THE COURT OF APPEAL

Record Number: 111/2018

The President.
Edwards J.
Kennedy J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

JOHN TIGHE

APPELLANT

JUDGMENT of the Court delivered on the 24th day of March 2023 by Ms. Justice Isobel Kennedy.

1. This is an appeal against conviction. On the 23rd March 2018 at the Central Criminal Court, the appellant was convicted of the murder of his infant son and accordingly, sentenced to life imprisonment. The cause of death of the infant was asphyxiation due to a foreign object in the throat thus blocking the infant's airway. The obstruction was an egg-shaped bolus of tissue.

Background Facts

2. On the 1st June 2013, the appellant was alone in the house with his six month old son. He described that following the changing of his son's nappy, he left him on a changing unit while he visited the bathroom. He told Garda Ryan at the scene, that when he returned from the bathroom, the infant was quiet and finding it difficult to breathe. He said he thought the baby might have swallowed a baby wipe.

3. The appellant called a local doctor and received no answer, he then called another doctor, and the phone rang out. While doing so, he placed a finger in the baby's mouth and felt an obstruction. He got through to Westdoc who gave him advice and assistance over the phone. He told Westdoc that he thought a baby wipe might have been obstructing the deceased's throat. The emergency services and a doctor were contacted. The GP who attended at the scene attempted to suction the obstruction from the deceased's throat to no avail. An ambulance crew arrived and attached a defibrillator to the deceased but were unable to detect any activity. He was pronounced dead at the scene. Garda Ryan noticed what appeared to be a bloodstain on the floor leading to the kitchen and baby's clothing in the hallway which seemed to have some blood staining on it.

4. A post-mortem examination was carried out by Dr. Khalid Jaber, who was Deputy State Pathologist at the relevant time. In the usual way, this examination was conducted in the presence of members of An Garda Síochána. A wad containing one 2-ply and one 3-ply tissue was recovered from the deceased infant's throat. Dr. Jaber was out of the jurisdiction at the time of the trial and unwilling to return to give evidence. The trial judge acceded to an application to admit evidence from Dr. Roger Malcomson, Consultant Paediatric and Perinatal Pathologist at the Royal Leicester Infirmary, relating to the cause of death. This, in effect forms the basis of this appeal.

5. At trial, it was the respondent's case that an infant of the deceased's age and level of development would not have been capable of fashioning an obstruction of this nature from tissue paper nor could he have grasped it and placed it in his mouth, nor could he have swallowed it in such a way that it would not have been visible to the doctor who attended the scene. Expert evidence was adduced in support of this position.

6. The appellant and the deceased's mother had been in a relationship but were separated at the time of the offence. In his statement, the appellant described that the deceased's mother had announced a new relationship on Facebook the day prior to the offence.

7. On the 17th June 2014, the appellant was interviewed and he set out his practice for changing the deceased's nappy. He stated that he would take out some baby wipes before removing the nappy and that while changing the deceased, he would scrunch them up and throw them to one side or into the soiled nappy on the floor. He further stated that the deceased was suffering from nappy rash at that time and that he would use tissues to apply sudocrem to this rash. The tissues would have been wedged between the changing mat and the frame of the changing unit beside the deceased's head. Similar to the wipes, the tissues would be rolled up and thrown to the right or dropped to the floor.

8. On the 23rd July 2015, following his arrest, when asked as to how a 6 month old child could put two tissues into his mouth, the appellant stated that: "*They must have been pre-balled up*" because he would "*take them, scrunch them up, put them together and put them down in the gap between the mat and the edge of the unit.*"

The Issues

9. The appellant's appeal centres on the admission of extracts from Dr. Jaber's report and the evidential consequences thereof. He relies on grounds 1-6 inclusive in the notice of appeal which Mr. Dockery SC for the appellant helpfully distilled into three categories.

(1) In admitting extracts from Dr. Jaber's report, the trial judge misapplied or misinterpreted the provisions of sections 5 and 8 of the Criminal Evidence Act 1992. The argument is advanced that the report ought not to have been admitted as it is said the witness was not compellable as he was abroad and/or that the report was either a record or anything but a record; rather a complete report of an examination containing opinions. The appellant also raises an issue of fairness under s. 8(2)(c).

(2) The admission of the report had the effect of placing crucial evidence beyond the reach of cross-examination, thereby depriving defence counsel of the opportunity to cross-examine Dr. Jaber in breach of the principle of *audi alteram partem* and the appellant's right to natural and constitutional justice.

(3) (i) The admission of the evidence of Dr. Roger Malcomson which was based on a review of Dr. Jaber's report, crime scene photographs, autopsy photographs, the book of evidence and histology slides. He therefore had to rely on the untested findings of Dr. Jaber in order to come to his conclusions.
(ii) An ancillary issue arises that Dr. Malcomson gave evidence beyond the cause of death which evidence went to the ultimate issue for the jury.

The Submissions

Sections 5 (3)(b) and 5(4)(b)(iv) and Section 8(2)(c) of the Criminal Evidence Act 1992 - The Fairness Argument

10. It is contended that Dr. Jaber was not compellable as he was outside of the jurisdiction and therefore the trial judge ought not to have admitted the extract from his report.

