THE COURT OF APPEAL

Record Number: 98/2023 (TM)
Record Number: 101/2023 (CC)

McCarthy J.
Ní Raifeartaigh J.
Burns J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

TM AND CC

APPELLANTS

JUDGMENT of the Court delivered on the 14th day of June 2024 by Ms. Justice Tara Burns.

1. This is an appeal against conviction. On 11 November 2022, TM was convicted of one count of rape contrary to s. 2 of the Criminal Law (Rape) Act 1981; six counts of oral rape contrary to s. 4 of the Criminal Law (Rape)(Amendment) Act 1990; and one count of false imprisonment contrary to s. 15 of the Non-Fatal Offences Against the Person Act 1997 in respect of the first injured party, referred to throughout this judgment as "K".

2. TM was further convicted of one count of oral rape and one count of anal rape contrary to s. 4 of the Criminal Law (Rape)(Amendment) Act 1990; and one count of sexual assault contrary to s. 2 of the Criminal Law (Rape)(Amendment) Act 1990 in respect of the second injured party, referred to throughout this judgment as "B".

3. CC, his co-accused, was convicted of four counts of sexual assault contrary to s. 2 of the Criminal Law (Rape)(Amendment) Act 1990; one count of reckless endangerment contrary to s. 176 of the Criminal Justice Act 2006; one count of false imprisonment contrary to s. 15 of the Non-Fatal Offences Against the Person Act 1997; four counts of sexual exploitation contrary to s. 3 of the Child Trafficking and Pornography Act 1998; and four counts of oral rape, acting as part of a joint enterprise with TM, contrary to s. 4 of the Criminal Law (Rape)(Amendment) Act 1990 in respect of K.

4. CC was further convicted of one count of reckless endangerment contrary to s. 176 of the Criminal Justice Act 2006 in respect of B.

5. Another co-accused, JK, was acquitted of some charges and disagreements were recorded in respect of other charges in relation to which nolle prosequies have now been entered.

6. On 13 March 2023, TM was sentenced to 19 years imprisonment and CC was sentenced to 14 years imprisonment. Both sentences were backdated to 11 November 2022 to reflect when the parties went into custody.

Background

7. CC is the mother of the injured parties. TM is the partner of CC.

8. The offending behaviour against K took place between 20 October 2012 and 10 October 2013 when she was five years old.

9. The offending behaviour against B took place between 1 January 2013 and 3 September 2014 when he was between 2 years and nine months and four years and six months.

10. In October 2013, CC signed K into the voluntary care of the Health Service Executive. K was placed in long-term foster care in December 2013. In February 2014, K's foster parents informed her social worker that she had made sexual abuse allegations against CC and TM. The matter was brought to the attention of An Garda Síochána and an investigation began. On 1 May 2014, a clarification interview was held with K in the course of which she made certain disclosures of sexual offending against her. On 21 May 2014, a s. 16 interview was conducted with her. Arising from further disclosures made by K to her foster parents, another clarification interview was conducted with her on 30 July 2014 during which she disclosed additional sexual offending against her. A s. 16 interview was conducted with her on 31 July 2014. These recorded s. 16 interviews, conducted when K was approximately six and a half, formed the basis of the prosecution case against CC and TM in relation to K's allegations.

11. On 4 September 2014, arising from the allegations made by K, all the remaining children living with CC and TM were taken into the care of the HSE. B was placed into the same foster family as his half-sister K.

12. On 30 September 2014, B began to make disclosures of sexual abuse to his foster parents against CC and TM. The matter was again brought to the attention of An Garda Síochána and an investigation commenced. On 24 November 2014, a clarification interview was conducted with him, in the course of which he made certain disclosures regarding sexual offending against him. On 27 November 2014, a s. 16 interview took place. Arising from further disclosures from B, another clarification interview was conducted on 25 February 2015 and a s. 16 interview ensued on 18 March 2015. These recorded s. 16 interviews,

conducted when B was between four and a half and five years of age, formed the basis of the prosecution case against CC and TM in relation to B's allegations.

13. On 23 September 2015, both CC and TM were arrested and detained pursuant to the provisions of s. 4 of the Criminal Justice Act 1984 for the purposes of questioning.

14. On 22 September 2016, a file was sent to the respondent by the investigating team. On 29 May 2018, the respondent directed that charges be preferred against the appellants and JK. On 13 March 2019, the appellants were arrested and charged. They were served with the Book of Evidence on 7 October 2019 and sent forward for trial in the Central Criminal Court on the same date.

15. The matter was first listed before the Central Criminal Court on 18 November 2019 and given a trial date of 25 January 2021. The matter came back before the Court on 16 November 2020 when the extensive outstanding disclosure from the HSE was brought to the Court's attention. On 14 December 2020, it became apparent that the trial could not proceed due to this disclosure issue. On 9 June 2021, a new trial date of 17 January 2022 was set, but this had to be vacated as the co-accused in the matter, JK, had been diagnosed with a serious illness and required immediate treatment.

16. The trial of CC and TM finally commenced on 4 October 2022. This was 8 years after the initial s. 16 interviews were conducted. This length of delay is truly shocking in any case, but most particularly in a case involving child witnesses.

