THE COURT OF APPEAL

Record No.: 147/2021

Edwards J.
Donnelly J.
Ní Raifeartaigh J.

BETWEEN/

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

-AND-

A.E.

APPELLANT

JUDGMENT of the Court delivered on the 20th day of June 2022 by Ms. Justice Donnelly

Introduction

1. The appellant appeals against his conviction by a jury on two counts of rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act, 1990 and seven counts of assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997 ("the 1997 Act"). The offences occurred during the period from his brother's (C) eleventh birthday on a date in 2001 and the date when C left the family home on the 27th March, 2006. To ensure anonymity in circumstances where reference must be made to the evidence of a number of family members at trial, random initials have been used to identify the appellant and his family members.

2. The appellant was originally charged with ten counts of rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act, 1990, seven counts of assault causing harm contrary to s. 3 of the 1997 Act and a count of production of an article capable of inflicting injury contrary to s. 11 of the Firearms and Offensive Weapons Act, 1990. A directed verdict was given on eight of the s. 4 rape charges at the end of the prosecution case. He was convicted of each of the assault counts and remaining s. 4 rape counts by unanimous verdict on the 16th April, 2021. He was acquitted on the count of production of the article contrary to s. 11 of the Firearms and Offensive Weapons Act, 1990. A sentence of nine years was imposed on the 28th July, 2021, with the final two years suspended on conditions, and backdated to the 5th February, 2020. He was given a five-year sentence on each of the assault charges.

3. The directed acquittals were given in respect of counts 3 to 10 inclusive. These counts alleged rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act, 1990 by

penetration of the mouth with the penis during the period between the complainant's birthday in 2002 to a date when the complainant was aged sixteen. The complainant gave no evidence in respect of any of these allegations. The appellant was convicted of all other charges (bar the production of an article charge).

4. At the time of the oral rapes, C was between the ages of eleven and twelve. The appellant was aged sixteen to seventeen years.

Grounds of appeal

5. The appellant raised three grounds of appeal as follows:

   (i) The trial judge erred in not acceding to an application on behalf of the appellant at the conclusion of the prosecution evidence to direct the acquittal on all counts on the indictment;

   (ii) The trial judge erred in admitting the memorandum of interview of the accused taken on the 22nd January, 2018 at a southside Garda station; and,

   (iii) The trial judge erred in failing to accede to the jury's request to re-hear the closing speech of defence counsel.

6. The appellant addressed all of these in written submissions. Only grounds 2 and 3 were expanded upon at the hearing of the appeal; counsel for the appellant indicated that she would rest on her written submissions in respect of ground 1.

7. By their nature, these grounds require an extensive consideration of the evidence that was placed before the jury at the trial, or in the case of ground 2, before the judge in the *voir dire*.

Summary of evidence

Witnesses to the allegations

8. It is not doing a disservice to either the appellant or the complainant to describe the family circumstances as grim. There were four brothers and one sister in the family. The appellant was the eldest and his sister the youngest. The complainant was the middle child. It appears that their father was a violent figure who on one occasion carried out an arson attack on the family home. The commencement of the alleged sexual and physical violence occurred when the father was committed to custody to serve a prison sentence. In the course of cross-examination, C confirmed that his siblings and his father "*support*" him in the making of these allegations.

9. In respect of the assault charges, C gave evidence that:

   a) He was abused as a child and that he was battered with baseball bats by the appellant at the family home and that "*it went on as the years went on.*" He also described being hit with weapons and specifically mentioned guns, hurleys, darts and sticks;

   b) In respect of guns, he recalled the appellant putting the barrel of a loaded shotgun into his mouth, threatening him and making him hide the weapon; this occurred in

the kitchen. He also described being hit with a baton with nails in it. A third specific allegation was that the appellant had thrown darts into his foot. These specific instances were charged as specific counts. There was an acquittal in respect of the count related to the shotgun;

c) He said that these beatings happened when he was sent out robbing by the appellant and did not return with anything. He recalled that the beatings occurred "*nearly every day*";

d) C also gave evidence of being "*[m]ade fight*" with his other brothers by the appellant;

e) The balance of the assault charges was particularised on the basis of one sample count per year when C was living in the family home.

10. C gave evidence of two s. 4 rapes that occurred when he was eleven. The first occasion was when he was made to "*suck [the appellant's] d****" on the top bunk in the back bedroom of the family home and the second was "*not long after the first time*" in the front box room. This happened "*under the blanket*" and again he was told to "*suck his d****".

11. On cross-examination:

a) C explained the delay in making a complaint was because he "*was ashamed of [his] life*" and that he was still in fear of the appellant. Special measures were employed even though he was 33 at the time of the trial and he gave his evidence from behind a screen;

b) In respect of the assault charges, counsel on behalf of the appellant said to C that the appellant accepted that "*there was physical violence but not to the extent that you describe it*" and that he was "*grossly exaggerating*". This was not accepted. It was not put that he was never assaulted;

c) It was specifically put to C that the instance with the gun did not happen at all. This was not accepted by C;

d) He was not cross-examined in respect of the dart or the baton with the nails;

e) It was put to him that the s. 4 rapes did not happen at all, but this was not accepted by C.

12. G, the sister of the appellant and the complainant, gave evidence that she remembered beatings that went on in the house. She specifically recalled the baton with the nails being used by the appellant on C and the scars that this left. She also recalled the appellant making C fight with his other brothers. She recalled C being hit with a handgun, but this was not related to the incident described by C, as that involved the alleged use of a shotgun in different circumstances. She also recalled the appellant sending his brothers out robbing and that if they did not do it "*they got killed for it*" and did it because they were "*terrified*" of him.

