An Chúirt Uachtarach

The Supreme Court

Dunne J
Charleton J
O'Malley J
Woulfe J
Murray J

Supreme Court appeal number: S:AP:IE:2023:000121
[2023] IESC 23
Court of Appeal record number: 2021/158
[2022] IECA 248
Circuit Criminal Court bill number: TYDP0054/2019

Between

The People (at the suit of the Director of Public Prosecutions)
Prosecutor/Respondent

- and -

BK
Accused/Appellant

Judgment of Mr Justice Peter Charleton delivered on Friday 13 October 2023

1. This appeal concerns the admissibility in criminal proceedings of a series of alleged confessions to participation in child abuse and child neglect, apparently recorded as against BK during an examination in aid of wardship by a psychologist into her capacity to care for her three children, here called A, B and C. These alleged admissions, consequently, were not in a custody setting, but in the context of wardship proceedings as to the care of A, B and C and an enquiry by the High Court as to the safety of access by BK to them. The key questions consequently arising here are: do such admissions outside of arrest and custody require particular safeguards for admissibility at a criminal trial; if so, are such safeguards equivalent to those applicable in an arrest for questioning situation; and, is any apparent admission of guilt subject to a general principal whereby a confession to a crime may be excluded because of unfairness as to the manner of taking same?

2. The objective of the psychological interviews, five in total, was essentially to enquire into, and potentially to validate, BK's claim that she had nothing to do with the physical and sexual abuse of A, B and C which had been shared on the Internet as child pornography. Her husband, here called LK, and another man, NM, were prosecuted for these offences and on conviction were sentenced to imprisonment.

3. BK's earlier denials of knowledge and of participation in the offences formed part of the background whereby the Director of Public Prosecutions decided not to prosecute her. Once the admissions were allegedly made in the psychological assessment, and consequently shared with the relevant agencies, the DPP reversed the earlier decision and had BK charged.

Trial and appeal

4. At her trial in Clonmel Circuit Court, on 14 July 2021, the judge, in the absence of the jury, on a *voir dire*, analysed the circumstances around the recording of the alleged admissions and decided that principles of fairness required him to rule these as inadmissible in evidence. There being insufficient other ostensibly incriminatory evidence, the jury were instructed by the trial judge to enter a verdict of not guilty by direction. The DPP appealed that acquittal to the Court of Appeal under s 23 of the Criminal Procedure Act 2010. The Court of Appeal, on 14 October 2022, [2022] IECA 248, reversed the decision of the trial judge and, further, ordered that BK should be retried; ruling that while there were grounds for caution, there was no basis for excluding the alleged admissions. Since the examination into BK's maternal capacity was conducted with the aid of a polygraph lie-detector system, (which no one sought, or now seeks, to introduce in evidence) and since there was no caution against self-incrimination or any other of the safeguards usually deployed for the professional police interview of suspects under arrest, the fairness of the admission of such confessions continues to be called into question on this appeal.

Determination

5. In the determination granting further leave to appeal from the Court of Appeal, [2023] IESCDET 9, and after hearing the parties at case management, this Court fixed the following as the essential issues for disposal:

> 1. Whether admissions made in a psychological assessment directed by the High Court in proceedings akin to wardship should be admitted in evidence against an accused in a criminal prosecution where, following a Garda investigation into the subject matter (possible child abuse) the DPP had already decided not to prosecute this accused in respect of that investigation and that decision had been conveyed to her prior to her agreeing to undergo such assessment?
> 2. Whether admissions gained in a psychological assessment conducted with the aid of a polygraph in civil proceedings should be admitted in a criminal trial?
> 3. Where an inculpatory statement is made by a person in the course of a psychological assessment conducted during civil proceedings what, if any, are the conditions for the admissibility of any such statement during a criminal trial?

Basic facts

6. BK is the mother of A, B and C. Two of these three offspring are adults. All have special needs. LK is the father. In March 2015, in consequence of notification from an international agency, gardaí began investigating what appeared to be a serious case of child pornography sharing over the Internet, which invariably also involves child abuse and sexual assault. Relevant investigations led to an IP address used by BK and NM. On a search of the family home of BK and LK, a camera was found with memory capacity. Footage and stills from it showed criminal actions against A, B and C. In addition, items reproduced from those images were found in the home as potential matches. LK and NM were arrested and successfully prosecuted, receiving condign terms of imprisonment.

7. BK was also arrested to further the investigation into these offences. There were garda interviews under caution, involving the ordinary safeguards, conducted with BK while under arrest as a suspect. Her response was a complete denial of either involvement in, or any awareness that, any such crimes were taking place as against A, B and C or any of them.

8. It may be inferred that since there was no identification of BK in any of the images and in the light of the denials, the DPP decided not to prosecute. This decision was dated 29 July 2015 and was communicated to BK shortly afterwards. Nothing in that communication, which was not before the Court, either indicated that such a decision was final or was not subject to later review.

9. As the case analysis of the offences and the investigation were being conducted by the gardaí, the relevant agencies sought to supply parental support through intervention and that inevitably involved the need to bring the children A, B and C to a place of safety. Because of the vulnerability of the victims of these crimes, wardship proceedings were initiated in the High Court before Kearns P. He decided that A, B and C did not have capacity for self-care; decision of 24 April 2015 of the High Court in wardship. They were brought to, and remain, apart from any parental care. BK, as a notice party to the wardship proceedings, was involved in the case and she sought involvement in the care of A, B and C in her capacity as mother. But, notwithstanding her denials of knowledge in interviews with the gardaí, serious questions naturally arose as to whether A, B and C were safe with her or whether contact with her might be detrimental to their interests. In consequence, Kearns P sought that she be interviewed as to that issue and that involved an exploration of the veracity of any denials she had already made and a consideration of her role in the home during the abuse suffered by A, B and C. She consented to being the subject of a psychological assessment as to her competence and capacity as a mother. The relevant background required a comprehensive risk and safety assessment of BK. This was done by a firm specialising in this work and the relevant psychologist assessing BK, with the aid of a polygraph for much of same, will be called Dr O.

10. The terms of reference of this psychological assessment were notified to BK. She was legally represented and correspondence from her solicitors to the relevant agency and from their solicitor indicates dialogue as to the nature of what was being consented to by BK. It was clear that the process was "not confidential" and that "new disclosure of sexual abuse against children, vulnerable adults and information about abuse perpetrated against me which identifies children and vulnerable adults currently at risk" would be "on the record" and could be "shared with other agencies, if necessary, to comply with statutory guidelines." This was a reference to the legislation requiring disclosure of the abuse of children and vulnerable adults.

