THE COURT OF APPEAL

Record No: 19/22

Edwards J.
McCarthy J.
Kennedy J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

V

B.B.

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 B.B. was convicted of one count of rape contrary to s. 2 of the Criminal Law (Rape) Act, 1981, five counts of rape contrary to s. 4 of the Criminal Law (Rape)(Amendment) Act, 1990, and two counts of sexual exploitation of a child contrary to s. 3 of the Child Trafficking and Pornography Act, 1998. On the 18th January 2022, the appellant was sentenced to a term of imprisonment of 15 years.

2. 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. Some further background to the offending and the grounds in common with this appellant are contained in the judgment of this Court entitled *People (DPP) v A.A*. (not that appellant's real initials).

3. The appellant was convicted in respect of sexual offending of B and C, his niece and nephew. He is their uncle; his sister is their mother. 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, B was aged between 6 years and 7 years and C was aged between 5 years and 6 years.

4. The complaints resulting in the conviction of the appellant were the subject matter of evidence given by B and C in video recorded interviews with Specialist Garda Interviewers

concerning incidents of sexual exploitation by way of the instruction to the children to engage with each other sexually, a s. 2 rape of B (the female child) and s. 4 rapes of C.

Grounds of Appeal

5. The grounds now relied upon are as follows:-

"1. The learned trial judge erred in fact and in law by allowing the DVD evidence in respect of [C] & [B] (two of the three child complainants) to be put before the jury;

2. The learned trial judge erred in fact and in law by (a) ruling at trial that Counsel on behalf of the Appellant was not entitled to cross-examine/put matters to a Garda Specialist Interviewer (before the jury) the fact that certain of the techniques used by Garda Specialist Interviewers during the Garda Investigation underpinning the proceedings resulted in the DVD interview evidence of one of the Child complainants to be admissible at the trial and (b) failing to give reason(s) as to why such cross-examination/putting matters could not be put before the Jury and/or heard by them.

3. The learned trial Judge erred in fact and in law by refusing to grant orders to the Appellant on foot of his Notice of Motion dated 16 November 2021 inter alia permitting and/or facilitating the making of an enquiry of the jury and/or jury foreman on foot of a letter received by the learned trial Judge from the jury/jury foreman subsequent to the completion of the issue paper in the proceedings and an order arresting the verdict of the jury in respect of Count numbers 76, 77, 79, 80, 81, 82, 83 & 84 on the list of the charges preferred to the jury for their deliberations.

5. The learned trial Judge erred in fact and in law by failing to grant the Appellant a separate trial to that of his co-accused.

6. The learned trial Judge erred in fact and in law by ruling inadmissible the expert testimony/evidence sought to be adduced by the Appellant from Dr A, Assistant Professor, School of Psychology."

6. Grounds 1, 2 and 6 are interrelated, ground 2, it is said provides context for ground 1. Grounds 3 and 5 are standalone grounds.

7. Grounds 1, 3, and 5 are grounds in common with the appellant referred to above; A.A. and have been addressed in that judgment. However, the basis for the application the subject of grounds 1 and 2 are somewhat different and requires separate consideration.

8. We propose to address grounds 3 and 5 in reasonably brief terms and the parties should refer to the judgment in *A.A.* in this respect, however, we will summarise the position in each instance below.

Ground 3

9. This appellant issued a motion seeking an order directing the foreman of the jury empanelled in his trial to swear an affidavit as to the details and circumstances of *inter alia*, bias and prejudgment in the jury room as referred to by him in a letter he wrote to the trial judge following conviction and prior to sentence.

10. The deliberations of all 84 counts against the five co-accused lasted 19 hours and 54 minutes over a period of nine days. The verdicts returned in respect of the appellant consisted of

majority verdicts. The jury further returned a unanimous verdict of not guilty in respect of one of the counts.

Submissions of the Appellant

11. The written submissions are quite broad in support of this appellant's argument that the judge ought to have embarked upon an enquiry into the letter written by the foreman of the jury. The appellant relies on this Court's judgment in *People (DPP) v JN* [2022] IECA 188:-

> "*There might be some very exceptional circumstances where further enquiry might be warranted and further evidence taking possibly necessitated …"*

12. It is said that this was an indication by this Court that there was, at the very least, a limited jurisdiction to enquire into a jury verdict in exceptional cases.

13. It is submitted that the contents of the letter from the foreman render the verdicts of the jury on all counts related to the applicant unsafe, or at the very least, entitle the applicant to be placed in a position to make fuller submissions.

14. In refusing the reliefs sought, the trial judge determined as follows:-

> *"It relates solely to the juror's personal view or perception of how his colleagues addressed, approached or considered the evidence from the start of the trial and during the course of their deliberations. The letter was clearly drafted with an appreciation of the limits that applied in discussing jury deliberations*."

15. It is submitted that this determination is unsafe for the following reasons:-

a) A finding that the evidence amounts (and is confined) to a personal view or perception can only be made where an opportunity has been given to explain, elaborate or test the evidence referred to.

b) The foreman's own appreciation or otherwise of the limits that apply to discussing jury deliberations is irrelevant.

16. It is acknowledged that the Irish position is as was laid down in *People (AG) v Longe* [1967] IR 369 that the nature of the deliberations of a jury in a criminal case should not be inquired into. It is further acknowledged that the Supreme Court decision in *People (DPP) v Mahon* [2019] 3 IR 151 is firmly on the side of restriction of enquiry into matters of deliberation within a jury room. However, counsel contends that while prejudice or impropriety occurring within a jury room is unimpeachable, if such is in fact external, giving rise to a potential injustice, then an enquiry may be justified.

17. The essence of the submission is that where a convicted person discovers the prospect of bias or impropriety in his trial, he/she is in no different a position than if he had discovered it from the bailiff or an external source. Counsel relies on a particular portion of the letter which he felt reached the threshold for an enquiry; that is an indication or a sense of the juror that the jury employed a reverse burden of proof when considering the appellant.

18. It is submitted that in the present case, the contents of the foreman's letter would cause a reasonable and fair-minded observer to consider members of the jury had acted contrary to their instructions. At the very least, it is submitted that the content of the letter raises a question mark as to the soundness of the jury's verdict which warrants some form of investigation by the Court.

19. In terms of the finality of the verdict, the applicant relies on the following quotation from *R v Pan* [2001] 2 SCR 344:-

> *"That rationale … inevitably invites the question of why the finality of the verdict should prevail over its integrity in cases where that integrity is seriously put in issue. In a legal environment such as ours, which provides for generous review of judicial decisions on appeal, and which does not perceive the voicing of dissenting opinions on appeal as a threat to the authority of the law, I do not consider that finality, standing alone, is a convincing rationale for requiring secrecy*."

20. It is again noted that an investigation may be permitted into irregularities that were extrinsic to the deliberations. *R v Charnley* [2007] 2 Cr App R 33 and *R v Young* [1995] 2 Cr App R 379 are cited in this regard. It is submitted that the foreman can be directed to address what happened outside of deliberation sessions to elaborate on the content of his letter.

Submissions of the Respondent

21. The respondent places reliance on the *Longe* case. It is submitted that no communication with a juror after trial has been permitted in Ireland for good and substantial reason.

22. It is submitted that this Court could not realistically reach a conclusion as to the safety of the verdicts returned based on the contention, even in sworn form, of one juror alone as other jurors, if requested to testify as to their recollections of the deliberations might provide testimony at odds with his letter.

