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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE KING

v

ROBERT BEGGS

Mr McDowell KC with Ms Gallagher (instructed by the PPS) for the Appellant
Mr Mulholland KC with Ms Walsh (instructed by Jack McCann & Co, Solicitors) for the Defendant

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Before: Keegan LCJ and Treacy LJ

KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] This is a prosecution appeal from a terminating ruling made by the Recorder, Her Honour Judge Smyth, ("the judge") on 27 June 2022, whereby she determined that the evidence was so unconvincing that considering its importance to the case against the defendant Robert Beggs his conviction of the offences would be unsafe, pursuant to Article 29 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order").

[2] After this ruling was given the prosecution indicated an intention to appeal. The Court of Appeal sat on 30 June 2022. An expedited hearing was not sought, and the jury was discharged. Skeleton arguments were thereafter filed on behalf of both parties. After an initial adjournment by consent of both parties the case was heard by the Court of Appeal.

Factual Background

[3] Robert Beggs ("the defendant") was charged with five offences. Two of these were rape, one sexual assault by digital penetration, one sexual assault and one indecent assault. In each case the complainant was Joan McClelland, who was born in September 1964. She is now deceased. The complainant, who was the sister-in-law

of the defendant, had Down's Syndrome and learning disabilities. The complaints of sexual abuse span a time frame from 1994 to 1999 in relation to some of the offences and 2011 to 2016 in relation to others.

[4] The first set of offences are alleged to have occurred at a private home in Ballyclare. The defendant, his first wife who was the sister of the complainant and his three daughters lived in the property with the complainant and her mother. Rape of the complainant is alleged to have occurred during this time, between 1994 and 1999.

[5] The defendant's wife died in 2000 and following from this he moved to another property in Ballymena. Rape and digital penetration of the complainant are alleged to have occurred there. In addition, it was alleged that a sexual assault on the complainant occurred at the defendant's caravan over the time span of 2011-2016.

[6] On 13 June 2011, the complainant moved to a care home. The defendant visited her regularly there and on some occasions was accompanied by his second wife. Records from the care home were admitted by agreement during the trial. These records demonstrated that there was a positive relationship between the complainant and the defendant.

[7] On 18 January 2016, the complainant made disclosures to staff of sexual abuse against the defendant. On 20 January 2016, because of these complaints the complainant was medically examined at the Rowan Centre. On 27 January 2016, an Achieving Best Evidence ("ABE") interview of the complainant took place. On 2 February 2016, the defendant's caravan was forensically examined and nothing of note was found. On 2 February 2016, police interviewed the defendant, and he denied all charges. On 15 February 2016, the defendant's caravan was further examined for fingerprints, and nothing was found.

[8] The agreed chronology provided by the parties refers to other occasions when the complainant made disclosures to various people which we summarise as follows. In February 2016 she told her niece, Fiona McMillan, that she was sexually assaulted in two private homes: Russell Manor and Charles Drive. Charles Drive was a property at which the defendant and his first wife lived with the complainant and her mother between 1980-81 and 1994. Russell Manor was a property in Ballyclare where the complainant lived between 1994 and 2000.

[9] In October 2016, the complainant made allegations of oral sex involving the defendant to staff members at the care home. On 18 October 2016, a pre-interview assessment was held with the complainant. The investigating officer and a social worker were present. No further disclosures were made. Sadly, on 23 April 2017, the complainant died.

Progress of court proceedings and rulings

[10] The summons against the defendant was issued on 4 February 2019. The defendant pleaded not guilty at arraignment on 4 April 2019. The trial commenced thereafter in various stages. There were a considerable number of attendances at the Crown Court. It is also of note that there were amendments to the indictment during the court process.

[11] The substantive part of the hearing in this case began in December 2020. On 20 and 21 December, medical evidence was heard from experts which resulted in the first ruling of the judge.

The first ruling

[12] This ruling dealt with the admissibility of expert evidence relating to the complainant's reliability considering her disability. In her written ruling the judge explained the context which we summarise. The prosecution sought to adduce the hearsay evidence of the sexual complaints made by the complainant in her ABE interview through the interests of justice gateway and Article 6(1)(d) of the 2004 Order. The defence objected to the application and submitted that the test in Article 6(2) had not been met and, further and in the alternative, that the court should refuse to admit the evidence under Article 30 of the 2004 Order which preserves the court's general discretion to exclude evidence or under Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1984 ("PACE").

[13] A preliminary point was also raised as to the extent to which expert evidence was admissible in relation to the hearsay application. The expert evidence was put before the court on an issue of the complainant's reliability, particularly, given her personal circumstances and how that impacted on the ABE evidence. In this regard the defence expert, Dr Cardosa, made several criticisms about the conduct of the ABE and how this impacted on the complainant's reliability. For example, at paragraph 4.02 of his report as the judge notes, he commented:

> "Some questions were lengthy, and others suggested an answer (ie they were not open ended) this would have made the interview unreliable. I understand that (the complainant) also had a particular fantasy she was the girlfriend of and was to be married to Brendan Rodger (sic) the then manager of Liverpool Football Club."

[14] The prosecution argued that it was apparent from the latter comment that Dr Cardosa had overstepped the line and provided an opinion on the complainant's reliability which is a decision for the court to make.

[15] In reaching her ruling on this the judge said at para [13]:

> "It is important to distinguish between the preliminary issue and the decision that the court has to make at this

> stage of the trial. The court is concerned with an application to admit hearsay evidence, which includes the question of capability. *Riat* [2012] EWCA Crim 1509 makes clear that in order to admit the hearsay evidence, it may be either demonstrably reliable or capable of proper testing. There is no requirement to show both."

[16] The judge's ultimate conclusion was as follows:

> "[15] In this case I accept that expert evidence is admissible to show the potential impact of the complainant's Down's Syndrome and intellectual disability on her reliability. I also accept that the evidence is admissible to show how the conduct of the ABE may potentially impact on the complainant's reliability in view of her condition.
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> [16] However, I do not accept that an expert's evidence that the complainant is, in fact, unreliable as a consequence of the manner in which the ABE was conducted is admissible. This conclusion accords with the observations contained in Archbold 2021 10-51.
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> [17] The decision whether to admit the hearsay evidence is dependent on its importance, its apparent strengths and weaknesses and what material is available to help test and assess it. The assessment of the complainant's reliability is central to that decision and is, therefore, a matter for the court, not for the experts. The duty of the experts in this case is limited to providing an opinion on the nature of the complainant's disability and how that might impact on her reliability in the context of all the circumstances in which the evidence was obtained.
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> [18] It follows that the passages in Dr Cordosa's report and handwritten notes which are the subject of criticism are inadmissible."

