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Neutral Citation Number: [2021] IECA 240

THE COURT OF APPEAL

Record No: 25CJA/20 & 18/20
Bill No: DUDP 147 / 2018

Between/

DIRECTOR OF PUBLIC PROSECUTIONS
Prosecutor/Respondent

-v-

H. M.
Accused/Appellant

And Between/

DIRECTOR OF PUBLIC PROSECUTIONS
Prosecutor/Respondent

-v-

B. O.
Accused/Appellant

JUDGMENT of the Court delivered by Mr Justice Edwards on the 30th of August, 2021.

Introduction

1. The accused/appellants in these two related cases are the applicants in the motions before the Court. For simplicity, and for the avoidance of confusion, they will hereinafter be referred to simply as "the appellants", or where necessary individually as "the appellant HM" and

"the appellant BO". They are husband and wife, respectively, and are the parents of a little girl "S".

2. The appellants were tried on indictment before a jury at Dublin Circuit Criminal Court, and on the 28th of November 2019 were each convicted, of (i) an offence of female genital mutilation ("FGM") contrary to s.2 of the Criminal Justice (Female Genital Mutilation) Act, 2012; and (ii) an offence of child cruelty contrary to s.246(1) of the Children Act 2001. The alleged injured party in both cases was "S". The appellants each received custodial sentences. They have each now appealed to this Court against both their convictions and sentences. The appeal is listed for hearing on the 7th and 8th of October, 2021.

3. This judgment is in respect of applications by the appellants pursuant to s.3(3) of the Criminal Procedure Act 1993 seeking directions from this court in advance of the hearing of their appeals in respect of certain matters.

The Court's Jurisdiction to Give Directions

4. Section 3 of the Criminal Procedure Act 1993 sets out the jurisdiction of the Court of Appeal on the hearing of appeals against either conviction or sentence in criminal matters. Subsection (1) lists the substantive orders that the Court may make on the hearing of an appeal against conviction, while subs. (2) similarly specifies the substantive orders that the Court may make on the hearing of an appeal against sentence. Subsection 3 then sets out the Court's entitlement to give procedural directions, and it provides:

> "(3) The Court, on the hearing of an appeal or, as the case may be, of an application for leave to appeal, against a conviction or sentence may—
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> (a) where the appeal is based on new or additional evidence, direct the Commissioner of the Garda Síochána to have such inquiries carried out as the Court considers necessary or expedient for the purpose of determining whether further evidence ought to be adduced;
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> (b) order the production of any document, exhibit or other thing connected with the proceedings;

(c) order any person who would have been a compellable witness in the proceedings from which the appeal lies to attend for examination and be examined before the Court, whether or not he was called in those proceedings;

(d) receive the evidence, if tendered, of any witness;

(e) generally make such order as may be necessary for the purpose of doing justice in the case before the Court."

The Directions Being Sought

5. For the purposes of these motions we are concerned only with the appeal against conviction. To place the directions being sought in context it is necessary to review the grounds of appeal against conviction which are to be advanced.

6. In the case of the appellant HM, by a Notice of Appeal dated the 29th of January 2020 it is indicated that he proposes to appeal his conviction on the grounds that:

1. The appellant did not receive a trial in due course of law in that he did not have available to him appropriate expert evidence that would have allowed him to challenge the evidence proposed by the respondent concerning injury to his daughter.
2. The appellant did not receive a trial in due course of law where the translation of his testimony in both evidence in chief and cross-examination before the jury was so inaccurate that the appellant was denied the right to give evidence in his own defence.
3. The trial was unsatisfactory in that the defence relied on purported expert opinion in relation to a crucial issue which after the trial was proved not to have been founded on an appropriate examination of relevant materials and which misled the defence.

7. The said Notice of Appeal then contains the further assertion:

"The appellant reserves the right to amend the within grounds of appeal and/or adduce further grounds of appeal upon *inter alia* **physical examination of the injured child.**" (this Court's emphasis).

8. In contrast, the Notice of Appeal, dated 20 February 2020, filed by the appellant BO only puts forward a single ground of appeal against conviction, namely, that:

"1. The verdict of the jury on both counts was perverse."

9. However, at the hearing of his client's motion before this Court seeking directions, counsel for the appellant B.O. stated that it was his client's intention to seek in due course an amendment to her existing grounds of appeal to include an additional ground (that in substance may be cast in the following terms):

"2. Having regard to all the circumstances (including fresh evidence that this appellant seeks leave to adduce) the verdict is unsafe, and the trial was unsatisfactory."

The appellant B.O.'s Notice of Motion seeking directions prays, *inter alia*, for leave to make such an amendment.

