UNAPPROVED **NO REDACTION NEEDED**

THE COURT OF APPEAL

IN THE MATTER OF SECTION 23 OF THE CRIMINAL PROCEDURE ACT 2010

[158CJA/21]

Neutral Citation No: [2022] IECA 248

The President
McCarthy J.
Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

AND

BK

RESPONDENT

JUDGMENT of the Court delivered on the 14th day of October 2022 by Birmingham P.

Introduction

1. In July 2021, the respondent stood trial in Clonmel Circuit Criminal Court (sitting in Waterford) charged with five counts, four of which were of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990 (as amended), relating to three different complainants, each of them sons of hers. The fifth count was one of causing, procuring or allowing a child in her custody to be assaulted, ill-treated, neglected, or exposed in a manner likely to cause unnecessary suffering or injury to the child's health or seriously affecting his wellbeing contrary to s. 246(1) and (2) of the Children Act 2001.

2. On 14th July 2021, the respondent was acquitted on all counts. The acquittal followed a decision by the trial judge to exclude certain evidence, the admissibility of which had been challenged.

3. The Director has now brought an appeal pursuant to s. 23 of the Criminal Procedure Act 2010 (as amended) ("the 2010 Act") seeking: (i) a declaration that the trial judge erroneously excluded compelling evidence, (ii) that the acquittal of the respondent be quashed, and (iii) an order providing that the respondent be retried in respect of the charges she had faced.

The Legislation

4. The relevant provisions of s. 23 of the 2010 Act provide as follows:

"(1) Where on or after the commencement of this section, a person is tried on indictment and acquitted of an offence, the Director, if he or she is the prosecuting authority in the trial, or the Attorney General as may be appropriate, may, subject to subsection (3) and section 24, appeal the acquittal in respect of the offence concerned on a question of law to —

(I) the Court of Appeal, or

(II) in the case of a person who is tried on indictment in the Central Criminal Court, the Court of Appeal or the Supreme Court under Article 34.5.4° of the Constitution.

[…]

(3) An appeal referred to in this section shall lie only where—

(a) a ruling was made by a court –

(i) during the course of a trial referred to in subsection (1),

(ia) […]

(ii) […]

which erroneously excluded compelling evidence, or,

(b) […]

[…]

(11) On hearing an appeal referred to in subsection (1) the Court of Appeal may—

(a) quash the acquittal and order the person to be re-tried for the offence concerned if it is satisfied—

(i) that the requirements of subsection (3)(a)(i) or (b), as the case may be, are met, and

(ii) that, having regard to the matters referred to in subsection (12), it is, in all the circumstances, in the interests of justice to do so,

or

(b) if it is not so satisfied, affirm the acquittal.

(12) In determining whether to make an order under paragraph (a) of subsection (11) or (11A), the Court of Appeal or the Supreme Court, as the case may be, shall have regard to—

(a) whether or not it is likely that any re-trial could be conducted fairly,

(b) the amount of time that has passed since the act or omission that gave rise to the indictment,

(c) the interest of any victim of the offence concerned, and

(d) any other matter which it considers relevant to the appeal.

(13)

(a) The Court of Appeal or the Supreme Court, as the case may be, may make an order for a re-trial under this section subject to such conditions and directions as it

considers necessary or expedient (including conditions and directions in relation to the staying of the re-trial) to ensure the fairness of the re-trial.

(b) Subject to paragraph (a), where the Court of Appeal or the Supreme Court, as the case may be, makes an order for a re-trial under this section, the re-trial shall take place as soon as practicable.

(14) In this section—

'compelling evidence', in relation to a person, means evidence which—

(a) is reliable,

(b) is of significant probative value, and

(c) is such that, when taken together with—

(i) all the other evidence adduced in the proceedings concerned, and

(ii) to the extent that such evidence has not been adduced, the relevant evidence proposed to be adduced in the proceedings,

a jury might reasonably be satisfied beyond a reasonable doubt of the person's guilt in respect of the offence concerned…"

Background

5. The background to this case is an unusual one and, in the collective experience of the members of this Court, it is a unique one.