23. The importance of the secrecy of jury deliberations is emphasised. The respondent draws attention to the "no impeachment rule" as set out by Charleton J in delivering the judgment of the Supreme Court in *People (DPP) v Mahon*.

24. It is acknowledged that an investigation may be permitted into irregularities that were extrinsic to the deliberations as long as there is no inquiry into the deliberations themselves; ref: *People (DPP) v McDonagh* [2003] 4 IR 417 and *R v Brandon* (1969) 53 Cr App R 466. This is distinguished from the present case where there is no evidence or even suggestion of extrinsic influence or interference whatsoever in the jury deliberations. As such, it is submitted that there is no basis on which there can be an enquiry into what transpired in the jury room.

25. The finality of jury verdicts is emphasised. The following from Lord Rodger in *R v Mirza* [2004] 1 AC 1118 is relied on:-

> *"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."*

26. It is noted that there is a strong public interest in the finality of jury verdicts as, in the absence of such a rule, criminal proceedings could become extremely protracted, especially with the possibility of retrials.

27. The respondent places reliance on the *JN* judgment which 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 excerpt from *Mirza* was 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*."

And:-

> *"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."*

28. It is submitted that the juror letter in the present case does not justify any further enquiry.

Discussion and Conclusion

29. We refer to our discussion of this issue at para. 27 of the judgment in *A.A.* We do not find reason to depart from the views expressed therein. We consider the particular portion of the letter to which counsel refers to be similar to the reference to the letter made by counsel in *A.A.* The thrust of the letter stems from a sense or a feeling on the part of the foreman. All concern proceedings within the jury room in respect of which no mention was made at any stage during the trial or during the delivery of each verdict to the trial judge.

30. We are not persuaded by this argument and accordingly this ground fails.

Ground 5

31. This ground is not being pursued with vigour and there is reality to that approach. We have stated our reasons for refusing this ground of appeal in *A.A.* and that judgment should be referred to for an analysis of this ground.

We briefly set out the written submissions as follows.

Submissions of the Appellant

32. Counsel for the appellant highlights that the trial consisted of 84 counts and presented what is submitted to be an impossible overload of information to a jury. It is submitted that the net result of the joint trials in this case was that the appellant suffered what is termed a group damnation. It was submitted at the pre-trial stage that there was a very serious risk no matter how it was warned against of there being a generational family sexual abuse issue such as would reverse the burden of proof to some degree with regard to the appellant and that this was a fundamental unfairness in his trial.

33. Counsel clarifies that, in essence, his complaint under this ground is that the spotlight became more intense on the appellant when his partner and the complainants' grandmother were discharged from the indictment such that his trial ought to have been separated from the other accused.

Submissions of the Respondent

34. It is submitted by the respondent that the trial judge's ruling was entirely within his discretion and based on the principles as set out in the relevant authorities in this jurisdiction.

35. It is further submitted that the judge gave careful and proper directions as to the weight of the evidence to be attached in respect of the appellant. Moreover, that the severance sought by the appellant would have required the child complainants to provide evidence at multiple trials and resulted in a position where the accused could seek to evade responsibility by blaming one another.

Discussion

36. We have analysed the issue of separate trials in the judgment given in *A.A.* It is readily apparent that the trial judge directed the jury in very clear terms of the evidential value of an accused person's statement and the importance of considering each accused and each count preferred against each accused on a separate basis. Moreover, he warned the jury to avoid the *"domino effect"* as follows:-

> "*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.*"

37. On the second day of his charge, the judge repeated his direction to the jury on the importance of considering each count separately:-

> *"These important principles are the presumption of innocence and the important understanding that you must have that the burden is on the prosecution to prove the case beyond a reasonable doubt and if there is a reasonable doubt in respect of any count on the indictment, which must be separately considered, well then you acquit of that particular count. So, the prosecution bears the onus of proof in terms of establishing each element of the offence as I have defined it for you on Friday, in respect of each count and if they fail in that you must acquit. If they succeed in respect of that beyond reasonable doubt, then you convict and if there's any reasonable possibility of innocence in respect of any count you acquit. They're the principles and that's the overriding principle that you must adopt to each count on the indictment and each count should be considered separately."*

38. The judge further reminded the jury of the legal principles on the third day of his charge:-

> *"Now, in respect -- again, to remind you, that in respect of each count on the indictment and each accused, you have to consider each count separately. You have to consider have the prosecution established the facts, the ingredients of the offence in respect of each offence laid on the indictment against each accused individually, have they established each count beyond a reasonable doubt? It's a matter entirely for you. There are arguments made as to why it is said that they have not. There is evidence there which you have to*

assess and consider whether they have or not and if there's a reasonable possibility consistent with innocence you acquit. So, they're (sic) just to remind you of the ground rules, it's as well to do it from time to time. It's highly important and it must be your guiding principle through all of this."

39. On the same date, the judge again cautioned the jury on the impermissible line of reasoning as follows:-

"Now, a corollary of that is, of course, that one can find an accused guilty on one count and not guilty on another count. It's not a domino effect. Just because you convict on one doesn't mean you convict on another. The other way round also applies. Just because you acquit on one doesn't mean that you acquit on the other or the others. Each has to be considered separately."

40. On the fifth day of his charge, the judge reminded the jury that each accused should be treated separately, emphasising as follows:-

"Now, I'm going to move now to the issue of -- essentially the issues that were raised in closing submissions because essentially each accused, and not only are they accused of separate counts on the indictment, but you also have a situation where each is, of course, separately represented and each has a separate case to present to you and has done so through their counsel and in respect of [the appellant] through his evidence."

41. And again:-

"As I said before, counsel don't decide this case, you do and -- but they're entitled to make the submissions and they're presenting their clients' case and they're doing so separately because each client -- each accused is represented here separately and has a separate case in his -- to be addressed and then you have the -- and each has separate counts against them which must be established if the prosecution is to succeed in respect of each count beyond reasonable doubt."

42. On that same date, as the judge was concluding his charge, his final remarks to the jury again referred to the issue of separately considering each accused person:-

"Each of those counts is a separate trial. In order to convict in respect of any one count, you have to be satisfied beyond reasonable doubt of the particulars set out in that count and that the ingredients of the offence alleged in respect of that count have been established in terms of the physical facts and the state of mind required, beyond a reasonable doubt. If there's any reasonable doubt the accused, on any particular count, has to be acquitted. If there's any reasonable possibility that they're innocent, they have to be acquitted and that's your duty. If there's -- if you find them guilty on the facts beyond reasonable doubt, well that's what you must do, that's your duty also. Every count, therefore, is to be treated as a separate count. Every accused's case should be considered separately in the sense that you have the separate submissions and the separate representations and cross-examinations conducted, but then there's the overarching evidence as well. So, all of the evidence in the case is important to consider in respect of the counts laid before you."

43. While the argument is touched upon that the acquittal by direction of two co-accused had the effect of shining a spotlight upon this appellant, it is acknowledged that no further application was made to sever the indictment following that ruling. An application for a direction was made

which highlighted this aspect of matters. However, that is insufficient, and we may operate on the assumption that the highly skilled and experienced counsel representing this appellant would undoubtedly have moved such an application if it was felt necessary.

Conclusion

44. We do not see any reason to depart from our decision in *A.A.* on this ground of appeal. The ground and submissions are confined to seeking a separate trial from the co-accused. This was a trial which called out for the accused to be tried together for the reasons stated by the trial judge.