10. By a Notice of Motion dated the 21st of January 2021, and returnable for the 25th of March 2021, the appellant HM seeks the following order(s):

[References hereinafter to a "Dr I." involve redaction by the Court for reasons that will become apparent]

1. An order pursuant to s.3 (3) of the Criminal Procedure Act 1993 permitting the applicant to adduce at the hearing of this appeal the additional evidence of:

a) Mr. James MacGuill as set out in his affidavit sworn on the 21st January 2021 exhibiting the report of Professor Birgitta Essén, and the reports of Dr I. and various associated documents concerning medical evidence which evidence was not called at the trial which is the subject matter of this appeal;

And such affidavit further exhibiting the report of Dr Mary Phelan, Professor Christian Dreisen and Ms. Liese Katschinka, concerning the failure accurately to interpret and translate the appellant evidence as heard by the court and jury at his trial on November 26th 2019.

b) Professor Birgitta Essén

c) Dr Mary Phelan

2. If necessary, an order pursuant to s. 3(3) of the Criminal Procedure Act 1993 providing for directions as to other steps to be taken in regard to and arising from the matters referred to at paragraph 1 above.

11. Since that Notice of Motion was issued the respondent has been notified that, pursuant to paragraph 2 thereof, the appellant HM is seeking a specific direction that in advance of the appeal hearing the injured party S should be required to submit to a joint medical examination by experts in FGM nominated by the prosecution and by the defence respectively, and if necessary be required to travel abroad for the purposes of being so examined.

12. By a Notice of Motion also dated 21 January 2021, and returnable for the 25th of March 2021, the appellant B.O. seeks the following orders:

1. An order pursuant to s. 3(3) of the Criminal Procedure Act 1993 permitting the applicant to adduce at the hearing of this appeal the additional evidence of:

a) Ms Danica Kinane as set out in her affidavit sworn on the [insert date] *sic* which exhibits the report of Professor Birgitta Essén, and the reports of Dr I. and various associated documents which evidence was not called at the trial which is the subject matter of this appeal; and

b) Professor Birgitta Essén as set out in her affidavit exhibiting her report.

2. If necessary, an order pursuant to s. 3(3) of the Criminal Procedure Act 1993 providing for directions as to other steps to be taken in regard to and arising from the matters referred to at paragraph 1 above.

3. An order providing for the amendment of the Grounds of Appeal herein by the inclusion of the following grounds of appeal:

"Having regard to the evidence adduced on foot of an order providing for the hearing of fresh evidence in the appeal herein including in particular the evidence as set out in the report of Professor Birgitta Essén exhibited therein, and having regard to all the circumstances, the verdict is unsafe and the trial was unsatisfactory"

13. Further, in the course of arguendo at the hearing of these motions by the court on 25 March 2021, counsel for the appellant B.O. sought yet a further direction. At page 44, lines 23 to 26 of the transcript of 25 March 2021 counsel stated:

"Dr I.'s legal representatives have indicated that he would have no difficulty complying with the request or direction from the Court and I do ask the Court to ask Dr I. to review the 2019 video and to indicate whether this affects the opinion and comments that he has made which are before the Court."

14. It will be necessary to explain the context in which this further direction is sought, and we will do so later in this judgment before ruling on this request. However, it is sufficient at this point to simply note the further direction that is being sought.

15. The appellant's respective motions are grounded upon numerous affidavits, which are replied to by affidavits filed on behalf of the respondent who opposes the applications. Before identifying the relevant affidavits it is necessary to record that neither the written submissions presented, nor the oral submissions made at the hearing of these motions on the 25th of March 2021, addressed the claim on behalf of the appellant HM for a Order that he should be allowed to call fresh evidence, namely that of Mr James MacGuill and Dr Mary Phelan, on what we

might describe as the "interpretation" issue, i.e., the suggestion that his evidence before the jury at trial was not properly translated for the jury by the interpreter provided. The interpretation issue is, however, addressed in the affidavit evidence. In circumstances where we have received no argument or legal submissions in respect of the interpretation issue, but where there has been no indication that it is being abandoned, we propose to simply adjourn this aspect of the motion to the hearing of the appeal. In doing so we are not to be taken as having expressed any view, or as having given any indication, as to whether or not we will ultimately be disposed to accede to the request for leave to adduce evidence from Mr MacGuill and/or Dr Phelan in the course of the appeal on the interpretation issue. We will need to hear argument on this specific issue.

16. In respect of what might be called the "expert evidence" issue, the appellant HM relies upon three affidavits of his solicitor, James MacGuill, sworn on 25th of January 2021, the 12th of March 2021 and the 16th (or possibly the 18th – it is difficult to decipher) of March 2021, respectively, together with the (extensive) documentation exhibited with those affidavits. The appellant BO relies upon two affidavits of her solicitor, Danica Kinane, sworn on the 21st of January 2021 and the 23rd of March 2021, respectively and the documents exhibited therewith. She also relies upon an affidavit of Birgitta Essén sworn on the 25th of January 2021, and documents exhibited therewith.

17. As indicated, both motions are opposed by the respondent in all respects, and the respondent relies upon two affidavits, namely one sworn by Margaret Moran, a Solicitor in the office of the respondent, on the 23rd of March 2021; and an affidavit by Mary Kate Halpin, also a solicitor in the office of the respondent, again sworn on the 23rd of March 2021; and documents exhibited with those affidavits.