17. On 21 December 2021, an intermediary was granted to each child as they both suffered from developmental language disorder and had difficulty articulating the events that had occurred. An intermediary was also granted to CC. The ground rules governing the cross examination of the children were also set, which amongst other matters, prohibited the use of tag questions. In the course of the oral hearing before us, it was suggested by Counsel for the appellants that the ground rules also prohibited the use of leading questions in the course of cross examination. That is not the case as a perusal of the transcript of the ruling reveals.

18. The respondent sought a pre-trial hearing seeking permission to admit the s.16 interviews conducted with each injured party into evidence. The application was opposed by the appellants. The trial judged granted the respondent's application and the s. 16 interviews were admitted into evidence.

19. The injured parties foster mother was called to give recent complaint evidence relating to the disclosures made to her. An objection was raised with respect to some aspects of her evidence relating to the disclosure of B. The trial judge permitted some of this evidence to be called.

20. At the conclusion of the respondent's case, an application pursuant to *The People (at the suit of the Director of Public Prosecutions v. PO'C* [2008] 4 IR 76 was made by the appellants seeking that the jury be directed to return not guilty verdicts against them, on the basis that a fundamental unfairness had arisen in the trial process because of the inability to conduct a meaningful cross examination of the injured parties. This application was also refused by the trial judge.

Grounds of Appeal

21. By notice of appeal dated 28 March 2023, TM indicated his desire to appeal his conviction. By notice of appeal dated 29 March 2023, CC indicated her desire to appeal her conviction. Both parties set out their grounds of appeal as follows:-

> *"(i) The learned Trial Judge erred in law in admitting into evidence, pursuant to a prosecution application to do so, the evidence of the First Complainant under Section 16(1)(b) of the Criminal Evidence Act 1992 pertaining to interviews conducted with the said party by specialist interviewers (Garda Linda Cusack and Garda Danielle Kennedy) on the 21st of May 2014 and the 31st of July 2014.*
>
> *(ii) The learned Trial Judge erred in law in admitting into evidence, pursuant to a prosecution application to do so, the evidence of the Second Complainant under Section 16(1)(b) of the Criminal Evidence Act 1992 pertaining to interviews conducted with the said party by specialist interviewers (Garda Danielle Kennedy and Garda Linda Cusack) upon the 27th of November 2014 and the 18th of March 2015.*
>
> *(iii) In particular to (i) and (ii), the learned Trial Judge erred in determining that it was admissible for the specialist interviewers to introduce into the said interviews disclosures which had been made outside of the said interviews in what was described as 'clarification meetings' undertaken with the Complainants in advance of the specialist interviews. In effect, leading questions were permitted, which are inadmissible.*
>
> *(iv) Further, the learned Trial Judge erred in law in determining that it was admissible for the specialist interviewers to ask leading questions and tag questions of the Complainants during the specialist interviews, particularly in circumstances where the defence were precluded from asking these types of questions during cross-examination, and where leading questions in an examination-in-chief are per se inadmissible.*

(v) The learned Trial Judge erred in law and in fact in determining that the Complainants were capable of giving an intelligible account of events during their specialist interviews and were thus competent witnesses, where leading questions were used by the interviewers who must have regarded them as necessary, and where questions were at times unanswered or incomprehensible.

(vi) The learned Trial Judge erred in determining that the delay of approximately eight years between the recording of the specialist interviews of the Complainants and the opportunity for cross-examination of each Complainant by the defence did not create a risk of unfairness such that specialist interviews were inadmissible and/or the trial was unfair.

(vii) The learned Trial Judge erred in allowing written transcripts of the specialist interviews to be provided to the jury. There is no legal basis for permitting written transcripts of an examination-in-chief to be provided to the jury.

(viii) The learned Trial Judge erred in law in ruling that the recent complaint evidence of Maxine Slattery (foster carer of the Complainants) was admissible in circumstances where the evidence amounted to unnecessary prejudicial repetition of the complaints.

(ix) The learned Trial Judge erred in refusing to withdraw the case from the jury."

Section 16 of the Criminal Evidence Act 1992

22. Section 16 of the Criminal Evidence Act 1992, as amended, provides, *inter alia*:-

"16.—(1) Subject to subsection (2)—

…

(b) a video recording of any statement made during an interview with a member of the Garda Síochána…—

…

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

(I) section 3(1), (2) or (3) of the Child Trafficking and Pornography Act 1998, or

(II) section 2, 4 or 7 of the Criminal Law (Human Trafficking) Act 2008,

shall be admissible at the trial of the offence as evidence of any fact stated therein of which direct oral evidence by him would be admissible:

Provided that, in the case of a videorecording mentioned in paragraph (b), the person whose statement was videorecorded is available at the trial for cross examination

(2) (a) Any such videorecording or any part thereof shall not be admitted in evidence as aforesaid if the court is of opinion that in the interests of justice the videorecording concerned or that part ought not to be so admitted.

(b) In considering whether in the interests of justice such videorecording or any part thereof ought not to be admitted in evidence, the court shall have regard to all the circumstances, including any risk that its admission will result in unfairness to the accused or, if there is more than one, to any of them.

(3) In estimating the weight, if any, to be attached to any statement contained in such a videorecording regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.

(4) In this section "statement" includes any representation of fact, whether in words or otherwise."

