THE COURT OF APPEAL

Record Number: 183/2022

The President.
Edwards J.
Kennedy J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

MB

APPELLANT

JUDGMENT of the Court delivered on the 29th day of March 2023 by Ms. Justice Isobel Kennedy.

1. This is an appeal against conviction. On the 22nd June 2022, the appellant was convicted of nine counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act, 1990 and twelve counts of invitation to sexual touching contrary to s. 4 of the Criminal Law (Sexual Offences) Act, 2017.

Background Circumstances

2. The appellant was the complainant's childminder from December 2019 until April 2020 when the complainant was seven years of age. His parents gave evidence of having hired the appellant from a childminding website to mind their two sons. He was hired for the position because he had a car and so could drive the complainant to school. The evidence disclosed that the appellant began by minding the boys at their own home but following the Covid-19 pandemic lockdown, minded them at his house while their parents worked from home.

3. The appellant's employment was terminated by the boys' parents on the 23rd April 2020 after the complainant told them that the appellant had shown him a video clip which showed a child being hit with a leather belt on the bottom by his father.

4. The alleged offending came to light on the 6th May 2020, when the complainant demonstrated to his mother sexualised conduct which he said was shown to him by the appellant; this involved him moving his hand up and down his penis. A short time later that same day, he again demonstrated sexual conduct; this time he lay and then sat on his mother and moved his

hips backwards and forwards. He demonstrated the conduct to his father also. Thereafter, his father attended the Garda Station and an investigation ensued.

5. On the 14th May 2020 a two-hour interview was conducted with the complainant pursuant to s. 16 of the Criminal Evidence Act, 1992 and in accordance with Good Practice Guidelines. During this interview, the complainant described that the appellant would "lay down" and the complainant would move "backwards and forwards" on top of him while the appellant told him to "go faster or slower." The complainant also described that sometimes his legs would be outside the appellant's legs and sometimes they would be inside his legs.

6. The complainant further outlined incidents where the appellant rubbed his penis. He stated that "his hand would go up and down then round in a circle then up and down" and that "when he's done doing it then I do it." When asked how often these incidents occurred he said, "it did happen a lot of times I think" and that the appellant had told him it was "private." This type of touching was described as both over and under clothing. During this interview, the complainant was able to recollect the layout of the rooms and furniture in the appellant's house.

7. The complainant was cross-examined by counsel at trial and indicated he had difficulty recalling the events, culminating in the following:

> *"Q. ... Did [the appellant] ever touch your penis that you can remember?*
>
> *A. No.*
>
> *Q. Okay. And did [the appellant] ever get you to jump and down on him or move around or anything like that, that you can remember?*
>
> *A. No."*

Grounds of Appeal

8. The appellant relies on the following three grounds of appeal:

> *"1. The learned Trial Judge erred in law in failing to direct an acquittal of the Appellant on each count on the indictment.*
>
> *2. The learned Trial Judge erred in law and in fact in failing to exercise the inherent jurisdiction of the Court to stop the trial proceeding to verdict in circumstances in which the trial had become unfair to the Appellant.*
>
> *3. The learned Trial Judge erred in law in allowing the trial to proceed to verdict having regard to the circumstances of the case and the evidence of the Complainant/Injured Party given during the trial."*

Submissions of the Appellant

9. It is the appellant's position that the evidence given by the complainant during his cross-examination was that the alleged offending behaviour had not actually occurred.

Further, it is submitted that it is clear from the answers given by the complainant that he did not have a clear recollection of the relevant events and did not actually understand the things which he said during the Child Specialist Interview.

Application for a Direction

10. At the conclusion of the prosecution case, counsel for the accused applied for direction of not guilty on all counts relying on *R v Galbraith* [1981] 1 WLR 1039 and *The People (DPP) v M* [2015] IECA 65; the principles arising from which were summarised by this Court in *The People (DPP) v MS* (No.2) [2020] IECA 309 as follows:

> *"It is well established by this Court that the withdrawal of the case from the jury is one which should only arise as an exceptional measure. It is also well established that the judge in deciding whether or not to withdraw the case from the jury must examine the case as a whole and must only withdraw the case if the evidence is so unsatisfactory, contradictory or unreliable that no jury, properly charged, could convict upon it."*

It is submitted that the complainant's answers in cross-examination rendered the evidence "so unsatisfactory, contradictory or unreliable that no jury, properly charged, could convict upon it" and as such, this exceptional jurisdiction ought to have been invoked.

