THE COURT OF APPEAL

JUDGMENT HAS BEEN REDACTED TO ENSURE COMPLIANCE WITH THE CRIMINAL LAW RAPE ACT 1981 AND THE CRIMINAL LAW RAPE AMENDMENT ACT 1990 NO MATTER LIKELY TO LEAD TO THE IDENTIFICATION OF THE COMPLAINANT SHOULD BE PUBLISHED

CCA Ref: CCAOT0105/2019

Bill No CCP0002/2018

BIRMINGHAM P.
KENNEDY J.
NÍ RAIFEARTAIGH J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

V.E.

APPELLANT

JUDGMENT of the Court delivered on the 20th day of April, 2021 by Ms. Justice Ní Raifeartaigh.

1. This is an appeal against conviction in which the primary ground of appeal relates to the trial judge's decision not to give a corroboration warning in a case where the complainant was a child with a learning disability and where certain parameters had been laid down by the trial judge, on the advice of an intermediary, with regard to the child's cross-examination. The appellant was convicted of rape, sexual assault and "s.4 rape" (anal rape). He was convicted on the 1 March 2019 following a trial in the Central Criminal Court which had commenced on the 19 February 2019. He was sentenced in May 2019 to 13 years imprisonment on the rape and anal rape counts, and 3 years and 6 months on the two sexual assault counts, to run concurrently. The appellant also appeals against sentence but this judgment deals with the conviction appeal only.

2. At the material time, the appellant was in a relationship with the complainant's mother. The offences were alleged to have occurred between 13 April 2015 and 30 September 2016 when the complainant was between the ages of eleven and twelve. I will refer to

the complainant throughout the judgment as N, and I have also made redactions accordingly in excerpts from the transcript which are quoted below. The name of the appellant's sister has likewise been redacted and she will be referred to as G in the text of this judgment and in quotations from the trial transcript. At the material time, the complainant was living with her mother, her two sisters (C and G), and her half-sister (L). The latter is the child of N's mother and the appellant. The relationship between N's mother and the appellant is no longer in existence.

3. The charges consisted of one count of rape contrary to s.2 of the Criminal Law Rape Act 1981, one count of sexual assault contrary to s.2 of the Criminal Law Rape Amendment Act 1990, and five counts of rape contrary to s.4 of the Criminal Law Rape (Amendment) Act 1990. Four of the "s.4 rapes" consisted of anal intercourse and one of them consisting of penetration of the vagina with fingers.

4. The complainant made the allegations to her mother in November 2016 and her mother contacted the Gardaí. A child specialist interview was carried out and recorded on the 26 November 2019. At the time of trial, the appellant was fourteen years of age. She has a mild learning disability.

5. The appellant was arrested on the 6 January 2017 and detained at a Garda station where he was interviewed. He denied all of the allegations during the Garda interview.

Relevant Legislation

6. A number of mechanisms which are made available by the Criminal Evidence Act 1992 were employed in the trial of the appellant. These were:

- the use of an intermediary (pursuant to s.14(1)(b) of the 1992 Act);
- the playing of a video-recorded statement of the complainant (pursuant to s.16(1)(b) of the Act);
- the giving of unsworn evidence by the complainant (pursuant to s.27 of the Act); and
- the use of a live video-link for the taking of evidence from the child during the trial (pursuant to s.13(1)(a) and (b) of the Act).

7. The use of an intermediary is provided for by s.14 of the Criminal Evidence Act 1992, which was commenced in 1997[1]. As amended by the Children Act 2001 and the Criminal Justice (Victims of Crime) Act 2017, it now reads:-

"(1) Where –

(a) a person is accused of a relevant offence, and

(b) a person under 18 years of age is giving, or is to give, evidence through a live television link, the court may, on the application of the prosecution or the accused, if satisfied that, having regard to the age or mental condition of the

[1] S.14 was commenced on 3 March 1997 by the Criminal Evidence Act 1992 (Sections 14 and 19) Commencement Order 1997 (S.I. 66/97).

witness, the interests of justice require that any questions be put to the witness be put through an intermediary, direct that any such questions be put.

(1A) Subject to s.14AA, where

(a) a person is accused of an offence, other than a relevant offence, and

(b) a victim of the offence who is under 18 years of age, is giving, or is to give, evidence through a live television link,

the court may, on the application of the prosecution or the accused, if satisfied that the interests of justice require that any questions to be put to the victim be put through an intermediary, direct that any questions be so put.

(2) Questions put to a witness through an intermediary under this section shall be either in the words used by the questioner or so as to convey to the witness in a way which is appropriate to his age and mental condition the meaning of the questions being asked.

(3) An intermediary referred to in subsection (1) or (1A) shall be appointed by the court and shall be a person who, in its opinion, is competent to act as such."

A "relevant offence" for this purpose is: (a) a sexual offence; (b) an offence involving violence or the threat of violence to a person; (c) an offence under s.3,4,5, or 6 of the Child Trafficking and Pornography Act 1998; (d) an offence under s.2,4,or 7 of the Criminal Law (Human Trafficking) Act 2008; (e) an offence under ss.33,38 or 39 of the Domestic Violence Act 2018; (f) an offence of aiding, abetting etc, any of the foregoing offences.

8. The complainant's statement to the Gardaí had been video-recorded and was played in evidence at the trial as evidence-in-chief in accordance with s.16(1)(b) of the Criminal Evidence Act 1992, which provides:

"Subject to subsection (2)—

…

(b) a videorecording of any statement made by a person under 14 years of age (being a person in respect of whom such an offence is alleged to have been committed) during an interview with a member of the Garda Síochána or any other person who is competent for the purpose,

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

Provided that, in the case of a videorecording mentioned in paragraph (b), either—

…

(ii) the person whose statement was videorecorded is available at the trial for cross-examination."

This procedure was introduced by the 1992 Act following recommendations of the Law Reform Commission Reports on Child Sexual Abuse and Sexual Offences against the Mentally Handicapped, published in 1990. However, these particular provisions were not commenced until October 2008 and the first trial in which a videorecorded statement was permitted in evidence as a substitute for examination-in-chief did not take place until 2010.[2] The procedure was extended in 2013 to persons under 18 years of age in relation to certain additional offences under the Child Trafficking and Pornography Act 1998 and the Criminal Law (Human Trafficking) Act 2008.

9. S.27 of the 1992 Act provides:

"(1) Notwithstanding any enactment, in any criminal proceedings the evidence of a person under 14 years of age may be received otherwise than on oath or affirmation if the court is satisfied that he is capable of giving an intelligible account of events which are relevant to those proceedings.

(2) If any person whose evidence is received as aforesaid makes a statement material in the proceedings concerned which he knows to be false or does not believe to be true, he shall be guilty of an offence and on conviction shall be liable to be dealt with as if he had been guilty of perjury."

10. Finally, and of considerable importance in the present context, two statutory provisions removed the traditional requirement of a corroboration warning in cases involving children and sexual offences respectively. The first of these is s.28 of the 1992 Act which provides as follows:-

"(1) The requirement in section 30 of the Children Act, 1908 of corroboration of unsworn evidence of a child given under that section is hereby abolished.

(2)(a) Any requirement that at a trial on indictment the jury be given a warning by the judge about convicting the accused on the uncorroborated evidence of a child is also hereby abolished in relation to cases where such a warning is required by reason only that the evidence is the evidence of a child and it shall be for the judge to decide, in his discretion, having regard to all the evidence given, whether the jury should be given the warning.

(b) If a judge decides, in his discretion, to give such a warning as aforesaid, it shall not be necessary to use any particular form of words to do so.

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[2] See "*Recorded Evidence for Vulnerable Witnesses in Criminal Proceedings*", Miriam Delahunt, Bar Review (2015), 20(3), 46. Various difficulties associated with video-recorded interviews, including issues relating to the transcripts of video-recorded interviews with children, are described in the article. A guide to such interviews is contained in the Good Practice Guidelines (Department of Justice, July 2003), although it appears Dr. Delahunt's article that aspects of these Guidelines may have been superseded by an internal DPP document, at least with regard to the procedure when a subsequent interview is required.

(3) Unsworn evidence received by virtue of section 27 may corroborate evidence (sworn or unsworn) given by any other person."

11. Similarly, s.7 of the Criminal Law (Rape) (Amendment) Act 1990 provides:

"(1) Subject to any enactment relating to the corroboration of evidence in criminal proceedings, where at the trial on indictment of a person charged with an offence of a sexual nature evidence is given by the person in relation to whom the offence is alleged to have been committed and, by reason only of the nature of the charge, there would, but for this section, be a requirement that the jury be given a warning about the danger of convicting the person on the uncorroborated evidence of that other person, it shall be for the judge to decide in his discretion, having regard to all the evidence given, whether the jury should be given the warning; and accordingly any rule of law or practice by virtue of which there is such a requirement as aforesaid is hereby abolished.

