THE COURT OF APPEAL

Record No: 20/22

Edwards J.
McCarthy J.
Kennedy J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

V

A.A.

APPELLANT

JUDGMENT of the Court delivered on the 16th day of May 2024 by Ms. Justice Isobel Kennedy

1. This is an appeal against conviction. On the 6th August 2021, the appellant was convicted of 4 counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act, 1990, as amended, 3 counts of sexual exploitation of a child contrary to s. 3 of the Child Trafficking and Pornography Act, 1998, as amended, 2 counts of rape contrary to s. 2 of the Criminal Law (Rape) Act, 1981, as amended and 1 count of rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act, 1990. We have not used the appellant's or the victims' real initials in the interests of protecting the identity of the children. A and C are the appellant's nephews and B is the appellant's niece.

Factual Background

2. The appellant was convicted in respect of sexual offending of his two nephews and niece. He is their uncle by marriage, having married their maternal aunt. The appellant was tried with six co-accused, two of whom were the subject of a directed acquittal by the trial judge. All of the offences of which the then accused were respectively convicted occurred between the 18th August 2014 and the 28th April 2016. Between those dates, A was aged between 7 years and 9 years, B was aged between 6 years and 7 years and C was aged between 5 years and 6 years.

3. The children were initially removed from the care of their parents by Tusla, pursuant to orders of the District Court of April 2016 on the basis of neglect. Once placed in foster care, the children exhibited sexualised behaviour and subsequently made disclosures of sexual abuse against their parents and other family members.

4. The complaints resulting in conviction of the appellant were the subject matter of the evidence given by A via video link at trial and interviews with Specialist Garda Interviewers with B and C concerning incidents of sexual assault, sexual exploitation by way of the instruction to the male children to engage with each other and/or other children sexually, s. 2 rapes of B (the female child), and s. 4 rape of C.

Grounds of Appeal

5. The appellant now appeals his conviction on the following grounds:-

> *"1. The learned trial judge erred in principle and in law in refusing to arrest the jury verdict and/or order an inquiry arising on foot of post-conviction communications from the jury foreman.*
>
> *2. The learned trial judge erred in principle and in law in failing to direct separate trials in respect of the applicant [and other co-accused in respect of the three complainants.]*
>
> *3. The trial judge erred in law in permitting the notes of the complainants to be used in evidence.*
>
> *5. The trial judge erred in law and/or in fact in refusing to exclude portions of memos of interviews of the co-accused in circumstances whereby their inclusion caused an overwhelming prejudice bearing no relevance towards the Applicant.*
>
> *7. The trial judge erred in his interpretation of the burden of proof in that he failed to recharge the jury appropriately in circumstances whereby he stated there was no obligation to give evidence but likewise did not say there was no obligation to call witnesses."*

6. We will address each ground in the order argued before this Court.

Submissions of the Parties

Ground 1: Letter from the Jury Foreman

The Appellant

7. On the 4th October 2021, post-conviction but pending sentence, the trial judge brought to the attention of the parties a handwritten letter sent to him by the foreman of the jury.

8. The appellant, in essence, relies on one line of this letter. We will adopt the same sensible approach as that of the trial judge and will not refer to the contents of the letter save to say that the author had a sense of pre judgment on the part of some jurors.

9. It is submitted that the letter undermines the safety of the verdicts reached by the jury with the suggestion that the jury did not, in fact, deliberate at all.

10. During oral hearing of this appeal, counsel for the appellant drew this Court's attention to the trial judge's ruling on the issue as follows:-

> *"Essentially Lord Hope is reflecting the equally strongly stated views of Mr Justice Haugh in the Court of Criminal Appeal in Longe. Lord Hope accepted that an allegation that a jury as a whole declined to deliberate at all and had decided a case by drawing lots or the toss of a coin would be a complete repudiation by a jury of their function to give a true verdict according to the evidence. In that instance he said the jury would have no need to have its deliberations protected since none occurred. In that case he was satisfied to make an exception to the rule that distinguishes between things that [are] intrinsic to the deliberation process and those extrinsic to it."*

11. The appellant emphasises that the trial judge concluded that he had no jurisdiction to set aside the verdict of the jury but that he added that this did not mean *"that there's no remedy against irregularities that occur during the course of the trial, there is, and this is provided by right to appeal the verdict to the Court of Appeal where any such alleged irregularity may be considered within the jurisdiction conferred upon that court."*

12. Reliance is placed on the judgment of the Court of Criminal Appeal in *People (DPP) v Dumbrell and Dumbrell* [2010] IECCA 84 in which Murray CJ outlined that:-

> *"[a] trial may be rendered unfair and a verdict considered unsafe if it is established that there was a danger, in the sense of a possibility, that even one juror might have been "unconsciously influenced" by matters which might make the trial unfair. There is at least such a danger or such a real possibility in this case."*

13. It is conceded by the appellant that the circumstances of the *Dumbrell* case differ from the present case, however, it is submitted that the principle that justice must be done and be seen to be done was emphatically reaffirmed by the then Chief Justice who noted that this principle was not "*a pious aspiration*" but was a "*substantive principle applicable to every trial*."

14. It is submitted that the contents of the jury foreman's letter rendered the verdicts of the jury unsafe. It is asserted that there was clear bias and prejudgment on the part of some jurors or at the very least that the contents of the letter would lead a reasonable person to assume that there was. It is said that in these circumstances justice was not done and justice was not seen to have been done.

15. It is submitted that the trial judge ought to have inquired further into the question of arresting the verdict or to have inquired further into the jury deliberations.

The Respondent

16. The respondent emphasises that neither the jury foreman or any jury member raised an issue regarding the jury deliberations at the time of the trial. The verdict was pronounced in public and was confirmed in the usual way by the foreman in the presence of the full jury.

