THE COURT OF APPEAL

Sheehan J.
Mahon J.
Edwards J.

Record No. 250/2010

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

E.C.

Appellant

Judgment of the Court delivered on the 12th day of May 2016 by Mr. Justice Edwards

Introduction
1. In this case the appellant appeals against his conviction by a jury in the Central Criminal Court on the 20th of August, 2010, of multiple counts of various forms of rape and/or sexual assault of his three children "J", "A", and "K", respectively, following a thirty two day trial.

2. In summary, the jury convicted the appellant of eighty five counts in total. These break down into thirty two counts of sexual assault, seventeen counts of oral rape and thirty six counts of vaginal rape. Twelve of the sexual assault counts related to J, three related to A, and seventeen related to K. All seventeen counts of oral rape related to A alone. Finally, twenty four of the vaginal rape counts related to A, and twelve related to K.

3. The appellant received concurrent sentences ranging from three and a half years imprisonment to five years imprisonment in the case of the sexual assaults, and ranging from ten years imprisonment to life imprisonment in the case of the rape offences.

The Grounds of Appeal
4. The appellant filed a Notice of Appeal against his conviction specifying a total of twelve grounds. This Court was informed by counsel for the appellant at the commencement of the appeal hearing that ground no's 5 and 6, respectively, as set forth in the Notice of Appeal, were being abandoned, and that the appeal would proceed relying on the ten remaining grounds which are as follows:-

> *"1. The trial judge erred in law refusing to allow an adjournment of the case in circumstances where defence counsel had applied for such an adjournment on three occasions and where a large volume of disclosure had been provided by the prosecution two weeks in advance of the trial date.*
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> *2. The trial judge erred in law and fact by refusing to allow an adjournment of the case in circumstances where counsel applied for such an adjournment on the basis that media articles adverse to the appellant had recently been published in the press.*
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> *3. The trial judge erred in law and in fact in refusing applications on behalf of the appellant to have the trial adjourned to allow the appellant and his legal team sufficient time to view video footage that was necessary for the full and proper preparation of the defence case, particularly in circumstances where:-*
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> > *(i) The appellant was denied proper facilities prior to trial to view all the said material*
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> > *(ii) The appellant had not been given sufficient time to view the video-footage.*
> >
> > *(iii) The prosecution had held the material for a long period prior to the trial before returning it to the appellant to allow it to be viewed.*
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> *4. The trial judge erred in law and fact by misdirecting the jury on the issue of corroboration and in particular by directing the jury that they could find that the condition of "J" when he was placed in foster care as a young child was capable of amounting to corroboration of his oral testimony that the offences were committed against him by the appellant.*
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> *5. [Abandoned]*
>
> *6. [Abandoned]*
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> *7. The trial judge erred in law by failing to charge the jury to the effect that the couch alleged to have been used in molesting "A" was not present in the room at the relevant time.*
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> *8. The trial judge erred in law by refusing to accede to the application made by counsel for a directed acquittal on the counts relating to "K" on the grounds that for a jury to return a guilty verdict on these counts would have been perverse even where as properly as possible directed by the learned trial Judge.*

9. The trial judge erred in law and in fact in refusing to accede to the application made by counsel for the defence at the close of the prosecution case to direct the jury to direct acquittals on the counts relating to "A".

10. The trial judge erred in law and in fact in refusing to accede to the application made by counsel for the defence at the close of the prosecution case to direct the jury to direct acquittals on the counts relating to "J".

11. The trial judge erred in law and in fact and erred in the exercise of his discretion in allowing "K" to give evidence by way of video-link despite the fact that she had at the time of the trial attained the age of 18 and was no longer a minor.

12. The evidence of the three complainants was inherently unreliable, in that:-

(a) they were recalling matters that allegedly occurred when they were young children;

(b) there were material conflicts between the evidence of each of the complainants;

(c) there were material conflicts between the evidence of the complainants and that of a number of other independent witnesses;

(d) there was no independent corroborative evidence to support the allegations;

(e) the extent and circumstances of the complaints of a sexual nature made by "K" and "A", respectively, in relation to other persons was a matter that necessitated either the granting of a direction on all the counts on the indictment or a particular warning from the trial judge to the jury;

and in the circumstances, the trial judge erred in law and in fact, in failing to grant a direction on all the counts on the indictment and in failing to adequately warn the jury in respect of the risk of convicting on foot of their evidence."

Ground No's 1 to 3 – The refusals to adjourn

5. It is convenient to deal with ground no's 1 to 3 together as they all relate to the refusal, on a number of occasions, of the presiding judge at various pre-trial hearings, to adjourn the trial in response to applications made by defence counsel, in circumstances where, for diverse reasons, it was being alleged that the appellant's trial was not ready to proceed.

6. There were essentially three main reasons put forward at various stages as to why the trial was not ready to proceed. The first concerned late disclosure of a large volume of material which the defence contended it had not had time to assimilate. The second concerned adverse media coverage which the defence suggested necessitated an adjournment so as to allow the potential prejudice thereby created to sufficiently dissipate by operation of the so-called "*fade factor*". The third concerned a claim that the appellant and his legal team had not had sufficient time to review video footage that they deemed necessary for a full and proper preparation of the defence case. The "*material*" the subject of the first complaint was overwhelmingly, though not entirely, comprised of the video recordings which were the subject of the third complaint. Accordingly, the first and third complaints can conveniently be considered together.

Alleged insufficient time to assimilate late disclosure and alleged insufficient time to view video footage.

7. An initial application was made for an adjournment on these grounds in late April 2010, in circumstances where the trial was due to commence on the 21st of June, 2010, and was refused on the basis that the trial was at that point still quite some distance away. The application was then renewed on the 18th of May, 2010. On this occasion, the case was made that the appellant required to view some 1,500 hours of video tape, and had only completed 10% of that. This was because the tapes had only been released to the defence in March, 2010 following a change of solicitor by the appellant. In addition, certain documentary disclosure, comprising details of state care arrangements in respect of two of the alleged injured parties, and concerning when they had absconded from care, had not yet been received. There was also a very large volume of documentary material, characterised by counsel as being *"a warehouse of legal documentation".* Finally, it was submitted that the trial was unlikely to finish by the end of the legal year.

8. The video tapes in question were home videos recorded by the appellant over several years, and which had been seized by Gardaí in the course of their investigations. It is common case that the video tapes do not record any incident of child sexual abuse.

9. The application of the 18th of May, 2010, was responded to, and opposed, by counsel for the respondent who pointed out that the case was initially returned for trial in 2008 and had been set down for trial in December, 2009. However, the initial trial date was vacated on the application of the defence for reasons similar to some of those being advanced in support of the adjournment application. All material that was within the power or procurement of the Director of Public Prosecutions to disclose had already been disclosed to the appellant's previous solicitors. With respect to alleged delay in making certain material available to his present solicitor, it was contended that this had not yet occurred solely because the appellant's solicitor had not provided a requested undertaking in respect of dissemination of the material that would be supplied to him, and accordingly the fault lay on the defence side.

10. The presiding judge then ruled:-

"Very good. This is a case in which there was a return for trial on 22nd December 2008. There has already been a trial in relation to this matter. The case concerns the alleged abuse of three minor children, and it seems to me that the parties should focus on that rather than warehouses of legal documents. Everything is now being weighed down on both the civil and criminal side by warehouses of legal documents and the perusal of same, and that is not to be encouraged. It seems to me that the trial is still over a month away and there must be ample time for preparation. I'm not disposed to interfere with the listing."

11. It is common case that the then presiding judge was incorrect in his belief that there had been a previous trial in relation to the matter.

12. The application for an adjournment was renewed on the 14th of June, 2010. The grounds advanced on this occasion were again that there was insufficient time for the appellant to view all of the video. In addition, the material was recorded on several different media, including VHS tape cassettes, camcorder tape cassettes and minidisks, and the appellant was having difficulty in acquiring the

equipment necessary to play those recordings that were on media that is obsolete or no longer commonly available. Further, certain third party disclosure requested from the HSE, to which two of the injured parties had lately agreed, was still awaited. Correspondence from the appellant's solicitors to the Chief Prosecution Solicitor raising these and other issues was opened to the Court. Counsel for the appellant concluded his renewed application by stating:-

> *"I suppose, to summarise it all, my lord, Mr C is now overwhelmed by all of this material that he has to go through for the purpose of properly instructing his legal representatives so that they're in a position to cross-examine the various witnesses contained on the book of evidence, my lord. And for those reasons, I am renewing the application on Mr C's behalf, my lord, for an adjournment."*

13. The renewed application was also opposed. Counsel for the respondent again pointed out that the matter had been initially listed for trial on the 7th of December, 2009, but that that date had been vacated at the behest of the defence on the basis that the trial would not finish within the two week period originally allocated to it. The point was further made that the appellant had on two occasions changed his legal team so that he was now on his third legal team. With regard to the video recordings, counsel stated:-

> *"In respect of the tapes that have been referred to, these are, as my friend has said, the accused man's own tapes, which were some kind of home movies of a kind, and, in respect of those particular tapes, inspection facilities were always made available to Mr C and his legal team in respect of those tapes. A schedule of the content of the tapes were also furnished to the defence, but, furthermore, as they are Mr C's own tapes, he surely must be in a position to identify what tapes he considers to be relevant, given that he made the tapes himself. Furthermore, in June of 2009 he was advised of these particular tapes. No response was received in respect of that correspondence. That was confirmed again on 20th November 2009, and also a schedule was prepared by the gardaí in relation to the contents of the tapes to assist Mr C in identifying the tapes which he believed to be of relevance to the defence. There was no response received to that particular letter. On the 10th of March the -- 129 of the tapes were delivered to Mr C's then legal representatives, and the remaining 12 tapes were delivered to his current legal representatives on 8th April of 2010. There was no further correspondence in respect of the tapes, but the prosecution have done everything possible to remind Mr C as to the content of the tapes so that it's easy for him to establish if any of those tapes are relevant. In respect of the matter, the defence now have three counsel and obviously a solicitor's office to assist in the disclosure material."*

14. Finally, it was pointed out that the last piece of disclosure had been made on the 16th of April, 2010, and that the further material awaited from the HSE to which defence counsel had alluded had only just been received by the DPP and would be made available to the defence within 24 hours.