11. Solicitors for BK wrote to the relevant State agency, in that capacity also engaging the independent psychologist, stating, on 19 August 2015, that BK "will agree to the amended terms and participate in the assessment . . . [but] does not agree to be bound by the outcome of the findings." Psychologists have traditionally used a range of tests to assess veracity, including such matters as analysis of the nature of the narrative and the presence or absence of appropriate emotional affect. But, as with a judge seeking the truth in a contested issue of fact, this is a difficult process. While involving a polygraph instrument to measure physical responses as to crucial issues in such a dialogue may not be universal, for this particular psychologist, it was considered a help and this was proposed. That also involved a separate operator. An issue with the use of a polygraph machine and operator to assist in interpreting physical signs when crucial questions were asked was flagged in correspondence. Solicitors for BK initially protested the use of this equipment as they "believe the accuracy of same to be controversial – to be very controversial. In the circumstances we believe that polygraph testing should not be used, and we'd ask you to clarify

the position with [the firm] and refer to us." Despite this reservation, polygraph testing was used by Dr O and this was known and eventually agreed beforehand, albeit under protest. All the interviews with BK were also video recorded.

12. This was a separate process of psychological assessment. It had nothing to do with exploring guilt or innocence in respect of any criminal offence. That, however, did not mean that any person participating would not be bound by disclosure obligations. On the facts available, the gardaí did not seek to impede and nor did they have any part in the psychological assessment. For the interviews with Dr O, some of which included the use of the polygraph, there were no gardaí present and at no stage was BK in custody but, rather, her continued participation was a matter for her, though no doubt motivated by her desire to re-establish contact with A, B and C.

The rulings

13. While it is not a matter for this Court, the basis of the later criminal prosecution consisted of admissions allegedly made by BK during the psychological assessment in aid of wardship and also involved the circumstances within the home of A, B and C. As to whether there was any or any sufficient admission or circumstantial evidence no comment is made. It suffices to record that BK was charged on the basis of the alleged confessions in the assessment with perhaps the involvement of inferences that might, or might not, properly have been drawn from circumstances. The case came on for trial in July 2021 in Clonmel in the County of Tipperary. Counsel for BK objected to the admission of the interviews with the psychologist. The trial judge, after hearing evidence in the absence of the jury, particularly from Dr O, ruled any admission out, reasoning as follows:

> Now bearing in mind the number and length of the interviews, the format of the interviews, the use of the lie detector and the role of Dr O, I must say that I'm satisfied that Dr O, that his role was not consistent with the standards of an interview or the practices of an interview conducted in a criminal case. I should say I make no criticism of Dr O. He was conducting an interview for the purposes of the High Court case. He was there to assess the accused in the context of the wards of court application or a custody or access application. He indicated that if he had been asked by the gardaí he would not have conducted interviews on behalf of the gardaí and I'm satisfied that as a matter of constitutional fairness and interpreting the law in a constitutional manner, and having regard to the right to silence and the issues of fairness, in order for admissions to be made on the facts and circumstances of this case there would have to be either (1) legislation permitting such interviews with appropriate safeguards afforded to the suspect and it may very well be the case that in the future there may be a role for psychologists to either take part in interviews or train or advise the gardaí [on] how to conduct interviews or (2) the rights provided to the person, there should have been rights provided to a person being questioned similar to the protections in the Criminal Justice Act [1984] and regulations[made thereunder], in particular an independent overseer similar to the member in charge to provide for breaks, meals, medical consultant, if necessary, and also an appropriate caution at the beginning of each interview and access to a solicitor in the same terms as the Criminal Justice Act [1984] provides and the case law provides.
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> Now, I agree with [senior counsel for the then accused's] submission that you cannot simply overcome the objections to the questioning by distilling the questions down to a number of discrete questions. It is appropriate to have regard to the entirety of the interviews. So having regard to the length, the nature and duration of the interviews, the use of the lie detector, I am satisfied that the accused was told she would not be prosecuted.

> I am satisfied that she should have been given access to a solicitor and should have been informed of this right and she did not have access to legal advice. She should have been cautioned at the start of each interview. I am also satisfied that the interviews in a number of respects were unfair to the accused. I make no criticism of Dr O in this regard.
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> As I have said, he was conducting the interviews in relation to the assessment he was carrying out for the other proceedings. Now the onus is on the prosecution to prove beyond reasonable doubt that the interviews are admissible. I am satisfied the prosecution have not discharged that burden. I am satisfied that the interviews were not voluntary within the meaning of the criminal law, indeed having heard evidence from last week and this week and the submissions, I am of the view that in this particular case it would not be possible for Dr O to conduct, if you like, a dual interview. It wouldn't be possible for him to conduct an appropriate assessment of the wardship custody cases and at the same time conduct and interview in this case which would be admissible in the criminal proceedings. I am satisfied that the matters I have referred to in the cross-examination of Dr O by Mr D in relation to the issues which were categorised then as inducements, promises, et cetera, I'm going to categorise those on the basis of fairness but I am satisfied that those issues from a criminal standard, the interviews fell below the basic standard of fairness in a criminal trial. So, in summary, therefore, I am satisfied that the interviews were not voluntary, that they fell below the basic standard of fairness. In relation to access to a solicitor, I am satisfied that she should have been--if the statements were to be relied on, she should have been given that right and that has not been done. I am satisfied that the interviews were not voluntary and I'm satisfied they fell below the standard of fairness.
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> Now, those matters, certainly the access to a solicitor, engages Article 38.1 of the Constitution under the guarantee of the due course of law. I am also satisfied that the questioning should have been conducted, if it was sought or contemplated to be relied on, it should have been conducted in accordance with the custody regulations and the Judges' Rules or a system implemented which would provide the protections I have referred to, and the failure --there was a failure to implement any such system. So, I'm satisfied from that point of view, the interviews were illegal.
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> In relation to both of the issues, and all of the issues I have identified, I'm satisfied that it is appropriate to exclude the evidence of the interviews.

14. The matter was appealed by the DPP to the Court of Appeal under a statutory provision enabling a legal ruling resulting in an acquittal to be reviewed and for there to be a retrial where there is sufficiently cogent evidence. Section 23(1) of the Criminal Procedure Act 2010 provides that where "a person is tried on indictment and acquitted of an offence, the Director . . . or the Attorney General as may be appropriate, may . . . appeal the acquittal in respect of the offence concerned on a question of . . ." But, such an appeal can only lie where "a ruling was made by a court during the course of a trial" which "erroneously excluded compelling evidence" or where "a direction was given by a court during the course of a trial . . . directing the jury in the trial to find the person not guilty" that direction being "wrong in law" and where such evidence as might be adduced in the "proceedings was evidence upon which a jury might reasonably be satisfied beyond a reasonable doubt of the person's guilt in respect of the offence concerned." As to what is compelling evidence, this is defined by subsection (14) thus:

> (a) is reliable,
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> (b) is of significant probative value, and

> (c) is such that when taken together with all the other evidence adduced in the proceedings concerned, a jury might reasonably be satisfied beyond a reasonable doubt of the person's guilt in respect of the offence concerned.

