THE COURT OF APPEAL

UNAPPROVED **NO REDACTION NEEDED**

Bill Number: DUDP0067/2018

Appeal Number.: CCA 0T 0119/2021

Neutral Citation Number: [2023] IECA 65

Edwards J.
McCarthy J.
Ní Raifeartaigh J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

M.T.

APPELLANT

Judgment of the Court delivered by Ní Raifeartaigh J. on the 21st day of March, 2023

Introduction

1. This is a case in which the contentious issue relates to the cross-examination of a child complainant in a sexual offence trial in circumstances where 4 ½ years elapsed between the video recording of the child's testimony (when she was aged 6) and the cross-examination at the trial at which the appellant was convicted (when she was aged 11). The appellant was convicted of the sole count of sexual assault at this trial and sentenced to four years imprisonment. The child in this case frankly conceded in cross-examination during the trial that she had little memory of the incident which was the subject of the charge and was relying upon what she had seen in the video-recording of her interview. The questions arising are

whether in those circumstances the appellant could exercise his lawful entitlement to cross-examine, whether the child's evidence should have been left to the jury, and whether the trial was fair.

2. The issue so described is deceptively simple. The case raises fundamental questions about the exercise of an accused person's right to cross-examine in circumstances involving a young child and where there is a significant delay between the making of the video recording of the child's interview and the trial; a situation that unfortunately arises relatively frequently in this jurisdiction. Two of the key facts in the present case are the period of time between video-recording and trial (4 ½ years) and the age of the child (6 at the time of the alleged incident, 11 at the time of the trial).

3. The Irish criminal justice system has in recent years made some progress in its efforts to ensure that child witnesses are treated fairly and appropriately at all stages of the process from complaint to trial. It was felt that in the past, pre-trial and trial practices were such that children were unable to give what is described in our neighbouring jurisdiction as their *"best evidence"*. Various measures were introduced by legislation as far back as 1992, but some have only become operative in practical terms in relatively recent years. One of these measures is that of video recording an interview with a child before the trial, and subsequently playing it at trial, effectively as a substituted evidence in chief, pursuant to s.16(1)(b) of the Criminal Evidence Act 1992. The intention behind this measure was to capture the child's evidence while still fresh and thereby achieve a greater balance as between the position of the child and the rights of the accused person. However, the question posed in this case is whether, in the particular circumstances arising, the conviction of the

appellant suggests that the balance tipped away too far from the protection of the rights of an accused person and deprived him of a fair trial.

4. While the case does concern the issue of cross-examination of a child witness, it should be noted what the case is *not* about. It does not concern the issue of requiring counsel to tailor their cross-examination of a child to the age and understanding of the specific child, or whether the trial judge unfairly constrained the ability of counsel to cross-examine the child, or anything connected with "ground rules" hearings. Nor does it concern the competence of the child to give evidence in the sense of whether, in view of her age and understanding, she would have been capable of giving an intelligible account of events at the time of the interview and/or the trial. The question raised in this case is specific: it is whether, in view of the child's concession that she had little memory of the incident in question, the appellant's ability to cross-examine was so impaired as to be meaningless and that a fair trial could therefore not be achieved.

Chronology of Events

5. We will refer to the child complainant in this case by the initial S. Further details will be set out below, but in essence the allegation was that the appellant sexually assaulted S while she was in a house playing with his daughter, D. The house was across the road from the complainant's own home. D lived in that house with her mother, and the appellant was the partner of the latter.

6. The date of the alleged incident was the 1st October 2016, the day of an All-Ireland football final replay between Dublin and Mayo. The next day, the 2nd October 2016, S told her mother that while she was at D's house the previous day, the appellant had touched her

in a way that amounted to a sexual assault. Obviously those words were not used and the description was in the language of a six-year old child. Her mother contacted the child's father, who arrived at the house, and then the Gardaí, who arrived promptly. The Gardaí considered that since the complainant was a child, it would not be appropriate to engage any further with her on that date, and that an arrangement should be made for a child to interviewed by a specialist interviewer. Meanwhile they called into the appellant in the house across the road and informed him of the general nature of the allegation. The appellant went voluntarily with them to the Garda station and voluntarily submitted to a cautioned interview. He gave a detailed account of his movements the previous day and denied the allegation. Further details will be given below.

7. In October or November 2016 (the precise date is uncertain), two specialist interviewers attended at the child's home. No notes of this meeting were made or kept. This was described as a *"clarification meeting"*, terminology which has apparently become common in this type of case to describe the first meeting of the Gardaí with the complainant. The fact of this meeting was not known to the appellant or his legal team prior to the first trial. (As will be seen, there were three trials: the jury were discharged in the first trial by reason of a failure to disclose the fact of, or any notes concerning, the first clarification meeting referred to; the second trial resulted in a jury discharge because of the pandemic; and the third trial resulted in the conviction of the appellant.)

8. On 10th December 2016, two different specialist interviewers attended at the child's home. The only note taken on that occasion was that the child said: "*He was rubbing my leg. He touched me there, at my privates*". On 11th December 2016, over two months after

the report to the Gardaí, the child was formally interviewed by the latter team of specialist interviewers and this was video recorded.

9. On the 2nd January 2017, the appellant was arrested. He was detained and interviewed, and gave an account of the day in question in broadly similar terms to that given by him to the Gardaí on the day after the alleged incident.

10. The file was sent to the DPP and directions to charge the appellant were received in late 2017. The Court is not aware of the precise date upon which the file was sent to that office nor, therefore, of the precise period from that date to the receipt of directions from the DPP's office. Nor is the Court aware of the date of charge or dates in the District Court. However, it may be noted that over a year had therefore elapsed between the alleged incident and the direction to charge even though the file cannot have been unduly complex, involving as it did a single allegation by one child.

11. The cases appears to have come into the Circuit Criminal Court list on 2nd February 2018 and a trial date was fixed for 29th October 2019. This first trial date was more than two years after the alleged incident.

12. The first trial started on 29th October 2019. The jury was discharged on the second day by reason of the absence of disclosure relating to the clarification meeting, already referred to. Statements were made by the two Gardaí in question, dated 21st November 2019, in which both stated that S made no disclosures at that first clarification meeting.

13. The next trial date fixed was the 5th May 2020, some seven months later. However, in February 2020 an application was made on behalf of the appellant that the May trial date be postponed because a different trial involving him (concerning the death of his father) had received some media publicity. This application was acceded to and the trial was ultimately fixed for 30th November 2020.

14. The second trial started on the 20th December 2020: it may be noted that this was approximately 14 months after the first trial, and some 4 years and 2 months after the alleged incident. The video-recording of the child was played to the jury and she was cross-examined. However, the jury was discharged on the fifth day of this trial due to the appellant having been in close contact with Coronavirus.

15. The third trial started on 4th May 2021, some five months after the previous trial, and some 4 ½ years after the alleged incident and the videorecording, and ran to its conclusion on 11th May 2021, when the appellant was convicted of the single count of sexual assault by a unanimous verdict.

Section 16 of the Criminal Evidence Act 1992

16. Section 16 of the Criminal Evidence Act 1992 provides for the recording and subsequent playing to the jury of Garda interviews with children. It provides as follows:-

> 16.(1) Subject to *subsection (2)*—
>
> …
>
> (b) a videorecording of any statement made by a person under 14 years of age (being a person in respect of whom such an offence is alleged to have been

committed) during an interview with a member of the Garda Síochána or any other person who is competent for the purpose, shall be admissible at the trial of the offence as evidence of any fact stated therein of which direct oral evidence by him would be admissible:

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

(i) it has been considered in accordance with section 15 (2) by the judge of the District Court conducting the preliminary examination of the offence, or

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

(2) (a) Any such videorecording or any part thereof *shall not be admitted in evidence as aforesaid if the court is of opinion that in the interests of justice the videorecording concerned or that part ought not to be so admitted*.

(b) In considering whether in the interests of justice such videorecording or any part thereof ought not to be admitted in evidence, the court shall have regard to all the circumstances, including any risk that its admission will result in unfairness to the accused or, if there is more than one, to any of them.

(3) In estimating the weight, if any, to be attached to any statement contained in such a videorecording regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.

(4) In this section "statement" includes any representation of fact, whether in words or otherwise.

(Emphasis added)

Applications during the trial

17. At the outset of the third (and final) trial, counsel for the appellant indicated there would be a challenge to the admissibility of the complainant's video recorded evidence. It is clear from the transcript that this was a repeat exercise in the sense that the same application had been made at the second trial (unsuccessfully). The relevant members of An Garda Síochána were called, as well as the child's mother, who gave evidence of what the child had said to her on the 2nd October 2016 by way of complaint about the appellant.