11. It is the appellant's position that further compelling evidence would have been required to support any contention that the complainant's direct testimony was reliable in a way that the answers given on cross-examination were not. Moreover, that the evidence in cross-examination could not be characterised as mere inconsistency and so the trial judge ought to have granted the application.

Fairness

12. Counsel for the accused also sought to invoke the inherent jurisdiction of the court to stop the trial in terms of *People (DPP) v PO'C* [2006] 3 IR 238; that the trial proceed no further on the basis of unfairness.

13. It is submitted that the manner in which the Child Specialist Interview was conducted was unfair as there was a failure to fully explore or contextualise the allegations. It is said that the interviewers were unaware of the complainant's autism and ADHD diagnoses. Issue is taken with the fact that the complainant's younger brother who was present for much of the alleged offending was not interviewed and it is said that there was no reason why the complainant himself could not have been interviewed a second time. In connection with this, it is submitted that there was a possibility that there was an innocent explanation for the disclosures made by the complainant.

14. The appellant complains that the failure to grant a direction in itself constitutes unfairness. The argument is advanced that if an adult complainant gave similar evidence in cross-examination, a direction would be granted.

15. The appellant further complains that the cross-examination of a child witness in the circumstances of the present case created particular difficulties which rendered the trial process unfair to the appellant, namely, the restrictions placed on the cross-examination of a child witness by virtue of best practice. It is said that in the circumstances, the defence were entitled to assume the allegations were negatived by the complainant's own evidence.

Submissions of the Respondent

16. The respondent wholly refutes the appellant's position that the evidence disclosed that the alleged offending behaviour had not actually occurred. It is submitted that when it was put to the complainant that the appellant "never did anything to you that he shouldn't have done, anything wrong or bold", the complainant merely confirmed that he understood what he was being asked and that this being his actual response was confirmed by the trial judge. Further, it is noted that as the appellant's position is that the alleged offending behaviour had not occurred, he was not placed at a disadvantage by the complainant's failure to recollect all of the offending nor were the defence's alternative theories proffered at trial curtailed by same.

17. It is the respondent's position that the cross-examination of the complainant cannot be assessed in a vacuum, but the entire body of evidence must be assessed; the complainant's direct testimony, the evidence of the complainant's parents, the evidence of the appellant's neighbour, a Mr G, the evidence of the recent complaint, the complainant's recollection of the layout and furniture of the appellant's house and the memoranda of interview. It is further submitted that the evidence should be assessed in light of all of the surrounding circumstances including the complainant's ADHD diagnosis and young age at the time of the offending.

18. The respondent says that on any objective assessment, the account given by the complainant of the allegations was graphic, cogent and credible.

19. It is submitted that the judge's ruling in both respects was legally correct and in accordance with the decisions in *The People (DPP) v M* and *The People (DPP) v PO'C.* It is the respondent's position that the matters raised by defence counsel were within the exclusive domain of the jury. The judge correctly pointed out that the evidence for consideration went beyond the evidence given by the complainant himself.

20. The respondent refutes the appellant's characterisation of the state of the prosecution's evidence. It is submitted that it was a matter for the jury to decide the weight to be given to the evidence in cross-examination of the complainant, the interview with him, and the balance of the evidence. Further, it is submitted that it was within the province of the jury to conclude that the complainant's lack of recollection of some of the offending during his cross-examination was explicable by reference to the lapse of time between his interview and the trial and his young age. Emphasis is placed on the judge's charge which included a corroboration warning and a warning in respect of child evidence.

21. The respondent refers to *People (DPP) v VH* [2020] IECA 198 where an inconsistency arose between the fact of the presence of implants in the appellant's penis and the evidence of the child complainant that they were not there at the time of the offences. This Court rejected the submission that the case should have been withdrawn from the jury because of this conflict, stating that; *"the contrast between the objective reality and what the complainant said was indeed present; but its significance was quintessentially a jury matter…"*

22. In response to the appellant's complaint regarding the manner in which the interview was conducted, the respondent says that no such complaint was made at trial and relies on *DPP v Cronin* [2006] IESC 9. It is further noted that it was never suggested that the complainant should have been interviewed for a second time. In terms of interviewing the complainant's younger brother, it is said that this would not have been appropriate where he had not made any disclosures himself and that there was no reality to this contention as he was only four years of age at the relevant time.