(2) If a judge decides, in his discretion, to give such a warning as aforesaid, it shall not be necessary to use any particular form of words to do so."

The Trial

The Ground Rules hearing

12. At the beginning of the trial, the court conducted a "ground rules hearing" to address the manner in which the questioning of the complainant would take place. This was done at the invitation of the prosecution. Counsel for the prosecution referred the trial judge to the case of *R v. Lubemba* [3] (discussed in further detail below), a judgment of the Court of Appeal of England and Wales which refers to the measures which a trial judge may legitimately take to protect a vulnerable witness without impacting adversely on the right of an accused to a fair trial. Naturally the ground rules hearing took place in the absence of the jury.

13. Evidence was given by a Ms. Jenny Humphries, whose report had been served on the defence as additional evidence prior to the trial. She said she was a qualified speech and language therapist since 2004 and had become a registered intermediary in Northern Ireland in 2016.[4] She confirmed that her role was impartial and neutral and that her primary duty was to the Court.

14. She described a language assessment of the complainant which she conducted on the 2 January 2019 in the presence of a neutral third party. This lasted 90 minutes. She viewed the recording of the complainant's s.16(1)(b) interview to note any additional observations as to the communication profile of the complainant. She also reviewed the following reports received from the office of the Director of Public Prosecutions with a

[3] [2014] EWCA Crim 2064, [2015] 1 WLR 1579

[4] She was registered in accordance with Article 17 and 21(b) of the Criminal Evidence (Northern Ireland) Order 1999. The Registered Intermediary Scheme was set up in Northern Ireland in 2011. Most intermediaries are speech and language therapists, clinical psychologists, or occupational therapists

view to gaining some background information on N's general development and speech and language profile:

(a) 2015 Report of Helen Long, Clinical Psychologist;
(b) 2015 Report of Heather Goodwin, Speech and Language Therapist;
(c) 2008 Report of Dr. Patricia Cross, Clinical Psychologist;
(d) 2008 Medical Report of Dr. John Twomey.

15. Ms. Humphries completed a report in respective of the complainant on the 9 January 2019 which she opened to the court. She gave detailed evidence, which confirmed among other things that the complainant N has a diagnosis of mild learning disability and that she has certain speech and language difficulties. N attends a mainstream school but has the assistance of a special needs assistant. Her understanding of vocabulary is that of an 8-year-old.

16. Ms. Humphries gave the following list of recommendations for eliciting evidence from the complainant:

i. Allow the complainant some settling in time at the beginning of cross-examination.
ii. Afford breaks in questioning at 20-minute intervals.
iii. The registered intermediary to monitor for verbal and non-verbal signs of stress, or failed comprehension.
iv. Prefixing questions with the complainant's first name.
v. One person to speak at a time to reduce confusion.
vi. A slow pace of questioning to be adopted to afford time to process questions.
vii. Explaining the rules of communication by letting the complainant use "cue cards" if she needed a break or did not understand the process.
viii. Avoid complex questions. Simple single questions to be used.
ix. Avoid the use of prepositions.
x. Questions using time and frequency to be avoided as abstract concepts and pre-planning these questions would be beneficial.
xi. Simple vocabulary to be used in questioning.
xii. Ensure that the complainant understands the sexual terms or crucial terms of evidence before asking a question of such nature.
xiii. Questions to be kept short and concise as longer questions may not be processed.
xiv. Follow up questions may be necessary to elicit further detail if the narrative of the complainant is short.
xv. Use the vocabulary that the complainant uses to describe intimate body parts.
xvi. Questions to be asked in chronological order to aid recall and to key into a specific timeframe.
xvii. Sign posting is required to highlight a specific time frame and direct back to a particular topic.

xviii. Questions about places, names, objects, and subjects should be clear and specific.
xix. Avoid the use of idioms or phrases such as "I put it to you..".
xx. Avoid "Tag Questions" such as "Am I right in saying ?"
xxi. Avoid multi part questions. Step by Step questions required.
xxii. Do not ask the complainant to point to her own body but ask her to refer to the cardboard cut outs supplied.
xxiii. Avoid multi part questions as the complainant cannot retain long sentences. Single short sentences should be used instead.
xxiv. Avoid negatives and double negatives which are linguistically confusing.

17. Ms. Humphries confirmed that she had offered to assist advocates in framing or constructing questions prior to the trial commencing to facilitate the process.

18. Ms. Humphries was briefly cross-examined by counsel on behalf of the appellant. At no stage was any objection expressed by the appellant's counsel to the use of the registered intermediary. On being asked by trial judge whether anything arose in relation to the matters canvassed, counsel responded:

> "No, I don't have a difficulty, as it were, with using the registered intermediary as suggested by [prosecution counsel]".

When asked by the trial judge about the proposed cross examination which he indicated should be asked in the way that Ms. Humphries had suggested, counsel for the appellant replied:

> *"Yes, I have no difficulty with that".*

19. The trial judge indicated that while questions would have to be formulated in line with the recommendations of the registered intermediary, there would be no attempt to interfere with the substantive content of the proposed questions. Further the Court explained that the registered intermediary had offered to assist both sides, on strictly neutral terms, in relation to the type of questioning that might be asked.

20. Defence Counsel ultimately indicated that he was happy to meet with the registered intermediary to discuss his proposed line of cross-examination, saying:

> *"I'm happy to meet and discuss the matter with the intermediary…and to explain to her…in general terms where I propose going.. and I have no difficulty with that, and I would obviously be grateful…."*

21. The trial judge then went on to recommend that the specific ground rules as set out in the evidence of Ms. Humphries would be the ground rules for the purpose of the trial and that they should be adhered to as far as possible. The court made a formal order pursuant to s.14(2) of the Criminal Evidence Act 1992 that, having regard to the age and mental condition of the witness, the interests of justice required that the questions be put to the

witness through an intermediary. He later added that he was directing, in effect, that the intermediary be available "*in the event that it's necessary under s.14 to utilise that process*". He also referred to making the recommendation pursuant to the inherent jurisdiction of the court.

Ruling on child's capacity to give an intelligible account of events

22. The trial judge was then shown a portion of the DVD of the child's interview and ruled that the complainant was capable of giving an intelligible account of events which are relevant to the proceedings. He said he was "*totally satisfied*" on that particular aspect of matters.

The playing of the video-recorded interview pursuant to s.16(1)(b) of the Criminal Evidence Act 1992

23. When the trial proceeded before the jury, instead of 'live' examination-in-chief, the jury were shown a video-recording of the complainant being interviewed pursuant to the provisions of Section 16(1)(b) of the Criminal Evidence Act, 1992.

Events prior to the cross-examination of the complainant

24. Before the cross-examination of the complainant took place, an issue arose. Counsel for the prosecution stated that the complainant's mother had indicated in a disclosure statement "*just received"* and which was taken that morning that she was "*not consenting"* to her daughter being cross-examined. The trial judge remarked that despite the reluctance of her mother to allow her daughter to be cross-examined by the defence, the complainant had been served with a witness summons and had an obligation to give evidence accordingly even if she was a minor. He said he considered the issue of the mother's consent to be irrelevant and that the complainant had the same status as any other witness. Nonetheless, counsel for the prosecution sought time to take instructions and this was granted.

25. After a short adjournment, it was indicated by counsel for the prosecution that the position of the mother had changed. Counsel requested that the trial judge hear from her in the witness box. The trial judge then enquired directly of the mother, who was in the body of the court, whether she was willing to consent to her daughter giving evidence in the case, to which her reply was "*No*" and that "*I have my reasons for that*". She was then sworn in and asked the same question, to which she replied "*Okay*". The cross-examination of the complainant then proceeded.

The cross-examination of the complainant

26. After an exchange between the trial judge and the complainant, he deemed her capable of giving evidence on oath. She was sworn in and therefore her evidence on cross-examination was sworn evidence while her evidence-in-chief was unsworn evidence.

27. Counsel for the appellant started the cross-examination by establishing who was living with the complainant at the material time, when the appellant came into their lives, where she went to school at the material time and so on. Then he referred to the video-recording, which she had been allowed to watch the day before, and posed the question "*You say that V did bad things to you*", to which she gave the reply: "*Yes, he did, he did, like, actual, like, things to me that he wasn't supposed to be doing to a child that you*

usually do to an adult when two of them are making love, something like that, that's what he did to me". She then gave further details of a particular incident including the lead-up to it, the location of the incident and the actions of the appellant. It was put to her that V says that "the story is not true", she replied: "*Yes, but it-I'm not the one who is lying because it did happen, he's the one who's been lying, not me, because it did happen*" and *"I remember it perfectly and I told G [her sister] about this, I told her everything about this and I told my Mum then". She added that G "didn't believe me in the first place and then about, like, a few days later or soon like that she started believing me then…".*

28. The complainant then made a reference to having told her sister G "on the day because *[V] hacked my Mum's phone and Mum was going to her friend and my Mum was crying about [V] had her phone and I told her that day"*. When probed about this, she said that her Mum told her that V hacked into her Mum's phone when she was sleeping. This was followed by the following exchange, upon which considerable emphasis has been placed by the appellant in this appeal.