17. The judgment of the trial judge in refusing the application sought is relied upon by the respondent. The following portion from the transcript of the 21st December 2021 refers:-

> "*I am satisfied therefore that the letter received cannot be advanced as a basis for an inquiry by me as the trial judge in the case. Furthermore, I am also satisfied that the letter does not provide a clear cogent allegation or evidence such as to indicate impropriety on the part of his fellow jurors which is sufficiently cogent to justify such an exceptional investigation of the jury's engagement with the evidence during the trial or during its approximate 20 hours of deliberations, even if evidence obtained during such an inquiry were admissible. Furthermore, I'm satisfied on the case law that the verdict of the jury in this case and any other cases carries with it a presumption of impartiality which I do not consider could be regarded as rebutted by the contents of this letter. For all of these reasons, I refuse these applications."*

18. It is submitted that no communication with a juror after trial has been permitted in Ireland for good and substantial reason. *People (AG) v Longe* [1967] IR 369 is relied upon in this regard as follows:-

> *"In our opinion the principle is well established that the nature of the deliberation of a jury in a criminal case should not be revealed or inquired into. For these reasons this Court is of the opinion the application for leave to appeal, on the three grounds stated in the notice; must fail."*

19. The respondent also references the sanctity of jury deliberations, the authority for which is *Vaise v Delaval* (1785) 99 Eng Rep 944; *People (DPP) v Mahon* [2019] 3 IR 151, *People (DPP) v McDonagh* [2003] 4 IR 417 and *R v Brandon* (1969) 53 Cr App R 466.

20. The respondent contrasts the present case with the authorities involving an extrinsic influence on the deliberation process. It is emphasised that in the present case there is no evidence or even suggestion of any extrinsic influence on deliberations as in *McDonagh* and *Brandon*.

21. The respondent submits that the test is an objective one of whether a reasonable and fair-minded observer would consider that there was a danger in the sense of a possibility that a juror might have been unconsciously influenced by his or her personal experience and for that reason the accused might not receive a fair trial.

22. It is submitted that a jury verdict once returned unequivocally is conclusively presumed to be final. Archbold (2020) at p 583 is cited in support of this:-

> *"The verdict is delivered by the foreman: and the assent of all jurors to a verdict pronounced by the foreman in the presence and hearing of the rest, without their express dissent, is to be conclusively presumed...."*

23. *R v Mirza* [2004] 1 AC 1118 is similarly relied upon as follows:-

> *"The law proceeds on a view that, if a juror who can hear the foreman's words makes no objection when the verdict is announced, he or she must be taken as having assented to the verdict as accurately reflecting the proper conclusion of the jurors' deliberations. Accordingly, when duly announced, the verdict is regarded as the authentic expression of the outcome of the jury's deliberations on the issues in the case, in light of the directions given by the judge."*

24. The respondent places reliance on the judgment of this Court *in People (DPP) v JN* [2022] IECA 188 in which Kennedy J reiterated that jury deliberations are sacrosanct and protected by the jury secrecy rule and that this rule prohibits any person from disclosing information about discussions, opinions and arguments had within the confines of the jury room. The following passages from *Mirza* were quoted with approval in *JN*:-

> *"Jurors need to be protected from pressures to explain their reasons and it is important to avoid an examination of conflicting accounts by different jurors as to what occurred during the deliberation. It has also been said on a number of occasions that the need for finality once a verdict has been given justifies the rule being applied strictly."*

And:-

> *"Jury secrecy is therefore sacrosanct and what transpires in a jury room must remain private for the very good reasons…"*

25. Further reliance is placed on *People (DPP) v John O'Donoghue* [2024] IECA 74 as follows:-

> *"The sanctity of the jury verdict has long been recognised within our system. It was reaffirmed in the recent Court of Appeal decision in The People (Director of Public*

Prosecutions) v. JN [2022] IECA 188 which carefully considered the matter, including the exceptionality of the circumstances in which a jury verdict might be scrutinised.

The unanimous verdict was returned in this matter in open court in accordance with s. 25(2) of the Criminal Justice Act 1984. It was pronounced in the presence of the juror member who subsequently contacted the appellant's Senior Counsel. No issue was raised by that juror at that time. The verdict was correctly received and recorded and no issue arises with it. This Court has no basis to interfere with the verdict having regard to what has been set out by the appellant and the law as summarised in JN. Accordingly, we do not uphold this ground of appeal." (Emphasis added)

26. It is submitted that no reasonable objective person could have any doubts about the validity of the jury verdict in the present case.

Discussion

27. The above sets out the background to this ground of appeal. The letter was received by the judge in the period post-conviction and pre-sentence. We consider the law in this area is very clear and that the facts of this case do not differ to any significant degree or at all from those in *JN* The role of the jury is a crucial one and jury deliberations cannot in general be subject to scrutiny following conviction.

28. A jury must be in a position to engage in full and frank discussion without fear of subsequent inquiry requiring jurors to explain the nature of their discussion or as to how the verdict came about. There may well be robust discussion and expression of contrary views in a jury room, indeed, that is the manner of discourse and debate, leading to conclusions, and should an inquiry take place regarding deliberations, this would serve to curtail such a vital process.

29. As previously stated, there are of course situations extrinsic to deliberations which may necessitate further inquiry; ref; *McDonagh*; *Brandon*. This is not one of those cases.

30. The issue raised by this appellant is that, in reality, there was no deliberation at all. However, this entirely flies in the face of the factual position where this was a lengthy trial with the jury commencing deliberations on the 29th July 2021 and returning verdicts on the 6th August 2021. In that period, specifically on the morning of the 6th August, the statutory question was posed to which the foreman replied that verdicts had been reached but had not yet been recorded on the issue paper. The jury were asked to so record and duly recorded those verdicts. The jury were then given the majority direction and returned with majority verdicts on the remaining counts. The majority verdicts were recorded as being 11:1 on all counts bar one count where the verdict was 10:2. The jury had deliberated for a period of 19 hours and 54 minutes. At no stage of this lengthy deliberation was there any mention by any member of any issue arising either by note to the judge or otherwise, much less any indication that the jury were not in fact deliberating but simply waiting for in excess of 19 hours to deliver verdicts. Moreover, a verdict on one count concerning another accused was that of not guilty, other verdicts were unanimous, and one verdict by majority was that of 10:2. None of these factors point to an aspect of prejudgment.

31. The appellant contends that the judge erred in failing to arrest the verdict of the jury and in failing to order an inquiry following the communication received post-conviction and pre-sentence.

32. The law clearly states that the arrest of a verdict is of very limited jurisdiction, such an application may be made post-conviction and pre-sentence, but such an application will usually concern a defect on the face of the record, such as an offence unknown to the law on the indictment. This is clearly not the situation which presents in this case, and we find no error in the judge's refusal to arrest the verdict.

