THE COURT OF APPEAL

UNAPPROVED **NO REDACTION NEEDED**

[117/14]

Neutral Citation Number: [2021] IECA 152

The President

Edwards J

Kennedy J

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

PB

APPELLANT

JUDGMENT of the of the Court delivered on the 24th day of May 2021 by Birmingham P.

1. On 5th March 2014, following a trial which commenced on 19th February 2014 in the Central Criminal Court, the appellant was convicted of eight counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990 (as amended), three counts of rape contrary to s. 4 of the same Act, and one count of rape contrary to common law. He has now appealed against both conviction and sentence.

2. On 19th May 2014, he was sentenced to a total of 12 years imprisonment. This judgment deals with the conviction appeal only. It is of some significance in the context of this appeal that the trial, which resulted in conviction and which is now the subject of this appeal, was the second occasion on which the appellant had stood trial. An earlier trial had ended with a jury disagreement.

Background

3. The complainant in this case, X, is the daughter of the appellant's then partner, Y. The complainant was born in the autumn of 1996. The indictment covered the period from June 2005 to May 2008, which is the period when the complainant was between six and three-quarter years of ages and 11 and a half years of age. Initially, the complainant lived with her mother, Y, in Dublin, but in 2000 or thereabouts, moved to Waterford after Y commenced a relationship with the appellant.

4. The complaints which resulted in the prosecution of the appellant were the subject of an interview conducted by specialist Garda interviewers on 7th July 2010. The interview was recorded on DVD. There had been earlier complaints, but these were retracted; the prosecution would suggest as a result of pressure by the appellant.

5. There was evidence of very extensive involvement by social services with X and with the family. The relationship between Y and the appellant was described as highly sexualised, but violent. Each made frequent complaints to Gardaí about the other.

6. In May 2003, the complainant was brought by her maternal grandmother, Z, to a Garda station to report incidents of sexual abuse. Then, in May 2008, orders were made under the Childcare Act 1991, the effect of which was that the complainant and her half-brother, W, who was born in the autumn of 2003, and who is the son of the appellant and Y, were taken into care.

7. In May 2008, the complainant made allegations of sexual abuse against the appellant in a letter addressed to a Ms. Cusack, who worked with social services at the time. This, in turn, led to the interviews in July 2010 that were conducted by specialist interviewers. The complainant told interviewers that the abuse began when she was aged about seven years in the family home in Waterford. It began with the appellant touching her vagina outside her

clothing and progressed to him touching her vagina inside her clothing and him forcing her to touch and rub his penis. This alleged activity was the subject of counts one to three on the indictment, which were three counts of sexual assault.

8. The complainant, her mother and the appellant then moved to another location in the same county and this became the scene for the balance of the alleged offending. The sexual assaults continued as before, and then, when the complainant began to develop, the appellant also began to touch her breasts. She described acts of oral sex, which were charged as s. 4 rape, and she described a vaginal rape, which involved ejaculation onto her stomach. She reported that after this occurred, the appellant had said to her that if she told anyone, she would be going 10 feet under.

9. On 5th June 2008, the appellant was admitted to Waterford Hospital and said that he had taken an overdose of paracetamol. While there, he sent texts to a Ms. O'Sullivan who worked for the mental health services and who had known the appellant previously. She gave evidence of receiving text messages from the appellant's mobile phone and that she made a note of these. One of the messages expressed concern that he thought he had touched the complainant and continued on to say that if he had, it was out of character and that "heaven is next, thanks for all". Another of the texts read:

> "Ger, [appellant]. Got bad flashback in Tramore this evening. Think I may have harmed [the complainant, X]. Love the kids and [Y]. Spent the weekend with [Y] in Kilkenny[,] great time; love her so much".

10. Y and the appellant married in 2009, after the complainant had made her allegations, but the relationship did not last long and ended shortly afterwards.

11. A theory advanced by the defence was that the complainant had been encouraged by her maternal grandmother to make allegations against the appellant, who strongly disapproved of him, believing that his relationship with her daughter was a violent one. The

complainant's maternal grandmother was a witness at the first trial which ended in disagreement. On that occasion, she was tendered by the prosecution and was then cross-examined on behalf of the then accused. However, by the time of the retrial in February 2014, she had died and the fact that she was not available at the retrial gave rise to an application to halt the trial. The application was refused and this is now an issue in this appeal.

