the complainant began to give evidence, there was a directions hearing centred on suggestions and proposals from the intermediary. It was accepted that the ground rules hearing was a useful and productive exercise and, in general, there was reasonable adherence to the ground rules thereafter. However, the duration of the case and in particular the length of period over which the very young complainant, who was 12 years of age at the time of the trial, was required to give evidence has to be a cause of very great concern. In response to the expression of those concerns by this Court, the point is made that the trial was an unusually complex and difficult one. We do not dispute the fact that the case was difficult and complex, but our concerns remain undiminished.

4. Even by the standard of the appeals that come before this Court from the Central Criminal Court and, on occasions, from the Circuit Criminal Court, the details of the allegations were particularly distressing and disturbing. This presents a dilemma. There is a difficult

balance to be struck between providing sufficient background information so as to make the arguments that were advanced on appeal comprehensible, and not providing so much detail as to cause distress for readers generally or for readers with some knowledge of the situation.

5. With that caveat, we would offer the following overview of the factual background.

Background

6. The complainant, A, was born in May 2003. At the time of the alleged offending, he lived with his parents – his father, the appellant, and his mother, who was a co-accused at trial, at an address in the south east region of Ireland. His mother had a number of other children from previous relationships and these were in care at the time of A's birth.

7. In April 2011, the complainant, who was eight years old at the time, made a disclosure to his school teacher that his father, the appellant, had been physically abusive to him. An emergency care order was sought and granted and the complainant was placed in foster care with a family – the B family – who were also fostering other children, including A's half-siblings.

8. A's stay at this foster home lasted some 11 months. During that period, certain difficulties developed after which he was moved to a new foster home and placed in the care of a new foster mother, Ms. C.

9. Ms. C was an experienced foster mother and provided this service on behalf of a private fostering agency. The complainant moved in with her in March 2012 and stayed there until October 2013. It appears this foster placement was a positive one and that the complainant and Ms. C developed a very close relationship. Within a period of some eight weeks or thereabouts, the complainant made a disclosure of sexual abuse to Ms. C. Over the following weeks and months, he provided details to Ms. C of the nature of the events that he said had occurred over the previous four years. By any standards, the allegations are harrowing in the extreme. In order to aid the complainant to come forward, Ms. C spoke of him emptying boxes in his mind if something was causing worry. The complainant would then approach Ms. C from time to time and tell her that he needed to empty a box and he would disclose further allegations of the abuse that he said he experienced. Of note is that Ms. C explained that by reason of her relationship with the fostering agency, she was obliged by them to keep a log in respect of day-to-day matters relating to the care of the complainant, and that accordingly, she recorded his disclosures to her at the time they were made.

10. The sequence of events relating to disclosure would seem to be as follows. There was the complainant's initial disclosure, focused on physical abuse by his father, to his school teacher on 4th April 2011 which precipitated the application for a care order, culminating in a full care order being granted on 23rd May 2013. On 24th August 2011, when the complainant was in the care of the B family, the complainant made a further allegation of physical and emotional abuse to his then foster mother, Ms. B. On 9th September 2011, the complainant made a video-recorded statement of complaint to Gardaí in the specialist

interview suite in the south east. Then, in January 2012, Ms. B informed TUSLA that she was not in a position to keep the complainant any longer for a number of reasons, including the fact that difficulties had arisen between the complainant and other children. Alternative foster arrangements were made and, on 22nd March 2012, the complainant went to live with Ms. C to whom the complainant disclosed, on 29th April 2012, that the appellant had locked him in a box in a shed. On 30th May, 23rd June and 1st July 2012, there were separate disclosures of sexual, physical and emotional abuse. These allegations are very shocking. Of note is that the allegation of 23rd June 2012 made reference to the appellant urinating and defecating. There was also a reference to a "hot stick game" and there was an allegation of the appellant allowing another man to touch the complainant's penis.

11. On 4th August 2012, the complainant took part in a second video-recorded interview with specialist interviewers. On this occasion, the complainant spoke of physical and emotional abuse but there was no reference to the disclosures of a sexual nature which had been made to his foster mother, Ms. C, over the preceding three months. Then, on 13th August 2012, the complainant was brought again to the specialist interview suite with a view to a further interview being conducted but the complainant declined, indicating that he found the experience of being video-recorded distressing as this was something that his father had done to him. Given that he was unwilling to be interviewed on video, a formal written statement was taken from the complainant. A second such statement was taken on 5th January 2013 and a further written statement was taken on 12th March 2013.