11. Insofar as s. 5(4)(b)(iv) is concerned, it is said that the reported findings of Dr. Jaber did not constitute a "record" for the purposes of s. 5(4)(b)(iv) of the Act and, as such, were inadmissible. S. 5(4)(b)(iv) of the 1992 Act provides for an exception to the rule against hearsay in the case of *"a record by a registered medical practitioner of an examination of a living or dead person."*

12. Reliance in this regard is placed on the case of *Bovale Developments Ltd v Director of Corporate Enforcement* [2008] 2 ILRM 13 wherein Irvine J., in considering the admissibility of a tribunal report held as follows:

> *"Whilst the applicant may be correct that the hearsay rule and its exceptions are not set in stone, the court is driven to conclude that if the legislature intended that findings made by tribunals of inquiry could be admitted as evidence of the truth of the facts supporting those findings in subsequent proceedings, either civil or criminal, or that any evidential weight could be attached thereto, that the legislature would have so provided."*

13. It is further submitted that the trial judge misinterpreted and/or misapplied s. 8(2)(a) and 8(2)(c) of the 1992 Act by admitting the reported findings of Dr. Jaber. These sections provide as follows:

> "(2) *In considering whether in the interests of justice all or any part of such information ought not to be admitted in evidence the court shall have regard to all the circumstances, including—*
>
> *(a) whether or not, having regard to the contents and source of the information and the circumstances in which it was compiled, it is a reasonable inference that the information is reliable,*
> […]
>
> *(b) any risk, having regard in particular to whether it is likely to be possible to controvert the information where the person who supplied it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them."*

14. In terms of reliability, particular attention is drawn to the portion of Dr. Malcomson's report in which in reference to the reported findings of Dr. Jaber he states that:

> *"The availability of a post-mortem CT scan would, in my view, have significantly improved the documentation and visualisation of the position of the airway obstruction and it is likely that it would have provided useful imagery that would have been available for use in court proceedings."*

15. In terms of unfairness, it is submitted that the appellant was unfairly deprived of the opportunity to confront and cross-examine Dr. Jaber on his report and methodology.

16. The respondent outlines that the issue of the admissibility of Dr. Jaber's report pursuant to the 1992 Act was argued in detail over two days at trial and that the trial judge considered the issue overnight before delivering a comprehensive ruling, carefully applying the relevant sections of the Act.

17. In response to the appellant's reliance on *Bovale Developments Ltd*, the respondent points out that that case does not deal with the record of the examination of a living or dead person by a registered medical practitioner in the ordinary course of a business pursuant to s. 5(4)(b)(iv) of the 1992 Act. The respondent relies on the following passage from the judgment of Woulfe J. in *The People (DPP) v AC* [2021] IESC 74:

> *"Documents such as medical records or clinical notes are normally confined to factual matters in terms of findings recorded on examination, the treatment prescribed etc, in contradistinction to medical reports which normally also include matters of opinion, such as a future prognosis etc. I appreciate that it may not always be easy to draw a bright-line distinction when it comes to evidence of fact and opinion in the context of medical practitioners, but nonetheless it seems to me that such a distinction was clearly intended by the Oireachtas, having regard to the plain language of s.25. I do not think it was the intention of the Oireachtas that evidence of opinion could be given by certificate, and not be subject to cross-examination. I note that s.25 did not provide that the certificate shall be evidence of any "matter" thereby certified, but provided only for certified facts."*

It is emphasised that the trial judge only permitted the parts of the document that set out Dr. Jaber's findings and what actions he took and not the opinion section.

18. In respect of the submissions made pursuant to s. 8 of the 1992 Act, the respondent cites McGrath on *Evidence* (2nd ed), which provides that evidence may be deemed inadmissible due to unreliability where the maker of the statement has a motive to mispresent or the statement is a self-serving statement. In this regard, it is submitted that the limited criticisms contained in Dr. Malcomson's report of Dr. Jaber's report do not render that report unreliable. It is noted that the post-mortem was witnessed by a number of members of An Garda Síochána and that multiple photographs were taken of the methods used.

19. The respondent notes that this is not the first instance in which the State Pathologist has been unavailable to give evidence at a criminal trial. Reliance is placed on the following passage from *The People (DPP) v Rattigan* [2013] 2 IR 221:

> *"Objection was taken to the admission of Prof Harbison's report. Prof Harbison was no longer available to give evidence, for health reasons. Evidence of his ill health was given*

to the Court. While it was submitted by the defence that the Court was wrong to admit the report into evidence, this Court is satisfied that the Court was not only entitled to do so, but was correct."

20. This passage was quoted with approval by this Court in *The People (DPP) v Nash* [2018] IECA 147 in which case, the trial judge ruled that he would allow another report of Dr. Harbison to be put before the jury despite misgivings about its reliability. This Court found that the ruling was "correct and appropriate in all the circumstances."

The Right to Cross-Examine and Audi Alteram Partem

21. It is submitted that the trial judge failed to engage with the potential for unfairness as a result of the appellant's inability to cross-examine Dr. Jaber on the infirmities of his methodology, as identified by Dr. Malcomson. It is acknowledged that Dr. Malcomson's conclusions were limited to a consideration of the tests **not** conducted by Dr. Jaber including a CT scan and the advantages thereof, however, the appellant says that Dr. Jaber's absence at trial deprived him of an opportunity to confront him about these issues and his view on the likely effect on the accuracy and utility of his report where those additional tests were not conducted.

22. It is submitted that only through the cross-examination of Dr. Jaber could effect be given to the dicta of O'Higgins CJ in *The State (Healy) v Donoghue* [1976] 1 IR 325 at p 335:

"Among the natural rights of an individual whose conduct is impugned and whose freedom is put in jeopardy are the rights to be adequately informed of the nature and substance of the accusation, to have the matter tried in his presence by an impartial and independent court or arbitrator, to hear and test by examination the evidence offered by or on behalf of his accuser."

23. Further reliance is placed on the following passage from *Kiely v Minister for Social Welfare* [1977] IR 267 at 281:

"Where essential facts are in controversy, a hearing which is required to be oral and confrontational for one side, but which is allowed to be based on written and, therefore, effectively unquestionable evidence on the other side has neither the semblance nor the substance of a fair hearing. It is contrary to natural justice."

24. This passage was cited with approval by Keane CJ. in *Borges v Fitness to Practice Committee* [2004] 1 IR 103 which is also relied upon by the appellant herein. In that case, the respondent sought to hold an inquiry into the applicant whose registration as a medical practitioner had been erased in the UK due to alleged misconduct. When it transpired that the original complainants were unwilling to attend the hearing, it was proposed that the evidence of the transcript of the UK proceedings would be admitted into evidence. Ó'Caoimh J. in the High Court held that the hearing should not be allowed to proceed, and the respondent appealed to the Supreme Court.

