

NO REDACTION NEEDED

APPROVED



THE COURT OF APPEAL

Record Number: 38/2023

Birmingham P.

Kennedy J.

Burns J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

REPOENDENT

- AND -

NW

APPELLANT

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

1. This is an appeal against conviction. On 9 June 2022, the appellant was found guilty by unanimous verdict of Count 14 (Sexual Exploitation contrary to s. 3(2)(a) of the Child Trafficking and Pornography Act 1998); Count 16 (Sexual Assault contrary to s. 2 of the Criminal Law (Rape)(Amendment) Act 1990); and by majority verdict of Count 13 (Child Cruelty contrary to s. 246(1) of the Children Act 2001).
2. The trial judge had previously directed the jury to return a verdict of not guilty on Count 15 (Sexual Exploitation).
3. On 8 December 2022, the trial judge sentenced the appellant to 3 years imprisonment in relation to the sexual exploitation and sexual assault offences and 12 months imprisonment in relation to the child cruelty offence, all of which were suspended on certain terms and conditions. The respondent has brought an application pursuant to s. 2 of the Criminal Justice Act 1993 seeking a review of the sentence imposed on the appellant on grounds of undue leniency. That application will be dealt with by the court in a separate judgment on a later date.

Background

4. The appellant is the mother of the injured party. The injured party's father, HS, was a co-accused on the indictment and was charged with a significant number of separate offences. He died before the matter came on for trial.
5. The injured party was between the age of 3 and 4 and three quarters at the time of the commission of the sexual exploitation and sexual assault offences and between the age of 0 and 4 and three quarters at the time of the commission of the child cruelty offence.
6. The injured party lived with his father from when he was approximately 18 months old. His father had notified Tusla that he would be the primary legal carer of the injured party but that the injured party would continue to have daily access to the appellant. The appellant accepted she saw the injured party on a daily basis both at his father's house and at the house where she resided. The appellant and her co-accused continued in a relationship after he obtained custody of the injured party. The appellant described herself carrying out a parenting role in her interactions with the injured party.
7. The injured party was placed into foster care by the State in June 2015 when he was 4 and three quarters years of age. He could not use a knife and fork; did not know how to drink from a cup; was prone to overeating; stole and hid food; took food from bins to eat; could not dress himself; did not know how to sit on a chair; had very poor language skills; and urinated on walls and defecated on the ground at school. When he attended primary school aged 5, while noted to be an intelligent child, his development was assessed as closer to that of a 2 or 3 year-old. The injured party's behaviours and his lack of development formed the basis of the child cruelty charge against the appellant.
8. While in foster care, the injured party began to make disclosures of sexual abuse to his foster mother. He also demonstrated sexualised behaviour: portraying the act of sexual intercourse; peeking into the bathroom when females were utilising it; inappropriate touching of other children; and inappropriate conversation.
9. His foster mother brought the disclosures to the attention of An Garda Síochána in June 2017 and an investigation began. On 25 August, 16 September and 1 November 2017, the injured party was interviewed by specialist garda interviewers and these s. 16 interviews formed the basis of the prosecution case against the appellant and her co-accused in relation to the sexual exploitation and sexual abuse charges. The interviews straddled the injured party's 7th birthday. He stated in these interviews that the appellant had taken his penis into her mouth; that he inserted his finger into the appellant's vagina, at his father's direction; and that he had stepped on the appellant's genital area.
10. In the course of these interviews, the injured party also made allegations of the most serious and shocking kind against his father and other unidentified persons.
11. By the time this matter came on for trial, the injured party was 11³/₄.

12. Prior to the appellant being arraigned on the child cruelty charge, the defence sought particularisation of the neglect which was alleged against the appellant. Counsel for the respondent, in the course of objecting to this application, indicated that this count did not relate to any of the alleged sexual activity. This application was refused by the trial judge.
13. With respect to the s. 16 interviews, the appellant made an application that those portions of the interviews which related to the alleged offending by the co-accused and unidentified persons, be omitted from the interview recording played before the jury on the basis of irrelevance and severe prejudice. This application was also refused by the trial judge.
14. At the conclusion of the respondent's case, Counsel for the appellant sought a directed acquittal on all three sexual offending charges on the grounds that the evidence relating to those charges was so infirm that it would be unsafe to permit it be considered by the jury pursuant to *R v. Galbraith* [1981] 73 Cr App R 124. In the alternative, an application pursuant to *The People (DPP) v. PO'C* [2008] 4 IR 76 was made on the basis that an unfairness arose with respect to the ability to cross examine the injured party, such that a trial in due course of law could not take place. This application was refused.

Grounds of Appeal

15. By notice of appeal dated 7 March 2023, the appellant indicated her desire to appeal her conviction and set out her grounds of appeal as follows:-

"i. The learned Trial Judge erred in law or in fact in refusing or declining to grant an application by the Defence to particularise the indictment and in particular count 13 of the indictment in relation to Child Cruelty in circumstances where no specific acts or omissions of the Accused were particularised.

ii. The learned Trial Judge erred in law or in fact in refusing or declining to grant an application by the Defence to edit/ omit or limit the section 16 [interviews]. In particular, the learned Trial Judge erred in law or in fact in refusing or declining an application by the Defence to omit [s. 16] Interview No. 2 with the Complainant and to omit portions of [s. 16] No. 3 with the Complainant.

iii. The trial judge erred in in fact and law in refusing or declining to end the Trial due to the re-examination of the Complainant which sought to raise issues not arising from the cross-examination of the Complainant.

iv. The learned Trial Judge erred in law or in fact in declining or refusing to grant an application for a direction by the Defence in relation to counts 14 and 16 due to conflict in the evidence of the Complainant and/ or the insufficiency of the evidence given by the Complainant in relation to those counts.