12. In February and March 2013, further disclosures to Ms. C were made. The reports of 4th March 2013 referred to the fact that the appellant took pictures of the complainant while the complainant was in the shower and, at other times, when he was naked. On 12th March 2013, Ms. C was told by the complainant that the appellant would video the complainant and the co-accused engaging in activity and that his parents would then watch the video.

13. In mid-June 2013, the view was taken that the placement with Ms. C had broken down. This was in a situation where Ms. C was describing the complainant's sexualised behaviour towards her. She provided examples of other very concerning behaviour which it is not necessary to detail at this stage.

14. In mid-October 2013, the complainant was transferred to specialist residential care in England. The decision to place him there was taken against a background of concern at the highly unusual and inappropriate degree of sexualisation displayed by the complainant. This question of the complainant's sexualised presentation would be a significant issue at trial.

Grounds of Appeal

15. A number of grounds of appeal have been formulated as follows.

    (i) The trial judge erred in law and/or in fact in failing to clearly, fully or fairly put the defence case to the jury. In particular, the trial judge fell into error when, in closing

remarks during his charge to the jury, he proffered an opinion of the complainant's evidence which was biased, unbalanced, favourable to the prosecution and thereby prejudiced the appellant in the eyes of the jury.

(ii) The trial judge erred in law and/or in fact in admitting evidence of the fact of a camcorder recording of the accused engaging in sexual acts with the co-accused and a third person and details of the content thereof.

(iii) The trial judge erred in law and/or in fact in allowing the previous convictions of the accused to be put before the jury.

(iv) The trial judge erred in law and/or in fact in admitting the evidence of Ms. C, the complainant's foster mother, as evidence of recent complaint and/or as background evidence.

(v) The trial judge erred in law and/or in fact in failing to exclude the opinion evidence of the complainant's social worker.

(vi) The trial judge erred in law and/or in fact by admitting extracts of the memoranda of interview of the appellant which were prejudicial to him and were not probative of any matter in issue in the case.

(vii) The trial was rendered unsatisfactory and unfair due to the repeated service of additional evidence by the prosecution on the defence throughout the trial.

16. As far as ground (vii) relating to the repeated service of additional evidence is concerned, it is expressly accepted by the appellant that this is very much a subsidiary ground which is to be read in conjunction with, and as being supplemental to, the other grounds of appeal. It is conceded that, of itself, it would not see a court setting aside the verdict.

17. So far as grounds (ii), (iii) and (vi) are concerned, at the hearing of the appeal these were grouped or bundled together in circumstances which will become apparent and we will adopt a similar approach in the course of this judgment.

Ground (i)

The trial judge erred in law and in fact in failing to clearly, fully or fairly put the defence case to the jury. In particular, the trial judge fell into error when, in closing remarks during his charge to the jury, he proffered an opinion of the complainant's evidence which was biased, unbalanced, favourable to the prosecution and thereby prejudiced the appellant in the eyes of the jury.

18. By way of background to this ground, it should be noted that the judge's charge was spread across three days. He began his charge on Day 30 of the trial. It continued throughout Day 31, at the end of which the judge indicated that he had finished with his summary of the evidence and that he was adjourning the matter to the following day when he would say "a few closing remarks", after which the jury would be sent out to begin their deliberations. The appellant takes no real issue with the judge's charge as

delivered on Days 30 and 31, and accepts that it was fair and balanced. The criticisms focus on what happened the following morning, Day 32 of the trial, on 19th May 2016. Having corrected an error he had made when dealing with the evidence of the social worker, attributable to a misreading of notes, the judge then commented as follows:

> "…ladies and gentlemen of the jury, you've heard all the evidence and you've heard the arguments advanced by counsel on both sides and you've heard my summary of the evidence. You will recall when I started my charge that I said it was my duty to give you the benefit of my knowledge of the law. And also to advise you in the light of my experience as to the significance of the evidence, if I think it might be of help to you in your deliberations. Remember that if I seem to express a view on the facts, it is your duty to reject that view if it doesn't appeal to you."