18. In making his application to have the video recording ruled inadmissible, counsel relied on *R v. Powell*[1], *R v. Malicki*[2] and *People (DPP) v. T.V*[3].. He pointed to the young age of the child at the time of the alleged incident and video recording, the passage of time between the recording and the trial, and the fact that it was a single-incident allegation of short duration in time. He submitted that there was a real risk that the child, under cross-examination, would not remember the incident and would be merely repeating what she saw on the recording, a risk which, counsel submitted, had been identified in the English cases as being one which could render a trial unfair. He also complained of the absence of notes concerning the first clarification meeting.

19. Counsel on behalf of the Director submitted that the Director had always appreciated the necessity to get trial involving children on as expeditiously as possible, and referred to the history in this case to explain the passage of time which had occurred. She said there

[1] [2006] 1 Cr. App. R. 31
[2] 2009] EWCA Crim 365
[3] [2017] IECA 200

was nothing wrong with the complainant being shown the recording in order to refresh her memory. She submitted that the complainant in the case had made a very specific allegation and had never altered her account. She submitted that the Gardaí who conducted the child specialist interview were experienced Gardaí and that while it was regrettable that the notes taken at the clarification meeting were not available, it was not something that should prevent the trial from proceeding or the evidence from being adduced.

20. The trial judge indicated that she was making the same ruling as she had made in the previous trial, namely to rule the DVD of interview admissible. In the course of her ruling she referred to the fact that the court had experience of many cases where there were significant delays in the prosecution of cases involving young children which only came before the courts decades later, and said that juries are in such cases given detailed warnings with regard to the delays which have occurred. She said that the Court of Appeal had indicated that this was an appropriate way for juries to deal with issues of delay. It had been the court's experience that these were matters that the jury could observe and that although counsel might say that it is difficult to cross-examine notwithstanding that the person has presented themselves for cross-examination, "*given the nature or (sic) the indication in reply to questioning, these are all significant matters which a jury observe and take on board and take into consideration and are matters which counsel can comment on in the course of a trial or summing up and indeed it's always a matter open to the court to act on in the course of a trial if it deems that the rights of the accused are not protected or at least in danger of not receiving a fair trial*".

The evidence before the jury and the complainant's video-recorded evidence

21. The *voir dire* having ended, the child's recorded interview was played to the jury. The child watched the DVD while it was being played from her position in the video-link room.

22. While the transcript does not record what was said on the DVD, this Court was furnished with a document entitled "*Specialist Interview's Summary Record*" which contains what is described as a "*verbatim record of salient points*" of the interview with the child. The following is a summary of what the child told the specialist interviewer. It may be noted that the information below is set out here in prose form although it was elicited by way of question and answer during the interview itself. The words are those of the child herself.

23. S was playing with her friend D on her friend's iPad on the sofa in the sitting room when D's dad came over to them and rubbed her leg. He was sitting watching the telly and was drinking out of a can which was brown and black with a yellow harp on it. She knew it was beer because it fizzed when it was poured and white stuff came up on it. He got up and went over to them on the sofa. His hand was rubbing her leg very softly for a few seconds. His hand went to her privates, which she clarified she uses to go to the toilet. She was wearing a skirt. His hand was outside her knickers. His hand went up her skirt and then he touched her. It went on for a few minutes. She felt scared. She did not know what he was doing. Her friend was sitting beside her on the chair but did not know, and her friend's mother was in the kitchen. It happened on a Sunday or Monday in September or October and it was a day when she was off school, in the evening. The skirt she was wearing was pink with wavy white lines and flowers. The sitting room was a bit messy and the chairs were brown. She and her friend were sitting on the comfy one but there were little holes and fluff everywhere on it. There was a "tiger" pillow and other pillows and a chalk board. After he rubbed her, he got up and went back over to drink his can. Her own sister came over to

collect her and she went home with her sister. She told her mother and sister the next morning.

The cross-examination of the complainant at trial

24. Much of the way counsel cross-examined the child was with reference to what she had said at the previous (*i.e.* the second) trial. It appears from the transcript of this trial (although the Court does not have the transcript of the previous trial) that the child had conceded in cross-examination in the previous trial that she had little or no memory of the incident in question. Counsel, for obvious reasons, questioned her in such a manner as to retain the benefit, from his client's point of view, of her answers in the previous trial. The complainant in fact endorsed what she had said in the previous trial.

25. Counsel told the child that he was interested in what she was saying on the last day when he asked if she had any memory at all of the day in question. He reminded her that in the previous trial, she had replied "*No, I only remember what was on the video*". He asked her if she remembered saying that and she said "*yes*". He asked her if this was "*still right today*" and she answered: "*I kind of like-after watching the video, I kind of get like a little few kind of like flashbacks, but I mostly don't remember".* This is an answer upon which counsel for the appellant placed considerable emphasis during the appeal.

26. Counsel asked her if she remembered his asking her previously: "*Do you remember playing with [D] in [address] that day*?" and she had answered "*Look, I don't remember playing with her that day. I definitely played with her some days. But that's all I can tell you*". He asked if that was right, and she answered: *"Yes. I remember playing with her some days but not that exact day. I kind of only remember like sitting on the sofa."*

27. He asked her about whether she remembered her friend being in her own house and an All-Ireland football final being on, but she had no memory of that. He asked if she remembered that at some point she was back in her friend's house, and she said "*yes*", and he asked if she remembered her friend's mum being there, and she said: "*I remember that day. I kind of remember her in the kitchen because she wasn't like in the house. I just remember she was in the kitchen*". She did not remember D's mother cooking. She was asked about who had the iPad and she said: "*I'm pretty sure like [D] was holding it in like the middle of us. I'm not sure*". She didn't remember there being a problem with the iPad or the appellant having the iPad in his hand. She did not remember going upstairs with her friend and playing with handbags. She had a memory of being upstairs in her friend's house and being given a doll to bring home but said "*I don't know if it was that certain day*", and that it could have been another day. She only remembered being upstairs in D's room once. She did not remember her own sister bringing her home; she only remembered seeing it in the video "*so she most likely did bring me home, yes*". Counsel asked her if the "*only way we have to think about things is the video*" and she answered "*yes, mostly*". She thought her sister and mother were watching telly when she arrived back at her own house. She remembered that she told them the next morning "*what happened*".

28. She was asked about whether the appellant was drunk and she answered: "…*I kind of do remember him being like very drunk, yes*". It was then put to her that the appellant says he did not touch her on the leg and private parts and was there a possibility she might be mistaken, and her answer was: "*Yes, it's not the case. Like I remember like he did, so he must be lying*". This was an answer upon which the prosecution placed considerable emphasis during the appeal.

29. She was asked about what day it was, and she answered that "…*in the video I said that it wasn't a school day, so it probably wasn't a school day because like I'm not really sure what day it was. So I'd say it wasn't a school day because in the video I said it wasn't a school day*". When asked if this was an example of getting mixed up, she said "*Yes, it's complicated because it was so long ago*". When asked about how the incident lasted she said she could not tell because it was so long ago and agreed that she was depending on looking at the video and could not really go any further than that.

The evidence of S's mother before the jury

30. The complainant's mother gave evidence. She remembered the date in question. She had two daughters and the complainant was six years old at the time. She played with a friend, D, who lived across the road from them. The girls were playing together that day and were going back and forth between each other's houses. At around 7.30pm that evening, she rang to see if S was there, and spoke to the appellant who got the friend's mother to ring her back. She was told the children were playing on a tablet at that stage. At about 8pm, her older daughter went over to bring S home. She came back without her and S came about twenty minutes later. S was "*okay*" when she came in, and they were watching television and S was "*just playing on the floor*". Later around 11pm they went to bed. The next morning, when they witting in the kitchen area, the complainant said that her friend's dad had touched her private parts. The witness went over to her and asked her to show her what happened, and her S showed her. Her mother understood S to be referring to her vagina when she used the words "*private parts*". The witness contacted the child's father (who did not live with them) and he came straight around and they contacted the Gardaí.

31. In cross-examination she agreed that perhaps two or two and a half hours elapsed before they all went to bed after S came in from D's house on the evening in question, and that she had said in her statement that the complainant was "*grand*" and "*totally normal*" when she came in from her friend's house.

Garda evidence of the appellant's memorandum of interview

32. A number of Garda witnesses who had given evidence on the *voir dire* were called in order to describe to the jury the receipt of the complaint, their first visit to the house, the two clarification meetings, and the video-recording of the complainant's interview. Garda Fitzgerald also gave evidence of the memo of interview conducted with the appellant on the day after the alleged incident.