The second ruling

[17] Following the first ruling the judge heard the prosecution's formal hearsay application on 30 April 2021 and delivered a substantial written ruling. In this ruling the judge introduced the legal context as follows:

> "This is an application by the prosecution to adduce hearsay evidence of the complainant's ABE interview pursuant to Article 22A of the Criminal Justice (Evidence)

(Northern Ireland) Order 2004. Article 22A provides that in criminal proceedings a statement not made in oral evidence in the proceedings is admissible of any matter stated if the relevant person is dead. Leave of the court is not required for the statement to be admissible, but the court has a discretion to exclude the evidence pursuant to Article 30 of the Order and Article 76 of PACE 1989."

[18] The judge also referred to the leading authority in this area of *R v Riat* [2012] EWCA Crim 1509. She also referred to a decision of Coghlin LJ in another case and a decision of Maguire J in *R v Thompson* [2014] NICC 18. Finally, she referred to a decision of *R v Friel* [2012] EWCA Crim 2871. The judge examined the question of the complainant's competence. She reiterated her view at para [17] in the following terms:

> "Applying the test in Article 27(3)(a) and (b) I am satisfied that the complainant appeared to understand the majority of the questions put to her about the matter stated and that she gave answers which for the most part could be understood and that the test for capacity is met."

[19] Next the judge summarised the prosecution arguments as follows:

> "[21] The prosecution submits that the circumstances in which the complainant's initial complaint was made is important evidence supporting the reliability of the complainant. There is evidence from three members of staff in the care home who recorded the complainant's complaint after she was heard crying in her bedroom shortly before the defendant was due to pick her up. Detailed accounts were recorded including part of a conversation between the complainant and her nephew in which he asked her why she had not told earlier, to which she replied that the defendant told her that she would have to leave the care home. It is apparent from the medical notes that the complainant was anxious to remain in this particular home.
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> [22] The prosecution also relies on evidence from Fiona McMillan, a relative, who recounts an occasion when she called at the house where the complainant lived and after a delay in the door being answered the complainant appeared flushed and dishevelled and her left breast was not properly inside her bra. The only person in the house at the time was the defendant and the blinds had been closed. Ms McMillan also confirms that the complainant told her in September 2015 that she had

been to the defendant's caravan where the complainant alleges abuse took place.

[23] In relation to the ABE the prosecution submits that there is no known explanation for her apparent sexual knowledge as described, there is no apparent motive for the account to be manufactured and the relevant consistency with her first complaints. Furthermore, it is submitted that the ABE is compelling because a number of things she said bore the ring of truth. Attention is drawn to the fact that she repeatedly remarked on the presence of the defendant's two dogs during the assault commenting 'it is not fair on the wee dogs.' Attention is also drawn to comments made throughout the ABE, that she had not seen a penis before, she did not want to see it again, that she had told him that she did not want to wet his penis, that his behaviour annoyed her and that it scared her and finally her remarks "I don't understand why he done it … and why now?"

[24] In the alternative the prosecution submits that the evidence can be safely tested and assessed. Firstly, the jury will have the benefit of the recorded ABE to assess the complainant's demeanour and the weaknesses of the defence if exposed will be clear to them. The existence of a recorded interview was one of the reasons the court in *Riat* was satisfied that the hearsay evidence had been correctly admitted. Secondly, the jury can consider the evidence of the staff who recorded the initial complaints and the circumstances in which that occurred. These witnesses will be available for the prosecution, not just about the issues but about issues touching on the complainant's credibility generally in relation to her behaviour within the home, which is well documented. Finally, evidence from the family member who alleges finding the complainant inappropriately dressed when she answered the door and when the defendant was the only person present can be challenged and the defence will have the benefit of their client's instructions."

[20] The judge then set out the defence case as follows:

"[25] The defence submit that the prosecution cannot satisfy the court beyond reasonable doubt either that the evidence is demonstrably reliable or that there are sufficient tools to assess the reliability. In final written submissions the defence emphasise previous medical and

social service assessments, highlighting the extent of her disability. It is against that background that the content of the ABE interview must be considered.

[26] The defence point to inconsistencies in accounts and, in particular, a subsequent allegation of oral sex made several months after the interview which was not investigated and in respect of which no charges have been brought. It is noted that at the end of the ABE the complainant confirmed that there is nothing else that she wanted to disclose.

[27] In final written submissions significant reliance is placed on the lack of disclosure of minutes of a meeting between the complainant and the PSNI prior to the ABE being conducted. Questions are raised about information that may have been given to her and how this may have impacted on the subsequent ABE. After those submissions were received, disclosure was served on the court. No further submissions having been received and so presumably these concerns had been assuaged.

[28] Whilst the prosecution has highlighted areas of consistency, the defence has highlighted areas of inconsistency and apparently conflicting statements. In particular, inconsistencies between the allegations in the ABE and the reports recorded by the staff at the home are relied upon as are omissions in the account given to Dr Middleton a week prior to the ABE. Furthermore, the defence has criticised the conduct of the ABE, the manner of questioning and, in particular, areas that it is submitted ought to have been clarified by the interviewer.

[29] Additionally, the defence points to the fact that over the lengthy period of time these allegations are said to have occurred, the complainant continued to have contact with the defendant on a weekly basis, even after the death of her sister, the defendant's wife. It is also documented that the complainant looked forward to "Robert collecting her", "had a good day with Robert" etc at a time after allegations are said to have taken place."

[21] In her consideration the judge accepted that in assessing the apparent reliability of the evidence the complainant's significant intellectual disability must be borne in mind. Applying the test in Article 18(2) of the 2004 Order the judge said, assuming it to be true, that the court readily concluded that the ABE would have substantial probative value. The basis for this conclusion is expressed as follows:

> "Indeed, it is fair to say that it is of crucial importance to the prosecution case. In circumstances where the complainant's ability to communicate effectively is compromised, other evidence which is supportive or otherwise must be very carefully scrutinised."