25. The following portions of Keane CJ's judgment for the Supreme Court are relied on:

"In considering whether the approach which found favour with the House of Lords and the Court of Appeal in those cases should be adopted in this jurisdiction, one must bear in mind the reasons which have led the courts in this jurisdiction to hold that, in some cases at least, the right of a person to have the evidence against him given orally and tested by cross-examination before the tribunal in question may be of such importance in a

> *particular case that to deprive the person concerned of that right would amount to a breach of the basic fairness of procedures to which he is entitled by virtue of Article 40.3 of the Constitution. It is not simply because the tribunal is in greater danger of arriving at an unfair conclusion, absent the safeguard of material evidence being given orally and tested by cross-examination. Such a departure from the normal rules of evidence might well be justifiable, as I have already noted, in the case of a tribunal of this nature**. It is because, depending on the nature of the evidence, its admission in that form may offend against fundamental concepts of fairness, which are not simply rooted in the law of evidence, either in its statutory or common law vesture."***

And:

> *"…The proposition that a tribunal can adjudicate on serious allegations of professional misconduct which may result in a person being struck off the rolls of his profession without hearing the testimony of his accusers being given orally and tested by cross-examination before them, **simply because they are unwilling to attend the hearing, is, in my view, irreconcilable with the standards of natural justice and fair procedures which are required** of such bodies in this jurisdiction, having regard to the decisions in In re Haughey [1971] I.R. 217, Kiely v. Minister for Social Welfare [1977] I.R. 267 and Gallagher v. Revenue Commissioners (No. 2) [1995] 1 I.R. 55…"*

26. It is submitted that if the above represents the case for doctors facing disciplinary allegations in civil proceedings, the argument must have even greater force in the context of the criminal law, where the accused is facing an allegation of murder based upon circumstantial evidence. It is further pointed out that in *Borges,* the applicant had had the opportunity to cross-examine his accusers in the UK proceedings whereas the appellant herein has never had any opportunity to confront Dr. Jaber.

27. The respondent, by reference to Hogan, Morgan and Daly on *Administrative Law in Ireland* (5th ed) and the observations of Keane J in *State (Boyle) v General Medical Services (Payment) Board* [1981] ILRM 14 submits that *Kiely* has no application beyond its particular facts and further that no comprehensive right to cross-examine arises from that case.

28. In response to the appellant's reliance on *Borges*, the respondent quotes from the transcript of the trial judge's ruling on the admissibility of the report as follows:

> "*In that case what was sought to be done was to put before the Medical Council the transcript of complaints made about a doctor in another jurisdiction before a different forum in order to ground applications for what I might shortly describe as a disciplinary process in this jurisdiction. It was at the very core of the case. It is the opinion that is at the core of this case. It is where the wad, as it's been described, was found in the throat. It is possibly extending to the issue of the frenulum or other damage inside the oral orifice or in the throat. Those matters are those matters are cannot be there is no suggestion that they can be controverted, to use the words of the section. The fact that the prosecution has been put to proof of them does not, of course, mean that they can be controverted. It means no more and no less than that. To put the matter to put the prosecution to the proof does not mean that the propositions can be controverted."*

And:

> "*If one has -- if there's any reasonable possibility that the accused might be, if deprived of the opportunity to cross examine, would be placed in the position of an unfair trial, it seems to me that one should exclude the evidence but it seems to me that this is what you might describe as an ordinary post-mortem done in the ordinary course of business where the course of action was approbated, where on any controversial point there is extrinsic material such as photographs and which places the defence in a position to form a judgment. And as I said, at the risk of repetition, on the material before me there is no basis, for example, for suggesting that he is wrong or in error in some respect. So, the conditions precedent are satisfied and the material there would be no unfairness to the accused or no reasonable possibility of an unfair trial and I think that's the test, it's a high barrier, were it to be received.*"

29. It is pointed out that the appellant accepted that there was an obstruction of a tissue-like object in the throat of the deceased in his interview with An Garda Síochána and that the question of how it came to be there and any potential role of the appellant in this regard were matters for the prosecution to prove. In this way, it is said that it is difficult to discern how the inability of the appellant to cross-examine Dr. Jaber in respect of Dr. Malcomson's views on the methods used by him impacted on these matters.

30. It is submitted that there was a failure on the part of the appellant to engage with the relevant aspects of the case. In particular, it is noted that at no stage was any medical report furnished to the prosecution on behalf of the accused pursuant to the Criminal Procedure Act, 2010 seeking to challenge the accuracy of Dr. Jaber's report, the accuracy of Dr. Malcomson's report or highlighting the perceived deficiencies of Dr. Jaber's report as identified by Dr. Malcomson.

31. The respondent says it is difficult to escape the conclusion that the appellant's contention that he was unfairly deprived of the right to cross-examine Dr. Jaber on the further additional tests as identified by Dr. Malcomson derives from a thwarted attempt to attack the witness on a somewhat collateral issue: his failure to carry out certain tests/procedures.

32. It is submitted that this situation could be seen as analogous to the point raised in *The People (DPP) v John Doran* [2022] IESC 39 in which case, the appellant complained that he did not have the opportunity to answer the allegation against him by means of Garda interview. MacMenamin J. stated as follows:

> *"The appellant has not shown how he was prejudiced in a manner that violated his constitutional rights to a trial in due course of law. There was no evidence as to what he would, or might, have said in response to the endangerment charge. This is in contrast to a lost evidence case, where an applicant to a trial judge would have to show the extent of the likely prejudice by identifying the potentially helpful nature of the unavailable evidence."*

The Admission of Dr. Malcomson's Evidence

33. The complaints flow from Dr. Jaber's absence at the trial. It is submitted that the trial judge erred in principle in admitting the evidence of Dr. Malcomson in circumstances where he was not present at the post-mortem examination and therefore was only in a position to give second hand evidence based on the extracts of Dr. Jaber's report and upon photographs taken at the post-mortem by members of An Garda Síochána.