v. *The learned Trial Judge erred in law or in fact in declining or refusing to grant an application at the requisitions stage for the Trial Judge to give a Special Direction to the Jury in respect of the frailty of the [s. 16 interviews] of the Complainant and the difficulty of relying upon it in the context in which it was taken.*

vi. *On initial application to the learned Trial Judge, the Court acceded to the requisition by the Defence to give a delay warning but the learned Trial Judge erred in law and in fact in the manner and substance of the delay warning given to the Jury.*

vii. *Counsel for the Prosecution, in his closing speech, commented adversely on the cross-examination of the Complainant by the Defence in circumstances which were unfair and prejudicial to the Accused.*

viii. *The learned Trial Judge refused to intervene in respect of the objection by the Defence when the Prosecution continuously requested the Accused to give her opinion on the evidence against the deceased co-accused which amounted to a fundamental breach of the Appellant's right to a fair trial.*

ix. *The learned Trial Judge erred in law or in fact in refusing or declining to warn the Jury sufficiently against sympathy or prejudice in circumstances of alleged cruelty against a child which amounted to a fundamental breach of the Accused's right to a fair trial."*

Appeal Grounds Pursued at Hearing

16. At the hearing before us, Counsel for the appellant indicated that the grounds which he was now pursuing had narrowed to two, namely the failure to particularise the indictment with respect to the child cruelty charge and the failure to direct the jury to return a not guilty verdict either on the basis of an insufficiency of evidence or unfairness. In respect of this latter ground, Counsel for the appellant indicated that he also relied on the trial judge's refusal to sever those parts of the interview which related to alleged offending by the injured party's father and other unidentified persons, and the delay which had occurred in the proceedings.

Particularisation of the Indictment

17. Section 246(1) of the Children Act 2001 provides:-

"It shall be an offence for any person who has the custody, charge or care of a child wilfully to assault, ill-treat, neglect, abandon or expose the child, or cause or procure or allow the child be to assaulted, ill-treated, neglected, abandoned or exposed, in a manner likely to cause unnecessary suffering or injury to the child's health or seriously to affect his or her wellbeing."

18. Count 13 on the indictment which alleged child cruelty contrary to s. 246 of the Children Act 2001, stated:-

"NW... between the 11th day of September, 2010 and the 18th day of June, 2015, both dates inclusive, within the State, being a person having the charge or care of [the injured party], a child, wilfully neglected him in a manner likely to cause unnecessary suffering and/or injury to his health or seriously affecting his wellbeing."

19. Prior to the commencement of trial, Counsel for the appellant made a submission in relation to the child cruelty charge asserting that it lacked specificity by not outlining any particular acts or omissions on the part of the appellant which were alleged to constitute the offence.

20. Delivering her ruling on the application, the trial judge stated:-

"[I]t was suggested to this Court or submitted to this Court that the particulars were too broad with regard to the factual particulars and that the particulars could suggest a number of different types of offending including one of sexual offending and others in relation to child and whether or not the child had sufficient shoes, or the shoes were in bad repair, whether or not the child was receiving enough food or was not adequately cared for. Or in respect of perhaps neglect with regard to the use of utensils and that none of this was obvious in relation to indictment.

On behalf of the prosecution, it was submitted that this was an appropriate indictment in circumstances where wilful neglect has been alleged and wilful neglect is provided for under the section and that this is an offence of omission not commission. And that thought had been given into including additional counts and rather than including additional counts the offence alleged is incorporated into the single count, a failure to act on the part of the accused person.

It was also confirmed yesterday that in relation to count No. 13, there is no suggestion of a sexual act as being part of the allegation of neglect but in relation to the matters I've already referred to with regard to the food and the footwear and use of utensils and toilet training was referred to by the counsel on behalf of the prosecution that they could be sufficient in respect of the care of the child and the role of the accused person with regard to the care of the child and the wilful neglect when and that in the circumstances the prosecution was of the view that the allegation is a failure to adequately and properly look after the child.

I have considered the section, I have looked at the section of 246, subsection 1 and 2 of the Children's Act 2001 over the course of the evening and in the circumstances I am satisfied that the count as it stands is sufficient for the accused person to be arraigned on that count. And I see no need to look for additional counts to be added or for additional information to be contained within that count where the allegation is that there was wilful neglect in a manner likely to cause unnecessary suffering and/or injury to his health or seriously to affect

his well being and in relation to what has been described as an offence of omission with regard to the alleged injured party."

Submissions of the Parties

21. The appellant submitted that the child cruelty count, as drafted, offended against s. 4(1) of the Criminal Justice (Administration) Act 1924 ("the 1924 Act") in that it lacked specificity and that it was unknown the manner in which the appellant was alleged to have wilfully neglected the injured party.
22. The respondent submitted that the count alleged wilful neglect against the appellant, which was a continuing offence, and that having regard to the evidence in the case, which the appellant was on notice of, the count provided sufficient detail for the appellant to be aware of the case which she was required to meet.

Discussion and Determination

23. Section 4(1) of the 1924 Act provides:-

"Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge."

24. The particulars of the offence set out in the indictment plainly state the allegation that the appellant wilfully neglected the injured party in a manner likely to cause him unnecessary suffering and/or injury to his health or seriously affect his wellbeing. While the acts or omissions of how it is alleged that the appellant wilfully neglected the injured party are not set out, it cannot be said that reasonable information was not provided as to the nature of the charge against the appellant as is required pursuant to s. 4(1) of the 1924 Act.
25. The evidence with respect to the child cruelty charge was based on circumstantial evidence where the respondent was seeking the jury to infer that the appellant had wilfully neglected the injured party having regard to the behaviour and presentation of the injured party. All of the evidence which the respondent relied upon to establish wilful neglect of the injured party by the appellant was served on the appellant. No complaint in that regard was made. The appellant clearly knew that an allegation of wilful neglect was being made against her, and that this charge was based on the behaviours and presentation of the injured party as reflected in detail in the evidence served. Accordingly, an assertion that it was unknown the manner in which it was alleged the appellant had wilfully neglected the injured party is without any basis in light of the evidence served. The particularisation of the offence in the manner as occurred in this case was appropriate and did not offend against s. 4(1) of the 1924 Act.