23. In response to the submission that the trial judge proceeded on the basis that the evidence given by the complainant in cross-examination was of less evidential value than that of the video evidence, it is submitted that this is to misconstrue her ruling which was to the effect that the evidence was for the jury to determine.

24. Insofar as it is said that the defence were entitled to assume that the complainant's allegations were negatived by the evidence given by him in cross-examination, the respondent

reiterates that the cross-examination cannot be assessed in a vacuum and due regard must be had to the evidence as a whole.

25. In response to the submission that the appellant was at a disadvantage as the complainant was a child the respondent relies on *People (DPP) v VE* [2021] IECA 122 in which this Court *"…gave a firm indication that it is for the courts and counsel to adapt to children and to adjust their techniques where necessary, but insisted that this does not and should not of itself compromise the ability to defend one's client "on the part of counsel) or the fairness of the trial."* It is pointed out that the complainant was available for cross-examination and that the defence were not curtailed in any way in the questions asked and were afforded fair procedures at all times.

26. *R v DL* [2019] EWCA Crim 1249 is also relied upon insofar as it sets out the issues arising from the time lapse between the conducting of a video interview and cross-examination at trial including memory loss in young children and how trial judges should approach same.

27. *The People (DPP) v SA* [2020] IECA 60 is referenced in which case the judge refused to grant a direction or stop the trial under *P'OC* where there was a lapse of 7 years between the specialist interview and the cross-examination of the child. In dismissing the appeal, this Court held:

> *"Moreover, the trial judge was in the best possible position to assess the demeanour of the witnesses and very carefully considered the issue of cross-contamination or collusion. And while accepting that the lapse of seven years from recording the interviews with the children and the trial, presented challenges, he concluded that a court must guarantee a fair trial but cannot guarantee a perfect trial and he was satisfied that these were matters which the jury were entitled to take into consideration but did not render the trial unfair so as to cause him to exercise the inherent jurisdiction to stop the trial. With this we are in entire agreement."*

This Appeal

28. Whilst there are three grounds of appeal filed, in essence, the appellant submits that this case ought to have been withdrawn from the jury, whether by applying the second limb of *Galbraith* or invoking the inherent jurisdiction to stop the trial in accordance with the *PO'C* line of jurisprudence. Essentially, the appellant argues that it was unfair, unsafe and unsatisfactory that the case was left for the jury's consideration given the state of the evidence following cross-examination.

The Evidence

29. We have been provided with the salient points of the Child Specialist Interview with the complainant which clearly set out the nature of the allegations made by the young child. The child makes several allegations of sexual misconduct on the part of the appellant. Firstly, that the complainant would sit on the appellant while he was lying or sitting down and move backwards and forwards on the appellant while he would direct him to move faster or slower. Secondly, that the appellant or the complainant would rub the complainant's penis. He gave detail in relation to these incidents, including the state of his clothing and positioning of the parties and the use of a towel placed under the child.

30. As stated, the incidents came to light when the complainant informed his mother that an inappropriate video of smacking was shown to him by the appellant and then demonstrated sexual movements to his mother which he said he had learned from the appellant.

31. The complainant was cross-examined, which cross-examination took place some two years after the Child Specialist Interview. We have taken the opportunity to view the DVD of the cross-examination in order to assist in our determination as to the effect of the answers given. It is noteworthy that the complainant recalled his previous childminder, that she would cook nice treats for him and that the appellant then began to mind him. He recalled the first time he met the appellant, describing how he was watching TV and that the appellant had a car with a female name. He agreed that the appellant had malodourous feet, that he took the complainant to Smyth's toyshop and that he and his brother played ball games with him. He also agreed that he had some issues with toileting, specifically having the occasional accident.

32. The next sequence of questions was central to the application to withdraw the case from the jury.

> *"Q Yes. Now, if I can just come back to the accidents, the wee-wee accidents, you've seen the video that you made with [Child Specialist Interviewers]; isn't that so?*
>
> *A. Yes.*
>
> *Q. Yes, and there's a reference in that video to [appellant] touching your penis outside your clothing?*
>
> *A. Yes.*
>
> *Q. And under your penis?*
>
> *A. Yes.*
>
> *Q. Okay. When you were telling them about that, is it possible that you were, in fact, describing what happened after you'd had an accident, a wee-wee accident?*
>
> *A.* ***Not sure.***
>
> *Q. You're not sure. Well, do you think it's possible?*
>
> *A.* ***Maybe.***
>
> *Q.* ***Yes, that maybe he was using a towel to help clean up after there'd been a bit of an accident?***
>
> *A.* ***Yes.***
>
> *Q. Okay, is that what it was?*
>
> *A. I think it is.*
>
> *Q. Yes, and you also mentioned about the wee-wee being yellow?*
>
> *A. Yes.*
>
> *Q. And that [appellant] was watching you to say: "Okay, [complainant], do we need*

to go to the toilet?" and then taking you off to the toilet?"

