Neutral Citation No. [2011] IEHC 368

THE HIGH COURT

2010 1299 JR

BETWEEN

G. O' R.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Mr. Justice Charleton delivered on the 7th October 2011

1. This application seeks to injunct the trial of the applicant G. O'R. on a charge of sexual violence because, it is claimed, the alleged victim of the offence was coached as to how she should give evidence. The resolution of this issue requires some discussion as to the proper approach to witnesses by those tasked with preparing for a criminal trial, be they police or lawyers or therapists. But first, the facts that will be in dispute at trial.

Facts in Issue

2. On the 10th of August 2007, together with a number of other young men and women, the applicant attended a party at his own address in student accommodation in Limerick. A young lady who came to that party later made a complaint of sexual assault against him. It is likely, at trial, that the conduct of the complainant while at the party will be closely scrutinised. The circumstances of the party were apparently typical of a contemporary student gathering, with people arriving and leaving throughout the course of the evening. Alcohol was available for the guests. The complainant drank some beer. It is claimed that at or around midnight she declined the offer of a lift home with a friend whose father was picking her up from the party. She said that her plan was, instead, to later call a taxi. Shortly after that, according to the complainant, she went into the applicant's bedroom in order to retrieve her mobile phone, as she felt that the time had come to ring for a taxi. What happened in the bedroom is the subject of conflicting accounts given by the complainant and the applicant to the gardaí.

3. While under arrest, the applicant claimed that he was not aware of the age of the complainant. He painted a background of socialising and chatting with the complainant for a considerable part of the evening. The applicant said that they had watched television together and had spoken on the balcony of the flat. Subsequently, according to him, they were alone in his bedroom and talking. He claims that they began stroking each other fondly and then feeling each other while lying on his bed. According to the applicant, the complainant permitted him to remove her jeans to facilitate intimate touching. This activity ended, the applicant claims, because the complainant did not seem interested and she turned away from him.

4. In her statements to the Gardaí, the complainant accepts that she and the applicant had been chatting while at the party. That interaction continued with them both sitting on the bed after she had gone in to his room in order to get her mobile phone. They sat on the bed chatting. She claims that she then fell asleep on the bed, with her back leaning against the wall having been sitting there for some time. She claims that when she awoke, the duvet cover was over her and she was lying flat on her back. She asserts that her jeans had been removed, without her consent, and that the applicant was touching her intimately. She says that she moved away from him and found her jeans thrown across a chair. Another person, related to the applicant, came in and asked was she okay. She did not say anything to him.

5. The trial of the case was considerably delayed. Eventually, on the 3rd February 2010, a jury was empanelled and the trial commenced the next day. During the empanelling, informal discussions between prosecution and defence counsel revealed that the complainant had attended counselling sessions for trauma. The defence sought more information. Notes of the counselling sessions were passed to the defence. A clinical psychologist, whom I will simply refer to as "the doctor", had counselled the complainant between 10th September and the 29th October 2009. The approach of the doctor is the central to this judicial review application to injunct the continuance of the trial.

6. It is claimed by the applicant that the doctor counselled the complainant not only in relation to what had happened to her, which would be unexceptionable, but that she also engaged in role play with her client whereby the doctor took on the task of pretending to be a defence barrister in order to prepare the complainant for the trial. Since much is made of this claim, I intend to refer as appropriate to the doctor's notes and to quote the relevant portion. There is nothing disclosed in the notes which could raise any issue of alleged impropriety in the sessions of the 10th September and the 24th September 2009. It is during the session of the 9th October 2009 that it is alleged that coaching took place. In portions of her notes, the doctor records the complainant as suffering from feelings of fear and anger arising from the incident. By this stage, fears around the court case had also become central. The notes record:-

> "Also worries that he will get off. How she will be in court. What she is putting her family through. Tired of people saying that he might get off. Their mother – trying to get [complainant] to detract and not go to court. Last week – she got drunk and told [complainant] she should reconsider. Annoys [complainant]. Do people disbelieve her? Will her mother cope with outcome? Mother worried about [complainant]. [Complainant] wonders if she'll cope herself. Also feels since she started sessions that she is thinking more about [not readable]. Crying more, knows how much she means to her. [Complainant] was tearful. Acknowledges she tries to be strong, doesn't like to show emotion. We practiced "role-play" scenarios of what court situation would be like. [Complainant] finds this good. Finds it hard, afraid will [illegible]. She doesn't want to show emotion. Agreed to meet again next month two/three more sessions? Generally [complainant] reports herself to be functioning well all of the time. May do clinical assessment tools to assess this formally."