26. The trial judge did not err in refusing to require the respondent to provide further particularisation of the indictment with respect to the child cruelty charge. We therefore reject this ground of appeal.

Failure to Direct an Acquittal on the Sexual Offending Counts

27. At the conclusion of the respondent’s evidence, an application was made on behalf of the appellant, pursuant to *R v. Galbraith*, to direct the jury to return a not guilty verdict on the two sexual exploitation counts and the sexual assault count having regard to the asserted infirmity in the evidence before the jury. In the alternative, an application was made, pursuant to *The People (DPP) v. PO’C*, to withdraw the case from the jury on the basis of an unfairness which had arisen arising from an asserted inability to cross examine the injured party arising from the delay in the case, and/or the prejudice to the appellant resulting from the jury learning of the serious and shocking sexual allegations against the co-accused and other unidentified persons.

28. As already indicated, after a period in foster care, the injured party made disclosures of sexual offending to his foster parents. He was interviewed by specialist garda interviewers on 25 August, 16 September and 1 November 2017.

29. Extracts from those interviews relevant to the appellant are as follows:-

1 November 2017

<i>When I stepped on [NW’s] foot. I mean, stepped on [NW]’ foot bum gently (?) and X stucked his bum into [NW’s] bum and uh, uh I, I, oh yeah [NW] sucked my front bum hard. I stuck my finger into [NW’s] front bum. I just remembered, I can’t remember the other thing X Sheila [Garda].</i>
<i>Okay. That’s okay. I’m going to ask you some questions about all of that [A], okay?</i>
<i>Nods Okay.</i>
<i>So you said that “[NW] sucked my front bum hard”.</i>
<i>Yeah, me, my one.</i>
<i>Okay. You okay?</i>
<i>Yeah.</i>
<i>Tell me more about that.</i>

Em, I don't know like, it was, I could describe it like hot, hairy and gooey.

Okay. What was hot, hairy and goory?

Her front bum.

Okay. How do you know that?

'Coz when I stuck my finger in it.

Okay. Tell me about sticking your finger in it.

I, em I can't, I don't know Sheila.

Okay. Is there a reason you stuck your finger in it?

She just told me to.

Okay. What did she say?

She said stick my X, I don't want to tell you.

Okay. What could you hear?

Nothing.

What could you see?

Just her nakedness.

Okay. Tell me about her nakedness.

She had no clothes on.

Okay. So what could you see?

Uh, just nakedness.

Tell me what you could see from the top of her head to right down to her toes, as much as you could see.

Uh, her front bum...

Okay.

...and I can't remember the other thing.

...you said that she sucked your front bum hard.

Yeah.

Tell me about that. Is that what you said?

<i>Yeah.</i>
<i>Just...okay. You okay?</i>
<i>...</i>
<i>Yeah.</i>
<i>...</i>
<i>Okay. Tell me a bit more about it, though.</i>
<i>Well I can't remember more.</i>
<i>Okay. You said that she sucked your front bum.</i>
<i>Yeah.</i>
<i>Hard. Tell me more about that.</i>
<i>Em she, she just did it.</i>
<i>Okay. How did she do it?</i>
<i>She got my front bum and then put it in her mouth and then sucked it hard.</i>
<i>Okay. So what way were you when she sucked your front bum hard?</i>
<i>What?</i>
<i>What way were you, were you standing, sitting or some other way?</i>
<i>Uh...I can't remember Sheila.</i>
<i>Okay. What way was she, was she standing, sitting or some other way?</i>
<i>She was, she was sitting.</i>
<i>Okay. Where was she sitting?</i>
<i>In, in, on the ground.</i>
<i>Okay. And where was that?</i>
<i>In the sitting room.</i>
<i>Okay. And where was that sitting room, [A]?</i>
<i>What?</i>
<i>Where was that sitting room?</i>

<i>Downstairs.</i>
<i>Okay. And downstairs where?</i>
<i>In the hall.</i>
<i>Do you know where this place was?</i>
<i>What?</i>
<i>Do you know where this place was?</i>
<i>In [NW's] house.</i>
<i>...okay, you said that she put it in her mouth.</i>
<i>Yeah.</i>
<i>Okay. How did she do that?</i>
<i>Em, she, she just got it and sucked it hard.</i>
<i>Okay. Explain how she got it.</i>
<i>She just like got it out (coughs)Well, she grabbed it by her hand.</i>
<i>Okay. What did she grab by her hand?</i>
<i>Em, what?</i>
<i>What did she grab by her hand?</i>
<i>My front bum.</i>
<i>Okay. And then?</i>
<i>And then she sucked it hard.</i>
<i>Okay, and when you say hard, [A], tell me what you mean by that.</i>
<i>Like, not like gently, very hard.</i>
<i>Okay. Explain very hard to me.</i>
<i>I, I don't know how to explain very hard.</i>
<i>Okay. Tell me what could you feel?</i>
<i>What?</i>
<i>What could you feel?</i>
<i>Her, her spits.</i>
<i>Okay. Where could you feel her spits?</i>

<i>In her mouth...</i>
<i>... So, how do you know they were spits?</i>
<i>What?</i>
<i>How do you know there was spits?</i>
<i>'Coz of the water bits.</i>
<i>Where could you feel the spits?</i>
<i>I could feel it, em, in her mouth.</i>
<i>Okay. You could feel it in her mouth...</i>
<i>Yeah.</i>
<i>How could you feel it in her mouth?</i>
<i>What?</i>
<i>How could you feel it in her mouth?</i>
<i>Em, I...could you say that a bit louder please?</i>
<i>Where, how could you feel it in her mouth? The spits?</i>
<i>'Coz of the water.</i>
<i>Okay. With what could you feel it in her mouth?</i>
<i>What?</i>
<i>With what could you feel it...</i>
<i>My front bum.</i>
<i>With your front bum, okay. Okay. Explain how she sucked it.</i>
<i>Wait...she like, she, she sucked, she, she...what was the question again?</i>
<i>How did she suck it?</i>
<i>I, I think with her mouth, her, with her air.</i>
<i>Okay. What did she use to suck it?</i>
<i>Her mouth, her air.</i>
<i>Okay. [A], when did this happen?</i>
<i>At [NW's] house.</i>