18. This Court has read all of the affidavit evidence submitted in this matter and the accompanying exhibits which included, *inter alia*, the experts' reports relied upon by each of the parties, relevant correspondence, the book of evidence, transcripts of the evidence of those experts who testified at the appellants' trial, and other portions of the trial transcript including

the testimony of the appellant HM, for the purposes of determining the issues arising on these motions, and has given due consideration to such evidence. As the evidence submitted is extensive it is not proposed to review it in detail in this judgment, and it will be referred to only to the extent considered necessary.

Overview based on the evidence before us.

19. The background to this matter arises from the presentation of S, aged almost two, at the Accident & Emergency Department of Our Lady's Children's Hospital in Crumlin on the 16th of September 2016 with active bleeding from her perineal region following an injury. The bleeding was described as *"brisk"*, a term clarified by Mr Sri Paran, Paediatric Accident and Emergency Surgeon, as meaning a type of bleeding in which *"a child would be expected to lose blood volume very rapidly and succumb to exsanguination and shock within 6-10 hours"*. The child was taken to the operating theatre to be operated on by Mr Sri Paran where she was found to have *"injury above her urethral opening with part of the clitoris missing and bleeding mostly from the clitoral base and underneath the labia minora."* Mr. Paran reported that, *"[i]ncidentally, no external bruising or injury to either the labia majora, minora, or vagina was noted."* The bleeding was controlled with cauterization, a urinary catheter was inserted, and S was admitted as an in-patient. The examination of S on the 16th of September 2016, and the surgical procedures performed on her by Mr. Paran on that date to stem the bleeding, were recorded in the operating theatre using a Colposcope, a procedure known as colposcopy.

20. In the days after S's admission two further specialists became involved in her care. The first was a Mr. Fergus Quinn, a Consultant Pediatric Urologist; and the second was a Dr Sinead Harty, a Consultant Paediatrician, who is also a qualified forensic medical examiner and the lead for child protection at Our Lady's Children's Hospital. On the 19th of September 2016 S was re-examined under sedation jointly by Mr. Paran, Mr. Quinn and Dr Harty. During this joint examination Dr Harty manipulated the urinary catheter which was still in place and physically

explored the area. She was unable to see the clitoral head. Once again, this procedure was recorded by means of colposcopy.

21. Prior to the commencement of the re-examination on the 19th September 2016 the appellant HM was asked by Dr Harty as to how the injury had occurred. He informed her that S had had a dirty nappy on the previous Friday and that her mother had brought her into the bathroom of the family home to change her. He said that after S had been cleaned up, and while her mother was washing her hands, S left the bathroom without her nappy on. He said that (upon encountering S outside the bathroom) he had showed her a toy that had frightened her and that this had caused her to run backwards. He said that as she did so she fell on a(nother) toy thereby injuring herself.

22. On the 20th of September 2016 the toy on to which S had allegedly fallen, which was described at the trial as being *"a little round activity center"* that had had a steering wheel, clutch, and a little wing mirror on it, was brought into the hospital by the parents. The medical team that had re-examined S on the previous day, having viewed the toy, were of the view that the history did not fit the findings. They suspected that there was a non-accidental cause for S's injury and the case was referred to the medical social work department in the hospital.

23. Dr Harty, who later gave evidence for the prosecution at the appellants' trial, considered that S's injury was consistent with female genital mutilation ("FGM"), type 1 ("FGM1"). FGM1 is where there is partial or total removal of the clitoris.

24. Following S's discharge from hospital Dr Harty carried out a two-month follow-up review of S on an outpatient basis on the 6th of December 2016, in the course of which S was again physically re-examined. Once again this was recorded by colposcopy. Dr Harty's conclusions remained the same following this review.

25. In circumstances where she was concerned from an early stage that S had possibly been subjected to FGM1, Dr Harty had sought a second opinion from another consultant

paediatrician, with expertise in FGM, namely Dr Deborah Hodes, who is based at University College London Hospital. This was prior to the review on the 6th of December 2016.

26. In 2014 Dr Hodes co-established and now runs a dedicated service for under 18-year olds with suspected or reported FGM. Her service has received more than 100 referrals, and referrals are increasing. She has published extensively in peer reviewed medical journals about the assessment and management of children who are suspected to have been, or who have been, subjected to FGM.

27. While Dr Hodes did not examine S personally, she reviewed the relevant notes and records including such colposcopy recordings as were available at the time that she was consulted, i.e.., those relating to the examinations on the 16th of September 2016, and the 19th of September 2016 (and a further colposcopy recording of the 26th of September 2016 which, it is accepted by all, was of no significance in that it fails to adequately capture the area of interest), and a Garda photograph of the controversial toy on to which it was claimed that S had fallen. In reporting her views, Dr Hodes agreed with Dr Harty. She reported, and later testified for the prosecution at the appellant's trial to the same effect, that the clinical examination findings as recorded were consistent with FGM1 involving partial or total removal of the clitoris. Further, in her view the injury suffered by S could not have been sustained by her running backwards and falling on to a plastic toy.