33. The memorandum of interview reads as follows (the names of the complainant and her friend are altered to be S and D respectively):

> *"I was out the night before yesterday. I was gambling down in Q's Snooker Hall in Clondalkin village. I got home at about 4:00am yesterday morning. I had been drinking Guinness, seven cans at [home address], before I went to Q's Snooker Hall in Clondalkin. I came back at 4:00am and I would have drank another nine cans of Guinness. It would've been 7:00am yesterday morning I went to bed at [address]. My girlfriend lives at [same address] with my child daughter. ... I wanted to see the match, the Dublin/Mayo All- Ireland Final. When I got up I was in the house ... [he refers to the mother and child being there]. I just stayed, moped around the house until 5:00pm when the match started. I started drinking when the match started. I was drinking cans of Guinness. I watched the match upstairs in my girlfriend's bedroom. It is directly over the entrance to the front door. I was upstairs because*

there is only RTE on the TV upstairs. There was no one with me watching the match. My girlfriend walked in once or twice. I don't know if there was anyone else in the house downstairs. I stayed up for the whole game and afterwards I came downstairs. I would have probably drank about 10 to12 cans during the duration of the game. It could be less; I can't be sure. When I came downstairs I don't know if I went into the kitchen to drink more cans or in the living room. I can't remember if my daughter was in the house at the time. I can't remember because it didn't mean anything to remember. ... I told D to get the Apple iPad for them. D got the iPad and they sat on the sofa in the sitting room. The iPad froze. It's a touch screen thing. I walked over to the couch and sat down on the couch. The other girl, who was D's friend, was sitting beside me and D was sitting beside her. I got the iPad. The girls were playing it between them. I tapped the screen and it came back on. I handed the iPad back to the girl that was beside me. I got up, and sat back down on the chair in the sitting room . This is where I always sit. After a while the young girl's sister came over. The kids were talking away, yapping away as they always do. I got up and went into the kitchen. [Partner's name] was after getting me something to eat. [She] and the big girl, the sister of the girl who was friends with D were yapping away. They were in the sitting room. And I then had to inject myself with insulin in the leg. I was in the kitchen. I had to pull my trousers down to inject it into my leg, into my right leg. I'm a diabetic. I thought maybe when I was taking down my trousers the young one seen something and that's what this was all about. After that [his partner] went out. I think it may have been for cigarettes. She wouldn't have gone out for anything else at that time. I don't know what time it would be exactly. The three girls went upstairs to play around in a back bedroom. I stayed downstairs. I had walked upstairs to ask them if they were ok. They said they were. The three kids were standing at the top of

the stairs on the landing. I did not go all the way upstairs, just near the top. I just turned around and went back downstairs when they said they were okay. Two minutes later the eldest girl came down and said that she was going home. I asked her would she not wait a minute or two until [name of partner] came home. "She would walk you home". She said she can't and left. I stayed in the kitchen and [partner's name] came back and D and her friend came downstairs and [his partner] brought her home. I think the youngest one is S but I can't think of the older girl's name. I know I was asleep at some stage as my next-door neighbour [name] knocked in and I was asleep in the house, on the kitchen table probably."

34. The appellant was asked what his response to the specific allegation was and he said:

"No, no way, no way, no way. I don't know what to say. I didn't, turning my stomach already. My woman is there 99% of the time. My woman and my child are there. I feel sick over it."

35. He was asked whether it could have happened because he had been drinking a lot and didn't remember and he answered:

"No, if anything I would have been asleep. I don't even remember falling off to sleep."

36. Garda Fitzgerald also gave evidence that he arrested the appellant on 2nd January 2017. He was detained and interviewed, in the course of which he gave an account of the day in question in similar terms to that given on the day after the alleged incident. He said that he was "*well intoxicated*" by the end of the football match and when he went downstairs to watch television in the room where the two children were playing. He said that his partner asked him to fix the children's iPad and he was irritated because he could not fix it. Otherwise his account was the same as his original account. He was asked if he denied the

allegation and he said he did. He said he sat beside S only when he was sitting on the couch trying to fix the game. When asked if, because he was drunk, he might have done something that he did not remember, he said "*It's not in me to do anything like that*".

Statement of the appellant's partner

37. A statement of the friend's mother, the appellant's partner, was read to the jury by agreement pursuant to s.21 of the Criminal Justice Act 1984. Her statement described the events of the day up until the conclusion of the football match and then said that the three girls (her daughter D, S, and her sister C) all came over to her house. They were in the sitting room eating pizza when the appellant came downstairs. He was singing "Up the Dubs" and was drunk. She told him to sit down in his chair, which is a single chair in the sitting room in front of the television, and she gave him his dinner. He was smiling and happy about the football. The girls then started to play with the tablet, passing it around the couch. The sister went home. Her daughter shouted something to her about the game freezing on the tablet and, because her hands were covered in grease from cooking, she asked the appellant to fix the tablet. She saw him getting up and staggering. She saw him get up, walk over to the girls, and sat down beside S. He could not get the game going and was frustrated and tapping the screen. She told him to turn it off if he could not get it to work and he handed the tablet to D. She told D to put the game back in the press where she got it and the appellant got up at the same time and went back to his chair. The sister then arrived back and after a few minutes the three girls went upstairs to a room to play.

38. The appellant was nodding off in the chair. She went out to get him cigarettes but before she left, she reminded him to take his insulin injection, and handed it to him. He had his trousers down and took his injection in his leg. He was then nodding off at the kitchen

table. When she arrived back, he was half asleep in the kitchen, and said that one of the children had left. She saw the two children (D and S) upstairs, and came back down. The girls came down and D had two play handbags and asked if S could have them and left them in the sitting room for a few minutes. She then walked D home and her sister came down and got S, and S's mother shouted her thanks. When she went home, she put D to bed. The appellant was still asleep at the kitchen table at this stage.

39. It may therefore be observed that, unlike many trials involving allegations of child sexual abuse, there was detailed evidence from several witnesses (including the appellant) confirming that the complainant was in the relevant house on the specific date in question, that she was sitting in a room with her friend D and the appellant at one point, and that the appellant sat beside both girls for a short period of time while they were playing with the iPad. Indeed, most of the detail as to events on the day were provided by the appellant and his partner. However, the only evidence as to the crucial matter of whether he touched her in a sexual manner– the only matter in dispute - was that of the complainant herself.

The *PO'C* application and the ruling of the trial judge

40. At the close of the prosecution case, the appellant made an application based on the decision in *People (DPP) v. PO'C*[4]. This was based on two grounds. The first was what counsel described as "*the effect of total absence of memory*" on the part of the complainant in respect of the events in issue. This meant, he said, that she was a person whose availability for cross-examination was "*physical only*" and that he could not go beyond that in terms of pursuing the right to cross-examine. He said that the witness had been admirably direct in answering questions about her failure of memory. It was not simply a case of remembering

[4] [2006] 3 IR 238

some details and not others; rather it was a situation of not recalling the events at all. He referred to *Malicki* and said that the present case was even more extreme because the child had no memory other than "*a few flashbacks*". He submitted that all the detail of the day relied upon by the prosecution had been provided by the appellant in his interview and his partner in her Garda statement, with only a bare account being given by the complainant in the recorded interview.

41. In relation to the decision in *People (DPP) v T.V.*, in which this Court upheld a conviction despite considerable delay between video-recording and trial, counsel sought to distinguish on the basis that the allegation there was that a father had been raping his young daughter on a weekly basis for four years when she was between 7 and 11. Further, in *T.V.*, the judgment of the Court (delivered by Kennedy J.) had said that while there were many occasions on which the complainant was unable to recall detail, "*equally there were many other instances when she gave details in a very clear and unequivocal manner*." Therefore, counsel submitted, the level of memory failure in *T.V.* was partial only, and distinguishable from the present case, where such "*tiny half-shards of recollection*" the complainant had were based on her viewing of the DVD.

42. Counsel also relied upon the failure of the Gardaí to keep notes of the first clarification meeting with the child and the failure to keep any notes of the second clarification meeting other than the eleven words consisting of the alleged disclosure by the child.

43. Counsel on behalf of the prosecution submitted that the child's account on the DVD was clear, precise and without embellishment. She had made a consistent complaint to her mother the next morning. She was very honest in cross-examination that she did not

remember certain things. Matters such as how long the incident lasted, or whether the iPad was working or froze, were not things a six-year old child would necessarily register. However, she was clear about the core matter: she was emphatic that he had touched her and that if he was saying he did not, he was lying. Therefore, she had not expressed any uncertainty in relation to what happened, and there had been no inconsistency in her account. She referred to the possibility of the trial judge giving warnings to the jury in due course, but submitted it was not a situation where withdrawing the case from the jury would be appropriate.