45. The above extracts from the transcript demonstrate the lengths to which the judge went in order to ensure a fair trial for each accused. The fact that two accused were acquitted by direction of the trial judge is simply one of the hazards of a joint trial but does not in and of itself render a trial unfair.

46. The trial judge's charge was absolutely clear in terms of separate consideration for each accused and while a submission is made that the proliferation of accused rendered the trial unfair, that is not substantiated when one views the careful and repeated directions of the trial judge.

47. Accordingly, this ground of appeal fails.

Grounds 1 & 2

48. Counsel for the appellant contests the admissibility of the recordings of interviews with B and C. It is contended that the totality of the appellant's complaints; alleged breaches of the Good Practice Guidelines, the manner in which the interviews were conducted and the context in which the appellant came to be named by B and C should have caused the judge to exercise his discretion to refuse to admit the interviews pursuant to s. 16 of the Criminal Evidence Act, 1992.

49. Ground 6 is linked to these grounds in that it is said that the evidence of Dr A ought to have been permitted. It is submitted that her evidence would *inter alia* have assisted the jury in determining the reliability of the process engaged in by the Specialist Interviewers. In particular, that she would have offered an opinion that the repetitive nature of some questions asked would have served to reduce the reliability of the answer elicited.

50. The appellant's arguments under these grounds will be outlined below under the following three headings where it is said the trial judge erred:-

- Breaches of the Good Practice Guidelines
- Background to the Naming of the Appellant
- The Manner of the Conduct of the Interviews with the Children

Submissions of the Appellant

Breaches of Good Practice Guidelines

51. It is submitted that the use of pre-prepared notes by the child complainants during the course of the interviews, repetitive questioning and the use of closed questions amounted to breaches of the Good Practice Guidelines 2003.

52. The Good Practice Guidelines were published for the purpose of assisting *"those making a video recording of an interview with a complainant where it is intended to submit the recording as evidence at the trial of the offence in accordance with section 16(1)(b) of the Criminal Evidence Act, 1992."*

53. In respect of the use of notes, it is submitted that these were used as "prompts" rather than "props" within the meaning of the guidelines and that they facilitated the naming of the appellant

by B and C as a potential perpetrator of abuse in circumstances where the complainants had not initially named him in their first interviews.

54. Particular issue is taken with the fact that the complainants were permitted to read their notes into the record of interview. It is submitted that this offends the rule against narrative/self corroboration.

Background to the Naming of the Appellant

55. The background to the preparation of notes in copybooks by each of the two complainants is set out in the judgment of this Court in *A.A.* with particular reference to the evidence of Ms X, the foster mother (not her real initial.)

56. The period between the first specialist garda interviews with the complainants on the 11th August 2017 and the second specialist garda interviews on the 30th August 2017 is referred to by Mr Devally SC as a "*chaotic period*" with particular reference to a period in late August.

57. It is emphasised by the appellant that he was not named by the child complainants until the second interviews and therefore what occurred within this time period was relevant in providing the context in which he was brought into the case.

58. It is outlined that following the first interviews, revelations came out that there was a fear that B and C may have been in contact on their iPads via Facebook with their sibling, A, (one of the complainants) their parents and this appellant. There was a suggestion that the alleged contact with their parents and the appellant was of an intimidatory nature. It is highlighted that during this period, on the 23rd August, A went missing from his foster parents' home and subsequently alleged that he was instructed by his father to do this. The foster parent of B and C gave evidence that their mother, this appellant's co-accused had contacted her via Facebook with a message indicating that she knew where she lived.

59. It is submitted that it is significant that B and C were under the impression that there were Facebook messages emanating from this appellant of an intimidatory nature. Mr Devally says that B and C's state of mind during the period between interviews was highly relevant in light of the fact that in the 30th August interviews the children were permitted the use of their pre-prepared notes.

60. It is further submitted that it is significant that the video link evidence given by A at trial was exculpatory of the appellant whereas B and C's interviews which were pre-recorded in 2017 had implicated him in the offending. Mr Devally says that this contrast is illustrative of the dangers of which he complains in relation to the use of notes in B and C's interviews.

The Manner of the Conduct of the Interviews with the Children

61. In respect of the questioning, it is submitted that the interviewers repeatedly asked closed questions which were in breach of the guidelines and that this gave rise to a real risk of an unfair trial.

62. Particular issue is taken with the fact that Garda O' S repeated the phrase *"[The appellant] put his private into my private"* in interview with B on many occasions and did not ask any open questions about this allegation which originated from B's notes.

63. Reliance is placed on para 3.40 of the guidelines which provide that:-*"persistent repetition of a question may lead a complainant to give an answer that he/she believes the interviewer wants to hear."*

64. Further reliance is placed on the proposed testimony of Dr A to the effect that the repetition of questions without the explanation of why the answer given was wrong or insufficient reduces the reliability of the answer given. This proposed testimony of Dr A was deemed inadmissible which is dealt with below.

Cross-Examination of Garda O'S

65. It is submitted that the trial judge erred in refusing to allow the appellant to cross-examine this witness in the presence of the jury in respect of the methodology and techniques used by her to highlight their asserted criticisms of the interview process.

66. Counsel for the appellant proposed the following aspects that they wished to put to Garda O' S in that the combination of the following factors gave rise to uncertainty in what the complainants were saying had been done to them by the appellant. They set out these factors as follows:-

a) It was only in the second video-recorded interview (the third interview including the clarification interview) in the case of each complainant, that the complainants said that the appellant had committed criminal offences of a sexual nature.
b) The complaints against the appellant coincided with the use that was made by the Specialist Interviewer, of notes made by each complainant.
c) These notebooks were written in an uncontrolled environment whilst in the homes of their foster parents and were contrary to, and certainly not in accordance with the Good Practice Guidelines.
d) Both [co-accused] and [co-accused] were the subject of directed acquittals on foot of direct evidence under cross-examination that the complainant was not sure of the allegations they had made. The evidence that was undermined by this testimony had been given in a specialist interview arising from a diary or notebook entry.
e) The evidence of [A], under cross-examination, was that his complaints against the appellant were incorrect and should properly have been against [A.A.]. Again, this was in a context where the contradicted complaint against the appellant had been made in the context of a notebook entry.

67. This application arose in the course of the cross-examination of Garda O'S when prosecution counsel objected to the line of questioning being pursued by the accused's counsel. Counsel submitted as follows:-

> *"This is necessary information, Judge, very important to my client. It is on this basis, three DVDs were made, one each in respect of the children, in which they were armed with written documentation generated under certain circumstances which will emerge. Out of those three, it appears that four allegations of sexual assault against [complainants' grandmother] have, in effect, foundered under cross-examination and they first emerged in that handwriting. Four allegations against [appellant's partner] appear to be questionable at this point, or at least expressed by her as being unlikely, by [B], I beg your pardon, and by [C]. I think in her terms that she didn't remember that [appellant's partner] was really involved. In terms of [C] who had written them down and read them out, that he felt it was probably wrong. That's the evidence in the case, as opposed to the notes."*

68. Counsel made a final submission as outlined below which was followed by the ruling of the trial judge which it is submitted essentially prevented the suggestion that techniques and methodology gave rise to uncertainty in the evidence and confined the cross-examination to pointing to contradictions in the evidence of the complainants and the fact that guidelines were not followed:-

> *"MR DEVALLY: I don't wish to transgress. However, Judge, this is a witness who has explained that the welfare of children is at the heart of everything she does, which I actually think is an honest assessment in her own view of what she's doing, but what she has done, which we know from previous hearings, is unusual, in encouraging these notes and allowing them into the interview suite has, in effect, inadvertently caused [A] to give live evidence.*
> *JUDGE: No, I'm not satisfied that you should go that far.*
> *MR DEVALLY: Very good.*
> *JUDGE: And I'm not going to allow that. What I can understand is that you are indicating to the witness that there is a process that is appropriate that has led to a -that has -- I mean, that has given rise to a situation where there is a -- the internal conflict in the evidence which has been given, between the evidence given and what was said on a previous occasion and you're allying that or lining up that with the introduction of a process which emanated from a use of notes that is not contemplated by the guidelines.*
> *MR DEVALLY: Yes, I'll stick to that.*
> *JUDGE: That seems to me to be appropriate."*

69. It is submitted that the trial judge refused the proposed cross-examination on the basis that it would otherwise be a collateral attack on the ruling under appeal at Ground 1 above.