At that stage, the judge offered a very short statement about the prosecution and defence position. What he had to say in that regard is not really in controversy. He then continued as follows:

> "Ladies and gentlemen of the jury, you will recall the evidence of [Ms. C, the second foster mother] who described that from an early time when she was fostering [A, the complainant] that he exhibited a high degree of sexualisation. For example, looking down her top, looking through a keyhole at her in the shower at the early stages and culminating in nearly two years later in more serious sexualisation in relation to the dog. [A] was eight, nine and ten at this period of time. It is clear from the evidence of Garda Savage and Garda Burke in relation to the investigation of abuse which existed in the [B] family [the first foster family], it seems that the only allegation of abuse of [A] was that of [another foster child] when he stayed in [E's] house [the house of the sister of the first foster parent]. You may recall [A]'s surprise at the issue of the investigation of his half-brother […] as he knew nothing about it. It's a matter for you to decide whether the incidents which took place in the [B family] house or [E]'s house were responsible for this sexualisation or whether this was due to his experience at an earlier time.
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> You may recall the evidence of [the complainant's former school teacher, Ms. F] in answer to [defence counsel]'s question, "And was there anything in particular that you recall in relation to that when you say in relation to boundaries?" [Ms. F] answered, "He didn't when it comes to adult, he was he behaved inappropriately towards adults, he would try and give them hugs, he would be over familiar with them. [A] has this well, I don't know if he still does, but he has this funny way of sometimes putting on a voice like an old man and he would come up to you and have this little chat with you as if he were an old man. We say to you, 'Oh how well how, how's your day going'? And he would say, 'Oh it's a terrible weather out there, isn't it'?" [Defence counsel] then said, "Right, okay?" And [Ms. F] said, "Which wouldn't be typical of a boy of his age." That is a matter for you to decide, bearing in mind when he was nine, when he made his statements in relation

to his father and subsequently his mother. However, this is a matter for you to decide and you are entitled to reject my views if I express them."

19. The appellant submits that a trial judge should, at all times, exercise care and restraint and avoid entering into what is the arena of the jury. In that regard, the appellant points to a decision of the Supreme Court in the case of DPP v. Rattigan [2017] IESC 72. It may be that the judge's comment to the effect that the jury would recall that when he started his charge, he said it was his duty to give them the benefit of his knowledge of the law and also to advise them in the light of his experience as to the significance of the evidence, led to a belief that the judge was about to say something very significant or perhaps something that might go to the very limits of the bounds of what was proper and arguably beyond. In fact, what the judge had to say was, in this Court's view, non-controversial. That the complainant had been sexualised to quite an extraordinary degree at an early stage was a matter that featured prominently during the course of the trial – it was not in dispute. The real issue, however, was how this was to be explained. Was the explanation to be found in what occurred in the family home, or was the explanation to be found later in the first foster home? It seems to us that the judge did not go further than pointing out to the jury, which was not in controversy, that these appeared to be the two possibilities. We do not see any basis for suggesting that the judge sought to usurp the jury's function in opting for one of the two possibilities, or that he impermissibly tried to steer them in one particular direction. On three occasions, during the course of what were relatively brief remarks, the judge pointed out that it was for the jury to decide the question of fact that arose, and on two occasions, reminded the jury of the fact that they were free to reject his view if he seemed to express a view.

20. We are quite satisfied that nothing the judge had to say on the morning of Day 32 of the trial unbalanced what is accepted up to then had been a careful and balanced charge, and so we reject this ground of appeal.

Grounds (ii), (iii) and (vi)

Ground (ii): The trial judge erred in law and/or in fact in admitting evidence of the fact of a camcorder recording of the accused engaging in sexual acts with the co-accused and a third person and details of the content thereof..

21. This ground of appeal has its origin in an issue that arose on Day 12 of the trial, 20th April 2016, when the prosecution sought to adduce the contents of material on a camcorder seized by Gardaí during the course of a search of the appellant's home. Many of these tapes, from the perspective of the prosecution, were routine. They were the sort of tapes that one would expect to find in any household; recordings of a child's birthday celebrations and the like. The defence had some interest in these recordings, contending that the recordings were indicative of a normal and a happy household.

22. Amongst the items seized was a tape which showed the appellant and the co-accused engaged in consensual adult sexual activity with a third party in the living room of the family home. The tape was undated, but there was internal evidence that clearly indicated that the activity depicted had taken place significantly before the period during which it was alleged that the abuse of the complainant had occurred. The complainant can be

heard crying in the background off-camera and there was a soother/pacifier visible on screen which would suggest that he must have been very young at the time.