13. On cross-examination, G was challenged on her memory due to her young age and inconsistencies between her evidence and her statement, but she did not resile from her evidence. It was specifically put that *"[the appellant] was violent towards your brothers, but not to the extent that you're telling the jury*". She did not accept this.

14. J, the second oldest of the brothers in the family, also gave evidence. In response to a question about what the appellant had done to C, J replied that "*[h]e would physically abuse him all the time. He would…most days anyway, just random hitting him, hitting him with things, objects. There was sexual abuse as well.*" He specifically recalled that the appellant had thrown darts at C, and that there were guns and made up weapons, such as "*batons with nails in them.*" He confirmed the evidence regarding being made to go out robbing by the appellant. He recalled an incident with a gun, but again this was not the same incident as the one charged in the indictment.

15. In respect of the sexual abuse, he gave evidence of witnessing one such event where he had walked in on his brothers; he witnessed the appellant at the top bunk with a "*blanket sort of over him*" and C "*popped his head out from under the blankets*" and he could see the appellant "*pulling his boxers and trousers up*".

16. On cross-examination, it was again put that the appellant accepted that there had been violence but just not to the extent that was being described in evidence. This was not accepted.

17. It was put to J that he had not witnessed any sexual assault, but this was not accepted by the witness.

The memorandum of interview

Admissibility

18. A single interview was held with the appellant. The admissibility of the memorandum of that interview dated the 22nd January, 2018 was challenged but the trial judge ruled it to be admissible. We will deal with the evidence that emerged in the course of that challenge when considering ground 2 below. For the purpose of dealing with ground 1, the application for a direction, it is necessary to have regard to the evidence heard by the jury. It should be noted that the memorandum of interview admitted before the jury, as is quite usual in a trial, did not fully reflect everything that was said in the course of the interview. The full contents of the interview were before the trial judge in the course of the *voir dire* on the issue of admissibility. We refer to the relevant contents of the full interview when addressing ground 2 below.

Contents of the memorandum (as given in evidence to the jury)

19. During the interview the appellant described a very dysfunctional family background, including by reference to violence and arson on the part of his father. He said his father had left the family home during the material time.

20. In the course of the interview, the appellant admitted:

a) "I'd give [my brothers] a box…. Stuff like that…But it would be nothing like what me da would do to me. That's where I got that from. …I clattered them. All me brothers, all different occasions" and that he had hit his brothers "over the years";

b) When asked if he physically abused and assaulted C, he accepted that he "did hit him... [t]hat was my way of keeping him under control. That was the way my father kept me under control";

c) He accepted that he had sent C out to rob and that sometimes he would "give him a clatter or two" if he returned empty-handed;

d) He said that he had beaten C for "five or six years for starters";

e) He accepted that G would have known that he hit C;

f) He denied that he had ever used any object;

g) He denied ever having a gun around his brothers.

21. In relation to the sexual assaults:

a) He initially denied any sexual abuse;

b) He claimed that he did not abuse him as "*[he has] women*" and later that he was in a relationship at the time;

c) He then accepted that he may have had oral sex with C, that it was possible. He then said that "*it could have been once or twice*";

d) When asked for details he stated "*He probably gave me a bit of [oral sex [… we were all doing it at the time…My cousins were at it, everyone was at it...I told you I done it once or twice. Everybody around me was doing it*";

e) He said that it had happened "*in the sitting room when no one was in*".

<u>*Sergeant F*</u>

22. Sergeant F was the member in charge of the station to which the appellant was taken after his arrest in relation to these offences. He gave evidence of the procedures followed. He said that "*[a]t 16.22, I removed the prisoner from the cell and brought him to an interview room where I read over and explained a new notice.*"

<u>*Sergeant K*</u>

23. Sergeant K was the investigating officer who had conducted the interview at 4.22pm and recorded it in memorandum form. He gave evidence that the appellant was attentive throughout the interview but was nodding off during the reading over of the notes at the conclusion of the interview. He said that when they thought he was nodding or non-attentive they asked him if he was listening. He answered the interviewers and Sergeant K said the appellant was still alert to what was going on.

24. In cross-examination he stated that he did not agree that older matters were harder to investigate. He confirmed that he had heard evidence from a colleague that earlier on the day of his arrest, the appellant had ingested what was thought to be a bag of heroin *i.e.* a street deal. He said that the appellant had accepted that he had ingested an item. He did not disagree with the suggestion that the appellant was nodding off in interview, but he said the appellant engaged on his own accord at some stage and that he and his colleague had interacted with him on two more occasions. He confirmed that the appellant's father was not arrested over allegations made in the statement by the appellant. He outlined the previous convictions of the appellant's father.

Dr. Mohammed Ghaffar

25. Dr. Ghaffar was an experienced medical doctor who was called to the Garda station to attend to the appellant. He assessed him when he arrived, prior to the interview, and found him fully *compos mentis*. He was orientated and his gait and speech were normal. He requested methadone, and the doctor contacted the appellant's pharmacy and dispensed him the recommended dose. He took blood pressure and pulse measurements. Under cross-examination he agreed that methadone was commonly given to heroin addicts and to terminally ill patients because it's a good potent analgesic. It was a strong medication.

Ground 1 – the trial judge erred in not acceding to an application at the conclusion of the prosecution evidence to direct an acquittal on all counts on the indictment

26. An application for a direction in respect of all counts on the indictment was made on behalf of the appellant. As there was no evidence to support counts 3-10 (the s. 4 rapes), the prosecution consented to the application in so far as those counts were concerned.