<i>When did it happen?</i>
<i>I, I can't remember.</i>
<i>Okay. What age were you? ...</i>
<i>...[A], how long did it last for? When she sucked your front bum?</i>
<i>Uh, for a small bit.</i>
<i>Okay, do you know what a small bit is?</i>
<i>I just need to what I I think I need to ask my Mam, I think I told her.</i>
<i>Okay. Okay. So when this happened, when [NW] sucked your front bum, [A], who was there?</i>
<i>Em, uh, me and [NW] and sometimes [HS].</i>
<i>And...what did you say?</i>
<i>Me and [NW] and sometimes [HS].</i>
<i>Sometimes [HS], okay. And when this happened, and we'll talk about one time that [NW] sucked your front bum, who was there?</i>
<i>Me, me and [NW] and sometimes [HS].</i>
<i>Okay. And where was [HS]?</i>
<i>I, I don't know.</i>
<i>How do you know he was there?</i>
<i>'Coz sometimes I see him.</i>
<i>Okay. And...</i>
<i>Okay, so you said, em, sometimes [HS] was there. How do you know that?</i>
<i>'Coz I saw him.</i>
<i>Okay, where did you see him?</i>
<i>In the living room.</i>
<i>Okay. Where in the living room was he?</i>
<i>What?</i>
<i>Where in the living room was he?</i>
<i>He was in the, by the door.</i>

<i>Okay, and...</i>
<i>In the seat by the, like, on the seat by the door.</i>
<i>Okay. And from where [HS] was sitting...</i>
<i>Yeah?</i>
<i>...at the seat by the door, what could he have seen?</i>
<i>What?</i>
<i>What could he see?</i>
<i>He could, what was the question again?</i>
<i>When [HS] was sitting on the chair by the door...</i>
<i>Yeah?</i>
<i>What could [HS] see?</i>
<i>Me and [NW].</i>
<i>Was anything said?</i>
<i>What?</i>
<i>Was anything said?</i>
<i>No.</i>
<i>Okay. How do you know he could see you and [NW]?</i>
<i>What?</i>
<i>How do you know he could see you and [NW]?</i>
<i>'Coz he, he, he was looking.</i>
<i>Okay. Tell me more about him looking.</i>
<i>Uh, I, I don't know Sheila.</i>
<i>Okay. So you said this happened in [NW's] house.</i>
<i>Yeah.</i>
<i>What age were you?</i>
<i>I can't, Sheila I can't remember.</i>
<i>Okay. Who lived there?</i>
<i>Just [NW] and sometimes we'd come over.</i>

<i>Sometimes we'd come over...who's we?</i>
<i>Me and [HS].</i>
<i>When [NW] sucked your front bum...</i>
<i>Yeah?</i>
<i>...how did you feel?</i>
<i>Sad.</i>
<i>Okay. Tell me about being sad.</i>
<i>I just didn't like it.</i>
<i>Okay. Tell me about not liking it.</i>
<i>'Coz of the way it felt.</i>
<i>Tell me more about the way it felt.</i>
<i>Hard. It felt hard.</i>
<i>What was hard?</i>
<i>Em, the way [NW] sucked my front bum.</i>
<i>Okay. When this was happening, [A], what could you see?</i>
<i>Wait, wait...</i>
<i>When this was happening, [A]...</i>
<i>Yeah?</i>
<i>...what could you see?</i>
<i>I, I could...what was the question again Sheila?</i>
<i>When this was happening, what could you see?</i>
<i>Um, [NW] and [HS].</i>
<i>Okay. Where was [NW]?</i>
<i>[NW] was sitting on the ground.</i>
<i>Okay. And where was [HS]?</i>
<i>What?</i>
<i>Where was [HS]?</i>
<i>He, he was, he was in, in the couch like.</i>

<i>Em, [HS] would be, [HS] was a, in the, would sit on the couch.</i>
<i>... You said sometimes [HS] was there.</i>
<i>Yeah.</i>
<i>Okay, tell me about that.</i>
<i>He wouldn't be there like often.</i>
<i>Okay. When was [HS] there?</i>
<i>Uh, just sometimes.</i>
<i>Okay, when you say sometimes...</i>
<i>Yeah?</i>
<i>...[A], what do you mean by sometimes?</i>
<i>Like not all the time.</i>
<i>Okay. How many times?</i>
<i>I don't know.</i>
<i>Okay. Tell me about a time when he wasn't there.</i>
<i>What?</i>
<i>Tell me about a time when he wasn't there.</i>
<i>I, I don't know about a time when he wasn't there.</i>
<i>Okay.</i>
<i>I just remember the times that, when he, when he was there.</i>
<i>Okay. Okay. Okay. So...</i>
<i>You said, em, about [NW] and your front bum.</i>
<i>Yeah?</i>
<i>Tell me about that.</i>
<i>I, I just...</i>
<i>I thought you used the word, em, "stepped" or "stomped" and I wasn't quite sure what you said.</i>
<i>Stepped.</i>
<i>Stepped, okay. Tell me about that.</i>