The Trial Court's ruling with respect of the admissibility of the s. 16 interviews

23. The respondent brought a pre-trial application seeking to admit the s. 16 interviews into evidence. The appellants objected asserting that the injured parties lacked competence to give an account of the alleged offending at the time the interviews were conducted; the delay of 8 years between the recording of the s. 16 interviews and the ultimate trial resulted in the appellants not being in a position to test the competency of the injured parties by cross examination at a time closer to when the interviews were conducted; the delay which had occurred was of such a magnitude that the interests of justice required that the interviews not be admitted into evidence; and the manner in which the interviews had been conducted, to include the use of leading and tag questions and the introduction of material from the clarification interviews, rendered the s. 16 interviews unreliable, particularly having regard to the learning disabilities which the injured parties laboured under.

24. The pre-trial application took place between 5 and 12 October 2022 during which the trial judge viewed the recorded s. 16 interviews; heard evidence from the specialist garda interviewers; and had sight of the reports prepared by the intermediaries appointed in respect of each child which set out the child's particular characteristics and developmental difficulties. On 12 October, the trial judge pronounced his decision that he was permitting the respondent adduce the s. 16 interviews and on 1 November 2022, he gave a written ruling setting out his reasons.

25. He determined that the injured parties were able to give an intelligible account and were competent to give evidence; whilst in breach of the guidelines for conducting s. 16 interviews, leading and tag questions had been asked, utilising information gleaned as a result of the clarification meetings, the narrative provided by the injured parties was such

that these questions did not fundamentally undermine the purpose of the s. 16 interviews and an unfairness did not arise; and the delay in the case, which might affect the ability to cross examine the injured parties, was a matter to be considered in a *PO'C* application rather than at the preliminary stage of the trial.

26. The trial judge also indicated that the issue of competence remained a live issue throughout the trial and that if it appeared in the course of cross examination that competence was an issue, he would revisit the question. No further application was made to the trial judge in this regard.

The Cross Examination of the Injured Parties

27. The injured parties were cross examined by counsel on behalf of each appellant, the relevant portions of which are set out hereunder:-

Cross Examination of K on behalf of CC

"Q. So, 2014, do you remember 2014?

A. Well, a little bit.

Q. What age were you?...

A. Probably five.

…

Q. ... And when you were with [CC], okay, you remember?

A. Yes.

Q. Did she say stop?...

A. I don't know.

Q. … Did you tell Linda that [CC] said stop?

A. I can't remember.

Q. Okay. Do you remember when you were five or six?

A. Yes…"

Cross Examination of K on behalf of TM

Q. Okay. Now, first of all do you remember yesterday?

A. A little bit.

Q. Do you remember what you did yesterday?

A. Yes.

Q. Did you watch two DVDs?

A. Well, the first, I watched the first one, but I didn't watch the second one.

Q. Oh, you didn't watch the second one?

A. No.

Q. Okay. And have you ever watched the second one?

A. Yes.

Q. You watched it before?

A. Yes.

Q. Do you remember when you watched it?

A. Probably like last week.

Q. Oh, last week?

A. Probably….

Q. Do you remember what was in those DVDs, do you?

A. The first, but I can't remember the second one.

Q. Okay, okay. Look, if you don't remember anything, just say you don't remember, there's no difficulty in that, okay?

A. Okay.

Q. Yes, what age were you [when the first interview took place]?

A. Oh, five….

Q. Okay. Now, I'm going to talk the first DVD that you watched yesterday, okay, is that okay?...

A. Yes….

Q. Okay, okay. Now, in the interview you said certain things in the interview, do you remember that?

A. No.

Q. Do you remember the things you said in the interview?

A. No.

Q. Okay. When you watched this video, or the DVD yesterday, do you remember anything that you watched on it yesterday?

A. No.

Q. Okay. It's okay to say if you don't remember, that's okay, okay?

A. Yes.

Q. Do you remember living in I think what you called your old house, do you remember that?

A. Yes.

Q. Okay. And who lived there?

A. [CC], [TM], me, [Sibling], [B] and [Sibling].

Q. And who was [CC]?

A. My mam.

Q. Okay. And who was her partner?

A. I don't want to say the name….

Q. Okay. So, in relation do you remember anything from the second DVD that you watched a few weeks ago?

A. No.

Q. No, okay. Okay, [K], do you remember in the video you watched yesterday, do you remember you said a number of things that had happened?

A. Yes, slightly….

Q. Okay. Do you remember anything about the interview at all?

A. No.

Q. Nothing at all. And even after you watched it yesterday do you remember anything about the interview at all?

A. No.

Cross Examination of B on behalf of TM

Q. Right. Now, in the courtroom we have just watched the two DVDs of your interviews?

A. Okay.

Q. And have you watched those?

A. Yes.

Q. And when did you watch them, [B]?

A. I was watching two yesterday. Two yesterday and I think two on Friday.

Q. Okay. You watched both of -- there are only two --

A. Yes.

Q. -- and you watched them both on Friday and yesterday?

A. Yes.

Q. Right. And do you remember doing the interviews?

A. Yes. Yes.

Q. The first one was in 2014?

A. Yes.

Q. And you remember doing that; do you?

A. Yes. Yes.

Q. And then the second one was in 2015?

A. Yes.

Q. And again, you're saying you remember that?

A. Yes.

Q. And do you remember how old you were at the time?

A. Yes.

Q. Well, how old were you?

A. The first one I was four years old and the second one I was five.

…

Q. All right. Now, in the first interview, you referred to the old house?

A. Yes.

Q. Can you remember the old house?

A. No.

Q. No, okay. Do you remember who you lived with in the old house?

A. Yes.

Q. And who was that?

A. *[TM] and [CC].*

Q. *And anyone else?*

A. *[JK].*

Q. *I'm talking about the old house. So, take your time?*

A. *[CC] and [TM]. And me and [Sibling].*

Q. *And anyone else?*

A. *No.*

Q. *You've said you don't really remember the house; do you remember the bedroom?*

A. *No.*

Q. *You said in the interview that you watched DVDs; do you remember that, in the house?*

A. *Can you say that again please?*

Q. *Of course. And thank you for asking me to do that. You said in the interview that you watched DVDs in the old house and I'm just wondering do you remember doing that?*