34. As issue is taken with the admittance of the extracts of Dr. Jaber's report, it is also submitted that the admission of Dr. Malcomson's conclusions, insofar as same were drawn from this report, was a breach of the principle of *audi alteram partem* and the appellant's right to natural and constitutional justice.

35. The respondent highlights the fact that Dr. Malcomson was furnished with additional material including the photographs of the post-mortem and the histology slides. Indeed, Dr. Malcomson stated that:

> *"I think pretty much every stage of the autopsy that Dr Jaber has referred to in his report has some form of photographic documentation associated with it. So, there was I think a couple of hundred at least photographs, if I recall rightly."*

36. It is submitted that the appellant had the opportunity to cross-examine Dr. Malcomson on the supposed deficiencies with the failure of Dr. Jaber to carry out certain procedures. Moreover, that the appellant had the opportunity to engage with Dr. Malcomson about Dr. Jaber's findings individually and collectively at the examination.

37. It is noted that the trial judge charged the jury on the evidence of Dr. Malcomson as follows:

> *"[t]here was a lot of expert evidence. We don't have trial by expert. One brings one's common sense and judgement to bear. One doesn't mechanically accept the expert's evidence. So it's evidence like any other evidence which is weighed and considered by you."*

Evidence on the Ultimate Issue

38. It is the appellant's position that the trial judge erred in permitting evidence to be led before the jury on the ultimate issue of whether the death of the deceased was accidental or suspicious. Particular attention is drawn to the following statement of Dr. Malcomson:

> *"Oh, yes, certainly. The presence of a frenular tear is very highly suspicious of inflicted trauma to the region of the mouth/upper lip. This will have been a source of bleeding if this had occurred in life. The resuscitation attempts describe (sic) do not appear consistent with causation of such an injury, which is usually considered to represent non accidental, blunt force trauma to the face.*

Discussion

Complaint of Misapplication or Misinterpretation of Section 5 of the 1992 Act

39. Part II of the 1992 Act concerns the admissibility of documentary evidence and provides an exception to the rule against in relation to documents which are compiled in the ordinary course of business. The relevant portions being:-

> ***"5 (1) Subject to this Part, information contained in a document shall be admissible in any criminal proceedings as evidence of any fact therein of which direct oral evidence would be admissible if the information-***
>
> ***(a) was compiled in the ordinary course of business,***
>
> *(b) [not relevant]*
>
> *(c) [not relevant]*
>
> *(2) [not relevant]*

(3) ***Subsection (1) shall not apply to-***

(a) [not relevant]

(b) ***information supplied by a person who would not be compellable to give evidence at the instance of the party wishing to give the information in evidence by virtue of this section,*** *or*

(c) subject to subsection (4), information compiled for the purposes or in contemplation of any-

(i) criminal investigation

(ii) investigation or inquiry carried out pursuant to or under any enactment,

(iii) civil or criminal proceedings, or

(iv) [not relevant]

(4) Subsection (3)(c) shall not apply where-

(a) (i) [not relevant]
(ii) [not relevant]
(iii) [not relevant]

or

(b) the document containing the information is-

(i) [not relevant]

(ii) [not relevant]

(iii) [not relevant]

(iv) a record by a registered medical practitioner of an examination of a living or dead person…..” **(**our emphasis).

40. The arguments advanced by the appellant may be divided into three subcategories:-
    a) Compellability under s. 5(3)(b) of the Act,
    b) The nature of the document and,
    c) Fairness

Section 5(3)(b) of the 1992 Act

41. In oral submission, Mr Dockery says that Dr. Jaber was not compellable as a matter of law as he was outside the jurisdiction and consequently, his evidence was inadmissible under s.5(3)(b) of the 1992 Act. In response, counsel for the Director contends that the limiting subsection relates to an individual who could never be compellable to give evidence as a matter of law, whereas Dr. Jaber was compellable at law but for the procedural difficulty which arose as he was outside the jurisdiction. In other words, that the witness was legally but not procedurally compellable.

42. Firstly, it may be instructive that Part II of the Act defines "business" as including *"any trade, profession or other occupation carried on, for reward or otherwise,* ***either within or outside the State****...."* (our emphasis). It would seem strange to us that a witness who compiled business records outside the State would only become compellable for the purposes of the Act, if that person came to this jurisdiction and the necessary witness summons was served.

43. Compellability is intertwined with competence. Unless a witness is competent, that witness is not compellable. As succinctly stated in McGrath on *Evidence* (2nd ed), at para. 3-03:-

> *"At common law, the competence and compellability of witnesses is governed by two rules. The first is that all persons capable of understanding the nature of the oath, and capable of giving intelligible testimony, are competent witnesses. The second is that all competent witnesses are compellable."*

44. At common law, an accused's spouse was not competent to give evidence for the prosecution except in certain limited circumstances, the issue of spousal competence and compellability is now provided for in s. 21 and 22 of the Act. There are other categories of person who are not compellable under the law, but Dr. Jaber does not fall within any of those categories. Therefore, from a legal standpoint, Dr. Jaber was both competent and compellable as a matter of law to give evidence for the prosecution. However, the situation which pertained was that he was in Saudi Arabia and was unwilling to return to this jurisdiction to give evidence unless certain conditions were met.

Conclusion

45. We agree with the respondent's argument that while he was not procedurally compellable, he was, under the law and for the purpose of the statute a compellable witness; Dr. Jaber was competent to give evidence, he did not fall within the categories of persons who are deemed non compellable and, therefore, he was compellable.