12. On 6th March 2011, the appellant apparently tried to commit suicide and left what was intended as a suicide note in his motor vehicle which was found by Gardaí. Then, on 16th March 2011, the appellant called into the local Garda station and asked to speak to a member of An Garda Síochána. The Gardaí present in the station agreed and took a note of the conversation. The appellant told the Gardaí that he had recently had several episodes where things had happened and he could not remember them, and wondered if this might be a psychological issue. He then spoke about the complainant and said that he dreaded to think that what was alleged against him could have happened. He was then cautioned, but the Gardaí he had been speaking to had to leave the station to deal with another matter. The appellant returned to the Garda station on 19th March 2011 and spoke with Gardaí again, under caution, and a further note was taken. In this conversation, the appellant said that until he had a full independent psychological evaluation, he could "not rule anything out" when it came to the allegations that the complainant had made against him. He suggested that a biological uncle of the complainant might be responsible.

13. On 21st March 2011, the appellant was arrested, detained and interviewed. He denied abusing the complainant and sought to cast suspicion on another person if, in fact, assaults had taken place. He also stated that although the texts sent to Ms. O'Sullivan had come from his telephone, he did not mean to send them. He said he had no flashbacks about hurting the complainant. When asked if he could have sexually assaulted the complainant, he said that,

theoretically, anything was possible, and that for his own wellbeing and for that of others, he was arranging for an assessment of himself for anything he may have done or said.

Grounds of Appeal and Submissions

Ground 1: Alleged Error in Refusing the Stay on the Indictment

14. It was submitted on behalf of the accused, and is now submitted on behalf of the appellant, that the absence of testimony from W, the complainant's maternal grandmother, diluted the strength of the defence. It was submitted that the complainant had no recollection of confiding in W, which meant that there was a definite inconsistency which would be of material assistance. While the transcript of the first trial was available, that was an inadequate substitute; the jury would not have the opportunity to observe the demeanour of W. The appellant says the indictment should have been stayed. It was not just the fact that the witness had died, but rather that major damage had been caused to the defence position by her absence.

15. The Director says that the trial judge's assessment that it was proper for the trial to proceed was a correct one. W was not a witness of major significance, in the sense that it was never suggested that she had actually been a witness to anything untoward. There was nothing to suggest that had she been available at the retrial, that her cross-examination would have taken a different route. Indeed, the Director says that her statement of evidence, as it appeared in the book of evidence, was more damning to the accused, and that it might be thought that, if anything, it was the prosecution that was disadvantaged by her absence. If she had given evidence a second time, she might have gone beyond what she had said in direct evidence on the first occasion.

16. To put this ground in context, it should be noted that having heard counsel on the issue, the trial judge found himself in disagreement with defence counsel. He indicated that

he had very considerable doubt as to whether there were any circumstances in which a trial could be inhibited by virtue of the death of a witness. He saw the situation as one involving the "vicissitudes of human existence". He then turned to the question of whether, in the particular circumstances as matters stood, the trial could fairly proceed. In that regard, he first made a point of the fact that there was available a transcript of what had occurred in the previous trial. From that, there was evidence as to the circumstances in which the allegations were made and the jury would have the benefit of that evidence. The judge made note of the fact that counsel was not in a position to point out to him any substantive change in circumstance which might give rise to a different form of cross-examination. He said the only matter that could be pointed to was that the jury would not have sight of the witness as a live witness, but it did not seem to him, on the facts of the particular case, that this should see the trial halted. He made clear that he saw his ruling, which came before the accused was put in charge, as interlocutory in nature and one that could be revisited during the course of the trial.

17. As will be apparent, this was not the usual delay application that not infrequently arises in what are sometimes referred to as historic sex cases. This was not a case where there had been really major delay. There was a complaint to Gardaí, leading to the complainant being interviewed by specialist Garda interviewers within approximately two years after the abuse ended and after various orders were made under the Childcare Acts.