A. *No.*

Q. *No. I mean do you remember anything about being in the old house?*

A. *Yes.*

Q. *Do you remember being woken up in the night?*

A. *Yes.*

Q. *You spoke in the interviews about a [JK]?*

A. *Yes.*

Q. *Do you remember [JK's] house?*

A. *No.*

Q. *You've watched the two interviews twice, [B]?*

A. *Yes.*

Q. *Might you be wrong about anything you've said in the DVDs?*

A. *No.*

Q. *You see, [TM] says that the things you have said about him in the interviews*

did not occur, did not happen; what do you say to that?

A. That they did happen. That they did happen.

Q. He says they did not happen?

A. They did.

Q. Can you remember when you did the interviews back in 2014 and 2015?

A. Yes.

Q. Did you speak to [K] before doing the interviews?

A. I don't really know.

Q. You don't know. Did you speak to [K] in the last couple of days about the interviews?

A. No.

Q. No. Okay. Thank you, [B].

Cross Examination of B on behalf of CC

Q. And you already told [Counsel] that you watched the DVDs yesterday and Friday; isn't that right?

A. Yes.

Q. When you made the DVD that you watched yesterday and Friday; do you remember how long ago that was?

A. Yes.

Q. And how long ago was that?

A. Around eight or nine years ago.

Q. Okay. And do you remember moving to [Foster Parents] house?

A. No.

Q. No. Okay. And you told [Counsel] when he asked you that you lived with [TM] and [CC] and [Sibling]?

A. Yes.

Q. Yes. Where was [K] then?

A. I think she was at another house.

Q. At another house. Did she live with [Foster Parents] then?

A. Yes.

Q. Okay. When you moved to [Foster Parents]; was [K] there?

A. Yes.

Q. And is [K] older than you, [B]?

A. Yes.

Q. And do you know how many years older than you [K] is?

A. Two years. Two years older than me.

Q. Okay. And did you say that you were four when you moved to [Foster Parents]?

A. Yes.

Q. So, how old was [K]?

A. Six.

Q. Six. Now, I only have two more questions for you?

A. Okay.

Q. [B], when you went to make the DVDs and you talked to the gardaí --

A. Mm-hmm.

Q. -- did you talk to [Foster Parents] about those DVDs before you made them?

A. I don't know.

Q. Thank you, [B]. That's all I wanted to ask you."

Admitting the s. 16 interviews into Evidence

28. The appellants submit that the trial judge erred in admitting the s. 16 interviews into evidence. They argue that the recorded interviews reveal an incomprehensible account by each injured party of the sexual acts and that on the basis of the interviews alone, the trial judge erred in determining that the injured parties were competent. In addition, they submit that the cross examination of the injured parties revealed them to be incompetent witnesses, suggesting that K did not have a recollection of the events alleged and B was not in a position to give intelligible answers regarding the offending. They repeat the submissions made to the trial judge regarding the delay in the case both with respect to their inability to test the injured parties competence by cross examination and the length of the delay simpliciter. They also repeat their submissions regarding the introduction of material from the clarification interviews and the use of leading and tag questions which they submit rendered the s. 16 interviews unreliable particularly having regard to the vulnerabilities of the injured parties.

Discussion and Determination

Competency

29. Section 27 of the Criminal Evidence Act 1992 provides:-

> *"27.—(1) Notwithstanding any enactment, in any criminal proceedings the evidence of a person under 14 years of age may be received otherwise than on oath or affirmation if the court is satisfied that he is capable of giving an intelligible account of events which are relevant to those proceedings."*

30. In the matter of *The People (Director of Public Prosecutions) v. VE* [2021] IECA 122, this Court addressed the issue of competency and cited with approval the English Court of Appeal case of *R v. Barker* [2010] EWCA Crim 4 where at paragraphs 38 and 40 of its judgment, that Court stated:-

> *"38. …The question in each case is whether the individual witness, or, as in this case, the individual, is competent to give evidence in the particular trial. The question is entirely witness or child specific. There are no presumptions or preconceptions. The witness need not understand the special importance that the truth should be told in court and the witness need not understand every single question or give a readily understood answer to every question. Many competent adult witnesses would fail such a competency test. Dealing with it broadly and fairly, provided the witness can understand the questions put to him and can also provide understandable answers, he or she is competent. If the witness cannot understand the questions or his answers to questions which he understands cannot themselves be understood, he is not.*
>
> *…*
>
> *40. We emphasise that, in our collective experience, the age of a witness is not determinative on his or her ability to give truthful and accurate evidence. Like adults, some children will provide truthful and accurate testimony and some will not. However, children are not miniature adults, but children, and to be treated and judged for what they are, not what they will in years ahead, grow to be. Therefore, although due allowance must be made in the trial process for the fact that they are children with, for example, a shorter attention span than most adults, none of the characteristics of childhood, and none of the special measures which apply to the evidence of children carry with them the implicit stigma that children should be deemed in advance to be somehow less reliable than adults. The purpose of the trial process is to identify the evidence which is reliable and that which is not, whether it comes from an adult or a child. If competent, as defined by the statutory criteria, in the context of credibility in the forensic process, the child witness starts off on the basis of equality with every other witness. In trial by jury, his or her credibility is to*