23. When the material was first viewed as part of the investigation by a member of An Garda Síochána, the view was taken that it did not contain material of evidential value as it involved only consensual adult sexual activity which was not relevant to allegations of serious child sex abuse. However, in the course of the trial, the prosecution had second thoughts in this regard. This would seem to have been prompted by a number of factors. There was concern that efforts were being made by the defence to present the household as a normal, happy one. There was also an emerging awareness that the initial viewing of the material, and the initial judgment that it was not of evidential significance which followed from that, had come at a time before the full detailed allegations of abuse were available from the complainant, and also before the then accused had been interviewed in relation to the allegations. The view was taken that these factors required a reassessment of the situation. There was a further practical consideration in that there were a number of Gardaí who were present in the courthouse for what was becoming a very lengthy trial, but who were excluded from the courtroom and it was felt there was an opportunity to deploy them to viewing and assessing material once more. As a result of this exercise, the prosecution decided to seek to introduce the evidence. This gave rise to legal argument which took up the entirety of Day 12 of the trial.

24. In the course of the legal argument, the prosecution advanced a number of points. They contended:

- that the appellant had engaged in filming adult sexual activity of a group nature and that this was consistent with the complainant's claim that he had been video-recorded;

- that the complainant had said that he was video-recorded in the lounge area and that the sexual activity on the camcorder had taken place there;

- that the complainant had said that his parents watched pornography, adult and child pornography, and that the recording showed adults watching pornographic material while engaged in sexual activity; and

- that the use of a lotion applied to the genital area was consistent with evidence from the complainant that his father had applied a gel to him from a bottle with a blue top or covering.

25. The lead on this issue was taken by counsel on behalf of the co-accused. It was argued that what was being contended for by the prosecution was simply too great a leap and was wholly speculative; that the evidence was massively prejudicial but entirely non-probative; and that all that was recorded on the camcorder was the vulgar drunken behaviour of consenting adults.

26. The judge approached the issue with some care, viewing the material in its entirety. He was clearly of the view that the material would not depict the accused in a positive light, and to that extent, would be prejudicial. However, the judge felt that there were aspects of the material which were the subject of legitimate interest on the part of the prosecution. He identified the application of the cream or gel to which he attached significance because the child complainant had said that his father would put a gel on his fingers and then apply it to him. The judge also attached significance to the fact that there were tapes on a table in the lounge which appeared, on the basis of their covers, to be of a pornographic nature, and there was a pornographic film playing on the television. This was seen as significant in a situation where the child complainant had given evidence that he had watched films with his father in which nude men and women were having sex. Again, the judge attached significance to the use of the camcorder or video-recorder in a situation where the child complainant's evidence was that his father had a video camera and would sometimes record his mother and the child complainant having sex.

27. In ruling on the matter, the judge decided that the prosecution would not be permitted to show the recording to the jury but he was prepared to allow a member of An Garda Síochána give evidence in respect of some aspects of what was to be seen on the recording. The judge ruled on the matter on Day 16, 26th April 2016, as follows:

> "However, the Court is satisfied that there are issues of which evidence can be given in by Garda Halpin who viewed the tape. The Court is satisfied that Garda Halpin, should the prosecution wish to call this evidence, should make a new statement dealing with matters as follows; [the complainant, A] stated that his father would put special gel on his fingers and that his father would put his finger in his bum and he would rub it around and this gel stung. [He] [d]oesn't remember what the product is called but he said it was blue. Detective Garda Halpin can give evidence of viewing this tape indicating that [the appellant], [the co-accused] and an unknown adult female were on the video and that there appears to be moisturising cream from a white plastic bottle with a blue and red label. The video also shows [the appellant] applying the lotion to the genital area of the two women.
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> Detective Garda Halpin can give evidence that there were two tapes on the on the in the table of the lounge, the top of which was clearly a pornographic tape and there was on the television a pornographic film. [The complainant, A] has given evidence that he would watch movies with his dad on TV, there would be be where people would be there would be men, a woman having sex with each other and they would be nude. He then said that there was on a computer, which was not in the lounge, there were children in it as well. Obviously no mention should be made of children or the computer, but Detective Garda Halpin can give evidence of seeing [the appellant], [the co-accused], the unknown female watching a pornographic movie and the existence of at least one pornographic video which may relate to the video that was being shown on TV.