6. The respondent is a fifty-year-old mother of three sons. Each child – aged 27, 25 and 13 – is severely mentally and physically disabled, though not all to the same degree, by reason of microcephaly. The respondent and her husband are Polish nationals who came to Ireland in 2005. Their youngest son was born in the State in 2008, while his elder brothers were born in Poland before the family left that country.

7. Gardaí attached to the Online Child Exploitation Unit received information from Europol about a suspected user in Ireland who had adopted the username "Majester". Majester had uploaded still images and videos recording the sexual exploitation of a young boy aged four to six years, along with other images of the sexual abuse of children. Later, it would emerge that Majester was the adopted internet name of the respondent's husband. An IP address was linked to the home of the respondent and her husband in a town in the south of the country. As previously indicated, the respondent and her husband ("A") are the parents of three sons: "B" born in 1994, "C" born in 1996, and "D" born in 2008.

8. A search warrant was sought in respect of this address and was obtained. Several items of potential evidential significance were located during the course of the search. Following the search, there were two sources of relevant material available to investigators; the images and videos that had been made available by Europol, and the material that was found during the search. It is not necessary to go into this in any great detail, but a number of items and objects that were visible in the Europol material were located during the course of the search. Suffice to say at this stage that there was little room for doubt but that the abuse depicted on the Europol material had taken place in the home of the respondent and her husband.

9. On the day of the search, a question and answer exchange took place with the respondent, during which she made reference to her second son touching the penis of the youngest child, causing it to enlarge. In due course, the prosecution would contend that this was in fact a lie about her second son, designed to cover actions of the respondent herself.

10. The respondent was arrested and detained on 26th March 2015, the day following the search. During the course of her six interviews, she made no admissions, though she repeated the story of her second son touching the penis of her youngest son at a time when the youngest son was in a nappy.

11. The husband of the respondent and her brother-in-law were prosecuted for various serious offences involving child abuse and child pornography. Each pleaded guilty and both were sentenced to significant terms of imprisonment.

12. The HSE and the Child and Family Agency ("CFA"/"Tusla") quickly became involved in the arrangement of care for the respondent's sons. The situation was complicated somewhat by the fact that two of the three sons were adults but lacking in capacity. This saw the matter come before the High Court and the case essentially took on the character of wardship proceedings. In the course of the High Court proceedings, the question of the carrying out of two assessments – a risk assessment and a safeguarding assessment by a psychologist – was addressed. Of note, in the context of the proceedings in the Circuit Court and now the application before this Court, is the fact that in July 2015, the Director decided not to prosecute the respondent and this decision was conveyed to her on 29th July 2015.

13. In the context of the wardship proceedings, the respondent was interviewed on a number of occasions by a forensic psychologist, a Dr. Sullivan. Those interviews will be considered in greater detail, but at this stage, it might simply be noted that during those interviews, the respondent made significant admissions which subsequently provided a basis for the charges that were later preferred. An application was brought by the HSE to the then President of the High Court (Kearns P.) in relation to the contents of the interviews conducted by Dr. Sullivan. He directed that the report of the psychologist should be made available to the Commissioner of An Garda Síochána. The order of the High Court, which had been opposed by the respondent, was appealed to this Court and that appeal was dismissed.

14. Influenced, it is to be inferred, by the reports of what the respondent had been recorded as having said to Dr. Sullivan, the Director reconsidered her decision not to prosecute and directed that the respondent be charged with the five counts to which there has already been reference. The matter came on for trial at the Circuit Court on 7th July 2021. At

trial, there was a challenge to the admissibility of the evidence of Dr. Sullivan and the issue was the subject of a *voir dire*. At the conclusion of the *voir dire*, the trial judge excluded the evidence of Dr. Sullivan, which evidence included the fact that there had been very significant admissions made to him by the respondent. By reason of the ruling of the trial judge excluding the evidence that it was proposed to tender, it was inevitable that an application for a directed verdict of not guilty would succeed, and, ultimately, the Director did not oppose that application.

15. It is this decision to exclude the evidence of Dr. Sullivan which is at the heart of the present application. It is, therefore, necessary to consider in greater detail the exercise upon which Dr. Sullivan embarked and to consider how the issue was dealt with by the trial judge.