> *be assessed by the jury, taking into account every specific personal characteristic which may bear on the issue of credibility, along with the rest of the available evidence."*

31. In relation to the question of competency, the trial judge viewed the s. 16 interviews; considered the intermediaries reports; and considered the relevant law relating to the question of competency, about which there was no disagreement. Having considered these relevant matters, the question of whether the injured parties were competent to give evidence was a determination which was within the trial judge's discretion to make. An error in principle has not been established in relation to his finding that the s. 16 interview demonstrated the injured parties to be capable of giving an intelligible account of the allegations which they made and therefore competent to give evidence. We agree with the trial judge that while the interviews are disjointed and the injured parties can be distracted, each is capable of giving an account which clearly reveals that they understand the questions asked of them and are capable of giving understandable answers to the questions relating to sexual acts.

32. In addition, we do not agree with the submission of the appellants that the cross examination conducted of the injured parties revealed them to be incompetent witnesses because they were unable to remember the details of the s. 16 interviews which they had just recently watched. What is of importance is whether the injured parties were in a position to give an intelligible account of the events at issue to include an ability to engage in cross examination. K was never directly asked about the events at issue, but rather was asked about her memory of the s. 16 interview, whereas when B was asked about the events at issue, he indicated that the events had occurred. Of principal significance, however, is the fact that an application was not made to the trial judge to revisit the injured parties competency after the cross examination, particularly in circumstances where the trial judge had indicated that he would return to this issue, if it arose. Accordingly, the question of the trial judge being in error in determining the injured parties to be competent on foot of cross examination simply does not arise.

33. The appellants argue that the delay in the case caused them a fundamental unfairness as the appellants were deprived of the opportunity of testing the competency of the injured parties at a time closer to when the s. 16 interviews were conducted.

34. This argument has no foundation. The question of competency arises when evidence is being given. The trial judge determined that the injured parties were competent to give the account reflected in the s. 16 interview. We have already determined that a legal error does not arise with respect to this decision. The next occasion when competency might be considered is when an injured parties comes to be cross examined. Indeed, in the instant case, the trial judge indicated that he would keep the matter under review. There is simply no evidential basis for suggesting that had there not been a delay in getting this matter on for trial, an

issue would have arisen at the cross examination stage in relation to the injured parties competency.

35. Nevertheless, the trial judge was of the opinion that the issue of delay was not without concern, but opined it was more appropriate to consider this under the *PO'C* jurisdiction.

36. This ground of appeal fails.

Leading and Tag Questions

37. The appellants argued that pursuant to s. 16(2) of the 1992 Act, it was not in the interests of justice that the s. 16 interviews were admitted into evidence because the manner in which the interviews were conducted rendered them unreliable, particularly having regard to the learning disabilities which the injured parties laboured under. They complained that the specialist interviewers inappropriately and in breach of the rules of evidence and the Good Practice Guidelines governing the conduct of s. 16 interviews, asked leading and tag questions relating to disclosures made by the injured parties in the course of their clarification interviews; asked repetitive questions; and continually pursued topics despite the injured parties wishing to conclude the interviews.

38. The trial judge was of the view that the interviews were conducted "*with consummate professionalism, skill and sensitivity*". He found that while leading and tag questions had been asked, which was in breach of the Good Practice Guidelines, utilising information gleaned from the clarification meetings, the narrative provided by the injured parties was such that these questions did not fundamentally undermine the purpose of the s. 16 interviews and an unfairness did not arise. With respect to repetitive questioning, he was of the view that the specialist interviewer demonstrated impressive patience and tact to bring K back to the question which she was being asked which was quite different to persistently asking the same question.

39. The submissions of the parties before the trial judge were repeated before this Court. In addition, it was argued that an unfairness arose as the ground rules ordered prohibited Counsel for the appellant from asking leading questions, when this is what occurred to elicit the evidence in chief. That argument can be dealt with swiftly. As already noted, Counsel for the appellants are incorrect in this regard as a perusal of the transcript of the ground rules determination, reveals that tag questions were prohibited, but a similar prohibition was not put in place regarding leading questions.

Discussion and Determination

40. The rules of evidence provide that leading questions, namely questions which suggest an answer or which assume a state of affairs which in fact is in dispute, should not be asked in the course of examination in chief. If the rule is breached, the evidence does not become inadmissible but the weight to be afforded to the evidence may be affected. As noted by

McGrath On Evidence, 3rd Ed., (Roundhall, 2020) at paragraph 3.80, an exception to the rule is when it is required to aid a witness's recollection. The Good Practice Guidelines governing the conduct of s. 16 interviews reflect the rule against asking leading question.