15. On the appeal, the court may quash such an acquittal and may also order a re-trial for the offence. The conditions for the latter order are set out in subsection (12):

> (a) whether or not it is likely that any re-trial could be conducted fairly,
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> (b) the amount of time that has passed since the act or omission that gave rise to the indictment,
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> (c) the interest of any victim of the offence concerned, and
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> (d) any other matter which it considers relevant to the appeal.

16. It was under this legal provision, enabling a retrial on offences where an acquittal has occurred by reason of an erroneous ruling of law, that the Court of Appeal, [2022] IECA 248, considered the appeal of the DPP as to the validity of the trial judge's decision. Ruling on the matter, on 19 October 2022, Birmingham P stated that the confession evidence should have been admitted in the trial in Clonmel, reasoning:

> 37. As in the Circuit Court, the respondent has sought to put her objections in the context of traditional considerations such as oppression, inducement, the absence of a caution, the absence of an independent supervisor, the departure from the normal procedure of a Garda interview and so on. While that approach is entirely understandable, for our part, we do not think it is appropriate in the context of this unusual case. It seems to us that the question is not whether the procedure that would have ordinarily been followed had this been a Garda interview in a Garda station was in fact followed, but whether what actually occurred was unfair.
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> 38. In this case, the trial judge concluded that the interviews were "non-voluntary" within the meaning of the criminal law. He did not see issues such as inducements or promises as applicable, but seems to have taken the view that, in the round, the interviews fell below the basic standard of fairness in a criminal trial. It is noteworthy that he came to that view while emphasising that he made no criticism of Dr. O.
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> 39. In the very unusual circumstances of this case, we think it appropriate to approach a consideration of the issues through the prism of overall fairness. It seems to us that a starting point for consideration of that issue is to ask whether, if it had been sought to make use of the intensive interviews during the wardship proceedings, there would have been anything objectionable about that. It does not seem to us that there would have been anything objectionable, though we recognise that there would be many who would be surprised at the emphasis placed by Dr. O on the use of the polygraph. However, as we know, what happened is that interviews that were conducted for one purpose, i.e., wardship proceedings, were used in the very different context of a criminal trial. Insofar as what occurred gives rise to any sense of disquiet, it seems to us that it arises from the fact that the nature of the interviews differed significantly to the sort of interviews that criminal practitioners are used to viewing and reading. More specifically, it seems to us that the fact that the interviews depart from the familiar, combined with the fact that interviews

were conducted with somebody who had been told that they would not be prosecuted, raises a sense of concern.

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

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

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

Précis of arguments on behalf of BK

17. BK asserts that she was effectively forced into the psychological examination; that the safeguarding forms were insufficiently clear to undermine a clear understanding that she had that she would never be prosecuted; that where evidence may be used (as in s 23 of the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012) a therapist or doctor or priest must give a warning against self-incrimination; that all of the rights of a person in garda custody must inure to the benefit of a person being interviewed on the basis of a report to an official body (as described in *The People (DPP) v Conroy* [2020] IESC 48, being custody regulations, tape recording, breaks, warnings against self-incrimination, access to medical assistance, reasonable access to legal advice, application of the Judges' Rules); that Dr O conducted the interviews in an oppressive manner such as to bring into play the sapping of the will test in law; that edited sections of an interview should never be played to juries since this is unfair and misleading; that deploying a polygraph (most especially under protest) renders any interview both oppressive and unfair; that a solicitor must at all times be present where someone may say something incriminating; that this is so where s 2 and 3 of the Withholding Act comes into play and requires minimum safeguards (which were absent); and that the overall test for a voluntary statement was never met, as found by the trial judge, whose ruling must be upheld.

18. The DPP, BK argues, should never have revised her opinion not to prosecute in the light of the new admissions (as alleged); that no fair procedures (*audi alteram partem*) were used; that a decision not to prosecute cannot be changed without safeguards; that the DPP should not mount a prosecution on the basis of what is argued to be involuntary; that what happened was unfair.

19. Polygraph evidence, BK contends, is implicitly unfair; that it is uncertain; that it was protested against; that it undermines and saps the right of those accused of a crime to remain silent (had such a warning been given); that it is an instrument of coercion; that interpretation is subjective; that its use pressurises a suspect (or interviewee); that no common law jurisdiction has been pronounced as entirely happy with such evidence; that on the contrary, this methodology is contrary to fairness; and of itself taints with involuntariness all interviews in which it is used.

Précis of arguments on behalf of the DPP

20. The DPP emphasises the importance of the case as regards interviews not conducted in the structured setting of arrest and of a custodial interrogation.

21. The DPP challenges any assertion that the interviews were anything other than not in custody and not compelled. The regime for custodial examination of interviews where particular safeguards are applicable arose from judicial experience and are particular to balancing the circumstance of custody with protecting those under arrest. This, it is claimed, cannot be such a case. There is a statutory duty of reporting, based on the protection of victims and no one was either coerced nor deceived, the DPP says.

22. All legal advisors know, the DPP suggests, that decisions to prosecute or not to prosecute are for that time at which they are made. A decision to prosecute may result in a *nolle prosequi* where, for example, evidence of innocence of the accused emerges; similarly, a decision to prosecute may be required where new evidence shows that a crime has been committed. These decisions, states the DPP, were made in good faith at the appropriate time and were at all times subject to the duties and powers of the prosecuting authorities under the Prosecution of Offences Act 1974. Even without the new evidence of participation in sexual violence against the vulnerable and minors, the DPP asserts an entitlement to review, but here, it is claimed, there was new evidence which,

of its nature, demands a reassessment. The powers and duties, including the reviewability judicially of same, the DPP asserts are clear on the case law and arguments by BK for constricting the DPP following decisions made on the relevant material at the time are rejected.

23. A review is presented by the DPP of the law on polygraph admissibility in various jurisdictions. That is all very well, but there is nothing to suggest, claims the DPP, that of itself this technique for uncovering lies and deceit is an instrument of oppression or involuntariness.

24. The public system of justice, asserts the DPP, is "entitled to the evidence of every man" and there consequently is a duty to consider the strength of a case. The ruling of the trial judge is asserted to be wrong and that of the Court of Appeal right.