15. The presiding judge then ruled:-

> *"Very good. The Court of Criminal Appeal, as I have observed many times, have not supported me where I forced a case on, and, accordingly, since then, I have normally refused to do so. However, I consider this particular application which is the third for an adjournment in respect of the instant trial date so devoid of merit that I'm refusing the application, notwithstanding."*

16. The defence was served with five boxes comprising further disclosure material on Friday the 18th of June, 2010. These comprised the materials received from the HSE referred to by counsel for the Director of Public Prosecutions. On Monday the 21st of June, 2010, when the trial was due to commence, there was no suitable courtroom available and the trial was adjourned until the 5th of July, 2010.

17. Prior to the arraignment and the empanelment of a jury on the opening day of the trial, counsel for the appellant sought an adjournment, yet again, on the basis that the appellant had not had enough time to go through all the video-tapes and assimilate documentary disclosure, and further on the basis that, in relation to adverse media coverage, insufficient time had elapsed to allow the fade factor to fully operate.

18. Having had various authorities opened to him concerning, on the one hand, the need for a court to be satisfied, before intervening, that there would be a real risk of an unfair trial; and, on the other hand, the need for the court to in fact intervene where such a risk was shown to exist, and before allowing the trial to proceed to take all necessary and appropriate steps to ensure that the accused would in fact receive a fair trial, the then presiding judge ruled as follows:-

> *"JUDGE: Very well, I've already refused three and a half applications for an adjournment in this case, and the Court has gone to considerable trouble to find a judge who can hear this case. In relation to the new matter advanced today, I note that the Director of Public Prosecutions has before me at the moment contempt proceedings against the Sunday World in respect of an article in similar terms as that produced in relation to Mr C. The date of that is May the 17th, 2009, and I have regard to the principles in relation to fade factors. Giving any more time would really amount, in effect, to giving immunity and I'm not prepared to do that. When I have forced cases on, I have by no means necessarily been backed in that course in the Court of Criminal Appeal, as a result of which I have substantially refused to force cases on in recent times. But as I say, not to do so in this case would, in effect, be granting an immunity against prosecution which I am not prepared to do. Accordingly, I'm directing that the case proceed at the risk of the prosecution …."*

19. While the presiding judge's ruling on the adjournment application on this occasion was primarily focussed on the second ground relating to adverse media coverage, he nevertheless made it clear, in circumstances where the defence had already had considerable time to prepare, that he was not prepared to give more time and that he believed that to do so would amount to giving the defendant immunity against prosecution. Just for the sake of completeness, it should be stated that the presiding judge's reference to a new matter being advanced related to information conveyed to the court within defence counsel's submission concerning the second ground relied upon, namely adverse media coverage, and did not concern the complaint of insufficient time to view the video tape material and/or to assimilate documentary disclosure.

20. The trial itself then commenced on the following day, the 6th of July, 2010, before another judge (the trial judge). Once it commenced, no further applications for a postponement of the trial due to an alleged insufficiency of time to prepare were made to the trial judge. An application was, however, made by defence counsel on the second day of the trial to be allowed to defer his cross-examination of the appellant's daughter A overnight. The basis for that application was that a lot of discovery had *"occurred about two weeks before the trial was due to start"* and that, although *"we've gone through all of those, my lord"* and *"it was an incredible amount of work",* counsel wished, before embarking on his cross-examination, *"to be absolutely certain, my lord, that I've got everything."* This application was acceded to, and counsel was facilitated in accordance with his request.

21. There are two aspects to the complaint about the failures to adjourn the trial to allow more preparation time, which are said to have resulted in an unfairness in the trial. The first concerns the assertion that the defence legal team had insufficient time to assimilate all disclosed material. The second concerns the appellant's assertion that he himself had insufficient time to view all of the video tapes. The appellant's overall case in regard to both of these matters is succinctly stated in the following terms in his written legal submissions. A decision to adjourn a trial is clearly a matter for the discretion of the judge concerned, but such discretion must be exercised fairly and with due regard to an accused person's right to a fair trial. It therefore must be exercised in a constitutional manner. This was a trial relating to serious criminal allegations. It was submitted that the trial was not ready to proceed, and therefore the appellant's defence was inhibited and placed at an unfair disadvantage.

22. To deal with the first point, the appellant's case is that his defence team required more time to go through the voluminous disclosure that had been made in the months coming up to the trial. There was late disclosure and, it was contended, ample time was not afforded to prepare properly for such a difficult trial. While the trial was a difficult one, involving as it did allegations from three different complainants spanning a great number of years, and involving a considerable amount of documentary disclosure, the appellant was afforded the facility of an extension of his legal aid certificate to cover a solicitor and three counsel instead of the usual solicitor and two counsel. The only very late disclosure, in terms of the eventual commencement of the trial on the 5th of July, 2010, was a number of boxes of material (eight according to the defence, four according to the prosecution) received from the HSE and furnished to the appellant's lawyers on the 18th of June, 2010, some 17 days before the trial commenced. Even if the number of boxes was eight as suggested by the defence, one would have expected that with a larger than normal legal team, and 17 days in which to do so, that amount of material could have been adequately assimilated. Moreover, it is clear from the fact that no application was made to the trial judge for anything other than for an overnight postponement of the cross-examination of one complainant, and the express acknowledgements made by senior counsel for the appellant on the second day of the trial that *"we've gone through all of those, my lord"* and "*it was an incredible amount of work*", that the late furnished material was in fact adequately assimilated.

23. It also bears remarking upon that nowhere, in either the written or oral submissions advanced on behalf of the appellant, is any specific instance identified in which the appellant's legal team were allegedly placed at a disadvantage by virtue of not having had sufficient time to assimilate the significance of documentary material disclosed to them. The appellant has not been able to point to any document in respect of which he could say either (i) that it had not come to the notice of his legal team in time to enable it to be used in cross-examination, or otherwise deployed in support of the defence; or (ii) that because of the lateness of disclosure the full significance of it had not been appreciated in time to enable it to be so used either at all or to maximum effect.

24. The second aspect of the complaint under this heading relates to alleged inability on the part of the appellant to have viewed all of the video recorded material in the time available to him. The evidence was that the majority of the material at issue was furnished to the defence legal team on the 10th of March, 2010, a little under four months prior to the commencement of the trial on the 5th of July, 2010. The remainder of it, comprising just 12 tapes, was furnished on the 8th of April, 2010, just under three months prior to the commencement of the trial.

25. It was submitted that the tapes were relevant for a number of reasons and that some had been used by the appellant's legal team during the course of the trial to substantiate certain arguments or to refute, or cast doubt upon, matters alleged by each of the complainants, e.g., the sort of details concerning the circumstances or the timing of the offences that are sometimes characterised as "*islands of fact*" in the jurisprudence relating to delay in historic child sexual abuse cases. However, it was submitted, other material could not be relied upon in the same way as the appellant was not given sufficient opportunity to watch all of the videos for the purpose of instructing his legal team on the content.

26. Seemingly, the appellant may have had some initial difficulty in arranging access while in prison to the equipment needed to view some of the older recordings which were recorded on media that is now obsolete. Be that as it may, that difficulty appears to have been overcome certainly by the time of the adjournment application made on 18th of May, 2010. The transcript reveals that there was no complaint on that occasion about on-going equipment difficulties. Rather, the complaint concerned "*the sheer quantity of tapes and the duration of them"*, and the Court was told that he had only managed to view about 10% of the material at that point. Thereafter, the appellant had another 47 days in which to view the remaining material before his trial in fact commenced.

27. The appellant contends that there was approximately 1,500 hours of video-recorded material to be watched, and that he simply had insufficient time to complete that task before his trial commenced. However, several points require to be made in that regard.

28. First, this was not material with which he was wholly unfamiliar. He had made these recordings himself and therefore was aware, at least in general terms, of what material of potential use might be found on them.

29. Secondly, in addition to being provided with the actual material in question in March and April 2010, the defence were also furnished by the prosecution with a schedule, prepared by the Gardaí, indicating in outline what each recording contained, a facility that would have served to narrow any search that needed to be conducted by the appellant himself or his legal team.

30. Thirdly, the appellant has given no indication of the proportion of material he had yet to view as of the date of the commencement of his trial. On the 18th of May, 2010, his counsel had been able to say that he had at that stage only viewed 10% of the material. However, nowhere in the submissions on this appeal, and nowhere in the trial transcript, is it indicated how much remained to be viewed at the commencement of the trial 47 days later.

31. Fourthly, in making this complaint, there has been no engagement by the appellant with the actual evidence adduced. Although the written submissions filed on his behalf are replete with examples of where the appellant himself, in response to questions asked of him in cross-examination, asserted an inability to properly answer because he had not had an opportunity to view all of the video recordings, the appellant has not in this appeal, some five years later, been able to point to a single piece of evidence on video which was overlooked, or undiscovered, and which might have made a difference either by significantly undermining the prosecution case, or assisting the defence. The submissions filed on behalf of the respondent contend that the examples of alleged prejudice cited by the appellant all amount to either a non-specific complaint that the appellant could not properly prepare his defence, or else concern a detail which is of little or no consequence in terms of the issue in dispute. This Court agrees with that submission.