Section 5(4)(b)(iv) of the 1992 Act

46. The issue here is whether Dr. Jaber's report constituted a record for the purposes of the Act. The argument advanced on behalf of the appellant was that the post-mortem report could not be regarded as a mere "record." It is said that the trial judge erred in ruling that the report constituted a record for the purposes of s. 5(4)(b)(iv) of the Act which permits for the disapplication of the exclusionary provision under s. 5(3)(c) of the Act whereby subsection 1 shall not apply to information compiled for the purposes of or in contemplation of any – criminal investigation. Subsection 4 provides that subsection 3 shall not apply in certain circumstances including under subsection (4)(b)(iv) where the document is "a record by a registered medical practitioner of an examination of a living or dead person".

47. The trial judge ruled on this issue as follows:-

> *" ....Mr. O'Higgins referred to the use of the word record. He made the point in terms of statutory interpretation, I trust that I am not repeating myself, that the use of the word record in that context did not extend to the introduction in evidence as to the examination itself, but rather merely would be limited to adducing evidence of the fact alone that an examination took place and he referred to a number of principles of statutory*

interpretation and case law. I trust it will be accepted that I have considered those principles and have, I hope, articulated thus far the approach which I take. I do not believe that the word record, as used in the context in question is limited in the way in which Mr. O'Higgins contends. I believe, again at the risk of repetition, that it extends as far as the information as to the substantive conduct of the postmortem, if I might put it that way, that is to say an examination."

48. It is argued that there is a distinction between "a report" and "a record" in law and this is a meaningful distinction. Whilst reliance is placed by the appellant on *Bovale,* it appears to us that the decision referred to by the respondent is more relevant to this determination. *The People (DPP) v AC* concerned the interpretation of s. 25 of the Non-Fatal Offences Against the Person Act, 1997, which permits the production of a certificate relating to an examination of a person and is proof of the content thereof so long as it is signed by a registered medical practitioner. In order to properly interpret a statute and assess the plain and ordinary meaning of words, the words must be assessed in context. S. 25 provides as follows: –

"25(1) In any proceedings for an offence alleging the causing of harm or serious harm to a person, the production of a certificate purporting to be signed by a registered medical practitioner and relation to an examination of that person, shall unless the contrary is proved, be evidence of any fact certified without proof of any signature thereon or that any such signature is that of such practitioner."

49. Woulfe J. considered the distinction between medical records and medical reports and said at para. 55 onwards:-

"On this issue of fact and opinion, it seems to me that the words used in s. 25 are plain and unambiguous. What may be certified by the medical practitioner is "any fact" relating to an examination of the injured person. I would consider that this reflects the intention of the Oireachtas that factual matters in documents such as medical records or clinical notes can be introduced into evidence by way of certificate.

Documents such as medical records or clinical notes are normally confined to factual matters in terms of findings recorded on examination, the treatment prescribed etc, in contradistinction to medical reports which normally also include matters of opinion, such as future prognosis etc. I appreciate that it may not always be easy to draw a bright distinction when it comes to evidence of fact and opinion in the context of medical practitioners, but nonetheless it seems to me that such a distinction was clearly intended by the Oireachtas, having regard to the plain language of s. 25."

Conclusion

50. The trial judge permitted extracts of Dr. Jaber's post-mortem examination to be admitted in evidence pursuant to s. 5 of the 1992 Act on the basis that the examination constituted a record by a registered medical practitioner of an examination of a dead person pursuant to the 1992 Act. As stated by Woulfe J. records *"are normally confined to factual matters in terms of findings recorded on examination…"* Given that the trial judge excluded any opinion evidence on foot of Dr.

Jaber's examination, the material admitted clearly constituted a record within the terms of s. 5(4)(b)(v) of the 1992 Act.

Right to Cross-Examine and the Principle of Audi Alteram Partem

51. It is axiomatic that cross-examination is a formidable tool to be employed in the course of a trial. It provides the opportunity to test the evidence and is inherent in the constitutional right to a trial in due course of law.

52. The argument in the present case is that the appellant was denied such right due to the unwillingness of Dr. Jaber to attend trial and therefore the ability to test his evidence was, for all intents and purposes, removed, specifically, that the appellant was deprived of the opportunity to cross-examine Dr. Jaber regarding the failure to conduct certain tests or the procedures as identified by Dr. Malcomson, thus, it is argued that the appellant's rights to natural and constitutional justice were infringed. This ground overlaps to a degree with the issue raised concerning Dr. Malcomson's evidence.

53. Before analysing this issue, it is necessary to look to the nature of the evidence admitted under s. 5 of the 1992 Act, moreover, that evidence cannot be viewed in isolation.

54. In the first instance, the extracts from Dr. Jaber's report were limited to the actual findings on the post-mortem examination, no evidence was adduced of his opinion as to the cause of death. That evidence was adduced by Dr. Malcomson, a Consultant Paediatric and Perinatal Pathologist, with 11 years' experience in those disciplines.

55. The criticism that the defence were denied the opportunity to cross-examine Dr. Jaber on alleged failings in the examination is premised on Dr. Malcomson's report that additional procedures, such as a CT scan, could have enhanced the quality of the pathological information. However, Dr. Malcomson' view was that only the CT scan would have generated additional contributory information concerning the cause of death and the absence of other procedures or tests were not detrimental to the conclusions reached.

56. Insofar as a CT scan was concerned he said:-

A. *"……The availability of a post-mortem CT scan would, in my view, have significantly improved the documentation and visualisation of the position of the airway obstruction and it is likely that it would have provided useful imagery, that it would have been suitable for use in court proceedings. Nevertheless, the lack of a CT scan in this instance does not undermine the conclusions and opinions made in this instance.*

Q. *And again, in layman's terms, while perhaps X could have been done and Y could have been done and Z could have been done, the absence of those measures being taken, do they affect your conclusions?*

A. *No, because I think there's a sufficient – more than sufficient evidence from not only the photographs and histology to indicate what's likely to have happened in this case."*

57. The post-mortem was attended by members of An Garda Siochana. Autopsy photographs were taken in the usual way. Dr. Jaber was observed removing a large tissue-like object from the

infant's throat, and photographs were taken of that foreign object. Indeed, Dr. Malcomson observed that this was a very well photographically documented autopsy, noting that almost every stage of the autopsy had some form of photographic documentation. Histology slides were also taken and obviously Dr. Malcomson had all the material to assist him in coming to his opinion as to the cause of death.