Duty of disclosure

25. None of the issues that have arisen on this appeal can be divorced from the context in which society has now set duties around any to whom any disclosure of abusing children is revealed. In essence, apart from the context where a lawyer is giving advice to a client, for instance preparing for a criminal trial, general rules circumscribe what ordinarily might be kept to oneself as a confidence. This, therefore, is a much different setting to the issue tried by O'Hara J in *R v Bell* [2019] NICC 20, as to the admissibility in a criminal trial in Northern Ireland of a videoed recording, apparently with the accused, where confidentiality had been guaranteed on a lifetime basis and, it must be noted, "the confession is likely to be unreliable in the sense that it may well be unreliable as a direct result of the circumstances in which it was improperly and dishonestly induced"; [33]. Since, in the past, the law as to duties of confidence and, it follows, privilege from disclosure within the setting of the administration of justice, has developed on a case-by-case basis, this has been replaced by a statutory formula which differs from the criteria set out by John Henry Wigmore in his classic *Evidence in Trials at Common Law* (McNaughton Revision, vol 8, 1961). These inform the common law generally whereby the courts may balance the public interest in maintaining the privilege against the fundamental duty to pursue the truth. In *R v Gruenke* [1991] 3 SCR 263, 284 these were set out on the basis of four well-accepted criteria, all elements of which must be met to successfully assert the privilege:

> 1) The communications must originate in a confidence that they will not be disclosed.
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> 2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
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> 3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
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> 4) The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.

26. Where offences are committed against children or against vulnerable persons and a person becomes aware of that fact, there is a duty to disclose what is known to the gardaí unless there is a "reasonable excuse" for non-disclosure. That duty was introduced in the context of public disquiet at revelation upon revelation of the abuse of children in supposedly safe settings of care and education as and from the commencement of the Withholding Act 2012. While there are defences, such as that the child has communicated that it would be better not to disclose, the proof of which is on the party asserting an entitlement not to disclose, these do not arise here. Section 2 applies to children while s 3 applies to vulnerable adults. That duty arises in relation to a range of

offences, including homicide and sexual violence cases, and the penalty for non-disclosure is set depending on summary or indictable disposal, and where the sentencing provisions depend on the offence involved. Section 2 is similar to s 3 and provides:

> (1) Subject to this section, a person shall be guilty of an offence if—
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> (a) he or she knows or believes that an offence, that is a Schedule 1 offence, has been committed by another person against a child, and
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> (b) he or she has information which he or she knows or believes might be of material assistance in securing the apprehension, prosecution or conviction of that other person for that offence,
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> and fails without reasonable excuse to disclose that information as soon as it is practicable to do so to a member of the Garda Síochána.
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> (2) Subsection (1) applies only to information that a person acquires, receives or becomes aware of after the passing of this Act irrespective of whether the Schedule 1 offence concerned was committed before or after that passing.
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> (3) The child against whom the Schedule 1 offence concerned was committed (whether or not still a child) shall not be guilty of an offence under this section.
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> (4) This section is without prejudice to any right or privilege that may arise in any criminal proceedings by virtue of any rule of law or other enactment entitling a person to refuse to disclose information.
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> (5) For the avoidance of doubt it is hereby declared that the obligation imposed on a person by subsection (1) to disclose information that he or she has to a member of the Garda Síochána is in addition to, and not in substitution for, any other obligation that the person has to disclose that information to the Garda Síochána or any other person, but that subsection shall not require the first-mentioned person to disclose that information to the Garda Síochána more than once.

27. This is not an appeal in which the implication of s 2(4), ostensibly preserving existing common law and statutory privileges against disclosure, has been argued. Further, it has not been argued that a therapeutic setting, for counselling or for psychological intervention, is privileged from later disclosure. Therapeutic intervention is, of its nature, independent of the trial process, and is concerned with mental stress issues. An argument may be made, and has been made by Simon O'Leary in his article, A Privilege for Psychotherapy? (2007) 12(2) The Bar Review 76 for legal confidence, but no comment is here made. In essence the argument for any privilege arises in that context because, as the author states:

> As a criminal lawyer, I am satisfied that even if the information protected by a psychotherapist-patient privilege were disclosed in order to supplement the fact-finding process, this information would be unreliable and inaccurate because it is only an abstract expression of the patient's inner feelings and emotions. Psychotherapists, once their training is complete, would not usually take or keep notes of sessions with patients. They might note the occasional dream or record a cryptic aide-memoire of significant events or their own musings. Even a complete account of a session would be loose and sketchy, a kind of stream of consciousness, shadowing the treatment. The world of psychotherapy is

> not like the world of law or medicine... Even if there were a record, it would not pass muster under a business-records ... exception to the hearsay rule, which would allow the admission of records only when they have a high degree of accuracy and are customarily checked as to correctness. Psychotherapy is concerned with the tension between inner reality and the outside world. The law is concerned with the outside world, i.e., "with objective facts, with truth" [Slovenko R – On Testimonial Privilege, (1975) Contemporary Psychoanalysis 11, 190]. It is not the business of psychoanalytic psychotherapy to counsel or to give or record opinions or assessments.

28. It is established that even within a psychotherapeutic setting, meaning an intervention which is for the benefit of the client and his or her mental well-being, there is no privilege whereby anything disclosed may not later be used in court; *O'R v Director of Public Prosecutions* [2011] IEHC 368 [17]. That authority has not been challenged and accords with the position as understood in practice.

29. What was involved here was at a further remove from any setting of psychotherapeutic intervention. Rather, this set of interviews was a High Court-mandated exploration designed to verify whether contact by BK with her children, or as a further step, custody, was safe in light of the offences to which her husband and another had pleaded guilty. The legislation applies to that setting whereby the 2012 Act required that Dr O disclose to the gardaí "information" which he "knows or believes might be of material assistance in securing the apprehension, prosecution or conviction of" the person making the disclosure. Since the legislation is not subject to challenge, it is clear that applies in its terms.

30. Wardship proceedings are conducted in camera. Hence the assessment of Dr O as to potential risk from BK to A, B and C was not directly communicated to the gardaí. This was an assessment conducted under the jurisdiction of the High Court in protection of vulnerable individuals. On receiving Dr O's report, the leave of the president of the High Court was sought as to disclosure of a step in the wardship proceedings. This application was opposed by BK who argued that the in camera rule should not be lifted for the purpose of furnishing a copy of the report to these parties. Kearns P rejected the argument and directed that the report be furnished to the Commissioner of An Garda Síochána and the Child and Family Agency. That ruling was appealed to the Court of Appeal which in a judgment of 10 December 2015 dismissed the objection. However, the Court, in its judgment, also concluded that there was no absolute obligation on the HSE to furnish the report onwards to the gardaí. Because of the in camera nature of the proceedings in which the report was provided, there was "a reasonable excuse" within the terms of the relevant section where the report was not provided directly but there was a duty to seek directions in the wardship proceedings. The correct test was that in *Eastern Health Board v The Fitness to Practise Committee of the Medical Council* [1998] 3 IR 399 in balancing any competing interests where an application was made to lift the in camera rule for a specific purpose. Applying this led to the irresistible conclusion that disclosure to the gardaí was in the interests of justice and of the vulnerable persons whose care was in issue and that the interest of BK in withholding the report from the Gardaí was overwhelmingly outweighed by those considerations.