<i>Sentence unclear</i>
<i>Explain that to me.</i>
<i>Like, em, like that hard like stopped and gently (?)</i>
<i>Okay. What did she use to do that?</i>
<i>What?</i>
<i>What did she use to do that?</i>
<i>She, what she used to do it, what?</i>
<i>What did she use to step on your front bum?</i>
<i>No, I stepped on it.</i>
<i>Okay. I'm getting confused. Okay. Tell me all about that.</i>
<i>What?</i>
<i>Tell me all about that.</i>
<i>He, he, I just stepped on it.</i>
<i>What did you use to step on it?</i>
<i>My foot.</i>
<i>Okay. What way was she when you did this?</i>
<i>What?</i>
<i>What way was she when you did this?</i>
<i>She was still sitting.</i>
<i>And where was she sitting?</i>
<i>What?</i>
<i>Where was she sitting?</i>
<i>By the door.</i>
<i>Okay, where by the door?</i>
<i>Uh, look I'll show you.</i>
<i>Well, Iris [Garda] won't be able to see you if you go over there. Just, tell me in words.</i>
<i>Uh, like in the middle.</i>

<i>Okay. And what was she sitting on?</i>
<i>What? She was on the ground.</i>
<i>Okay. And who was there?</i>
<i>Who was there when you did this, [A]?</i>
<i>Uh, sometimes [NW] and sometimes [HS].</i>
<i>And is there a reason you did it?</i>
<i>No [NW] just, yeah there [NW] asked me, told me to let's do some bold stuff but I said no.</i>
<i>Okay, what did she say?</i>
<i>She said "[A], I like to do bold stuff"</i>
<i>Okay.</i>
<i>And I said no.</i>
<i>And then?</i>
<i>She, and then she made me do it.</i>
<i>Tell me, how did she make you do it?</i>
<i>Explain how she made you do it.</i>
<i>She just, she just grabbed me and made me do it.</i>
<i>Okay, tell me how she grabbed you.</i>
<i>She just grabbed me like a...</i>
<i>How did she grab you?</i>
<i>What?</i>
<i>How did she grab you?</i>
<i>Like hard.</i>
<i>What did she use...</i>
<i>I'll just, I'll just I'll just, I just need to X, I just need to tell Iris something. Iris I need to tell my Mam something.</i>
<i>What do you need to tell your mom?</i>
<i>That I just need to ask her did she grab me or not, I just can't remember.</i>

<i>It's okay.</i>
<i>So you told me that she grabbed you, where did she grab you?</i>
<i>Holds wrist to demonstrate</i>
<i>Okay, what's that?</i>
<i>My arm. My hand.</i>
<i>Where did, em, what did she use to grab your hand?</i>
<i>She used, what?</i>
<i>What did she use to grab you?</i>
<i>She, what?</i>
<i>You said she grabbed you...</i>
<i>Yeah.</i>
<i>What did she use to grab you?</i>
<i>Her hand.</i>
<i>Okay. And...</i>
<i>Yeah.</i>
<i>Okay. So when you stepped on her front bum, what could you feel?</i>
<i>Uh, just the hairiness.</i>
<i>So, we were talking about what could you feel when you stepped on [NW's] front bum.</i>
<i>Yeah.</i>
<i>Okay. What could you feel?</i>
<i>Just hair.</i>
<i>Okay, where could you feel the hair?</i>
<i>All outside.</i>
<i>All outside where?</i>
<i>Outside like, around her front bum.</i>
<i>Okay. How could you feel that?</i>
<i>What?</i>

<i>How could you feel that?</i>
<i>I just, I was just like X feel it.</i>
<i>Where on you could you feel it?</i>
<i>What?</i>
<i>Where on you could you feel it?</i>
<i>Not on me, just my legs.</i>
<i>Okay. What was on your leg?</i>
<i>Nothing was on my leg.</i>
<i>Okay. Tell me about everything that you were wearing.</i>
<i>What? I, I, just my clothes.</i>
<i>Okay.</i>
<i>Okay. And, I dunno whether I've asked you this and I might have, but where did this happen?</i>
<i>Um, [NW's].</i>
<i>In [NW]. Okay. And where in [NW's] did this happen?</i>
<i>[NW's] house.</i>
<i>Where in the house?</i>
<i>Uh, in the sitting room.</i>
<i>Okay. And who was there?</i>
<i>What?</i>
<i>Who was there?</i>
<i>[HS], um, sometimes [HS], some, uh, [NW] and me.</i>
<i>Okay. When did this happen?</i>
<i>Hm?</i>
<i>[A], when did this happen?</i>
<i>It happened at...I, I, I can't remember Sheila.</i>
<i>Okay. Okay. What age were you when it happened?</i>
<i>Uh, I think it was three or four. I don't know.</i>

Okay, how do you know that? That you were three or four, just leave the microphone [A].

'Coz, because I was smaller then.

30. The following cross examination, with respect to the sexual exploitation counts and the sexual abuse count, was conducted: -

Q. So, one of the things you said is that "I stepped.." – you were talking about [NW], and you said "I stepped on [NW]'s front bum gently." Okay

A. Mm-hmm

...

Q. And can I ask you, is it possible that your wrong about that?

A. I don't think – I don't even remember doing that at all.

Q. Okay. Okay. So is it possible that you're wrong about that – about stepping on her front bum?

A. Like, I did not do that, like.

...

Q. And you said that: "[NW] sucked my front bum hard" is the second thing that you said. Is that okay?

A. Mm-hmm, yes.

Q. And is it possible that that's -- that that didn't happen or that that's wrong?

A. I think I got -- I think it did happen.

Q. You think it did happen, okay?

A. Yes, it's just so long ago, I can't remember.

Q. I understand. So you think it did happen but it's so long ago you can't remember?

A. I can't remember.

Q. Okay. So, if you can't remember, is it possible that that's -- you're wrong about that?

A. Like, I remembered -- I must have remembered that happening then, but I just can't remember it now."

...