44. The trial judge refused the *P.O'C.* application. She applied the test of whether the applicant had established a real and unavoidable risk of an unfair trial which could not be avoided by appropriate rulings in the trial. She again (as she had in the admissibility ruling) said that the court was well familiar with trials where allegations of sexual assault were made many years or decades after an alleged event, and that the courts were mandated where appropriate to give warnings to the jury on issues such as delay and lack of corroboration. She said that she had watched the DVD and heard the evidence of the complainant as well as the memo of interview of the appellant, and the evidence of the two mothers. She said that the complainant had on two occasions "*gone into the witness box and engaged with and answered questions asked of her*" (referring, presumably, to the second and third trials). She had said S could not remember when asked about a number of " *peripheral matters about the day in question*". She referred to the fact that the complainant had made the allegations on three different occasions to different people, and if there were inconsistency as between those, she would have been cross-examined about that. The complainant also made a complaint in early course to her mother. She noted that in the present case, the surrounding facts were "*largely agreed, with agreement on the date, the alleged time, and those present*",

and observed that *"the surrounding circumstances which form the basis for a complaint are often matters which are central to a cross-examination because they are not agreed. ..."* .

45. She said that notwithstanding the "*frailty*" of the complainant's presentation with regard to the circumstances surrounding the assault, it would be for the jury to assess her reliability based on what they had seen in the witness box and the DVD of interview. She did not accept that the appellant had demonstrated a real risk of an unfair trial.

Submissions on appeal

46. The appellant repeats the submissions made to the trial judge and again submits that the right to cross-examine in the particular circumstances of this case was effectively rendered meaningless where the only witness to the alleged offence could answer no questions concerning the events on the day it was alleged to have occurred. Although other witnesses could testify to other events on the day, as regards the allegation of sexual assault itself, it amounted to a bare assertion met with a bare denial in circumstances where the child's lack of memory amounted to a denial of the right to cross-examine. His submissions again refer to *PO'C*, *Powell* and *Malicki*. The Director of Public Prosecutions repeats the submissions made to the trial judge and also relies upon *R v. Barker*[5] and *DPP v. V.E.*[6].

Relevant Authorities

47. The appellant places considerable reliance upon the decisions in *R v. Powell* and *R v. Malicki*, both of which stress the risks presented by delay between video recording of a child's interview and trial. It is necessary to start with an examination of the judgments in

[5] [2010] EWCA Crim 4
[6] [2021] IECA 122

those cases. It may be noted that in both of these cases, the issues were framed primarily (although not exclusively) in terms of the child's competence to give evidence.

Powell (2006)

48. The decision in *Powell* dates from 2006 and, importantly, involved a child who was *3½ years old* at the time of the offence. The child made a complaint to her mother within minutes of the alleged sexual assault, saying that he had licked her vagina. She gave certain other details including that the appellant had given her a one pound coin. A forensic scientist gave evidence that DNA matching that of the appellant was found on the inside and outside of the child's knickers. In police interview, the appellant accepted that he had been alone with the complainant upstairs in the house and said that he picked her up just after he had been sick in the bathroom. He said she had touched his beard and then put her hand down her knickers. He said he told her off for being naughty. He accepted that he gave her a one-pound coin but said that this was motivated by kindness.

49. A video-recorded interview with the child was conducted *nine weeks* later. The Court of Appeal was highly critical of this delay. The account in the video recording lacked the detail of the complaint she had made to her mother on the night of the incident but included the allegation of sexual assault by licking her private parts. The trial was conducted *nine months* after the alleged incident. Again, the court was highly critical of this delay. The appellant gave evidence at the trial along the same lines as his answers in interview.

50. Both prosecution and defence called expert witnesses on a *voir dire* concerning the child's competence. It may be noted that the judgment records that the experts were in broad agreement that "*after two months, the complainant would have lost substantial chunks of*

information". It also records the defence expert's concerns that "*she would not be able to understand what was being asked of her in court and whether it would be possible to follow what she was trying to explain*". The trial judge ruled the child to be competent.

51. The Court of Appeal held that the judge was justified in ruling, on the material she had heard and seen prior to the evidence being given, that the complainant was competent to give evidence and that the recording should be admitted, but held also that the trial judge should have *revisited* the competence issue after the child had been cross-examined. Most of the child's answer while under cross-examination consisted of her shaking or nodding her head. She nodded in answer to whether she remembered the man telling her off; she nodded in answer to a question about whether she was cross with the man when he said she was naughty; she nodded when asked if she was worried he might say that she was naughty and that she told her mother a story about the man. When asked what the story was that she had told her mother, she said "*he hurted me*" and "*he punched me…in the back of the garden*".

52. The court said that "*while evidence in chief through the pre-recorded interview indicated the child just about passed the competence threshold, the position was different when one looked at the whole of her evidence including the largely abortive attempt at cross-examination*". It said: "*What is relevant is the complainant's competence to give evidence at the time of the appellant's trial*". Quashing the conviction, it held that the trial judge should have reconsidered the issue of competence after the child's cross-examination, concluded that she was not competent, and then withdrawn the case from the jury.

53. The judgment is often cited for the general comments by the court about delay which we consider to be worthy of consideration:

"40. We return finally to the question of delay. The complainant was not interviewed until nine weeks after the incident. Such delay is strongly discouraged by the achieving best evidence ("ABE") guidance. Mr Glasgow [the prosecution expert] said there were two reasons why delay was particularly ill advised with a very young child. First, cognitive development, including memory, is poorly predicted by chronological age. So, there is a wide variation between different children of a similar age. Some will cope better than others from the view point of accuracy and completeness of recollection. Secondly, young children are particularly vulnerable to their recollections being contaminated by information from others. We were told the reason for the delay was that it was initially felt that the complainant was too young to give evidence but that this view was later changed when some thought had been given to s.53(3) of the 1999 Act. Although the videotaped interview took place on 21 April 2004 the appellant's trial did not take place for another seven months, the trial concluding on 25 November 2004 . The trial was transferred to the Crown Court on the 16 June 2004 and a preliminary directions hearing took place on the 27 July 2004 .

41. Explanations can be found for each element of the delay in this case. However, the plain fact is that where a case depends on the evidence of a very young child it is absolutely essential (a) that the ABE interview takes place very soon after the event; and (b) that the trial (at which the child has to be cross-examined) takes place very soon thereafter. As the expert evidence in this case showed, very young children simply do not have the ability to lay down memory in a manner comparable to adults. Looking at this case with hindsight, it was completely unacceptable that the appellant should have been tried for an offence proof of which relied on the evidence of a three-and-a-half year old when the trial did not take place until over nine months had

passed from the date of the alleged offence. Special efforts must be made to fast-track cases of this kind and it is simply not an option to wait weeks for example for forensic evidence to become available."

54. Counsel for the appellant draws the Court's attention to the much greater periods of time between (a) complaint and interview, and (b) interview and trial, in the present case, although of course the complainant was somewhat older, being 6 years old rather than 3½ years of age, as was the complainant in *Powell*.

Malicki (2009)

55. The decision in *Malicki* was handed down in 2009. The child was 4 years and 8 months at the time of the alleged sexual assault, and she made a complaint to her mother within minutes of it. The allegation was that the appellant had pulled aside her pants and licked her vagina. The police were contacted and a video-interview was conducted *the following day* ("*with commendable speed*", according to the Court of Appeal) and the trial took place *14 months* after the alleged incident ("*serious delay*", according to the court). The trial judge rejected submissions that the child was not a competent witness, that the evidence should be excluded under s.78 of the Police and Criminal Evidence Act 1984, and that the case should be stopped because of a delay in bringing the matter on for trial. The judge also rejected of submission of no case to answer at the end of the prosecution case.

56. The grounds of appeal centred on the child's competence as a witness and the effect of the delay between the incident and the trial. The court referred to the decision in *Powell* and having set out paragraph 41 of the judgment therein (set out above), commented:

18. We share the concerns expressed in that passage. The complainant in the present case was a year and a half or so older than the complainant in Powell, but she was still very young. The video interview in the present case was prompt, but the overall delay until trial was much greater. The problem in such a case as it seems to us is twofold: first, the risk that a child so young does not have any accurate recollection of events fourteen months previously (that is almost a quarter of her life ago); secondly, the even greater risk that if she is shown the video of her interview just before the trial and during the trial, as she must be, all she is actually recollecting is what was said on the video, and that she is incapable of distinguishing between what was said on the video and the underlying events themselves. It seems to us to be a near impossible task to undertake an effective cross-examination in those circumstances when the cross-examination must depend for its effectiveness on probing what actually happened in the course of the incident itself and immediately after it, not just going over what the complainant said in her interview. These problems go beyond the normal difficulties of recollection with an adult witness or an older child.