[22] The judge then referred to other supportive evidence from family members and from those who worked in the care home to whom the complainant had made disclosures. In her judgment she said that "there is no explanation for the sexual knowledge expressed, nor any motive for the complaints." Against that finding the judge balanced the fact that there was evidence that the complainant enjoyed the defendant's company after the time-period these offences are alleged to have been committed and there was evidence of attention seeking behaviour. From paras [35]-[40] the judge explains why she decided to admit the hearsay evidence in the following terms:

> "[35] The real question in this case is how reliable the maker of the statement appears to be. There is no question that there are inconsistencies in the detail of the accounts, and notwithstanding the complainant's communication difficulties this is a matter of concern.
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> [36] However, as the Court of Appeal stated in *Riat* at para [5], there is no general rule that hearsay has to be shown to be reliable before it can be admitted or left to the jury. It is enough that there are sufficient tools safely to assess its reliability. In this case, the evidence of the family member can be challenged, the circumstances in which the initial complaints were received and recorded can be challenged, the complainant's entire history can be put to witnesses and each of the inconsistencies, omissions and conflicts can be laid bare before the jury. The jury will also have the benefit of seeing for themselves how the ABE was conducted and how the evidence emerged.
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> [37] The defence has rightly pointed out that there is no supportive medical or forensic evidence and there is no independent supporting evidence. Evidence from the staff at the home is not independent evidence because the complaints emanated from the complainant herself and the evidence from the family member is evidently not independent either. It has to be remembered, however, that sexual offences are committed in private, there is rarely independent supporting evidence and even in the rare cases where there is medical evidence, more often than not, it is a neutral finding."

> [38] In considering the amount of difficulty involved in challenging this statement it should be remembered that even if the complainant was alive and fit to give oral evidence, the questioning would have been limited in light of her vulnerability, and as with all vulnerable witnesses, the defence would not have been permitted to challenge her evidence in the normal way. In such cases, inconsistencies are now revealed to the jury in innovative ways and the defence does not put its case in the normal way. That does not mean that the prosecution case is not properly tested. In fact, the evidence would have been tested in a similar way had the complainant been able to attend as it will be tested in her absence.
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> [39] The limitations of hearsay evidence will be the subject of careful direction after discussion with counsel and all of the deficiencies in the prosecution case will be highlighted.
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> [40] I, therefore, admit the hearsay evidence of the ABE."

The subsequent trial

[23] Following from this ruling the trial was listed on 1 November 2021. It was adjourned on this occasion after legal argument which was heard over 1 and 2 November 2021. The trial then recommenced on 13 June 2022. Outstanding hearsay applications and a non-defendant bad character application were heard.

[24] On 14 June 2022 the prosecution opening speech took place. In opening the case the prosecution frankly accepted some evidential challenges. Prosecution counsel referred to the complainant's evidence that the defendant was on top of her when the penetration occurred and accepted that in that position penetration of the anus may not be plausible and that vaginal penetration was most likely.

[25] The ABE was then played, and evidence was heard by the jury from a medical expert Dr Middleton, and from care home personnel Hannah Page and Joanne McClements. On 15 June 2022, evidence was heard from other care home staff and family members: Joanne McClements, Patricia Abrahams, Amanda Gilchrist (edited statement read), Caroline Forsythe, Elizabeth Blair, Fiona McMillan and Jonathan Mahood. On 16 June 2022, evidence was heard from the investigating officer who proved the defendant's interviews and the agreed facts in relation to records from the care home.

[26] As far as we can discern the witnesses gave evidence largely in accord with their statements. Defence counsel challenged the evidence from various standpoints

and highlighted inconsistencies in the complainant's evidence. We also note the content of the medical evidence that was called. Dr Middleton, called on behalf of the prosecution agreed with the report from Dr Hall obtained by the defence, that full penetration was most unlikely, but it could have been attempted or superficial or could involve genital to genital contact that could be mistaken in a person without previous sexual experience. On examination, the complainant was found to have a very narrow vaginal opening measuring 1cm.

[27] Dr Middleton opined that this vaginal characteristic can commonly occur after menopause when oestrogen levels fall and there can be fusion of labia minora and narrowing of the vaginal opening. Dr Middleton stated that this is likely to make full penetration of the vagina difficult, but she did not refute that penetration occurred. The complainant was 12 years post-menopausal at the point of examination and had therefore, gone through the menopause seven years before she moved to the care home. Dr Middleton also confirmed that the menopause and consequent lack of oestrogen causes loss of elasticity and dryness which pre-disposes a woman to injury. Dr Middleton agreed that full penetration of the vagina would be likely to cause genital injury and that because of the disparity in size between an adult erect penis and the complainant's vaginal opening as well as her post-menopausal state, injury would be very likely. No injuries were found on examination although the complainant clearly stated that the defendant hurt her in her ABE.

[28] On 17 June 2022, there was legal argument in relation to applications made by the defence of no case to answer (*Galbraith*) and an application under Article 29 of the 2004 Order to stop the case. A decision was made to send the jury away until Monday 27 June 2022. There was further legal argument over 20-22 June 2022. The trial did not sit on 22-24 June 2022 to enable the judge to consider the arguments. On 27 June 2022, the judge provided her ruling.

The third ruling

[29] This is the ruling under challenge as it deals with the defence applications at the conclusion of the prosecution case. The judge acceded to the application pursuant to Article 29 of the 2004 Order. It is that decision which the prosecution appeals.

[30] We summarise the terms of the ruling as follows. The judge began her judgment by setting out the history of the case. She referred to the fact that the defence was asked to provide a list of questions which the complainant would have been asked if she had been available to give evidence considering her communication difficulties. A written document was provided.

[31] The judge also referred to the fact that a registered intermediary report was commissioned in this case. That report described the complainant as a 52-year-old lady with Down's Syndrome. It said that her understanding of language was severely impaired and she had difficulties with expression and use of language.

[32] Having set the context the judge then considered the law in relation to admissibility of hearsay evidence and in relation to a *Galbraith* application applying the test found in *Galbraith* [1981] 1 WLR 1039. In relation to the Article 29 application, she referred to the inconsistencies in the complainant's evidence relied upon by the defence and numbered 1-15. The judge summed up the defence case in this way:

> "In short, the defence submission is that the nature and extent of inconsistency trumps the strengths identified by the prosecution. Some of the matters set out by the defence in themselves are matters for jury consideration."