33. The finality of a jury verdict is essential to the proper administration of justice. Once a verdict is pronounced in public in accordance with s. 25(2) of the Criminal Justice Act, 1984 and is one to which no juror dissents, then there is a presumption of finality.

Conclusion on Ground 1

34. We have scrutinised the letter received by the trial judge and the ruling delivered by him. No issue can be taken with the legal position as stated therein or in our view, with the careful and considered analysis by the trial judge of the facts as known to him. Moreover, it is instructive that the trial judge noted in his ruling that he observed the jury throughout the trial as being "*extremely attentive and engaged*" and demonstrating "*a high degree of commitment to the task which they undertook and carried it out diligently*." It seems that the jury were constantly taking notes, which was clearly sensible in such a long trial. This points towards a jury acting properly and with conspicuous care.

35. The principle is well settled that the manner and nature of a jury's deliberations should not be the subject of an inquiry. There is nothing in the present case suggestive of an issue external to the jury room giving rise to highly exceptional circumstances justifying an inquiry. Jury secrecy is sacrosanct and for very good and logical reason. As this Court stated in *JN* at para. 49:-

> *"[i]t is essential that jurors are in a position to speak their mind without any fear or concern or pressure of any kind. Candour in the jury room is essential……[T]he "no impeachment" rule remains steadfast."*

36. The trial judge directed the jury in his charge to carefully consider the evidence, free from any potential prejudice or emotion due to the nature of the evidence and charges.

37. For the reasons stated above, we do not see any indication of pre-judgment and do not find any error in the trial judge's approach and ruling.

38. Accordingly, this ground fails.

Ground 7: Re-Charge on the Burden of Proof

The Appellant

39. Counsel on behalf of the appellant requisitioned the trial judge to re-charge the jury in respect of the burden of proof, in particular, to make clear that the appellant was under no obligation to call evidence in his defence.

40. The trial judge recharged the jury to the effect that there was no obligation on any accused person to give evidence. The appellant complains that he failed to tell the jury that there was also no obligation on any accused person to call a witness or witnesses. It is submitted that the failure to do so might have resulted in confusion or prejudice in the minds of the jury.

The Respondent

41. The respondent points out that no authority is cited by the appellant in support of this argument. It is asserted that the trial judge made it clear that no adverse inference could be

drawn from the level of participation of the accused during the trial or whether an accused gave evidence and that this is apparent from the following portion of the charge:-

> *"But I want to say just about the participation of each of the accused in the case, that the -- they're all represented by solicitor and counsel. They do not have an obligation to give evidence in the course of this trial. And of course, every accused person is entitled to have (sic) participate in the trial to the extent that they wish. They can simply sit back and do nothing and simply put it up to the prosecution to prove the case beyond reasonable doubt,'* (Emphasis added)

42. It is submitted that the comment that an accused may *"participate in the trial to the extent that they wish"* encompasses the calling of witnesses and therefore this ground has no substance.

Discussion and Conclusion

43. No complaint is advanced regarding the judge's charge on the fundamental principles applicable to all criminal trials. This ground is confined to a discrete point regarding possible prejudice to the appellant due to the fact that he called no witnesses in his defence, and that the judge did not inform the jury that there was no such obligation in law. It is said that this potential prejudice could have been obviated by directions from the trial judge.

44. This is quite a novel application, and one on which we are not persuaded. The trial judge's charge on the fundamental legal principles was impeccable. The duty of the trial judge is to make clear to the jury that there is no obligation on an accused to give evidence. This is precisely what the judge instructed the jury, however, he went somewhat further in that he advised the jury also that each of the accused persons were entitled to "*participate to the extent that they wish*."

45. We do not believe there is any requirement on a trial judge to instruct the jury that an accused is under no obligation to call witnesses in his/her defence. The very fact of informing the jury that an accused does not have an obligation to give evidence, coupled with a clear direction as to where the burden of proof lies is more than sufficient to ensure that there is no risk a jury might question as to why an accused did not call evidence in his/her defence.

46. Accordingly, this ground fails.

Ground 2: Separate Trials

The Appellant

47. The appellant's position is that the trial judge erred in refusing a pre-trial application for a separate trial from the 1st and 2nd named accused. While this ground initially referred to the application for severance of the indictment concerning each of the three complainants, that is now not being pursued. It appears to this Court that the oral argument focused on the application to sever the indictment insofar as it concerned this appellant and the 2nd named accused; the mother of the three complainants. However, the written submission is broader in its terms.

48. The application was made pre-trial and ruled upon on the 21st December 2020. Whilst the application on this specific basis was not renewed, following cross-examination at trial in July 2021, concerning the age of this appellant's now wife when he first met her; 12 years old or thereabouts, a further application was made for a separate trial. It is argued that the above issue was the straw that broke the camel's back and demonstrated the hazards of a joint trial causing irreparable prejudice. Counsel for the appellant observed in his application during trial that a member of An Garda Síochána had commented on the 2nd named appellant's memorandum of

interview referring to this appellant and this clearly caused him some concern. Both applications were refused.

49. The application in respect of separate trials was initially brought on the following grounds:-

(a) It was in the interests of justice that separate trials should be held.

(b) The appellant herein would suffer a miscarriage of justice as a result of some of the evidence being tendered against his co-accused.

(c) As distinct from the first and 2nd-named accused, the appellant herein was not before the court in relation to allegations of child neglect.

(d) The appellant would be seriously embarrassed and prejudiced by being tried jointly with his co-accused.

50. It is contended that the indictment which concerned a significant number of counts, several accused and several different types of offending behaviour relating to multiple complainants created an overwhelming prejudice in the minds of the jurors, leaving them with an onerous and burdensome task in differentiating as between the various accused persons and the various offences.

51. Reliance is placed on *People (AG) v Sykes* [1958] IR 355 in which case the court held that it was within the discretion of the trial judge to grant separate trials where the statement of one accused, intended to be given in evidence, incriminates another or where it is clear that the defence of one co-accused is to exculpate himself and incriminate another. It is asserted that some of the material contained in the 2nd named accused's memoranda of interview tended to incriminate the appellant to the extent that he was unfairly prejudiced in his defence.