7. It is claimed that by this approach, the doctor has irremediably tarnished the prospect of a fair trial. In addition to all of her clinical notes, the doctor supplied a formal statement to the gardaí. In that statement she outlines the pressures which arose for the complainant by reason of delay in hearing the trial. To address this and the trauma of the event, there was focus in the counselling

sessions on anxiety management through cognitive behavioural therapy. This involves an apparently live exposure, whereby a person is encouraged to imagine a feared situation and thus desensitise the fear and enable them to cope with a difficult situation. The doctor also said in the statement:-

> "Elements of these components were included in the [complainant's] sessions. In line with imagined exposure, [complainant] was encouraged to picture and imagine in detail what it would be like to appear in court and how she might feel and respond. A "role-play" model was used whereby I asked [complainant] what she thought the atmosphere would be like in court?, what did she envisage would happen?, and how this might make her feel? An emphasis was then placed on practical strategies for preventing and coping with her anxiety. This included encouraging [complainant] to be aware of her anxiety related thought patterns and how she could modify them to reduce her anxiety. This included asking [complainant] how she might cope if certain events did occur i.e. if she were to feel her heart racing and what she might do? Advice from a psychological perspective about how she might prevent and manage anxiety through the use of relaxation, distraction and deep breathing, were briefly discussed."

Preventing a criminal trial

8. The burden of proof is on any applicant for judicial review to prohibit a judicial authority, or injunct a non-judicial authority, from proceeding with a criminal trial. An applicant must demonstrate circumstances whereby a real risk has been established that as the accused, she or he could not obtain a fair trial. This does not require the applicant to demonstrate certainty, or even probability, that an unfair trial will result from what is complained of. The test is met once a real risk of an unfair trial is established; *Scully v. D.P.P* [2005] 1 I.R. 242 at para. 22 and McFarlane v. D.P.P., [2007] 1 I.R. 134 at para. 23. In this context, a real risk of an unfair trial does not encompass a danger which is merely remote, fanciful or theoretical. The burden of proof on the applicant requires that he or she engage with the evidence in order to demonstrate how the circumstances complained of amount to a real risk of an unfair trial. Whether the issue is one of delay, missing evidence, allegedly prejudicial pre-trial publicity or, as in this case, an allegation of coaching, the test remains the same. A real risk of an unfair trial must be established within a context where the unfairness alleged cannot be avoided by appropriate rulings and directions on the part of the trial judge: in other words, that real risk must be demonstrated as unavoidable; *Z. v. D.P.P.,* [1994] 2 I.R. 476 at 506-507.

9. Judicial review may be refused on discretionary grounds if an applicant has a viable and appropriate alternative remedy. It is not clear on the case law whether an application to the trial judge to stay the trial as an abuse of process is to be regarded as an alternative to judicial review to prevent a trial. In *McFarlane v. D.P.P.* [2007] 1 I.R. 134 at para. 34, Hardiman J. stated that a court of trial:-

> "[W]ill be able to assess whether there is indeed a prima facie case at the appropriate stage. More than that it will be able to assess, on the evidence as it actually develops, whether there is any unfairness to the applicant, incapable of remedy by the trial court, for which the prosecution is responsible. Its powers in this regard are wholly unaffected by the result of the present application [for judicial review]".