> *Q: Yes. Did she [the mother] tell you what happened when [the appellant] did the bad things to you?*
>
> *A: Yes, no I'm not I think she did, yes. I think so, yes.*
>
> *Q: N, just if you don't understand a question please tell me, if something isn't clear, just say so. We will try and sort it out?*
>
> *A: Okay.*
>
> *Q: Did your Mum tell you about all the things that had happened to you?*
>
> *SPEAKER [the intermediary]: Your honour, I think counsel needs to clarify what this is in reference to?*
>
> *MR O'HANLON: All the bad things.*
>
> *JUDGE: Well now, yes, exactly.*
>
> *MR O'HANLON: Yes, sorry I apologise. Did your Mum tell you about all the bad things that had happened to you?*
>
> *A: Yes.*
>
> *Q: And was that the first time that you knew about them, about the bad things?*
>
> *A: Can you explain that more?*
>
> *Q: Yes. When your Mum told you about the bad things did she tell you before anything had happened to you?*
>
> *SPEAKER: Your honour, I think that question needs to be simplified.*

A: I don't understand what you mean.

Q:JUDGE: If I might ask a question. Listen carefully now to this?

MR O'HANLON: The- what you -

JUDGE: I'm just going to ask a question.

MR O'HANLON: -explained about the bad things, is that what your Mum told you happened to you.

A: Yes, she did, yes.

The appellant submits that this line of questioning supports his contention that N's mother had, in effect, coached her by providing her with a narrative about "bad things" being done to her by the appellant. The questioning continued as follows:

Q: And did [the appellant] ever really do those things to you?

A. Yes, he did, he did those things to me. He would do them, like, whenever he comes.

29. The questioning then moved on to how frequently V stayed at her house and other matters. Shortly afterwards, there was a break, after which the trial judge said to counsel for the appellant (in the absence of the jury) that "*some of the questions don't really follow the guidelines"* and said *"I know you're doing your best and it's difficult but please do try and adhere to the guidelines"*. The jury then returned, and the cross-examination of the complainant resumed with particular emphasis on a particular incident which she alleged took place in her bedroom. She was asked: *"And did your Mum tell you about this as well?"* to which she replied *"No"*, and then (after objection from the trial judge) *"Did your Mum tell you about this?"* to which she replied *"No, I don't think so, I don't think so".* He continued questioning her about details and then asked *"And is the story about all these bad things…done by [the appellant] true"* to which she replied *"Yes".* He again asked: *"And was your Mum able to tell you all about all of the bad things?",* to which she replied*: "Yes, because when I told her she was, like, just tell me, like…and everything what I told her because when I told her she was, like, very angry because I didn't tell her, like, on time because I thought I told her on time but I didn't".* The cross-examination concluded after this.

30. There was no objection by counsel for the appellant at any time during the trial about cross-examination being unfairly restricted, whether in general or in respect of any particular matter.

31. Later, the complainant was re-examined by counsel for the prosecution as follows:

Q: Just like the judge said, N[…] you're to tell me if you don't understand any of the questions I ask you and it's absolutely okay to say I don't know as well, okay?

A: Yes.

Q: Okay. So, N[..], I want to ask you questions about the bad things that happened to you?

A: Yes.

Q: About the bad things that [the appellant] did to you, okay. Who was the first person you spoke to about those bad things, N[…]?

A: My ... younger sister G[…].

Q: And what did you tell her, N[…]?

A: I was telling her about, like, what [the appellant] did to me and everything that he done the bad things to me. Then she didn't believe me in first place and then, like, about a few days or so she started believing me then.

Q: Okay. And did you tell her about the bad things?

A: Yes.

Q: Okay?

A: That what he was doing and everything to me.

Q.: Okay. So, G was the first person you told; is that right?

A: Yes.

Q: And who was the next person you spoke to about those bad things?

A: I spoke to my to G's friend C, that's what I told her because she was having a sleepover and then I couldn't keep it in, then I told her everything.

Q: Okay. And who after who was the next person that you spoke to about those bad things?

A: Then it was my Mum that I told.

Q: Okay. So, your Mum was the third person you spoke to about those bad things?

A: Yes.

Q: Okay?

A: Yes.

Q: And what did you tell your Mum, N?

A: I was telling my Mum that what [the appellant] did, the bad things that he done to me and everything. Then my Mum called [the appellant] and then they were speaking and then my Mum told me that he was, like, denied it and, like, say that it didn't do it and this and that and I was telling the truth and he won't believe me and everything.

Q: Okay. Did you explain the bad things to your Mum, N?

A: Yes, I did.

Q: Okay?

A: Yes, this happened in night.

Q: Okay. Thank you very much, N?

A: You're welcome.

The evidence of the clinical psychologist

32. Ms. Helen Long, Clinical Psychologist, gave evidence that she conducted an examination of the complainant at age 11. She told the court that the complainant had been under the care of various health professionals at Tallaght Hospital from the age of 3. Having considered the reports of Ms. Patricia Cross, Senior Clinical Psychologist, and Dr. John Twomey, Psychiatrist, Ms. Long was aware that N had been diagnosed with developmental delay and intellectual disability as a young child. As a result, N was referred to St. John of God's Special School with indicators for children with a moderate learning disability for one year and then transitioned back to mainstream education.

33. On the 8 September 2015, Ms. Long completed a formal cognitive assessment on the complainant to assess her language and verbal skills, perceptual reasoning, and processing of information. On assessment the majority of the child's scores were below average for her age, with the verbal comprehension, perceptual reasoning, processing speed and full-scale scores within the range of mild learning disability. Her overall level of ability was assessed as within the range of mild general learning disability. Her working memory score was at the lower end of the average range.

The evidence of the school principal

34. The principal of the school attended by the complainant testified that N was well-integrated and well-liked by her fellow students but that she *"required an awful lot of academic and social support"*. N had a special needs assistant who helped her within the class, when out playing, and when taking part in extra-curricular activity. She also said that *"socially…[N] found it sometimes difficult to interpret the relationships that were going on within the school… getting on with the other children in the yard, friendships, understanding nuances… in communications"*.

The evidence of the complainant's sister (G)

35. The prosecution called G, a sister of the complainant, who was almost 13 years of age. Her evidence was sworn. She testified that about two years before, N told her *that "V, our uncle, was sticking his penis into her bum and having sex with her practically"*, but that she didn't believe this at the time. She said that a couple of weeks after, a friend C came over for a sleepover and that the complainant told her also.

The evidence of the complainant's mother

36. The complainant's mother gave evidence about meeting the appellant and starting a relationship with him. She described the course of the relationship, including her becoming pregnant with the appellant's child, and the birth of that child, L. She said that the relationship stopped completely after her daughter N told her that the appellant had been *"doing stuff to her".*

37. She gave detailed evidence as to what her daughter told her the appellant had been doing. She stated that when her daughter made the allegations, she informed An Garda Síochána that same evening. She said she telephoned the appellant before she went to the Gardaí and told him of the allegations and he said *"It's lies".* She also said that she took the complainant to the hospital.

38. She was cross-examined in detail and it was put to her in the course of the cross-examination that she had made up the entire story, which she denied. It was put to her that the appellant did not want to have any more children with her, that she was upset about this, and that was why they separated; and that subsequently she discovered that he had started a relationship with another woman who became pregnant. She denied all of these suggestions. It was also suggested to her that she was pursuing the appellant for child support, which she also denied and strongly asserted that she supported all the children entirely by herself.

39. The court heard evidence that at one point, she sought to have the prosecution dropped. She accepted this, and said it was because *"I have a daughter for him, it is all this is very-is weighing heavy on me, it's hard".* She said "*I myself have forgiven him because he is the father of my daughter"* and that she did not want him to go to jail, partly because *"the families back in [their home country], they are involved, his family they have been begging, begging me to please forgive him. So-and if he goes to jail…he is going to seek for revenge for me and I am in fear of might have life (sic) that if he goes to jail, I'm going to get killed and he knows it, even…even if he doesn't do it in the spiritual-in the physical form and then in the spiritual form, he will do it, he will come after me"*. She then asked the judge to *"have mercy on him"* and not to send him to jail because it would *"destroy"* her.