18. Applications to prevent or halt trials of sexual allegations because of the absence of witnesses, whether that is because they cannot be traced given the time lapsed or because they have died, are not unusual. Normally, they involve contentions that the witness identified would have material evidence to offer, along with an assertion that the witness would, if available, have been expected to give evidence that was supportive of the defence position. The present situation is somewhat different. It is not suggested that the now deceased grandmother was ever likely to have proffered testimony favourable to the

appellant. Rather, the defence complaint is that they have been denied the opportunity to advance their theory that the complainant was "put up to" making complaints by her grandmother. The defence concern is that because of the death of the grandmother between the original trial and retrial, that they were denied an opportunity to advance that theory in an effective manner.

19. This Court finds itself in agreement with the trial judge and the approach taken by him. Reference has already been made to the fact that this was not a case where there was a very long delay between offending and the matter coming on for trial. Therefore, the case is to be distinguished from many of the historic sex abuse cases where the effects of very long delay have fallen to be considered.

20. The decision to cross-examine the witness at the first trial cannot have been a straightforward one as there had to be a risk that evidence unfavourable to the then accused would emerge. However, the cross-examination did take place at the first trial, a transcript was available, and there was agreement that the transcript should be made available to the jury at the second trial. It was also agreed that if the witness had been available for the second trial, that any cross-examination that would have occurred would have proceeded along the same lines as the cross-examination at the first trial.

21. In all the circumstances, we are in no doubt that the approach of the trial judge to allow the trial proceed was a proper one, and so we are not prepared to uphold this ground of appeal.

22. We agree with the trial judge that the occasions on which a trial will be halted because of the death of a witness are likely to be few and far between. In this case, the witness who had died was not someone who, it was alleged, had witnessed anything, but rather, she was a witness through whom the defence at the previous trial had advanced the theory that complaints had emerged at the instigation of the witness. The difficulties, such as they were,

created for the defence were further ameliorated by the fact that there was a transcript of the original trial available. In the circumstances, we are in no doubt that the trial judge was correct to reject the application to halt the trial, and so we dismiss this ground of appeal.

Grounds 2 and 3:

23. The second and third grounds of appeal were set out as follows:

> **(2) The trial judge erred in law in allowing the admission into evidence of the video of the complainant.**
>
> **(3) The trial judge erred in law in not requiring the complainant to be present in court for cross-examination rather than allowing her to be cross-examined *via* video link.**

24. The direct evidence of the complainant at trial came from the video recording of her interview conducted by the specialist interviewers in the Garda station. The situation is complicated somewhat by the fact that those interviews had touched on other rapes beyond those that were charged. The trial judge had indicated that references to other matters not charged, as well as counselling undergone by the complainant, should not go before the jury. This was achieved by the Garda, who was playing the tape, pressing the pause button and then fast forwarding as appropriate. The appellant says that this is unsatisfactory in circumstances where it is not possible to know just what was played to the jury and just what was heard by them.

25. The other criticism centres on the fact that the cross-examination of the complainant was by video link. It is said that while that might have been acceptable if she had given her direct evidence by video link, in a situation where the direct evidence involves the playing of the interview, that she should have been cross-examined live in court.

26. Regarding the appellant's complaints about not knowing what exactly was played to the jury, the Director submits that while a video-recording is not available, an edited transcript of the DVD, as played to the jury, has been provided to the defence. Further to that, the Director submits that the then accused's entire legal team was present in court while the 'edited' DVD was played, and no issue was taken with the evidence as adduced. Indeed, the Director says that if the appellant is vaguely suggesting that something improper was heard by the jury, one would have expected an immediate application for a discharge of the jury at the time.

27. In relation to the appellant's submission that the trial judge should have required the complainant to be cross-examined in court rather than by video-link, the Director maintains that the default position can be found under s. 13 of the Criminal Evidence Act 1992 which sets out that any person under the age of 18 can give evidence *via* the link "unless the court sees good reason to the contrary". The Director says that the only reason proffered by counsel for the then accused at trial was that the complainant seemed to be competent in recounting her story on a DVD four years previously and that she was then, at the time of the trial, much older, being 17 years of age. The trial judge rejected this submission, noting that the default position was set out in the legislation. As to what seems to be the implicit suggestion that the jury may have heard material that was not meant to be heard, we regard this as quite unconvincing. If there had been any problems, then these would have been the subject of applications at the relevant time during the trial. The suggestion at this remove that perhaps something went wrong lacks substance.