27. There is some degree of confusion about the extent to which the submissions of the appellant at trial related to the two counts of s. 4 rape. The prosecution makes the point that during the course of her submission at trial, counsel for the appellant conceded that there was evidence in respect of counts 1 and 2; although those counts are included under this ground of appeal. That confusion can be resolved in favour of the appellant, as the concession was limited to saying that while there was evidence in respect of those counts, nonetheless under the second limb of the *R v. Galbraith* [1981] 1 WLR 1039 test together with the decision in *The People (DPP) v. PO'C* [2006] IR 238, there was such vagueness that it was unsafe to leave these to the jury. We are satisfied therefore that this ground of appeal includes all offences on which the appellant was convicted.

28. On the other hand, there is reference in the submissions to this Court to the evidence in relation to the possession of a firearm. There was an acquittal by the jury in relation to that charge (although it is noted that the notice of appeal submitted by the appellant seeks to appeal against his conviction on it). The firearms conviction does not form part of this appeal.

29. In advancing this ground of appeal, the appellant relies on the *dicta* set out in *The People (DPP) v. PO'C* where Denham J. stated at para. 23:

> *"…This, of course, does not preclude the jurisdiction of the trial court in the course of the trial from addressing matters relating to delay which arise on the evidence. It is*

not inconceivable that evidence may be given during the course of the trial which would require the trial judge to exercise his jurisdiction to prevent the trial proceeding. When a judicial review has been heard and determined it does not exclude the continuing duty of a trial judge to ensure fair procedures and due process, including issues arising because of any delay. However, this jurisdiction is exercised in the course of a trial on the evidence given in the trial, on the evidence given at trial and not as a separate motion on specific evidence at the commencement of the trial."

30. The appellant places specific reliance on the Supreme Court in *The People (DPP) v. CC* [2019] IESC 94 which set out the proper approach to be adopted by a trial judge in assessing as to whether a trial is fair and just in light of the lapse of time complained of. On the issue of whether the accused had thereby been deprived of a realistic opportunity of an obviously useful line of defence, the Supreme Court said as follows at paras. 9.3 to 9.5:

> *"If the trial judge is satisfied that it has been established that there was a real prospect that the evidence concerned could have been tendered, next, he or she will be required to (d) assess the materiality of any such evidence. The materiality of that evidence will need to be considered in the light of the prosecution case as it evolved at the trial.*
>
> *In the light of all of those factors, the court must finally (e) reach an assessment as to whether the trial is fair. The assessment of whether the trial is fair involves a conscientious determination by the trial judge whether, on the basis of all of the materials before the court, it can be said that the test identified by Hardiman J. in S.B. has been met, being that the absence of the missing evidence has deprived the accused of a realistic opportunity of an obviously useful line of defence.*
>
> *Although not relevant on the facts of this case, it should also be noted that culpable prosecutorial failure or wrongdoing can be taken into account in assessing the degree of prejudice which renders a trial unfair. As noted earlier, no trial is perfect. However, the degree of departure from a theoretically perfect trial which will render the proceedings unfair can be less where it can be said that culpable action on the part of investigating or prosecuting authorities have contributed to the prejudice. A lesser departure from what might be considered to be a theoretically perfect trial will render the proceedings unfair if that departure is caused or significantly contributed to by culpable action on the part of investigating or prosecuting authorities. A greater degree of departure from the theoretically perfect trial will need to be demonstrated in cases where there is no such culpable activity."*

31. The defence at trial submitted that the evidence in support of the charges was vague in so far as the complainant said the matters complained of happened on unspecified dates between 2001 and 2006. It was said that notwithstanding the evidence of C stating that there were medical records available which would corroborate the injuries inflicted on him as a result of darts being thrown at him, no such medical records were produced.

32. The extent of the legal submissions before this Court were as follows:

> *"While the learned trial judge gave a reasoned ruling refusing the appellants application, it is submitted that in all of the circumstance of the case and in particular the very general nature of [the] evidence in support of each of [the counts] on the indictment he was incorrect in law in so doing."*

33. We have no hesitation in rejecting this ground. These were all matters which were quintessentially for the jury. As Edwards J. clarified in *The People (DPP) v. M* [2015] IECA 65 at para. 48:

> *"…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."*

34. There was nothing unfair about letting this matter to the jury. In respect of the two s. 4 rapes, there was the direct evidence of the C, the corroboration of one of them by J and the admissions by the appellant. Any vagueness was quintessentially a matter for the jury. The timeframe was quite focussed in respect of those matters.

35. In respect of the s. 3 assault counts, the fact that they were alleged to have been committed over a long period did not lead to any unfairness. There was ample corroboration of the evidence of C as to the general circumstances in which the s. 3 assaults were alleged to have occurred: the evidence of G and J outlining the general nature in which the appellant dominated and physically abused C. There were also the admissions of the appellant (both in interview and *de facto* through his counsel's approach to cross-examination). With regard to the specific evidence of the scars, this was corroborated by the evidence of G. In so far as the appellant relies upon the absence of the production of medical reports, it is difficult to understand the rationale behind this submission. It cannot be a submission that delay caused an absence of medical records because there was simply no evidence adduced to support the contention that medical records were sought by the defence and not produced (or that they did not actually exist). If anything, it was a weakness in the prosecution's evidence which was there to be exploited by the defence. Its absence did not *per se* render the trial so unfair as to be a ground for removing the counts from the jury.