[33] The judge then considered matters which she thought fell outside the ambit of jury consideration. First, she dealt with the reliability of evidence as to the alleged abuse which occurred at the caravan and found as follows:

> "The complainant has given two completely different accounts of the nature of the sexual contact which she says occurred at the caravan. I pause to observe that whether or not she was at the caravan at all is a live issue in this case. The defendant denies it, a statement from the caravan park owner, provided by the prosecution by way of disclosure, records that he was not aware of anyone other than the defendant's wife ever being at the caravan, and forensic tests undertaken to look for a link between the complainant and the caravan proved negative. Two witnesses have given evidence that the complainant told them that she had been at the caravan prior to these complaints being made, although no complaint of sexual misconduct was made to them.
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> [31] The first account the complainant gave relating to the caravan was recorded by care worker, Joanne McClements. She recorded the complainant saying the defendant took her to the caravan and also did it there. The defendant put his finger in, and his thing and he lay on top of her. The complainant said, 'you should not have done that.' The complainant also said that he felt her breast in below her top and bra. However, in her ABE recorded two days later, the complainant said that the defendant was lying on top of her on the sofa and he tried to kiss her and touched one of her breasts, she said he rubbed her breast, and she told him that she did not like it. She was asked if he kissed her or touched her with his mouth anywhere and she said 'I think he did.' She agreed that she said that he touched her boobs and that he had lifted her top and put his hand underneath her bra. She was asked did he do anything else in the caravan and the answer she

> gave was 'no.' She is asked again, whether he did anything else and she said 'he didn't do anything else.' The complainant stated that sexual activity had happened once in the caravan."

[34] At this point we pause to observe that the prosecution charged the defendant in the amended indictment on the basis of the account contained in the ABE because it was less serious than the account to the care worker. This is the first area where the judge raises a difficulty with the evidence ie the caravan complaint.

[35] The second area of inconsistency that the judge highlighted concerned count 1 rape and count 2 sexual assault by penetration either vaginally or anally in each case which were offences alleged to have occurred in the defendant's home. We note that each of these accounts was amended by the court on the application of the prosecution on the grounds that it was unclear whether the complainant was talking about her vagina or her anus. The timespan is 13 June 2011 to 18 January 2016 which is the date when the complainant became a resident at the care home.

[36] The judge examined the points made by the defence in relation to this second area of inconsistency. In support of the argument the defence set out the relevant portions of the complainant's ABE. It is noted that in the visual recording of the ABE the complainant motions to her private area at various times and has no real understanding of the different anatomical parts. The defence therefore highlighted the fundamental question that the jury would have to consider was whether they were sure that the complainant was describing a penetrative act either by a penis or a finger before they went on to consider whether they accept that evidence was truthful and reliable. In this regard the judge said:

> "This is indicative of the difficulty in assessing the complainant's evidence and specifically the sexual behaviour that she is describing."

> "There is more force in the defence argument that if there was penetration there is no evidence of the kind of physical injury that Dr Middleton indicated would be expected."

[37] Then, the judge turned to what happened at the first house in which the alleged abuse occurred. The judge highlighted the following inconsistencies. Initially, in the ABE the complainant refers to the defendant putting his penis in her bottom four times. Later she says it happened once. The prosecution charged the defendant with only one count of rape to reflect this inconsistency and, count 5 indecent assault, relates to the same incident and is on the indictment in the event the jury is not sure that penetration with a penis occurred.

[38] Drawing all together the consideration section of the ruling reads as follows:

"[44] There is no dispute that the complainant's evidence is of central importance to the prosecution case. Having considered the strengths and weaknesses of the evidence and the tools available to the jury for assessing its reliability, I have concluded that the hearsay evidence that the defendant sexually abused the complainant, even if sole and decisive might be shown to be reliable in the sense that it is shown to be so to the jury, and the jury might perfectly properly accept it without any unfairness in the trial process: *Riat* para 33(dd).

[45] But, that is not the end of the matter. In applying the Article 29 test, I have to consider the charges that have been brought against the defendant. I make no criticism of the Public Prosecution Service. It has clearly, carefully considered the evidence, the inconsistencies and the lack of clarity and done its best to discharge its responsibilities. Where there have been fundamental differences in accounts, it has opted for the version most favourable to the defence. Where there have been potential alternative counts it has drafted the indictment appropriately, and where there has been a lack of clarity it has sought appropriate amendments.

[46] However, I have ultimately concluded that the extent of inconsistency, differences in accounts and, in particular, the lack of clarity about the nature of the alleged sexual acts underpinning the accounts on the indictment means that the hearsay evidence is so unconvincing that any conviction would be unsafe.

[47] I recognise the public interest in prosecuting those who commit sexual crimes against mentally disordered persons and hearsay evidence is admissible to prove crimes, even if it is sole and decisive, subject to careful scrutiny and safeguards. Article 29 is a vital safeguard.

[48] However, it is not fair to leave counts to the jury where the sexual behaviour alleged by the complainant is so unclear. Was there penetration? Was there attempted penetration? Was it sexual assault? What is the complainant describing? In my view, this case is akin to *Ibrahim*, because the evidence is so flawed, so central to the case and, in particular, so difficult to assess that it would be unfair to leave it to the jury."

Grounds of Appeal

[39] The grounds of appeal set out by the prosecution in the Form 1 notice dated 27 June 2022, are sparsely stated. Under the specification of the question of law the question is simply put - whether the learned judge was correct to stop the case under Article 29 of the 2004 Order. This ground of appeal has been supplemented by the skeleton argument filed by Mr McDowell and Ms Gallagher of 23 September 2022.

[40] In that argument the prosecution applies for leave to appeal against the ruling on three grounds.

[41] Firstly, it is submitted that the conclusion of the judge involved an error of principle based as it was on the same evidence as the first conclusion. In the alternative, it was an unreasonable conclusion for the judge to have reached. Second, the prosecution submit that the judge erred in principle in her reliance in coming to the conclusion upon inconsistencies in the evidence which were not of fundamental importance. Thirdly, it is submitted in the alternative that given the judge's conclusion there was evidence that the jury could properly accept that the defendant had sexually abused the complainant, lesser alternative offences should have been left to the jury.

[42] The defendant filed a notice in defence of the appeal which is dated 20 June 2022. It is instructive to look at the points raised in that notice which are expressed as follows:

(i) Prosecuting counsel sought orally to apply for leave to appeal before the learned trial judge. No actual ground was advanced. Leave to appeal was, accordingly, refused in the course of an ex tempore ruling.