52. The appellant sets out the allegations made by the 2nd named accused against the appellant in her memoranda of interview. It is submitted that the appellant was exposed to a risk of an unfair trial as a consequence of the trial judge's failure to direct separate trials on account of her allegations of misconduct against this appellant in those memoranda of interview.

53. Reliance is placed on the following observation of Prof. O'Malley in his text on *Sexual Offences*, 2nd Ed, as follows:-

> *"it may be unrealistic to expect a jury to keep the evidence relating to the various counts or complainants compartmentalised."*

54. Reliance is also placed on *R v Sims* [1946] KB 351 in which case it was held that in a case involving four complainants, it would be asking too much of the jury to consider each charge separately, while disregarding the others and that the prejudice created would be "*improper and would be too great for any direction to overcome."*

55. Further reliance is placed on the relevant test as indicated by the court in *People (DPP) v LG* [2003] 2 IR 517 as whether the accused "*would be prejudiced in his defence to such an extent as to make it desirable to order separate trials."*

The Respondent

56. The respondent's position in respect of this ground is that the particular role of the appellant within the family of the complainant children could only be fully appreciated when seen in the context of the dynamic of that family as a whole and so he could not be dealt with separately to their parents.

57. It is emphasised that the appellant herein put himself forward as a representative of the parents' interests in meetings between them and Tusla It is submitted that the neglect of the children by their parents provided the background to the appellant availing of the opportunity to sexually abuse the children himself. Count 63 is provided as an example of this. This count reads as follows:-

> *"[The appellant], on a date unknown between the 18th of August 2014 and the 28th of April 2016 both dates inclusive at [address] did together with [2nd accused] and [1st accused], sexually exploit a child, namely [A], by inviting, inducing or coercing him to insert his penis into the anus of [B]."*

58. It is submitted that there was no reality to ordering separate trials in the present case where the matters were so completely interlinked and certain of the counts referenced more than one of the complainant children.

59. Reliance is placed on a recent judgment of this Court, *People (DPP) v PM* [2024] IECA 21 in which Kennedy J noted that:-

> *"31. It was held by the Supreme Court in Limen that a judge may sever the indictment if the judge is of the opinion that it would be unfair to the accused to proceed on the basis of the indictment as preferred.*
>
> *32. As this Court is generally reluctant to interfere with the manner in which a trial judge exercises his/her discretion, it is necessary to look to the ruling of the judge but before doing so, certain matters should be noted."*

60. The respondent asserts that the trial judge properly and correctly analysed the law and facts in light of the above passage from *PM* in refusing the appellant's application for separate trials on the 21st December 2020 as follows:-

> *"I'm satisfied that similar allegations are made by the three against their uncle, [appellant]. A central feature again is the allegations occur within the bosom of the family, the extended family. They all live very close to one another. It would be entirely unreal to permit a severance of counts which were dependent for their commission on that close family relationship and bond between the adults. The fact that -- the fact it's alleged that they lived very close to each other, they'd very close contact with each other and that the occasion for these offences was provided by the fact that the children were subject to their -- that contact and their care and control and dominion relevant to these offences. That interaction was the hallmark of these offences. Separate trials in respect of the allegations made by each complainant would, in my view, unduly restrict the jury's ability to assess in an open and transparent way relevant evidence concerning the role of these adults in their relationships with each other and in the light of the children and the dynamic of the family life which underpinned and facilitated the commission of these alleged offences by the adult accused. Fundamentally, the case law requires that severance and the law relating to severance must be applied in a manner that doesn't offend common sense."*

61. It is submitted that the trial judge's decision in this regard is an exercise of discretion. Prof. O'Malley is cited as authority for this proposition.

62. It is accepted that an account of one accused which incriminates another accused is not admissible against that other person however, it is pointed out that in *People (DPP) v Murtagh*

[1966] IR 361 Kenny J held that the mere fact that one accused has made a statement which incriminates another is not by itself a matter which compels the trial judge to grant separate trials.

63. Further reliance is placed on the judgment of this Court in *People (DPP) v Roche, Roche and Freeman* [2019] IECA 317 in which Kennedy J stated:-

> *"32. In order to properly exercise his or her discretion, a trial judge must assess the evidence before him or her. Separate trials will not necessarily be ordered in circumstances where the content of a memorandum of interview of one accused implicates another accused. It is always a question of discretion…*
>
> *34. As we have observed, the trial judge must exercise his or her discretion judicially, the exercise of which may serve to take either the prosecution or the accused from the risk of prejudice should parties be tried together. It is the long-standing position that mere embarrassment on the part of an accused will not be sufficient to sever an indictment. More than that is required. The central issue is that of the interests of justice, this Court will only intervene if the refusal of an application for separate trials has resulted in a miscarriage of justice.*
>
> *35.The interests of justice ordinarily dictate that persons charged with the same offences or offences arising from the same incident ought to be tried together. Leaving aside the fact that joint trials save time and expense and enable juries to be furnished with the complete picture, should each individual be tried separately, each would then be able to blame the other for the offending conduct. This cannot be said to be in the interests of justice. However, should a joint trial result in an unfair trial, this cannot be said to be in the interests of justice. Therefore, every application for the severance of an indictment must be treated with care by the trial judge."*

64. Particular reliance is placed on para 41 of that judgment in which the Court stressed that *"juries have been shown time and again to be responsible and robust and of sound common sense."*

65. It is submitted that the trial judge gave appropriate directions to the jury as regards the 2nd named accused's memoranda of interview and that juries are sufficiently robust and sensible to be able to appreciate and apply such directions.

66. It is also noted that in respect of the issue of separate trials that same would have resulted in the child complainants giving evidence on multiple occasions during their childhood.

67. In respect of the 2nd named accused's interviews, it is submitted that the trial judge's charge was crystal clear that the account of each accused did not constitute evidence against any of the other co-accused.