28. Following notification by the hospital of child protection concerns in respect of S to Tusla and An Garda Siochána, and the conduct of an investigation, a file was referred to the DPP who directed that the appellants be charged and tried on indictment with the offences of which they were ultimately convicted. The appellants were duly charged, and were served with a Book of Evidence, and later a Notice of Additional Evidence, which material contained, *inter alia*, statements of intended evidence/reports from Mr Paran, Dr Harty and Dr Hodes. Moreover, relevant medical records including the colposcopy recordings of the examinations of S on the

16th of September 2016, the 19th of September 2016 and the 6th of December 2016, were disclosed to the defence.

29. Mr Paran, Dr Harty and Dr Hodes all gave evidence at the appellants' trial in accordance with their statements of intended evidence and were cross-examined by counsel for the appellants. The Court has, as previously indicated, had the opportunity to read the transcripts of their evidence.

30. The trial commenced on the 11th of November 2019 and concluded on the 28th of November 2019. The manner in which the case was defended at trial was not to dispute that S had sustained a perineal injury which had led to profuse bleeding which had in turn required urgent surgical intervention. The fact of injury was accepted, but what was disputed was how that injury was caused. The defence was that it had been caused accidentally in circumstances where S had fallen on to the previously mentioned toy. The appellant HM testified in that regard on behalf of both himself and his wife. It is also relevant that both appellants were represented by the same firm of solicitors, although they each had separate senior and junior counsel.

31. When cross-examining the prosecution's experts, counsel for neither defendant sought to suggest that their evidence as to what had been, and indeed had not been, visible and palpable on examination was incorrect. In so far as they had testified positively that S's clitoris could not be located, it was not suggested to any of those experts that they were incorrect in this. There was no dispute concerning the correctness of their anatomical assessments, either during the surgery to address the acute injury, or during the subsequent re-examinations. Moreover, it was never suggested to any of them that S's clitoris was in fact still in place; that it had not been either partially or totally removed whether intentionally or through accidental circumstances; and that they had simply failed to detect it.

32. This approach to defending the case was taken in circumstances where a forensic medical consultant had been retained in advance of the trial to advise the defence legal team, and as a possible defence expert witness.

33. The expert in question was a Dr I., who has academic and professional credentials in forensic and legal medicine, and 35 years' experience both as a clinical practitioner of forensic and legal medicine, including having acted as a Senior Forensic Medical Examiner for a police force in the United Kingdom, and in general practice. Although undoubtedly having forensic medical expertise, and the further expertise of a general medical practitioner, Dr I. is not, however, a specialist either by qualifications or experience in any aspect of paediatric medicine or paediatric surgery or paediatric gynaecology, or in paediatric anatomy; nor does he have claim to have previous experience of forensic medical investigation of a case or cases of suspected FGM. Dr I. was sourced by the then defence solicitors as a potentially suitable expert through a reputable agency, namely Medical Expert Witness Alliance LLP (MEWA), and is said by the said former solicitors (in a letter to the present solicitors for the appellant HM dated the 20th of January 2021 and exhibited as JMG 11 to the first affidavit of James MacGuill) to have represented himself at all times, both when initially contacted (on or about the 1st of October 2019) and thereafter, as somebody with sufficient experience and expertise to provide an opinion required by those solicitors, i.e., as to whether *"part of the child's clitoris was missing and if so whether this could have happened accidentally, more particularly in the manner alleged by the defendants."*

34. The appellants state, and it is confirmed by Dr I. in his report dated the 15th of October 2019 which is exhibited by Mr MacGuill as exhibit JMG 6 to his first affidavit, that Dr I. was initially provided with all statements in the Book of Evidence and, more particularly, with the witness statements/reports of the prosecution's expert witnesses i.e., three medical experts being the aforementioned Mr. Sri Paran, Dr Sinead Harty, and Dr Deborah Hodes, plus a forensic scientist Mr John Hoade. He was not, however, supplied at that juncture with any colposcopy recordings as they were not to hand.