(ii) The prosecution notice of appeal under the sub-heading 'Specify the question of law' sets out the following basis, namely "whether the learned judge was correct to stop the case under Article 29 of the 2004 Order, because the evidence was so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe."

(iii) Article 20 of the 2004 Order deals with the determination of prosecution appeals by the Court of Appeal. The Court of Appeal has no inherent jurisdiction to hear an appeal by the prosecution against a terminating ruling. For this jurisdiction to arise the prosecution must satisfy the court upon the grounds provided for in Article 26 of the 2004 Order which deals with the reversal of rulings made by a judge, this provides:

> "26. The Court of Appeal may not reverse a ruling on an appeal under this part unless it is satisfied –
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> (a) That the ruling was wrong in law;

(b) That the ruling involved an error of law or principle; or

(c) That the ruling was a ruling that it was not reasonable for the judge to have made."

(iv) In essence, the prosecution's notice of appeal fails to come within the statutory provisions. Rather, it is seeking a rehearing of the application. This is illustrated by the request to seek transcripts of the entire evidence in the case despite all relevant facts having been set out in the written ruling and accompanying appendices.

(v) In *R v Courtney* [2007] NICA 6, this court accepted the general principle that:

> "[26] … if it is necessary for this court to address the question whether the ruling was one that it was not reasonable for the judge to have made, it is not for the members of this court to consider whether they would have reached the same conclusion. The ruling could only be reversed on this basis if it was established that the judge did not act reasonably in making it. As a matter of inevitable logic, if we consider that the ruling was one that lay within the spectrum of reasonable conclusions on the available evidence, the application for leave to appeal, in so far as it depended on this ground, would fail."

(vi) This approach was further elucidated by Sir Igor Judge in *R v B* [2008] EWCA Crim 1144:

> "No trial judge should exercise his discretion in a way in which he personally believes may be unreasonable. That is not to say that he will necessarily find every such decision easy. But the mere fact that the judge could reasonably have reached the opposite conclusion to the one he reached, and that he acknowledges that there were valid arguments that might have caused him to do so, does not begin to provide a basis for a successful appeal …"

(vii) The ruling from the learned trial judge included a comprehensive analysis of the evidence by the close of the prosecution case, fairly and accurately summarised the position of the parties, accurately stated the legal principles on which it should act and explained the basis for her decision in reaching a decision under Article 29 of the 2004 Order. In short form, the ruling of the learned judge was not wrong in law, there was no error in law or legal principle, and it is not unreasonable in the circumstances of the case.

(viii) The application for an expedited hearing is subject to the grant of leave. Without prejudice to same, it is respectfully submitted, that the court has a jury waiting in a trial which relates to allegations by a deceased complainant contained in an ABE interview conducted on 27 January 2016, and which has previously had to adjourn on a number of occasions. The matter was listed for arraignment on 4 April 2019, and there have been approximately 40 hearings before the Crown Court prior to commencement of the trial on 13 June 2022, including at least one earlier trial listing.

The relevant law

[43] The core legal provision in relation to this case is Article 29 of the 2004 Order which reads:

> "**Stopping the case where evidence is unconvincing**
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> 29.—(1) If on a defendant's trial before a judge and jury for an offence the court is satisfied at any time after the close of the case for the prosecution that—
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> (a) the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings, and
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> (b) the evidence provided by the statement is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe,
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> the court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a retrial, discharge the jury.
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> (2) Where—
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> (a) a jury is directed under paragraph (1) to acquit a defendant of an offence, and
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> (b) the circumstances are such that, apart from this paragraph, the defendant could if acquitted of that offence be found guilty of another offence,
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> the defendant may not be found guilty of that other offence if the court is satisfied as mentioned in paragraph (1) in respect of it."

[44] In addition, Articles 18 and 20 of the 2004 Order regarding the admissibility of hearsay evidence are in play. Article 18 reads as follows:

> "**Admissibility of hearsay evidence**
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> 18.—(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if—
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> (a) any provision of this Part or any other statutory provision makes it admissible,
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> (b) any rule of law preserved by Article 22 makes it admissible,
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> (c) all parties to the proceedings agree to it being admissible, or
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> (d) the court is satisfied that it is in the interests of justice for it to be admissible.
>
> (2) In deciding whether a statement not made in oral evidence should be admitted under paragraph (1)(d), the court must have regard to the following factors (and to any others it considers relevant)—
>
> (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
>
> (b) what other evidence has been, or can be, given on the matter or evidence mentioned in sub-paragraph (a);
>
> (c) how important the matter or evidence mentioned in sub-paragraph (a) is in the context of the case as a whole;
>
> (d) the circumstances in which the statement was made;
>
> (e) how reliable the maker of the statement appears to be;
>
> (f) how reliable the evidence of the making of the statement appears to be;

(g) whether oral evidence of the matter stated can be given and, if not, why it cannot;

(h) the amount of difficulty involved in challenging the statement;

(i) the extent to which that difficulty would be likely to prejudice the party facing it.

(3) Nothing in this Part affects the exclusion of evidence of a statement on grounds other than the fact that it is a statement not made in oral evidence in the proceedings."

[45] Article 20 reads as follows:

"**Cases where a witness is unavailable**

20.—(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if—

(a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter,

(b) the person who made the statement ("the relevant person") is identified to the court's satisfaction, and

(c) any of the five conditions mentioned in paragraph (2) is satisfied.

(2) The conditions are—

(a) that the relevant person is dead;

(b) that the relevant person is unfit to be a witness because of his bodily or mental condition;

(c) that the relevant person is outside the United Kingdom and it is not reasonably practicable to secure his attendance;

(d) that the relevant person cannot be found although such steps as it is reasonably practicable to take to find him have been taken;

(e) that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence."

[46] We note that there are similar provisions in England & Wales in section 125 of the Criminal Justice Act 2003. By virtue of this legislation the Crown Court has a specific power to stop a case where:

"(a) the case depends significantly (wholly or partly) on the hearsay statement, and

(b) the evidence is unconvincing to the point where a conviction based on it would be unsafe."