Discussion

68. The principles concerning separate trials are well-established. A trial judge retains a discretion to order separate trials if he/she is of the view that such is necessary in the interests of justice. Such a discretion must of course be exercised judicially, and this Court is generally reluctant to intervene in the manner in which the trial judge exercises that discretion. While the exercise of the discretion is subject to review by this Court, this Court will only intervene if satisfied that the refusal to order separate trials has resulted in a miscarriage of justice. As said by Sullivan P. in *Attorney General v Joyce* [1929] IR 526 at p. 537:-

> *"…the trial Judge may direct that they be separately tried if, in his opinion, separate trials are desirable in the interests of justice. The trial Judge has a discretion in the matter which must be exercised judicially. The exercise of such discretion may be reviewed by this Court, and a re-trial directed, if we are satisfied that a refusal to direct separate trials has resulted in a miscarriage of justice."*

69. We commence our consideration by saying that the trial judge in the present case took conspicuous care in his approach to the multifaceted and multiple applications before him to sever the indictment, whether to sever in terms of complainants or in terms of accused persons. He read the book of evidence, the transcripts of the DVDs of the child complainants and the interviews of each of the accused then before him.

70. The trial judge referred to the general background to this trial, to which we will not refer in any detail in this judgment, save to say that the three complainants are siblings, their parents were the subject of various counts on the indictment, including sexual assault, rape, sexual exploitation and child cruelty. The children's maternal uncle and uncle by marriage, (this appellant) were also the subject of sexual offending. Some of the counts of sexual exploitation concern the 1st and 2nd named accused and this appellant. The offences were alleged to have occurred therefore within the family and extended family environment, thus rendering the family dynamic of importance.

71. The real issue canvassed on appeal on behalf of the appellant concerning the interviews with the 2nd named accused wherein she refers to this appellant and we have set out that material in brief hereunder in our consideration of Ground 5 at para 87.

72. That was obviously an important factor for the judge to consider in respect of the appellant's right to a fair trial and the proper exercise of his discretion whether or not to order a separate trial for this appellant.

73. It was therefore necessary for the judge to carefully assess a separate trial was necessary in the interests of justice.

74. It is the case ordinarily that where one or more persons are charged with an offence or offences arising from the same incident or incidents, that those persons be tried together. That is in the interests of justice for good and logical reasons, to include that separate trials would enable persons to blame the other for the offending. A joint trial may give rise to potential issues, such as the issue in this appeal, that statements made by another may implicate or place an appellant in a position of prejudice in the eyes of the triers of fact.

75. However, the fact that an accused implicates a co-accused will not in itself require a separate trial, it is always a matter for the discretion of the trial judge who will consider whether the interests of justice require that persons be tried together notwithstanding a statement of one accused implicating another.

76. In the present case, the argument is advanced that the material in the 2nd named accused's memoranda of interview was such so as to severely prejudice the appellant. Moreover, that the content of the interviews and in particular the reference to this appellant handling the 2nd named accused's breast compounded the prejudice. The prejudice was then, it is said, copper fastened by the cross-examination of a Garda witness by counsel for another accused in the trial resulting in

connotations of paedophilic tendencies in the appellant. This resulted in a further application for severance.

77. The trial judge refused the applications, being satisfied that any potential issues could be addressed in his charge to the jury. In our view, he directed the jury in strong and clear terms on the legal position concerning the 2nd named accused's interviews as follows:-

> *"The other thing that you must be very aware of, and it's absolutely essential that you be aware of it, that -- and I've told you this* ***before*** *and I mentioned it before because it's important, in respect of each of the accused in the course of their interviews, you have to be -- you have to understand and bear this in mind, that if any one of them says anything against another co-accused, it is not evidence against the other co-accused. It cannot be regarded as evidence against the co-accused. It can only be regarded as evidence in their own case against them. And that's absolutely important that you understand that because there may well be in the course of an interview negative things said about somebody else and that person isn't there to challenge that at the time.* (our emphasis).
>
> *They don't have the right to question and pick up on that or put in their contribution or challenge it at the time. And it may well be that somebody who is being interviewed in that situation, and I'm not saying it's this case or any one of their cases. But they might have a reason to deflect on to somebody else. I'm not saying necessarily that's what's happening, but that's one of the reasons as a matter of principle why it's not permitted to use a person's interviews against a co-accused. These are dangerous (sic) that the courts and the law recognised and therefore it is not permitted to do that, and you won't do it. And that applies to each set of interviews, you cannot simply use any one set of interviews as evidence against any other of the co-accused.*
>
> *It applies therefore when you're considering each of the cases and you've got to be extremely careful about that and not do it*."

78. He then continued:-

> *"Again, in respect of the two, as with the two -- as with the other accused, nothing contained in [2nd named accused] or……interviews can be used against any of the other co-accused in evidence in their cases and you must be very aware of that and apply that in the course of your deliberations."*

79. Insofar as his charge is concerned, the judge directed as follows:-

> *"There are a large number of counts in the indictment laid against the accused, different numbers of counts against different accused. And you should understand in relation to those counts that each count must be treated separately.*
>
> *They are all tried together for reasons of convenience, it would have been obviously not sensible to try 90 odd counts separately. But they are to be regarded as a separate trial in relation to each accused. And you must consider the guilt or innocence of the accused, each of them in respect of each count separately in terms of whether they're guilty or not guilty of the alleged offence. And it may be that and I'm not saying -- I don't know what way you'll ultimately decide the case. But it may be that in respect of one count or other or one or more counts, you may decide that a person is guilty. That doesn't mean the balance of the counts, the other counts against them must inevitably result therefore in a guilty*

verdict.

You have to consider each separately and you must in respect of each be satisfied beyond reasonable doubt in respect of the particulars in relation to each count, that that -- those particulars have been established by the prosecution in respect of each count against each individual accused beyond a reasonable doubt. So, it's not a domino effect, guilty on one doesn't mean guilty on all. Not guilty on one doesn't mean not guilty on all. You must consider the -- each particular count separately, individually in respect of each accused. And so, in relation to the ultimate verdict that you reach, it is in effect reached in respect of each accused individually. And each accused has to be treated separately as well. "

Conclusion on Ground 2

80. In our view, the trial judge did not err in the exercise of his discretion. This was clearly a trial where the family dynamic and conduct within the family of a dysfunctional nature was central to the allegations of abuse by each of the perpetrators. To order separate trials notwithstanding the refences to the appellant by the 2nd named accused would not have been in the interests of justice. Should separate trials have been ordered, this would simply have paved the way for the mischief sought to be prevented by a joint trial; respective blaming of various accused.

81. The trial judge took the view that his directions to the jury would adequately address any potential prejudice, and with this we agree. This Court holds the strong view that juries are robust and abide by the directions of a trial judge.