Protections in custody

31. Protection against oppression is built into the legislative framework for arrest and detention of a suspect for the purpose of the investigation of a crime. These protections arise from the circumstance of the arrest of a suspect: a person nonetheless and up to conviction presumed to be innocent is subjected to deprivation of liberty, involuntary detention in police custody and being subject to, at the least, requirements to attend interviews, if not to answer questions, to take breaks

from this process as and when demanded, sleeping in confined circumstances and put into an utterly strange, disquieting and challenging ambience. As important are the various rules which have their origin in attempts to guard against a false confession whilst in custody; though these relate to the manner of questioning and the record that may thereby be generated rather than atmosphere of alienation into which a suspect is compelled by law.

32. Hence, many decisions emphasise the need for support to a suspect upon his or her arrest. In *The People (DPP) v Madden* [1977] IR 336, 355, failure to notify a suspect that the detention to which he had been subject had expired resulted in his being unaware that he could leave, rendering his confession unlawfully obtained, and in *The People (DPP) v Healy* [1990] 2 IR 73, 81, Finlay CJ emphasised that the right of access to a lawyer as being "a contribution, at least, towards some measure of equality in the position of a detained person and his interrogators." Whereas, since the 1970s, the Oireachtas has considered it necessary to extend the span of detention to which a suspect is liable upon reasonable suspicion justifying his or her arrest, even in the very earliest cases, the entitlement of those detained for questioning to legal advice and, if necessary, to medical assistance has been central to the constitutional interpretation of these deprivations of liberty; *Re The Emergency Powers Bill* [1977] IR 159. Such rights are exercised by a suspect in private; thereby counterweighting the milieu of control to which the detainee is subjected; *The People (DPP) v Finnegan* (unreported, Court of Criminal Appeal, 15 July 1997) p 33.

33. An analysis of the protections afforded to suspects in custody for the investigation of crime is engaged in the judgments in *The People (DPP) v Doyle* [2018] 1 IR 1, 135; judgment of Charleton J. In summary, someone cannot be arrested without being suspected, on a basis where reasonable people would think that it is possible for particular factors pointed to this person, of the crime; where powers of detention are provided for that suspected crime by law; where those are abided by, the suspect being free to leave where either a suspicion dissipates in consequence of enquiry or time elapses; where treatment is humane; where legal access is provided; where medical attention is given as needed; where rest is provided and interviews do not exceed the limits set by regulation; where there is no harassment; where there is access, exceptional circumstances aside, to communication with family; and where statutory and regulatory models as to recording and questioning are abided by.

34. It also must be emphasised that a confession is among the most powerful categories of evidence. In this respect, it is not realistic to view juries as more susceptible of influence than judges. A person admits to having done something which is utterly discreditable; this is against their interest, representing a step into self-realisation that renders personality stripped of all protections of deceit; most likely what is said is therefore true. That, at least is the perception before considerations as to pressure, suggestion, deceitful tricks and hopes of temporary relief through co-operation with the subject's detainers temper what may be an assumption and turn the mind towards scepticism.

Custody and non-custody

35. The considerations which apply to confessions made while in custody do not readily extend into social situations. While people may have motivations of impressing or shocking others when speaking as apparent equals to others, the primary reality is that self-protection and autonomy are present in as full measure as the nature of the person making an admission allows, in contrast to the constraints of custody. That is why the law has not developed such tests for admissibility and for guiding the police force as was represented by the Judges' Rules as originally drawn up in 1912 in respect of people who are not in custody for the investigation of an offence or where a person in authority has decided to charge a suspect with an offence.

36. What is not being dealt with here is a situation of confinement or even a confrontation as between what might be regarded as a person who has authority over the future course of an investigation, in the sense of a responsibility in decisions to charge a person or to declare them no longer a suspect in respect of an offence. There is a reality here and it is of a mother faced with either a dreadful discovery of the abuse of those whom she trusted of her own children, or who knew of this, perhaps supressing awareness, meaning wilful blindness. That family has been subject to intervention by State authorities in furtherance of the common good and where, in the most gross way, there has been a failure in the fundamental unit-group of society. The hope and expectation in the case of BK is of re-establishing contact with her offspring and that by engaging in a process of verification there may come about some amelioration in the severance of relationships that had to result from what the gardaí discovered. That is entirely different to a custody situation. In theory, a person's will can be overborne in any situation. It is not a situation of risk, as where a suspect is detained against their will; *Re Buckley Gunner* [1998] 2 IR 454. This was qualitatively different to any custodial setting. BK was free to leave an interview with Dr O at any time or to consider, perhaps in consultation who those advising her, to leave an interval of time elapse before attempting to remake the bonds with her children that had been so cruelly broken through abuse.

Polygraph

37. This is not a case where it has been sought by a party to civil or criminal proceedings to admit into evidence the physical reactions of a person to questions whereby a contrast is sought to be drawn as to how they reacted on a corporal level when faced with neutral, challenging or comfortable questions, as recorded in graphs and as interpreted by a person asserting a skill in discerning the supposed presence of deceit. That encapsulates the use of polygraph evidence as admitted in some jurisdictions and as regarded with such suspicion in others as to require the exclusion of such evidence. In any event, in our jurisdiction, the assessment of a witness by reference to likelihood, in contrast with other evidence, judged against physical facts and as to what weight any assertion may carry is one of ordinary day-to-day consideration whereby the truth may be assessed. While there has been correspondence between BK and the solicitors for the State authorities commissioning the test protesting the use of a polygraph, the point here is of making a report to the judge with responsibility for wardship matters and not the production of evidence that removes the responsibility of a jury, or judge if trier of fact, of assessing evidence.

38. It would be a mischaracterisation of the evidence of Dr O, and of the approach of the High Court in wardship proceedings, to assert that the use of the polygraph was as an instrument of oppression. Rather, the evidence of Dr O was to the effect that by using traditional methods of assessment of a narrative, a lower level of accuracy was achievable than when a polygraph was deployed. In no sense could this be regarded as an exercise in threat since the approach of Dr O was that the interviewee reflect on the truthfulness of answers. This was not designed to elicit particular answers. Dr O was clear in his evidence that in any professional assessment a psychologist must approach the interview with no pre-conceived opinions: the result might as equally be to confirm that an interviewee had no knowledge of, and did not in any way participate in, child abuse as to tend to any opposite conclusion.