JUDGE: I'd just ask maybe to take the question --

MR ORANGE: Sorry, Judge, yes, yes.

JUDGE: Yes, yes.

MR ORANGE: Sorry, [complainant], I'm -- the Judge has pointed out that I'm getting a bit ahead of myself, okay? Okay, and so I'm just going to break that down a little bit for you. So, were there times when you were with [appellant] when he spotted that you might need to go to the toilet?

A. I think there's --

Q. Yes, and that he'd then say: "[complainant], toilet." Does that sound right?

A. Maybe.

Q. And that you then went off to the toilet to try and do a wee?

A. Yes.

Q. Okay, and that if you didn't make it there on time, he might wipe you down with a towel?

A. Yes.

Q. Is that correct?

A. Maybe. I'm not sure.

Q. ***Well, do you think that's what you were talking about when you were telling [CSI] about the wee-wee and the towels?***

A. ***Yes.***

Q. ***Okay. And I also have to ask you about being on top of [appellant]?***

A. Yes.

Q. Okay. What was that about?

A. I'm not sure.

Q. Well, how about this -- and if you disagree with me, please say you disagree with me -- that very often when you were in your house in the evening time, the three of you -- you, [appellant] and [complainant's brother] -- would be sitting watching TV or something?

A. Yes.

Q. And that you and [complainant's brother] would occasionally play a game on the chairs?

A. Yes.

Q. Okay, and that sometimes this involved jumping onto [appellant] as well?

A. Not sure.

Q. You're not sure. And that he might be sitting there waiting for your mum to come home, watching the TV and then yourself and [complainant's brother] might jump on him?

A. Maybe.

Q. ***Yes. [complainant], I have to ask you this question, did [appellant] do anything to you that he shouldn't have done?***

A. Not sure.

Q. Okay. Because I'm just going to tell you that he has told the police, the friends of [CSI] that he never did anything to you that he shouldn't have done, never did anything appropriate -- sorry, inappropriate with you?

MR HENEGHAN: That word might be a bit --

JUDGE: Yes, I'm not sure about that word, yes.

MR ORANGE: Do you understand inappropriate?

A. Yes.

Q. Okay, if you don't understand it, that's fine, but that he never did anything to you that he shouldn't have done, anything wrong or bold?

A. Okay.

Q. Do you accept that or do you understand that?

A. I understand."

33. As can be seen from the foregoing the complainant said he was unsure regarding certain matters, specifically regarding the use of the towel and as to whether the appellant had done anything untoward or inappropriate to him. The trial concluded for the day and then resumed the following day with cross-examination continuing:-

"Q. Yes, okay, if you're not comfortable just say it. But there was a fair bit of talk about towels and touching your penis and doing your wee?

A. Yes.

Q. Do you remember that?

A. Yes.

Q. Do you know what that was about?

A. No.

Q. Okay. Look [complainant], I'm going to finish up now with just a few more questions. When you were with -- when [appellant] was looking after you where was [brother], can you remember?

A. No.

Q. Okay. Would you have been playing with [brother] during the time that [appellant] was looking after you?

A. Yes.

Q. Jumping up and down and maybe wrestling with him?

A. Yes.

Q. Yes, and would you have been maybe wrestling with [appellant] as well a bit?

A. I'm not sure.

*Q. Not sure, okay**. Did [appellant] ever touch your penis that you can remember?***

A. No.

*Q. Okay. **And did [appellant] ever get you to jump and down on him or move around or anything like that, that you can remember?***

A. No."

34. The cross-examination then concluded and the trial judge asked the complainant the following questions:-

"Q. JUDGE: Okay, so when you were speaking to [CSI] in the room with the leather couch if you remember, you saw it on the DVD, you told her, you made a reference or you spoke about a "bulgie", do you remember seeing that on the video?