Within the context of the refugee application system, the issue has often been raised as to whether judicial review is appropriate as a remedy rather than the statutory appeal mechanism that has been provided by statute. It seems to me that the principles as between appeal in such a case and an application to the trial judge in a criminal trial are similar. In *Stefan v. The Minister for Justice Equality and Law Reform* [2001] 4 I.R. 203 it was found that part of a translation of the applicant's asylum questionnaire was not before the deciding officer. Denham J. found that as the omitted information could not be said to be immaterial, the decision-maker had acted in breach of fair procedures. She also made the following general comment at p. 217 on the issue as to when an appeal would be the appropriate remedy instead of judicial review:

> "Certiorari may be granted where the decision maker acted in breach of fair procedures. Once it is determined that an order of certiorari may be granted, the court retains its discretion in all the circumstances of the case as to whether an order of certiorari should issue. In considering all the circumstances, matters including the existence of an alternative remedy, the conduct of the applicant, the merits of the application, the consequences to the applicant if an order of certiorari is not granted, and the degree of fairness of the procedures, should be weighed by the court in determining whether certiorari is the appropriate remedy to obtain a just result."

10. My view is that the availability of the jurisdiction of the trial judge to stop a trial constitutes an adequate alternative remedy and, as such, ought to be considered as a discretionary ground for refusing judicial review. The primary duty of ensuring that a trial is fair rests upon the trial judge. It is apparent from the decided cases that a trial judge has the responsibility of declining to proceed with a trial where circumstances have demonstrated that a real risk of unfairness is inescapable and that nothing by way of direction to the jury and ruling on the evidence can avoid the occurrence of the circumstances giving rise to that real risk. The duty of the trial judge is to ensure a trial in due course of law as guaranteed by Article 38.1 of the Constitution. That duty is not removed or in any way diminished by the co-terminus obligation of the High Court under Article 34.3 of the Constitution to supervise by judicial review all lower courts and tribunals in order to ensure fairness of procedures. As an available and appropriate remedy in the first instance, nothing prevents a properly grounded application by an accused person to the designated trial judge that the trial should be stopped on the basis that unfairness has become so ingrained in the procedure that nothing within the power of the trial judge can remove a real risk that the trial will be unfair. The existence of an alternative remedy is not necessarily determinative that judicial review should be refused. That alternative is one of the factors upon which the High Court may act if appropriate. It follows, therefore, that in considering a judicial review application, the High Court is entitled to refuse an application to prohibit a trial on the basis that there is an alternative remedy open to the applicant; namely, an appropriate application to the trial judge.

11. In that context, however, an application by way of ambush of the prosecution can also be a breach of fair procedures as may any similar attempt to rush any substantial step in the trial process in disregard of the right of either of the parties to reasonable notice. Within the concept of procedural fairness, the disposal of an application to prevent a criminal case does not differ in terms of reasonable notice from the basic requirements involved in a civil trial. Fair notice must be given by the defence at an appropriate time to the prosecution of the issue alleged to constitute a real risk of an unfair trial and the nature of the case to be made should be set out in writing by way of a notice of motion accompanied by a suitable affidavit. In terms of time, the prosecution must have a fair chance to respond. It would be difficult to envisage that there would be many cases where the already available remedy of application to the trial judge is so unsuitable, by reason of complexity, the time needed for disposal, or some other clear factor such as novelty, whereby judicial review becomes solely the appropriate remedy. The issue raised in this case is, however, a completely novel point concerning alleged witness coaching. Judicial review is, in these circumstances, an appropriate remedy. I therefore turn to that issue.

Witness Rehearsal

12. Whether in civil or criminal matters, the trial process is concerned with an enquiry as to where the truth lies. To a degree, this principle is influenced by the burden and standard of proof. The party bringing the case must prove it. In a civil case the issue is as to whether the plaintiff has proved the case being made at trial on the balance of probability. In a criminal case, the issue is whether the prosecution have proved the charge beyond reasonable doubt. The formulation of the burden and standard of proof is not designed to hinder the truth but to assist it. As a contest between parties, the trial process involves a declaration as to whether the prosecution, or in a civil case the plaintiff, succeeds because the standard of proof has been met. Unlike in an enquiry under the Tribunals of Enquiry Act 1923, as amended, the court may declare the result of that determination as a dismissal without necessarily being obliged to state where the truth in fact lies. A case may be dismissed because the case of a plaintiff has not been proved as probable. A guilty verdict by a jury in a criminal trial involves the acceptance that a very high standard of proof has been met by the prosecution and the rejection of the defence case as not containing a reasonable factor to doubt that case. An acquittal is a declaration that the available evidence is not sufficient to displace the presumption that the accused person is innocent. The serious consequence of a judgment of a court against a person is not to be made in any case, civil or criminal, unless sufficient proof exists. Proof involves the tribunal of fact finding that the case brought is credible and reliable; in other words that it has sufficient indication of truth for the facts alleged to be acted upon. Furthermore, the rules of procedure and evidence all have as their original justification that fundamental principle of inquiring after the truth.