39. Reference has also been made to reviews completed by the British Psychological Society whereby there has been analysis of accuracy and application in practice of polygraph testing; generally see Wilcox and Collins, Polygraph: The Use of Polygraphy in the Assessment and Treatment of Sex Offenders in the UK, (2020) 14 number 2 (52) European Polygraph 55. This is not about the admissibility of expert assessment of physical reaction to deceit or truth but as to

whether there is an overarching principle of fairness in the taking of what turned out to be, but was never necessarily going to be, a statement against interest.

Fairness in confession evidence

40. Whereas the trial judge ruled out the evidence of the confession made by BK to Dr O, in the context of the assessment of safety of future contact with her children, the basis for this exclusion was incorrect. In *The People (DPP) v Shaw* [1982] IR 1, at 61 Griffin J postulated a principle of fairness in the taking of statements of admission. It may be that this principle has been seen in a context where this was a dissenting judgment as to the exclusion of evidence in consequence of a breach of constitutional rights, as to which see *The People (DPP) v Quirke No 2* [2023] IESC 20, but his judgment remains, nonetheless, founded on good authority. He said:

> Our Constitution postulates the observance of basic or fundamental fairness of procedures, the judge presiding at a criminal trial should be astute to see that, although a statement may be technically voluntary, it should nevertheless be excluded if, by reason of the manner or the circumstances in which it was obtained, it falls below the required standard of fairness. The reason for exclusion here is not so much the risk of an erroneous conviction as the recognition that the minimum or essential standard must be observed in the administration of justice.

41. The vitality of the common law has been such that on occasion not only are rulings made on a case-by-case basis, but the fundamental motivation may also be expressed by judges *en banc* as to why the law is so. One example of that was McNaughten Rules of 1843, while appearing as *M'Naghten's Case* (1843) 10 C & F 200 in the reports is in fact an explanation as to the judge-made rules defining insanity as a defence to a criminal charge and circumscribing its applicability. Similarly, as to why supposedly tenable confession statements were ruled inadmissible in various rulings was refined and set out in the Judges' Rules of 1912. Again, this was an example of the judiciary explaining why rules existed and was formulated at the request of the Home Secretary; see the judgment of Lawrence J in *R v Voisin* [1918] 1 KB 531. This setting out of "administrative directions the observance of which the police authorities should enforce upon their subordinates" were not "rules of law" but have always been treated as more than guidelines since they are "tending to the fair administration of justice."

42. Hence, over centuries, in cases arising out of the maxim *nemo debet prodere se ipsum*, judges have always exercised a supervisory jurisdiction over the admission of evidence where a suspect incriminates himself or herself. That authority is exercised to exclude in order to ensure fairness; see for example *R v Payne* [1963] 1 All ER 848. This extends in a definite way to govern the admissibility of a confession, or physical admission such as the demonstration to police of contraband, which has been obtained through misleading calculated to undermine a suspect, through oppression or through the deliberate use of tricks; *Jeffrey v Black* [1978] 1 All ER 559. Hence tricking a suspect through deceit as to the presence, for instance, of their fingerprints or DNA at a crime scene, or through inventing a legal obligation that did not exist to force a response, will tend to undermine the inherent reliability of a confession; *R v Ireland* [1970] ALR 727. Suggestibility and the feeling of being in a hopeless position of denial due to the deceitful imposition of being entrapped in what in fact is false may only randomly lead to what is the truth; with a large measure of unreliability that undermines proof. See, for a discussion, Mannheimer, *Fraudulently Induced Confessions* 96 Notre Dame L. Rev. 799 (2020) where the standard on a review of American law is stated:

> While it might be common for police deception to induce confessions, it is rare that the deception would have caused a reasonable person, particularly one having just been informed of her rights, to speak. Only when, given the deception, a reasonable person aware of her rights would have chosen to forgo the right to remain silent and instead speak can we say that the confession was fraudulently induced and should be suppressed.

43. In contrast, Professor Gudjonsson in *The Psychology of Interrogations and Confessions: A Handbook* (London, 2003) 7-9 points up the abusive trickery, amounting to falsehood, sometimes contained in some police manuals on interviewing. These could include the concealment of identity (pretending to be a fellow-prisoner), misrepresentation of the nature or seriousness of the offence (to obtain a panicked denial that matters were so serious), that a victim has survived an attack and so may recover and identify a suspect, that forensic or eyewitness material exists (when it does not), that a co-accused has implicated the suspect (which may legitimately be presented to a detainee under the Judges' Rules), or has struck a deal and will testify, or that results have come back from a test. He comments that research has now led other scientists to acknowledge the "potential risk of false confessions occurring during custodial interrogations", due to "psychologically manipulative and deceptive interrogation" sessions.

44. While Gudjonsson comments that "no police interrogation is completely free of coercion" deception is of at a dangerous level as to the reliability of a resulting admission. Hence, at 37:

> Innocent suspects may be manipulated to confess falsely, and in view of the subtlety of the techniques utilised innocent suspects may actually come to believe that they are guilty. Inbau et al. state that their techniques, when applied in accordance with their recommendations, do not result in a false confession. This is simply not true. There is ample evidence that their advocated techniques do on occasions lead to false confessions. How often this happens we do not know.

45. It is impossible to lay down a definitive rule, beyond requiring a minimum standard of ordinary fairness. In terms of decided cases, it may be noted that in *State of Florida v Cayward* 552 So 2d 971 (Florida District Court of Appeal 1989) a confession was supressed when the police, in interrogating a young man on a charge of sexual assault on his niece, a young girl of five-years, fabricated two forensic reports linking his DNA to the victim, thereby provoking an admission. The observations of Schab J, ruling out that part of a confession statement which resulted, while not of general application, keenly address the danger of trickery in undermining the free will of a suspect when confronted by police in a custody context with fabricated, but what seems like compelling, 'evidence':

> We agree with the state that police deception does not render a confession involuntary per se. Frazier v. Cupp, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969). While Florida courts have frequently condemned the articulation by the police of incorrect, misleading statements to suspects, they have upheld the resulting confessions. Paramore v. State, 229 So.2d 855 (Fla. 1969); State v. Moore, 530 So.2d 349 (Fla.2d DCA 1988). See State v. Manning, 506 So.2d 1094 (Fla.3d DCA 1987). See also Burch v. State, 343 So.2d 831 (Fla. 1977). Police deception does not automatically invalidate a confession especially where there is no doubt that the defendant was read and understood his Miranda rights. Halliwell v. State, 323 So.2d 557 (Fla. 1975); Miller v. Fenton, 796 F.2d 598 (3d Cir. 1986).
>
> A clear majority of state and federal courts have taken a stand similar to that advanced by Florida's appellate courts. See, e.g., People v. Cortez, 143 Ill. App.3d 1024, 98 Ill.Dec. 242, 494 N.E.2d 169 (App.2d 1986); State v. Jackson, 308 N.C. 549, 304 S.E.2d 134 (1983),

rev'd on other grounds, 479 U.S. 1077, 107 S.Ct. 1271, 94 L.Ed.2d 133 (1987); Moore v. Hopper, 389 F. Supp. 931 (M.D.Ga. 1974), aff'd, 523 F.2d 1053 (5th Cir. 1975); Roe v. People, 363 F. Supp. 788 (W.D.N.Y. 1973).