58. Insofar as the positioning of the wad of tissues was concerned, Dr. Malcomson stated that there were quite a number of photographs at various stages of the dissection from the neck with the foreign object in situ. In this regard, he noted:

> *"Three) [the deceased] was found to have a wad of two ply and three ply paper tissue impacted in his throat at autopsy. Four) an upper frenulum tear with minimal associated bleeding was also found at post-mortem."*

59. When asked to explain the nature and the impact of the foreign object, he said:

> *"A. Well, essentially, the foreign object which was composed of essentially two different types of tissue paper essentially blocked his airway. So, it blocked his ability to breathe in or breathe out and this was associated with evidence of traumatic injury, so physical injury in the surrounding tissues. So, where the wad of tissue paper was impacted in the ---in the airway or round the top of the airway, there was evidence of traumatic injury in the adjacent tissue and that had resulted in the breakage of the lining of the airway and the back of the --- or the back of the pharynx and creation of essentially a pocket of – well, containing blood, a few fibres, a few other bits and pieces of debris, which shouldn't normally be there. That was—that's basically disruption caused by the traumatic injury at the site. "*

60. It must be recalled that the core of the case was that of the opinion as to the cause of death, the position of the wad of tissue and the manner in which it came to be in the infant's throat. In this regard, when the appellant sought medical assistance, he said he thought a baby wipe might have been obstructing the baby's throat. No expert evidence was adduced on behalf of the appellant and therefore there was no basis for an assertion of contrary propositions.

61. Insofar as the reliability of the report is concerned and the issue of fairness, this is not a case where there was a failure to fully photographically document the entire post-mortem procedure. We observe in *The People (DPP) v Nash*, the decision of the trial judge to admit Professor Harbison's report in the absence of photographs regarding every injury described was not found by this Court to be a basis for unreliability.

62. Insofar as it is said the trial judge failed to engage with the issue of fairness the following portion of the ruling refers:-

> *"….if there's any reasonable possibility that the accused might be, if deprived of the opportunity to cross examine, would be placed in the position of an unfair trial, it seems to me that one should exclude the evidence but it seems to me that this is what you might describe as an ordinary post-mortem done in the ordinary course of business where the course of action was approbated, where on any controversial point there is extrinsic*

material such as photographs and which placed the defence in a position to form a judgment."

Conclusion

63. It is difficult to see how the inability to cross-examine Dr. Jaber on the methodology employed by him and, in particular, on the perceived failure to carry out certain tests, including a CT scan could have prejudiced the appellant so that his constitutional right to a trial in due course of law was violated. Simply because Dr. Jaber could not be examined did not mean that the defence were prejudiced. Dr. Malcomson was very clear that the absence of tests/or the perceived procedural failings did not undermine the conclusions and opinions offered. He was of the view that there was more than sufficient evidence from the photographs and histology slides from which to conclude what had actually occurred. Dr. Malcomson was available for cross-examination, he was the witness who raised the issue of the absence of, *inter alia*, a CT scan and facial dissection. Should Dr. Jaber have been cross-examined, it is difficult to see how that cross-examination could have aided the defence, particularly where Dr. Malcomson gave the opinion that their absence did not undermine the conclusions.

64. We do not accept the appellant's proposition that the trial judge failed to engage with the issue of fairness, and we are not persuaded that the appellant's rights to natural and constitutional justice were infringed due to the absence of Dr. Jaber and the consequences thereof.

Dr. Malcomson's Evidence

65. As stated, there is a considerable overlap with this argument and the former argument. In essence, the argument is advanced that Dr. Malcomson's evidence by necessity was second hand evidence premised on Dr. Jaber's examination. Consequently, the trial judge erred in admitting evidence of Dr. Malcomson's conclusions insofar as they were drawn in whole or in part from Dr. Jaber's findings.

66. We have already alluded to the material furnished to Dr. Malcomson and, in particular, to the extensive photographs taken during the autopsy, it seems that almost every stage of the procedure was recorded photographically and, of course, those photographs along with the other material were available not just to Dr. Malcomson, but also to the defence to enable an expert to interrogate the process. No such expert was engaged by the appellant.

67. It is of course true that Dr. Malcomson was not present for the examination. However, extracts of Dr. Jaber's post-mortem report were admitted into evidence pursuant to the 1992 Act as evidence of the facts contained therein. That report was, as stated, fully documented photographically, along with histology slides and other material. In ruling that extracts from Dr Jaber's report were admissible, the trial judge referred to Dr. Malcomson's expression of satisfaction regarding the reliability of the report quoting from Dr. Malcomson's report as follows:-

""I consider that the investigations described have adequately documented the circumstances and findings and that they have addressed the relevant documentation demonstrates an appropriately thorough macroscopic autopsy has been conducted and the available images correspond to the relevant elements of Dr Jabbar (sic)'s report.""

Conclusion

68. Once the extracts from the report were admitted, where the trial judge ruled that the opinion of Dr. Jaber was inadmissible, the report formed part of the factual matrix for the jury's consideration. Dr. Malcomson came to his conclusions based on those uncontroverted facts, and uncontroverted they were, absent any alternative propositions put in evidence and in our view, he was entitled to do so and to give that evidence. No unfairness could be said to accrue from this course of action, the appellant was entitled to cross-examine Dr. Malcomson on his conclusions and the manner in which he arrived at those conclusions. We are not persuaded that the admission of Dr. Malcomson's evidence breached the appellant's right to natural and constitutional justice and so this ground fails.