82. We do not consider that the multiplicity of counts taken as a standalone argument or in conjunction with the other issues required a separate trial. There is no doubt that this trial presented challenges for all parties, not least because of the multiplicity of counts, but it was a classic case for a joint trial. The judge again carefully directed the jury to consider each count, and each accused separately.

83. In our view, it was necessary for the jury to hear the evidence of the relationships between the parties, the interactions between the adults and the children in the trial which was essentially linked with the offending conduct and provided a backdrop to it.

84. The concern that the sheer number of counts would give rise to impermissible reasoning on the part of the jury was considered by the trial judge and it is acknowledged that this in itself presents a challenge in trials of this nature. However, and fortuitously, trials involving so many inter-related accused are not frequent. More frequent is that of a single accused charged with many offences of a sexual nature concerning one or more complainants. These issues may be addressed by a trial judge in careful directions to a jury; obviously the greater the number of accused and the greater the number of counts/complainants, the more detailed the directions required.

85. The judge in the present case addressed all issues to which this ground refers in a detailed, but precise manner, thus ensuring that the appellant's right to a fair trial was vindicated. We are not persuaded that he erred in refusing the application for separate trials.

Ground 5: Failure to Exclude Portions of the 2nd Named Accused's Memoranda of Interview

The Appellant

86. The appellant asserts that the trial judge erred in law and/or in fact in refusing to redact references to his conduct in the 2nd named accused's memoranda of interview.

87. The appellant takes issue with the following:-

- Interview 2: she makes reference to the appellant and that her children may have watched his behaviour, allegedly pulling her by the breast and taking off her top.
- Throughout her interviews, she refers to the fact that the children may have learned sexual activity from being at the appellant's house.
- Interview 5: she makes reference to the appellant allegedly interfering with her daughter, B.
- Interview 5: she makes further allegations against the appellant in relation to B and in relation to both A and B.

88. It is submitted that the failure to redact these elements of the 2nd named accused's memoranda of interview caused prejudice to the appellant which could not be cured by a warning. It is argued that the appellant was placed in a wholly unfair position being tainted with allegations which were not the subject of any criminal charge and that these allegations would not have been admissible against the appellant if he had been tried separately.

The Respondent

89. The respondent sets out excerpts of the trial judge's ruling on the appellant's objections to various elements of the 2nd named accused's memoranda of interview and says the judge properly refused the applications.

90. It is submitted that the trial judge's ruling on each objection was unimpeachable. The principle that an account of one accused person which incriminates another accused is not admissible against that other person is accepted but it is submitted that there is no inflexible rule that where same occurs a separate trial must ensue.

91. In respect of her comment that the children may have watched the appellant's behaviour in allegedly pulling her by the breast and taking her top off, the trial judge ruled as follows:-

> *"It provides them with a clear understanding of the progress and dynamic of these interviews to enable them to make a decision on the evidence as to the reliability or not of what is said by [2nd named accused] under subsequent admissions. This is important because she goes from denial and deflecting blame on to others to admissions, some of which involve others. Her answers also supply part of her account and understanding of the level of engagement which she and the children had with other family members, including [this appellant], which is also referred to elsewhere in her memoranda. The answers are consistent with [this appellant's] position, that he was engaged in the lives of the [-] family, which has also been made clear from other evidence and his own interviews"*

92. In respect of the 2nd named accused's statement that the children may have learned sexual activity from being at the appellant's house, the trial judge ruled as follows:-

> *"That is part of her explanation and her denial that she did nothing untoward with the children and it seems to me the jury are entitled to hear it in full and give such weight as they think appropriate to it in her case, again subject to the warning that applies in respect of not using such material against [this appellant]."*

93. In respect of the 2nd named accused's allegation that the appellant had interfered with her daughter, B, the trial judge ruled as follows:-

> *"To say that a person who's been described as challenged might be seen as seeking to assist her focus on a serious issue, which is then discussed as set out in the questions which remain in the text, does not seem to me to be unreasonable. I see no reason for the removal of the sentence as the jury will be told the garda view in a question on the way, and the way in which it is formulated is not evidence in the case, seems to me that the important element is the answer is the important issue and once again that the jury will be told of this and that the principles in Almasi apply."*

94. In respect the 2nd named accused's allegations against the appellant in relation to both child A and child B, the trial judge ruled as follows:-

> *"I'm satisfied that the question and answer should stand. It is subject to the warning as limitations and the use of such evidence in respect of co-accused. It is what the accused said and is an admission of her involvement and provides some limited context for it, which is relevant, given the nature of the case."*

Discussion

95. This ground can be dealt with succinctly. The appellant contends that the judge ought to have ordered references to the appellant in the memoranda of interview of the 2nd named accused be redacted on the basis of overwhelming prejudice to the appellant.

96. Where a co-accused has inculpated another accused, it may transpire that the judge is required to rule on portions of such memoranda of interview implicating that accused as in the present case. Such issues are within the discretion of a trial judge who is best placed in assessing the potential evidence and how it features in the overall body of evidence. A trial judge has to exercise caution in such an application to ensure that an unbalanced version of an individual's statement or memorandum does not come about as a result of editing.

97. This Court therefore will be slow to intervene with the exercise of the judge's discretion.

Conclusion on Ground 5

98. In some instances, a judge may determine that directions and warnings may safeguard an accused's position rather than redacting an accused person's memoranda of interview. It must be borne in mind that editing may not be possible without consent. In the present case, the judge carefully considered each portion of the memoranda to which there was objection on the part of the appellant.

99. Having read the ruling pertinent to each impugned portion, we are satisfied that no error arises in the judge's determination. He considered aspects of the impugned material to be relevant and thereby admissible as some of the 2nd named accused's answers were relevant to her progress from *"denial and deflecting blame on to others to admissions, some of which involved others."*

100. Some aspects of the impugned material provided part of her explanation and denial and so the jury were entitled to hear that in complete form.

101. It was, as stated, for the trial judge to determine how best to safeguard the appellant from any perceived prejudice. He took the view that the matters could be addressed by appropriate directions and warnings which he duly gave and already quoted above.

102. We are not persuaded that the trial judge erred in refusing to exclude the material and accordingly, this ground fails.