28. Neither are we persuaded by the argument that the cross-examination should not have proceeded by way of video link. There was statutory authorisation for what occurred and, in our view, this is sufficient to dispose of this ground of appeal.

Grounds 4, 5, 6 and 7:

29. These grounds of appeal were formulated as follows:

> **(4) The judge erred in law in failing to properly address the jury on the complainant's evidence generally, and specifically, on her statement as to whether the offences had occurred.**
>
> **(5) The judge erred in law in failing to adequately address the jury regarding the complainant's lack of memory.**
>
> **(6) The judge erred in law in failing to adequately address the complainant's memory regarding the making of complaints and her interaction with other witnesses.**
>
> **(7) The judge erred in law in failing to adequately address the complainant's reliability as a witness.**

30. The appellant says that considerable uncertainty and unreliability was a feature of the complainant's evidence. It is pointed out that she failed to recall interactions and exchanges with a number of individuals, particularly persons involved with social services. The appellant complains that the judge did not adequately charge the jury in respect of how the poor memory of the complainant should be dealt with by the jury when deliberating.

31. In the course of his charge, the trial judge dealt in some considerable detail with the evidence of the complainant; both her direct evidence, which came from the video recorded interview, and her cross-examination. As he rehearsed the evidence, he recorded that there were many occasions when the complainant said she did not remember, and indeed said to the jury that this was an issue that they would have to consider. It is also of some significance that the question of lack of memory was clearly a factor in the trial judge's decision to give a discretionary corroboration warning. When requested by way of requisition to contextualise

the warning that he had given, the judge responded by making specific reference to the complainant's memory difficulties.

32. The Director says that the judge did, in fact, deal with the complainant's memory difficulties. The Director points out that the cross-examination largely focused on what had been said to various doctors and social workers. It was those contacts and interactions, rather than the detail of the sexual abuse allegations, which were the focus of the cross-examination. The Director says that given the nature of the complainant's upbringing, her tender age and the extent of her interaction with various social workers and doctors, that it is not altogether surprising that she did not recall the specific details of those that she spoke to and what she said at specific meetings.

33. It seems to us that one cannot lose sight of the fact that the jury saw both the direct examination and cross-examination and observed for themselves how often the complainant responded to questions by saying that she did not remember. They were then further reminded of this, as one would expect, during the course of the defence closing argument and the judge made specific mention of it in the course of his charge. Having said that, we do think there is much force in the argument made by the Director that such was the extent of the young complainant's interaction with medics and social workers, that it was not surprising that she would have difficulty recalling particular interactions and what was said on particular occasions. It is the nature of things that individuals recall standout events, or once-off events, but may have difficulty in remembering the details of a particular event if events of that nature were frequent or routine. For this young complainant, contact and interaction with professionals of one variety or another was very routine indeed. We have not been persuaded that the judge's handling of this issue was other than satisfactory.

Grounds 8 and 9:

34. Grounds 8 and 9 were formulated in the following way:

> **(8) The trial judge erred in law in failing to give a proper corroboration warning.**
>
> **(9) The trial judge erred in law in failing to charge the jury properly regarding the lack of corroboration.**

35. The appellant says that while the judge correctly decided to give a corroboration warning, that having done so, he then failed to give a sufficiently clear warning and failed to put the warning in context. What was lacking from the case was a warning in clear and unambiguous terms. Indeed, it is said that having embarked on a warning, the judge then proceeded to undermine what he was saying. It is said that this happened in a case where a strong and clear warning was called for. It is also said that the need for such a clear warning was highlighted by the fact that some 64 issues were raised with the complainant about which she had no memory.

36. The judge addressed the issue of corroboration on a number of occasions in the course of his charge. He did so first after dealing with the general principles which govern criminal trials, and he then returned to it at the stage in the charge when he was reviewing the evidence. In fact, what the judge had to say might arguably be regarded as unduly favourable to the defence, in that when he came to identify evidence that was capable of amounting to corroboration, he did not refer to the text messages sent by the appellant to Ms. O'Sullivan. Apparently, this was because he harboured some doubts about the text messages, but on the face of it, it would seem that these were messages that should have been free to be considered.