The instant case, however, presents a different question and one which appears to be one of first impression not only in Florida but in the United States. The reporters are filled with examples of the police making false verbal assertions to a suspect, but counsel has not indicated nor has our research revealed any case in which the police actually manufactured false documents and used them precisely as the police did in this case. Our inquiry then is whether there is a qualitative difference between the verbal artifices deemed acceptable and the presentation of the falsely contrived scientific documents challenged here. We think there is, and we agree with the trial judge that the police overstepped the line of permitted deception.

It admittedly is difficult for us to draw a distinction purely on legal grounds in light of the sometimes egregious verbal misrepresentations which have previously been allowed. Our opinion, therefore, is the result not only of prior case law, but of a careful examination of traditional constitutional protections as well as practical considerations. Based on what we perceive as an intrinsic distinction between verbal assertions and manufactured documentation, we draw what we hope will be a bright line by saying that the type of deception engaged in here has no place in our criminal justice system.

It may well be that a suspect is more impressed and thereby more easily induced to confess when presented with tangible, official-looking reports as opposed to merely being told that some tests have implicated him. If one perceives such a difference, it probably originates in the notion that a document which purports to be authoritative impresses one as being inherently more permanent and facially reliable than a simple verbal statement.

The very fact that our law insists that a suspect be advised of his Miranda rights and indicate that he understands them is almost an acknowledgment that individuals questioned by the police are entering an uncertain arena. See Miranda, 384 U.S. 436 at 458, 86 S.Ct. 1602 at 1619, 16 L.Ed.2d 694 at 714 (police interrogation is inherently coercive, and unless adequate protective devices are employed, no statement can truly be voluntarily given). Realistically, suspects given Miranda rights recognize that the object of a police inquiry is to confirm the suspicions held by the police. Police interrogations, even those of the least aggressive nature, are imbued with an atmosphere of confrontation. Thus, a suspect reasonably expects that police will make assertions and disclose or not disclose certain information in an attempt to observe the suspect's reactions.

We think, however, that both the suspect's and the public's expectations concerning the built-in adversariness of police interrogations do not encompass the notion that the police will knowingly fabricate tangible documentation or physical evidence against an individual. Such an idea brings to mind the horrors of less advanced centuries in our civilization when magistrates at times schemed with sovereigns to frame political rivals. This is precisely one of the parade of horrors civics teachers have long taught their pupils that our modern judicial system was designed to correct. Thus we think the manufacturing of false documents by police officials offends our traditional notions of due process of law under both the federal and state constitutions. U.S. Const. amends. V, XIV; Fla. Const. art. I, § 9.

46. Other examples may readily be found. What tends to characterise the analysis in such cases, justifying excluding a confession, is that the deception involved is as against a suspect in custody where the trick played, or false report manufactured, is deployed to favour a sense of hopelessness in the fundamental stance of the person accused of a crime but persisting in denial. Among the examples are: *The People (DPP) v O'Neill* [2007] IECCA 8 at [19], [2007] 4 IR 564 at 570, where a statement was excluded because a garda had told the accused that there was CCTV footage which implicated him when this was not true; *R v Collins* [1987] 1 SCR 265, where Lamer J held that a confession would not be inadmissible unless the trick was a "dirty trick" in the sense that it would shock the community; *People v Esqueda*, 17 Cal App 4th at 1473-77, 22 Cal. Rptr 2d at 139, where detectives falsely told the murder suspect that the victim made a dying declaration that implicated the suspect, that the suspect's fingerprints were found on the victim's neck, that the suspect's fingerprints were found on the fatal bullet, that there was a witness to the killing, and that gunshot residue was found on the suspect's hands – all of which were false. See also *Jenner v. Smith*, 982 F.2d 329, 332 (8th Cir. 1993); *State v. Jackson*, 308 N.C. 549, 567-68, 304 S.E.2d 134, 144 (1983).

47. All of these constitute very serious deceptions calculated to undermine a detained person's free will: hence they strike directly at the principle that a confession must be voluntary. Innocent misstatements are not in such a category. Interviewers cannot be held to a standard of perfection. This is a matter for individual assessment. While the Judges' Rules cover a situation where a co-suspect has confessed and while a confrontation with such a suspect is possible, deception is dangerous as to reliability. In custody situations, the case law demonstrates that there is a range of necessary protections against coercion. Similarly, in custody situations, deceptive conduct may enable a judge to rule out a confession statement where thereby a suspect's will is undermined in a fundamental way.

The Director of Public Prosecutions

48. In our system of law, decisions as to prosecution are not vested in the judiciary, as in some civil law jurisdictions. The Constitution provides at Article 38 that prosecutions are initiated in the name of the people of Ireland and by the Attorney General or such other official as may be prescribed by law. Since the Prosecution of Offences Act 1974, this has been the Director of Public Prosecutions. This is an executive function; *State (McCormack) v Curran* [1987] 1 ILRM 225. The grounds for any review by the courts must be founded on a breach of administrative law principles, including an absence of fair procedures. Thus, in *Eviston v Director of Public Prosecutions* [2002] 3 IR 26 an absence of fairness was found where a decision had been made by the DPP not to prosecute for dangerous driving, ostensibly on the basis of an expert report commissioned by the suspect demonstrating a tyre defect leading to the fatal collision. On the relatives of the deceased writing to the DPP under s 4 of the 1976 Act, that decision was changed, but on the basis alone of the new representations, without the submission of any contrary potential testimony as to the cause of the crash. The decision amounted to a reversal of what had earlier been concluded and based on no new evidence:

> Viewing the matter objectively, and leaving aside every element of sympathy for the applicant, I am forced to the conclusion that in circumstances where the respondent candidly acknowledges that there was no new evidence before him when the decision was reviewed, the applicant was not afforded the fair procedures to which, in all the circumstances, she was entitled.