32. Fifthly, the point made above at paragraph 31 concerning the appellant's failure to engage with the evidence actually adduced in making the complaint which he now makes is all the weightier in circumstances where, as is acknowledged in the written submissions filed on behalf of the appellant, the defence did in fact make significant use of certain video recorded material at the trial, including for the purpose of addressing islands of fact in the complainants' evidence. The defence used video extracts to show, *inter alia*, the position, at various critical times, of a 'red couch' that had featured prominently in the evidence; to show the complainant's son J wearing an overcoat in 1998; to show the appellant's own very long finger-nails in 2002; and for the purpose of depicting the

circumstances of various supervised access visits and family holidays at relevant times. Given that such use was made at the trial of video material which the appellant had had a chance to review, it is reasonable to infer that if some additional important video material had been uncovered ex post facto, either on the basis that it had lain entirely undiscovered, or alternatively on the basis that its significance had not been fully appreciated due to the pressurised circumstances, and haste, in which it had had to be considered, this Court's attention would surely have been specifically drawn to it.

33. We are satisfied in the circumstances that no actual prejudice was caused by the then presiding judge's repeated refusals to accede to the various adjournment applications, and in particular the last one on the 5th of July, 2010. In ruling effectively that sufficient time had in fact been afforded for necessary preparations, his assessment was prescient.

34. While it would have been better if on the 5th of July, 2010, the then presiding judge had made explicit reference to the complaint of insufficient time to prepare, in addition to the remarks that he did make which focused on the second ground on foot of which the adjournment was sought, i.e., the adverse media coverage issue, we are nevertheless satisfied that he did not in fact err in the exercise of his discretion on that occasion. Indeed, we are satisfied that in so far as the various applications for adjournments relied on alleged insufficiency of time to prepare, he was correct on each occasion to refuse the adjournment sought, having regard to the circumstances existing at the time of each such adjournment application. We are satisfied that the appellant had in fact had sufficient time to prepare, as was borne out by the run of the trial.

Alleged adverse media coverage.

35. As mentioned already, the adjournment application made at the pre-arraignment stage on the 5th of July, 2010, was also based on alleged adverse media coverage. Counsel referred in particular to an article published by the Sunday World on the 17th of May, 2009, which, the appellant contends, contained significant falsehoods concerning him and which was in any case highly prejudicial to him in circumstances where his trial in the present proceedings was pending.

36. This was against a background of the appellant having been tried and convicted in relation to other criminal charges, comprising 52 counts of indecent assault involving two complainants in 2002, and then succeeding in 2006 in having his said convictions overturned on appeal by the Court of Criminal Appeal. However, he was then re-tried in 2007 on the same charges and was convicted again, following which he was sentenced to ten years imprisonment. He appealed against his said convictions for a second time, but his appeal was dismissed by the Court of Criminal Appeal in 2009.

37. Following his initial conviction, the newspaper in question had characterised the appellant as an evil monster and a beast, and, it was contended by the appellant, had accused him of matters of which he had not been convicted. The appellant had either sued, or had threatened to sue, the said newspaper, and it had at one point published an apology accepting that matters had been published concerning the appellant that had been incorrect. However, the appellant alleges that by 2009 the said newspaper was again publishing prejudicial material concerning him, including re-iterating some of the matters for which it had apologised for publishing previously. The appellant contends that a particularly egregious article was published on the 17th of May, 2009, just days after the Court of Criminal Appeal had rejected his appeal against his conviction for a second time following his re-trial in 2007. Seemingly, this article referred, *inter alia*, to the fact of his conviction in 2007 and the rejection of his subsequent appeal. This occurred in circumstances where the appellant had a further trial pending before the Central Criminal Court (i.e., his trial in the present proceedings) which was, at that time, scheduled to commence in December, 2009.

38. Following the publication of the article of the 17th of May, 2009, the appellant's legal team applied successfully to vacate the trial date set for December of that year, so as to allow the so called *"fade factor"* to operate. The trial was put back to the 21st of June, 2010, on the basis that by that point more than a year would have elapsed following publication of the article which had been regarded as so objectionable and so potentially prejudicial.

39. In the course of the adjournment application on the 5th of July, 2010, it was contended that insufficient time had elapsed for the required fade factor to have operated to such an extent as to adequately address the risk of an unfair trial. This ground was rejected by the then presiding judge, whose ruling has already been quoted at para. 18 of this judgment.

40. Counsel for the appellant has rehearsed at some length in the written submissions filed on his client's behalf the jurisprudence concerning an accused's entitlement to a fair trial and the duty on a court, where an accused has demonstrated a real and unavoidable risk of an unfair trial, to take such steps as may be necessary to counter that risk. Amongst the cases to which we have been referred are several cases concerning the risk of a fair trial being prejudiced through adverse publicity. These include both cases where the issue was raised within the trial and cases where it was relied on for the purpose of seeking to prohibit any trial from proceeding.

41. The Court was particularly referred by the appellant to the decisions in *P.O'C. v. The Director of Public Prosecutions* [2008] 4 I.R. 76; *The Director of Public Prosecutions v. Haugh (No. 2)* [2001] 1 I.R. 162; *Zoe Developments Ltd v. The Director of Public Prosecutions & Anr* [1999] IEHC 118 (Unreported, High Court, Geoghegan J., 3rd March, 1999); *D v. The Director of Public Prosecutions* [1994] 2 I.R. 465; *Z v. The Director of Public Prosecutions* [1994] 2 I.R. 476 and *The People (Director of Public Prosecutions) v. Nevin* [2003] 3 I.R. 321. The Court has read, and is in any event familiar with, these cases.

42. Indeed, to this list the Court would add *Redmond v. The Director of Public Prosecutions* [2002] 4 I.R. 133; *The People (Director of Public Prosecutions) v. Laide* [2005] 1 I.R. 209; *Rattigan v. The Director of Public Prosecutions* [2008] 4 I.R. 639; *The Director of Public Prosecutions v. Wharrie* [2013] IECCA 20 (Unreported, Court of Criminal Appeal, 19th April, 2013); *O'Brien v. The Director of Public Prosecutions* [2014] IESC 39 (Unreported, Supreme Court, Denham C.J., 14th May, 2014); *M.S. v. The Director of Public Prosecutions* [2015] IECA 309 (Unreported, Court of Appeal, Hogan J., 22nd December, 2015); and, most recently, *Lowry v. The Director of Public Prosecutions* [2016] IEHC 92 (Unreported, High Court, Noonan J., 23rd February, 2016) amongst others, as representing the consistent application of what is by now well settled jurisprudence.

43. In the case of *O'Brien v. The Director of Public Prosecutions* [2014] IESC 39, Denham C.J., being of the view (which we share) that the relevant law as to the right to a fair trial is well established, said (at para. 64):-

> *"There is no necessity to restate the law, other than to state that the courts intervene to prohibit criminal proceedings in circumstances where, it is established that there is a real risk that by reason of the circumstances of the case the applicant could not obtain a fair trial. The onus rests upon the applicant who seeks to prohibit his or her trial. The appellant in this case submitted that he could not receive a fair trial due to the prejudicial pre-trial publicity. The individual's right to a fair trial is a superior right to that of the community to prosecute, and a trial should not proceed if there is a real risk to a fair trial. However, the right of the community to prosecute, especially serious crime, and the position of victims, must also be considered by the Court."*

44. Yet more recently, Hogan J. in this Court, in *M.S. v. The Director of Public Prosecutions* [2015] IECA 309, a case on the civil side in which the applicant, a retired surgeon, sought to prohibit his trial for sexual offences on the grounds of a welter of prejudicial publicity following upon a Medical Council ruling adverse to him some six years earlier, remarked (at paras. 52-53):-

> *"While it is true that the allegations against the applicant have at times generated saturation coverage, it may be noted that there are really almost no examples of where coverage of this kind has been held to justify the prohibition – as distinct from the postponement – of a criminal trial: see, e.g., D. v. Director of Public Prosecutions [1994] 2 I.R. 465, Z. v. Director of Public Prosecutions [1994] 2 I.R. 476; Rhattigan v. Director of Public Prosecutions [2008] IESC 34, [2008] 4 I.R. 639 and O'Brien v. Director of Public Prosecutions [2014] IESC 39.*
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> *It may be accepted that had this welter of publicity occurred within the last 6 months or so, an application for an order staying the prosecution of the charges for a period of somewhere between 6 months and 12 months in order to enable memories to fade might well have been justified. In the present case, however, the wave of potentially prejudicial publicity has long since passed and there has been little by way of public comment since he was charged with these offences in July 2012. Judged, therefore, by the standards consistently articulated in this quartet of Supreme Court decisions from D. to O'Brien which I have just mentioned, I see no basis on which the applicant's pending trials can be prohibited on this ground."*

45. Counsel on behalf of the appellant has submitted that in the present case there is a real danger that the adverse media publicity about which his client complains unconsciously influenced the jury and prevented the appellant from obtaining a fair trial. He submits that the appellant's trial should have been further postponed to allow for the fade factor to properly operate and that the presiding judge hearing the adjournment application erred in law in refusing to further postpone the trial. It was further submitted that the appellant's right to a fair trial was wrongly made subordinate to the public interest in having him tried expeditiously. It was further submitted that the prosecution failed to act in a fair manner in insisting that the trial should proceed.