The Evidence of Dr. Sullivan

16. Dr. Sullivan is a specialist forensic psychologist with a PhD in forensic psychology. In his practice, he evaluates, assesses, and provides intervention programmes for adult and adolescent perpetrators of sexual abuse of children. He was a director of Mentor Forensic Services Ltd., a company which provides risk assessment for agencies such as Tusla in this jurisdiction, but also for several social services departments in the UK. In the context of the family law wardship proceedings, to which there has already been reference, the High Court directed that a report be prepared. It directed that that report be given to An Garda Síochána by order of 30th July 2015. That order was the subject of an appeal to the Court of Appeal which was ultimately dismissed.

17. Following on from that, Dr. Sullivan was contacted by lawyers on behalf of Tusla in order to carry out a risk assessment and a safeguarding assessment in respect of the respondent. The risk assessment focuses on the risk posed by the respondent directly, while the safeguarding assessment focuses on her ability to safeguard the children. Questions that were going to arise for consideration by Dr. Sullivan included whether the respondent was

completely unaware of what was going on in the family home; whether she had some level of awareness; whether she ought to have been aware of what was happening; and whether she was actually collaborative or complicit in some respect in relation to the activities in which her husband was engaged.

18. An interpreter was provided for the process, although the respondent speaks good English. The question of formal consent was addressed. A consent form had been provided to the lawyers for Tusla (Arthur Cox & Co.) and this in turn was provided to the respondent. The respondent had legal advice in respect of the consent form through a legal aid centre, and she and her solicitor were offered the opportunity to raise any questions in respect of the form in advance of the first interview. A signed consent form was received by Mentor Forensic Services Ltd. in advance of the first interview. The consent was signed by the respondent, dated 10th August 2015, and forwarded to Dr. Sullivan. It was headed "Consent to Assessment: Safeguarding Assessment".

19. A copy of the consent form was available to the trial court. It is not a particularly lengthy document, and it is convenient to set out its contents here. After the heading, within which the name of the referrer (the solicitors firm acting on behalf of Tusla), the assessor, (Mentor Forensic Services Ltd.), and the name of the subject (Mrs. BK) are set out, the document states:

> "Assessment Context
>
> - Mentor Forensic Services Ltd has been engaged by the Referrer to conduct a Safeguarding Assessment. You are participating in this process.
> - The process is concerned with assessing what risk, if any, exists. Assessment/intervention is not an exact science and no guarantees are made as to the results.

- Where necessary assessments can help determine what kind of intervention, if any, might help to control inappropriate behaviour.
- People who have transgressed professional and/or sexual boundaries can be assisted to learn effective control techniques for the future.

Assessment Process Consent

I confirm that I agree to participate in the assessment/enquiry/intervention process with Mentor Forensic Services Ltd in the knowledge that:

1. The process is not confidential and I am aware that the content of the interviews will be 'on the record'. Anything I say to Mentor Forensic Services Ltd staff may be included in the final report and/or interim discussions with the Referrer. This includes any new disclosure of sexual abuse against children/vulnerable adults and information about abuse perpetrated against me which identifies children/vulnerable adults currently at risk.
2. I acknowledge and accept that it is MFS policy to video record all sessions. I understand that these recordings are not produced to an evidential standard, but are made to ensure and facilitate the accurate reporting of the content of discussions. I accept that MFS does not permit any additional recording of the sessions and I undertake not to record the sessions or discussions with MFS staff in any way. I accept that MFS will be the sole owner of the video generated and will not provide copies of the sessions to other parties.
3. Reports will normally be submitted six weeks after the completion of MFS professional services. A single copy of the report will be sent to the Appointer. The report will be the exclusive property of the Appointer.

4. The report should only be used for the purpose for which it was commissioned. Any copies of the report made at the discretion of the Referrer, may be shared with other agencies, if necessary, to comply with statutory guidelines and in the interests of protecting others.
5. MFS give consent for the report to be shown to the Subject.
6. If, on the completion of a report, the Subject and/or their legal adviser disputes the accuracy of the report of the Subject's account they may review the relevant disputed section of the video recording. MFS do not provide copies of recordings of the interviews but will meet with the Subject and/or their legal adviser to facilitate review of the disputed parts of the interview.
7. MFS undertake to correct any factual inaccuracies identified in reports and will resubmit a corrected version, in this eventuality all copies of the original report are to be referred to MFS.
8. Once the report is submitted MFS will commit to retain all documentation, materials and notes taken by MFS staff relating to the assessment for a further six months, to allow time for any queries to be checked. MFS will need to be notified of any queries within this timeframe otherwise it will be taken that the report is considered to accurately reflect the content of the risk assessment meetings.
9. I understand that detailed discussions regarding my social and sexual history will take place throughout assessment/intervention.
10. I consent to Mentor Forensic Services Ltd obtaining any information about me from third parties (including any sensitive personal data) which Mentor Forensic Services Ltd. consider necessary in order to conduct the assessment herein.