41. In *The People (at the suit of the Director of Public Prosecutions) v TV* [2017] IECA 200 and *The People (at the suit of the Director of Public Prosecutions) v. SA* [2020] IECA 60, this Court held that the introduction of material garnered from a clarification meeting, combined with leading questions, did not render the admission of the s. 16 interview unfair having regard to the overall contents of the interview. With respect to breach of the guidelines, the Court held in SA that the guidelines do not have the force of law and that while those conducting interviews should be slow to depart from the guidelines, the particular circumstances and characteristics of an interviewee will direct how best to proceed with an interview.

42. In the instant case, two matters referred to by each injured party in the course of their clarification interviews were introduced into the s. 16 interviews by the interviewers. We have considered each of the issues which the appellants complain about. It is clear from the interviews that this material is introduced for the purpose of reminding the injured party what was said at the clarification interview and bringing them to that event so as to discuss it. However, on each occasion this occurs, the injured party is then required to give his/her own account of the sexual events at issue.

43. We agree with the trial judge that these interviews were conducted with immense skill, professionalism, patience and care, demonstrating an understanding of child witnesses and how best to help them tell their story. While some leading questions in relation to matters previously disclosed by the injured parties were asked, the purpose of so asking was to introduce these matters into the conversation so as to then have the injured parties detail these events. The trial judge did not err in his conclusion that the interviews were not rendered unreliable as a result of the manner in which they were conducted and that it was not in the interests of justice that they should be deemed inadmissible in evidence.

44. This ground of appeal also fails.

Delay Simpliciter

45. The appellant makes a general submission that the delay in this case - eight years from the time of the first s. 16 interview to the trial - was too great and that, in and of itself, the unjustified delay should have resulted in the s. 16 interviews being deemed inadmissible.

46. In *R v. Barker* [2010] EWCA Crim 4, the English Court of Appeal rejected the contention that in a case involving child complainants, delay alone could result in a case being withdrawn from the jury, stating:-

> *"Be that as it may, in our judgment the decisions in Powell and Malicki should not be understood to establish as a matter of principle … that where the complainant is a young child, delay which does not constitute an abuse of process within well understood principles, can give rise to some special form of defence, or that, if it does not, a submission based on "unfairness" within the ambit of Section 78 of the 1984 Act is bound to succeed, or that there is some kind of unspecified limitation period. There will naturally and inevitably be case specific occasions when undue delay may render a trial unfair, and may lead to the exclusion of the evidence of the child on competency grounds. Powell, for example, was a case in which after the evidence was concluded it was clear that the child did not satisfy the competency test, and if the child in Malicki was indeed "incapable of distinguishing between what she had said on the video and the underlying events themselves" it is at least doubtful that the competency requirement was satisfied. However, in cases involving very young children delay on its own does not automatically require the court to prevent or stop the evidence of the child from being considered by the jury. That would represent a significant and unjustified gloss on the statute. In the present case, of course, we have reflected, as no doubt the jury did, on the fact of delay, and the relevant timetable. Making all allowances for these considerations, we are satisfied, as the judge was, that this particular child continued to satisfy the competency requirement.*
>
> *51. There remains the broad question whether the conviction which is effectively dependent upon the truthfulness and accuracy of this young child is safe. In reality what we are being asked to consider is an underlying submission that no such conviction can ever be safe. The short answer is that it is open to a properly directed jury, unequivocally directed about the dangers and difficulties of doing so, to reach a safe conclusion on the basis of the evidence of a single competent witness, whatever his or her age, and whatever his or her disability. The ultimate verdict is the responsibility of the jury."*

47. In *The People (at the suit of the Director of Public Prosecutions) v. SA* [2020] IECA 60, where a delay of seven years occurred, the Court of Appeal also rejected the suggestion that delay simpliciter could result in the withdrawal of the case from the jury.

48. The delay in this case is shocking. While there are reasons for some of the delay, Covid being one, the fact remains that a delay of eight years occurred between the time of the recording of the interviews and the case coming on for trial.

49. All of the authorities dealing with child sex cases must make better efforts to ensure that these cases are dealt with expeditiously. That includes the guards, the Director of Public Prosecutions and the Courts. A different mindset and different procedures must be devised to deal with these cases in an appropriately speedy fashion.

50. However, failure to do so, does not mean that a trial will not proceed. For that to occur, a real consequence affecting the fairness of the trial needs to arise. Indeed, the cases cited in *R v. Barker,* namely *R v. Powell and R v. Malicki* reflected a specific consequence arising from the delay rather than delay in and of itself.

51. While we are dismayed at the delay which occurred in this case and urge all involved in the investigation and prosecution of child sex cases to do more to get trials of this nature on as quickly as is possible, we agree with the view expressed in *R v. Barker*, that delay in and of itself is not a sufficient reason to halt a criminal trial. Accordingly, rather than the suggestion that there was no possibility for "*a fulsome, comprehensive or otherwise meaningful cross examination of the Complainants*" to be conducted because of the delay, it must be established on the evidence that this could not be done.

52. This ground of appeal also fails.

Recent Complaint Evidence

53. The respondent proposed calling the foster mother of the injured parties to give evidence relating to the disclosures which B had made to her, or in her presence, regarding TM sexually abusing him. The appellants objected to this evidence on the basis that some of her proposed evidence amounted to prejudicial repetition and that some of the complaints were imprecise and vague such that they had no probative value.