46. In response, counsel for the respondent points out that the article complained of was published on 17th May, 2009, and the trial commenced over one year later, on 5th July, 2010. The jury had also been warned that they should not serve if they knew anything about untoward events of a sexual character alleged to have taken place between the accused and the alleged injured parties. It was submitted that there had been sufficient time for the fade factor to operate. However, it was further submitted, even if this Court was of the opinion that the adverse publicity complained of could have jeopardised the appellant's prospects of a fair trial, then, following the approach adopted in *The Director of Public Prosecutions v. Nevin* [2003] 3 I.R. 321, this Court should proceed to ask the further question: was the trial which actually took place a fair one? It was submitted that it manifestly was.

47. In this case more than a year had been afforded to allow the fade factor to operate. In *Zoe Developments Ltd v. The Director of Public Prosecutions & Anr* [1999] IEHC 118, an adjournment of just six months had been considered adequate even though the impugned media comments in that case were highly prejudicial and referred to previous convictions for offences of unlawful killing.

48. It was submitted that the precedent value of *The Director of Public Prosecutions v. Haugh (No. 2)* [2001] 1 I.R. 162 was minimal because the circumstances of that case were sui generic, and it represented an isolated and rare case in which the prejudice was regarded as being incapable of being remedied by an adjournment, both on account of the defendant, a former Taoiseach, being one of the most readily recognised and well known persons in Ireland, and the fact that the prejudicial remarks were uttered by a senior member of the government. The circumstances of the present case were said to be not at all comparable.

49. It was further submitted that the adverse publicity, even if it had been recalled by one or more jurors, would have been dwarfed by the extended duration of the trial and the extent of the evidence heard on the issues: As was noted by Carroll J. in *The Director of Public Prosecutions v. Nevin* (at page 336):-

> *"Moreover, providing the judge effectively warns the jury to act only on the evidence given in court, there is no reason to suppose that they would do otherwise. In Kray [1969] 53 Cr. App. R. 412 at pp. 414 and 415, Lawton J. said:-*
>
> > *'The drama … of a trial almost always has the effect of excluding from recollection that which went before.'*
>
> *This was reiterated in Young and Coughlan (1976) 63 Cr. App. R. 33 at p. 37. In ex p. The Telegraph Plc (1994) 98 Cr. App. R. 91, 98, [1993] 1 W.L.R. 980, 987, I said:*
>
> > *'a court should credit the jury with the will and ability to abide by the judge's direction to decide the case only on the evidence before them. The court should also bear in mind that the staying power and detail of publicity, even in cases of notoriety, are limited and the nature of a trial is to focus the jury's minds on the evidence put before them rather than on matters outside the courtroom'.*
>
> *This quotation and particularly the quote within it from the very experienced trial judge, Lawton J., is, in the view of the court, apposite to this case. There is a big difference between, say, a one day trial taking place immediately after adverse publicity and, on the other hand, a 40 day trial. Reading the entire transcript of the third trial this court cannot but be impressed by the calm and resolute way the trial judge conducted the trial from start to finish. By the same token, this court cannot but be impressed by the length of time the jury took in arriving at their verdicts. The transcript, at every turn, gives the impression of a fair and orderly trial."*

50. In the present case the trial judge gave the jury directions on the need to disregard outside influences, on the very first day on which evidence was heard in the trial (the 7th of July, 2010, day 3). This arose from discussions between counsel and the trial judge in advance of the jury being put in charge. The trial judge was informed of the unsuccessful application for an adjournment heard by his colleague two days previously. In circumstances where the trial would be proceeding, he was asked to give the jury appropriate warnings. The judge agreed to do so saying:-

> *"JUDGE: Well I'll be saying to them as usual that they should decide the case not on the basis of what anyone says to them or anything, that they should avoid discussions, that they should avoid being influenced by what appears in the media, and I'll say to them that given that they'll have gathered that it's a case that goes back a distance that there might be a temptation on some of their parts to attempt to Google the parties with a view to informing themselves, and I'll urge them in the strongest terms not to do that.*
>
> *MR O'CARROLL: Yes, my lord."*

51. Following the jury being put in charge, prosecuting counsel's opening speech, and the usual formal evidence in a trial of this sort from a mapper and a photographer, the trial judge took the opportunity to address some remarks to the jury in advance of the first complainant being called to give her evidence. He said:-

> *"Can I just make this comment to you? When, at the end of this case, you go to your jury room, you'll be asked to retire and to deliberate and reach a verdict. The verdict that we want is the verdict of the 12 of you, and that may seem an obvious remark to make, but I make it to indicate that we want your view, as a jury of 12, uninfluenced by any outside factors. And it's the nature of things that if you tell people that you've been sworn to serve on a jury down in the new Criminal Courts' building in Park Gate Street that there will be people who will want to engage you in conversation, it's the most natural thing in the world, and they may have views to offer to you. So, I'd ask you to try and avoid getting yourselves into that kind of a situation where there might be any possibility of you being influenced by what the people you've been talking to might have to say, and it is the nature of things. You know, at this stage, what kind of case you're going to be hearing is; it's a case involving allegations of sexual misconduct in a family setting, and many people in society have strong views on that, so if people learn that you're serving on a jury, it would be the most natural in the world if they wanted to engage you in conversation and share their views on that topic. So, I'd ask you to avoid putting yourselves in that position. By the same token, this is a case that may or may not receive attention, either in the newspapers or on radio or television. There's really never any sure way of knowing whether any particular case is going to get publicity or not, but it's a case that might and I'd ask you to not pay attention to anything that you might happen to read in the newspapers or see on television because in the nature of things, with the best will in the world, the journalist is only going to be able to write two or three paragraphs or the broadcaster on radio or television is only going to give the matter a matter of seconds or a moment at most, and you'll have been here right throughout the day hearing hours of evidence. And, again, it's your impression and your view of what has been heard, rather than the view of the journalist or the broadcaster, however conscientious and to whatever extent they're doing their best. By the same token and related to that, you'll have gathered that this is a case that goes back a period in time. When the indictment was read out by the registrar the dates go back to the mid-'90s to the turn of the century, turn of the millennium, and there might be a temptation, on some of your part, to start doing your own research to, for example, Google the case or Google the names of the parties or of witnesses. That is something that I would urge you and which I would demand of you, with respect -- that you don't do because, again, you're not private investigators; you're here as jurors to observe what happens in court and then to deliberate on what you have heard and to give us a verdict, uninfluenced by any other outside source. So, the three messages are: Avoid getting into conversations, avoid paying attention and being influenced by anything you might see or hear in the media, and avoid using the internet to do your own researches."*

52. Counsel for the appellant made no complaint about either the comprehensiveness or adequacy of the trial judge's said instruction to the jury.

53. Later again, in the course of his charge to the jury, the trial judge emphasised to them that they could only act on the evidence that they had heard in court in the course of the case. While on this occasion he did not again allude specifically to the need for members of the jury to disregard anything that they might have read in newspapers, or elsewhere such as on the internet, or anything that they might have seen or have heard in the broadcast media, he was neither asked by defence counsel to re-visit or repeat what he had earlier said, nor was any requisition raised concerning this issue after he had concluded his charge.

54. The Court has carefully considered the helpful submissions from counsel on both sides. The presiding judge hearing the adjournment application had previously concluded that there was a real risk that the accused could not receive a fair trial having regard to adverse media publicity, and had granted an adjournment of over a year to allow the fade factor to operate. When the issue was raised again on the 5th of July, 2010, what he was required to address was whether the party seeking the adjournment, i.e., the accused, had established that there was an ongoing real risk that he would not receive a fair trial on account of adverse media publicity, and specifically the material published by the Sunday World on the 17th of May, 2009, such as to warrant a further postponement of the trial. Regrettably, the focus of the presiding judge's remarks was not on the issue of whether there was an on-going real risk of an unfair trial, much less on what steps might be required to address any such ongoing risk. On the contrary, the stated basis of his decision was that: *"[g]iving any more time would really amount, in effect, to giving immunity and I'm not prepared to do that"*. However, as has been pointed out time and again in the case-law, the individual's right to a fair trial is a superior right to that of the community to prosecute, and a trial should not proceed if there is a real risk to a fair trial.

55. To the extent that the presiding judge ostensibly failed to engage with whether or not there was an ongoing risk of an unfair trial, and focused unduly on the public interest in seeing the prosecution proceed, he was in error. Moreover, unlike the *Haugh (No. 2)* case, this was never going to be a case where the prejudice caused was incapable of being addressed by a postponement. To have granted a further postponement if it had been considered necessary would merely have delayed the trial further, but it would not have amounted to the giving of immunity from prosecution.

56. That having been said, this Court is not persuaded that there was in fact any merit in the application for a further adjournment. More than a year had been allowed for the fade factor to operate, and in the absence of any evidence tending to suggest that the postponement for that period had been ineffective, and none was offered, the accused could not have been regarded in any event as having discharged the burden upon him of demonstrating the existence of an on-going real risk that he would not receive a fair trial such as to necessitate a further postponement.

57. Moreover, it is clear from the transcript, that the accused did receive a fair trial. The trial judge instructed the jury in great detail that they were not to have regard to extraneous influences, and that they should decide the case on the evidence and the evidence alone.

58. In conclusion, on this issue, we are satisfied that the decision not to further adjourn the case on the 5th of July, 2010, on the grounds of ongoing prejudice arising from adverse media publicity was in fact the correct one, albeit a decision made for the wrong reasons and on a flawed legal basis. It was appropriate in all the circumstances of the case to allow the trial to proceed, and that is borne out by the fact that the appellant in fact received a scrupulously fair trial. We are therefore not disposed to uphold this ground of appeal.