11. I can expect to be treated with respect by Mentor Forensic Services Ltd staff at all times and undertake to treat all those I meet in the course of work with Mentor Forensic Services Ltd with the same respect. I understand that inappropriate behaviour, verbal and/or physical threats/violence will not be tolerated.

Additional Consent Requirements

I confirm that I am willing to undertake a Polygraph examination during the assessment to confirm the veracity of my account.

I confirm that I understand and accept the terms of the Consent/s set out on the within pages 1-2 inclusive.

NAME (in block capitals): […]

(Subject of assessment)

Signature: […]

(Subject of assessment)

Dated: 10.08.2015".

20. Interviews were conducted with the respondent on 26th, 27th and 28th August 2015, and again on 11th and 14th September 2015. The most significant admissions were made on day five. A polygraph was performed on 28th August 2015, with a second test taking place on 14th September (day five). Admissions were forthcoming from the respondent on day five, after this second test. A number of video clips from the interviews were shown to the trial court during the course of a *voir dire* and these video clips have been available to the members of this Court on the hearing of this appeal. In broad terms, the admissions from day one included reference to the respondent viewing images of children with her husband,

whereas by day five, the videos record the respondent admitting, in considerable detail, to sexual contact on her part with each of her three sons.

21. While there were a number of themes raised during the course of cross-examination of Dr. Sullivan, significant focus was placed on the polygraphs. It was suggested to him, and he agreed with the suggestion, that the solicitors that had been acting for the respondent had reservations about the use of a polygraph. Dr. Sullivan's position was that he was only prepared to undertake the assessment if the respondent was fully cooperative with the assessment process, and that process involved the taking of a polygraph. He explained that the use of the polygraph had helped parents to be reunited with their children when they had successfully completed the process and when no concerns had been identified by it. It allowed him to be more emphatic in the conclusions to which he came, in that he could be more confident that the account he had been given was accurate.

22. Dr. Sullivan was asked whether it was the case that he had not warned the respondent of the possibility that she was incriminating herself and could be prosecuted and he accepted that that was indeed the case. He confirmed that at no point was he pursuing the questioning from a criminal perspective because the Gardaí had decided that they were not prosecuting or proceeding with their investigation. He confirmed that it appeared to be the case that on day three, the first day on which the test was administered, the respondent appeared to be running countermeasures, by holding her breath with a view to affecting the reliability of the test.

23. In cross-examination, it was put to Dr. Sullivan that significant pressure was being put on the respondent and Dr. Sullivan's response was that the polygraph examiners were putting it to the respondent that she was deliberately holding her breath on certain questions and not doing so on others. It was suggested that she was not being honest, that she was holding something back, and for this reason, was not passing the test. He was cross-examined on the basis that the respondent was being offered hope in her ambition to see her children. Dr.

Sullivan's response to that was that he was offering to help her articulate her involvement in the situation by being honest so that she might persuade a court or social services that, having been drawn into an abusive world by her partner, she was now coming through that difficult time in her life. He was offering her hope if she was going to engage honestly.

24. It was then put to Dr. Sullivan that at one point he had said to the respondent, "I think we need to make sure you will pass", and his response was that the inference from that was that he needed her to say more in order to demonstrate that she had been honest. Dr. Sullivan indicated that the fundamental problem was that he did not believe the data he was receiving from the respondent. At that point, he did not believe that she was a suspect. Rather, he was undertaking the assessment on the basis that she might know nothing about what had happened, or had been fully collaborative, or anywhere in between on that spectrum.