> Detective Garda Halpin can also give evidence that there was a camcorder or a video camera being used. [The complainant, A] said his father had a video camera and he would sometimes video record his mother and himself having sex. In accordance with the decision of the [P]eople v. McNeill, I am admitting this evidence to make the evidence before the jury complete and it is both relevant and is evidence of consistency."

28. At first sight, the idea of admitting evidence relating to consensual adult sexual activity in the course of a prosecution for child sexual abuse would seem counterintuitive. However, on further examination, there were powerful factors present in favour of admission of the evidence. While the decision to seek to admit the material would seem, in part, to have been prompted by a desire on the part of the prosecution to confront any suggestion of a normal, happy family, or even an idyllic household, this would not, of itself, have provided anything like a sufficient basis to see the evidence admitted. However, there were other matters that required consideration.

29. In that regard, we would instance the following as significant. Firstly, there was the fact that the sexual activity was video-recorded. This carried some significance in a situation where the child complainant had said that this was his father's practice. The fact that the adults were watching pornography together was consistent with, and provided support for, the child complainant's account that this was something that happened in the house. The significance of the playing and viewing of pornography was greatly heightened by the fact that the appellant had been questioned about this in the course of interview by Gardaí and had been emphatic in his assertion that there was no pornography in the house after the child complainant was born. The material seized established that this was a direct lie. A further matter of note is that on the recording, the appellant is reading what appears to be some sort of a story where the question of defecation features prominently. The child complainant's narrative had also raised the question of defecation and his father's interest in that. As such, it appears that some further support for the reliability of the child complainant's narrative was provided. However, this was not a matter adverted to by the trial judge.

30. The trial judge was clearly conscious of the fact that the admission of the material was damaging to the then accused, now appellant. Thus, as we have seen, the judge decided that the matter should be dealt with not by playing the video, but by a Garda who had viewed it reporting on some but not all of what he had seen. It seems to us that this approach exemplifies a trial judge who was acutely conscious of the competing considerations of relevance and probative value on the one hand, and prejudice on the other.

31. While the relevance of the material might not have been immediately apparent, this Court is of the view that on close analysis, the relevance of the material becomes clear. Accordingly, we have not been persuaded that the judge was in error in dealing with the matter as he did. Therefore, we would not be prepared to allow this ground of appeal, taken in isolation, to succeed.

Ground (iii): The trial judge erred in law and/or in fact in allowing the previous convictions of the accused to be put before the jury.

32. On Day 22 of the trial, the prosecution made an application to the trial judge for leave to adduce evidence relating to the appellant's previous convictions, in respect of which a notice of additional evidence had been served on the defence the previous day. We have already commented that at first sight, the idea of adducing evidence of consensual sexual adult activity in the course of a prosecution for child abuse seems quite strange. One's immediate reaction to adducing evidence relating to previous convictions might be similar in circumstances where, at first blush, convictions for the theft of a paddling pool and a jar of mustard, and a conviction for being drunk in charge of a mechanically-propelled vehicle and a public order offence, could scarcely be further removed in character from the extraordinarily grave allegations before the Court. Indeed, one's first impressions would have to be that there was a considerable air of unreality to this issue. How could it be thought that a jury would think the worst of someone on trial before them for offences of extraordinary seriousness because it was established that the accused had been convicted of stealing a paddling pool, which was presumably intended to benefit his son? However, as in the case of the video recording, a somewhat different picture emerges as one delves deeper into the issue.

33. As to the other matters, the judge did not permit evidence of the public order offence to be given but did permit evidence in relation to the drunk in charge matter. The prosecution were interested in this in circumstances where the child complainant had stated that the appellant had sexually abused him when drunk. Their interest was heightened by the fact that the appellant, in the course of interview, had denied drinking and drunkenness. However, in interview, while the appellant had indicated that he had not been drinking for many years, he did accept that there was one aberration when he encountered two couples who were sailing around the world on a trimaran, who had invited himself and his son, the complainant, onboard. He subsequently met them in a local public house and had a few drinks. In interview, he describes "being done for this", an apparent reference to the drunk in charge matter.