37. The corroboration issue was dealt with once more at the requisition stage. At that point, following a request from counsel, the judge explained to the jury that the reason he was giving a warning was because of the complainant's poor memory and because of inconsistencies in her evidence.

38. The starting point for consideration of this has to be the fact that the giving of a warning is not mandatory, and that if a warning is given, the judge is not required to follow any particular form of words. In this case, the judge dealt with the issue of corroboration at two points during the course of his charge and then dealt further with the issue in response to requisitions.

39. In the Court's view, while what the judge had to say would not be described as a textbook corroboration warning, it was, in the circumstances of the case, in our view more than adequate.

Ground 10 and 11:

40. Grounds 10 and 11 were set out in the notice of appeal as follows:

> **(10) The trial judge erred in law in reading from the transcript of the previous trial during his charge to the jury.**
>
> **(11) The trial judge erred in law in failing to adequately explain to the jury that he had read from an incorrect transcript and charging them accordingly.**

41. These grounds are a reference to the fact that the judge, when reviewing the evidence, and, in particular, at the stage when he came to deal with the evidence of Y, the mother of the complainant, began to quote the evidence given by Y at the previous trial before he was interrupted and corrected by prosecution counsel. Obviously, what occurred was unfortunate, but it does not seem that any real harm was done. The portion that was read from the previous transcript was uncontroversial in the sense that her evidence at both trials, certainly, her direct evidence at both trials, followed a similar pattern. Presumably, it was because the evidence was similar that the error was not spotted immediately. However, when the error was spotted by prosecution counsel, she took the unusual, but in the circumstances, entirely correct decision to interrupt the judge mid-charge and the situation was quickly rectified. Indeed, it

was not even necessary for the jury to leave the courtroom. No doubt, it was for this reason that there was no application for a discharge of the jury. The lawyers at trial did not see that anything of enormous consequence had occurred, nor was there any suggestion of irretrievable prejudice having been caused. We are unimpressed with the significance that is now being attributed to the issue at this time remove.

Grounds 12 and 13:

42. These grounds set out:

> **(12) The trial judge erred in law in allowing certain questions to be put in re-examination.**
>
> **(13) The trial judge erred in law in allowing hearsay evidence to be admitted.**

43. This was a reference to the fact that in 2003, the complainant was brought to Gardaí where she made complaints about the appellant which were subsequently retracted. In the course of Y's (the complainant's mother) evidence-in-chief, prosecution counsel elicited that the appellant had told her to tell the complainant not to go ahead with the statement, and had said the complaints were all fabricated, and Y went ahead and did that. The issue was canvassed in cross-examination. In the course of cross-examination, Y said she had not recalled meeting Dr. Butler. In re-examination, counsel for the prosecution commented that Dr. Butler's note suggested that both the witness and the appellant were present and asked whether that assisted her at all in recalling, to which the witness said "no, sorry". There was no objection at the time to re-examination, and in fact, the re-examination did not go anywhere. Despite this, it is now said that the question asked, which it is acknowledged did not receive a positive response, was more akin to a question that would be put to a witness in cross-examination, and it is said that the judge fell into error in allowing this additional evidence to be put before the jury. It seems to us that the manner in which the issue is now

being raised, or sought to be raised, does not reflect what occurred at trial. At trial, the witness was cross-examined on the basis of what had occurred at a particular meeting with a particular doctor. The witness's response was that she did not recall the particular meeting. In re-examination, counsel on behalf of the prosecution sought to assist the witness in recalling the meeting, but her efforts came to naught. We cannot see how it can possibly be suggested that what occurred rendered the trial unfair or the verdict unsafe.

44. There is now a complaint that the trial judge erred in allowing hearsay evidence to be introduced; specifically, hearsay from the complainant's maternal grandmother, W. The background to this issue is that in the course of the previous trial, W, in response to persistent cross-examination, had told counsel that she had taken the complainant to a Garda station "because of what she said to me earlier in the day". At that point, counsel for the accused shut the witness down and she did not go on to give any evidence of what the complainant had said to her. It does not seem, therefore, that anything untoward occurred at the previous trial, but what is clear is that the defence were fully on notice of what occurred at the previous trial, and notwithstanding that, were still prepared to have the transcript from that trial read to the jury. In the circumstances, once more, we find ourselves in a situation of being quite unable to see how this could provide a basis for an appeal.