A. Yes.

Q. JUDGE: And do you recall what that was about, or do you remember what that was?

A. No.

Q. JUDGE: No. You said that [appellant] asked you "Could I feel a bulgie?" Do you have any memory of that now, what that meant?

A. No.

Q. JUDGE: No, okay. And you spoke about your pants being down around your ankles. Do you remember on the video, you spoke about your jeans or your trousers or your sports pant, you said it was at a height and you showed that it was at your ankles?

A. Yes.

Q. JUDGE: Do you remember when would that be or what was that about?

A. No.

Q. JUDGE: No, okay. And you spoke about rocking back and forth when you were sitting on [appellant]?

A. Yes.

Q. ***JUDGE: Do you remember what that -- do you have any memory of that now?***

A. I'm not sure."

35. The child's parents gave evidence of employing the appellant, the termination of that employment following the disclosure that the appellant had shown the complainant an inappropriate video, recent complaint evidence, the appellant's memoranda of interview and the evidence of a Mr G, the appellant's neighbour.

36. The relevance of Mr G's evidence was that it sought to demonstrate an inconsistency in the appellant's version of events regarding the showing of the video to the child. The appellant's own evidence was that he did this to show the complainant what would happen if he stole food, whereas Mr G said that the appellant told him that he showed the complainant the video because he wanted to check if either boy was being physically abused by their parents.

Discussion

37. It is worthwhile repeating the second limb of *Galbraith* where Lord Lane CJ set down the applicable principles in applications to withdraw a case from the jury:

> *"(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however, the Crown's evidence is such that its strength or weakness depends on the view to be taken of the witness's reliability , or other matters which are generally speaking within the province of the jury and where on one possible view of the fact there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury…. There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."*

38. In the decision of this Court in *The People (DPP) v M*, Edwards J clarified the position concerning the second limb of *Galbraith* and stated at para. 47 onwards:-

> *" 47. At the outset the Court wishes to address a misconception that it occasionally encounters, that the second limb of Lord Lane's celebrated statements of principle in R v Galbraith represents authority for the proposition that a case must be withdrawn from the jury if the prosecution's evidence contains inherent weaknesses, or is vague, or contains*

significant inconsistencies. This Court wishes to emphasise that it is not authority for that proposition.

48. On the contrary, the emphasis in Galbraith is on the primacy of the jury in the criminal trial process as the sole arbiter of issues of fact. What Lord Lane was in fact saying in Galbraith was that even if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies, it is for the jury to assess that evidence and make of it what they will, unless the state of the evidence is so infirm that no jury, properly directed, could convict upon it. Accordingly, what Galbraith is in fact concerned with is fairness.

49. Moreover, implicit in the Galbraith principles enunciated by Lord Lane, is that withdrawal of a case from a jury should be an exceptional measure, to which resort should only be had for the purpose of avoiding a manifest risk of wrongful conviction. 50. This Court considers that the matter is well put in the following quotation from Archbold, Criminal Pleading Evidence & Practice 2014 at page 484, where the authors state: "In making the judgment in line with the second limb of Galbraith, as to whether the state of the evidence called by the prosecution, taken as a whole, is so unsatisfactory, contradictory or so transparently unreliable, that no jury, properly directed, could convict, the judge must bear in mind the constitutional primacy of the jury and not usurp its function.""

39. It is well known that cross-examination is essential to the trial process. As stated by McGrath on *Evidence*:-"*….the right to cross examine is considered to be a fundamental procedural right in this jurisdiction, constitutionally guaranteed in both civil and criminal cases."* One of the purposes of cross-examination is to cause the jury to have a doubt regarding the reliability or accuracy of the evidence given by witness. In an effort to achieve this objective, a witness may be asked *inter alia* about their ability to recall events, detail in relation to allegations made or issues peripheral to the allegations.

40. There can be no doubt in the present case that counsel for the appellant had the opportunity and availed of that opportunity to cross-examine the complainant. We do not believe that the appellant's right to cross-examine inherent in the constitutional right to a fair trial as guaranteed by Article 38.1 of the Constitution and by Article 6 of the European Convention on Human Rights hampered or restricted due in any manner.

41. It is also true to say that what is proper and fair in the context of trials may be dependent on how society evolves and the knowledge that society gleans as it evolves. Therefore, as is now well known, the cross-examination of children must be conducted in a manner which permits a child to give their best evidence and causes the least trauma to the child, but without impinging on Art. 38 of the Constitution.