34. So far as the theft matters were concerned, the child complainant had given evidence that the appellant had encouraged him to steal, a contention very far removed from the suggestion of ultra-responsible parents so concerned with any suggestion that their child would steal, that they would want to raise this with the schoolteacher. The complainant's former teacher had been cross-examined on the basis that the accused and his co-accused had demonstrated concerns that the complainant had been stealing in school. The suggestions were that this was relevant on two different bases; that the child was dishonest and unreliable, but also and perhaps primarily, on the basis that because the parents approached the schoolteacher about concerns that their child was stealing, that this showed them as concerned, responsible parents. The schoolteacher's response was to indicate that there were no particular concerns about the child stealing, that she had some memory that there might have been one issue involving a ruler or a rubber, but that incidents of that nature were not at all unusual in a primary school and would not be the cause of any concern.

35. So far as the drunk in charge matter is concerned, we do not see the fact that such an offence was recorded as being of any significance in the context of the case. It goes without saying that the fact that somebody has a conviction for being drunk in charge of a mechanically-propelled vehicle says nothing about whether they engaged in gross child sexual abuse. To the extent that there was an issue at trial about whether the appellant drank regularly and to excess, it did not really bring the matter any further. We say this because the appellant's position had been that he was not drinking at the time and that he had given up drink, but he accepted in the course of Garda interview that his resolve broke on one occasion when he encountered the round-the-world sailors, and it appears that this was the encounter which led to the prosecution for drunk in charge.

36. Given what the appellant had to say in this regard, this Court does not think that the evidence on this issue was crucial in the context of the trial. Overall, it seems to us that the previous convictions which were admitted were relevant and were probative, offering support to aspects of the complainant's narrative. On the other side of the coin, we do not think that the disclosure of these convictions was seriously damaging. We think there is a certain unreality in the suggestion that a jury would think the worst of a person, or be prejudiced against a person facing allegations of the gravity that the appellant was facing, because of the fact of having convictions of this nature recorded. The recorded convictions were minor - one might even say trivial - and we do not think they would have impacted on how the appellant was regarded by the jury. We do not think that this was a case where the prejudicial effect exceeded the probative value.

Ground (vi): The trial judge erred in law and/or in fact by admitting extracts of the memoranda of interviews of the accused which were prejudicial to him and were not probative of any matter in issue in the case.

37. This ground of appeal relates to memoranda that were taken of three interviews conducted under caution on 22nd August 2012. It should be noted that not only were the interviews conducted under caution, but that prior to them, the appellant had an opportunity to consult with his solicitor. As is usual in such cases, an amount of editing was undertaken by agreement between the parties, but there were areas that were left to the trial judge to rule on. So far as the matters that were in dispute were concerned, the defence position was that they were not relevant or probative, or if they had any probative value whatsoever, that their prejudicial effect outweighed the probative value.

38. The extracts in question are set out in full in the course of the written submissions on behalf of the appellant. In summary, the extracts deal with the appellant drinking with the round-the-world sailors on the trimaran (interview no. 1), his interactions with health service personnel (interview no. 2) and his visitation rights (interview no. 3).

39. The appellant says that certain extracts from the memoranda of interview should not have been put before the jury. The appellant says that the extracts were not relevant and that their only effect was to cast the appellant in a poor light, showing him as a person who was prone to losing his temper and being aggressive.

40. For her part, the Director says that there was no issue about the fairness of the interviews and no suggestion that the answers given were not voluntary. The Director

says that the complainant's evidence had been that he was afraid of his father, that his father had been violent towards him, that his father had threatened to kill him if he told anyone, and specifically threatened that he would "throw him out the window". The Director says the fact that the same threat to "throw him out the window" was directed at a HSE social worker was of particular resonance. The Director says that one cannot lose sight of the fact that the role of social workers was very much to the centre of the case since the appellant was contending that false allegations had been made up about him by his son as a result of being "brainwashed" by social workers. The Director also says that the extent of the appellant's drinking was of real significance in the context of the case. They point to extracts from the evidence of the complainant who referred to his father always going out to the pub and getting drunk, "like, very drunk".

41. It seems to us that the topics that were being explored during interviews, including the relationship with HSE personnel and the extent of drinking, were matters for legitimate exploration. The appellant chose to answer questions on these topics and did so having had an opportunity to take legal advice. In the circumstances, we do not believe that further editing beyond what was agreed was required.