Ground 3: Notes of the Complainants

The Background in Brief

103. The direct testimony of complainant B and C was adduced by way of their respective recordings of interview with the specialist interviewers. There were two such interviews in each instance. The issue here rests with the use of notes which were prepared by each child and used in the 2nd interview in what is said to be an impermissible manner.

The Appellant

104. It is said that the use of the notes went beyond that contemplated as an aide memoire, that the manner of use of the notes offended the rule against narrative/self-corroboration and was contrary to the basic rules of fairness.

105. While the written submission contends that the recordings ought to have been excluded, counsel confines the argument to the contention that the impugned portions ought to have been redacted and that the judge erred in failing to accede to this application.

106. In particular, issue is taken with the fact that the children read out portions of the notes during their respective interviews which counsel argues offends the rule against narrative/self-corroboration.

The Respondent

107. The respondent relies on excerpts of the ruling of the trial judge in admitting the recorded interviews of child B and C on the 4th May 2021 as follows:-

> *"A number of these submissions are based on speculation and others are simply not supported in my view on the evidence or are misconceived. There's nothing wrong with a child writing notes or looking at her notes prior to interview. There's nothing to suggest that a child who writes notes of her experience is ipso facto telling lies or untrustworthy. She is encouraged to do this.*
>
> *[…]*
>
> *In essence her need to be assisted by the interviewer to tell her story. It should not be forgotten that her distress and upset was found to be directly related to her neglect and abuse as a very young child. I am satisfied, for the purpose of this issue, beyond reasonable doubt, that this continued to affect the child and will do so in the future requiring ongoing intervention and therapy. It was necessary in my view that the interviewer used the notes to engage with her and assist her to focus on what she wanted to tell the interviewer.*
>
> *[…]*
>
> *Her testimony will be the subject of extensive cross-examination.*
>
> *[…]*

Likewise in the case of [child B's] interviews I find no unfairness in admitting his interviews having regard to the matters I have referred to and the vulnerabilities which he exhibited and the analysis of his mental state and the psychological assessments which have been referred to in the course of this ruling."

108. It is submitted that the appellant's submission that counsel was hampered in their cross-examination of B and C is unsustainable in circumstances where the recordings and all notes had been disclosed and they were free to cross-examine as they saw fit.

109. Reliance in this regard is placed on *People (DPP) v JD* [2018] IECA 232 in which this Court held that:-

"7. It is to be noted that s. 16(1) of the Criminal Evidence Act 1992 provides that a video recording shall be admissible unless the Court is of opinion that in the interests of justice, the video recording ought not to be admitted. In the case of DPP v. FE (Bill No. 84/2013), Hunt J. as quoted in the paper "Recorded Evidence for Vulnerable Witnesses, Practical Issues at Trial", delivered by Michael Bowman SC and Dr. Miriam Delahunt BL, at an Irish Criminal Bar Association seminar had said:

'[t]he use of the word "shall" in the section gives the provisions a directory or mandatory flavour, in that where the age or mental handicap qualifications are met, the relevant evidence shall then be given by the means specified in the section unless it shall not be in the interests of justice to do so.'

The Court agrees that the section, as structured, envisages that in the ordinary way, the DVD will be available to the trial Court."

110. Further reliance is placed on *People (DPP) v SA* [2020] IECA 60, a judgment of this Court, in which Kennedy J stated that:-

"48. It is important to observe that this section permits vulnerable witnesses in our society alleging sexual or violent offences to give evidence in chief by way of interview recorded pre-trial. Furthermore, the section is directory in terms, that is to say, such evidence shall be admissible, unless a court is of the opinion that in the interests of justice the video recording or part thereof ought not be admitted. Finally, it is a prerequisite for the admission of this category of evidence that the witness must be available for cross - examination."

111. Section 16(2)(a) of the 1992 Act states that a video shall not be admitted if *"the court is of the opinion that in the interests of justice, such video recording or any part thereof ought not to be so admitted."*

112. It is submitted that a court is required to consider both the interests of justice regarding the accused and the complainants and that therefore the interviews made with the aid of notes *"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."*

Discussion

113. The issues concerning the admissibility of the interviews conducted pursuant to s. 16 of the Criminal Evidence Act, 1992 were canvassed by way of voir dire and the trial judge ruled in respect of same in May 2021. The issues raised by the various accused related to the admissibility

of all or parts of those interviews. The primary focus here by this appellant rests with the use of the notes prepared by the children in copy books regarding the allegations of abuse.

114. Section 16 of the 1992 Act, as amended, is one of the provisions providing a suite of special measures in order to assist a vulnerable witness in giving evidence. Section 16 was certainly a departure from the recognised evidential route but is now very much part of our jurisprudence. Once the procedural and eligibility requirements are met, the pre-trial recorded interview is admissible per se but subject to the residual discretion vested in the trial judge to exclude part or all of the recorded material, thus safeguarding the rights of an accused person.

115. The relevant portion provides:-

"(1)Subject to subsection (2)-

(a) […]

(b) a video recording of any statement made during an interview with a member of the Garda Siochana or any other person who is competent for the purpose-

(i)[…]

(ii)by a person who is under 18 years of age (being a person other than the accused) in relation to-

(I)a sexual offence

(II) […]

(III) […]

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), 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 be so admitted.

(b) In considering whether in the interest 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."

116. Therefore, there is a presumption of admissibility of a pre-trial recorded interview pursuant to statute where the procedural and eligibility requirements are met but subject always to subsection 2 of the Act.

117. The focus of the issue in the present case is a narrow one and requires a brief consideration of previous consistent statements. First to say the Act is very clear in its terms; the videorecording shall be admissible at the trial as evidence of any fact stated therein of which direct oral evidence by him/her would be admissible. One can readily see that the Act is directory in its terms but, of course, it is confined to material which would be admissible if the person were giving oral evidence in the usual manner.

118. The general prohibition on the use of a previous consistent statement, otherwise referred to as the rule against narrative or self-corroboration is there to ensure accuracy of testimony and so that a witness cannot bolster his/her credibility if such a statement is sought to be introduced to demonstrate consistency. It is, of course, subject to several exceptions which do not form part of our considerations.

119. The argument in the present case rests on the above rule and also on the fairness of the appellant's trial given the use of the prepared notes by the two children and the interviewers in interview.