42. The rights of victims are protected by Article 40.3 of the Constitution and Article 42A.1 of the Constitution refers to the natural and imprescriptible rights of a child and guarantees to protect and vindicate those rights as far as practicable. In practical terms, when cross-examining a child, questions asked should be short, simple and without repetition. The judge must carefully guard the interests of the child, ensuring the child understands what is being asked but at all times ensuring the right to a fair trial.

43. In the present case, counsel and the trial judge took pains to ensure that the rights of the child were met. Procedures were adopted during the trial having regard to the child's age and a diagnosis of autism and ADHD, which diagnoses were not known at the time of the complaint.

44. In *R v Barker* [2010] EWCA Crim 4, the Criminal Division of the Court of Appeal of England and Wales stated *inter alia* at para 40:-

> *"The purpose of the trial process is to identify the evidence which is reliable and that which is not, whether it comes from an adult or a child. If competent, as defined by the statutory criteria, in the context of credibility in the forensic process, the child witness starts off on the basis of equality with every other witness. In trial by jury, his or her credibility is to be assessed by the jury, taking into account every specific personal characteristic which may bear on the issue of credibility, along with the rest of the available evidence."*

45. *Barker* was cited with approval by this Court in *The People (DPP) v VE* with Ní Raifeartaigh J stating that the case was "equally apposite in this jurisdiction."

46. Further, in *The People (DPP) v SA* this Court stated at para 153 that:-

> *"Simply because a witness is a child does not mean that the testimony is untruthful*. ***A witness must be assessed in the same manner as any witness is assessed*** *and in the present case the trial judge was satisfied that the two witnesses were coherent and clear in their testimony."*

47. The complainant in this case was seven years old at the time of the allegations and nine years old at the time of trial. The complainant was vulnerable both in terms of age and his diagnoses on the autism spectrum and ADHD and the trial judge conscientiously safeguarded the interests of the child throughout the trial process.

48. Whilst no real issue or criticism is made regarding the ability to cross-examine the child, it is said that when the child gave the evidence, which on the defence case, effectively negatived the allegations, the defence did not explore the issues further, as might have been the case with an adult. We are not persuaded that this is a meritorious argument. It is quite clear that the cross-examination was conducted carefully and sensitively. The cross-examination was not limited, leaving open the option to further explore the issues without repetition of questions. The fact that accommodations are put in place for vulnerable witnesses requires an adjustment in approach but does not impact on the fairness of the trial.

49. The issue which arises in this case is somewhat unusual in that the child recalled many details concerning his care at the time of the offending and, indeed, even before that. Significantly, he recalled personal issues concerning the appellant, such as that his feet were malodourous and that he liked the boys to play outdoor games. However, when asked about the material the subject of the offences, he initially expressed himself as unsure and then the following day, the following exchange took place in cross-examination:-

> *"**Q.*** ***Did [appellant] ever touch your penis that you can remember?***
>
> ***A.*** ***No.***
>
> *Q.* *Okay.* ***And did [appellant] ever get you to jump and down on him or move around or anything like that, that you can remember?***

A. No."

50. It seems to us that this is not so much a case of defective memory, as the absence of clarity as to whether the incidents alleged occurred at all. At an earlier stage in cross- examination, regarding inappropriate touching, the child appeared unsure as to whether that may have occurred in the context of toilet issues.

51. The more significant problem, however, arose during cross-examination the following day, as set out at para. 49 above. Part of the difficulty, in our view, which arose concerned the questions put to the child, which rather than being formulated in single short, simple questions, the questions included the words, "that you can remember." This, in our view, could have given rise to some confusion on the part of a young child. A simple straightforward question should have been asked, such as "did x ever touch your penis?" It is not possible to know at this remove whether the answer to the question asked in cross-examination was to the first part or the second part of the question, and this, in our view, is an unsatisfactory state of affairs.

52. Having said that, the method of correcting any uncertainty in order to achieve a fair trial for both the defence **and** prosecution, lay with re-examination. Re-examination may involve a witness being asked to explain and clarify an answer given and may be utilised to rehabilitate a witness. As stated in McGrath on *Evidence,* 2nd ed at para. 3-146:-

> "*A witness who has been cross-examined may be re-examined by the party who called him or her with a view to eliciting further evidence that is favourable to that party and to rehabilitate the credibility of the witness and the veracity, reliability and accuracy of the evidence given by him or her if this has been impugned on cross-examination*."