35. Dr I. proceeded to furnish a report dated the 15th October 2019 in which he provided a brief summary of the allegations and considered the witness statements of Mr. Sri Paran and Dr

Sinead Harty and a report dated the 3rd of October 2016 (subsequently served as additional evidence) from Dr Deborah Hodes. Having done so, he reported:

> *"It is clear, from a careful review of the papers in this case, in particular the medical evidence provided, that [S], who was almost 2 years old at the time, had been brought to Crumlin Road Children's Hospital on 16th September 2016, bleeding from her perineal area and with her parents, the defendants [H.M.] and [B.O.] alleging that this was an injury that had occurred accidentally as a result of [S] having fallen onto a plastic child's toy.*
>
> *It is in fact clear, from the medical examinations and the evidence provided, that the injuries sustained by [S] was localized to the clitoris and in particular involved the removal of the clitoral head."*

36. At no stage did Dr I. seek to conduct a physical examination of S. His review was entirely confined to the records and materials furnished to him. While his report ostensibly answers in the affirmative the first part of the query posed to him., i.e., as to whether *"part of the child's clitoris was missing"*, the report does not purport to answer the second part of the query, namely "*and if so whether this could have happened accidentally, more particularly in the manner alleged by the defendants."*

37. The defence solicitors say that Dr I. was subsequently furnished by them with a single colposcopy recording, namely that of 19th of September 2016, together with an inquiry as to whether, when he had had a chance to view the material, it would cause him to alter the view which he had already communicated. A communication was subsequently received by the defence solicitors on the 8th of November 2019, by email via a representative of MEWA, which was understood to be from Dr I. and to the effect that he had reviewed the colposcopy recording and that that review had not caused him to alter his view. A controversy has since developed, the circumstances of which it is unnecessary to outline in detail, about the fact that Dr I. had felt able to offer an opinion before ever reviewing a colposcopy recording. Correspondence exhibited before us between the present solicitors for HM and the former solicitor on record, and between the present solicitors for HM and Dr I., queries precisely what material was reviewed by Dr I. when preparing his report and subsequently. It is sufficient to

state that a doubt has since been raised, at least in the minds of the appellants and their present and former solicitors, as to whether Dr I.'s review of the medical evidence before reporting was sufficiently rigorous, extensive and comprehensive.

38. In the light of the contents of Dr I.'s report of the 15th of October 2019, the cases were defended in the way in which they were, and no expert evidence was adduced on behalf of either accused. The appellants were duly convicted and immediately indicated a desire to appeal.

39. Following their convictions, the appellants discharged their previous solicitors, and each engaged their present separate representation. The new solicitors, following a consideration of the files and working in tandem, decided to seek a fresh expert opinion. They sourced and retained the services of Professor Birgitta Essén, a Swedish Consultant in Obstetics and Gynaecology, who is also an expert in FGM. Like Dr Hodes she has also published extensively in medical journals on the subject of FGM. Professor Essén was furnished with all the documentary materials furnished previously to Dr I., plus the colposcopy recordings of the 16th of September 2016, the 19th of September 2016 and the 6th of December 2016. She furnished a first report dated the 6th of December 2020.

40. In her report dated the 6th of December 2020 she opines:

> *"There is an injury, apparent in the video of September 16 and 19, 2016, on the vulva vestibule, in the supra (upper) and para (beside) urethral mucosa tissue. There is no sign of bleeding from the clitoral area but from the vulva vestibule area. The labia minora, labia majora, prepuce, and clitoris external part (includes the glans/head) are visualized and judged to be within normal variation for the age. There is no video evidence of removal of any genital tissue.*
>
> *The background information did not indicate an injury due to the practice of FGM. The video evidence does not show FGM type 1 nor any other type of FGM. I judge the genitalia to be unmutilated because the videos of September 16, and 19th, and December 6, 2016, show evidence of intact, undamaged and unharmed clitoris with no bleeding. The video, 3 months later, shows a normal variation of the external genitalia. The injury could have been caused by an external mechanical trauma, damaging the mucosa*

tissue around the vulva vestibule. I have made my assessment independent of cultural influences. The findings in video stand for themselves.

I have viewed the video but have not myself examined. I can thus not comment on the consistency of anatomical structures. There should have been a physical examination. From the evidence available, the strong indication is that there was no mutilation of the genital (FGM), but a physical examination is needed to confirm this.

41. The report goes on to note the report of Dr Hodes expressing a contrary view and postulates several possible explanations for their differing opinions. Professor Essén then queries how much clinical and theoretical experience of FGM Dr Hodes had at the time of testifying, and what academic training in scientific methodology and experience of being a principal investigator she had at that time. She asserts adamantly that, *"I did not, however, diagnose FGM. I saw the external clitoris (including the head of the clitoris) several times in the video. The bleeding injury was from the vulva vestibule area."*

42. Professor Essén is then critical of Dr I.'s report for having performed only a secondary judgment of Dr Hode's report in circumstances where he had never encountered patients with FGM and had neither clinical experience in paediatric gynaecology, nor research experience, nor teaching experience, relevant to FGM. She then strongly asserts her own basis for claiming relevant expertise, maintaining that the anatomy of the clitoris, particularly in the case of a child, requires deep specific knowledge which few have, but which she claims to have. She implicitly suggests that none of the other experts involved in this case had the knowledge and skills to competently assess whether S has, or has not, experienced partial or complete removal of her clitoris. She, on the other hand, believes that she has that knowledge and those skills, and that moreover, although she has not conducted a physical examination, she is convinced that she has visualised S's clitoris on the colposcopy recordings.