Ground No. 4 - Corroboration

59. The complaint here is that the trial judge misdirected the jury on the issue of corroboration. There are two aspects to this complaint. First, the trial judge is said to have misdirected the jury in telling them that they could find that the condition of J when he was placed in foster care as a young child was capable of amounting to corroboration of his oral testimony that the offences were committed against him by the appellant. Secondly, the trial judge is also said to have misdirected the jury in suggesting that the

evidence of K that she had personally witnessed the sexual abuse of A by the appellant was capable of corroborating the testimony of A, in circumstances where their evidence contradicted each other on the issue as to whether K did in fact witness A being so abused.

Was the evidence as to J's condition potentially corroborative?

60. The appellant was charged with twelve counts of sexual assault of J. J, who was born in July, 1993 and who was 17 at the time of the trial, gave evidence on day 12 via video link and described being serially sexually abused at the hands of his father in what was then the family home, prior to being removed by the authorities and placed in foster care in February, 2000.

61. In the course of his evidence in chief, the complainant J had testified, *inter alia*, as follows:-

> *"Q. Now, you mentioned that these things would happen that your father would make you touch him on his private parts and you mentioned that it would happen upstairs in the bedroom or also you said the bathroom?*
>
> *A. Yes.*
>
> *[Witness then describes incidents of sexual abuse in detail]*
>
> *Q. All right. And used you when you needed to go to the bathroom where did you go to the bathroom?*
>
> *A. I used to go in the bedroom.*
>
> *Q. And why was that, J?*
>
> *A. Because I was afraid to go in the bathroom.*
>
> *Q. And when you say you used to go in the bedroom are you talking about going to the toilet in the bedroom?*
>
> *A. Yes.*
>
> *Q. Okay. And where would you go to the toilet in the bedroom?*
>
> *A. Anywhere.*
>
> *Q. Did that happen often?*
>
> *A. Yes, a lot."*

62. While J was being cross-examined by defence counsel, the following further exchanges took place:-

> *"Q. And would you have told your foster mum about what life was like back in [the family home]?*
>
> *A. Yes, I told her some things about it, yes. I told her that I used to get hit, not get fed, she knew what I got treated like because had I came to the house first I had my sister's clothes on, big long scruffy hair. The minute I went there and the social workers went my foster Ma went out bought me new clothes, gave me got me a hair cut, gave me a shower, looked after me.*
>
> *Q. So you'd just come from hell had you?*
>
> *A. Yes, that's what it was like, hell. That's what I thought was real."*

63. J's foster mother had been W, who gave evidence on day 20. She testified, *inter alia*, to the following:-

> *"Q. Now when J first came to live with you, I think we know that he was five years of age going on six, approximately; is that right?*
>
> *A. That's right, yes.*
>
> *Q. And when he first came to live with you what kind of a condition was he in?*
>
> *A. How do you mean, like physically mentally?*
>
> *Q. Well food wise how did he look to you?*
>
> *A. He was he was very, very, very undernourished. He had his hair was in really bad condition. He had little or no hair, just like whisps of hair. His skin was nearly transparent. His he couldn't close his mouth because the muscles in his jaw weren't strong enough, so his mouth was constantly hanging open and he used to be constantly soaking wet his chest because the saliva was always he just couldn't control it. He couldn't eat. He had*
>
> *Q. Now when you sorry Mrs W?*
>
> *A. Sorry.*
>
> *Q. When you say he couldn't eat, what do you mean by that?*
>
> *A. He couldn't eat solid food, he wasn't able to.*
>
> *Q. Did he know how to eat?*
>
> *A. No, he didn't know how to he didn't know how to hold a spoon, a fork; he didn't know what plates was. He just didn't know and most foods he didn't even know what foods were like potatoes and he just didn't know the only food he*

seemed to recognise would be chips.

Q. Did he know how to wash?

A. No, definitely not.

Q. Did he know how to use the bathroom, how to go to the toilet?

A. No.

Q. Did he know anything at all about bathrooms or do you know?

A. No, he was when he came first he was actually it was like he was terrified to even go into the toilet.

Q. All right. And where used he have go to the toilet?

A. Everywhere. In his bed, in the rooms, upstairs, downstairs, the kitchen, behind the curtains, behind the sofas, the chairs, out the back, the side entrance.

Q. Right?

A. Everywhere, anywhere and everywhere basically.

Q. Now I think then you looked after him from the time obviously he came to live with you. Did you tidy him up, tidy his hair ?

A. Of course.

Q. fresh clothing, matters of that nature?

A. Oh of course, yes.

Q. All right. Because of the bathroom or the toilet difficulties, did he wear nappies going to school?

A. No, he never wore nappies.

Q. Right?

A. I got him you know the pull ups.

Q. All right?

A. So that he wouldn't be embarrassed, because he had no control over his excrement or whatever and it'd be all down his legs and all

Q. All right?

A. and he it often happened in school and he was ridiculed a few times about it and stuff like that."

64. In charging the jury on the issue of corroboration, in so far as it concerned the evidence of J, the trial judge said:-

> *"Let me deal first with the position of J because he's in a slightly different position to his two sisters. It seems to me that there are aspects of the evidence of W which are potentially capable of amounting to corroboration, but I stress whether her evidence does so amount and does have that status is a matter for you. W says that when she received J into her care that he was malnourished, his skin was transparent, he was dressed in dirty clothing, girls clothing, leggings, a pink smock like top, in essence that he was in a pitiful state. Again, she gives evidence of his terror at going to use the toilet or bathroom with the consequential difficulties of his toilet habits. And it seems to me that that is a matter that you could choose to regard as corroboration. And I say that in a situation where J presents his complaints of sexual abuse in a situation where he is describing his life in [the family home] as akin to a life in hell. I think that was actually Mr O'Carroll's phrase but I think it's a fair summary. And where in contrast Mr C is saying that that's all nonsense and that this was a very happy household indeed. Given that extraordinarily sharp divergence, it seems to me that if this evidence of W was accepted by you, then it could have the potential to assist you in determining where the truth lies. Can I stress again I am not saying that the evidence of W does in fact amount to corroboration; it's for you to decide whether it does or does not. And in determining whether you regard it as corroboration, it would be appropriate to bear in mind that W's evidence doesn't deal specifically in that regard with the allegation of sexual abuse."*

Submissions on behalf of the appellant

65. The passage just quoted is said by the appellant to amount to misdirection. The appellant has referred us to the traditional definition of corroboration as stated in *Rex v. Baskerville* (1916) 2 K.B. 658 (at p. 667) which is couched in terms that:-

> *"[Corroboration is] independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it."*

66. It was submitted that the Baskerville test has been approved and applied many times in this jurisdiction, including in *The People (Attorney General) v. Williams* [1940] I.R. 195; *The People (Director of Public Prosecutions) v. Phelan* 1 Frewen 98; and *The People (Director of Public Prosecutions) v. Reid* [1993] 2 I.R. 186. It was acknowledged that in later cases, and specifically those of *The People (Director of Public Prosecutions) v. Gilligan* [2006] 1 I.R. 107 and *The People (Director of Public Prosecutions) v. Meehan* [2006] 3 I.R. 468 which ostensibly broadened the scope of what can amount to corroboration, such corroboration in Irish law has (to quote Kearns J. at para. 54 in the *Meehan* case) *"received definitions and characterisations …which largely follow Rex v. Baskerville*

(1916) 2 K.B. 658, but which are replete with nuanced differences." Nevertheless, it was submitted, it was much too big a step in the circumstances of the present case to regard the evidence of W as being capable of corroborating J's claim that his father, the accused, had sexually assaulted him. It was submitted, *inter alia*, that such evidence as there was of gross parental mistreatment was not specifically referable to the accused and could equally have been visited upon the children by their mother.

Submissions on behalf of the respondent

67. The respondent to this appeal relies on the recent cases of Gilligan and, more specifically, *Meehan*. We were referred to Kearns J.'s illustrations (at paras. 54-57 of his judgment in the *Meehan* case) of the many nuanced differences to which he had alluded by reference to the judgments in *Attorney General v. Levison* [1932] I.R. 158; *The People (Director of Public Prosecutions) v. Murphy* [2005] 2 I.R. 125; *The People (Director of Public Prosecutions) v. Gilligan* [2006] 1 I.R. 107; *Attorney General v. O'Sullivan* [1930] I.R. 552; and *Attorney General v. McGrath* (Unreported, Court of Criminal Appeal, 15th June, 1925 – referred to in Sandes, *Criminal Practice, Procedure and Evidence* (1930, Dublin) at p.142). In particular, the following passage from the judgment of Kearns J. in the *Meehan* case (at paras. 56-57) was commended to us:-

> *" Corroboration as it has been defined and applied in this jurisdiction, does not have to directly prove that the offence was committed. It is sufficient if it confirms a material particular of the witness's evidence implicating the accused. This court in The People (Director of Public Prosecutions) v. Murphy [2005] IECCA 1, [2005] 2 I.R.125 at p.159 approved as correct the reference to corroboration as it appears in Criminal Evidence (2nd ed.) by Richard May at p. 330:-*
>
> > *'Material particular' simply means a material fact i.e. a fact which in the circumstances of the case and the issues raised in it is material to the guilt or innocence of the accused of the offence charged. It does not mean that the corroborative evidence has to corroborate the whole of the evidence of the witness who requires corroboration. If this were required the evidence of the complainant or accomplice would be unnecessary. The whole case could be proved by the corroborative evidence. It is sufficient therefore if there is confirmation of a material part of the witnesses' evidence implicating the defendant in the offence.'*
>
> *Furthermore, circumstantial evidence can constitute corroboration, as noted by Denham J. when delivering the judgment of the court in The People (Director of Public Prosecutions) v. Gilligan [2005] IESC 78, [2006] 1 I.R. 107 at p. 142. Indeed, it would be virtually impossible ever to have convictions in sexual cases if it were otherwise."*

68. Following his review of the relevant jurisprudence, Kearns J. had concluded (at para. 61 of his judgment) that each case has to depend partly on established legal principles, partly on the manner in which the case is run, the nature of the facts in issue in respect of which corroboration is desirable or necessary and the nature of the defence.