13. For a witness to be directed as to what they should say in order to prove a case fundamentally strikes against the proper administration of justice. The nature of the enquiry through examination in chief and cross-examination at trial is that thereby the nature of the person giving evidence and the reliability of that person is, it is to be hoped, exposed. Rehearsal, even as to the form of evidence, may have the effect of undermining the natural presentation of testimony which is expected by any court of trial to be given by witnesses of truth.

14. It is also clear, however, that the process of both civil and criminal trial preparation involves both police and lawyers talking to witnesses at various stages. This is inescapable. Otherwise, the presentation of evidence in chief, which is designed to be directed at the crucial points of evidence that are likely to be in issue, would become drawn out, unstructured and lacking in concision, involving as the late Judge Gerard Clarke S.C. used to say, "a consultation in the witness box". Trained solicitors and barristers involved in pre trial consultations will avoid any suggestion to a witness that a particular emphasis is needed in evidence, much less suggest that a witness should embroider or invent facts. The nature of this process, if professionally conducted, is neutral. It does no more than focus potential evidence and it avoids directing its content. Formal enquiry in preparation for trial is necessary and appropriate: it can help expose strengths and weaknesses to the professional lawyers representing a client; this, when conducted in this neutral form, aids a fair assessment prior to court, possible settlement of a case and its proper prosecution at trial. Witnesses are never to be directed as to the content of their evidence. It would fundamentally undermine the trial process were it to be allowed to become fictional whereby each side is presenting invented facts based on direction as to what may assist their case. No criminal trial process, consistent with that principle of the obligation of truthfulness, can be presented by the defence whereby the case which is regarded as suitable for a successful challenge to the prosecution is put, in distinction to the case made in consultation by the accused and his or her witnesses. It must be recognised, as well, that some witnesses may need more than usual assurance and in the instance of some expert witnesses, for instance university academics, more used to the presentation of a discursive rehearsal of a subject, these may be assisted as to the best form in which their evidence may become focussed. It is not wrong, therefore, to direct those witnesses as to the issues in question in the case and the manner in which their view may be appropriately presented through being shorn of rambling side references and irrelevant musings or tangential material.

15. Those who accuse others of sexual violence have historically tended to be placed in a special category as regards preparation for trial. I do not know that this is necessarily justifiable. As a matter of principle, there would seem to be slight reason why a witness in a criminal case should be treated as being different to any other witness; in order words, a person who can be talked to by those preparing or presenting the case. A book of evidence which incorporates the prosecution witness statements to be given at the trial of an accused removes or lessens the necessity for any direct discussion between prosecution counsel and those who are scheduled to give evidence. On the defence side, a direct discussion between the defence barrister and the accused assists in clarifying such issues as the case to be put to prosecution witnesses, the potential credibility of the accused as a witness and whether, in that context, a client is best advised to give, or to avoid giving, evidence in her or his defence. It is notable that, in this context, no issue has ever been raised that counsel for the defence may not speak with an accused person whom he or she is representing, no matter what the charge. Whether it is the defence or the prosecution lawyers that feel the need to speak with a witness in a criminal trial, the process must be the same for both; that is a neutral form of enquiry. It is clearly apparent to all involved in criminal litigation that suggestion of any kind to a witness as to the appropriate form or content of evidence, or the putting of only selected and apparently attractive or credible parts of the defence case to prosecution witnesses, would completely undermine the search for truth which remains at the heart of any trial process.