36. We reject this ground of appeal.

Ground 2 – the trial judge erred in admitting into evidence the memorandum of interview of the accused

37. The objection to the admissibility of the memorandum of interview was made on the basis that the admissions were obtained by way of inducement to the appellant by the interviewing Gardaí. The applicable law as to inducements was not at issue at the trial. The following quote from *Charleton and McDermott, in Charleton and McDermott's Criminal*

Law and Evidence (2nd Edn., Bloomsbury Professional, 2020) is a succinct statement of how such a claim must be approached (at para. 3.33):

> *"the trial judge must be satisfied that a confession was a free and voluntary emanation of the accused's mind and not obtained from him by a threat or inducement or by oppressive questioning or through unfair circumstances. The burden of proof is on the prosecution to establish beyond reasonable doubt that a confession was not obtained in a manner which would render it inadmissible."*

38. The Court of Criminal Appeal in *The People (DPP) v. McCann* [1998] 4 IR 397 described an inducement in the following terms:

> *"As regards what constitutes an inducement, the test would appear to be (a) were the words used by the person or persons in authority, objectively viewed, capable of amounting to a threat or promise? (b) Did the accused understand them as such? (c) Was his confession in fact the result of the threat or promise?"*

Thus, there are two parts to the test: (a) was something said which amounted, objectively, to an inducement? If so, (b) did it act, subjectively, upon the mind of the accused person?

The voir dire

39. At the outset of the voir dire, counsel for the appellant outlined the basis for her challenge as follows: "*the admissions are the result of an inducement and the particular inducement being that my client would have remained in custody until his trial had he not answered the questions that the guards put to him.*" In other words, the alleged inducement was that the appellant would be released on bail if he co-operated with the Gardaí and answered their questions during interview.

40. In the course of the *voir dire*, the precise wording of the alleged inducement varied somewhat between the cross-examination of the Gardaí and the oral evidence of the appellant. The prosecution's defence to the challenge was that the words alleged to be spoken were not in fact said to the appellant. The prosecution did not make the case that, if the words were said, they would not amount objectively to a promise/inducement or that there was no evidence that he subjectively acted upon them. It was accepted by all that if words to the general effect were said to him by the Gardaí, they would amount objectively speaking to a promise and that, in the context of what the appellant was saying, he subjectively acted upon them. The key issue was therefore the factual one of whether words to that effect had been used at all.

41. An issue that caused some confusion as to its relevance in the *voir dire* was the physical (and perhaps mental) condition of the appellant. Counsel confirmed at the appeal that she had not made the argument, and was not submitting, that the appellant ought not to have been interviewed, but said that this was a factor that had to be taken into account in considering the issue of the inducement. She submitted that this was relevant to the subjective part of the test, in that he thought, as a result of his condition, that he would benefit from complying with the inducement.

42. At trial, the overall issue was correctly identified by the trial judge as one of fact, that is whether Sergeant K had actually made this inducement. The trial judge also identified, correctly, that the onus lay on the prosecution to establish beyond reasonable doubt that Sergeant K had not said these words. The trial judge's ruling however became the focus of this ground of appeal. Counsel for the appellant submitted that the trial judge had not taken into consideration any of the matters that the defence said supported the proposition that the inducement had been made. It was also submitted by the appellant that the trial judge had erred in finding that objective factors supported the evidence of the prosecution.

43. Counsel for the appellant accepted that, as her complaint primarily related to whether the reasons cited by the judge were sufficient to demonstrate that he had considered all proper matters, if successful on this ground then a retrial would have to be ordered where a trial judge could once again assess the evidence.

44. In ruling on admissibility, the trial judge had roundly rejected the evidence of the appellant who gave evidence in the *voir dire*.

The evidence

45. The video of the interview was shown to the trial judge and we have had an opportunity to view the video of interview also.

46. A number of witnesses gave evidence during the *voir dire*. The evidence demonstrated that, earlier on the day of his arrest for these offences, the appellant had been arrested by another Garda on the northside of Dublin. He was observed by that arresting Garda at 12.45pm in respect of drugs charges and she saw him swallow what appeared to be a street deal of diamorphine in a small knotted plastic bag. In the northside Garda station, the appellant told the member in charge that he was taking methadone and that he had taken six Tranex. Sergeant K was contacted by the arresting officer as he had posted an alert on PULSE about the appellant.

47. After the appellant was charged and released on station bail by the Gardaí of the northside Garda station, he was arrested by Sergeant K in relation to the present matters. None of the information about his drug use/misuse was passed on to Sergeant K. None of that information was therefore made available by Sergeant K to the custody Gardaí in the southside Garda station at which the interview took place.

48. Both the gaoler and the member in charge of the southside Garda station gave evidence confirming that the appellant had been dealt with in accordance with the custody regulations and that a custody record had been opened. It was noted in the custody record that there was no evidence of drugs and the appellant stated that he had no medical issues. The appellant also stated to the custody Gardaí that he had not taken any medication. Both of the custody Gardaí gave evidence that they had offered no inducements to the appellant to encourage him to make admissions. The appellant made no complaints to them. They were not aware of the earlier arrest. The member in charge was not asked if he had taken the appellant to the interview room, however he read his notes, which said "*prisoner*

removed from cell and brought to interview room, where I read over, explained and handed him a notice under reg. 5 (2)…" The appellant did not want to speak to a solicitor.

49. Sergeant K gave evidence that, having arrested the appellant, he arrived at the southside Garda station at 2.55pm. He said that the appellant was dealt with there in accordance with the regulations. He denied that he had made any promise or inducement to the appellant. He said that, in a situation concerning investigations into historic sexual abuse, a file had to be forwarded to the office of the DPP to seek a direction and there could be no question of a person being charged (and then bailed). He said that he did not know the appellant prior to the arrest and he was not aware if he knew of his bench warrant history on the 16th January, 2018, but he accepted that this history would be recorded on PULSE. He accepted that in his written statement he had said that he had brought the appellant to the interview room but that the custody record recorded that it was Sergeant F. He was not sure if he did or did not take the appellant to the interview room. However, he stated that the distance from the cells to the interview room was a number of meters only. When it was put to him that the appellant appeared to be nodding off in the interview, he confirmed that this happened only during the reading over of the memorandum. He said however that when he was asked a question during the reading over the appellant answered and that on one occasion the appellant had corrected something of his own volition.