[47] Moving from the statutory provisions to the relevant jurisprudence, the Court of Appeal in England & Wales in the case of *Horncastle* [2009] EWCA Crim 964, identified a series of safeguards forming a crafted code on hearsay that protects the fair trial rights of the accused under article 6 of the European Convention on Human Rights ("ECHR"). Para [74] of the decision states as follows:

"[74] … at the close of all the evidence the judge is required, in a case where there is a legitimate argument that the hearsay is unconvincing and important to the case, to make up his own mind, not as a fact finder (which is the jury's function), but whether a conviction would be safe. That involves assessing the reliability of the hearsay evidence, its place in the evidence as a whole, the issues in the case as they have emerged, and all the other individual circumstances of the case. The importance of the evidence to the case is made a specific consideration by the statute: see s.125(1)(b)."

[48] In the case of *R v Riat* [2012] EWCA Crim 1509 Hughes LJ stressed the difference between cases subject to section 125 and the general principles on submission of no case to answer contained in *Galbraith* [1981] 2 All ER 1060 where it is not part of the function of the judge to assess the reliability of the evidence. The point was made that in hearsay cases the judge is not only entitled but is required to see whether the hearsay evidence is so unconvincing that any conviction would be unsafe. That means looking at its strengths and weaknesses, at the tools available to the jury for testing it, and at its importance to the case as a whole. *Riat* has been successfully applied in *RT* [2020] EWCA Crim 1343.

[49] Another case referred to us is that of *Ibrahim* [2012] EWCA Crim 837. In that case it was said that a judge should have uppermost in his mind the question of

whether an untested hearsay statement has been shown to be unreliable in the light of all the other evidence adduced. If not, and the statement is part of the central corpus of evidence without which the case on the relevant account cannot proceed, the statement is almost bound to be unconvincing such that a conviction based on it will be unsafe. In *Ibrahim* the conviction was found to be unsafe, and the case was stopped pursuant to the statutory provisions.

[50] The most accessible guidance which has been consistently applied in this jurisdiction is provided in various parts of *Riat* by Hughes LJ:

> "[5] The written arguments in several of the cases now before us suggest that this language may be being understood to mean that hearsay evidence must be demonstrated to be reliable (ie accurate) before it can be admitted. That is plainly not what these passages from *Horncastle* say. The issue in both this court and the Supreme Court in *Horncastle* was whether English law knew an overarching general rule that hearsay which could be described as the sole or decisive evidence was not to be admitted, or would inevitably result in an unfair trial if it was. In answering 'no', this court pointed out repeatedly that any such inflexible rule would exclude hearsay which was perfectly fair because either it did not suffer from the dangers of unreliability which often may attend such evidence, or (if it did) there were sufficient tools safely to assess its reliability. This court was far from laying down any general rule that hearsay evidence has to be shown (or 'demonstrated') to be reliable before it can be admitted, or before it can be left to the jury. That is to take only half of the paired expressions as if it represented a separate and universal rule. If that had been the rule adopted, the appeals under consideration in *Horncastle* would probably not have been dismissed. Nor can that be the rule, for it would mean that hearsay evidence has to be independently verified before it can be admitted or left to the jury. That would be to re-introduce the abolished rules for corroboration, which the Law Commission expressly, and Parliament implicitly, rejected; indeed, in some cases it would render the evidence admissible only when it was unnecessary.
>
> [6] The true position is that in working through the statutory framework in a hearsay case (below), the court is concerned at several stages with both (i) the extent of risk of unreliability and (ii) the extent to which the reliability of the evidence can safely be tested and assessed. We give simple examples only, which are in no sense exhaustive.

The circumstances of the making of the hearsay statement may be such as to reduce the risk of unreliability, for example if it is spontaneous: a very clear illustration is given in *Horncastle* in this court at [61]. The disinterest of the maker of the statement may reduce the risk of deliberate untruth. Independent dovetailing evidence may reduce the risk both of deliberate untruth and of innocent mistake: an illustration is given in *Horncastle* by the Supreme Court at [91]. The availability of good testing material (admissible under section 124) concerning the reliability of the witness may show that the evidence can properly be tested and assessed. So may independent supporting evidence.

…

[17] If a specific gateway for admission is passed, we suggest that a court should always at that point consider the vital linked questions of (i) the apparent reliability of the evidence and (ii) the practicability of the jury testing and assessing its reliability. Section 124 is critical at this point. It permits the challenging party not only to adduce evidence going to credibility which would have been admissible at his request if the witness had given evidence in person (s 124(2)(a)), and to put in evidence inconsistent statements by the witness (s 124(2)(c)), but also (with leave) to adduce evidence which would otherwise simply have been material put in cross examination, as to which answers going purely to credit would have been final: s 124(2)(b).

[18] In our view, the judge will often not be able to make the decision as to whether the hearsay evidence be admitted unless he first considers, as well as the importance of the evidence and its apparent strengths and weaknesses, what material is available to help test and assess it.

…

[29] Section 125 may be confronted either at the end of the Crown case or at any time thereafter: see s 125(1). Whether it arises, and, if it does, when, must depend on the circumstances of each individual trial. Counsel and the judge should keep the section 125 question under review throughout the trial. As the terms of the statute, and the passage cited above from *Horncastle* both make clear, the

exercise involves an overall appraisal of the case. It may often, therefore, best be dealt with at the end of all the evidence.

…

[33] We respectfully agree that the hearsay statements in *Ibrahim* were so flawed, so central to the case, and so difficult to assess, that it was unfair for them to be left to the jury. The case is a good illustration of the use of the framework provided by the 2003 Act to ensure that a trial remains fair where hearsay evidence is tendered. However, these references at [106] and [109] to the statements not being shown to be reliable may be open to misconstruction if taken out of context. For the reasons which we have set out above at [4]-[5], it is clear that the framework of the 2003 Act does not carry the implication that a hearsay statement must be wholly verified from an independent source before it can be admissible. Nor does it mean that there has to be such independent verification before the case can properly be left to the jury. The passage quoted from the judgment of Lord Phillips was addressing the same overarching "sole and decisive" test as the passages in the Court of Appeal judgments which we have listed at [4] above. In speaking of evidence which is shown to be reliable it is clear that he was demonstrating the error of such an overarching "sole or decisive" test; he was recognising that hearsay evidence, even if sole and decisive, might be shown to be reliable in the sense that it is shown to be so to the jury, and the jury might perfectly properly accept it without any unfairness in the trial process. That that was also the view of this court in *Ibrahim* is demonstrated by the closely juxtaposed paragraph of the judgment, where the judge said that:

> 'We do not accept the submission that the question of the reliability and the credibility of Ms W's evidence should have been left to the jury. It seems to us that the clear effect of the judgments of the Court of Appeal and Supreme Court is that it is a pre-condition that the untested hearsay evidence be shown to be potentially safely reliable before it is admitted … That is a matter for the judge to rule on, either at the admission stage or after the close of the prosecution case pursuant to section 125 of the 2003 Act.'