16. The bulk of the work in trial preparation of a criminal case is done by the gardaí. In the context of a traumatic event, on what may reasonably be thought to have been a traumatic event, such as sexual violence, experience has shown that it is very rarely enough to take one statement from a witness. Details will almost invariably be later recalled that were absent on a first occasion of taking down a witnesses account. A witness should be allowed to study an earlier statement so as to address any subsequent interview. It is not an indication of untruthfulness that further details will emerge. In cross-examination of any witness it is not correct for issues to be taken out of context. The trial process must be controlled in such a way as each fact as presented in each statement is set within its proper context. In other jurisdictions, issues as to why an issue was not raised in an earlier statement are dealt with in the context of police training for interviewing the victims, or apparent victims, of crime. Some jurisdictions require the video recording of the statement of the alleged victims of sexual violence. Whether as part of the pre-trial process or the trial process itself, the fundamental principle remains that there should be no distortion of what a witness wishes to say through the taking of a passage of evidence out of its appropriate overall context. A crime is not be compounded by the accidental mispresentation of the account of an alleged victim as part of the process of cross-examination.

17. Neither can it be the case that simply because a person is the victim of a crime they are to be shut out from seeking therapy. Of course, in that context, the notes of a therapy session will be sought by the defence and variations in the history of the events recounted may be teased out at trial. This is perfectly proper, once these alleged variations are placed within a truthful context of the relevant passage in full and any earlier or later references to an event or issue. It is difficult to see counselling as a process which might unfairly influence a trial. Therapeutic intervention is, of its nature, independent of the trial process, is concerned with mental stress issues, and is divorced from any immediate desire to seek a particular result. It can also be the case that therapeutic notes are, of their nature, incomprehensible. As pointed out by Simon O'Leary in "A Privilege for Psychotherapy? Part 2", [2007] Bar Review 76, the nature of what is pursued in therapy differs markedly from the examination of a witness. At pp. 78-79 of that article, the issue of privilege for psychotherapy is pursued as a desirable legal development. This Court has no view on this issue. While this privilege does not now exist in law, the reasoning of the author on the nature of therapy is informative:-

> "As a criminal lawyer, I am satisfied that even if the information protected by a psychotherapist-patient privilege were

disclosed in order to supplement the fact-finding process, this information would be unreliable and inaccurate because it is only an abstract expression of the patient's inner feelings and emotions.

Psychotherapists, once their training is complete, would not usually take or keep notes of sessions with patients. They might note the occasional dream or record a cryptic aide-memoire of significant events or their own musings. Even a complete account of a session would be loose and sketchy, a kind of stream of consciousness, shadowing the treatment.

The world of psychotherapy is not like the world of law or medicine... Even if there were a record, it would not pass muster under a business-records … exception to the hearsay rule, which would allow the admission of records only when they have a high degree of accuracy and are customarily checked as to correctness. Psychotherapy is concerned with the tension between inner reality and the outside world. The law is concerned with the outside world, i.e., "with objective facts, with truth" [Slovenko R – On Testimonial Privilege, (1975) Contemporary Psychoanalysis 11, 190]. It is not the business of psychoanalytic psychotherapy to counsel or to give or record opinions or assessments."

18. While this view seems both sensible and correct, it is appropriate to warn that the addition to psychotherapy or counselling of any acting out of the trial process in the therapeutic setting may blur lines which, for the benefit of the alleged victim and the administration of justice, should be kept separate. It is undesirable. Does an undesirable practice necessarily render a subsequent trial will carry the real risk of unfairness?