Q. *I'm moving onto another different thing. And that's -- the third thing you said to Iris and Sheila is "I stuck my finger into [NW]'s front bum." Okay?*

A. *Mm-hmm.*

Q. *And is it possible that you're wrong about that?*

A. *No, I don't -- like, I think -- I think I got told to do it or whatever, but I can't remember.*

Q. *Okay. So what you said there was: "I think I got told to do it, but I can't remember." Is that right?*

A. *Yes.*

Q. *Okay?*

A. *Yes.*

Q. *And so, am I asking you -- is it that it's hard for you to remember; is it?*

A. *Yes, it's hard for me to remember.*

Q. *Okay?*

A. *I think my father told me to do it.*

Q. *Okay. So --*

...

Q. *Okay, good man. Is it -- can I ask you this question, about this statement: "I stuck my finger into [NW]'s front bum." You said: "It's hard for me to remember." I think, somebody told you to do it. Is that what you said?*

A. *Yes, I think it was my father who told me to do it.*

Q. *Okay. Very good. And it is possible that you didn't stick your finger into [NW]'s front bum? Is that possible, that it did not happen?*

A. *I can't remember."*

31. The trial judge determined to direct the jury to return a not guilty verdict in respect of one of the sexual exploitation charges (Count 15 which related to the allegation of the injured party stepping on the appellant's genital area) but permitted the remaining sexual exploitation charge and the sexual assault charge to be considered by the jury. She ruled:-

"I am drawing a conclusion and I'm exercising my discretion with regard to fairness, and in those circumstances I am of view that it would be unfair to the accused person to allow count 15 go to the jury. It is difficult for the defence to cross-examine a young witness, a witness who was seven years of age when the DVD was recorded by the specialist interviews, and is now 11 years of age, and it is difficult to cross-examine a witness years after the alleged offending took place. But the defence must be in a position to test the evidence. This

was done in a careful and sensitive way by [Counsel for the appellant], and the complainant said in relation to count 15 he did not do that. He qualified his answers in relation to the other two counts, and I am drawing a distinction between count 15 and the other -- the other two counts, count 14 and count 16, and I have referred to the complainant's evidence in cross-examination in relation to both counts. The material went before the jury by way of recorded interview with the complainant, which is regarded by the jury as the examination in chief. Section 16 provides that a witness must be available to be cross-examined. This young witness was available, he was cross-examined, and, in my opinion, it would be unfair to allow count 15 in the circumstances of this case to go to the jury, and in those circumstances I am going to exercise my discretion and remove that count from the jury..."

Submissions of the Parties

32. Counsel for the appellant submits that the trial judge erred in not also directing an acquittal on Counts 14 and 16 having regard to the asserted infirmity in the evidence arising from the cross examination of the injured party. Relying on *R v. Galbraith*, Counsel submits that the evidence was of such a weak and tenuous nature that it was unsafe to permit these counts to be considered by the jury. In making this argument, Counsel for the appellant relied on the evidence which the complaint gave when cross examined in relation to Count 15 where he indicated that the event reflected in that count did not occur. It was submitted that this establishes that the s. 16 interviews were unreliable and that it therefore was not safe for this evidence to be considered by the jury.
33. In the alternative, Counsel for the appellant submits that the ruling of the trial judge refusing to sever those parts of the s. 16 interviews relating to the allegations of severe sexual abuse perpetrated on the injured party by the co-accused and other unidentified persons, resulted in irredeemable prejudice to the appellant. It was suggested that it was possible that the jury approached the case against the appellant with the mindset that someone had to account for the serious allegations which the injured party made. This was in a situation where the appellant could not challenge the allegations made against the co-accused and other unidentified persons.
34. It was further submitted that the circumstances of the case, to include the injured party's very tender years when the events were alleged to have occurred; the significant time elapsed since then; and the injured party's stated inability to remember the alleged events, resulted in cross examination of the injured party not being possible, thereby rendering the trial of the appellant unfair.
35. Accordingly, it was submitted that on the basis of either or both of these grounds, the trial judge erred in not acceding to the PO'C application to direct an acquittal in respect of the remaining two sexual counts.
36. Counsel for the respondent accepted that there were frailties in the evidence of the injured party but submitted that the appropriate arbiter of the evidence was the jury. Relying on *The People (DPP) v. M* [2015] IECA 65, it was submitted that it was for the jury to consider all of the evidence in the

case, to include the cross examination conducted of the injured party together with his evidence that one of the events outlined in the s. 16 interview did not occur.

37. With respect to the *PO'C* application, Counsel for the respondent submitted that the trial judge was correct to refuse to sever those portions of the s. 16 interviews which related to other sexual allegations made by him against other persons so that the jury could assess the injured party's evidence as against the appellant, in its proper context.
38. It was further submitted that the fact that Counsel for the appellant made the tactical decision not to cross examine the injured party further did not equate to being unable to cross examine. In addition, the answers provided by the injured party in cross examination did not reveal that the injured party had absolutely no recollection of the alleged events, but rather was more nuanced than that. It was submitted that the injured party had given a compelling account of the surrounding circumstances of the alleged offending which provided support for his allegations, as did the sexualised behaviour which he demonstrated. Counsel for the respondent also submitted that the grounds of appeal did not raise this as an issue and that belatedly this argument was being advanced in an attempt to rely on the recent decision of this Court in *The People (DPP) v. MT* [2023] IECA 65.

Discussion and Determination

Galbraith application

39. In *The People (DPP) v. M* [2015] IECA 65, the Court of Appeal restated the *Galbraith* principles, emphasising the central importance of the jury. Edwards J., delivering the judgment of the Court stated at paragraphs 47-51 of the judgment:-

"47. At the outset the Court wishes to address a misconception that it occasionally encounters, that the second limb of Lord Lane's celebrated statements of principle in R v Galbraith represents authority for the proposition that a case must be withdrawn from the jury if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies. This Court wishes to emphasise that it is not authority for that proposition.