> The critical word is 'potentially.' The job of the judge is not to look for independent complete verification. It is to ensure that the hearsay can safely be held to be reliable. That means looking, in the manner we have endeavoured to set out, at its strengths and weaknesses, at the tools available to the jury for testing it, and at its importance to the case as a whole."

The prosecution argument in support of this appeal

[51] In this case the prosecution submit that the jury could safely exclude the possibility of mistake or misinterpretation. It was plainly the defendant that the complainant spoke of and plain that she spoke about sexual misconduct by him. The consequence of this is that, if the misconduct did not occur, it had to be manufactured, wittingly or unwittingly, that is either she had imagined it, or it was a deliberately false allegation. Both these possibilities were highly unlikely given her lack of sexual knowledge. Family and staff agree that she would not have had such knowledge. The jury would have been entitled to reject them on that basis.

[52] Further, the prosecution say that it was properly open to the jury to conclude that she did not possess sophistication to manufacture an account. As in *R v MH* it was inherently improbable that she would of her own volition invent the subject matter of the complaint. Finally, the prosecution submits that there was a conspicuous absence of any motive to implicate the defendant. Rather, as the evidence demonstrated in the records from the care home made out the complainant was on good terms with the defendant. This the prosecution say is a strong indicator of the truth of the allegations. In addition, the point is made that evidence was given at the ABE and to Joanne McClements, Fiona McMillan, and Patricia Abraham. The supporting evidence and features of the evidence considered were tools by which the reliability of the victim's hearsay could be assessed. There were of course inconsistencies in the evidence which are set out by both parties.

[53] The prosecution also submit that the judge was wrong to compare the case to that of *R v Ibrahim*, the facts of that case were described by Hughes in *Riat* as follows:

> "The working of this framework is well illustrated in *Ibrahim*. There, the court considered a hearsay statement which had many conspicuous weaknesses. It contained accusations of rape and of a separate wounding, made by a drug addict who was working at the time as a street prostitute. The rape allegation had not been made at the time, nor for two and a half years afterwards, despite opportunity to make it on the night of the alleged offence and subsequently. Moreover, this allegation had been positively disclaimed by the witness on the night of the incident. The allegation of wounding was inconsistent in

> its content with a previous statement by the same witness. An explanation for not making the allegation on the first occasion was advanced which, even if not necessarily deliberately untruthful, could not be the real reason. The witness was, from her addiction, a potentially unreliable source. She had made a previous false complaint of rape against an unconnected person. There was every likelihood, if not certainty, that there had been general discussion amongst the prostitutes in the neighbourhood about the defendant and his rumoured offending. Such support as there was did not significantly help to resolve the question whether there had been a rape, nor did it provide a means of testing the reliability of the complainant."

Consideration

[54] We begin by perhaps stating the obvious that hearsay evidence must be treated carefully in each case to avoid the prospect of unfairness to a defendant or an unsafe conviction. The case law we have referenced also highlights the fact that each case is fact specific. The authority of *Riat* establishes that in hearsay cases the judge is not only entitled but is required to see whether the hearsay evidence is so unconvincing that any conviction would be unsafe. That means looking at its strengths and weaknesses, at the tools available to the jury for testing it, and at its importance to the case as a whole.

[55] The core point made by the prosecution in support of its grounds is that the judge having considered to admit the hearsay evidence then arguably undertook the same consideration and decided that it was so unreliable that the case should have been stopped. The simple prosecution submission is that nothing changed by virtue of the trial, and, in fact, that the prosecution case may have improved by virtue of the evidence of witnesses and the playing of the ABE. A subsidiary point is that the judge has not explained what has led her to reach a different conclusion. Finally, the prosecution submit that the judge failed to consider alternative verdicts as required by Article 29(2).

[56] Before we deal with these appeal points, we remind ourselves of the test to be applied on appeal. Applying general principles, we must bear in mind that a trial judge is best equipped to assess evidence of this nature having conducted the trial and heard evidence. Whilst we have viewed the ABE evidence that is only one part of the case. We pay considerable regard to the decision of the trial judge in this case who had to effectively exercise a discretionary judgement as to whether to admit hearsay and allow a trial to continue. It is only where the judge has strayed beyond the band of reasonable decisions or made an error of law that the court would intervene.

[57] The appellate jurisdiction is further defined by statute in a prosecution appeal of this nature. Specifically, the court must adhere to the parameters set up by Article

20 of the Criminal Justice (Northern Ireland) Order 2004. The Court of Appeal has no inherent jurisdiction to hear an appeal by the prosecution against a terminating ruling. For this jurisdiction to arise the prosecution must satisfy the court upon the grounds provided for in Article 26 of the Criminal Justice (Northern Ireland) Order 2004. By virtue of that provision the Court of Appeal may not reverse a ruling on an appeal under this part unless it is satisfied that the ruling was wrong in law; that the ruling involved an error of law or principle; or that the ruling was a ruling that it was not reasonable for the judge to have made.

[58] In this appeal it is not suggested that the judge made any error of law or principle and so the first two limbs of Article 26(1) cannot avail the prosecution. This is not surprising given the comprehensive legal submissions which were made to the judge by counsel which she has thoroughly analysed in her judgment. We are therefore in the more difficulty territory of whether the judge exercised her discretion properly and specifically whether the ruling was one that it was not reasonable for the judge to have made. This is a high bar. The question is not whether members of this court would have made a different decision but rather whether the judge's decision was reasonable.

[59] Next, we turn to examine the core arguments made on appeal. First is the submission that because the judge admitted the hearsay and then heard the evidence it was not reasonable for her to have given an Article 29 terminating ruling. This argument had some superficial attraction to us however on close analysis it cannot stand up to scrutiny for the simple reason that the judge must assess the evidence at each stage of the proceedings.