42. Overall, we have not been persuaded that the issues that have been raised in grounds (ii), (iii) and (vi), whether considered in isolation or viewed cumulatively, give rise to concerns about the fairness of the trial or the safety of the verdict.

Ground (iv): That the trial judge erred in law and/or in fact in admitting the evidence of Ms. C, the complainant's foster mother, as evidence of recent complaint and/or as background evidence.

43. The background to this ground of appeal is that on 29th and 30th April 2012, the complainant disclosed to his foster mother, Ms. C, that the appellant had locked him in a shed and that he had been sexually assaulted during the period of his first foster placement. However, the first allegation of sexual abuse by his father was not made to Ms. C until 30th May 2012. Thereafter, there were periodic reports of sexual abuse.

44. The appellant seeks to put the disclosures in context and points out that the first disclosure by the complainant was as far back as 4th April 2011, and at that stage, it was confined to allegations of physical and emotional abuse. A Garda investigation ensued and two interviews, which were conducted by specialist Garda interviewers, were recorded on DVD in September 2011 and August 2012. Ultimately, the first time that there was a formal complaint by the complainant to Gardaí was by way of written statement on 13th August 2012. However, it seems that the issue of sexual abuse had been raised by him in the course of the clarification meeting that Gardaí held on 6th July 2012, but that was not followed through on at the video recorded interview.

45. The appellant takes issue with any suggestion that the first report of sexual abuse made to the complainant's second foster mother, Ms. C, could be regarded as a recent complaint. It is said that by that stage, there was an active Garda investigation underway, the complainant had been apart from the appellant for over a year, and so it is said that the question of dominion could not continue to arise. It is also pointed out that there had already been a disclosure, albeit not of sexual misconduct, made to his foster

mother. It is said that clearly there were ample and reasonable opportunities to make disclosures between April 2011 and May 2012, but if these opportunities were not taken, then it cannot be said that the complaints to Ms. C were made at the first opportunity. The appellant says that the possibility that disclosures were being made because there was a receptive ear, and were being made in order to gain favour, was a live one and certainly not one that could be excluded. The appellant says that the difficulties presented for him by the belated disclosures were compounded to an unacceptable degree by the fact that Ms. C recorded what was said in a diary or log. It should be noted that Ms. C was required by her employer to keep a log recording significant occurrences in the life of the child in her care.

46. It is said that the reference to the log diary offended against the rule against narrative and was, in effect, used by the prosecution as an independent stream of supporting evidence.

47. The Director takes issue with the suggestion that the complainant had "ample and reasonable opportunities" to make disclosures of sexual abuse if he wanted to, prior to making an eventual disclosure. This Court finds itself in complete agreement with the Director in that regard. The complainant was a very young child. His foster mother, Ms. C, described how he would become highly distressed when making disclosures. She did so in these terms:

> "[The complainant] was quite small and a petite little boy at this age and he would just – he'd just melt into your lap and curl up in a little ball."

It must be appreciated that in May 2012, the complainant was just nine years of age. His first foster placement had not been a success and significant issues had arisen there. However, within a very short period of being in an environment where he felt safe and secure, he was in a position to make disclosure of sexual abuse. We see it as significant that disclosure was forthcoming soon after the commencement of the second foster placement, but the circumstances in which disclosure was made are also significant. For example, disclosures of misconduct by his father associated with the shower emerged in circumstances where the complainant was stating that he did not want to get into the shower because of his experience of his father getting into the shower with him.

48. In relation to the child cruelty charge which focused on an allegation that the complainant had been locked up in a cage in the garage by the appellant, this emerged when Ms. C and the complainant were watching a programme on television which involved a depiction of poachers locking a gorilla in a cage. When this appeared on screen, the complainant hid under a blanket and started crying, and when asked what was wrong, he compared what was happening to the gorilla on screen to what had happened to him in the cage in the garage.

49. So far as the log entries are concerned, as we understand it, these were not retained in the possession of Ms. C, but submitted by her to her employers as she was required to do. The next time they became available to her was in the context of her giving evidence

as a witness at trial. If there was a contemporaneous record of when the complainant made disclosures and what the individual disclosures touched on, then we can see no reason why the witness would not be permitted to refer to her record. We cannot see any logic in a suggestion that the witness should be forced to rely on her memory of what was said and when at a time remove of several years when there was a contemporaneous record available to assist her recall. Overall, it seems to us that the trial judge was entitled to take the view that the disclosure criteria for admissibility were met. Therefore, we are not prepared to uphold this ground of appeal.