Sections 8(2)(a) and 8(2)(c) of the 1992 Act

69. Associated with the previous two arguments is the contention that the trial judge misinterpreted and/or misapplied s. 8(2)(a) and 8(2)(c) of the 1992 Act by admitting the reported findings of Dr. Jaber. These sections provide as follows:

> "(2) *In considering whether in the interests of justice all or any part of such information ought not to be admitted in evidence the court shall have regard to all the circumstances, including—*
>
> *(c) whether or not, having regard to the contents and source of the information and the circumstances in which it was compiled, it is a reasonable inference that the information is reliable,*
> […]
>
> *(d) any risk, having regard in particular to whether it is likely to be possible to controvert the information where the person who supplied it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them."*

70. In terms of reliability, particular attention is drawn to the portion of Dr. Malcomson's report in which, in reference to the reported findings of Dr. Jaber he states that:

> *"The availability of a post-mortem CT scan would, in my view, have significantly improved the documentation and visualisation of the position of the airway obstruction and it is likely that it would have provided useful imagery that would have been available for use in court proceedings."*

71. S. 8 of the Act provides a discretion to a court to exclude material, or any part thereof, where, in the view of the court, the material ought not be admitted in the interests of justice.

72. There can be no doubt but that the court considered all the circumstances of the gathering of the information, being the post-mortem examination, the manner in which the examination was conducted, the extensive photography of each element of the examination, the histology slides, et al. There did not seem to be an issue as such regarding the reliability of the information save and insofar as it was contended that the defence were deprived of the opportunity to cross-examine Dr. Jaber on possible deficiencies, which Dr. Malcomson did not consider determinative or that

such potential deficiencies impacted on the conclusions drawn. The trial judge also considered any risk of unfairness should the information be admitted in evidence and properly concluded that there was no such risk. The judge found that the information was reliable in the following manner:-

> *"Now, one must then turn to the question of reliability. As far as I know, there is no suggestion on the basis of any of the material before us that there is an unreliability in this matter. Insofar as there is evidence, very coherent evidence, I put it no further than that, on the report of Dr Malcomson, every part of it would tend to support the reliability, so far as it depose, of this examination. There are — there is an explicit reference by him to the manner in which the examination ought to have been — or as to the conduct of the examination — I'll just — yes, sorry. And he says at page 222 of the book of evidence, this is — his report is not paginated but nonetheless at paragraph 11: "I consider that the investigations described have adequately documented the circumstances and findings and that they have addressed the relevant issues in relation to this particular death. In particular, the photographic documentation demonstrates an appropriately thorough macroscopic autopsy has been conducted and the available images correspond to the relevant elements of Dr Jabbar(sic)'s report." He goes on to say, at paragraph 14 on the following page: "Ideally, the autopsy investigation of this death could have included a number of additional procedures that would have further increased the overall quality of the pathological information available. Such procedures include radiotherapy, including postmortem CT scanning being undertaken before the commencement of the autopsy, the radiology images reported by a pediatric radiologist, the joint examination of the body by the forensic pathologist, in conjunction with a suitably experienced pediatric pathologist, the brain examined and systematically sampled for histology as a suitable period of formalin fixation, a formal examination of the brain by a neuropathologist, now more widespread systematic histological sampling of the major organs and tissues of the body, including the additional use of frozen sections in selected tissues, karyotyping for the exclusion of gross chromosomal abnormalities and bio chemical screening for recognized metabolic causes of sudden infant death."*
>
> *And then he proceeds at paragraph 12: "However, it is my opinion, other than CT scanning, none of these additional procedures would have carried any great likelihood of generating significant additional contributory information relating to this particular death and their lack in this case does not appear in anyway detrimental to the conclusions and opinions made in this instance. The available of a postmortem CT scan would, in my view, have significantly improved the documentation and visualization of the position of the airway obstruction and it is likely that it would have provided useful imagery that would have been available for use in court proceedings. Nonetheless, the lack of a CT scan in this case does not undermine the conclusions and opinions made in this instance."*
>
> *It will be seen that the latter pertains to his conclusions and opinions. I have decided to exclude those, but it is relevant, I think, to the issue of reliability that the approbates the*

conclusions based on the material which was, as it were, obtained in the course of the postmortem and which it's plain was available with other material to this doctor. It has been suggested that the witness might have been cross-examined with respect to the lacunae alleged and the first thing is this, it seems quite clear that the CT scan would have been of assistance, potentially perhaps the only item which might have been. It is a common place to find one's self in situations where there is what one might describe as a paucity of evidence of a type which, rationally speaking, might perhaps have been capable of being obtained. Does this give rise, in some sense, to an issue — a real fear, if could I put it that way, of unreliability? It seems to me that it does not. One might proceed further and consider the portion which I quoted pertaining to the conduct of the examination with a suitably experienced pediatric pathologist. This does not go to reliability. These are additional steps which, if taken, might be of benefit to one side or the other in the case. They may be even in accordance with good practice in England, I do not go through that paragraph in extenso. I've isolated only one part of it where there might be considered to be a direct basis for criticism, which I have held does not undermine the reliability.

The others are merely additional steps which would be capable of being taken. As we know, it's for many years been the practice in this jurisdiction that one forensic pathologist only conducts the autopsies. Bear with me for one moment, there's a further passage I wish to refer to. Very good, at page 197 of the book and, as I say, I don't have a paginated copy of his report, he says as follows: "Dr Jabbar (sic) has provided a comprehensive report of his examination which appears to me to conform to accepted international standards for forensic autopsy reporting."