25. After the conclusion of the *voir dire* in relation to the evidence of Dr. Sullivan which was conducted on days three and four of the trial, the judge heard submissions from counsel on both sides on the question of admissibility. Counsel on behalf of the then accused indicated that his principal objection to the evidence proposed to be tendered was that the assessment carried out by Dr. Sullivan was in the context of family or child proceedings. He submitted that rules that might be appropriate for family or child proceedings did not apply in criminal cases. For any evidence to be admitted in criminal cases, it was necessary that admissions would be made voluntarily, without threat or inducement. He submitted that in this case, the then accused was obliged to participate in the assessment if she wished to participate in proceedings in relation to the care of her children. She did so at a time when she had been told that a decision had been made that she would not be prosecuted. It is said that what had occurred could not be regarded as a voluntary statement.

26. Counsel cited the well-known case of *Saunders v. UK* (1997) 23 EHRR 313, the case involving the former Guinness executive. Counsel indicated that the second leg of his

argument was that what had occurred offended the basic constitutional right to basic fairness in the trial court. It was pointed out that in the case of an ordinary trial, any interviews with suspects would have been conducted subject to the custody regulations. Counsel proceeded to point to the effect of those custody regulations had they been applicable. However, what had occurred was that the interviews were not conducted in accordance with ordinary Garda practice. There was no caution at the beginning of every interview. Moreover, he said that the interviews were conducted unfairly, in that the inquisitor held himself out to be a friend of the suspect and indicated that he would help her in various ways. Counsel referred to what he described as an "obsession" with conducting a polygraph and explained that the need to pass it put immense pressure on the accused. He said that, whatever about childcare proceedings, this was not the way that business was done in criminal law. In the area of criminal law, there must be no threats or inducement, and here, the threat was that the assessor would not write a good report, and the inducement was that a good report would be written which would be good for her and would improve her position.

27. In reply, counsel on behalf of the Director distinguished the *Saunders* case, saying the essential difference was that, in that case, Mr. Saunders was under a legal compulsion pursuant to statute to provide information to the Department of Trade and Industry inspectors, whereas in the present case, the then accused was not under any form of legal compulsion to participate in the assessment. Counsel acknowledged that he did not doubt for one moment that she was anxious to secure the return of her children, and that, accordingly, on the basis of the advice given to her, it seemed like a good idea to participate in the assessment, but he said that was very far indeed from saying that she was under any form of legal compulsion. He pointed out that the essential difference between *Saunders* and the present case was that here it had been necessary to secure her consent to the assessments which was why the two consent documents had been put in evidence.

28. Turning to the question of voluntariness, he pointed out that anything in the nature of an inducement, a threat or a promise had to emanate from a person in authority. He drew attention to the case of *DPP v. McCann* [1998] 4 IR 397 where it was established that a person in authority was defined as meaning someone engaged in the arrest, detention, examination, or prosecution of the accused. Very properly, he drew attention to the fact that McGrath in *Evidence*, 2nd edn. (Round Hall, 2014) makes the point that decisions in other jurisdictions have extended the definition of a person in authority. This was so as to include people such as the captain of a ship *viz à viz* a sailor, a school headmistress *viz à viz* a pupil, employers *viz* à *viz* employees, a social worker *viz à viz* the victim of an offence, even though it was not immediately evident that these categories of persons could be said to be engaged in the arrest, detention or prosecution of those over whom they were held to exercise authority. He said that there was authority for saying that a subjective approach should be used *i.e.*, whether the accused believed on reasonable grounds that the person holding out the inducement was in a position to influence his or her arrest, detention, examination or prosecution.

29. In relation to the polygraph, counsel said it was clear that the purpose of it was so that Dr. Sullivan could be confident about the contents of what he would be putting in his report. If his report had to say that he felt the respondent had not been honest with him, then that was going to be very unhelpful from her point of view, whereas if he was satisfied that she had been truthful, then, depending on the nature and extent of what she had admitted to, there was a possible pathway which might see her securing the return of her children. He submitted that there was no threat or promise of the type seen in case law, which would be such as to result in the evidence being excluded on the basis of the admissions being involuntary; this was not a case of the will of a suspect being overborne by what had been said in the nature of an inducement.