19. It is plain that this case did not receive the expedition it could and should have had. For the purposes of the appeal it does not matter where the fault lay. The result was to create the same unfairness for the appellant as was referred to in such strong terms in Powell .

20. We have borne in mind that the case against the appellant was a strong one. L was in distress straight after the incident. She made an immediate complaint to her mother, she repeated her account promptly and consistently to a neighbour and then the following day in her police interview. She was consistent throughout in saying that the appellant had pulled aside her bikini bottom, exposing her vagina — something she demonstrated to her mother — and that he had put his head there. What she said

in interview about it feeling like a tickle is clear enough. The fact that she used the word "nipped" when she initially described the incident, and referred to "licking" only after that word had been suggested quite innocently by the police officer in the course of the interview does not go, it may be said, to the essential nature of the assault described.

21. We have considered in all those circumstances whether the conviction can be regarded as safe, despite the unfairness caused to the appellant by the delay. The reluctant conclusion to which we have come is that it cannot be. For the reasons given, we are satisfied that the judge ought in the particular circumstances of this case to have excluded the complainant's evidence and then to have stopped the trial for lack of any case to answer, and that the conviction cannot therefore stand. It follows that the appeal must succeed and the conviction be quashed.

22. What has happened in this case underlines the importance of what was said in Powell and the crucial need for all concerned to pay full attention to it. We have concentrated on the effect that the delay had on the ability of the appellant to defend himself. But it is of equal concern that the young complainant had to wait so long before the matter came to trial, then had to come to court and be cross-examined, only for the conviction to be quashed because of the delay. As was said in Powell, cases involving such young complainants must be fast-tracked. The proper administration of justice requires it. It is the responsibility of all concerned — prosecution and defence — to bring the need for expedition to the attention of the court (and we refer both to the magistrates' court and to the Crown Court because expedition is needed at all stages of the procedure), and it is the responsibility of the court to ensure that such expedition is provided."

57. Counsel for the appellant contrasts the period between interview and trial in *Malicki* (14 months) with the period of time in the present case (4 years 6 months) and submits that the risks identified by the court in the above quotations are even more grave in the present case.

58. The prosecution's response was essentially that decisions such as *Powell* and *Malicki* need to viewed with some scepticism because there has been a sea-change in the courts' attitude to children's evidence in the United Kingdom since the decision in *Barker (2010)* and *Lubemba (2014),* referenced in this jurisdiction in *DPP v. V.E (2021).* However, it is necessary to look carefully at those decisions to see what was said and decided in those cases; and, equally importantly, what was not.

Barker (2010)

59. The child in the *Barker* case made her complaint about the appellant to a foster mother shortly before her third birthday. The timeline in the case was complicated by the fact that she and her three sisters were taken into care following the unnatural death of their younger brother (baby P), and that the appellant was tried (and convicted) of an offence of causing or allowing the death of a child first before he stood trial for rape of the complainant. The complainant was interviewed by a number of persons, including a doctor at Great Ormond Street Hospital . This interview was more than four months after the initial complaint by the child and she was now just over three years old. She also made relevant comments to a consultant paediatrician who examined the child's anus and genitalia some three months later. A decision was then taken to carry out what is referred to in England as an ABE interview (the equivalent of our s.16(1)(b) interview), which was conducted some *eight or nine months* after the initial complaint. The trial took place some *21 months* after the initial

complaint. This was obviously greater than the passage of time in either *Powell* or *Malicki*, and the complainant was not quite 3 years old at the beginning of the process. Nonetheless the Court of Appeal upheld the conviction. The prosecution places emphasis on this decision, suggesting that it shows a change in attitude towards delay in such cases on the part of the English courts.

60. The issue which took centre stage both at trial and on appeal in *Barker* was the issue of the child's competence. This Court in its judgment in *(People) DPP v. V.E.* has set out with approval certain passages from the *Barker* judgment (paras 38, 40 and 42) concerning the general approach to assessing the competence and credibility of child witnesses. The essential point was that courts should not approach children's evidence with any *"tired and outdated misconceptions about the evidence of children"* and that the question of competence is child-specific. The court, having closely studied the ABE interview and considered the transcript of the child's cross-examination with "*anxious care*", held that the trial judge had been correct to rule that the child was competent. This was despite the "*extreme youth*" of the child, and that the ABE interview took place "*long after the alleged indecency occurred*".

61. For present purposes, it is also interesting to note the following comments within the quotations from *Barker*:

> *"The questions come, of course, from both sides. If the child is called as a witness by the prosecution he or she must have the ability to understand the questions put to him by the defence as well as the prosecution and to provide answers to them which are understandable."* (para. 38)

"At the same time the right of the Defendant to a fair trial must be undiminished. When the issue is whether the child is lying or mistaken in claiming that the Defendant behaved indecently towards him or her, it should not be over-problematic for the advocate to formulate short, simple questions which put the essential elements of the defendant's case to the witness, and fully to ventilate before the jury the areas of evidence which bear on the child's credibility." (para. 42)

62. Such comments demonstrate that while the Court in *Barker* was seeking to ensure that "*the child witness starts off on the basis of equality with every other witness*" in terms of competence or credibility assessments, it nonetheless envisaged that the accused should be in a position to cross-examine the child, albeit that it emphasised that counsel should use language and concepts that are appropriate to the particular child. *Barker* does not in any way dispense with the right to cross-examine a child witnesses.

63. It may also be noted that at para 45 of the Barker judgment, the court characterised the complainant's evidence while being cross-examined as follows:

"*We note that she gave clear answers although, from time to time, she responded by nodding her head or shaking it. That is what she had done during the ABE interview. No one entertained the slightest doubt that a nod meant 'yes', and a shake of a head meant 'no'. Neither indicated uncertainty nor lack of comprehension by her of the question or her intended response, or left any doubt about her meaning."*

It seems clear, therefore, that no issue arose as to whether the child actually remembered the incident or not, an issue which does arise in the present case.

64. Counsel for the appellant in *Barker* put forward an argument on delay *simpliciter* (as distinct from the argument on competence) in what the Court described as a "*fallback position*". The court rejected this argument and in the course of doing so, referred specifically to *Powell* and *Malicki* in the following terms at paragraphs 50-51 of its judgment:

> "*Both Powell and Malicki underlined the importance to the trial and investigative process of keeping any delay in a case involving a child complainant to an irreducible minimum. Unsurprisingly, we agree, although we draw attention to the circumstances which did not appear to arise in either Powell or Malicki, that the complaint itself, for a variety of understandable reasons, in the case of a child or other vulnerable witness may itself be delayed pending "removal" to a safe environment. The trial of this particular issue was delayed because of the trial arising from the death of Baby P. With hindsight it can now be suggested that perhaps the better course, given the age of X, would have been to try her allegation first. Be that as it may, in our judgment the decisions in Powell and Malicki should not be understood to establish as a matter of principle is [sic] that where the complainant is a young child, delay which does not constitute an abuse of process within well understood principles, can give rise to some special form of defence, or that, if it does not, a submission based on "unfairness" within the ambit of Section 78 of the 1984 Act is bound to succeed, or that there is some kind of unspecified limitation period. There will naturally and inevitably be case specific occasions when undue delay may render a trial unfair, and may lead to the exclusion of the evidence of the child on competency grounds. Powell, for example, was a case in which after the evidence was concluded it was clear that the child did*

not satisfy the competency test, and if the child in Malicki was indeed "incapable of distinguishing between what she had said on the video and the underlying events themselves" it is at least doubtful that the competency requirement was satisfied. However, in cases involving very young children delay on its own does not automatically require the court to prevent or stop the evidence of the child from being considered by the jury. That would represent a significant and unjustified gloss on the statute. In the present case, of course, we have reflected, as no doubt the jury did, on the fact of delay, and the relevant timetable. Making all allowances for these considerations, we are satisfied, as the judge was, that this particular child continued to satisfy the competency requirement.

51. There remains the broad question whether the conviction which is effectively dependent upon the truthfulness and accuracy of this young child is safe. In reality what we are being asked to consider is an underlying submission that no such conviction can ever be safe. The short answer is that it is open to a properly directed jury, unequivocally directed about the dangers and difficulties of doing so, to reach a safe conclusion on the basis of the evidence of a single competent witness, whatever his or her age, and whatever his or her disability. The ultimate verdict is the responsibility of the jury." (Emphasis added)

65. It is clear from the above passage that the court rejected the proposition that delay gives rise to "*some special form of defence* "or some form of "*unspecified limitation period*". However, it is important to note that it did also accept that there might arise "*specific occasions when undue delay may render a trial unfair and may lead to the exclusion of the evidence of the child on competency grounds*". Interestingly, the words which we have underlined in the longer quotation above describe, as an example of this, a situation where a

child is incapable of distinguishing between what she had said on the video and the underlying events themselves. This is the situation which, counsel for the appellant submits, arises in the present case.