40. She accepted that she told the children that V had hacked her phone. She continued to believe this was case. She said she also told the Gardaí about her belief as well as the fact that the appellant had denied any phone-hacking.

The evidence of Garda Butler

41. Garda Simon Butler was called by the prosecution and gave evidence of the receiving of the complaint on the 19 November 2016, the interviewing of the complainant by a child specialist interviewer on the 27 November 2016, and the subsequent arrest and detention of the appellant on the 6 January 2017. The memoranda of two interviews with the appellant were read into record and exhibited. During cross-examination, the recordings of the interviews were played for the jury and the recordings were also exhibited. The appellant denied all the allegations.

The evidence of the consultant paediatrician

42. The prosecution read into the record the evidence of Doctor Emma Curtis, Consultant Paediatrician. Dr Curtis conducted a medical examination of the complainant and reported that there were no signs of trauma, scarring or tearing in the genital area and that everything appeared normal. She pointed out that it was well recorded in the international child protection clinical and research literature that anogenital examination is normal in the majority of children and young people where there have been allegations of or even proven penetrative sexual abuse, and therefore while a "positive" examination which provides proof that the alleged event had occurred is helpful, "normal" examination is not helpful in confirming whether or not the alleged abuse has taken place.

Amendment of the Indictment

43. At the conclusion of the evidence, the prosecution applied to amend the indictment in relation to various details, with reference to the evidence given by the complainant. Counsel on behalf of the appellant had no difficulty with some of the amendments, and made submissions about the others which he described as his "observations". There does not appear to have been any objection to the amendment of the indictment *per se,* although criticisms were made in the course of the appeal hearing to the effect that the trial judge himself had been over-active in encouraging and/or facilitating amendment of the indictment.

Discussion of a corroboration warning

44. There was then a discussion of whether a corroboration warning should be given. Counsel on behalf of the appellant requested that one be given on the basis that the evidence-in-chief was unsworn evidence from a witness who had a mild mental disability and that the *"the overall context of the case is one which would give rise to a concern where she has also given evidence that her mother told her what happened and that was the first time she had become aware of the bad things"*. Counsel for the prosecution accepted there was no corroboration but drew the court's attention to authorities including *Wooldridge*,[5] and opposed the application. Counsel for the appellant in reply said that this was the first case he was involved in where there was an intermediary and that *"it's the first case I have been involved in where the Court ends up in a situation where there is a restriction of sorts on cross-examination",* which *"takes the case out of the ordinary"*.

45. The trial judge ruled against giving such a warning, saying:

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[5] [2018] IECA 135

"JUDGE: Well, I'll just - I agree incidentally Mr O'Hanlon that it is not an ordinary case. I don't necessarily agree in relation to the process that it doesn't allow for a full testing of the witness's evidence. It's necessary in these cases and I think there seems to be little or no authority in it in Ireland. But as I said, I was content to follow some English practice guidelines. The matter of cross examination is not an unfettered right, it can be, if you like, there may be - it may be necessary to modify the right of cross examination in certain cases. As where a witness is suffering from an intellectual disability and take into that account. The courts have a jurisdiction to do that. I don't think that the defence case was in any way trammelled in relation to that.

I do agree that the first part of the evidence was unsworn evidence but it was unsworn evidence which is allowed in by the Oireachtas, and can be tested by cross examination and effective cross examination, might I say it. So I don't agree in relation to that. It's also necessary to say and I'll be saying it to the jury that in considering the accuracy of the evidence, because the Act specifies that to be so, the jury are in fact obliged to have regard to every circumstance within the surrounding evidence in the case which would it's not just that they are sort of given a free hand in relation to the matter.

They have to have to have regard to every aspect in relation to the circumstances surrounding the provision of that evidence, I think, in making their mind up. And I'll just refer to the relevant section of the Criminal (Evidence) Act 1992 in relation to that, because it seems to me that it's an important matter which I'll be dealing with them dealing with and just get it out. Where are we? "In estimating the weight if any, to be attached to any statement contained in such a video recording regard should be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.

So as I will be saying, I will be explaining to the jury that they have an obligation under statute to conduct that sort of exercise in relation to it. So in my view, this isn't a case where there are such concerns in relation to the evidence in the case that would warrant me giving a corroboration warning."

46. There was no application for a direction at the conclusion of the prosecution case. The appellant did not give evidence. Counsel made their closing speeches and the judge then charged the jury.

Requisitions and Verdict

47. At requisition stage, the prosecution raised one matter in relation to the evidence concerning one incident. Counsel on behalf of the appellant raised two issues. The first was that the trial judge told the jury that if they accepted the complainant's evidence, they could convict, whereupon the judge intervened to say that he agreed, that he should have told the jury that they should look at *all* the evidence before they convict. The other issue related to the precise date(s) when the complainant's mother had been off work.

The trial judge brought the jury back and directed them on this as well as on the evidential matter raised by the prosecution.

48. The jury ultimately convicted the appellant of all counts on the indictment.

The Grounds of Appeal

49. The grounds of appeal were as follows:

(i) the trial judge erred in refusing the defence application to give the jury a warning as to the dangers of convicting on the uncorroborated evidence of the complainant;

(ii) the trial judge erred in reading out in full during his charge the evidence of the complainant in this case;

(iii) the verdict of the Jury went against the evidence and the weight of the evidence and

(iv) the verdict of the Jury was perverse in all the circumstances.

50. It may be noted that there was no ground of appeal complaining that the cross-examination of the complainant was unfairly restricted by the "ground rules" as to her questioning as laid down at the ground rules hearing.

Ground of Appeal 1: Decision of trial judge not to give a corroboration warning

The appellant's submissions concerning the corroboration warning issue

51. The appellant accepts that the appropriate principles concerning the trial judge's discretion with regard to corroboration warnings were set out in *DPP v. Wooldridge*. He submits, however, that this was one of those special cases in which a warning was warranted because a number of "unusual issues" arose during the trial. These issues are summarised as follows:

(i) The reliability of the complainant's evidence could not be tested to its fullest extent by reason of the constraints imposed by the ground rules hearing;

(ii) The complainant's evidence-in-chief was unsworn;

(iii) The complainant suffers from a mild learning disability;

(iv) This is a case which gives rise to a concern that the complainant was provided a narrative by her mother;

(v) The complainant's own sister did not believe the allegations when she first heard them.

52. The appellant says that the cumulative effect of all of these factors made it unsafe for the case to be left to a jury without a corroboration warning. With regard to point number (iv) above, counsel relies in particular on the exchange during cross-examination of N which is set out above at paragraph 28 above. He says, in effect, that this was an

acknowledgment by the child that her mother had put words in her mouth by telling her the "bad things" that the appellant had done to her.

53. Counsel also refers to *DPP v. M.D,* [6] where it was held that the right to cross-examine one's accuser is firmly embedded as part of the constitutional right to a trial in due course of law as guaranteed under Article 38.1 of the Constitution and that the right of cross-examination may not be unreasonably confined or hampered in terms of the time allowed or otherwise. Counsel does not object to the holding of a ground rules hearing or the imposition of restrictions upon cross-examination as such, but says that this restriction, along with the other factors described, should have led to the discretion being exercised in favour of a warning being given to the jury.

The DPP's submissions concerning the corroboration warning issue

54. In reply, the DPP relies on Wooldridge as well as *DPP v. GH,*[7] *DPP v. K.C,* [8] and *DPP v. Ryan*. [9] She submits that there were no circumstances in the case which warranted a corroboration warning and that the trial judge carefully exercised his lawful discretion in this regard.

55. With regard to the ground rules hearing, the DPP submits that, contrary to the submissions of the appellant on appeal, no objection was voiced at the time of trial in respect of either the ground rules hearing or the proposed contents of the ground rules which emerged from that hearing. Further, she submits that it was within the inherent jurisdiction of the trial judge to adopt the recommendations of Ms. Humphries, the intermediary, having taken guidance from the decision of *R v. Lubemba*. The respondent also relies on the provisions of the Criminal Justice (Victims of Crime) Act 2017 and the European Directive on the Victims of Crime (2012/29/EU).

56. The DPP relies on the comments of the court in *R v. Barker* [10] concerning the proper approach to the evidence of children, and submits that the complainant matched the description of the complainant given in *R v. Barker* at paragraph 52, namely *"an utterly guileless child, too naïve and innocent for any deficiencies in her evidence to remain undiscovered, speaking in matter of fact terms. She was indeed a compelling as well as a competent witness. On all the evidence, this jury was entitled to conclude that the allegation was proved." The Court in that case concluded that "unless we simply resuscitate the tired and outdated misconceptions about the evidence of children, there is no justifiable basis for interfering with the verdict"*.