70. It is submitted that this is an error in law and in principle as there was no such attack and the specific procedural context in which the evidence of complaint of sexual misconduct against the appellant arose was of fundamental relevance and significance to the appellant's defence.

Submissions of the Respondent

Breaches of Good Practice Guidelines

71. It is submitted by the respondent that the guidelines are exactly that, guidelines. They are cited by the respondent as follows:-

> *"'[The Guidelines] should not, therefore, be used in isolation but rather as a resource to be added to knowledge gained from training and the practitioners own expertise. In addition, care should be taken not to assume that these Guidelines provide a universal prescription: each complainant is unique and the effective interview will be one which is tailored to the complainant's particular needs and circumstances."*

72. Further along they provide (emphasis added):-

> *"(xi) THESE GUIDELINES ARE ADVISORY, NOT MANDATORY- It is a matter entirely for the court to decide whether a video recording is admitted as evidence. The fact that a video recording does not comply with these Guidelines should riot (sic), of itself, affect its admission into evidence by the court. On the contrary, it was the clear intention of the Oireachtas that such video recordings should be admitted unless, in the opinion of the judge, to do so would be contrary to- the interests of justice. The Guidelines are,*

therefore, advisory but should be followed whenever practicable to try to ensure that a video recording will be acceptable in a criminal court. Therefore, while we recommend that the principles stated in these Guidelines be followed in all instances where it is decided to record a complainant's evidence, we recognise that all aspects of the Guidelines may not be appropriate in every case. In other cases, a complainant's account may have been video recorded for purposes other than criminal proceedings (e.g. civil proceedings or therapy). The question of whether such video recording, may be tendered in evidence under the Act is a matter for the court to decide."

73. Counsel does not accept that there was a breach of the guidelines but says that if there was, the guidelines cannot affect the Oireachtas' intention that such video recordings should be admitted unless, in the opinion of the judge, to do so would be contrary to the interests of justice.

74. Reliance is placed on the trial judge's ruling on the interviews. It is submitted that the judge made a finding of fact that the notes were not used as pre-prepared statements and that they were in fact used as an aide memoire and that this was necessary given the background of the children, having watched the interviews.

75. It is the respondent's position that the trial judge correctly applied the law, that he made findings of facts which were open to him and that these findings allowed him to apply *People (DPP) v SA* [2020] IECA 60 to say that the use of the notes was a proportionate use in all of the circumstances.

76. Reliance is placed on *SA* as follows:-

"67. We are not satisfied that the material was in some way a pre-prepared statement of her evidence or that the complainant merely repeated a script which had been previously prepared by her or with the assistance of others. The material was used in order to assist her in discussing very difficult issues, similar to an aide memoire.

68. By virtue of the use of s.16 of the 1992 Act, the interview process is entirely transparent. The use to which the notes and drawings were put is apparent to all. The demeanour of JE and the approach adopted by the specialist interviewer was visible to everyone involved in the trial process.

[…]

72. It is certainly so, that the use of the drawings, notes and letters was unusual and not one which is expressly contemplated by the Good Practice Guidelines, but one must not lose sight of the fact that the specialist interviewers were dealing with a nervous and scared child. The use of this material was at all times measured and circumspect with due regard for the anxieties and vulnerabilities of the witness and was within the letter and the spirit of s.16.

73. The Gardai were confronted with a scared and nervous child which presents particular challenges for a specialist interviewer. It is clear that the child was reluctant to speak about certain issues, specifically the allegations concerning the appellant. A degree of flexibility must be afforded to specialist interviewers in circumstances such as those that presented themselves."

77. It is submitted that the fact that the judge deemed child A's interviews inadmissible is instructive of how he approached his task.

Background to the Naming of the Appellant

78. It is submitted that the manner in which the appellant came to be named in the case was put before the jury by counsel for the appellant during the trial and that that was the appropriate place for those matters to be ventilated and decided upon. It is submitted that this was not an admissibility issue but one going to the weight to be attached to the credibility of the children.

79. Reliance in this regard was placed on counsel for the appellant's cross-examination of the child complainants. C was cross-examined as follows:-

"Q. Do you remember is [the appellant] related to you?

A. Yes, I think so.

Q. So, you think so, that's fine. Do you know whose brother or he might be that makes him a relation to you?

A. No.

Q. When you remember back to him and [appellant's partner], I know when you're only seven or eight it's really hard to say how old somebody it, is it?

A. Mm hmm.

Q. Sorry, sorry. Was [the appellant] as old as your then Mum and Dad, [mother and father], or was he younger than them?

A. I think he was older.

Q. In all the meetings with [Specialist Interviewers], including the two films, okay, so that's maybe four or five, you described some bad things that maybe [appellant] and [appellant's partner] are included in doing, do you understand that ...?

A. Yes.

Q. You make those statements, you say them in the last interview, the second film; do you understand that?

A. Yes.

Q. It's a hard question and if you if you just can't figure it that's why [intermediary] is there, okay. Do you know why you didn't say anything about them in the first DVD or the earlier meetings?

A. Probably because I didn't think about them in the first DVD

[...]

Did you receive text messages?

A. Yes.

Q. Do you remember anything about them?

A. Yes.

Q. What do you remember?

A. I think [A] messaged [B] to -- on the tablet to run away and then I think [A] ran away and then I think, I don't know, I think -- I think [the appellant] found [A] in a field and then he gave him some pills to make him fall asleep in the car and then [B] was told to run away on Thursday and I was told --no, [B] was told to run away on Tuesday and I was told to run away on Wednesday or Thursday.

Q. And was that by messages you got those instructions?

A. Yes.

Q. Who sent them?

A. [A] did.

Q. And did anybody else message you, that you can remember?

A. No.

Q. And that story of [the appellant] giving pills to [A]?

A. Yes.

SPEAKER: Sorry, can you ask that again, we just missed the last part of that sentence.

Q. MR DEVALLY: Sorry. You mentioned to me there, [C], [A] was found in a field by [the appellant] and given medicine or pills?

A. Yes. I think [the appellant] messaged [A] to run away into--like, I don't know, to run away to some field and he would find him there. I think he gave him pills to make him fall asleep. I think

Q. Sorry, [C], what I want to know is where did you-- how did you learn that?

A. I think [A] messaged [B] about it and [B] told me about it.

Q. And do you--this is hard, if you don't know it's fine, did you get that information before the second film?

A. No, I don't think so."

80. Counsel for the respondent opened the transcript of evidence given by B and C's foster mother, Ms X, during a voir dire on the 25th March 2021 before this Court. He noted that Ms X gave evidence that the appellant was being mentioned by C in relation to sexual wrongdoing on the 24th August 2017 before his second interview.