43. Based on Professor Essén's reported views the appellants consider that appropriate expert evidence was neither sourced nor adduced on their behalf and that, accordingly, they did

not receive a fair or satisfactory trial. It is in those circumstances that they now seek leave to adduce testimony from Professor Essén as fresh evidence.

44. Professor Essén's report has been furnished to the other witnesses who testified at the trial for their commentary. However, they reject her criticisms and stand over the opinions they have expressed. Their responses have in turn been furnished to Professor Essén who has responded in rejoinder, in a supplementary report dated the 2nd of February 2021, again sticking to her guns.

45. Dr I. was also asked by the solicitors for the appellant H.M. to comment on Professor Essén's report. He did so by means of a supplementary report of the 8th of January 2021. In doing so he stated that he had reviewed his original report, together with the papers which were furnished to him, and Professor Essén's report, and had also reviewed the video recordings of the various colposcopic examinations and assessments. Having done so he stated that he was satisfied that his original report could stand in its present form, albeit that the report had been prepared on the basis of the papers and documentation alone, and not as a result of his having had sight of the colposcope recordings at the time. He commented that the colposcope recordings have significant limitations and that they lack clarity, particularly in respect of the detail of the anterior genital area. However, notwithstanding those limitations and lack of clarity, it was clear, particularly on the recording carried out on the 16th of December 2016 in theatre, that there was significant injury to the anterior genital area at and around the clitoris, urethra and anterior part of the vestibule. Overall, he was unable to state with any degree of confidence, as Professor Essén had felt able to do, that one can clearly see the clitoris, clitoral head, and prepuce, all intact and undamaged. He pointed to the fact that the papers indicated that S had been jointly physically examined by Mr. Paran, Mr Quinn and Dr Harty and that all three had formed the opinion that there was a clear absence of evidence of the clitoral head and tissues beneath the junction of the labia minora. Moreover, Dr Hodes in her review of the evidence in the case had formed the same opinion. He concluded by suggesting:

> *"The only way in which this situation might be usefully resolved would be to give serious consideration to the possibility of a joint medical examination by two clinicians experienced in the issue of female genital mutilation …"*

46. The appellant's former solicitors, in a letter to the present solicitors for the appellant HM dated the 20th of January 2021, have since commented on Dr I.'s supplementary report stating, *inter alia,* that:

> *"If Dr I. had informed us in November 2019 that the colposcopy recordings had significant limitations, let alone if he had informed us of the need to have a joint clinical examination of the child, we would of course have acted on this. We are not in a position to provide any explanation as to why he failed to do either of these things. We are in a position to state our opinion that his failure to do so compounded the entirely misleading opinion which he provided to us on or about the 8th of November 2009* (sic)."

47. The position now being taken by the appellants in the light of all these developments is quite a nuanced one. It was asserted several times by counsel for the appellants at the hearing before us that a case of ineffectual legal representation is not being made. It appears to be accepted that the former solicitors took appropriate steps to source and retain a suitable expert. The complaint seems to be one of underperformance by the expert Dr I., including complaints about: an alleged failure on his part to seek an opportunity to examine S in the context of a joint clinical examination, and to advise in a timely fashion that this needed to be done; also an alleged failure on his part to report before the trial that the colposcopy recordings had significant limitations and lacked clarity (relevant in that context was the fact that he had only apparently seen one such recording, i.e., that of the 19th of September 2016, in advance of the trial and may not have sought to clarify if there were others and if so to request them; although by the time of his supplementary report of the 8th of January 2021 it appears he had seen what he describes in that report as "*the video recordings of the various colposcopic examinations and assessments"*); and an alleged failure to answer in full the query raised with him. There is also complaint about alleged misrepresentation by or on behalf of Dr I. as to his capacity and ability to provide the required

expert opinion, in circumstances where he had no experience of a suspected or actual case of FGM; and concern relating to the fact that he had expressed an opinion before he had considered any colposcopic recordings. The appellants maintain that in the circumstances outlined they were deprived of an opinion by a medical expert who was appropriately experienced in the area and who had appropriately ascertained and examined the available medical evidence, thereby rendering their trial unsatisfactory and the verdicts unsafe.

48. In circumstances where the new expert engaged by the appellants is in profound disagreement with the experts who testified at the appellants' trial, the appellants now say that this disagreement can only be satisfactorily resolved by requiring S to undergo a joint medical examination to be conducted by experts from both sides (in effect adopting the suggestion made by Dr I. in his supplementary report of the 8th of January 2021).