30. Counsel pointed out that, following the interview on 28th August, the respondent, in what was a departure from what she had said earlier, indicated that she had viewed child pornography with her husband on 25 occasions. Following further discussion between Dr. Sullivan and the respondent, counsel noted that Dr. Sullivan had said, "[l]ook, I'm not going to write a report at this point in time. I am going to seek an extension of time within which to carry out further work in the hope that I can present a better picture in relation to these matters". Dr. Sullivan's evidence was to the effect that he told the respondent that she needed to speak to her own solicitor and tell the solicitor about the further matters that she had admitted to. However, the key admissions came much later, on day four of the interviews, and more specifically, on day five, which was nearly two weeks after the first occasion (day three) when a polygraph was introduced.

31. Counsel addressed the points that had been made by his colleague about the duration of the interviews, the absence of structured breaks and so on, and pointed out that there was no equivalence with the regime that applied to interviews in Garda custody. Here, the maximum duration of any interview was three hours, whereas the custody regulations provided for interviews of four hours. Dr. Sullivan had made it clear that if a break was required at any time, it would have been given. Counsel on behalf of the respondent said that the most important point was that the interviews were conducted over a series of days, the first set on 26th, 27th and 28th August, following which there was a break of nearly two weeks, to 11th September, with the final interviews being on 14th September. Unlike a suspect subject to prolonged detention in a Garda station, the respondent went home to her own bed every night. He said there was no question of any obligation to administer a caution, and that the Judges' Rules govern the questioning of individuals by An Garda Síochána. The coercive power of the State was not in any way being exercised in the context of the assessment of the respondent. It was not an arrest; it did not involve the exercise of any statutory authority.

32. In exchanges between counsel for the prosecution and the trial judge, the trial judge posed the question of whether, if the process was to take place, one would not expect that the accused's solicitor to be informed that the interviews may be used in criminal proceedings, and that perhaps some similar procedures to the custody rules and regulations would be put in place – nothing as detailed as the custody regulations, but simply that the respondent would be told she had a right of access to a solicitor and perhaps that some of the usual safeguards would be put in place if the interviews were to be used in criminal proceedings. Counsel's response to that was to say that that was to superimpose on the process after the event many of the safeguards appropriate to an arrest, but this simply was not such a situation. At the time of the interviews, the respondent was not a suspect because a decision had been made not to prosecute her.

33. The judge took the opportunity to consider the matter overnight and the following morning gave a detailed ruling. The operative part of the ruling was in these terms:

> "Now bearing in mind the number and length of the interviews, the format of the interviews, the use of the lie detector and the role of Dr Sullivan, I must say that I'm satisfied that Dr Sullivan, that his role was not consistent with the standards of an interview or the practices of an interview conducted in a criminal case. I should say I make no criticism of Dr Sullivan. He was conducting an interview for the purposes of the High Court case. He was there to assess the accused in the context of the wards of court application or a custody or access application. He indicated that if he had been asked by the gardaí he would not have conducted interviews on behalf of the gardaí and I'm satisfied that as a matter of constitutional fairness and interpreting the law in a constitutional manner, and having regard to the right to silence and the issues of fairness, in order for admissions to be made on the facts and circumstances of this case there would have to be either (1) legislation permitting such interviews with

appropriate safeguards afforded to the suspect and it may very well be the case that in the future there may be a role for psychologists to either take part in interviews or train or advise the gardaí [on] how to conduct interviews or (2) the rights provided to the person, there should have been rights provided to a person being questioned similar to the protections in the Criminal Justice Act [1984] and regulations [made thereunder], in particular an independent overseer similar to the member in charge to provide for breaks, meals, medical consultant, if necessary, and also an appropriate caution at the beginning of each interview and access to a solicitor in the same terms as the Criminal Justice Act [1984] provides and the case law provides.

Now, I agree with [senior counsel for the then accused's] submission that you cannot simply overcome the objections to the questioning by distilling the questions down to a number of discrete questions. It is appropriate to have regard to the entirety of the interviews. So having regard to the length, the nature and duration of the interviews, the use of the lie detector, I am satisfied that the accused was told she would not be prosecuted. I am satisfied that she should have been given access to a solicitor and should have been informed of this right and she did not have access to legal advice. She should have been cautioned at the start of each interview. I am also satisfied that the interviews in a number of respects were unfair to the accused. I make no criticism of Dr Sullivan in this regard. As I have said, he was conducting the interviews in relation to the assessment he was carrying out for the other proceedings.