66. In sum, there is much in *Barker* which sweeps away the "*tired and outdated misconceptions about the evidence of children*", but it would be wrong to consider *Barker* as authority for the proposition that delay between interview and trial can never affect a child's competence; or that the different parameters for counsel's questioning of child witnesses (*e.g.* simplified language and concepts) mean that the right to cross-examine has been diluted to the point of extinction.

***Lubemba* (2014)**

67. The decision of the Court of Appeal in *R v. Lubemba and J.P.*[7], another leading modern English authority on the questioning of children, concerned restrictions placed by two separate trial judges on the cross-examination of child witnesses. This decision is also discussed in *People (DPP) v. V.E.* (at paras 81-86). It supports the proposition that advocates must adapt their questioning style for vulnerable witnesses, and that requiring counsel to adopt reasonable departures from the traditional style of advocacy in order to question a child in an age- and- otherwise appropriate manner will not amount to a violation of the right to cross-examine nor of itself render the trial unfair. It is interesting to note the contrast in the outcomes of the two cases: while the court upheld the conviction in *Lubemba* on the basis that no unfairness was caused by the reasonable restrictions which had been placed on counsel's cross-examination in that case, the court quashed the conviction in *J.P.* on the basis that the trial judge allowed the video-recorded statement to be played to the jury but

[7] [2014] EWCA Crim 2064, [2015] 1 WLR 1579

did not permit *any* cross-examination of the child. This again emphasises that although there has been a considerable change in attitude to child witnesses in our neighbouring jurisdiction, cross-examination continues to be regarded as something meaningful and not something which can be readily dispensed with in such cases simply because there is a video-recording of the child which provides a clear and coherent account.

People (DPP) v. V.E. (2021)

68. The judgment of this Court in *V.E*. discussed *Barker* and *Lubemba* in the context of an appeal point based on the decision of the trial judge not to give a corroboration warning. The primary issue there was the question of the credibility of a child witness and how that interacts with the discretion of a trial judge to give a corroboration warning. There was no ground of appeal relating to an inability to cross-examine the complainant, let alone a ground that such inability arose by reason of the passage of time between interview and trial. The decision in *V.E.* is therefore of limited assistance in relation to the issue which arises in the present case. Insofar as the judgment approves of passages from *Barker* and *Lubemba*, neither those judgments nor that in *V.E.* itself suggests that the right to cross-examine in such cases can be lightly dispensed with. More pertinent to the issue arising in the present case is this Court's decision in *People (DPP) v. T.V*[8].

People (DPP) v. T.V. (2017)

69. In *(People) DPP v. T.V.*, the appellant was convicted of multiple sexual offences at the most serious end of the spectrum; eighteen rapes and seven "s.4 rapes". The complainant, his daughter, was 11 years old when she told a friend that she was being sexually assaulted by her father. This was in April 2012. A teacher in her school was informed and the HSE

[8] [2017] IECA 200

notified within days. An investigation was undertaken by the HSE and the gardaí and the complainant was immediately removed from the family home. The complainant was interviewed by specialist interviewers on three occasions: 11th May 2012 (one month after her report), 1st July 2012 (three months after her report) and the 3rd May 2013 (13 months after her report). The third interview came about because of a request from the respondent (not the complainant). The complainant was shown the recording of the first and second interviews before embarking on the third.

70. The offences were alleged to have occurred over a period of four years, when the child was between 7 and 11 years of age. She said that the appellant had raped her on a weekly basis, with most offences taking place in the family car. It is recorded that the complainant was 15 years old at the time of the appeal but the date of trial is not given in the judgment of the Court. One would assume she was either 14 or 15 years old at the time of the trial. Thus, the passage of time from first interview to trial would appear to have been approximately 3 or 4 years.

71. The grounds of appeal include that the video interviews should not have been admitted into evidence, and that trial judge should have acceded to a defence application for a directed acquittal or a stay of the indictment in circumstances where the quality of evidence had deteriorated and "*the capacity of the complainant to recollect the particularity of detail was such as to create an obvious and insurmountable impediment to cross examination in circumstances where on a multiplicity of occasions the complainant professed to have no particular recollection of the incidents themselves*". Thus, the issue was very similar to that arising in the present case.

72. As to the first ground, it was argued that the complainant had been inappropriately prompted by the interviewer at the outset of the first interview, in breach of the Guidelines. The Court held that, taking into account the entirety of the interview and subsequent interviews, the trial judge's decision to admit the content of the three interviews was correct.

73. As to the second ground, based on the passage of time between the interviews and cross-examination of the complainant, the Court noted that the appellant had relied upon *Malicki*. The court distinguished *Malicki* on the basis that the child in that case was only six years old, "*significantly younger than the complainant in this case*"; that *Malicki* concerned "*a single allegation of a sexual assault*"; and that "*there was a concern that the complainant, when giving evidence at trial, was merely repeating the details of her allegation made in the course of a significantly earlier video recorded interview and which she saw shortly before the trial*". The Court said that in the case before it, the allegations in the first two interview were "*many in number, thereby reducing the possibility or likelihood of merely repeating details from those interviews in a third interview*". The Court said that the decision on the reliability of a witness is primarily a matter for the trial judge, and went on to say:

> *"In the instant case there was a detailed and robust cross examination of the complainant. While there were many occasions when she was unable to recall detail, or could not recall particular events, or said that she did not know the answer to a question, equally there were many other instances when she gave details in a very clear and unequivocal manner. Her evidence effectively went both ways, and ultimately it is properly a matter for a jury to decide on the reliability of that evidence".*

74. The Court also noted that the trial judge had carefully advised the jury to exercise caution, particularly having regard to the considerable lapse of time between the events

complained of and the hearing of the case. It refused this ground of appeal also and upheld the conviction.

75. It is apparent that there are important factual points of difference between *T.V.* and the present case: (1) the child in *T.V.* was 11 at the time of complaint and 14 or 15 at the time of trial; (2) the offences in *T.V.* were alleged to have taken place over a period of 4 years on a weekly basis whereas the present case involves an allegation of a single incident; (3) the offences in *T.V.* consisted of rape/s.4 rape whereas the allegation in the present case involved an incident of inappropriate touching. That is not to suggest that there is some different bright-line rule for more serious offences but rather to apply a common-sense approach that the more serious the offence, the more likely a person is to remember it. As to the passage of time between interview and trial, in *T.V.* the maximum period of time (from the first interview to trial) was 4 years (and may have been less), while here the delay was 4 years 6 months; in that regard, perhaps, the cases are at a point of similarity.

Perhaps most importantly of all, the complainant in *T.V.* did not have a total loss of memory concerning the incidents; rather, she was unable to remember particular details about which she was questioned. However, there were, as the passage above shows, many instances when she gave details in a very clear and unequivocal manner.

76. The question of delay also arose in *People (DPP) v. S.A*[9]., where the two complainants were aged 10 and 12 at the time of the alleged offences and the trial took place some 6 1/2 years later. The appellant was absent from the jurisdiction for three of those years.

[9] [2020] IECA 60

Numerous complaints were made in respect of video-recorded interviews of the complainants, one of which was that delay undermined the ability to cross-examine because of the impact on their memories. The Court upheld the appellant's conviction for three counts of rape and twenty counts of sexual assault. In respect of the delay argument, it referred to *Powell* and *Malicki*, and said that while it was unfortunate that time had elapsed between the interviews and cross-examination of the children (young women by the time of trial), for three years the appellant was outside the jurisdiction and that "*while that was entirely within his rights, as he was not facing any charges, nonetheless, he cannot now complain of prejudice in cross-examination in that respect*". The Court also noted that the appellant "*denied the allegations in broad terms*"; it was common case that he had resided with the children and their mother at the relevant locations described; and said the transcript showed that the cross-examination of each complainant was "*skilful and fulsome*". Accordingly the passage of time had not rendered the process unfair or impacted negatively on the ability of the appellant to cross-examine the witnesses.

77. There is no suggestion from the judgment in *S.A.* that there was anything along the lines of a lack of memory of the rapes and assaults. In this regard, two other factors may be noted: (1) the ages of the complainants at the time of the offences and their interviews (ten and twelve) *i.e.* considerably older than the complainant in the present case; and (2) The nature and multiplicity of the offences.