49. Following the issuance of the motions for directions in this appeal, including the request that S be directed to submit to a joint medical examination, the respondent sought the views of Dr Harty as to whether such an examination would be appropriate and of potential assistance in regard to the issues which the appellants now seek to ventilate on appeal. In her response dated the 5th of March 2021, Dr Harty indicated that, following the raising of child protection concerns in relation to S, and specifically the concern that S had possibly suffered FGM, she (i.e., Dr Harty) had been asked by Tusla, whose personnel were maintaining supervision of S on an ongoing basis, to conduct regular medical follow up examinations of S to ensure that she was not being subjected to further FGM. Dr Harty reported on the 5th of March 2021 that she had attempted re-examination of S on the 4th of April 2017 and the 15th of May 2018 without success, as S found these attempted re-examinations to be distressing. She had met with S again on the 20th of August 2019 following a rapport building exercise when S appeared to be much happier. No physical examination was conducted on that occasion, but an arrangement was made to see S again on the 19th of October 2019. On that occasion Dr Harty had successfully conducted a physical examination. Once again this was recorded by colposcopy. Finally, Dr Harty also

reported that she again attempted to re-examine S in June of 2020 but was unsuccessful on this occasion as S had refused to be examined and had become upset.

50. The fact that Dr Harty was periodically attempting to re-examine S at the behest of Tusla, and had successfully done so on the 19th of October 2019, was a fact unknown to either the prosecution or the defence legal teams, or their respect experts (except obviously Dr Harty herself), at the time of the trial. There is no suggestion of any impropriety or active concealment of these details. It is simply an unfortunate circumstance that this information was not revealed until after the trial. Nevertheless, the appellants now seek to characterise the failure to make their then legal team aware of Dr Harty's attempts at further examination post the 6th of December 2016, and of the existence of the colposcopy recording of the 19th of October 2019, and to provide them with a copy of that recording in advance of the trial, as "material non-disclosure".

51. This non-revelation of the attempts at further examination, and the actual further examination on the 19th of October 2019 is potentially relevant in several respects. The first is that the colposcopy recording on the 19th of October 2019 is said to be of very good quality, and indeed is of better quality than the recordings of earlier examinations. Secondly, as far as Dr Harty was concerned, this recording, and what she noted on physical palpation of the area during her examination on the 19th of October 2019, both serve to confirm her findings during previous examinations and support the evidence she gave at trial. Thirdly, Dr Hodes, who also gave expert testimony on behalf of the prosecution, and who has been furnished *ex post facto* with the colposcopy recording of the 19th of October 2019, has opined that it further confirms the views that she expressed at trial. Fourthly, the new expert that the appellants now seek to introduce, i.e., Professor Birgitta Essén, disputes Dr Harty's view as to what the colposcopy recording of the 19th of October 2019 shows, and maintains that, because this recording is of even better quality than the previous recordings, it serves to further confirm her previously expressed view that S's clitoris remains in place. She asserts categorically that she can see it on this latest recording. Fifthly, while the colposcopy recording of the 19th of October 2019 has now been

furnished to the defence expert who advised the appellants' lawyers in advance of the trial, i.e., Dr I., he has refused to comment on it or to indicate whether it would cause him in any way to alter views which he previously expressed. This is in circumstances where Dr I. perceives (with justification) that he is the subject of some criticism by the new legal teams representing the appellants for the purposes of this appeal, and has felt it necessary to notify his professional indemnity insurers who have instructed solicitors to represent his interests, and which solicitors have exchanged correspondence with the appellants' solicitors, some of which is exhibited.

Submissions

52. Written submissions were filed on behalf of the appellant B.O., and which have been adopted by the appellant H.M. These address the request for a direction that S should undergo a further joint medical examination but do not address the other directions and relief sought in the notice of motions, and specifically the request for leave to adduce testimony from, *inter alia*, Professor Birgitta Essén as fresh evidence. On the issue of a joint medical examination the case is made by the appellants that as it is already a Tusla requirement that S should undergo periodic further examinations the proposed joint examination will impose no additional burden on her; and they point to the fact that she was successfully further examined by Dr Harty on the 19th of October 2019 as evidence that further examination is possible, notwithstanding that there have also been a number of unsuccessful attempts to further examine her. It is suggested that given the irreconcilable conflict between the views of the prosecution's experts, and those of Professor Birgitta Essén, a joint examination is justifiable and required in the circumstances to resolve that conflict.

53. Written submissions were not filed by the respondent in circumstances where it is contended that the time available in which to respond to the appellants' submissions was insufficient. However, oral submissions were made by both sides.

100. During the hearing counsel for both appellants were asked by the bench as to how their clients proposed to satisfy the so-called *Willoughby* criteria, set forth by the Court of Criminal

Appeal in *The People (Director of Public Prosecutions) v Willoughby* [2005] IECCA 4, and approved by the Supreme Court in *The People (Director of Public Prosecutions) v O'Regan* [2007] 3 I.R. 805 and applied by that Court recently in *The People (Director of Public Prosecutions) v D.C.* [2021] IESC 17. The *Willoughby* principles, as approved by the Supreme Court in *O'Regan*, are as follows:

a) Given that the public interest requires that a defendant bring forward his entire case at trial, exceptional circumstances must be established before the court should allow further evidence to be called. That onus is particularly heavy in the case of expert testimony, having regard to the availability generally of expertise from multiple sources.

b) The evidence must not have been known at the time of the trial and must be such that it could not reasonably have been known or required at the time of the trial.

c) It must be evidence which is credible, and which might have a material and important influence on the result of the case.

d) The assessment of credibility or materiality must be conducted by reference to the other evidence at the trial and not in isolation.