Grounds 14 and 15:

45. It appears these grounds are not being pursued.

Ground 16: The trial judge erred in allowing the recording of the complainant's evidence to be played back to the jury and doing so without repeating her cross-examination

46. In order to put this ground in context, it is necessary to refer to the fact that when the video recording of the interview conducted with the complainant with specialist Gardaí was first played to the jury on 24th February 2014, there was an issue about audio quality. That emerges very clearly from the transcript. Indeed, the level of concern was such that consideration was given to making a copy of a transcript, with certain material excised, available to the jury. In the end, that did not happen. The trial proceeded, and ultimately, on 3rd March 2014 at 10.45am, the jury commenced deliberating. Then, at 12.51pm, the jury asked to see the video of the interview with the complainant and also asked if they could possibly get a transcript. The trial judge ruled that they could not be given a transcript as a transcript did not form part of the evidence in the trial, and they could not be given the video to view, essentially for the same reason, but he did permit the video to be played in court and viewed by the jury.

47. The appellant says that what occurred meant that the trial was conducted with a real degree of imbalance as there was no re-viewing or re-reading of the complainant's cross-examination. Reference is made to the case of *Kemmy v. Ireland* [2009] 4 IR 74 which concerned an action for damages arising from the decision of the Court of Criminal Appeal to overturn the plaintiff's rape conviction. Following the conclusion of the trial of the plaintiff and during the course of lengthy deliberations, the jury requested to be reminded of the evidence of the complainant. Rather than read the transcript which would have involved questions and answers, the trial judge decided to read from his own notes of what he had recorded as the evidence of the complainant. The Court of Criminal Appeal was of the view that in light of the circumstances of the case, and the Court stressed the phrase "in the circumstances of this particular trial", what had occurred was unfair and rendered the trial unfair.

48. In the view of this Court, the circumstances of this particular case which require focus include the fact that there was significant difficulty with sound quality in respect of a particular part of the evidence and that was evident from the very beginning. In those circumstances, the fact that a jury would want to view what was obviously a very important part of the evidence of the case a second time can hardly have surprised anybody. It does not seem to us that what occurred upset the balance of the trial. Accordingly, we are not prepared to uphold this ground of appeal.

49. It is merely to state the obvious to say that it is the jury who are the judges of fact and it is jurors who are called on to consider the evidence in the course of the jury deliberation. One aspect of the trust that we repose in juries involves trusting them to know which aspects of the evidence they wish to be reminded of, or, where that is an option, they wish to view again.

50. A trial judge faced with a request for a specific piece of evidence to be re-read, or, in this instance, to be replayed, will have to consider whether a response that would involve telling the jury that they are going to have to re-view other evidence in respect of which no request had been made might not be particularly welcome or particularly well received.

51. In this case, the sound quality issues attached to one aspect of the evidence, the evidence from the interview session which constituted the direct evidence in the case, and one aspect of the evidence only. In those circumstances, the idea that the jury would formulate their request by reference to that particular aspect seems entirely understandable, and that the judge would respond specifically to the specific request made to him seems to us not at all surprising.

52. This Court was required to consider a somewhat similar situation in the case of *DPP v. SA* [2020] IECA 60. There, we were of the view that a trial judge had a discretion whether

to permit a replay of the videos of the examination in chief, and that such a replay did not necessarily trigger a requirement to re-summarise the cross-examination.

53. In a situation where sound quality difficulties attached to the direct examination, but no such difficulties attached to the cross-examination, and where the two events took place in quite different contexts, one an interview suite in a Garda station conducted by specialist Garda interviews and the other in a courtroom cross-examination, albeit conducted by video link, requiring the jury to view both when they had expressed no desire to do so would not have been an effective exercise in communication which is, first and foremost, what a judge's charge and interaction with the jury is meant to be about.

54. In the circumstances, we are not prepared to uphold this ground of appeal.

Conclusion

55. In summary, we have not been persuaded that the trial was unfair, or that the verdict was unsafe, and accordingly we will dismiss the appeal.