Ground (v): The trial judge erred in law and/or in fact in failing to exclude the opinion evidence of the complainant's social worker

50. To put this ground in context, it should be explained that on a regular basis during the period that he was placed in the specialist unit in England, the complainant received visits from his social worker and also from his guardian ad litem. One such visit occurred in February 2015 involving his social worker, another TUSLA social worker and the guardian ad litem. During the visit, the Irish professionals took the complainant to a McDonalds which was located close to the residential centre. This meeting was at a time proximate to the original trial listing. During this McDonalds meeting, the complainant stated that he wished to retract the allegations and said that he had previously lied about being abused. This was recorded in social work records. The fact of retraction was not disclosed by TUSLA until late in the day which was, in effect, not until the eve of the trial that had been listed for February 2015. Late disclosure saw the trial adjourned. Statements were then taken by Gardaí from the complainant and from the relevant professionals. The complainant said that he had been apprehensive about the forthcoming trial and had sought to avoid the trial by claiming that his allegations were a lie. He reiterated at that stage that what he had previously said about having been abused was true. In her statement, the complainant's social worker said that she had never believed the retraction and that in her experience, children in the complainant's situation sometimes lied in order to avoid going through a trial.

51. It was this reference to not being surprised about the retraction, and the fact that the experience of the social worker was that retractions pre-trial were not uncommon, that gave rise to the legal issue. The Court ruled that the social worker would be allowed to give evidence of the fact that she was not surprised by the complainant's retraction based on her experience as a professional social worker who works with children, in particular, children who had been subjected to trauma and sexual abuse. The statement of the social worker envisaged her going further than the judge was prepared to admit her doing. At this stage, the issue seems to relate to the following exchange in examination in chief:

> "Q. And were you shocked or surprised by what he said to you?
>
> A. No, no. I suppose children in care do have difficulties with -- with their past and --
>
> Q. And you would have seen that as a professional social worker?
>
> A. Absolutely, absolutely, time and time again."

52. It seems to us that the appellant overstates the significance of what the social worker was doing and what the social worker was being permitted to do. The social worker was not saying that, in her opinion, the original complaint ought to be believed, but was reporting on the fact that, in her experience, children, not infrequently, do retract complaints in the run-up to a trial that is listed for hearing. In a situation where the extent of the reaction on the part of the social worker and her colleagues was likely to be in issue, we can see nothing objectionable in what she was permitted to say. Accordingly, we will reject this ground of appeal also.

Ground (vii): The trial was rendered unsatisfactory and unfair due to the repeated service of additional evidence by the prosecution on the defence throughout the trial

53. The appellant is at pains to point out that this is very much a subsidiary ground which should be read in conjunction with and as supplemental to the other grounds of appeal.

54. It is said that it is estimated that there were seven notices of additional evidence served during the course of the trial and that this added to the difficulties that the defence were facing, which were already considerable, as they were required to cross-examine a 13-year old boy, with an array of supports available to him, at great length. The respondent rejects the suggestion that there was any prejudice arising from the fact that additional evidence was served. It is pointed out that a majority of the additional evidence was material that had already been served by way of disclosure.

55. We have already expressed our concern about the duration of the trial and have referred, in particular, to the length of time that the evidence of the complainant took. It seems that one consequence of a protracted trial is that it may lead to a reassessment of material that has already been served, and a decision that because of the run of the trial, what had previously been regarded as insufficiently relevant to be put before the jury should now be adduced in evidence. In any case, we think that before serving additional evidence, the prosecution needs to consider whether the evidence that is being considered is necessary and will really add to the case that they seek to make. However, in the present case, we do not believe that the service of the additional evidence disadvantaged the defence. There is no suggestion that they were not in a position to cope with the material served and we are satisfied that there is no basis for suggesting that the service of the additional evidence rendered the trial unsatisfactory or unfair.

56. Having considered each of the grounds raised, we have not been persuaded to uphold any ground. We are not of the view that any of the grounds argued, whether considered individually or cumulatively, have caused us to doubt the fairness of the trial or the safety of the verdict.

57. Accordingly, we dismiss the appeal.