48. On the contrary, the emphasis in Galbraith is on the primacy of the jury in the criminal trial process as the sole arbiter of issues of fact. What Lord Lane was in fact saying in Galbraith was that even if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies, it is for the jury to assess that evidence and make of it what they will, unless the state of the evidence is so infirm that no jury, properly directed, could convict upon it. Accordingly, what Galbraith is in fact concerned with is fairness.

49. Moreover, implicit in the Galbraith principles enunciated by Lord Lane, is that withdrawal of a case from a jury should be an exceptional measure, to which resort should only be had for the purpose of avoiding a manifest risk of wrongful conviction.

50. This Court considers that the matter is well put in the following quotation from Archbold, *Criminal Pleading Evidence & Practice 2014* at page 484, where the authors state:

"In making the judgment in line with the second limb of Galbraith, as to whether the state of the evidence called by the prosecution, taken as a whole, is so unsatisfactory, contradictory or so transparently unreliable, that no jury, properly directed, could convict, the judge must bear in mind the constitutional primacy of the jury and not usurp its function."

51. Further, in *The People (Director of Public Prosecutions) v M.* (Unreported, Court of Criminal Appeal, 15th February, 2001) Denham J, as she then was, provided the following exegesis, with which we fully concur, concerning how the Galbraith principles ought properly to be applied:

"If there is no evidence that an element of the crime alleged has been committed, the situation would be clear. The judge would have to stop the trial. However, that is not the case here. If a judge comes to the conclusion that the prosecution evidence taken at its highest is such that a jury properly directed could not properly convict it is his duty to stop the trial. However, that is not the case here. Here there is lengthy evidence from the complainant in which there are some inconsistencies. These inconsistencies are matters which go to issues of reliability and credibility and thus, in the circumstances, are solely matters for the jury. The learned trial judge was therefore correct in letting the trial proceed. These are matters quintessentially for the jury to decide. However, if the inconsistencies were such as to render it unfair to proceed with the trial then the judge in the exercise of his or her discretion should stop the trial. However, that is not the situation here. On the facts and the law the learned trial judge did not err in refusing to withdraw the count in respect of the sexual assault from the jury at the conclusion of the prosecution case."

40. In the instant case, detailed evidence was given by the injured party in the course of his s. 16 interviews which presented a compelling account of the offences comprised in Counts 14 and 16. Details were included which extended beyond the allegation in itself and provided a context in which sexual acts, of the nature alleged, occurred. In addition, these details were of a nature which a young child would not be in a position to describe unless involved in the acts.
41. In cross examination, the injured party did not indicate that these matters did not occur, but rather than he could not remember them at this far remove. However, he also made the point that he must have recollected the events at the time in respect of one of the allegations and that he was directed to do this by the co-accused in respect of the other count.

42. With respect to the *Galbraith* application, we are of the opinion that it was for the jury to consider all of the evidence before them to determine whether they could be satisfied beyond reasonable doubt of the appellant's guilt on the charges before them.
43. The trial judge did not err in refusing to direct the jury to return a not guilty verdict in respect of Counts 14 and 16.

PO'C argument

44. With respect to the appellant's argument that she was irredeemably prejudiced by the failure to sever those portions of the s. 16 interviews which related to the co-accused and other unidentified persons, we are of the opinion that that argument is without merit and fails to have any regard to the ability of a jury to faithfully follow directions and instructions provided to them by a trial judge. The trial judge directed the jury in the following manner in the course of her charge to them:-

"[T]his is what I want to say to you now and it is in relation to [HS]. And as you know, very serious allegations have been made against him and, as you know, he is deceased. He appears on the indictment, there are allegations made against him, very serious allegations made against him, and you have heard deeply disturbing accounts about his alleged behaviour. This is not evidence against the accused person. This is not evidence against [NW]. You heard the entire account of what [A] was alleging, including very disturbing material regarding [...], and, of course, very disturbing allegations made in relation to [HS], the co-accused originally, who's now deceased. You've heard that evidence, so you have the complete account provided by [A] because you are the judges of fact. The allegation of cruelty against this accused does not include any allegation of sexual wrongdoing. So, in relation to wilful neglect, that does not include any allegation of sexual wrongdoing. You must put aside any sympathy you might have for [A] and look at the facts in a cold and dispassionate way as I've said to you before. You cannot form a view of the facts alleged... Sorry, you cannot form the view that what you have heard against [HS] influences your view of the facts alleged against [NW], the accused person. You cannot punish her or be prejudiced against her because of alleged criminal wrongdoing on the part of other people. You look at the evidence and the facts in relation to this accused person and what this is alleged she is said to have one. And you do not use the evidence in respect of wrongdoing on the part of [HS] in any way in relation to her. That is not evidence against her, the horrendous allegations made against him. And it's very important, when I started at the beginning of this charge to say to you, that you put aside your sympathies and you put aside you put that aside. It's very important in a case of this nature where you have heard such horrific allegations made in relation to [HS].

...

Now, I did remind you, and it's important that I remind you again, ladies and gentlemen, that when it comes to [HS], who was a co accused in this case but has passed away, you cannot form the view that the allegations made against him can be used by you in any way

against this accused person. You cannot form the view that you're going to be prejudiced towards this accused person because of the behaviour of [HS] and form the view that somebody has to pay and somebody has to be found criminally guilty in relation to this child and how this child presented when he was taken allegedly presented when he was taken into care. You cannot do that. You consider the facts against this accused on their own and the evidence against this accused, including all of the evidence which includes the circumstantial evidence, in relation to her and in relation to her alone.