Now the onus is on the prosecution to prove beyond reasonable doubt that the interviews are admissible. I am satisfied the prosecution have not discharged that burden. I am satisfied that the interviews were not voluntary within the meaning of

the criminal law, indeed having heard evidence from last week and this week and the submissions, I am of the view that in this particular case it would not be possible for Dr Sullivan to conduct, if you like, a dual interview. It wouldn't be possible for him to conduct an appropriate assessment of the wardship custody cases and at the same time conduct and interview in this case which would be admissible in the criminal proceedings.

I am satisfied that the matters I have referred to in the cross-examination of Dr Sullivan by Mr Durack in relation to the issues which were categorised then as inducements, promises, *et cetera*, I'm going to categorise those on the basis of fairness but I am satisfied that those issues from a criminal standard, the interviews fell below the basic standard of fairness in a criminal trial. So, in summary, therefore, I am satisfied that the interviews were not voluntary, that they fell below the basic standard of fairness. In relation to access to a solicitor, I am satisfied that she should have been -- if the statements were to be relied on, she should have been given that right and that has not been done. I am satisfied that the interviews were not voluntary and I'm satisfied they fell below the standard of fairness.

Now, those matters, certainly the access to a solicitor, engages Article 38.1 of the Constitution under the guarantee of the due course of law. I am also satisfied that the questioning should have been conducted, if it was sought or contemplated to be relied on, it should have been conducted in accordance with the custody regulations and the Judges' Rules or a system implemented which would provide the protections I have referred to, and the failure -- there was a failure to implement any such system. So, I'm satisfied from that point of view, the interviews were illegal.

In relation to both of the issues, and all of the issues I have identified, I'm satisfied that it is appropriate to exclude the evidence of the interviews."

Submissions on Appeal

34. The Director contends that while the trial judge stated in the course of his ruling that the interviews "were not voluntary within the meaning of the criminal law", the basis upon which this conclusion was reached is not at all clear. That is particularly so given that he had said at one point in his ruling that it was "not appropriate to deal with this issue in the context of the case law about oppression, inducements, promises, [or] threats," because they all relate to what occurs in a Garda station. The Director says that, in this case, there is no evidence that anything that was said by Dr. Sullivan had caused the respondent to make admissions. Much of the focus of the cross-examination was on comments made by him during the first series of interviews in August 2015, but thereafter, there was a two-week break and most of the key admissions were made on the fifth and final day of interviews.

35. The Director says that the arguments which had been advanced at trial based on the *Saunders* case and the judgment of the Supreme Court in *Re National Irish Bank Ltd (No 1)* [1999] 3 IR 145 had no application. It was pointed out that the trial judge had referred to the fact that those cases involved an individual who was bound to answer, but having said that, he commented that he took into account the generality of the provisions. It is said that the trial judge's view that a caution should have been administered at the start of each interview did not have any legal basis. In this regard, it is submitted that the judge fell into error in equating what occurred with interviews conducted with suspects in custody, pursuant to the Criminal Justice Act 1984 and the regulations made thereunder. In this case, the respondent was not under arrest when Dr. Sullivan conducted his interviews and therefore there was no

basis in law for the trial judge's conclusion that she had a right of access to a solicitor. While that was so, it was in fact the situation that the respondent had the opportunity to consult with the solicitor on record in between interviews, and it is pointed out that, at the end of the first set of interviews, Dr. Sullivan had suggested to the respondent that she should speak to her solicitor. The Director says that the trial judge's view that the interviews were not consistent with the standard of an interview, or the practices of an interview, conducted in a criminal case are hard to square with his comment made on a number of occasions that he was making no criticism of Dr. Sullivan.

36. Insofar as the interviews took place at a time after the respondent had been told that she was not going to be prosecuted, it is pointed out on behalf of the Director that any decision not to prosecute in a particular case is a decision in its own time and is always subject to the possibility of reversal, particularly if new evidence emerges.

Discussion and Decision

37. As in the Circuit Court, the respondent has sought to put her objections in the context of traditional considerations such as oppression, inducement, the absence of a caution, the absence of an independent supervisor, the departure from the normal procedure of a Garda interview and so on. While that approach is entirely understandable, for our part, we do not think it is appropriate in the context of this unusual case. It seems to us that the question is not whether the procedure that would have ordinarily been followed had this been a Garda interview in a Garda station was in fact followed, but whether what actually occurred was unfair.