[60] Arguably, the difficulty arises in this case because the judge has not spelt out as explicitly as she might have why she has changed her mind. However, a trial judge is entitled to review matters of reliability on an ongoing basis. We think that is exactly what she has done. A judge in a complicated case such as this is also entitled to think again and in fact is obliged to review reliability at every stage of the process. We agree with the defendant's submissions on this point that a judge cannot be straight jacketed by any earlier ruling otherwise Article 29 which applies at a particular stage at the end of the prosecution case would have no purpose.

[61] We also note that by the end of the case the judge had additional submissions from counsel, and she clearly anxiously considered the case again as a whole. It would have been better if the judge had included a line in her judgment to that effect, but any deficiency is not fatal to the decision the judge reached.

[62] Rather, the appeal turns on whether the judge's assessment of the inconsistencies was correct. We take some issue with the apparent reliance on the medical evidence as full penetration is not required to establish the rape charge. We also think that the case of *Ibrahim* is not on all fours as in that case the complainant was inherently unreliable. The situation is different here as the unreliability stems from the complainant's condition rather than any malevolence on her part. We accept the prosecution argument that the complainant was naive and without sexual

knowledge. Whilst we understand the point made by the prosecution that other evidence was called at trial the complainant's evidence was of central importance to the prosecution case.

[63] All of the above points made we find the defence submission on inconsistency to have force over the six areas they summarise as follows:

(i) Firstly, a count alleging sexual assault in the defendant's caravan, about which the complainant had told members of staff that she had been the subject of forced digital and penile penetration. However, when asked a number of questions about this during the course of her ABE interview, she positively asserted that 'nothing else' occurred other than touching her breast and an attempt to kiss her by the defendant. These two versions are fundamentally inconsistent. This was in circumstances where there was no separate evidence other than from the complainant that she had ever been to the defendant's caravan – an issue which was vehemently disputed. Furthermore, forensic testing was carried out at the caravan, including the removal of the seat pads on the sofa for screening resulting in an absence of any evidence of semen being found. Fingerprinting of the location also produced negative results regarding the complainant ever having been present. The investigating officer had also spoken to the manager of the caravan site, Colin Mayes. He told police that he had never seen the defendant at the site with any other female other than his wife.

(ii) Secondly, a count on the indictment of rape premised upon a prosecution case that it was "likely" that vaginal penetration occurred, could have been either 'anal' penetration, attempted vaginal penetration, superficial vaginal penetration or genital to genital contact. Despite the complainant's report that the defendant's "whole willy" had gone into her, the medical evidence was clear that penetration through the vaginal opening was 'unlikely' due to the complainant having a very narrow vaginal opening due to her post-menopausal condition.

(iii) Thirdly, evidence that the complainant told witness Fiona McMillen that she had been the subject of rape at a property known as Charles Drive at which she resided before any of the locations which are referred to in the prosecution case as reflected in the indictment. Again, she was clearly asked in the ABE interview if anything else had happened at another location and understanding the question she positively answered no.

(iv) Fourthly, evidence that the complainant had told members of staff Mrs Joanne McClements and Mrs Amanda Gilchrist that she had been the subject of oral sex by the defendant. Subsequent to these reports, a specific pre-interview assessment was carried out with the complainant at which it was explored further with her if 'anything else had happened' beyond that which she had reported in her ABE interview. Again, she answered in the negative. This was consistent with her original ABE interview several months prior to

making the allegation when asked if anything else had happened and when no such complaint to any incident of oral sex was raised.

(v) Fifthly, the complainant stated that the abuse had not happened prior to her entry into the care home but then went onto say it had happened at a house she lived at.

(vi) Finally, the allegation of rape (count 4 and 5) is so sparse in information due to a complete lack of exploration of the complainant's basic account. This meant there was no detail as to what room the alleged rape had occurred; what she had been doing prior to it; any details about clothing and its removal; any questions about movement into the position in which the defendant is alleged to have raped the complainant.

[64] Properly analysed, the outcome in this case came down to a fine and difficult judgment. We are satisfied that the judge considered the strengths and weaknesses of the evidence and the tools available to the jury for assessing its reliability. Having done so she concluded that the hearsay evidence could not be left to the jury without unfairness to the defendant. Whilst this is a fine balance, we think that the assessment made is a reasonable one arrived at as it was by a trial judge who was acquainted with the case over a considerable period of time and given the particular features of this case.

[65] In truth the judge was faced with a situation where, clearly, she felt she could not direct the jury in any meaningful way on the inconsistencies. We consider that view was not unreasonable. Self-evidently there is a dual difficulty in this case in that the complainant was deceased and had significant learning and communication difficulties. It must be observed that the defendant had no opportunity to test the complainant's evidence. Whilst there would have been obvious limits to this had the complainant been alive, we think that some questions could have been asked along the lines of the draft document which counsel submitted.

[66] We repeat the cardinal principle that the appellate test we must apply means that we cannot simply substitute our own view to the facts of this case. Rather, we must decide if the conclusion reached by the judge was a reasonable one. Having considered the case in detail and the judge's reasoning we conclude that the judge was within the bounds of her discretion to question the practicability of the jury testing and assessing the reliability of the complainant's evidence and in granting the Article 29 application. We therefore dismiss the first limb of this appeal.

[67] We can deal with the remaining argument raised by the prosecution in shorter compass. This point is that the judge erred in not looking at alternative verdicts, this is required under Article 29(2). We find little strength in this line of argument. Firstly, the indictment was amended to consider the state of the evidence in the case. Second, there was no application made to the judge about alternative verdicts. Third, the judge did refer to alternative verdicts in her ruling, albeit not in detail. It is

impermissible in an appeal of this nature to raise new issues not canvassed at trial. Accordingly, we do not find any merit in this ground of appeal.

Conclusion

[68] In unison with the sentiments expressed by the judge we recognise the public interest in prosecuting those who commit sexual crimes against persons with a mental impairment or learning disability. However, we cannot fault the exercise of judgment in this sensitive and difficult case that it was not fair to leave counts to the jury. This conclusion is highly fact sensitive and one which will clearly not arise in all or indeed in very many cases of this nature. In this case there were particularly challenging and unusual features where the sexual behaviour alleged by the complainant was found to be so unclear and where she was deceased by the time of trial.

[69] We are not satisfied that the prosecution has satisfied the appellate test. We, therefore, dismiss the appeal.