50. Sergeant K denied when asked in cross-examination that he had said to the appellant "*that he would remain in custody were he not to answer questions that [he] put to him*". Sergeant K said that he was astonished when he heard what had been said by counsel at the beginning of the *voir dire*.

51. The appellant's counsel made an issue of that assertion of "astonishment" by Sergeant K. She did so by referring to the fact that the appellant has also been investigated *at a later date* in relation to alleged assaults against another brother, J. In the course of that subsequent investigation, the appellant was also interviewed by Sergeant K. That investigation led to a separate prosecution in respect of alleged offences against his brother, the outcome of which has no bearing on the issues in this appeal. What is of significance, however, is the following extract from a memorandum of interview between Sergeant K and the appellant taken during that subsequent investigation:

> "*Q. Explain how you forced your brother, J.*
>
> *A. Tell him going robbing, we need money. That is how we used to get money to go robbing. I was a bastard of a brother, far from being a rapist. I (sic) only reason I said what I did was because I thought I was going into custody, took a load of Zimmers in town, me partner and me brother just died.*"

In the course of the *voir dire* in the trial at issue in these proceedings, it was suggested to Sergeant K that the admissions were only made as the appellant was acting on foot of an inducement made by the Sergeant and that this comment in the later investigation was evidence of that. This was denied.

52. Dr. Ghaffar gave evidence that he had examined the appellant and certified him fit to be interviewed as set out above. He said that had the appellant told him that he had taken medication or other substances, he would have made a note of this, but he had no note. When he was asked if he would have done anything differently, had he been told that the appellant had taken Tranex, he stated that "*[w]e have to examine and decide*", commenting that, "*we can't completely rely on what we are being told.*"

53. Garda M was present for the arrest and the interview of the appellant. He confirmed that he had not heard Sergeant K make any inducement to the appellant and he, himself, did not make any such inducement. No complaint was made to him. When asked about the suggestion that the appellant had been nodding off, he said "*… he did seem to be nodding off but any time he was asked a question he responded immediately so if he wasn't responding to the questions I would have informed the member in charge…but he seemed to respond quickly to being asked any questions.*"

The unredacted transcript of interview

54. The parties agreed a transcript of the interview which reflected the contents of the interview as compiled from the video. This transcript, as is commonplace, contained more information than was to be found in the recorded memorandum. The appellant placed particular reliance on instances where the appellant referred to his desire/need to be released from custody to secure his clothes from the hostel where he was residing.

55. As the contents of this interview formed a large part of what was put forward as "corroborative evidence" of the claims of the appellant, it is necessary to discuss it in a certain amount of detail. The interview began with the appellant replying to a question about speaking to a solicitor to say he did not need one. He was told that if he wanted one he could ask and would get one of his choice. He confirmed he had received a meal and seen the doctor who gave him his methadone. He said he knew why he was there and when asked if he wanted to tell the Garda he said "*[n]o.*" He gave general information about the family and the violence of his father. At an early stage he said that he used to hit his brothers and "*make them be afraid of [him]…*". He said he never used an object to hit his brothers, but his father had used a belt buckle on him. He said he had never given C a scar.

56. When asked about sexually abusing C he denied it. He blamed his father on telling C what to say about him. He said he did not abuse C and said he "*[had] women*". He agreed that his sister G would have known he was hitting C. He agreed he had sent C to "*rob houses*".

57. The first time anything arose in the interview about release from custody came about as follows:

> *"Q. What happened if C didn't bring you back robbed stuff?*
>
> *A. I'd be doing it as well. It wasn't just C doing it. I was in on it as well. This is going back a long time. I was robbing stupid things.* ***Would you say I'd get out of here by 5 o'clock maybe. 5 o'clock.***

Q. ***What about 5 o'clock?***

A. ***Would you say I'd be out of here, I've to move me luggage.***

Q. ***We'll be out as soon as we are finished and hopefully that will be very soon. We have to do it right for your sake A.***

A. ***I know but when you get the rest of my family and other people…***

Q. ***Well if I keep going with the questions I can get it done quicker. If you want.***

A. ***Yeah.****"*

58. As the interview continued, the appellant was asked if he would beat C for not getting stolen goods and he said "*[s]ometimes I'd give him a clatter or two.*" He was asked about the arson attack committed by his father. He was then asked about the oral rapes again and he denied them vociferously. He then told the Garda that his father would do "*things under the covers*", but he said he did not want to talk about it. Parts of his mother's statement as to what C had said to her were put to him. He again denied what was said. He described in more detail the physical abuse of himself by his father. As he was discussing this abuse, he was told the Gardaí could help him and that it was his chance to tell them so they could help him. When he asked what help, the interviewer said that they could try and understand and then get him help if he thought he needed it. He was told that the Gardaí believed he was abused as well. The appellant said he was not "*getting into any of this*". **He refused a break for a cup of tea, saying "[j]ust go on with this."** He was exhorted to tell the whole story even it if was embarrassing.

59. The appellant was then closely questioned about the oral sex and numerous ways of describing it were put to him. He was then asked:

"Q. Where in the house did you get C to perform the oral sex?