Cross-Examination of Garda O'S

81. It is the respondent's position that the appellant did in fact extensively cross-examine Garda O'S in the presence of the jury. Her cross-examination by counsel for the appellant is quoted extensively in the respondent's written submissions. The following is of relevance with emphasis added by the respondent:-

"Q. Mr Devally: They were written at a time different to the interview without any of the preparations that are at length described in the guidelines; is that right?

A. Judge, these notes were written by the child. When we met the child we said to her if you remember things if you want to make a note of them, if they'll help you, you can write it down. This child came to the interview with those notes. To me, these were notes that the child made when she started to remember stuff and she wrote them down and she brought them to the interview.

Q. I appreciate that, [Garda O'S], but what I'm suggesting to you is that by enabling or inviting these children to write up and then bring in their notes and then telling them to read an allegation contained in that note, all of the careful guidelines, rapport, ground rules, free narrative account, questioning, open ended questions, specific yet non leading questions, do not take place. You simply hear what has been written on a previous occasion and go into focused questioning; isn't that right?

A. No, Judge. Judge, the child in an ideal world it's one disclosure, one incident and there you go through your phases. This was multiple incidents. I couldn't go through rapport and closed questions in all those stages for every incident that these children were

disclosing. There was multiple for each adult that was disclosed. I didn't go through rapport for each person. I didn't go through the whole process. She wrote out she read out her piece and I got as much information as possible on each occasion as you saw on the DVD.

Q. Well, with respect, [Garda O'S], the guidelines do not call for building of rapport and so on for each accused, it is for each interview; isn't that correct?

A.. Yes, Judge.

Yes. So, I'm not suggesting you should do it for each named person but this interview, insofar as it effects my client, there is some rapport being built, I agree, but by causing her to read an allegation naming him, made on a different occasion in handwriting, possibly in private, there is no demonstration that it is careful, spontaneous and guarded in the way the practice guidelines suggest it should be because you weren't there when it was written; isn't that right?

A. I wasn't there. Judge, these notes were to assist the child in remembering alleged incidents that had happened to her when she lived at home. She went through each one. This child, it was extremely traumatic for her. She had done her first interview. She came back with the notes and they assisted her in remembering all of the alleged incidents. It wasn't that there was one or two. Each incident that she read out was dealt with individually and as much information as possible was obtained about that alleged incident.

Q. The section before the interview in preparation, as you concede, omits entirely the prospect that the child be asked or encouraged or given an option of bringing in notes prepared by them. Do you think that's a mistake and that it should be allowed or it should be guided

A. Judge, these are guidelines.

Q. Do you think the guidelines should be updated to include what you and [other Specialist Interviewer] do?

MR CONDON: This is beyond the scope of the jury now at this stage.

MR DEVALLY: I'll turn to another feature, and it won't be as long, [Garda O'S].”

The Good Practice Guidelines

Discussion

82. It is fair to say that the focus of the appellant’s oral submissions concerned the use of the notes made by child B and C in their respective copybooks. Their foster mother gave evidence that the children kept these books in their bedrooms, and it seems the notes were made at some point after contact with the Gardaí and were not produced until the second interview in the interview suite.

83. Clarification statements were taken from both children on two dates in July 2017. It is clear from the first clarification statement with child B on the 3rd July 2017, that following a general conversation with her about her family, she became very upset on being asked as to whether something occurred, she did not answer and again became very upset. Four questions were asked of the child.

84. When child C's clarification statement took place on the same date, he did not answer when asked whether anything had occurred that he did not like (aside from a brother pushing him). He indicated that his parents had asked him not to speak to the Gardaí.

85. Clarification statements are taken for the purpose of clarifying that there is in fact a complaint being made. It is clear from the evidence that child B became very upset when she was first interviewed on the 11th August 2017. She was asked very few questions, but when asked if something happened, she did not answer, remained silent for a period and became very upset.

86. Both children were interviewed on the 11th August 2017 and were again interviewed on the 30th August 2017 when they brought their notebooks with them. The context of the interviews and the approach of the interviewers must be viewed in light of all the background to the case which was unusual to say the least.

87. These were children who, it is apparent from the evidence, had been severely neglected. Their condition on being taken into foster care is testament to that. The trial judge, in his charge to the jury, set out that evidence in some detail and it makes for very unpleasant reading. Not only were the children neglected but one cannot disregard the kind of environment which led to such neglect; that is a matter of common sense. Not only was neglect an issue, but, in addition, the allegations of a sexual nature were broad both in terms of alleged perpetrators and activity. This was the backdrop to the interviews with these two young children.

88. Having observed the above, s. 16 of the Act of 1992 is clear in its terms. Evidence is only admissible if it would be admissible in the ordinary course of oral hearing. The issue raised here is that the use of the copybooks in conjunction with alleged breaches of the guidelines and the process of interviewing, against the background of how this appellant came to be named all point towards an error on the exercise of his discretion by the trial judge.

The Good Practice Guidelines and the 1992 Act

89. In the introduction section to the guidelines, it is stated that the primary purpose of the guidelines is *"to assist those making a video recording of an interview with a complainant…"*

90. That is the stated purpose. Paragraph (XI) states that the guidelines are advisory, not mandatory and that it is entirely a matter for a court to determine admissibility. That paragraph goes on to say:-

> *"The fact that a video recording does not comply with these Guidelines should not, of itself, affect it's (sic) admission into evidence by the court."*

91. The 1992 Act is, again, crystal clear, there is a presumption of admissibility of such recordings where conditions of eligibility to give such evidence are met. The witness must be available for cross-examination. Such a recording is admissible unless the court is of the opinion that, in the interests of justice, the recording ought not to be admitted and in the exercise of the residual discretion to exclude the recording, a court must look to all the circumstances which include a risk that the admission of the recording will result in an unfairness to an accused.

92. Such video recordings of interviews are out of court statements and therefore are a departure from the normal rules of evidence in that they are technically, in any event, hearsay. Therefore, the admission of material garnered under s. 16(1)(b) is an exception to the rule against hearsay. However, the witness is available for cross-examination and the contents of the recording

may be challenged in cross-examination. The distinction between oral evidence in court and video recorded evidence, as stated by Mahon J. in *People (DPP) v TV* [2017] IECA 200 essentially *"evaporates ..when the evidence adduced in both processes are subject to cross-examination by lawyers…."*

93. An important observation by Mahon J. in *TV* relates to the nature of this evidence when he says that the recorded evidence is:-

> *"unsworn information elicited with the assistance of trained interviewers dedicated to the task of facilitating a would be child witness to tell his or her story in circumstances which would otherwise make that process difficult, impossible or otherwise unsatisfactory."*

94. The notes played a part in the interview process. How those notes came to be prepared was set out in the evidence of Ms X. It is the position that evidence of previous consistent statements is inadmissible as a general rule, (subject to exceptions), but the context of the admission of the recordings where the notes were utilised cannot be ignored.