R v. R.T. **[2020]**

78. Having regard to the Director's argument that cases such as *Barker* and *Lubemba* have altered the position concerning child witnesses in the United Kingdom, is interesting to note that in a recent English decision concerning a vulnerable witness, the importance of cross-

examination was emphasised within a general framework of principles concerning the position where cross-examination is restricted, impaired or limited. This emphases our point that modern English cannot, in our view, be taken to have swept away the right to cross-examination in its desire to facilitate child witnesses in giving their best evidence but rather seeks to maintain a careful balance between them. In *DPP v. R.T. and Stutchfield*[10], a conviction was upheld in a case in which a vulnerable witness (who was aged 16 and had autism) became distressed during cross-examination and refused to continue giving evidence. In a helpful exposition of general principles, the court said:

> *"37. The defendant has a fundamental right under the criminal law to a fair trial. The right of a legal representative to ask questions of witnesses giving evidence against the defendant is one way in which a fair trial is delivered but limitations have long been recognised to the right to question, for example the hearsay statements of dying witnesses cannot, for obvious reasons, be questioned. The hearsay exceptions have been added to by the Criminal Justice Act 2003 , but the proceedings must remain fair, see R v Horncastle [2009] EWCA Crim 964; [2009] 2 Cr App R 15 , and Al-Khawaja v UK (2012) 54 EHRR 23 . The effect of not being able to cross examine because of the death, illness or refusal to continue for a witness is not a new problem for the law. In Blackstone's Criminal Practice at F7.7 there is reference to Doolin (1832) 1 Jebb CC 123 where the evidence of a witness who died before being cross examined was held to be admissible, even though little weight was attached to the evidence. In some cases the effect of not being able to cross examine a witness who has become ill and unable to continue has meant that a fair trial becomes impossible. In other cases it has proved possible to continue the trial and ensure that it is fair.*

[10] [2020] EWCA 155

38. In R v Stretton and McCallion (1988) 86 Cr App R 7 a witness who had been cross examined for a period of time became ill and unable to continue. The judge permitted the trial to continue with a clear warning to the jury. It is sometimes permissible to prevent further cross examination when a witness has become distressed, see R v Wyatt , although it is also important to remember that not every witness showing distress will be vulnerable, see R v G(S) .

39. When considering whether a fair trial is possible when a witness's evidence has been cut short a judge will have regard to the extent to which the defence has been put and explored with the witness, whether previous inconsistent statements can be put into agreed facts, and whether there is other relevant evidence, see Pipe [2014] EWCA Crim 2570; [2015] 1 Cr App R(S)

40. It is also right to record that fairness in court proceedings extends to complainants and witnesses. The law and practice in relation to the questioning of vulnerable witnesses has developed. Training in the cross examination of vulnerable witnesses is available to advocates. Practice and procedure is now governed by the Criminal Procedure Rules ("Crim PR"), see in particular Criminal Practice Direction: Division 1 (General Matters) at paragraph 3E.4 which provides that "all witnesses, including the defendant and defence witnesses, should be enabled to give the best evidence they can." Thee toolkits published on the Advocates' Gateway are also available."

79. The court went on to explain why it would uphold the conviction on the facts of the particular case, in which the offence was conspiracy to commit robbery. Its reasons included (a) the other evidence in the case; and (b) that there was some cross-examination of the witness before she became distressed and refused to continue. The court said:-

> *"42… The relevant circumstances included the facts that first the jury had seen Ms F give evidence and be cross examined at least in part. Secondly there was some unfortunate questioning of Ms F which explained her refusal to stay for the whole of the cross examination, although we make it clear that the trial judge found that this questioning was not carried out deliberately to provoke the witness, and counsel for RT did not have the opportunity to carry out any questioning. Thirdly there was material which was admitted, including the Facebook messages, which enabled the jury to make a fair assessment of the credibility and reliability of Ms F's evidence. Fourthly Ms F's evidence could be assessed in the context of the other evidence which included: DNA evidence against RT; evidence about earlier social media conversations about a plan to commit a robbery; CCTV evidence showing the movements of RT and Mr Stuchfield; and Mr Stuchfield's letter sent after the offence. Fifthly the judge gave proper directions to the jury identifying the limitations of Ms F's evidence."*

General Observations

80. The above authorities should be considered against the backdrop of the following.

81. First, the right to cross-examine is a key right which is protected under Article 38(1) of the Constitution and, indeed, Article 6(1) of the European Convention on Human Rights.

While certain reasonable restrictions upon the exercise of that right are valid in order to ensure that the questioning of a child is appropriate to the age and other characteristics of the child (as discussed in *People (DPP) v V.E.*), careful consideration must be given to a claim that an appellant's right to cross-examine has, by reason of the effects of delay upon a child's memory, been limited or impaired to a degree that renders the trial unfair. The Irish system is an adversarial system in which, unlike some civil law systems, the right to cross-examine the child witness directly is considered to be an important procedural protection for a person accused of a sexual offence in respect of a child. The right to cross-examine has a constitutional pedigree in this jurisdiction and this is the backdrop against which the relevant legislation, and any particular trial, must be considered.

82. Secondly, it is important to recognize the purpose of s.16(1)(b) of the 1992 Act. The legislative intent was undoubtedly to ensure that the child's account would be recorded while the events are still fresh in the child's mind, and then used as evidence at the trial, so that the child's best evidence could be captured and shown to the jury. While this involved a departure from the traditional method of taking statements and giving evidence within the common law adversarial model, it was a carefully considered departure which was introduced for good reason. However, we do not think that it was thereby intended also to impair the right to cross-examination any more than was necessary. Unfortunately, if delay occurs, for whatever reason, *to the point where the child has little or no recollection of the event(s) in question*, and is relying almost exclusively, or indeed entirely, on what he or she saw on the videorecording, cross-examination loses its fundamental essence. In such a situation i.e., where the child has no remaining memory of the event(s), the right to cross-examine is futile; the child is now answering questions based on what he or she said or saw on the videorecording, not on memories of the event itself.

83. We consider it important to point out that the context is entirely different to that which obtains in cases arising under s.16 of the Criminal Justice Act 2006. This Court has considered what it means for a witness to be "available for cross-examination" in the context of that particular statutory regime in cases such as *People (DPP) v Rattigan* [2013] 2 IR 221 and *People (DPP) v. D.K. and M.K.* [2021] IECA 32. However, as Murray J. explained in the latter case, the very reason for the introduction of the provision at issue in those cases was to deal with witnesses who refuse to give evidence, including under cross-examination, and that it would therefore undermine the legislative intention if a case were to be withdrawn from a jury on the basis that the witness was refusing to answer questions:

> "It is the purpose of the provision to enable the admission of statements in that very situation…. Nothing in s.16 supports the proposition that it is inoperative in such circumstances and, if it did, the trial Judge would not have made an order under the provision in the first place. For as long as the section remains on the statute book, the issuing of a direction on this basis would fundamentally undermine the legislative framework put in place by the Oireachtas".

However, the present context is entirely different, and we are of the view that it is important to bear that in mind when considering the intended effect of s.16(1)(b) of the 1992 Act.

84. We would also observe that the present situation is also different from another situation which, at first sight, might appear to be similar to that arising here, namely those cases sometimes referred as "historic child sexual abuse" cases. In such cases, an adult witness gives oral evidence at a trial as to abuse they have suffered as a child. In that situation, both

the evidence in chief and the cross examination is conducted at a single point in time (i.e. during the trial); and the infirmities of memory do not benefit either side in particular. There is, so to speak, a reasonably level playing field as between the prosecution and defence in terms of the witness' memory. However, in cases involving the use of the s.16(1)(b) procedure (1992 Act) in respect of child witnesses, the situation is rather different. The s.16(1)(b) procedure is a two-stage process involving evidence being taken at two different points in time: (i) the first point in time being when the evidence is video recorded and (ii) the second, being the cross-examination at the trial. The playing-field, to use as sporting metaphor, is not level as between the prosecution and the defence in that regard; it favours the prosecution because the child's evidence in chief has already been secured on the videorecording. The longer the delay until the trial, the greater the risk that the field may be rendered uneven. This is intended purely as a metaphor, as of course a criminal trial is in no sense a game but instead an extremely serious exercise in which each of the procedures serves an essential and important function to ensure that justice is served.