69. He had also referred (at para. 63 of his judgment) to the remarks of Murray J. in *The People (Director of Public Prosecutions) v. C* [2001] 3 I.R. 345 at p. 362, where he had observed:-

> *"Corroborative evidence does not mean that the evidence of the complainant must be corroborated in every material respect."*

70. Further, Kearns J. had referred *in extenso* (at para. 64 of his judgment) to the judgment of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Gilligan*, in which Denham C.J. had alluded to the fact that there are often multiple factors relevant to a witness and the issue of corroboration. She made those remarks in the specific context of a case which had involved witnesses who were both in a witness protection programme and were accomplices. Denham C.J. stated, *inter alia*, at pp.142-143:-

> *"In this case the trial court dealt expressly with the circumstances, including that witnesses were both accomplices and in a witness protection programme. While the trier of fact may convict, after the appropriate warning, on the evidence of such a witness, it is open to the trier of fact to require corroboration of the witness's evidence, as did the trial court in this case.*
>
> *These multiple factors go to the issues of credibility and to the weight to be attached to the evidence. Thus they should be assessed in light of all the circumstances of the case. However, it is open to the trier of fact to determine that in spite of these multiple factors the credibility of a witness is such that corroboration is not required and that significant weight may be given to his evidence.*
>
> *The multiple factors are matters for the trial court to assess and determine having heard all the evidence in the case, both in the giving of the appropriate warning by the trial judge and in the determining of the facts of the case by the jury, or the court.*
>
> *In this case it is clear from the judgment that the trial court was aware of the dangers of convicting on evidence from a person who was both in a witness protection programme and who was an accomplice. The trial court referred repeatedly to compromising facts and regarded the evidence cautiously. It took a different view in its assessment of different witnesses. This illustrates that the application of the law as to corroboration is quintessentially a matter for the trier of fact after the appropriate warning is given."*

71. At paragraphs 65 and 66 of his judgment in the *Meehan* case, Kearns J. had concluded that:-

> *"65 There is no need in the context of the present case to take the step in this jurisdiction of abandoning Rex v. Baskerville [1916] 2 K.B. 658, even if it was open to this court to do so, and even if it might prefer to do so, in favour of the model in Vetrovec v. The Queen [1982] 1 S.C.R. 811. The court is satisfied that the more nuanced approach adopted in the cases already cited in this jurisdiction already goes some distance to qualify Rex v. Baskerville towards a more common sense interpretation of what the requirements of corroboration should be.*
>
> *66 Any re-evaluation of Rex v. Baskerville [1916] 2 K.B. 658, which is surely overdue, would have to acknowledge that the world described by Denham J. in her conclusions in The People (Director of Public Prosecutions) v. Gilligan [2005] IESC 78, [2006] 1 I.R. 107 is one which is light years away from that which existed when the English Court of Criminal Appeal decided Rex v. Baskerville in 1916. Modern Ireland is awash with illegal drugs and beset with the enormous social problems which attend their use. Gangland killings in connection with that trade have virtually become a daily occurrence. A witness protection programme may well provide one of the few effective ways of dealing with these activities, a consideration which must be kept in mind if the community's right to see serious crime being prosecuted is to be respected. Evidence emanating from witnesses in such a programme is not automatically to be scorned or*

discounted. It is, and will always be, evidence which must be treated with caution. However, if and when satisfied in a particular case that it is credible, a court should be free to act on it. This court is of the view that a more flexible approach to the whole issue of corroboration beyond the narrow formalistic definition of Rex v. Baskerville is entirely open on the decided cases in this jurisdiction and in the particular circumstances adverted to by Denham J. in the passages just quoted. The views of the Supreme Court in The People (Director of Public Prosecutions) v. Gilligan do, in the opinion of this court, permit such an approach. The review of cases demonstrates that the application of Rex v. Baskerville in Ireland has over the years been of a flexible and nuanced nature. The court believes in any event that the formula of words adopted in Rex v. Baskerville to define corroboration, including as it does the words "tending to connect him with the crime", leaves a considerable margin of discretion with any court dealing with issues of corroboration to decide what may or may not constitute corroboration. As noted in Attorney-General v. O'Sullivan [1930] I.R. 552 by O'Byrne J., it is for the court of trial to determine in the particular context, including the conduct of the defence, what may constitute corroboration."

72. Relying on the *Gilligan* and *Meehan* cases as representing the current law as to what can constitute corroboration in Ireland, counsel for the respondent made the following submission. The prosecution case was that the sexual abuse charged took place in a wider setting of severe physical neglect, manifesting itself in malnutrition and poor hygiene. It was contended by the defence that no such situation pertained and that the complainant J's motivation for saying this were the same as his motivation for the other allegations: to blacken the name of the accused. The condition of the children at the time was therefore a fact in issue and was relevant both to the credibility of the respective parties and to the fact of the abuse itself.

73. It was submitted that in the circumstances of this case, an observation of the physical condition of the accused's young son was corroborative in the same way that the observation of a black eye or a fresh wound shortly after an alleged incident of domestic abuse would be corroborative of an assault. The only difference being perhaps that in the given example the correlation between injury and guilty action is direct, whereas in the instant case the correlation occurs in two stages: firstly, the observations directly support a conclusion of physical abuse and mistreatment (not necessarily of a sexual kind); secondly, the confirmation or proof of physical abuse circumstantially supports the account given in respect of the father's treatment of his son at the time, including the allegations of sexual abuse.

74. It was further submitted that provided the connection between the independent evidence and the guilty act was not tenuous or wholly speculative, but was underpinned by a degree of probability and plausible connection, then it might properly be said to be corroborative. It was conceded that it might not be conclusively so, but then again virtually all aspects of a prosecution case are falsifiable; it is their cumulative weight which supports the conclusion of guilt beyond a reasonable doubt. If, as was the case here, the defence put forward is a positive one which posits a certain set of facts which are not peripheral to the allegations, any independent evidence which disproves those facts is capable of being corroborative.

75. Counsel for the respondent has placed particular reliance on W's evidence concerning her observation of the complainant J's ostensible fear of using the toilet, and concerning him going to the toilet in inappropriate locations, as being potentially corroborative. It was contended that in the light of J's express evidence, previously quoted at para. 61 of this judgment, concerning being afraid to go to the bathroom having been repeatedly abused there by his father, and going to the toilet in other places, W's evidence did in fact tend to implicate the accused in the commission of the alleged offences involving J.

76. In so far as there was an objection that the evidence of gross parental mistreatment was not referable to the accused and could equally have been visited upon the children by their mother, it was submitted that more or less the same opprobrium would arise if one parent stood by and allowed the other parent to mistreat the child thus, and that it would be sufficient also to dispel the defence account of a loving and caring family environment. If a defence had been maintained that some other householder had sexually abused the children, then evidence emanating from the conditions at home might not have been properly held against Mr. C. Rather, the defence was that the abuse had never occurred in the C family home and that these allegations were deliberately falsified by others. It was submitted that in those circumstances, any independent evidence of maltreatment was corroborative of the accounts given by the children and probative as to the issue of Mr. C's guilt.

77. Finally, it was submitted that it is well established that a complainant's observed state of distress can constitute corroboration of the complaint in an appropriate case.

Discussion and Analysis

78. While to date it has not been considered necessary for Irish law to totally abandon the approach commended in *Rex v. Baskerville*, the decision of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Meehan* [2006] 3 I.R. 468 makes it clear beyond peradventure that the Baskerville approach must be applied in a nuanced and flexible way that takes appropriate account of the circumstances of the case, including the manner in which the case is run, the nature of the facts in issue in respect of which corroboration is desirable or necessary, and any defence set up by the accused. It is sufficient if there is confirmation of a material part of the witnesses' evidence implicating the accused in the offences.

79. We consider that W's evidence concerning her observation of the complainant J's fear of using the toilet, and concerning him going to the toilet in inappropriate locations, was clearly capable of providing corroboration of J's testimony. It was independent, credible and, we are satisfied, confirmed in a number of material particulars J's evidence implicating the defendant.

80. In addition, we are satisfied that W's evidence concerning J's condition when he arrived in her care was also capable of providing corroboration of J's testimony. It is correct to say that an observed state of distress can constitute corroboration of the complaint in an appropriate case, and we are satisfied that this is such a case. Again, we are satisfied that W's evidence was credible. In terms of the third *Baskerville* requirement, we do not consider that the need for the two stage correlation acknowledged by counsel for the respondent should matter in principle. W's evidence circumstantially supports a material aspect of J's account of his father's treatment of him at the material time, which treatment included, but was not alleged to be confined to, the allegations of sexual abuse. In deciding that W's evidence on this issue is capable of amounting to corroboration, we have also taken account of the manner in which the case was run, and in particular the positive defence put forward by the accused that J, and his siblings, had been raised in a loving and caring family environment, that J had not been abused and that false allegations had been deliberately made against C. In such circumstances, independent and credible evidence with the potential to corroborate J's account of conditions in the family home was manifestly relevant and potentially probative in terms of the prosecution case against C.