95. The section is there to permit vulnerable persons who fall within the eligibility criteria to give evidence in this manner. That is the purpose of the section. While always having regard to the fair trial rights of an individual, the section is mandatory in its terms but subject to the terms of subsection 2. That subsection implies in and of itself a level of flexibility in that a court in considering whether in the interests of justice, the recordings ought not to be admitted must have regard to all the circumstances, which includes any risk of unfairness to the accused, but in that assessment all the circumstances must be examined. That includes, in our view, the background to the taking of the video recorded unsworn statements.

96. The rules of evidence cannot be ignored, but it must be borne in mind that s. 16 is a departure from the normal rules of evidence in the first instance. However, the section provides at subsection (1)(b) that the recording is admissible of any fact therein of which oral evidence would be admissible and that the witness must be available for cross-examination. Therefore, the rules of evidence are applicable but in exercising the residual discretion, and in looking to all the circumstances, a degree of flexibility must be engaged. In this respect, we are satisfied that the trial judge did not err in finding that the use of the notes was in order to assist the children in focusing on the events in issue. That such focus was necessary is understandable when one looks to the background circumstances giving rise to the allegations. We find no error in the judge's ruling that the notes in fact constituted permissible aide memoires to assist them in their complaints at interview.

97. A further fact to be noted is that such interviews are, by their nature, entirely transparent; one can see the witness' response to questions and the demeanour of the witness.

98. Insofar as child B is concerned, the trial judge *inter alia* ruled as follows:-

> *"The suggested unfairness in asking her to refer to and read out elements of her notes ignores the central significance of her evident distress and crying when dealing with these matters, especially in the first interview, and the trauma which [Garda O'S] said she demonstrated at the commencement of the second. 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. I reject the characterisation of what happened as simply reading out her notes as evidence. It was part of a detailed and fairly conducted process. It was an approach adopted by the interviewer which was careful and necessary in difficult circumstances and allowed the interviewer to explore, in considerable detail, what she wanted to tell them by using the limited materials set out by the child in her notes. It was most certainly not a ploy in nature or effect to avoid the application of the hearsay rule to the evidence to be tendered by way of DVD at trial. Its purpose was entirely proper and fair to the child and the witness. Her testimony will be the subject of extensive cross-examination."

99. Earlier, the trial judge had found:-

"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 factor telling lies or untrustworthy."

100. As can be seen, the judge referred to the child's distress and upset related to her neglect and abuse as a very young child and importantly said:-

"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."

101. Insofar as child C is concerned, the judge considered the entirety of the position and the material before him and said:-

"It seems to me that this interview proceeded with an open narrative with appropriate questions prior to the introduction of the notes which [child c] made and brought with him. Clearly the interviewer was seeking clarity and detail as to the allegations which had already been made in opening questioning in the earlier part of the interview and tried to facilitate that by reference to his notebook. She also used the notes as an aid to explore matters which he had described to some extent with a boy who was eight years old at the time. Their use enabled the interviewer to move the interview along by providing the child with that with which he was very familiar, his own note, and thereby explore the detail of the allegations already set out by the child in the earlier part of interview. In that she was success. As stated earlier this interview was taking place when he was being placed under what I consider to be significant pressure by his father and uncle [the appellant] not to reveal matters. He was a child with all the vulnerabilities and disadvantages described in [Dr H's] report and the evidence which I received. I consider this second interview and the use of the notes made established to my satisfaction that [Garda O'S] was seeking to explore the detail and obtain optimal clarity in very difficult circumstances from a very young and troubled child."

102. He ultimately found:-

"Likewise in the case of [child c'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."

Conclusion on Alleged Breaches of the Guidelines

103. It is clear from the Good Practice Guidelines that each complainant should be treated as an individual, obviously, one size will not fit all. The Guidelines provide advice and guidance, they do not require rigid adherence, an interview must be adjusted to ensure that a witness can give their best evidence. We are not persuaded that the judge erred in his determination in ruling:-

> "*I do not consider that any of the suggested departures from the guidelines undermined the overall efficacy of the interview in seeking and obtaining reliable material from the child in an unfair way.*"

104. Nor are we persuaded that there was in fact a breach of the guidelines. The interviewers are entitled to adjust the approach and the manner of interview in order to meet the unique needs of each child in an effort to give his/her best evidence. This does not mean that the rules of evidence are ignored, it simply means that an element of flexibility must be taken by the interviewers in interview and that the entirety of the circumstances must then be examined by the trial judge to determine whether any unfairness will be caused to the appellant if the interviews or any part thereof are admitted. We cannot find an error in the trial judge's approach.

Background to the Naming of the Appellant

Discussion

105. This aspect of the within ground may be seen in conjunction with the following issue regarding the methodology deployed in questioning by the interviewer.

106. Concern was and is expressed with how the appellant came to be named by the complainants. It is clear that no mention was made of him in the first interview by child B or indeed child C. At the commencement of the second interview, the copybook notes were produced by child B.

107. In the early stages of the second interview, having addressed the issue of truth and lies, child B says that she brought her folder with her. When asked about this she says that the folder contained things she had written about what happened in her old home. She is asked where that is, and she then proceeds to state the nature of the abuse. She says that she wrote down all the names of the adults involved and within this list the appellant is named. She then speaks of the other adults involved, commencing with her mother, proceeding to give detail regarding other adults and the allegations of sexual assault and then proceeds to speak of the allegations of rape. She speaks of a number of persons and then makes a complaint about her father, an uncle and this appellant. Her complaint regarding this appellant is then repeated back to her and she is asked to tell the interviewer about him.

108. Child C speaks of other alleged offenders and is then asked if there was anything else he remembered. He then makes an allegation of s. 4 rape in respect of the appellant. He then expands on his allegations concerning this appellant.

109. The complaint is made that what are described as the chaotic events around the 18th August 2017 prior to the second interview when the appellant is first named by the children in interview, coupled with the interview process itself gave rise to a real risk of an unfair trial, consequently, the recorded interviews ought to have been excluded.

Conclusion

110. In our view, the circumstances leading to the naming of the appellant by the children was one which went to weight and not to admissibility. These circumstances were ventilated in cross-examination of child C. He was asked why he did not say anything about the appellant and another in the first interview and replied that it was probably because he did not think of them. The child was also asked about the social media contact and when that occurred.

111. We are not persuaded on this aspect of the ground.

The Manner of the Conduct of the Interviews with the Children

Discussion

112. The argument advanced is that in repetitively asking the same question that this undermined the process of interview. By repeating the same question without an explanation as to why the question is being repeated has certain consequences. Those being that a young child may possibly, for example, want to please the interviewer or the child may believe the answer given to be wrong and that it should be varied. Accordingly, and in particular, when the repetitive questioning is viewed through the lens of how the appellant came to be named by the complainants, gives rise to a real risk of an unfair trial, necessitating the exclusion of the recorded interviews.

113. The trial judge ruled against the appellant and found that the questioning was not repetitive but reflected efforts by the interviewer to bring the child back to focus on the individual in question.

Conclusion

114. We have read the transcript of the interviews with child B and C. Insofar as child B is concerned, the first question concerning this appellant comes about after he is named in a list of perpetrators by the child. After she expands on her complaints regarding those individuals, she is reminded of the complaint made concerning this appellant. Thereafter, in repeating the allegation, the interviewer does so in circumstances where she is clearly seeking for the child to expand on her allegations. Questions are asked regarding clothing, feeling, and positioning. Those questions were asked by repeating the allegation made, but clearly with the additional sub questions being asked about the detail.