38. In this case, the trial judge concluded that the interviews were "non-voluntary" within the meaning of the criminal law. He did not see issues such as inducements or promises as applicable, but seems to have taken the view that, in the round, the interviews fell below the

basic standard of fairness in a criminal trial. It is noteworthy that he came to that view while emphasising that he made no criticism of Dr. Sullivan.

39. In the very unusual circumstances of this case, we think it appropriate to approach a consideration of the issues through the prism of overall fairness. It seems to us that a starting point for consideration of that issue is to ask whether, if it had been sought to make use of the intensive interviews during the wardship proceedings, there would have been anything objectionable about that. It does not seem to us that there would have been anything objectionable, though we recognise that there would be many who would be surprised at the emphasis placed by Dr. Sullivan on the use of the polygraph. However, as we know, what happened is that interviews that were conducted for one purpose, *i.e.*, wardship proceedings, were used in the very different context of a criminal trial. Insofar as what occurred gives rise to any sense of disquiet, it seems to us that it arises from the fact that the nature of the interviews differed significantly to the sort of interviews that criminal practitioners are used to viewing and reading. More specifically, it seems to us that the fact that the interviews depart from the familiar, combined with the fact that interviews were conducted with somebody who had been told that they would not be prosecuted, raises a sense of concern.

40. To try identify what the extent of those concerns is, and the extent to which they are justified, it is necessary to note that there was nothing here in the nature of a trap or a ruse or a stratagem. It is certainly not the case that the Director made the decision, first, not to prosecute the respondent, and second, to inform the respondent of this, with a view to going back on the decision. The initial decision not to prosecute was a conscientious one, taken on the basis of the information then available. There can be no doubt that any such decision is always subject to the caveat that it can be reviewed, and indeed, reversed, if new information comes to light. Suppose the respondent had walked into her local Garda station, and in an entirely unsolicited manner, made comprehensive admissions of very grave wrongdoing;

assuming there was no reason to doubt the reliability of the admissions, would there be any surprise if the Director reconsidered the decision not to prosecute?

41. If, and we are inclined to this view, it is the case that the decision to reverse the earlier decision not to prosecute does not give rise to unfairness, then the question that arises for consideration is whether the manner in which the interviews were conducted, and in particular, the extent to which what occurred diverged from the traditional approach to interviews in the criminal context, gave rise to such a level of concern that one should conclude that there was a departure from overall fairness. While the unfamiliarity of what occurred gives rise to an initial sense of disquiet and unease, we feel that on further consideration, there was, in truth, nothing unfair about what happened. When Dr. Sullivan was conducting interviews, the expectation was that they would be very important in assisting authorities, including the High Court, in coming to a conclusion on issues of the most fundamental importance, including where a parent should have custody or access to their children. The interviews were conducted by someone highly experienced in the area, and the procedures that he followed were those that he had found, based on his experience, to be effective. He did not ask questions with the expectation that the answers would be conveyed to An Garda Síochána so as to be deployed in a prosecution. He asked probing questions which were designed to assist in the twin tasks in which he had engaged; the risk assessment and the safeguarding assessment. Moreover, it is relevant that the respondent had extensive legal advice during the two-week period following which she made significant admissions. When information as to the wrongdoing came to light, the question then became what was to be done with that information: was it to be deployed in the course of a criminal trial or was it to be discarded? Overall, we are satisfied that the interests of justice were served in permitting the evidence of what was said at interviews to be adduced and permitting the contents of the interviews to be considered. Accordingly, it follows that, in our view, the trial

judge was wrong in concluding that the interviews that took place were “non-voluntary” and departed from basic fairness, and wrong in concluding that the evidence should be excluded.

42. Therefore, it seems to us that, being of the view that potentially compelling evidence, as defined in s. 14 of the 2010 Act, was excluded, the acquittal of the respondent must be quashed. We have considered, pursuant to s. 12 of the 2010 Act, the criteria for determining whether a re-trial should be ordered, and we have concluded that, in the circumstances of the case, a re-trial should be directed.