A. I don't remember any of this, seriously. Maybe, I don't know. Maybe. What age would I have been in 2000?

Q. 16.

A. 16? I'm not saying I did it but if I did do it I was either out of my head or twisted drunk but I don't remember doing any of this."

He was asked further questions about his own sexual experiences. He was then asked as follows:

"Q. Is it possible that you got C to do it when you were drunk?

A. There is a possibility. This is going back a long time. There's a possibility there. And it's eating me up here now thinking about it. But I still can't believe that I could do such a thing."

He was later asked:

"*Q. Why did you get C to do it?*

A. I don't know. I don't remember any of this."

60. He was asked about his mother's statement about stitches the appellant had received as a result of his father's assault on him. The following question was then asked:

"*Q. So is she correct in what she says that she remembers you hitting your brother.*

A. She must be.

Q. Did you ever give C a cut on his eye?

A. Not that I remember of. Not that cut there now (points to under eye), he fell off a shed. He has a scar there on one of the sides. He fell off a shed."

61. The appellant was then asked:

"*Q. Did you enjoy the oral sex?*

A. What?

Q. Did you enjoy oral sex?

A. I don't remember oral sex."

The appellant went on to deny the description C gave as to how the oral sex ended.

62. When asked if he knew how difficult it was for C to come down and say what he said, the appellant repeated that C was forced to say it. He continued to deny the extent of the physical assaults. The appellant was then asked if he had oral sex with his brother. The transcript continues:

"*A. It's a possibility.*

Q. Yes or no. It's something you remember. It's a possibility that I went for a piss today. I possibly went three times I possibly went five times. I won't remember that. How many times or did he give you [oral sex]?

A. It's a possibility.

Q. How much of a possibility? Is it 99% or is it one %?

A. It's not five or six years or anything.

Q. Right take that away. Take away the six years.

A. It could have been, I don't know, it could have been once or twice.

Q. Did it happen once or twice?

A. It could have.

Q. Could have. It did or it didn't.

*A. I was out of my head on e, drinking Jack Daniels, not giving a f*** about anything.*

*Q. Yes, but do you give a f*** now looking back that it wasn't right to do that.*

A. Of course I do."

63. He was then asked how he felt and gave graphic detail about what he felt like doing to himself. There was discussion about how important his own life was to himself and his family. The interview continued:

"*Q. Stop here A. You think what happened here in your life and what you can do for your brother. And do you know what the first thing you can do for your brother is either say what he is saying is true or say what he is saying is lies. Now, is what he is saying truth or is it lies?*

A. It's not all true obviously.

Q. Right, is some of it true?

A. There's bits and parts of it.

Q. Right. You tell me the bits what are true so that it will help him.

A. So it will help him?

Q. Yeah.

A. Like what?

Q. Listen to what I said to you here?

A. I was a kid.

*Q. That's totally understandable but we need to find out the truth. This is him saying: 'before I was never a young fella for losing the head. Because of all this abuse I'm totally f***ed up mentally. I was terrified coming in here today because I'm ashamed of all this'. Does he have a reason to be ashamed?*

A. Ashamed, this is right to be ashamed.

Q. But should he be ashamed? Did he do anything wrong?

A. No he did nothing wrong.

Q. Right so he shouldn't be ashamed so let's take the blame off him.

A. I haven't blamed him.

Q. Yeah but he blames himself. Is it his fault A?

A. No, it's not his fault.

Q. Right can I write some of this down.

A. Yeah.

Q. Because I don't want to have to ask you twice because it's not fair on you. Because you care about this don't you?

A. Obviously I care about it.

Q. So is what C says true?

A. What?

Q. Is what he says in that statement true?

A. Parts of it is true.

Q. Did C ever get sexually abused by you?

A. What do you mean?

Q. Was C a part of your sexual joy at any stage?

A. No. Not sexual joy no."

The appellant was asked two further questions including whether there had been oral sex with this brother:

*"A. There's a possibility. I don't know. You're going back a long time here. I was a f***ing child.*

Q. Should C feel ashamed?

A. No.

Q. Why?

A. Why should he feel ashamed. It's not his fault.

Q. No as you look back can you tell me what happened between you and C?

A. What?

Q. Can you tell me what happened between you and C?

A. What do you want?

Q. Can you tell me what happened between you and C? What did you do to him or what did he do to you sexually?

*A. What did he do? He probably gave me [oral sex]. You know it's a big gang of young fellows all f***ed up neighbourhood and that's what we were all doing it at the time. We were all kids.*

Q. Did this happen many times?

A. Once or twice.

Q. A all I want to do is help you and also help C.

A. My cousins were at it, everyone was at it. Everyone, my neighbours and all, everyone was at it.

Q. What do you mean they were all at it?

A. What you're telling me yeah, that's what they were all doing.

Q. It was normal for young lads to get their brothers to give them [oral sex]?

A. To get their brothers? They were all doing it to each other. Very strange it was completely disgusting.

Q. So was it normal to get your brother to give you [oral sex]?

A. Normal? No, it wasn't normal at all.

Q. What I'm asking you was it the done thing was it?

A. I told you I done it once or twice. Everybody around me was doing it."

The appellant denied that he had oral sex with anyone else or that he had given his brother a reward for engaging in it. The transcript continued:

"Q. Did you threaten him to do it?

A. Don't think so.

Q. Was he afraid of you?

A. I'd say so.

Q. Why?

A. I'd say he was afraid of me like I was afraid of me da but not as worse.

Q. You okay?

A. (Nods)"

64. The interview continued and then he was asked as follows:

"Q. What triggered you to do it to C?

A. What?

Q. Why did you do it originally?

A. I don't know. I was drunk and out of it. I don't know why I acted that way."

65. The appellant was then asked:

"Q. You alright? Want a drink of anything?