115. We again point to the transparency of the process. The impugned material and how it came about was readily apparent to the jury. This was really a matter of weight for their assessment. It cannot be ignored that the children were dealing with allegations of a serious nature made against several relatives against the background of neglect.

116. The children in this trial were very young indeed and were rendered significantly vulnerable due not only to their age, but also due to the neglect of them. It was necessary in those circumstances for the interviewer to tailor the manner of interview accordingly. It was necessary to bring the child back to the individual at issue; the appellant, where there were many relatives in respect of whom allegations were made and as a consequence of the circumstances in which those allegations were said by the child to have arisen.

117. We are satisfied that the judge was entirely correct when he formed the view in respect of child C that the notes were used in order to assist in exploring matters with a young boy aged 8 years.

118. We find no error in the judge's approach.

Cross-Examination of Garda O'S

Discussion

119. This ground is said to provide context to Ground 1. Under this ground, the appellant complains that counsel was not permitted to cross-examine this witness on the methodology and techniques used in the interviews. The appellant wished to cross-examine on this area so that the jury would be in a position to draw inferences favourable to the appellant, such as that the techniques used by the interviewers undermined the accuracy, consistency and reliability of the allegations made.

120. The specific matters which counsel wished to put to the witness on behalf of the appellant are set out at para. 66 of this judgment. The trial judge refused to allow cross-examination to the extent sought and confined it to pointing to contradictions in the complainant's evidence and the use of pre-prepared notes.

121. It is clear from the transcript that the witness was cross-examined on the guidelines and the issue of the notes. Questions were asked regarding the making of the notes, the purpose of the guidelines, that they are designed to produce a spontaneous account by a child, that the notes were written prior to interview, that the invitation to the children to make notes and permitting the reading of the notes meant that there was, in effect, a failure to adhere to the guidelines. Specific reference was made to the aspects of rapport, free narrative account, open ended questions and non-leading questions.

122. Moreover, it is clear that the jury were aware that the appellant was not mentioned until the second interview in the case of each child. The jury knew of the chaotic situation between the first and second interview.

123. Issue is taken with the fact that the appellant was not permitted to cross-examine the witness so as to elicit that the manner of the witness's interview with child A had resulted in that witness giving evidence viva voce and so by implication this impacted on the reliability of the evidence of child B and C.

Conclusion

124. It appears to us that many of the issues now complained of were in fact ventilated before the jury. The final matter concerns the revelation of a ruling made in the absence of the jury following a voir dire. It is trite to say that matters of law rest with the trial judge and issues of fact with the jury, the triers of fact. Aside from the obvious fact that a jury is never involved in issues of law arising in a voir dire or otherwise, seeking to impart the type of limited information sought to a jury without the jury hearing the full issue, the evidence, the submissions, and the ruling would be contrary to a fair trial.

125. The trial judge's decision on a voir dire as to admissibility is never communicated to the jury. Take for example a situation where the ruling was against an accused, should that be

revealed to the jury, prejudice would clearly arise. The decision on admissibility is for the judge, and the basis for that decision should not impact on the credibility or reliability of any other witness.

Determination on Grounds 1 and 2

126. It is quite clear from an examination of the judge's ruling on the admissibility of the interviews recorded pursuant to s. 16 of the Act that he considered all issues with conspicuous care and attention to detail. He properly identified the law with reference to the jurisprudence and came to certain findings of fact which were open to him on the evidence and with which this Court will not interfere.

127. He considered in the final analysis that while some questions asked by the interviewer may have been leading questions, the majority of the questions asked were in accordance with the guidelines and any suggested departures therefrom did not render the interviews of child B and C inadmissible.

128. We are not persuaded that the judge erred in his ruling. This was undoubtedly a challenging interview process and one which required careful handling by the interviewers. The guidelines are not rigid, they are specifically stated to be advisory in terms, there to provide for the use of certain tools, if necessary, in order to assist a child of tender years in communicating difficult matters. The use of the pre-prepared notes is not contemplated by the guidelines, but this area of law is constantly evolving.

129. The particular circumstances of the background to the allegations, the condition of the children when received by their foster parents, and the inter familial allegations all served to make these interviews challenging and as we have said in *SA*, *"a degree of flexibility must be afforded to specialist interviewers in circumstances such as those that presented themselves."*

130. The interviews were conducted in such a way so as to meet the particular vulnerabilities of these children.

131. For all the reasons stated, we are not persuaded that Grounds 1 and 2, either on a consideration of each of the separate aspects contained within Ground 1 or on a consideration of Ground 1 in conjunction with Ground 2 demonstrate an error on the part of the trial judge and accordingly both grounds fail.

Ground 6

Submissions of the Appellant

132. It is submitted by the appellant that the trial judge erred in refusing to admit the evidence sought to be adduced from a Dr A, an Assistant Professor at a University School of Psychology. This evidence was sought to be introduced regarding criticisms of the interview process, in particular, the use of notes and the repetitive questioning.

133. It is submitted that Dr A's evidence was supported by extensive research and based on the expertise required to give opinion evidence. It is further submitted that Dr A had given evidence as an expert before, including on one occasion in the Circuit Court in this jurisdiction.

134. The following is a flavour of Dr A's proposed testimony in respect of the use of notes by the complainant children:-

> *"Yes. I've read and viewed thousands of forensic interviews and I've never seen this practice before, where a child is essentially reading their statement or a diary, I've never*

seen that. It means that most of the details that are elicited from a lot of these children and a lot of the portions of the interviews are essentially -- they're not recalled from memory, it's just a reading from a script. This -- that kind of dynamic, it completely shifts the way that the interview is conducted and the way that we can evaluate it because it's not the children recalling the events from their own memory."

135. The trial judge ruled against the admission of this evidence and commented as follows:-

"I am satisfied that the two issues in respect of which it is sought to adduce this witness's testimony as expert evidence simply do not require expert testimony of the kind proposed. The witness has no clinical experience as a child psychologist or any experience in actually interviewing children. There's no empirical data referred to in her reports in respect of her conclusions against which they can be measured in a meaningful way."

136. It is submitted that the trial judge erred in his ruling that expert testimony was not required and by making it a prerequisite to the evidence being that of an expert that she had clinical expertise and knowledge of the psychological reports prepared from assessments of the children.

137. It is emphasised that the witness is a Doctor of Psychology with a highly impressive curriculum vitae and that her expertise covered a precise area of concern for the trial: developmental psychology and investigative interviewing of vulnerable witnesses, including children.

138. It is submitted that the credentials and research available to Dr A and her experience of examining thousands of hours of forensic interviews in addition to the analytical work conducted on these materials qualified her to assist the court in the manner in which she sought to do.

139. Reliance is placed on the test as set out in *R v Bonython* (1984) 38 SASR 45 as follows:-

"whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court."

140. It is pointed out that the court did not have evidence from any other expert or psychologist or academic to say there was something deficient in Dr A's evidence.

141. Further reliance is placed on *People (DPP) v Bowe* [2017] IECA 250, as follows:-

"The courts permit expert evidence in relation to all matters that are outside the scope of the knowledge and expertise of the finder of fact, whether judge or jury. The expert opinion evidence must be evidence which gives the court the help it needs in forming its conclusions. The evidence is required to be necessary in the limited sense that it has to provide helpful information which is likely to be outside a judge or jury's knowledge and experience."

142. Mr Devally says that the failure to admit this evidence compounds the unfairness he complains of in respect of the use of notes in B and C's interviews.