57. The DPP submits that the appellant has failed to give any indication of how his cross-examination of the complainant was hindered and says that, on the contrary, there was a full cross-examination, covering a number of different matters as well as the central

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[6] [2017] IECA 322
[7] [2020] IECA 130 (para. 21 in particular)
[8] [2016] IECA 155
[9] [2010] IECCA 29, [2010] 4 JIC 2001
[10] [2010] EWCA Crim 4

allegations themselves. On the latter point, she draws attention to the following exchange during the cross-examination:

"Q: You say that [V] did bad things to you?

A: Yes, he did, like actual, like things to me that she wasn't supposed to be doing to a child that you usually do to an adult when two of them are making love, something like that, that's what he did to me"

Q: Yes. You said that he did it when in the morning when you were getting ready for school?

A: Yes, he did that in the morning when my Mum was going to work on that day and then he – then my youngest – my two youngest sisters, [G], like, came and told my uncle that there wasn't enough milk because they notice there wasn't any milk at that time and [G] was trying to tell my uncle… then my uncle still say no, no, no, no and he didn't listen to [G] because [G] wanted me to follow her to get milk in Spar and then I was, like, watching You Tube on my phone… challenge and then he walked to the living room door, draw the curtains and close to me and then just kneel down and just start kissing me and do the bad things to me and then after that he brought me to the kitchen and then he pulled my tracksuit trousers down and then put me on this table thing, like, up where the cereals are and then started doing the disgusting things to me again.

…

Q: [V] says that story is not true. Do you understand ?

A: Yes, but it – I'm not the one who is lying because it did happen, he's the one who's been lying, not me because it did happen."

58. As regards the emphasis placed by the appellant upon the exchange set out at paragraph 28 above, the DPP refers to the subsequent answers given by the child in re-examination and submits that the answers provided in cross-examination were clearly the product of confusion about the meaning of the questions and that the matter was resolved on re-examination. Therefore, she submits, no unreliability was disclosed leading to any need for a corroboration warning.

59. The DPP also relies on the concluding remarks of *R v. Lubemba* where the Court of Appeal stated:

> *"…a trial judge is not only entitled, he is duty bound to control the questioning of a witness. He is not obliged to allow a defence advocate to put their case. He is*

entitled to and should set reasonable time limits and to interrupt where he considers questioning is inappropriate" (para. 51). [11]

60. As regards the evidence from the complainant's sister that she *initially* did not believe her sister, the DPP submits that this was opinion evidence on the ultimate issue of the culpability of the appellant which should be given little weight and certainly did not disclose grounds for a corroboration warning.

Analysis and Decision on the corroboration warning issue

61. S.28 of the Criminal Evidence Act 1992 abolishes the mandatory requirement of a corroboration warning in cases involving children, while s.7 of the 1990 Act abolishes the mandatory requirement of a corroboration warning in cases involving sexual offences. The previous Court of Criminal Appeal and this Court have repeatedly emphasised the discretion which inheres in the trial judge to deal with this matter, and that the purpose of the legislative provision should not be undermined by over-readiness to give such warnings. Relatively recently, the decision of this Court in *DPP v. Wooldridge* re-stated the principles, emphasising that the giving of a corroboration warning falls within the discretion of the trial judge and, more particularly, that the abolition of the mandatory corroboration warning must not be circumvented by a trial judge simply adopting a prudent or cautious approach of giving a corroboration warning in every case where there is no corroboration. The Court said

> *"There must be something* ***special or peculiar*** *in the evidence which give rise to the danger of convicting the person on the uncorroborated evidence of that person before one is required"* [12] *(para. 14) (emphasis added).*

62. As noted above, the appellant submits that the evidence in this case taken as a whole does indeed fall within the category of 'special or peculiar', thus attracting the need for a corroboration warning. He submits that it is the cumulative effect of several factors which brought the evidence into that category:

(i) The fact that he could not, he said, test the complainant's evidence to the fullest extent because of the limitations imposed as a result of the ground rules hearing;

(ii) The fact that the complainant's evidence-in-chief was unsworn;

(iii) The fact that the complainant suffers from a mild learning disability;

(iv) A concern that the mother had furnished the narrative to the child;

(v) The fact that the complainant's own sister did not believe the allegations when she first heard them.

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[11] [2014] EWCA Crim 2064 at para. 51.

[12] [2018] IECA 135

63. The Court is not persuaded that these factors, individually or cumulatively, gave rise to a situation where the trial judge could be considered to have erred in failing to give a corroboration warning. First, the fact that the complainant's sister did not believe the allegations when she first heard them was no more than the initial reaction of a child on being told by her sister, also a child, that a trusted adult had sexually abused her, something greatly outside the range of any normal child's experience. It is hardly surprising that it may have evoked a preliminary reaction of incredulity. One might question whether this piece of evidence was even admissible, being the child's opinion on the ultimate issue before the jury, but even if it was, we would consider it to be a matter of minor significance in the overall circumstances of the case and certainly not something that would point towards the need for a corroboration warning, even in conjunction with other matters.

64. Secondly, the issue of whether the mother had furnished a narrative to the child is not an established fact but was a proposition that was being advanced by way of defence. The only passage in the transcript which the appellant could point to in this regard was the passage set out at paragraph 28 above. Having read the totality of the complainant's evidence on the transcript, it is clear to us that there was confusion on the part of the complainant because of the manner in which the question had been framed; it may be noted that the intermediary had to intervene twice around this point to ask for greater clarity in the questioning. Further, the child gave a clear answer to the contrary in re-examination. The evidence in support of the thesis that the mother had coached the child was therefore very thin indeed, but in any event it was for the jury, who had heard the evidence 'live', to consider whether the mother had furnished the child with a narrative. This is far from a case where the transcript discloses to an appellate court a real concern that a mother has coached the complainant, as the appellant submits. Again, we do not consider that this factor pointed towards the need for a corroboration warning, even in conjunction with other matters.

65. Thirdly, as to the fact that the child's evidence was unsworn, it is now almost thirty years since the Oireachtas saw fit to abolish the requirement that a child's evidence be sworn. Nothing in the legislation suggests that the unsworn evidence of a child is to be given lesser weight than sworn evidence. The weight to be given to a child's evidence depends more upon its content and the manner in which the child gives evidence and the overall circumstances than the simple fact of whether or not it was sworn. This point leads into the remaining two facts relied upon by the appellant, namely the fact that the complainant was a child with a learning disability and the ground rules imposed upon the manner in which questions would be posed, to which we now turn.

66. The right to cross-examine witnesses undoubtedly inheres in the concept of a fair trial pursuant to Article 38(1) of the Constitution (and for that matter, Article 6 of the European Convention on Human Rights). In *State (Healy) v. Donoghue*, [13] Gannon J.

[13] [1976] IR 325

identified among the trial rights of an accused the right *"to hear and test by examination the evidence offered by or on behalf of his accuser"*, while in the same case on appeal, O'Higgins C.J. said that words *"in due course of law"* make it *"mandatory that every criminal trial shall be conducted in accordance with the concept of justice, that the procedures applied shall be fair, and that the person accused shall be afforded every opportunity to defend himself"*. Nonetheless, O'Higgins C.J. also went on to say: –

> *"The general view of what is fair and proper in relation to criminal trials has always been the subject of change and development. Rules of evidence and rules of procedure gradually evolved as notions of fairness developed".*

These words were cited by Hamilton C.J. in *Donnelly v. Ireland,* [14]a case in which the Supreme Court upheld the constitutionality of s.13 of the 1992 Act (video-link evidence) in the face of a challenge grounded upon the constitutional right to cross-examination.

67. However, it is necessary also to consider the rights of complainants in criminal trials. Even if Article 38.1 does not apply to complainants, the rights of victims of crime are protected by Article 40.3 of the Constitution, while Article 42A(1) of the Constitutional now refers to the natural and imprescriptible rights of the child and guarantees to protect and vindicate those rights as far as practicable . The constitutional right to bodily integrity is of primary relevance here; rape being considered as one of the most serious violations of bodily integrity in the criminal calendar.[15] Indeed the European Court of Human Rights has repeatedly held that rape and other crimes of sexual violence violate the right to be free from torture and inhuman and degrading treatment under Article 3 of the Convention and the right to privacy under Article 8,[16] and that States are under a positive obligation to have systems in place to effectively investigate and prosecute such offences. [17] Article 13 of the Convention on the Rights of Persons with Disabilities requires that persons with disabilities have effective access to justice and that appropriate accommodations be made available to facilitate their participation. This Convention was ratified by Ireland in March 2018. The core challenge for the criminal trial is how to adequately defend those rights without diminishing the essential nature of cross-examination on behalf of the accused person pursuant to Article 38.1. In this regard, it may be noted that Barrington J. said in *Re National Irish Bank* [18] that the guarantee of trial in due of course of law embodies *"dynamic constitutional concepts into which lawyers have obtained deeper insights as society has evolved".*

68. The fairness of the trial may require some accommodations to be made for a complainant who has a particular vulnerability. Such persons may fall victim to sexual offending, and indeed their very vulnerability can sometimes render them particularly at risk of abuse. A trial process which seeks to be fair to such complainants must take into account their special needs in order to place them on an equal footing with other complainants. A

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[14] [1998] 1 IR 321
[15] DPP v.Tiernan [1988] IR 250; DPP v.CO'R [2016] 3 IR 322
[16] Stubbings v. UK (1997) 23 EHRR 213, para. 62; Aydin v. Turkey (1998) 25 EHRR 251; E.G. v. Republic of Moldova, application 37882/13, 13 April 2021.
[17] X and Y v. The Netherlands (1986) 8 EHRR 235. MC v. Bulgaria (2005) 40 EHRR 20
[18] [1999] 1 ILRM 321

person who has a learning disability is not in the same position to deal with questioning as a person who does not; she may less able to understand complex questions, less able to withstand the inherent pressure of suggestibility in a leading question, and more easily tired and confused than other complainants.