120. We have examined the transcripts of the interviews of the children emanating from the interviews with the Specialist Garda Interviewers and have had regard to the evidence of their foster mother.

121. The evidence of the foster mother is significant. It gives insight into the particular vulnerabilities of these two children, and it is against that backdrop that the application and ruling of the trial judge must be considered. It should also be borne in mind that what we are dealing with is the residual discretion vested in a trial judge to exclude portions or all of such videorecorded interviews, the judge being the person who heard the evidence on the voir dire viva voce.

The Foster Mother's Evidence

122. It is important to look at the context in which these children came to make their disclosures and were interviewed by the Gardaí. In that regard, it is necessary to look to the condition of the children when they were taken into the care of their foster parents. This of course means their mental, physical and emotional condition. One cannot ignore the environment from which they came in assessing the admissibility of the videorecordings of interview as the approach taken by the Specialist Interviewers is dictated by the level of vulnerability of the child being interviewed.

123. The children's foster mother, to whom we shall refer as Ms X gave evidence of the condition of the children when she received them into her care in April 2016. They were dirty, scared, disruptive and frightened. One child had burns and scarring on his leg, arms and face. They had no skills, such as basic hygiene skills. Child B's hair was ragged and contained dead head lice. Ms X described both children as exhibiting traumatic behaviour.

124. The involvement of the children with the Gardaí commenced in and around the 3rd July 2017. Ms X gave evidence that following this meeting, child B made disclosures to her and was upset, afraid and crying. She said both children were unsettled. She thought that this was the time when the Gardaí made the suggestion that if the children remembered anything, or wanted to write anything down, that they could do so.

125. Some days later in July, child B made disclosures to Ms X regarding this appellant.

126. Later that same month a further meeting took place with the Gardaí and the children, following which Ms X said they were nervous and upset. The meetings were with the Garda Child Specialist Interviewers for the purpose of preparing clarification statements.

127. On the 11th August 2017, both children were interviewed in the interview suite pursuant to s. 16 of the Act. Their second interviews took place on the 30th August 2017.

128. In the period between the 11th and 30th August, it seems that some concerns arose regarding the use of Facebook and photographs having been taken of a compromising nature

involving the children and adults the subject of the trial proceedings. This again caused upset amongst the children, specifically child B.

129. Following the second interview, when being driven home, Ms X said that the children were very nervous, it seems related to the Facebook situation and had been crying "*an awful lot*" to quote Ms X. They were afraid of some of the persons who were subsequently tried. In fact, Ms X gave evidence that *she* was very upset looking at the children, presumably as they were so upset.

The Copybooks

130. Questions were asked regarding the copy books in which the children wrote their notes and as to whether Ms X had anything to do with them. She gave evidence that she did not and had asked the children to keep them in their bedrooms. She stated she had nothing to do with the content therein.

The Interviews

131. The children brought the copybooks with them to the second interview. It is clear that they each read certain portions of those notes to the Garda Specialist Interviewers and were then asked questions about their allegations.

Discussion

132. All material was disclosed to the defence in advance of the trial, no doubt in the usual manner. An important factor to note regarding the use of s. 16 video recorded interviews is that the process is entirely transparent. All parties involved can see not only the questions asked in print, but also the manner of the asking, the response and the manner of response. It can be seen if a child is upset, reticent, reluctant, or afraid.

133. The evidence by way of videorecording shall be admissible subject to subsection (2), but of course the evidence must be admissible evidence in the first place, that is admissible as if the person were giving evidence viva voce, and so the normal rules of evidence apply.

134. Any witness may refresh his/her memory before giving evidence in the witness box. That means that a witness may look at the statement made to the Gardaí outside the door of the courtroom and then proceed to give evidence. A witness may not give evidence that he/she has previously made a statement which is consistent with his/her testimony, and this is the mischief now complained of by the appellant; that the use of the notes effectively breaches the rule against narrative.

135. Section 16 is a departure from the principle that a witness gives evidence viva voce. It is designed to ensure insofar as possible that a child witness may give his/her best evidence and a degree of flexibility must be utilised in determining an issue such as was before the trial judge.

136. Child B was noted to be very upset during her first clarification statement and again on the 11th August 2017 during her interview. She is asked after only 45 minutes or so whether she wishes to finish up and she takes up this option. Child C's first interview is of longer duration, in the region of some 2 ½ hours. He also opted to finish his first interview when the option was presented to him.

137. It must be borne in mind that both children were extremely young and had come from a background of appalling neglect, even leaving aside the prolific nature of the alleged sexual abuse, both in terms of the nature of the abuse and the number of alleged perpetrators.

Conclusion on Ground 3

138. In our view, it is permissible for a vulnerable witness such as these two complainants to use notes to assist them in ordering their thoughts for the purpose of interview. We do not agree with the appellant's proposition that the use of the notes offended the fundamental rule against self-corroboration. The notes were prepared by the children in an environment of which evidence was given by Ms X. They brought the copybooks with them to interview and while they read certain portions, such were quite limited. The entire purpose of the notebooks it seems to us were to enable the witnesses to focus their minds on the allegations and to enable them to provide the best account. That is within the letter and the spirit of s. 16.

139. The admissibility of the evidence must, in the case of s. 16 evidence, be considered against the background of how the children come to be interviewed in this manner. To make a statement to the Gardaí of sexual allegations is a daunting prospect for an adult, not to mind a vulnerable, young child against a background of appalling neglect and alleged abuse.

140. If there was any case for the need to marshal one's thoughts, particularly those of small children who were making allegations of widespread abuse of a physical and sexual nature, this was it.

141. We are not persuaded that the trial judge erred in deeming the videorecordings admissible. We do not see that the notes made by the complainants and the manner to which they were put to use constituted in the context of a s.16 recording a breach of the rule against narrative. The purpose of using the notes was to enable each child to focus and marshal their thoughts in particularly difficult circumstances.

142. We are not persuaded that there was any unfairness in the admission of the videorecording of interviews in the case of either child. The trial judge carefully considered all material and exercised his residual discretion appropriately in deeming the recorded interviews admissible.

143. Accordingly, this ground fails.

Decision

144. As we have not been persuaded to uphold any ground of appeal, the appeal against conviction is dismissed.