Submissions of the Respondent

143. It is the respondent's position that Dr A's evidence was not expert evidence. Mr Condon points out that Dr A had never conducted an interview with any child.

144. Reliance is placed on the test laid down in a UK case, *Kennedy v Cordia (Services) LLP* [2016] 1 WLR 597 which was summarised by McGrath as follows:-

"The UK Supreme Court identified four considerations which govern the admissibility of expert evidence: (i) whether the proposed skilled evidence will assist the court in its task; (ii) whether the witness has the necessary knowledge and experience; (iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and (iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence."

145. This test was cited with approval and applied in this jurisdiction in the case of *Duffy v McGee* [2022] IECA 254. It is submitted that the ruling of the trial judge on this matter was entirely correct and within the parameters of the *Kennedy* test when he held as follows:-

"It is clear that there is very little empirical research to sustain a number of the witness's conclusions or to justify a diminution of the importance of all of the other relevant evidence on the issue concerning the actual lives and experiences of these three children."

146. The judge continued as follows:-

"I am not satisfied either that Dr A's opinion as expressed in evidence forms part of a reliable body of knowledge which, in the particular circumstances of this case, gives rise to an opinion that can assist the Court on the relevant issues. I'm particularly concerned at the limited nature of her evidence which does not consider relevant and detailed psychological assessment and ongoing therapy received by each of the children concerned and the trauma and vulnerabilities which they have experienced. The research has not addressed the significance, if any, of making notes, speaking to family members or professionals prior to interview, the effect of trauma or other vulnerabilities or indeed the effect on the reliability of an interview of a child bringing its note in and wishing unprompted to read it. Indeed the witness considered them to be irrelevant to her exercise. There are a multitude of factors that may be relevant in my view to the overall reliability of an interview and its effectiveness and whether it is unfair to admit a DVD into evidence. The guidelines are very important but recognise this difficulty specifically in allowing for flexibility and differing circumstances. There's probably no such thing as the perfect guideline compliant interview."

147. The judge also noted that:-

"…She calculated a percentage of what she regarded as suggestive or otherwise what might be deprecated questions. She recorded a high number count of repeated questions. Repetition is not part of the ground rules in Ireland.

…She criticised the use of leading or suggestive questions, though she was not clear to my mind as to her definition of either.

[…]

She did not receive any psychological assessments carried out on the children. She took no regard of the children's cognitive functioning because it wasn't relevant to her assessment of the quality of the interview. There was no empirical research advanced to indicate a rate of inaccurate responses to repetitive questions that would be problematic. There was very little research dealing with specific consequences of repetition."

148. It is submitted that bearing in mind the high standards for admissibility of such evidence, especially in new fields, as set by this Court in *Duffy* and the findings of fact by the learned trial judge, this ground should be dismissed as failing to demonstrate any error of principle or fact.

Discussion

149. The appellant sought to admit the evidence to establish that closed questions and repetitive questions put to child B during the second interview reduced the reliability of the DVD evidence. Moreover, it was argued that the evidence was admissible in respect of the use of notes made by the children in the interviews.

150. It is well established that admissible expert evidence is that which is outside the scope or knowledge of a court or jury. In many instances it will not be difficult to determine as to whether an issue of fact requires expert testimony and indeed in many instances, no issue will arise. However, in the present case, the respondent contends that the witness was not an expert in the sense that term is understood in law. Moreover, that this was not a matter which required expert testimony to assist the triers of fact. The matter was one within the ordinary knowledge of an individual and so was inadmissible.

151. The expert who it is desired to call must be in a position to give evidence of matters which are outside the common sense, knowledge and life experience of the triers of fact.

152. The (UK) Supreme Court decision in *Kennedy v Cordia (Services) LLP* was cited with approval in this jurisdiction by Collins J. in *Duffy v McGee*. The criteria was admissibility of expert evidence as stated in *Kennedy* is worth repeating:-

> (i)whether the proposed skilled evidence will assist the court in its task
>
> (ii)whether the witness has the necessary knowledge and experience
>
> (iii)whether the witness is impartial in his or her presentation and assessment of the evidence and
>
> (iv)whether there is a reliable body of knowledge or experience to underpin the expert's evidence.

153. Significantly, in *Duffy*, Collins J. observed that the Justices in *Kennedy* considered a reliable body of knowledge or experience depends on the subject matter of the evidence and where the body of knowledge is not widely recognised, then it is necessary to establish the expertise of the witness and the validity of that body of knowledge. The bar is therefore a high one.

154. The respondent during the voir dire as to the admissibility of Dr. A's evidence challenged the proposed evidence on three of the four principles stated in *Kennedy*. That is that whether the evidence would assist the court in its task, whether the witness had the necessary knowledge and experience and whether there existed a reliable body of knowledge or experience to underpin the expert's evidence. No issue was taken with the impartiality criterion.

155. The evidence which was sought to be introduced related to, in essence, a critique of a said failure to adhere to the guidelines, such as repetitive and closed questions with emphasis on the use of notes during interview.

156. The trial judge carefully considered the material and came to the view that the evidence did not meet the threshold for admissibility. It is important to note what was said in *Kennedy*; "*what amounts to a reliable body of knowledge or experience depends on the subject matter of the proposed evidence."* The judge found that the evidence did not meet the requirements on

methodology and science and ruled the evidence inadmissible. He was not satisfied that the evidence formed part of a reliable body of knowledge which could give rise to an opinion which could assist the court on relevant issues.

157. The judge was quite properly concerned that the proposed witness' testimony did not consider as relevant the psychological assessment and ongoing therapy for the children and their particular vulnerabilities. He went on to say:-

> *"The research has not addressed the significance, if any, of making notes, speaking to family members or professionals prior to interview, the effect of trauma or other vulnerabilities or indeed the effect on the reliability of an interview with a child bring its note in and wishing unprompted to read it. Indeed, the witness considered them to be irrelevant to her exercise."*

158. Significantly, the judge went on to determine that there was *"no empirical research advanced to indicate a rate of inaccurate responses to repetitive questions that would be problematic. There was very little research dealing with specific consequences of repetition."*

159. In essence, the judge concluded that the two issues in respect of which it was sought to adduce the potential evidence did not require expert testimony of the type that was proposed. The judge was of the opinion that the potential witness did not have the clinical experience as a child psychologist or experience in interviewing children and nor was the empirical data present as referred to above. Moreover, he was not persuaded that the potential opinion formed part of a reliable body of knowledge which could assist the court.

160. Returning to the principles in *Kennedy* and the approval thereof in this jurisdiction, it is clear that the bar is high for the admissibility of potential expert evidence and where that evidence concerns a new field or one not widely recognised, then not only is it necessary to establish the expertise of the expert but also the methodology and validity of the field of knowledge.

161. The judge was not so satisfied and as a consequence for this and other reasons refused to permit the evidence.

Conclusion

162. There is a threshold for the admissibility of expert evidence and in light of *Duffy*, (albeit arising in the civil context), it is established that the bar is set quite high. In any event, it appears to us that if evidence of the type sought to be admitted in the present case were deemed admissible, such presents the potential risk noted in *R v Turner* [1974] EWCA Crim J1017-6 that such evidence *"if it is given dressed up in scientific jargon"* may simply cause confusion for a jury.

163. For the reasons stated, we find no error in the judge's approach and dismiss this ground of appeal.

Decision

164. Accordingly, as we have not found favour with any ground advanced, the appeal against conviction is dismissed.