54. The trial judge permitted some of the disclosures sought to be adduced by the respondent to be admitted in evidence. He was of the opinion that these disclosures were sufficiently precise and did not amount to prejudicial repetition but rather were elaboration of a previously disclosed event which appropriately could be adduced under the doctrine of recent complaint.

55. In submissions before us, the appellants point to the fact that the jury were aware that B had made a previous complaint about the sexual offending as they were aware that a clarification meeting had occurred prior to the s. 16 interview taking place. It was submitted that there was little probative value in adducing evidence of the repetitive complaints, whereas the prejudicial value increased as the level of repetition raised the concern that the jury would consider this evidence as probative of guilt rather than relevant to consistency.

56. The recent complaints at issue were led by Counsel for the respondent when examining the foster mother as follows:-

"[Q]: *And I think that [B] said to [your husband] and to [Sibling] and you, he said to all of you -- he said to you that: "[Sibling] and me …" -- himself -- "… used to cry." And I think …, your husband, said "Why?" And [B] replied: "When [TM] used to hit us." And your husband asked him: "And when else did you cry?" And [B] said: "When [TM] pushed back my willy." Is that right?*

[A]: Yes.

[Q]: And I think at this stage…, your husband, hugged [B] -- or sorry, [B] hugged [your husband], and [your husband] said: "We won't do that to you here." And I think then [B] said: "He pushed my willy back, and me pushed his back." And I think you asked him, [B], if anything else had happened, and [B] said: "He put it in my mouth and it was very sore." And [your husband] said: "What was very sore?" And [B] said "my bum", and pointed to his bottom; is that right?
[A]: Yes.
[Q]: And he again said: "It was very sore." And I think you reassured -- you and your husband reassured [B] that nothing would happen at your home and that you'd look after him; is that right?
[A]: Yes."

5th of November 2014:
"*[Q]: I think that you've noted what happened on that date and I think what happened was that: "At teatime, [B] talked about [TM] used to wake him in the middle of the night and do bad things to him." Is that right?*
[A]: Yes.
[Q]: And I think you asked [B]: "What, like?" And he said: "Put his willy in my bum, and I cried." I think you asked him: "Did you tell your mammy?" And he said: "Yes." He said, she "told me to stop crying" and they told him to stop talking."

1st of January 2015:
"*[Q]: The 1st of January 2015. I think that [B] told you in the kitchen that he had a dream about [TM] hitting him and the bad things he had done, the same stuff, pulling his willy. And that [CC] told [B] to "shut his mouth." Is that right?*
[A]: Yes.
[Q]: And you enter that in your diary after that happened; is that right?
[A]: Yes."

27th of January 2015:

"[Q]: […] I think [your husband] saw a cat on television, and [B] said he didn't like cats. And then your husband…asked him if he had one at home, and he said: "No, JK ..." -- is that stand for [JK]?

[A]: Yes.

[Q]: "[JK] did." And [B] then told you and [your husband] that he went to [JK's] with [TM] and [CC]. [Your husband] asked [B] if he liked [JK], and he said no. [Your husband] asked why, and [B] said: "He put his willy in my tummy and it hurt." [Your husband] asked him was he on his own with him, meaning [JK], and he said: "No, [CC] and [TM] were there." You asked him then: "Was that when [K] lived with him ..." -- with you -- sorry, lived with him, with [B] or when [K] lived in your house … And he said it was when [K] lived with you and [your husband] that this had happened."

Discussion and Determination

57. The fact that the jury were aware that previous complaints were made, has no relevance to the issue of recent complaint evidence, the purpose of which is to establish consistency between what was previously recounted by a complainant about an alleged sexual event and what is then adduced in evidence. Furthermore, the jury were specifically directed by the trial judge as to how they were to approach this recent complaint evidence. An assumption must be made that the jury faithfully followed the trial judge's direction in this regard and considered the evidence of the foster mother from the perspective of consistency.

58. In relation to the terms of the recent complaints, the complaints cannot be categorised as repetitive. Each complaint provided further information in terms of the overall sexual offending and was relevant from the perspective of establishing consistency on the part of B. The trial judge's categorisation of further elaboration of the sexual offending being provided by these complaints is accurate and he did not err in admitting the complaints into evidence to be considered by the jury under the doctrine of recent complaint.

59. This ground of appeal fails.

***PO'C* Application – Asserted Inability to Cross Examine**

60. At the end of the respondent's evidence, Counsel for the appellant sought to have the case withdrawn from the jury on the basis that a meaningful and effective cross examination was not possible arising from the delay in the case. Reliance was placed on the cross examination which was conducted with the injured parties which has already been set out.

61. The trial judge refused this application on the basis that it had not been established that a meaningful and effective cross examination of the injured parties could not be conducted as

Counsel for the appellants had not sought to engage with them in relation to the sexual events themselves, but rather asked questions in relation to their memory of the s. 16 interview and other peripheral matters. In light of the cross examination, the trial judge was of the view that it was not established that an unfairness arose.

62. In the hearing before us, Counsel for the appellants sought to rely on the recent Court of Appeal decision in *The People (at the suit of the Director of Public Prosecutions) v. MT* [2023] IECA 65 to advance their argument that in circumstances where an injured party has no recollection about the sexual events at issue, the case should be withdrawn from the jury as a meaningful cross examination cannot be engaged in. It was also submitted that lack of memory relating to the specific sexual events was established on the evidence before the trial court.