19. In *R. v. Dye, R. v. Williamson,* (19th December 1991, T.L.R.) the Court of Appeal for England and Wales deprecated a process whereby witnesses in a forthcoming prosecution appeared prior to a criminal trial in a television programme as though they were giving evidence in chief. The court did not reason out why this process was undesirable. It did not need to. The decision accords with fundamental principles as to not interfering with the trial process as they have been understood in this jurisdiction. Nonetheless, no danger to the conviction was identified in this instance. In *R. v. Skinner* (1994] 99 Cr. App. R. 212, the Court of Appeal for England and Wales ruled that discussions between prosecution witnesses, particularly just before going into court to give evidence, should not take place. Where that kind of discussion happens, it is not necessarily the case that the trial should be prohibited on judicial review, or dismissed by the trial judge exercising the jurisdiction of which I have spoken earlier in this judgment. If it emerges that police officers confer together prior to making witness statements, the defence may properly make an enquiry as to whether this was for a legitimate, or for an illegitimate, purpose. In circumstances where that issue is engaged, it is appropriate for the trial judge to make reference to the relevant controversy in changing the jury. At p. 218 of that judgment, Farquharson L.J. stated that where this issue is raised in the course of a trial:-

"… the jury should have very clearly put before them the fact that because the conference had taken place and the interchange of recollections of evidence which is to be inferred from what occurred, they should bear in mind that the evidence for that reason is all the more suspect. To use [the trial judge's] own words, "if the officers had made up their minds to lie about it, it gives them an opportunity to get their lies straight." So long as the jury had in mind that as a consequence that would arise from this kind of conduct, it seems to us that it is sufficient."

20. In *R. v. Momodou* [2005] 1 W.L.R. 3442 the Court of Appeal for England and Wales dealt with a situation where the actual events that were involved in a crime caused trauma to those who would later be called to give evidence. This situation is analogous to that in issue here. The comments therein made by Judge L.J. for that court, were in the context of a riot and arson situation at an accommodation centre for refugee claimants which apparently left several security officers traumatised. These witnesses received counselling some three or four days after the incident. Som time later a training event was held by the security company which employed them. This used the incident as a model for the training of security officers, including witnesses to the incident in question, in order to prepare them and others who had not been involved should there be any recurrence of scenario like the one to which these particular security officers had been subjected. Unlike in this case, where there are notes of the therapy sessions, no record of the event was made available at the trial. The learned trial judge correctly told the jury: "There is no place for witness training in our country, we do not do it. It is unlawful". In the context of a challenge to the soundness of the later conviction of some of those involved in the original riot, the court made the following comments:-

61. There is a dramatic distinction between witness training or coaching, and witness familiarisation. Training or coaching for witnesses in criminal proceedings (whether for prosecution or defence) is not permitted. This is the logical consequence of well-known principle that discussions between witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any other witness: see *R v. Richardson* [1971] 2 QB 484, R v. Arif, The Times, 22nd June 1993*, R v. Skinner* (1993) 99 CR App R 212 and *R v. Shaw* [2002] EWCA Crim 3004. The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids, any possibility that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so. These risks are inherent in witness training. Even if the training takes place one-to-one with someone completely remote from the facts of the case itself, the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him. An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be "improved". These dangers are present in one-to-one witness training. Where however the witness is jointly trained with other witnesses to the same events, the dangers dramatically increase. Recollections change. Memories are contaminated. Witnesses may bring their respective accounts into what they believe to be better alignment with others. They may be encouraged to do so, consciously or unconsciously. They may collude deliberately. They may be inadvertently contaminated. Whether deliberately or inadvertently, the evidence may no longer be their own. Although none of this is inevitable, the risk that training or coaching may adversely affect the accuracy of the evidence of the individual witness is constant. So we repeat, witness training for criminal trials is prohibited.

62. This principle does not preclude pre-trial arrangements to familiarise witness with the layout of the court, the likely sequence of events when the witness is giving evidence, and a balanced appraisal of the different responsibilities of the various participants. Indeed such arrangements, usually in the form of a pre-trial visit to the court, are generally to be welcomed. Witnesses should not be disadvantaged by ignorance of the process, nor when they come to give evidence, taken by surprise at the way it works. None of this however involves discussions about proposed or intended evidence. Sensible preparation for the experience of giving evidence, which assists the witness to give of his or her best at the forthcoming trial is permissible. Such experience can also be provided by out of court familiarisation techniques. The process may improve the manner in which the witness gives evidence by, for example, reducing the nervous tension arising from inexperience of the process. Nevertheless the evidence remains the witness's own uncontaminated evidence. Equally, the principle does not prohibit training of expert and similar witnesses in, for example, the technique of giving

> comprehensive evidence of a specialist kind to a jury, both during evidence-in-chief and in cross-examination, and, another example, developing the ability to resist the inevitable pressure of going further in evidence than matters covered by the witnesses' specific expertise. The critical feature of training of this kind is that it should not be arranged in the context of nor related to any forthcoming trial, and it can therefore have no impact whatever on it."