A. I need a cigarette.

Q. Ask the sergeant when we are finished.

Q. D says you got him to go into your bedroom in number [X] to [engage in oral sex], is this correct?

A. No.

Q. Where did it happen?

A. Downstairs in the sitting room when no one was in."

When the appellant was asked if his brother had consented to the oral sex he replied:

"A. I don't know, guard. My head's all over the place seriously."

The transcript continued:

"Q. C is six years your junior, so you know he was 10 or 11 at the time. Is it ok to do this to a child?

A. No.

Q. Did you know that he was under 18 years at the time?

A. Think so yeah."

The appellant was asked further questions about the age of his brother. At one point, he said "*I don't even remember all this. You know what I mean?*" The transcript continued:

"*Q. I'm just trying to understand why it was going on.*

A. I know.

Q. So did you do to make him show who was the man of the house?

*A. No. My da is the one that started all this. He's the one that f***ed my head up. I really have to pick all my clothes up.*

Q. Do you want to say anything before we finish this interview?

A. As far back as I can remember my da used to make me do things under the blankets.

Q. Will you go easy so I can get all of this perfectly right."

The appellant expanded about the family relations. He was then asked:

"*Q. Is there anything else you want to say there? If there is anything else you want to say I'll read it back to you and you say it ok? Do you want to tell me how you feel about it all?*

A. I feel disgusted with all this and I'm sorry about the feelings my brother C is going through.

Q. Anything else A?

A. I can't think of anything else.

Q. ***Well if you do later on don't hesitate to say it, we'll write it down as well.***

A. ***I just need to get out and get my clothes, seriously.***

Q. ***We're not holding you here unnecessarily. We need to get this and we need to try and help everybody ok so there's nobody making promises but we'll get you out as soon as we can but we still have to do the investigation properly and right. Fair enough?***

A. ***Yeah, what time is it now?***

Q. ***Six.***

A. ***My clothes are going to be gone by half seven. Gone, all me clothes.***

Q. ***That's your phone isn't it (phone rings [in evidence bag]). That's your phone make sure you get it back before you go.***

A. ***Who is it?***

Q. ***Not saved. You've some ring tone. Do you memorise your numbers?***

A. ***I have them saved on a place in my SIM card. How much longer do you think I'm going to be here?***

Q. ***We can't say. We have to get it done properly. Once we get it done properly, we'll do our best then after that. It's in your best interests that it's done properly as well. Isn't it?***

A. ***Yeah, my clothes are going to be thrown out.***

Q. ***We will do our best as we said to you. I'm going to read this back to you A now right?***

A. ***You don't need to read it back to me."***

66. The memorandum of interview was then read back to the appellant. He appeared to be dozing at times but entered into conversation when challenged.

67. The appellant gave evidence in the *voir dire*. He said that he had a drug addiction, that he had a number of previous convictions, was well used to being in a Garda station and knew the "*procedures and processes*". He said that he wanted to get out of the Garda station on the day because he had to collect his "*stuff*" by a certain time. He was in homeless accommodation at the time and would lose his clothes and personal belongings of sentimental value if he did not return to the hostel before it closed for the evening. When asked about the end of the video when he appeared to be nodding off, he said that "*clearly I wasn't in my right state of mind.*"

68. He claimed that he made the admissions regarding the sexual assaults "*[b]ecause I was told I was getting kept in custody for two and a half years to three years and my track record in court, that there's not a hope I was going to get out.*" This appears to be a reference to pre-trial detention as a result of bail being refused because of his warrant history. He said that Garda K told him this "*at the cells*."

69. Under cross-examination he said that "*Garda K said to me that if I didn't start talking that he was going to make sure that I didn't get out of court and I'll be held on remand for two and a half three years.*" Originally it appeared that he was saying that the inducement was told to him on the way to the interview as opposed to at the cells. He then reverted to it happening at the holding cells, continuing that "*I was high out of my head on drugs.*"

70. On further cross-examination about his denials of the sexual assaults in the interview, he said that, as he got closer to the time he was going to be kept in the interview, "*what in my head he was saying make admissions, like, you know what I mean. So, I was just -- I just gave him a little taste of it, just to get out of the garda station, to pick up the stuff that was sentimental to me at the time and still is to this day.*" When he was pushed further about why he did not make the admissions at the start of the interview if he had been told he would be released, he stated "*[w]ell, I'll tell you what happened, as it was getting close*

to the time that I had the deadline to pick up my stuff from the place getting demolished, because that's what happened to the building, I had a deadline to collect that stuff, if I didn't collect that stuff that stuff was getting put into a, what would you call it, a skip."

71. In addition to the evidence of the appellant on the issue, it was submitted by the appellant that the following matters supported the assertion that the eventual admissions to the rape offences were on foot of an inducement at a time when the appellant was under the influence of intoxicants:

    a) The evidence of Garda FK that the appellant had taken heroin on the day in question;

    b) The information contained in the custody record at the northside Garda station recording that the appellant had taken Tranex on the day in question;

    c) The evidence of Dr. Ghaffar to the effect that he had prescribed methadone to the appellant on the day in question;

    d) The fact that the appellant was in a reduced state of consciousness at time during the interview;

    e) The fact that prior to making admissions in relation to the sexual offences and having already made admissions in relation to the physical abuse charges, the applicant asked the interviewing guards "*[i]s that not good enough?*";

    f) The fact that it was apparent during the interview that the appellant had an expectation that he was going to be released in time to retrieve his belongings;

    g) The fact that Sergeant K's failure to note the appellant's repeated references to needing to get his belongings in the written memorandum of interview was more than a mere oversight and rather reflective of an earlier agreement between them;

    h) The reluctance of Sergeant K to accept in evidence that he brought the appellant to the interview room;

    i) The stated astonishment of Sergeant K at the charge that the admissions were made by the appellant on foot of an inducement, *i.e.* the statement that the first he had heard of it was when it was raised at trial notwithstanding that the appellant had said it to him on a subsequent occasion when he was being interviewed by the Sergeant.