69. The traditional method of cross-examining may of course suit the defence better precisely because the complainant may be more susceptible to the subtle pressures exerted during cross-examination by means of questioning techniques such as the posing of complex or loaded questions. However, the fairness of a trial is not equivalent to what might suit the defence or what defence counsel are traditionally used to doing. Rather, it is a concept of much greater depth, complexity and objective content. To ensure fairness to a child-complainant with a learning disability, adaptations may need to be made the form, content, pace and length of questions to a complainant in order to ensure that she gives the best evidence she is capable of giving. The trial judge has the difficult task of trying to hold the delicate balance between enabling this to happen while ensuring that the ability of the accused to present his case is still protected in such a way that the trial complies with the requirements of Article 38.1 of the Constitution.

70. The appellant sought to rely upon the M.D. case, which concerned a ruling that counsel could not cross-examine the child-complainant while showing her some CCTV footage relevant to her account. Central to the court's decision to quash the conviction and order a re-trial was that that *"there is no question but that it would have been possible to facilitate what was requested"* even though it might have been *"inconvenient".* In other words, the court said that this was not a case where what was requested by defence counsel was impossible to achieve or was unreasonable. The court also quoted from the judgment of Hardiman J. in *Maguire v. Ardagh*, [19] where, having stated that the right to cross-examine derives from the Constitution, he added: *"It follows from the foregoing that the right of cross-examination may not be* ***unreasonably*** *confined or hampered in terms of the time allowed or otherwise …."* (emphasis added). There is a considerable difference between counsel being restricted in questioning a complainant for reasons of convenience, on the one hand, and restrictions being imposed on reasonable grounds to ensure that the complainant understands the questions and can cope with the questioning process, on the other. We therefore do not think that the comments in *M.D*. advance the appellant's arguments.

71. The trial judge has a responsibility to ensure that communication is developmentally appropriate, which includes questioning which is tailored not only to the complainant's age but also her cognitive capacities (in the case of a learning disability). Even experienced barristers can be completely unaware of the extent to which their normal method of communication is incapable of being understood by a child, particularly a child with a learning disability. Complex and 'tag' questions which are used regularly in the courtroom by advocates often require the witness to use advanced forms of psychological

[19] [2002] IESC 21, [2002] 1 IR 385

reasoning to understand the question and answer the question.[20] A fair trial must seek to avoid a situation where, for example, a complainant may give answers without having properly understood the questions, or acquiesces to leading questions because she feels pressurised by the question itself, or gives answers to questions simply because she is tired and wishes to have the process over and done with. This is where intermediaries can assist, but of course their role is limited to the communicative aspects of the questions and answers and they are not concerned with content. As was stated in the Review of Protections for Vulnerable Witnesses in the investigation and prosecution of Sexual Offences (July 2020) (the "O'Malley Report),

> *"The sole function of an intermediary is to assist in the communication process, whether between lawyers and witnesses during trial, or, earlier, during police interviews. In this respect, their role is somewhat akin to an interpreter. The intermediary's loyalty is to the court…On no account should the intermediary be, or be perceived to be, an advocate or support worker acting on behalf of the person being assisted"*

And

> *"It is not a question of somebody being interposed between counsel and the witness. Rather it is a proposal for the provision of expert advice to legal representatives and the court as to the best and most effective way of questioning a witness. Such an arrangement is quite compatible with the ultimate purpose of a criminal trial, which is to discover the truth in a just and lawful manner".*

72. This jurisdiction has been very slow in taking practical measures to secure the best evidence from vulnerable witnesses in criminal trials. While the Criminal Evidence Act 1992 contained many useful measures, some of its provisions remained at the level of theory for many years because the practical measures required for its implementation were not provided for. It was almost 20 years before a video-recorded statement (pursuant to s.16(1)(b)) made its first appearance in a trial, and almost 30 years before an intermediary was used. Indeed, it is notable that there is *still* no register of intermediaries in this jurisdiction, a most disappointing state of affairs. [21] It may be noted in that regard that the intermediary employed in the present case had been registered in Northern Ireland. Since the 1992 Act was enacted, there has been a sea-change in attitudes towards the role of the victim in the criminal justice process. Of particular relevance is that the EU has introduced a Directive on the Victims of Crime

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[20] 'Tag' questions are questions which contain both a positive and a negative statement and can be too complicated for some children; however, barristers are often accustomed to using this type of question. An illuminating study of children's experiences of court was the 2009 study "Measuring Up: Evaluating implementation of government commitments to young witnesses in criminal proceedings" conducted by Joyce Plotnikoff and Richard Woolfson and published by the Nuffield foundation/NSPCC. Of the young witnesses taking part in the study, 65% described problems of comprehension, complexity, questions that were too fast or answers being talked over. Most of those who experienced problems with questions had been advised they could tell the court about a problem but fewer than half actually did so. Some 58% said that the defence lawyer tried to make them say something they did not mean or put words in their mouth. Some 57% said they had been accused of lying, usually more than once.

[21] The O'Malley report calls for the establishment of a register as well as a training programme for intermediaries and the creation of a Code of Practice.

(2012/29/EU)[22] which in turn led to the enactment of the Criminal Justice (Victims of Crime) Act 2017 in this jurisdiction.

73. Other countries have been much more proactive in recent years in terms of developments intended to secure the best evidence from vulnerable witnesses while simultaneously protecting the right of cross-examination as far as possible. [23] The procedures employed in the present case, including the holding of a ground rules hearing, was based on the United Kingdom procedures, presumably because no such procedures have ever been provided for in this jurisdiction. [24] In the United Kingdom, the Criminal Practice Directions Amendment No.2 provides:

> *3E.1 The judiciary is responsible for controlling questioning. Over-rigorous or repetitive cross-examination of a child or vulnerable witness should be stopped. Intervention by the judge, magistrates or intermediary (if any) is minimised if questions, taking account of the individual's communication needs, is discussed in advance and ground rules are agreed and adhered to.*
>
> *3E.2 Discussion of ground rules is required in all intermediary trials where they must be discussed between the judge or magistrates, advocates and intermediary before the witness gives evidence….*
>
> *….*
>
> *3E.4 All witnesses, including the defendant and defence witnesses should be enabled to give the best evidence they can. In relation to young and or vulnerable people, this may mean departing radically from traditional cross examination. The form and extent of appropriate cross-examination will vary from case to case…" [25]*

74. We agree that a ground rules hearing at the beginning of a trial (or indeed, in advance of it if pre-trial hearings become part of the procedural landscape in the criminal justice system) is a useful mechanism at which issues relating to the questioning of the particular complainant(s) in the trial can be aired, with the assistance of expert advice from a suitably qualified person, and where decisions can be made about how the particular complainant(s) is to be questioned in the trial. It may be noted that in the present case, there was no objection by counsel for the appellant to the parameters actually laid down at the ground rules hearing which was conducted.

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[22] Directive on Establishing Minimum Standards on the Rights Support and Protection of Victims of Crime. Article 10 concerns the right of victims to be heard in criminal proceedings and provides: "Member States shall ensure that victims may be heard during criminal proceedings and may provide evidence. Where a child victim is to be heard, due account shall be taken of the child's age and maturity."

[23] Intermediaries were introduced in England and Wales on a phased basis from 2003 onwards. Formal evaluation being conducted of a pilot scheme and this led to nationwide rollout from 2008 after positive feedback was obtained.