85. It may be noted that concern about the impact of delay between video recording of a child's evidence and trial have led to significant attempts in the UK to ensure that such cases are brought to trial as soon as possible[11]. Indeed, even more far-reaching steps have been

[11] In our neighbouring jurisdiction, considerable effort has gone into trying to ensure that such cases are dealt with expeditiously while ensuring that disclosure obligations are fulfilled by the prosecution in a timely fashion. See the following documents: The Protocol between the National Police Chiefs' Council, the Crown Prosecution Service and HM Courts & Tribunals Service to Expedite Cases involving witnesses under 10 years; Criminal Practice Directions (2015) which include **inter alia** sections on Case Management (Section 3A), Vulnerable people in the Courts (section 3D), and Ground Rules Hearings to plan the questioning of a vulnerable witness or defendant (Section 3E)**;** Guidelines on Prosecuting Cases of Child Sexual Abuse from the Crown Prosecution Service**;** Protocol and Good Practice Model: Disclosure of INfomration in cases of alleged child abuse and linked criminal and care directions hearings (2013); A substantial volume of guidance on interviewing victims and witnesses and on using special measures entitled Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures; A website (The Advocates' Gateway) containing Toolkits on various topics, including one specifically on the topic of Case Management in criminal cases when a witness or a defendant is vulnerable (2019).

taken in that jurisdiction; pilot schemes have been run in three courts in order to test the implementation of s.28 of the Youth Justice and Criminal Evidence Act 1999, which involves the child being cross-examined *before the trial* (but after disclosure has been made). That delays in such cases are undesirable is well recognised in our neighbouring jurisdiction, and for good reason. The problems caused by delays are unique to this particular context.

86. These considerations lead us to the conclusion that *if* matters have reached a point where a child witness no longer remembers the events which gave rise to the prosecution by reason of the delay between the video-recording and the trial, matters may have reached a point where cross-examination would is in effect meaningless, and the accused person may be said to have been deprived of his right to cross-examine. Whether this leads to a real risk of an unfair trial, depends upon all of the evidence in the case, but it is significant factor in and of itself.

Application to the present case

87. It seems to us therefore that the first issue to be decided in the present case is to arrive at a conclusion as the degree of impairment of this child's memory and, consequently, the degree of impairment of the appellant's right to cross-examine. This is a difficult question, having regard to the evidence. The Court has described the course of the cross-examination earlier in the judgment and will not repeat it here, although we have considered it in its totality. The appellant submits that this is an exceptional case where the complainant had *no memory* of the incident at all and was entirely relying on her videorecording of interview. In this regard, he places heavy reliance on the fact that the complainant accepted that at the previous (third) trial, she had said: "*No, I only remember what was on the video*" and (in the

fourth trial): "*I kind of like - after watching the video, I kind of get like a little few kind of like flashbacks, but I mostly don't remember"*. He also points out that when pressed on details surrounding the alleged offence, she was unable to answer; and when he asked her if the "*only way we have to think about things is the video*", he answered "*yes, mostly*".

88. The Director submits that the appellant overstates the position and points out that when it was put to the complainant that that the appellant denied the allegation and that she might be mistaken, her answer was: "*Yes, it's not the case. Like I remember like he did, so he must be lying*".

89. There is no question but that the complaint was being entirely honest about her loss of memory. It is hardly surprising, indeed, that a child of her age might not remember a single, brief incident which took place over 4 ½ years before. Having regard to the terms of her own evidence, it appears that at the very least, her memory of the day in question was very significantly impaired. All attempts at cross-examination led to her saying that she did not remember and/or references back to what was on the videorecording of her evidence. She agreed that that the videorecording was "*mostly*" how she was remembering things. The height of the case that she remembered anything at all by the time the cross-examination was taking place is the single answer: "*I remember he did, so he must be lying*". The prosecution's contention that she had a memory of the events in question relies entirely and solely upon this answer. The Court is not satisfied that this is a sufficient basis on which to build an assumption that the child did in fact have any memory of the event, particularly when one considers the cross-examination attempt in its totality. The Court is of the view that her memory was substantially impaired if not completely absent and will proceed on that basis. It should be said that such a situation could only be expected to arise in rare and exceptional

cases. Indeed, it had not arisen in any of the authorities to which the Court was referred, although it was alluded to as a hypothetical example in *Barker,* as we have seen.

90. The next question then is, on the assumption that this child's memory was substantially impaired and the ability to cross-examine correspondingly so, whether, having regard to the other circumstances of the case, there was a real risk of an unfair trial.

91. We note that in the present case:

(i) This child was 6 at the time of the alleged offence, which is towards the lower end of the spectrum for child witnesses;

(ii) The allegation was of a single incident of touching the child's vagina; and

(iii) While there was a considerable amount of other evidence which supported her account of where she was at the time of the alleged offence and other surrounding circumstances, there was no supporting evidence as to any touching or indecent touching; this is not untypical in this type of case, but nonetheless it does mean that the child's evidence was crucial, and therefore the impairment of the right to cross-examine of corresponding importance.

92. The Court has carefully taken into account the fact that many other aspects of the day in question were described by the appellant and his partner, and that the factual dispute in the case was narrow: it reduced itself to the question of whether the appellant indecently touched the complainant while he was sitting beside her. There was no dispute about *when* the event was said to have happened; or *where;* or *who else was in the* house; or *where the other parties were at the time;* and so forth. The disputed fact amounted to no more than whether or not he had indecently assaulted the child. Equally, however, it amounted to no

less than that: if the indecent touching happened, it warranted a criminal conviction of sexual assault of a child, which is a very serious matter indeed. It was a matter which the defence were entitled to explore and, unfortunately, by reason of the impact of the lapse of time before the trial, upon the child's memory, were unable to explore.

93. The Court does not consider that warnings to the jury could guard against injustice. This is a case where a jury might well be influenced in favour of the prosecution, having seen a coherent account from the child on the videorecording. It is the experience of the Court that cross-examination may raise a reasonable doubt (and sometimes more) about the reliability of a witness even where the evidence-in- chief seemed very strong at first sight. It is dangerous and inappropriate to engage in speculation as to whether cross-examination at an earlier point in time would have made in any difference; that is not the question to be addressed. The key question in our view is whether in the circumstances of the case, the appellant could exercise his constitutional right to cross-examine. We have concluded that he could not, and that in all the circumstances of the case, there was a real risk of injustice.

94. In all of the circumstances, the Court has reached the conclusion that the conviction should be quashed on the basis that there was a real risk of an unfair trial in the particular circumstances of this case.

95. The Court wishes to emphasize that its conclusion should not in any way be interpreted as any kind of bright-line rule about the lapse of any particular period of time between a videorecording and trial/cross-examination in such cases, whether the lapse of time is taken alone or in combination with the young age of a particular child. Nor should it be relied upon for any suggestion that a case should be brought to a halt simply because a child complainant

cannot remember some details relating to the event(s) in question. What happened in this case was most unusual insofar as the child herself accepted she had little memory of the event. Each case must be decided in light of its own facts. It is the particular combination of facts and evidence in the present case which leads the Court to its conclusion.

96. The Court also wishes to note that there is nothing impermissible *per se* in permitting a child witness to view the videorecording prior to being cross-examined. Witnesses generally are entitled to refresh their memories by viewing the statements they made to the Gardaí, and there is no reason to carve out an exemption from this practice for child witnesses. The source of the problem in the present case was the delay prior to trial which had such a significant impact upon the memory of this particular child, not the viewing of the videotape.

97. Having regard to the totality of the evidence and circumstances, the Court is satisfied that there was a risk of an unfair trial. In our adversarial system of criminal justice as currently constituted, it is not sufficient that there be clear and coherent evidence-in-chief from the child complainant (which there undoubtedly was, *via* the videorecording): there must be some realistic opportunity to cross-examine in order to afford an accused person his constitutional right to cross-examine. The Court has concluded that where the witness' memory was impaired to the degree described by the child complainant herself in this case, any attempt to cross-examine the child was effectively an exercise in futility and there was therefore a real risk that the trial was unfair which could not be cured, no matter what warnings the jury might be given.

98. The Court has also considered whether the appropriate jurisdiction to be exercised in such a case is (i) the *PO'C* jurisdiction, namely to halt a trial on the basis that there is a real

risk of an unfair trial; or (ii) an exercise of the discretion in s.16(2) not to admit the evidence because the court "*is of opinion that in the interests of justice the videorecording concerned or that part ought not to be so admitted*" and/or there is, within the meaning of s.16(2)(b) a "*risk that its admission will result in unfairness to the accused***."** A decision under s.16(1)(b) of the 1992 Act (if there is a challenge to the admissibility of the video recorded evidence) is of course conducted in the first instance before the child's evidence is played to the jury, but the decision can be re-visited by a trial judge after the witness has been cross-examined (or an attempt to do so has taken place), and there is nothing to prevent a trial judge from ruling the evidence inadmissible at that stage if persuaded that there is a risk of unfairness or that to do so is in the interests of justice (the jurisdiction referred to in *Malicki)*. In a case where the child's evidence is the only evidence of the alleged crime, the practical effect in terms of the ultimate outcome will be the same although by means of a slightly different procedural mechanism to the *PO'C* jurisdiction. In our view, the second of these mechanisms (i.e. ruling the evidence of the child inadmissible by applying the tests in s.16(1)(b)) is or would have been the appropriate procedural mechanism to be used in the present case.

99. The Court will allow the appeal and quash the conviction.