45. The trial judge in the instant case was correct to refuse to sever those portions of the s. 16 interviews which related to other persons so that the allegations and credibility of the injured party could properly be determined. This is particularly so in light of the position adopted by the appellant in evidence to the effect that the injured party had not been sexually abused by anyone to include herself. The trial judge correctly directed the jury as to how they should consider this aspect of the s. 16 interviews and no unfairness arises in this regard.
46. In relation to the asserted inability to cross examine the injured party, the grounds of appeal do not reflect a specific ground raising the inability to cross examine as an issue. Rather, there are more general grounds which refers to the insufficiency and frailty of the injured party's evidence. It is arguable that the oral argument advanced before us falls within these grounds of appeal so we will proceed to consider this issue.
47. Counsel for the appellant relies on the recent decision of *The People (DPP) v. MT* [2023] IECA 65 to advance an argument that an unfairness arose in this matter because of an inability to cross examine the injured party in light of the injured party's very young age when the events were alleged to have occurred; the significant delay in prosecuting the matter; and the injured party's evidence that he could not now remember the events.
48. In *The People (DPP) v. MT*, a four and a half year delay had occurred between the s. 16 interview and the trial. Having conducted an extensive analysis of the jurisprudence of the English Courts relating to this issue, Ní Raifeartaigh J. concluded at paragraph 86 of her judgment:-

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

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

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

50. In addition, significant differences exist between the facts in this case and the facts in *The People (DPP) v. MT*. In the first instance, the sexual assault alleged in *MT* was a single incident event asserted to have occurred over a very short period of time. That is not the position in the instant case. Two counts relating to sexual events were charged, in the context of allegations of serious sexual offending. Furthermore, significant detail surrounding each of the sexual offences at issue was provided in the s. 16 interviews of the injured party which was important in terms of assessing the veracity of the injured party account. In addition, the complainant's position in *The People (DPP) v. MT* was that her memory was based on what was contained in the recorded interview rather than having an independent memory of the alleged offending. In the instant case, the injured party denies that the interview is accurate with respect to one of the allegations he made in the interview - so rather than relying on the interview, he in fact indicates that a particular event did not occur. Furthermore, the injured party did not give evidence that he relied on the s. 16 interviews with respect to his recollection of the other two events. Finally, the appellant did not make an application to have the s. 16 interviews ruled inadmissible in their entirety as had been the case in *MT*.
51. These are important differences, some of which are referred to in *The People (DPP) v. MT* as being of significance in terms of the reasoning of that Court. Furthermore, some of these differences are also existent in the English cases considered by the Court in *The People (DPP) v. MT*, namely *R v. Malicki* [2009] EWCA Crim 365 and *R v. Powell* [2006] 1 Cr App R 31. Indeed, the basis of the application, by Counsel for the accused in *The People (DPP) v. MT*, to exclude the s. 16 interview, was noted by Ní Raifeartaigh J. at paragraph 18 of her judgment to be *"the young age of the child at the time of the alleged incident and video recording, the passage of time between the recording and the trial, and **the fact that it was a single-incident allegation of short duration in time.**"* (emphasis added)
52. In *The People (DPP) v. TV* [2017] IECA 200, an approximate 3 year delay had occurred between the time of the first s. 16 interview and the trial. A similar submission of unfairness arising because of

an inability to cross examine was considered. Mahon J., delivering the judgment of the Court stated at paragraph 46 and 48 of his judgment:-

46. A further ground of appeal in this case is based on the issue of the reliability of the complainant as a witness, coupled with the vagueness or lack of particularity with which many of the sixty four counts on the Indictment were based. It is further contended on behalf of the appellant that he was at a disadvantage because of the length of time between the interviews and the cross examination of the complainant. In this regard the case of R. v. Malicki [2009] EWCA CRIM 365 is cited as an authority. However, in that case the facts were very different to the present case, and the child in Malicki was only six years old, significantly younger than the complainant in this case. Further, Malicki concerned a single allegation of a sexual assault and there was a concern that the complainant, when giving evidence at trial, was merely repeating the details of her allegation made in the course of a significantly earlier video recorded interview and which she saw shortly before the trial. In the instant case the allegations in the first two interviews were many in number, thereby reducing the possibility or likelihood of merely repeating details from those interviews in a third interview.

...

48. In the instant case there was a detailed and robust cross examination of the complainant. While there were many occasions when she was unable to recall detail, or could not recall particular events, or said that she did not know the answer to a question, equally there were many other instances when she gave details in a very clear and unequivocal manner. Her evidence effectively went both ways, and ultimately it is properly a matter for a jury to decide on the reliability of that evidence."

53. This issue was also considered in *The People (DPP) v. SA* [2020] IECA 60, where a delay of six and a half years occurred between the time of the s. 16 interview and the trial. The Court analysed the evidence and found that "*the cross-examination of each complainant was skilfull and fulsome*". The Court was not satisfied that the passage of time (part of which the appellant in that case was responsible for) rendered the process unfair or impacted negatively on the ability to cross examine.
54. In the instant case, we are not satisfied that cross examination of the injured party was not possible. Whilst it is understandable why Counsel for the appellant made the tactical decision to conclude his cross examination when he did from the perspective of meeting the case against his client, this does not mean that cross examination was not possible. It appears to us that in light of the significant detail which was provided by the injured party in relation to the sexual events and their surrounding details, that further cross examination was possible. It also appears to us that further exploration was possible in relation to the answers which were given by the injured party. Whilst it is unknown what answers the injured party would have provided, an unfairness has not been established by the limited cross examination which did take place.

55. While *The People (DPP) v. MT* was decided after the trial in this case, it is important to warn against the development of a practise where the focus of cross examination of a child is to have the child agree that he cannot remember the events at issue. A fulsome cross examination, within the limits of the ground rules set, in relation to the alleged incidents must be attempted before a submission can be made of unfairness arising because of an absence of recollection.
56. Accordingly, we are of the view that having regard to the particular facts of this case, the trial judge did not err in refusing to withdraw the sexual allegations from the jury. This ground of appeal also fails.

Conclusion on Conviction Appeal

57. In circumstances where we have not upheld either of the appellant's grounds of appeal which the appellant pursued at hearing, her appeal against conviction is dismissed. As indicated earlier, we will deliver our judgment in relation to the undue leniency appeal at a later stage.