[24] Developments in the UK started to develop momentum following the publication in 1989 of the "Pigot Report" (Home Office Report on the Advisory Group on Video Evidence, chaired by His Honour Judge Thomas Pigot QC). In 1998, a Home Office report recommended that statutory provision be made for intermediearies; "Speaking Up for Justice". Landmark developments in that jurisdiction included the Criminal Justice Act 1988 and the Youth Justice and Criminal Evidence Act 1999.

[25] Criminal Practice Direction [2015] EWCA Crim 1567, S.3E ("Ground Rules Hearings to plan the questioning of a vulnerable witness or defendant").

75. In England and Wales, much has been done to educate lawyers and judges about the communication difficulties of particular witnesses and how appropriate questioning parameters can be of assistance in ensuring fairness to everybody. The Advocacy Training Council made recommendations in a Report entitled *"Raising the Bar: the Handling of Vulnerable Witnesses, Victims and Defendants in Court"* which led in turn to the development by experts of *"Toolkits"* on how to deal with vulnerable witnesses without undermining the accused's right to a fair trial.[26] Further, training has been provided to judges and advocates, including how to conduct ground rules hearings and set appropriate parameters for questioning of vulnerable witnesses. Article 25 of the EU Victim's Directive requires Member States to ensure that persons likely to come into contact with victims, including judges and lawyers, receive general and specialist training. The Bar of Ireland has already started to provide training, including by inviting speakers from England to familiarise Irish barristers with the relevant techniques of questioning, and will no doubt intensify its efforts in view of the recommendations of the O'Malley report. The latter report also requests that the Judicial Studies Committee be asked to give high priority to the issue of appropriate training for judges dealing with such cases and that an inter-disciplinary approach, as well as input from other jurisdictions which have well-established training programmes, be adopted. There is therefore much to be learned by all Irish professionals concerned with this type of case.

76. These developments were endorsed in the leading case of *R v. Barker*. We agree fully with the comments of the court in *Barker* set out below.

77. In *Barker,* the Court of Appeal (Lord Judge C.J., Hallett L.J. and Macur J.) dismissed an appeal against conviction for anal rape in circumstances where the complainant was 4 years old when she made her complaint. The court contrasted the modern understanding of children's evidence with the view which had formerly been held in England and Wales,[27] exemplified by the celebrated observation of Lord Goddard C.J. in *R v. Wallwork,* [28] when he said *"the jury could not attach any value to the evidence of a child of five; it is ridiculous to suppose they could…".* The more modern and informed approach to child witnesses was set out at some length by the Court of Appeal in *Barker.*

78. On the issue of competence, the court said:

> *"The question in each case is whether the individual witness, or, as in this case, the individual child, is competent to given evidence in the particular trial. The question is entirely witness or child specific. There are no presumptions or preconceptions. The witness need not understand the special importance that the truth should be told in court and the witness need not understand every single question or give a readily understood answer to every question. Many competent adults witnesses would fail such a competency test. Dealing with it broadly and fairly, provided the*

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[26] These materials are available from the Advocates Gateway Website, which contains some 19 Toolkits and also includes a film demonstrating how cross-examination can be modified while retaining its essence.

[27] Although apparently the position in Scotland was somewhat different; see para. 35 of *Barker***.**

[28] [1958] 4 WLUK 4, (1958) 42 Cr. App. R. 153

witness can understand the questions put to him and can also provide understandable answers, he or she is competent…. If a child is called as a witness by the prosecution he or she must have the ability to understand the questions put to him by the defence as well as the prosecution and to provide answers to then which are understandable." [29] (para. 38)

79. The court emphasised that the fact that a witness is a child is not *in and of itself* a reason to consider the evidence as less reliable than that of an adult. At paragraph 40 the court observed:

> *"We emphasise that in our collective experience the age of a witness is not determinative on his or her ability to give truthful and accurate evidence. Like adults some children will provide truthful and accurate testimony, and some will not. However, children are not miniature adults, but children, and to be treated and judged for what they are, not what they will, in years ahead, grow to be. Therefore, although due allowance must be made in the trial process for the fact that they are children, with for example, a shorter attention span than most adults, none of the characteristics of childhood, and none of the special measures which apply to the evidence of children carry with them the implicit stigma that children should be deemed in advance to be somehow less reliable than adults. The purpose of the trial process is to identify the evidence which is reliable and that which is not, whether it comes from an adult or a child. If competent, as defined by the statutory criteria, in the context of credibility in the forensic process, the child witness starts off on the basis of equality with every other witness. In trial by jury, his or her credibility is to be assessed by the jury, taking into account every specific personal characteristic which may bear on the issue of credibility, along with the rest of the available evidence."*

80. The court gave a firm indication that it is for the courts and counsel to adapt to children, and to adjust their techniques where necessary, but insisted that this does not and should not of itself compromise the ability to defend one's client (on the part of counsel) or the fairness of the trial:

> *" The trial process must, of course. and increasingly has, catered for the needs of child witnesses, as indeed it has increasingly catered for the use of adult witnesses, whose evidence in former years would not have been heard, by for example, the now well understood and valuable use of intermediaries. In short, the competency test is not failed because the forensic techniques of the advocate (in particular in relation to cross examination) or the processes of the court (for example, in relation to the patient expenditure of time) have to be adapted to enable the child to give the best evidence of which he or she is capable. At the same time, the right of the defendant to a fair trial must be undiminished. When the issue is whether the child is lying or mistaken in claiming that the defendant behaved indecently*

[29] 2010 EWCA Crim 4.

towards him or her, it should not be over problematic for the advocate to formulate short simple questions which put the essential elements of the defendant's case to the witness and fully to ventilate before the jury the areas of evidence which bear on the child's credibility. Aspects of evidence which undermine or are believed to undermine the child's credibility must, of course, be revealed to the jury, but it is not necessarily appropriate for them to form the subject matter of detailed cross examination of the child and the advocate may have to forego much of the kind of contemporary cross examination which consists of no more than comment on matters which will be before the jury in any event from different sources. Notwithstanding some of the difficulties, when all is said and done, the witness whose cross–examination is in contemplation is a child, sometimes very young, and it should not take very lengthy cross-examination to demonstrate, when it is the case, that the child may indeed be fabricating, or fantasising or imagining or reciting a well-rehearsed untruthful script, learned by rote, or simply just suggestible, or contaminated by or in collusion with others to make false allegations, or making assertions in language which is beyond his or her level of comprehension and therefore likely to be derived from another source. Comment on the evidence, including comment on evidence which may bear adversely on the credibility of the child, should be addressed after the child has finished giving evidence." (para. 42) [30]

81. In the later case of *R v. Lubemba*, *R v. JP*, [31] the Court of Appeal considered two separate appeals in cases involving child witnesses who had made allegations of sexual offences against the appellants and where the trial judge had imposed certain restrictions upon the questioning by defence counsel. The appeal in *Lubemba* was refused on the basis that the trial judge had exercised his power entirely reasonably and had not undermined the fairness of the trial. In contrast, the appeal in JP was allowed in circumstances where the trial allowed the child's video-recorded statement to be played to the jury but did not permit any cross-examination of the child at all.

82. Again the utility of a ground rules hearing was highlighted:

> *"The Court is required to take every reasonable step to encourage and facilitate the attendance of vulnerable witnesses and their participation in the trial process. To that end.... it is best practice to hold hearings in advance of the trial to ensure the smooth running of the trial, to give any special measures directions and to set the ground rules for the treatment of a vulnerable witness. We would expect a ground rules hearing in every case involving a vulnerable witness, save in very exceptional circumstances."* (para. 42)

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[30] It is fair to say that certain people, including Joyce Plotnikoff, have been to the forefront of promoting best practice in the use of developmentally appropriate questioning of witnesses/complainants in the UK. See J. Plotnikoff and R. Woolfson, (2015), Intermediaries in the Criminal Justice System.