49. Reviewing a decision of the DPP may be possible where an applicant can demonstrate, the burden of proof lying on the moving party, that a decision resulted from bad faith or from

improper motive; *H v Director of Public Prosecutions* [1994] 2 IR 589. In *Carlin v Director of Public Prosecutions* [2010] 3 IR 547 the existing law was summarised at [19] by Fennelly J:

> Prior to considering this question of observance of fair procedures, it is appropriate to recall the nature and extent of the powers of the Director to decide, respectively, to institute a prosecution, to decide not to prosecute and to review and, where appropriate, reverse any earlier decision. The relevant case law has seen the development of clear criteria. Keane C.J., most notably, in his majority judgment in *Eviston* comprehensively examined and explained the key elements. For the purposes of the present appeal, it is sufficient to recall the essence of that judgment. Firstly, "both the decision to initiate a prosecution and the subsequent conduct of the prosecution are functions exclusively assigned... to the respondent under the Constitution and the relevant statutory provisions." Secondly, in the absence of mala fides, evidence that the Director had abdicated his functions or improper motivation, the Director "cannot be called upon to explain his decision or to give the reasons for it or the sources of the information upon which it is based." Thirdly, the Director is entitled to review and to reverse his own earlier decision not to prosecute even in the absence of new evidence and even following the making of representations by the complainant or his family.

50. An existing decision to not prosecute is capable of being changed even in the absence of new evidence and without debating the issue with either the suspect or with the victim or victim's family. At [24] Fennelly J stated:

> The Director is entitled to change his decision even without new evidence. The Director is under no specific obligation to warn a person of the possibility of review, when communicating a decision not to prosecute. In fact, as was pointed out in the course of argument, communication of such a caveat would be likely to add to the stress, whereas, at least on his own affidavit, the appellant did not worry at all about the matter between the two relevant dates and thus would probably have suffered more from stress, if he had believed that the prosecution could be revived. Moreover, it is not suggested in *Eviston* (at least it was not a ground advanced) that the Director was obliged to warn the appellant that he was reviewing his decision so as to allow him an opportunity to make representations, which would be the classic observance of fair procedure. Such a procedure would be quite incompatible with the autonomy of the Director's decision-making function. In addition, such a warning would be likely to give rise to some degree of flight risk.

51. That approach was affirmed in *Cosgrave v Director of Public Prosecutions* [2012] 3 IR 666 which involved an additional charge of corruption some five years after a plea of guilty to electoral offences. One of the grounds was a legitimate expectation plea that a suspect could rely on an earlier representation of no prosecution. There was no duty, it was held, to inform a suspect of any potential review of an earlier decision and in that case there were reasons for the delay.

52. Hence, the case law affirms that the seat of decision-making as to prosecute or to forego prosecution is vested in the Director of Public Prosecutions and that such decisions are reviewable only on limited grounds where it is possible to produce evidence of improper motive or mala fides or where, in specific circumstances, an unfair procedure has been adopted. The burden of proof, in such regard, being on an applicant, what may be remarked here is the absence of any evidence for asserting that there was any engagement by the DPP in any aspect of the child protection assessment of the wardship application in the High Court or that any decision made was subject to any consideration that new evidence might thereby emerge. All of the evidence suggests that

the original decision not to prosecute BK was made in good faith at a time when no potential testimony pointed to a sufficient basis for prosecution. Without any involvement by either the gardaí or the DPP, and in a context necessary to protect the vulnerable subjects of wardship proceedings, new evidence has emerged. From the point of view of prosecuting or not, that evidence can only be judged as to its potential assistance to a prosecution. Any assessment as to weight of evidence will only be possible at trial.

53. Finally, in the context of the lively correspondence, it cannot be asserted that BK was unaware that any decision to prosecute was at all times, as a matter of law, subject to review. The entire context of the 1974 Act is one placing responsibility for decisions as to prosecution on the Director of Public Prosecutions. That responsibility must include that of review of decisions.

Exclusion of evidence in this case

54. There remains a long-standing entitlement of a judge to scrutinise a confession from whatever situation in the context of the authority long exercised over the entitlement of a suspect not to be forced into self-incrimination. Basic fairness is what is required for a confession to be admissible. No such standard may, however, be applied as if to give to judges an entitlement to be free of principle.

55. The principle of control over the fairness of confessions by suspects is grounded in the decisions. These have led, in the instance where a person is deprived of liberty and subject to direction as to attendance at interviews, to a range of safeguards which circumscribe the possibility of coercion or oppression. This is because of the radically different nature of an interview which takes place under the authority of arrest and detention on reasonable suspicion of the commission of a crime and, in stark contrast, either a social interaction or an interview for the purpose of ascertaining the safety of the vulnerable to parents in the context of a wardship enquiry.

56. Wardship, while formal in nature, does not have any of the structural protections in relation to the interview of suspects which arose out of either from statute, or initially, through the authority of the judiciary to protect rights or to guard against false confessions through the sensible use of what now may seem like ordinary caution to ensure that police interviews were reliable. Wardship is about the protection of the vulnerable. That absence of structural protection cannot be used as a basis for the invention of what would be an entire series of novel rules of law, as contended for on behalf of BK on this appeal, whereby those conducting interviews in order to ascertain if contact with a parent is safe were required to bring into play the detailed rules designed for the protection of those in custody. Such an argument is untenable.

57. What remains a basic foundational principle, however, is that deception and trickery are dangerous authors of what may be unreliable but, of their nature, potentially compelling, confession statements. That principle of fairness has assumed the form of detailed statutory and common law rules in respect of custody. Those rules are not applicable outside that situation, but maintaining a context wherein underhand and perilous contamination of a person's mind are eschewed remains a principle upon which judicial decision may be legitimately based.

58. Fairness is rooted in the case law and is applicable whether deception is used as a tool of manipulation either in custody, where its effect is likely magnified, or where a formal interview is conducted and leads to an admission. This is not a question of what is a detached analysis of what may or may not seem appropriate. Rather, the authorities demonstrate that judges are not at large. Instead, there must be a focus on what is alleged to be wrong with an interview and why that of

itself renders the resulting confession dangerous. The two are related. The analysis presented as to what is wrong with deception is that it leads to, and may result in, an unreliable or false confession.

59. Here, there was no basis for excluding any of what BK said in the context of the interview with Dr O. There is nothing to suggest that the polygraph test was used as an instrument of oppression, whereby unless particular answers were given or admissions were made, BK would be reported as an unsafe contact for her children. The instrument was used by Dr O for the purpose only of securing verification, as an aid to discovering where the truth might lie. Nor was there any aspect of this series of interviews which in any way could be said to be equivalent to the circumstance of arrest or of being put under authority in consequence of detention for the purpose of the investigation of a crime. This was completely different, a measured investigation into potential threat where there was no purpose of charging anyone with any offence or of exercising any form of coercion.

Result

60. In the result, the decision of the trial judge to exclude the alleged confession material which was elicited during the interviews in aid of wardship was incorrect. On the grounds herein stated, the decision of the Court of Appeal is affirmed. Submissions are now required as to whether the Court should order a retrial of BK on the charges.

61. Any question of re-trial is a matter for a separate hearing on the basis of the criteria set out in paragraph 15 above. Consequently, further submissions are necessary.