54. Counsel for appellants have responded that the Supreme Court made clear in the *O'Regan* case, at paragraph 72 of the judgment of Kearns J, that the application of the *Willoughby* principles should not be seen as displacing or negativing in any way the overarching requirement that justice be seen to be done having regard to all the circumstances and facts of the particular case. The appellants contend that when regard is had to all the circumstances and facts of the present case the interests of justice require that they should be granted leave to adduce the fresh evidence that the now wish to adduce, notwithstanding that this evidence might have been, but was not, sourced and adduced at the trial.

55. All of the directions sought, and the leave to adduce fresh evidence also sought, are opposed by respondent as being unnecessary. The suggestion that the interests of justice require

that leave be granted to adduce fresh evidence is rejected in circumstances where two of the experts relied upon by the prosecution have conducted actual physical examinations of S and did not rely solely on documentary descriptions of her anatomy and colposcopy recordings. Some importance is attached to the fact that Dr Harty has reported as recently as the 5th of March 2021 that in the course of her most examination of S on the 19th of October 2019 that, *"I did attempt to palpate the clitoris and the clitoris was not palpable"*. However, evidence of that particular examination was not adduced before the jury. While accepting that that is so, counsel for the respondent stresses that the jury did have evidence of the earlier physical examinations and that no clitoris was detected during those examinations. The general rule, i.e., that a party is expected to bring forward his or her entire case at trial, was very much emphasised and the point was made that there were good policy reasons for this. Were it not so, every disappointed litigant could seek to have his or her case re-opened by the simple expedient of securing a new witness *ex post facto* the trial who was prepared to disagree with expert testimony given at the trial.

The Court's Decision

56. We are not at this point persuaded by the appellants that the interests of justice require that they should be granted leave to adduce testimony from the parties' respective solicitors and Professor Birgitta Essén at the hearing of the "expert evidence" issue in this appeal, and that their proposed testimony should be received as fresh evidence. This represents a provisional view.

57. Nevertheless, we accept that this case exhibits some unusual features, particularly the non-revelation before the trial of the attempts at further examination, and the actual further examination on the 19th of October 2019 (a matter in respect of which we do not level criticism at any individual or party). Further, there are the unfortunate controversies that now exist between the present and former defence legal teams on the one hand, and Dr I. on the other hand, concerning his professional performance during his involvement in the case and the accuracy of certain representations made either by him or on his behalf. We merely note that

these controversies exist and express no views concerning whether the criticisms being levelled are well founded.

58. In the circumstances we believe that it may assist us in arriving at a definitive view on where the interests of justice lie to hear the proposed testimony to be adduced by the appellants from Professor Birgitta Essén, and to hear her being tested in cross-examination. We will therefore permit evidence to be adduced from her for that limited purpose. In granting such leave we wish to stress that no indication is to be taken from the fact that we are doing so that this Court will necessarily be prepared to treat her evidence as fresh evidence to be taken into account in determining the merits of the appeal. Whether or not the Court is prepared ultimately to do so remains to be determined, and we have reached no decision on that. Clearly in the interests of fairness and balance, if testimony is to be adduced from Professor Birgitta Essén for the limited purpose indicated, the prosecution should also recall their experts, i.e., Mr Paran, Dr Harty and Dr Hodes, to respond to any views expressed by Professor Essén. Again, in the context of assisting the court as to where the interests of justice lie, we would like Dr Harty to give sworn oral evidence before us concerning her attempts at further examination, and the actual further examination conducted by her on the 19th of October 2019, which matters were undisclosed before the trial, and to submit to cross examination by counsel for the appellants in regard to that should they wish to do so.

59. The Court will facilitate any party who wishes to have their expert or experts testify by video link.

60. We are of the clear view that a joint medical examination of S is not warranted on the evidence before us and the Court refuses to the direction sought in that regard. Such an examination would cause further distress to this child, and in our view, it would be a disproportionate intervention in circumstances where she has already been physically examined several times and there are colposcopy recordings of those examinations in existence, at least one of which is accepted by both sides as being of very good quality. In our assessment the dispute

between the experts is capable of being resolved in the context of the limited hearing of additional evidence that we are proposing, on the basis of examination and cross-examination of the relevant experts concerning their expertise and experience, concerning what is or is not said to be capable of being seen on the various colposcopy recordings, and concerning the manner of conducting, and what was found in the course of, the various physical examinations that have in fact taken place.

61. Finally, we are not disposed to direct Dr I., who was not an actual witness at the trial, to comment on the colposcopy recording of the examination of S on the 19th of October 2019, in circumstances where he does not wish to do so and has been independently advised not to do so. We do not consider that it would assist us with respect to the issues we have to decide on this appeal to have Dr I.'s views on that recording.