[3131] [2014] EWCA Crim 2064

83. The court indicated the type of issue which should be the subject of the ground rules hearing:

> *"In general, experts recommend that the trial judge should introduce him or herself to the witness in person before any questioning, preferably in the presence of the parties…. The ground rules hearing should cover, amongst other matters, the general care of the witness, if ,when and where the witness is to be shown their video interview, when, where and how the parties and the judge if identified intend to introduce themselves to the witness, the length of questioning and frequency of breaks and the nature of the questions to be asked. …"* (para. 43)

84. The trial judge has the responsibility of monitoring compliance with the rules laid down at the ground rules hearing:

> *"The trial judge is responsible for controlling questioning and ensuring that vulnerable witnesses and defendants are enabled to give the best evidence they can. The judge has a duty to intervene, therefore, if an advocates questioning is confusing or inappropriate."* (para. 44)

85. Again, the fact that there would inevitably be some departure from traditional forms of cross-examination was both recognised and accepted by court:

> *"It is now generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary.* ***Advocates must adapt to the witness, not the other way around****.. They cannot insist upon any supposed right to "put one's case "or previous inconsistent statements to a vulnerable witness. If there is a right to "put one's case" (about which we have our doubts) it must be modified for young or vulnerable witnesses. It is perfectly possible to ensure the jury are made aware of the defence case and of significant inconsistencies without intimidation or distressing a witness".* [32] (para.45) (emphasis added)

86. The Court is of the view that the views expressed in *Baker* and *Lubemba* set out above are equally apposite in this jurisdiction. [33] Accordingly, and returning to the arguments advanced by the appellant, there is no reason to consider that the evidence of the particular complainant in this case was unreliable simply because she was a child and/or because she was a child with a learning disability. The reasons for this have been eloquently expressed in the quotations set out above and in particular the passage: *"Like adults, some children will provide truthful and accurate testimony, and some will not.… none of the characteristics of childhood, and none of the special measures which apply to*

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[32] It may be noted that Baker J subjected the 'rule' about putting one's case to a witness a detailed analysis in DPP v. Burke [2014] IEHC 483, [2014] 2 IR 651 in an 'ordinary' situation (i.e. a non-child/non-vulnerable witness situation) and concluded that there was no such 'rule' in any event.

[33] It may be noted that the Court in DPP v. D.O'D (No.2) [2015] IECA 306, 10 December 2015, said that the manner of cross-examining may be a relevant factor in sentencing; in that case counsel on behalf of the appellant had not interrupted or objected to prosecution examination of the witness and his own cross-examination was "relatively low key", all of which "could reasonably be expected to have significantly reduced the stress of the proceedings for [the complainant] and which deserved specific recognition in the sentencing of the appellant".

the evidence of children, carry with them the implicit stigma that children should be deemed in advance to be somehow less reliable than adults… If competent, as defined by the statutory criteria, in the context of credibility in the forensic process, the child witness starts off on the basis of equality with every other witness". The trial judge had observed the child on the video-recording and being cross-examined and was best placed to judge whether a corroboration warning was required. It was a matter within the discretion of the trial judge to assess the child appearing before him and whether there was any particular reason to consider that her evidence might warrant the corroboration warning, and the fact that she was a child with a learning disability did not, in our view, in and of itself point towards the need for a corroboration warning.

87. We also reject the suggestion that counsel for the appellant was unfairly constrained in his questioning or that he was unable to properly defend his client. The manner in which the trial judge carried out the ground rules hearing in this case was entirely appropriate and the recommendations of the mediator were reasonable. That that is so is demonstrated by the complete absence of any objection during or at the conclusion of the ground rules hearing by counsel on behalf of the appellant. Further and significantly, there is no ground of appeal suggesting that (i) the use of an intermediary was wrong, (ii) that the recommendations of the intermediary and adopted by the court went too far or were unsuitable in any way, or (iii) that the appellant's counsel was restricted in any material way from carrying out a cross-examination in accordance with his instructions. The issue of "restricted cross-examination" is raised solely in the context of a ground of appeal relating to the corroboration warning, where a complaint about such restriction has sought to be introduced, as it were, by the back door. In fact, a review of the transcript makes it clear that there was no time during the cross-examination where counsel wished to pursue a line of questioning and was prevented from doing so. Having regard to the above matters, the suggestion now made in the context of an entirely different ground of appeal (namely that the trial judge should have given a corroboration warning), that the counsel was constrained in his cross-examination by the ground rules lacks reality. It is a generalised assertion which has not been substantiated in any concrete way.

88. In all the circumstances, the Court is satisfied that the various issues raised by counsel as demonstrating that there were "special and unusual" circumstances of the case which necessitated the giving of a corroboration warning, do not withstand scrutiny. The Court rejects this ground of appeal.

Ground of Appeal 2: The reading out of the complainant's evidence

89. The appellant submits that the trial judge wrongly took it upon himself, without seeking the view of either counsel, to take his own note from the recorded interview with the complainant and to read it to the jury. Counsel says that the judge was correct in not reading the transcript of her evidence to the jury but erred in reading his note instead, which was essentially a verbatim account in any event. The jury were therefore, the appellant submits, hearing her evidence twice.

90. The appellant refers to the fact that the judge had invited the prosecution the previous day to "*take on board*" certain matters relating to the indictment and that he then said,

on day 5, *"The first thing that should happen is it seems to me that there is to an application to amend the indictment,….."* and that he went through each count on the indictment and suggested a further amendment to the revised indictment and following discussion with both Counsel, made an order amending the indictment. The appellant says while *"no specific point is made about the indictment being amended on foot of the study by both the Judge and counsel for the prosecution of the DVD of the complainant's interview"*, it further "*enhances*" the importance of this evidence and the fact that the jury heard it twice. The appellant submits: *"However it is respectfully submitted that the manner in which the trial was conducted – the Judge preparing a note of the complainant's evidence on DVD, the Judge insisting on an amendment of the indictment using the note he prepared to assist in doing so, reading out in full that note of evidence during the Judge's Charge to the jury, telling the jury during his charge they could convict if they accepted her evidence with all other evidence used merely to inform their view of the complainant's evidence- had given the complainant's evidence a status which made it very difficult for a jury to properly consider all of the other evidence they heard during the course of the trial."*

91. There seems to be some overlap between this ground of appeal and the first as the appellant also goes on to submit that the reading out of the complainant's evidence was another reason for giving a corroboration warning.

92. The DPP points out that the jury was instructed as to its obligation under s.16(3) to examine all the evidence in the trial which would allow them to infer whether the material was accurate or not and to assess its probative value. She submits that the evidence-in-chief was read to the jury from a transcript prepared by the trial judge based on the contents of the DVD played to the jury in the same way that a judge's note would be read to a jury where evidence was given viva voce. It was accurate in all aspects and there was neither objection taken to its use nor requisition raised by the defence as to its form or content. The entire cross-examination by Counsel for the appellant was also read out to the jury by the trial judge. The DPP submits that at all stages the trial judge maintained fairness and balance, carefully advising the jury that the facts of the case were a matter for determination within their domain.

93. We have no hesitation in rejecting this ground of appeal. We fail to see any difference of substance between a judge reading out his notes of live evidence and a judge reading out his notes of a video-recorded interview. The complaint appears to be in some degree that the judge's notes were verbatim because they were taken from the video-recording. It is entirely possible that that a judge who writes or types notes quickly during live evidence could achieve the same level of detailed note-taking. It has long been permitted for a trial judge to recapitulate the evidence of witnesses, including the complainant in a trial involving sexual offences. We reject this ground of appeal.

Grounds of Appeal 3 and 4 : Jury verdict against the weight of the evidence/ perverse

94. The appellant submits that the verdict went against the weight of the evidence. He submits that the cumulative effect of reading out in full the evidence of the complainant, and of refusing the defence application to provide a corroboration warning, "*elevated*" the

complainant's evidence and enhanced its reliability in the eyes of the jury in the absence of any supporting evidence. He submits that the verdict of the jury was therefore perverse in all the circumstances.

95. The appellant's counsel did not seek a direction at the close of the prosecution case. It is highly unlikely that a conviction will be quashed on the basis that a verdict was perverse in circumstances where the counsel at trial did not even consider that an application for a direction was warranted as this amounts in effect to a concession at trial by the appellant that there is sufficient evidence upon which a jury might convict. The point was made in *DPP v. P.B.*[34] by the Court that to argue on appeal that a jury verdict was perverse when no application for a direction was applied for risks seriously undermining the credibility of the appeal more generally.

96. In the present case the complainant's evidence was coherent and cogent, taking into account both her evidence-in-chief, given via the video-recorded interview, and her evidence while under cross-examination. There was nothing in the surrounding circumstances that was particularly unusual. The child's answers in cross-examination, the mother's evidence concerning her relationship with the appellant and the circumstances of its breakdown, and the evidence of the complainant's sister, were all matters which fell within the normal range of matters for jury consideration. It is not uncommon in sexual offence cases for a defence to be run on the basis that the mother 'put the child up to' making the allegations, and the mere assertion of such a matter together with other aspects of the case highlighted by the appellant do not bring the case into the 'special and unusual' category envisaged by *Wooldridge*. These matters do not give rise, whether of themselves or in combination with the fact that the complainant's evidence was supported by the various procedural mechanisms already described, to any particular concern about the jury verdict and certainly do not give the Court any ground for interfering with the verdict on the basis that it was perverse and/or against the weight of the evidence.

97. This ground of appeal is also refused.

Conclusion

98. In all of the circumstances, each ground of appeal having been rejected, the appeal should be dismissed. The Court will hear submissions in relation to the appeal against severity of sentence in due course.

[34] [2020] IECA 158, para. 15. See also DPP v. M.A. [2020] IECA 367