Discussion and Determination

63. In *The People (at the suit of the Director of Public Prosecutions) v. MT*, a four and a half year delay had occurred between the s. 16 interview and the trial. Having conducted an extensive analysis of the jurisprudence of the English Courts relating to this issue, Ní Raifeartaigh J. concluded at paragraph 86 of her judgment:-

> *"These considerations lead us to the conclusion that if matters have reached a point where a child witness no longer remembers the events which give rise to the prosecution by reason of the delay between the video-recording and the trial, matters may have reached a point where cross examination would (sic) is in effect meaningless, and the accused person may be said to have been deprived of his right to cross-examine. Whether this leads to a real risk of an unfair trial, depends upon all of the evidence in the case, but it is significant factor in and of itself."*

64. It is important to note that the Court in *The People (at the suit of the Director of Public Prosecutions) v. MT,* specifically indicated that it was a case which turned on its own particular facts and was not of general application. Ms. Justice Ní Raifeartaigh stated at paragraph 95 of her judgment:-

> *"The Court wishes to emphasize that its conclusion should not in any way be interpreted as any kind of bright-line rule about the lapse of any particular period of time between a videorecording and trial/cross-examination in such cases, whether the lapse of time is taken alone or in combination with the young age of a particular child. Nor should it be relied upon for any suggestion that a case should be brought to a halt simply because a child complainant cannot remember some details relating to the event(s) in question. What happened in this case was most unusual insofar as the child herself accepted she had little memory of the event. Each case must be*

> *decided in light of its own facts. It is the particular combination of facts and evidence in the present case which leads the Court to its conclusion."*

65. In addition, very differently to the instant case, the sexual activity alleged in *The People (at the suit of the Director of Public Prosecutions) v. MT* related to a single alleged sexual assault asserted to have occurred over a very short period of time, which is referred to by Ní Raifeartaigh J. in the course of her judgment. This distinction is reflected in the English cases which are considered in *MT*, namely *R v. Malicki* [2009] EWCA Crim 365 and *R v. Powell* [2006] 1 Cr App R 31. The significance of this factor is also referenced in *The People (at the suit of the Director of Public Prosecutions) v. TV* [2017] IECA 200.

66. In the course of the oral hearing before us, we specifically asked Counsel for the first appellant to point to the questions which were asked of K which are relied on as establishing that she had no memory of the events in question. They were identified as follows:-

> *"Q. Okay, okay. Now, in the interview you said certain things in the interview, do you remember that?*
>
> *A. No.*
>
> *Q. Do you remember the things you said in the interview?*
>
> *A. No.*
>
> *Q. Okay. When you watched this video, or the DVD yesterday, do you remember anything that you watched on it yesterday?*
>
> *A. No.*
>
> *Q. Okay. It's okay to say if you don't remember, that's okay, okay?*
>
> *A. Yes."*

67. We do not construe these questions as K being asked whether she remembered the events which she referred to in the s. 16 interviews. Clearly, the trial judge, who also watched the s. 16 interviews, did not construe the questions in that manner either. Indeed, issue was not taken with the trial judge's view that K had not been specifically asked about the sexual events at issue which is somewhat surprising in light of the importance which is now sought to be attached to these questions. Accordingly, we are of the view that K was not specifically questioned in relation the sexual events at issue.

68. In relation to B, it was put to him that the sexual events did not occur to which he replied that they did. Nothing further was explored with him in relation to the sexual events at issue.

69. Counsel for the appellants suggest that he was prohibited from asking about the actual events as this risked re-victimisation. As a simple proposition, that it incorrect. While Counsel may wish to explore a complainant's memory of the interview conducted, the central plank of the cross examination conducted in a case of this nature must relate to the actual alleged events themselves. Furthermore, the trial judge is available to seek directions from in relation to cross examination rather than Counsel making a judgment call with respect to avoiding re-victimisation.

70. In light of the cross examination conducted, we are in agreement with the trial judge that an inability to conduct a meaningful cross examination in relation to the sexual events at issue was not established and that therefore an unfairness was not established.

71. Cross examination in these matters is difficult and requires an understanding of how best to engage with a child, particularly a damaged child. It also requires significant preparation and planning. In addition, conditions need to be optimal in terms of the video link working correctly. However, while cross examination of a child witness is difficult, it is not impossible. It is only when evidentially it has been established that a meaningful cross examination cannot take place that an unfairness can be established to have arisen. This was not established in this case in light of the limited manner in which K and B were cross examined with respect of the sexual offences at issue.

72. While *The People (at the suit of the Director of Public Prosecutions) v. MT* was decided after the trial in this case, it is important to repeat a comment this Court recently made in a similar case of *The People (at the suit of the Director of Public Prosecutions) v. NW* (Unreported, Court of Appeal, 14 May 2024) in which the Court warned against the development of a practise where the focus of cross examination of a child is to have the child agree that he or she cannot remember the events at issue. A fulsome cross examination, within the limits of the ground rules set, in relation to the alleged incidents must be attempted before a submission of unfairness arising because of an absence of recollection can be considered.

73. Accordingly, we are of the view that the trial judge did not err in refusing to direct a not guilty verdict on the basis of *The People (at the suit of the Director of Public Prosecutions) v. PO'C*. This ground of appeal also fails.

Conclusions

74. In circumstances where we have refused to uphold any grounds of appeal pursued at hearing, we dismiss the appeals against conviction of both appellants.