He also refers extensively to what are described as slides. These are for histological examination and he refers to a large number of photographs. I think there were 46 in all of the autopsy itself. It appears that a number of items were identified as being of potential relevance in terms of possible cross-examination or possible controversy. It seems to me that the 46 photographs, insofar as any issue might be regarded as being capable of being worthwhile, putting — debating, so to speak, worthwhile in terms of cross-examination, to be the subject of questioning for the purpose of testing each what we might term touch topic is dealt with by photographs. The salient aspects of the case, which might rationally be the subject of meaningful testing or cross-examination are such that the photographs have been taken at the instance of Dr Jabbar, (sic) again going to the reliability but also diminishing the extent to which any assertion that the capacity to test alone is fundamental to affording constitutional justice in this instance.

The — very good. I've quoted 8 (2) (b) also which pertains to the — a conclusion that the document is authentic, no one could doubt that, ... for a moment to put in controversy and then I repeat the following because it seems to me to be of such significance, any risk having regard in particular to whether it is likely to be possible to controvert the

information where the person who supplied it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or if there is more than one of them. Now, it seems to me that those must be read disjunctively. So, in the first instance one has circumstances — one has to address the issue of whether or not it's likely to be possible to controvert the information and then, in addition, where one has to consider whether or not the admission or exclusion would result in unfair — its admission would result in unfairness to the accused. The latter is probably, to a degree, tautologist.

But in any event, it's necessary on an issue of this kind to engage with the evidence. Mr. O'Higgins has very properly sought to do so. I should say, in the first instance, if the opinion is excluded, there is no basis, in my view, for seeking the attendance of the witness to canvas opinion evidence with him. Other witnesses, should the defence so wish, can be canvassed as to their opinions, based upon facts. These facts, as contained in the pathology report or others."

Conclusion

73. As can be seen from the foregoing, the trial judge carefully considered the position, applied s. 8 of the 1992 Act and came to the proper conclusion that no injustice could arise should the material be admitted. Moreover, should any lingering doubt exist as to the appropriateness of admitting extracts from a pathology report in circumstances where the pathologist is unavailable for reasons of ill health, illness, unavailability or unwillingness, the dicta of O'Donnell J. (as he then was) in *The People (DPP) v Rattigan* at para. 31 put the admission of such an examination beyond doubt where he says:-

"Objection was taken to the admission of Professor Harbison's report. Professor Harbison was no longer available to give evidence for health reasons. Evidence of his ill health was given to the Court. While it was submitted by the defence that the Court was wrong to admit the report into evidence, this Court is satisfied that the Court was not only entitled to do so, but was correct."

Evidence on the Ultimate Issue

74. This aspect of the appeal is focused on the following evidence of Dr. Malcomson:-

"Q. ……..just your own opinion, doctor, if you don't mind, in terms of the possibility of a six-month old baby ingesting two different tissue papers to cause airway obstruction and the local laryngeal and pharyngeal injuries seen, your own opinion on that possibility?

A…….. The presence of a frenular tear is very highly suspicious of inflicted trauma to the region of the mouth/upper lip. This will have been a source of bleeding if this had occurred in life. The resuscitation attempts describe do not appear consistent with causation of such an injury, which is usually considered to represent non accidental, blunt force trauma to the face.

Q. And while it is fairly straightforward in layman's terms perhaps that means—

A. That means normally I see those injuries in association with either conscious or blow or a severe struggle with pressure over the mouth essentially a force applied to the mouth. I have not convincingly seen this in association with the usual attempts at resuscitation. I might admit that it might be possible to have a small frenular tear, but this is quite a—this is quite a serious tear of the frenular, it's an avulsion. So, it's basically split completely apart. However, I do acknowledge that there wasn't an awful lot of bleeding around this and while it may have—may have—may well have occurred in life, I cannot exclude that it had been occasioned after the child had ceased its normal circulation."

75. Dr. Malcomson was cross-examined on the issue of the frenular tear and said *inter alia* the following:-

"A…. While there's an abrasion on the upper lip, I'm not sure the origin of that, but other than that there isn't really anything else to suggest that the child has been punched. So, one would have to suggest that significant force has been used to cause injury to the tongue directly by fingers.

Q. Yes?

A. At what point that has happened in the sequence of events I can't say, all I can say that there is bruising that has occurred in the tongue whilst the baby was still essentially alive.

Q. Is the focal (sic) avulsion a small chair (sic)?

A. Well, it's actually quite a small structure, so if it's avulsed it means the whole of it has been torn away from its attachment and actually that's what the photograph shows in this case, the whole of the frenulum, it is quite a small structure, but the whole of us has been torn away from its attachment site."

Conclusion

76. It is said that this evidence was on the ultimate issue, that is whether the death was accidental or not. However, we cannot agree with this proposition. In giving his evidence in cross-examination, Dr. Malcomson referred specifically to the photograph of the tear to the frenulum and offered his opinion as to the nature of the tear and that was that it was highly suspicious of inflicted trauma to the region of the mouth or upper lip. It is also important to note that the cause of death was not this particular injury, but the wad of tissue itself which caused asphyxiation. To give such an opinion, Dr. Malcomson had to demonstrate his qualification and experience and he clearly did so.

77. The core issue concerned how the wad of tissue found its way into the child's throat leading to the child's death. The trauma to the frenulum and the manner in which that might have come about was clearly relevant evidence but is not determinative of the ultimate issue.

78. The respondent's case was that a child of 6 ½ months was incapable of putting the bolus of tissue in his mouth and so it must have been put there by the appellant. Therefore, whilst the question of force may have been a consideration for the jury, the degree of that force was not in itself significant. The significant question on which the prosecution bore the onus of proof was whether the appellant put the bolus of tissue in the child's mouth.

79. It is also the position that the trial judge instructed the jury regarding expert testimony saying:-

> *"There was a lot of expert evidence. We don't have trial by expert. One brings once common sense and judgement to bear. One doesn't mechanically accept the experts' evidence. So, it's evidence like any other evidence which is weighed and considered by you."*

80. In the circumstances, we are not persuaded that the evidence should not have been admitted and this ground fails.

Decision

81. As we have not been persuaded to uphold any of the grounds of appeal, the appeal is dismissed.