81. In the circumstances we are not disposed to uphold the first aspect to the complaint based on the judge's charge with respect to corroboration. It is necessary, then, to consider the second aspect to the complaint.

Was the evidence of K capable of corroborating the testimony of A, in circumstances where K and A had contradicted each

other?
82. In the course of her evidence, the complainant K had testified that she had personally witnessed the sexual abuse of A by the appellant. A, however, testified that K could not have, and did not, witness her being abused. The question arose as to whether the evidence of K was capable of corroborating the testimony of A, in circumstances where K and A had contradicted each other.

83. The trial judge ruled as follows:-

> *"What then about the position of A. and K.? Untoward sexual conduct nearly always takes place in private. That's the nature of the activity. So it's very unusual for an eyewitness or someone claiming to be an eyewitness to come forward. Unusually in this case, that has happened in that K. says she witnessed the abuse of A.. Now, let me hasten to remind you, if you need reminding, that A. flatly contradicts this and says that K. was never present to see her abused. She was prepared to go insofar as saying that that suggestion was patent nonsense. Now, it's for you to resolve that conflict. If you resolved it to your satisfaction by concluding beyond reasonable doubt that K.'s version is correct, then obviously that would have the potential to offer corroboration or independent confirmation of A.'s complaints. It would have a direct relevance to the sexual assault counts on the indictment in the vehicle but it would also offer support, I suppose, in a more general context to the allegations involving A.. The fact that in that situation K. was saying that A. was present to see her abused would not offer independent support or confirmation or corroboration of K.'s claims to have been abused because, as we know, A. doesn't say that she witnessed any acts of abuse. In summary then, insofar as A. and K. is concerned, the position would seem to be that K.'s evidence isn't corroborated and that A.'s evidence is potentially corroborated only if you accept K.'s statement that she witnessed acts of abuse despite A.'s firm denials that that was so. However, notwithstanding the absence of corroboration in the technical sense of independent confirmation in the case of K., and perhaps also its absence in the case of A., the prosecution say that there is significant other evidence in the case which supports the consistency of both K. and A."*

84. It was not for the trial judge to resolve the conflict between K and A's evidence. That was, as the trial judge correctly told the jury, a matter for them to resolve. The trial judge did not say that the evidence of K was corroborative of A's testimony, merely that it was capable of corroborating it subject to an important qualifier, namely that the jury would have to have satisfied themselves beyond reasonable doubt that K's version was correct. We consider that this was an entirely correct instruction and that it contained no misdirection.

Ground No. 7 – The judge's charge concerning the red couch
85. The complainant A testified that she used to sleep for many years on a big red couch that was placed in the sitting room of the family home, and that her father, the appellant, had had sexual intercourse with her on that couch. The charges in relation to such abuses spanned a period from March, 1995 until February, 2000.

86. There was much cross-examination of A concerning her understanding of the provenance of the couch, when it had been brought into the house, and how long it was after the couch was placed in the sitting room that she had commenced sleeping on it. The complainant was unable to provide dates. Both A and the complainant K had recalled it as being positioned under the window.

87. Home video recordings said to have been taken by the appellant in the sitting room of the family home on various dates in October, 1998; January, 1999; and October, 2001 were shown to the witness. Having viewed the recordings, A confirmed that she could not see the red couch in either the October, 1998 footage or the October, 2001 footage, but claimed in relation to the January, 1999 footage that, in addition to a couch clearly visible in the footage and on which the appellant was seated, there was also a red couch behind a television in the left hand corner of the room along the window. While this Court has not had the advantage of viewing for itself the January, 1999 footage, the impression conveyed from the transcript is that A was not contending that the red couch to which she was referring was actually visible on the footage but rather that she was making the point that it would have been behind the person holding the video camera and therefore off camera.

88. The jury also heard evidence from Ms. D who stated that she had given the appellant and his wife a second hand wine coloured sofa and two armchairs at some point between January and October, 1994. Her recollection, from being in and out of the C family home, was that it had not been used immediately by them but had been stored for a while in a shed in the back garden. She thought it might have been stored but three or four months, but accepted it was possible that it could have been for as much as eighteen months. However, she recalled it being in the house at some stage. She further recalled it being positioned along a wall of the sitting room facing the fireplace. Ms. D estimated that the last time she visited the house was in March or April, 1999. She was shown home video footage taken in September, 1998 and asked whether a couch visible in the footage had been her couch she stated "*It looks a little bit like it all right, the high handles*". When shown the same footage from January, 1999 that had been shown to A, the witness stated that a couch visible in that footage was not her couch. She was also shown the footage from October, 2001 that had been shown to A. On this occasion, when asked about a couch visible on the recording, she had stated "*The size and shape looks like it, but it looks like it has been reupholstered, but I'm not too sure about the handles, I can't really remember, but it is something similar to that*".

89. The complaint made is framed in terms that "*the learned trial judge erred in law by failing to charge the jury to the effect that the couch alleged to have been used in molesting A was not present in the room at the relevant time*." In our view, if the judge had done that, he would have usurped the jury's function. Whether or not the red couch was in the room in question at the material time was a question of fact for the jury to determine in the course of weighing and assessing all of the evidence. It was not the case that there was no evidence that the red couch was in the room at the material time. There was evidence on the issue from various sources that was to some extent conflicting, and it was for the jury to resolve those conflicts. It was not for the trial judge to determine the issue for them. The judge was merely obliged to fairly summarize the evidence.

90. In the course of his charge to the jury, the trial said the following with respect to A's evidence concerning the red couch:-

> *"She confirmed that it was the situation that at a particular stage in her life she moved from the box bedroom upstairs that she had been sharing with her sisters and moved down to the sitting room and took up occupancy on the red couch. She confirmed that it was only a short period after the red coach was placed in the sitting room that the abuse started. The red coach was a sort of landmark that she was using in a sense to date the commencement of what she was alleging against her father. She didn't know when the red coach was moved into the sitting room. It was near the window. While sleeping on the red couch, her father would come in on a regular basis to have sexual intercourse with her and he would also on a regular basis force her to give him oral sex, taking the two together most nights."*

91. Moreover, in reviewing the appellant's own evidence he returned to the issue, stating:-

> *"Now, Ms Isobel Kennedy, senior counsel then for the DPP, had an opportunity to cross-examine and again bear in mind what I said to you earlier about the fact that recording the end answers in a cross-examination don't give the full flavour. He agreed that his position was that there was never any abuse of A. and secondly that it couldn't have happened anyway, because there was no red couch in the house, it was out in the red station -- it was out in the radio station, I beg your pardon, in the back. He was reminded of the evidence of Ms D that the couch had arrived in [the family home] between January and October of 1994 and that she had said initially that it might have been in the shed for three or four months and had then accepted that it could possibly have been there up to 18 months. He agreed that if one went on the basis of Ms D's evidence, that that would have the couch in the house from April 1996 but he didn't accept that that was correct at all and he referred to the videos."*

92. No requisition, or complaint whatever, was raised by the defence concerning the adequacy of the trial judge's review of the evidence concerning the red couch. The respondent to this appeal contends firstly that the trial judge's review of the evidence on this issue was in any event entirely adequate, but contends that even if that were not so, the appellant should, on the basis of the principles enunciated in *The People (Director Public Prosecutions) v. Cronin (No. 2)* [2006] 4 I.R. 329 be precluded from complaining about it now.

93. This Court finds itself in agreement with both points argued by counsel for the respondent. We are satisfied that the trial judge's review of this aspect of the evidence was adequate and in no way unfair. Moreover, in circumstances where the trial judge was not requisitioned in respect of the complaint which it is now sought to ventilate, the appellant ought not now to be permitted in the circumstances of this case to argue that this aspect of the judge's charge was deficient.

94. We are therefore not disposed to uphold ground of appeal no. 7.

Ground No's 8, 9, 10 & 12– The refusals to direct acquittals

95. Ground no. 8, relates to the failure to grant a direction in respect of the charges involving the complainant K, whereas ground no. 9 is the same but with respect to the complainant A, and ground no. 10 is also the same but with respect to the complainant J. Ground no. 12 reflects an omnibus complaint that the three complainants were inherently unreliable and, in the circumstances, the trial judge erred in failing to grant a direction and in failing to adequately warn the jury concerning the risk of convicting on foot of their evidence.

96. The case made on behalf of the appellant, in respect of the charges relating to all three complainants, is that the trial judge erred in not withdrawing the case from the jury at the end of the prosecution case, because he would have been justified in doing so, and indeed ought to have done so, based on the second part of the two part test advocated in *R v. Galbraith* (1981) 73 Cr. App. R. 124; [1981] 1 W.L.R. 1039.

97. The seminal statement of principle was contained in the judgment of Lord Lane C.J., who stated (at p.1042):-

> *"How then should the judge approach a submission of "no case"? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred.*
>
> *There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."*

98. In this case the defence relied on part 2 (a) of the *Galbraith* test. In that regard, while it was acknowledged that there was some evidence to support the charges, it was contended that the evidence was of such poor quality that it could not found convictions.

99. Counsel for the accused pointed to numerous alleged inconsistencies, both internal and external, and numerous instances of alleged inherent weakness or vagueness in the testimony given by all three complainants, respectively. Without attempting a comprehensive review of all matters relied upon in this context, it will suffice for the purposes of this judgment to highlight some of the main ones.