53. In our view, re-examination is especially important in the context of a child witness whose direct testimony is adduced by way of video recorded interview. Re-examination may have the effect of clarifying an unsatisfactory situation one way or the other. Whilst re-examination took place in the present case, it did not sufficiently rehabilitate the witness to confirm that the events complained of took place.

54. Each case is of course fact dependent. In the experience of this Court, difficulty in recall is not an unusual feature of cases where a witness statement is taken by video link and the cross-examination takes place sometime thereafter. It is obvious that these trials should, where possible, be prioritised. In some instances, the insufficiency of recall will be starker than in others, there is no one size fits all, sometimes there will be an absence of recall regarding the specifics of an incident, but the child confirms some details of the incident. Sometimes, it may be an inability to recall one incident whilst recalling others or the detail of an incident may differ somewhat. Without being prescriptive, in those situations, the absence of specifics may impact on the credibility of the witness, and can safely be left to a trial judge to determine whether the lack of recall renders a trial unfair. The courts must strike a balance between ensuring a child gives their best evidence whilst ensuring a person's right to a fair trial is honoured.

55. However, the situation pertaining in the present case is quite different.

Conclusion

56. One analysis of the above could be that the complainant simply could not remember the events complained of; if so, then the absence of memory and the effect on a fair trial, is one of degree for assessment by a trial judge. As stated, the more appropriate question to ask in cross-examination would have omitted the words "that you can remember." Questions asked of a child should be simple and short so that there is no room for any uncertainty. However, we have carefully considered the transcript and also assessed the manner in which the complainant answered the highlighted questions reflected on the DVD and it appears to us, that his answers related to whether the events giving rise to the allegations had in fact occurred at all.

57. The words of Denham J. (as she then was) in *The People (DPP) v M* (Unreported, Court of Criminal Appeal, 15th February 2001) and as quoted with approval in *M supra* are helpful in analysing the manner in which the judge exercised her discretion.

At page 15 Denham J. said:-

> *"If a judge comes to the conclusion that the prosecution evidence taken at its highest is such that the jury properly directed could not properly convict it is his duty to stop the trial. However, that is not the case here. Here there is lengthy evidence from the complainant in which there are some inconsistencies. These inconsistencies are matters which go to issues of reliability and credibility and thus, in the circumstances, are solely matters for the jury."*

58. A judge must consider all of the evidence in determining whether to withdraw a case from the jury, and the trial judge did so in the present case. It is an exceptional measure to withdraw a case from the jury. However, in our view, in the circumstances of this case, the answers given by the complainant were to questions central to the allegations, in fact, directly concerning the events which gave rise to the allegations and contradicted his direct testimony. This was not a situation of inconsistencies arising on the evidence, this was quite different, where, in truth, the answer given as to whether the offending occurred was a simple "no."

59. We wish to make it clear that where the child's response to questions was that he was unsure of certain things, this would not necessarily have been sufficient to direct a jury to return verdicts of not guilty, but those responses, together with the responses "no" brings the case into the exceptional category.

60. The evidence regarding the playing of the video, the contradictory evidence as to why the appellant had shown it to the child, and the recent complaint evidence certainly formed part of the body of evidence, but the contradictory evidence on the core issue brought this case into the exceptional category, where the evidence was so infirm that a direction was warranted.

Fairness

61. Insofar as the application pursuant to *PO'C* is concerned, we do not need to consider this application as we have found that the trial judge erred in refusing the application for a direction on foot of the evidence. This was not a situation of an inability to cross-examine or a severe constraint on cross-examination, which may give rise to a *PO'C* application. Again, we emphasise that the assessment of such an application will be a question of degree in each case.

62. Insofar as the appellant seeks to make the point that the manner in which the Child Specialist Interviewers conducted the interview with the child was unsatisfactory as it is said there was a general failure to explore or contextualise his complaints and that his younger brother ought

to have been interviewed. There is little doubt that the appellant would have complained if indeed the interviewers had explored the allegations further. It seems to us that the interview was conducted in a sensitive and free-flowing manner and no realistic complaint can arise therefrom. Insofar as it is said that the younger boy ought to have been interviewed, he was a child of four years of age who had made no disclosure.

63. As we have found an error in principle, we will allow the appeal and quash the conviction.