21. I agree with these comments. I note that in the context of what had occurred in that case, the traversing of the line between legitimate inquiry for trial preparation and legitimate therapy on the one hand, and coaching on the other, had been crossed and that this was noted to have adversely reflected on the prosecution case. In that context, the conviction was upheld.

22. Out of caution, I would merely add to the comments which I have made, that in major criminal prosecutions, familiarisation with the trial court, the personnel involved, the likely sequence of events, and the general nature of any approach to examination and cross examination has become a standard feature of assistance offered by the Chief Prosecution Solicitor for the Director of Public Prosecutions to those who are thought to be the victims of serious criminal offences. Further, the Scottish Equal Treatment Bench Book, which is distributed to members of the judiciary in that jurisdiction, and which is publicly available on the website of the Scottish judiciary, reiterates the importance of familiarisation with the trial court and its proceedings, with a specific focus on alleged victims of sexual crime. It provides as follows:-

> "11.2 While it is important that any witness be given information about his or her appearance in court, it is doubly important that a complainer in a case involving allegations of sexual crime be given as much information as possible, as regularly as possible…
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> 11.3 A complainer may benefit from a pre-trial visit to court premises before the case begins. Such visits are normally arranged by the prosecution, but a welcome development in this context is the Witness Service, which offers visits, general guidance and assistance".

23. Where I differ from later passages in the decision of Judge L.J. is in his insistence that familiarisation visits to court by victims and alleged victims should be fully recorded by note. I see that process as bland and neutral and not requiring anything other than a file note by the prosecution solicitor that it occurred. Even after such a visit, a witness may need to be interviewed again.

24. Other issues can arise prior to trial that necessitate intervention into what might be thought of as the untrammelled recollection of a witness. It often happens that prosecution or defence counsel reviewing witness statements in preparation for trial may see that an issue has not been dealt with. The correct approach, it seems to me, is for counsel to note that issue and to ask whether a solicitor of police officer might take a further statement within the definite confines whereby the witness is not to be led into believing that particular testimony is dishonesty sought or that particular evidence is expected of them. Instances in which this might arise in practice include the response of an apparent victim to a robbery, as to whether they were put in fear, issues for the victim of a crime as to a defence case made by a statement of the accused to gardaí later in time than the statement or statements founding the complaint and questions in the context of a pathology report on the cause of particular injuries or as to the weapon or as to the amount of force needed.

25. In an overall sense and with a view to summarising the foregoing, what characterises an appropriate approach to trial preparation is its non-directive nature.

Conclusion

26. Having examined the statements in this case in detail, and having read the doctor's notes, I have concluded that while the intervention by way of the brief acting out of the roles of defence counsel and witness was undesirable, it was not directive towards any particular result and nor could it be regarded as distorting the evidence. Instead, it has created an issue which may be explored by the defence if they so choose, and if so explored, may become part of the defence case.

27. It is striking that even in the context of the arguably more influential intervention described in *R v Momadou* [2005] 1 WLR 3442 the resulting conviction was nonetheless regarded as safe and satisfactory. It may be that, if the issue of inappropriate discussion with a witness prior to trial is raised, the trial judge might wish to specifically address any issue by way of a direction whereby he or she points out that if the result of the therapeutic intervention was to cast doubt upon the soundness of the account to be given by the alleged victim, then this has to be taken into account in the adjudication of whether the prosecution had met the burden of proving their case beyond reasonable doubt. This is a matter within the discretion of the trial judge in the running of the case on which no final guidance from a judge hearing a judicial review application is appropriate or possible.

28. Since this is a novel point of law, and one which may impact outside the terms of this particular criminal trial, it may be that the usual costs order that costs follow the event is not appropriate. I will therefore hear submissions.