100. In the case of K, reliance was placed on the fact that she had made allegations in relation to a number of people over the years, including a brother L and her foster father M. M, who gave evidence for the defence, had later in a letter to social workers expressed the belief that K had been pressurised by another to make these allegations. Further, M's wife, whose was K's foster mother, testified that K would make things up and say things that were not true, and later withdraw them. K had also alleged that she had been raped on one occasion in a country town by a person in drag.

101. Further, K had claimed to have witnessed the sexual abuse of A by the appellant, a claim which A had discounted as untrue. Reliance was also placed on alleged inconsistencies between what K claimed to have disclosed concerning being sexually abused by her father in the course of an investigation by staff at St. Louise's Unit in Crumlin Hospital in 2003, and concerning the timing of her disclosures, and the evidence of a witness from St. Louise's Unit, Dr. Imelda Ryan.

102. In the case of A, the defence contended there were grounds for suspicion that she had conspired with her father to create a complaint, with the object of having the children reunited with their mother. Reliance was also placed on the fact that, in recounting matters, A had been very young at the time of the alleged events. Reliance was again placed on the inconsistencies between A's evidence and K's evidence.

103. In the case of J, reliance was placed on the fact that this complainant was referring to allegations relating to a part of his life when he was between 3 and 6 years of age. He had made no allegations until he was 12 years of age. Many of his complaints related to neglect and physical abuse. However, his allegations of neglect were inconsistent with the evidence of his sister A.

104. It was contended that looking at the evidence in relation to the charges involving each of the complainants from the high water mark of the prosecution, there was simply an insufficiency of cogent evidence on which a jury properly charged could convict. The

decision in *R v. Shippey* (1988) Crim. L.R. 767 was commended to this Court, where Turner J. had held that the requirement to take the prosecution evidence at its highest did not mean "*picking out the plums and leaving the duff behind*". In *Shippey*, although there had been evidence to support the prosecution's case, Turner J. had concluded that the evidence as a whole contained "*really significant inherent inconsistencies*", and he had felt obliged withdraw the case from the jury. It was urged upon this Court that the trial judge in the present case should also have withdrawn all counts from the jury.

105. Perhaps unsurprisingly, the prosecution relying on part (2)(b) of the *Galbraith* test argued that the numerous issues raised by the defence as potentially impugning the evidence of each of the complainants, respectively, were all matters bearing on the credibility and reliability of those witnesses, and in the normal course of events it was for the jury to weigh and assess the evidence given by any witness or witnesses, and to determine whether their evidence was in fact to be believed and treated as reliable. Moreover, the prosecution contended, if the jury were to regard the evidence of the complainants as being credible and reliable, they would be entitled to convict the accused.

106. We have carefully considered the submissions on both sides concerning whether the trial judge's refusal to withdraw the counts relating to some, or all, of the complainants was correct. We are satisfied that the trial judge acted within the scope of his jurisdiction, and that his decisions to allow the counts concerning each of the complainants, respectively, to proceed to the jury were the result of a lawful and valid exercise of his judicial discretion. There were undoubtedly some inconsistencies, contradictions, and other possible infirmities in the evidence of the complainants. However, it could not be said, certainly from a reading of the transcript, that they were manifestly incapable of being believed or regarded as reliable. We are at the disadvantage that a transcript is invariably an arid record, which sometimes fails to capture all the nuances associated with the giving of testimony. The transcript will never capture the demeanour or body language of a witness, how he or she comported themselves while giving evidence, or the manner in which a particular answer was delivered. Frequently, a trial judge is much better placed than any appeal court to form a judgment on the potential credibility or reliability of a witness or witnesses who have given evidence in the trial before the jury. In this complex case,the trial judge had observed all of the witnesses giving evidence, and had a much more complete overview of the state and quality of the evidence at that point than any appellate court could have solely on the basis of having read the transcript. Certainly, the matters pointed to by the defence were all potentially relevant to an assessment of whether the complainants, or some of them, should be regarded as credible and reliable, but in the normal course of events that assessment was one to be carried out by the jury. The trial judge was right, in our view, not to grant the directions sought.

107. In so far as there is a complaint that the trial judge failed to adequately warn the jury concerning the alleged inherent unreliability of the complainants' evidence, we are satisfied that the judge's charge overall, from which we have already quoted several relevant passages in the course of dealing with the grounds of appeal relating to corroboration, more than adequately dealt with the complainants' evidence.

108. In the circumstances we are not disposed to uphold grounds of appeal no's 8, 9, 10 and 12.

Ground No. 11 – The decision to allow K to give evidence by way of video link

109. K was not a minor at the time she gave her evidence to the court. The prosecution made an application to the trial judge to allow her give evidence by way of video-link and not from the witness box in open court. The defence objected as they wished to be able to cross-examine this complainant from the witness box in the normal way. The application was made pursuant to s. 13(1)(b) of the Criminal Evidence Act 1992 (the Act of 1992), and was supported by the evidence of a psychiatrist.

110. Section 13(1) of the Act of 1992, provides:-

> *"13.—(1) In any proceedings (including proceedings under section 4E or 4F of the Criminal Procedure Act, 1967) for an offence to which this Part applies a person other than the accused may give evidence, whether from within or outside the State, through a live television link—*
>
> *(a) if the person is under 17 years of age, unless the court sees good reason to the contrary,*
>
> *(b) in any other case, with the leave of the court."*

111. The psychiatrist who testified, a Dr. Robertson, stated *inter alia*, that:

> *"K, in all the time I have known her, has been an extremely vulnerable young girl who has just turned 18, as you know. This court procedure naturally is very traumatic and stressful for her anyway. K is often suicidal and has a history of multiple overdoses and chronic deliberate self-harm. The entire court proceeding naturally is making her more vulnerable at this point in time. I'm extremely worried for her mental health and her safety in terms of, again, deliberate self-harm or suicide attempts and general coping. During the course of this trial she is extremely concerned about having to face the accused in the courtroom setting. She's very avoidant consistently of verbalising even or discussing matters with -- relating to the accused and memories of the alleged abuse even in session with me over the years. She has had no contact with him for many years and to have her face him or not to be given the opportunity to give her evidence via video link, in my opinion, would be endangering her life further, and that is my opinion."*

112. The appellant complains in the first instance that his counsel was not allowed to properly challenge this evidence, because when his counsel attempted to ask the witness in cross-examination whether, in formulating his opinion, he had considered the possibility that K's difficulty in articulating her account was because that account was untrue, the judge had interjected, supported by prosecuting counsel, to suggest that he was asking the witness to speculate. It has been submitted that the defence were not allowed to explore matters that were clearly relevant.

113. However, a close review of the relevant exchange as recorded in the transcript does not bear out the complaint made. While the trial judge did interject, and enquired: "*Should the witness be asked to speculate*?", defence counsel was then afforded an opportunity of justifying the appropriateness of his question. He sought to do so, following which the trial judge addressed the witness stating "Well you can answer it so, Doctor." The question was then answered, with the doctor expressing the view that "As to whether it's a false account. I don't believe so, and I don't see a reason as to why she would give a false account of it."

114. Having heard the evidence, and submissions from counsel on both sides, the trial judge ruled:-

> *"Now, if one marries the effect of section 13 of the 1992 Act and section 19 to which I've made reference in relation to persons with a mental handicap, it does seem to me that the policy of the legislature is clear in differentiating between persons who are vulnerable and those who do not share those vulnerabilities and can be expected to give evidence in*

the ordinary way. And it does seem to me that the presumption is very much in favour of evidence being given viva voce in court. This is a situation where a young woman, a very young woman, is proposing to come to court to give evidence against her father. That's obviously going to be a traumatic situation in any circumstances and that's something I bear in mind. I do accept and I factor in that the trial will be heard in camera so that there won't be hordes of people watching her every movement but it is still going to be a very traumatic occasion and very specific fears have been expressed by Dr Robertson, and Dr Robertson is quite clear that her concern is to keep K alive and well and she has expressed very considerable fears about what the impact of these proceedings will be. She, in effect, presents this as a case where the right to life is an issue and in those circumstances it seems to me that there are factors that are weighing heavily in favour of permitting this complainant, K, to give her evidence by video link. The concern, as I've said, always is that the accused is disadvantaged. Well, I can only say that my own experience of trials involving video links is that those who have a need to cross-examine persons on video link are in a position to do so and are in a position to do so effectively. The technology available does mean that the jury is in a position to observe the demeanour of the witness, are in a position to not just to consider what the witness says but how the witness says it, and all in all I'm entirely satisfied that permitting K to give her evidence by video link represents no threat to the fairness of the trial of the -- of Mr C, and it seems to me that there being no substantial threat to the fairness of the trial that the arguments presented by Dr Robertson are absolutely overwhelming, so overwhelming indeed that it's perhaps slightly surprising that, given what has been said about the risk to life, that the objection has been persisted in by the accused but there you are, it was. So, I will permit the evidence to be given."

115. It was submitted in the written submissions filed on behalf of the appellant, although only pressed lightly in oral submissions at the appeal hearing, that there were "not sufficient grounds to allow the video link application". In our view that contention is simply untenable in the light of the testimony given by the psychiatrist. We are satisfied that the trial judge's decision to allow K to testify via a video-link was made within the scope of his legitimate and lawful discretion having regard to the terms of the statute and having regard to the evidence that he had received.

116. We are not therefore disposed to uphold ground of appeal no. 11.

Conclusion

117. In circumstances where we have not seen fit to uphold any of the appellant's grounds of appeal, we find his trial to have been satisfactory and his conviction to be safe. We therefore dismiss his appeal against conviction.