72. The prosecution, in submitting that they had discharged their burden and onus of proof, relied upon the testimony of the Gardaí, the changing nature of what the appellant was saying about the inducement, and the place where it was alleged to have been said. The prosecution also relied upon the nature of the interview to say that "*it beggars belief*" that there was some sort of agreement between Sergeant K and the appellant beforehand. The contents of the interview did not "*add up*" to there being any agreement.

The trial judge's ruling

73. Having heard submissions, the trial judge ruled on the voir dire. He commenced by noting all the evidence he had heard. He then said:

> *"Now, it's really a factual matter rather than a legal matter. There's no dispute between the prosecution and defence what an inducement or threat is or what the principles are that are set out in DPP v. McCann, Irish Reports, reported at 1998, 4 IR. Now, before I deal with the central disputed evidence between Sergeant K and [the appellant], there's a couple of objective matters which the Court obviously feels has helped us resolve the conflict of evidence. First of all, it's quite clear, objectively, that in [un]challenged evidence that when historical sexual abuse is being investigated the file has to go to the Director of Public Prosecutions to decide if there are to be charges at all and, I mean, that is common sense. These have taken place a long time ago, they're difficult to investigate and there may or may not be prosecutions. So, the clear evidence from Sergeant F, who's the member in charge, and Sergeant K, is that there would be no situation of a charge being presented against [the appellant] that evening.*
>
> *The other matter, or the number apart from other matters, before I go to the direct conflict, is that Sergeant F's evidence was particularly clear that on that he explained to [the appellant] in ordinary language the nature of his detention and how long he could be detained for and his right to access a solicitor and repeated that, in fact, on two separate occasions and explained it in ordinary language to [the appellant] and [the appellant] has accepted in evidence that he was used to being in police stations. He had a difficult criminal record and a difficult upbringing and he – it's not that he was an innocent abroad in a garda station.*
>
> *The position is also that if you look at the interviews, now, there may be a situation where the Court is considering something that was said to someone or something where someone's position seems to alter quite substantially, but there was no break in this interview at all. It started from 4.22 and there was absolutely no break in it and the interview doesn't run like one, to me, where you could see that there was any situation where an inducement or a promise could be offered and the third thing in relation to it, or the fourth thing in general that I want to deal with is that, I mean, it would be very unusual where an investigation was starting out, when the subject of the investigation is detained and being questioned, that there would be any inducement or promise made or anything of that nature before an interview commences at all in the first place, you know. I mean, a member of An Garda Síochána conducting an interview cannot expect in advance what he's going to hear or not when certain questions are put and certainly [the appellant] dealt with a lot of different aspects throughout the interview and I don't disagree with the description by Sergeant K that it was a kind of a scattered interview with [the appellant].*
>
> *Now, the -- I mean, obviously sometimes the Court only has to -- in a conflict of evidence situation which obviously, you know, if there was any benefit of the doubt it was due to [the appellant] as sometimes the Court has only to deal with one sworn*

piece of evidence against the other but, in fact, there's objective evidence, in my view, available to the Court that, in my view, [the appellant] is not being truthful with the Court in relation to his allegation against Sergeant K. I just don't believe his evidence in that regard that Sergeant K either made a threat or promise that he would be kept in custody for two to two and a half years because of his bench warrant record and other matters.

Now, the other general issue which, I mean, hasn't been specifically relied on by the defence, but I think the prosecution should cover and that's his general condition. Now, that's a delicate issue where, and it's a difficult one for An Garda Síochána where these clearly were serious allegations of familial assault and sexual assault. [The appellant's] brother, C, had given a statement to Sergeant K, his sister, G, and the other, L, had also given a statement. Clearly there was a duty rested upon the Garda Síochána and a responsibility to get [the appellant's] version of events and there was an alert put out on PULSE. He wasn't easily contactable. And, you know, the run of the interviews, itself, in my view weren't unfair to, the questions put to [the appellant], weren't in any way unfair to him. Clearly there was some obvious evidence that, on the read over, his head was nodding over which is a matter of concern to the Court but, generally speaking, I mean, I think the gardaí were diligent in the way they dealt with the they summoned a doctor who examined [the appellant], who certified him fit to be interviewed. There was only one interview conducted and the doctor administered methadone to [the appellant] and I fully accept it's a difficult issue and, you know, perhaps, you know, the gardaí would have been wiser to call in the member in charge but, in my view, it didn't effect (sic) the development of the interview with [the appellant] and I'm satisfied to admit it before the jury. Now, I should say that obviously the issue of his condition is a matter that the jury are quite entitled to consider in considering the weight of the evidence as to the issues [the appellant] has raised before the Court in the absence of the jury."

The submissions on appeal

74. Counsel for the appellant closely critiqued the ruling of the trial judge. She identified three reasons which appeared objectively to the judge to support the fact that the appellant was not truthful in his evidence. These were the DPP's policy on charging, the appellant's previous familiarity with being investigated and the fact that this was a single interview. Counsel submitted that when one looked at these matters their "objective" character in aid of the prosecution position faded away. She submitted:

a) The reference to the DPP's policy on only charging after a "file to the DPP" was not something that her client knew about. It was possible for a Garda who would give an inducement to make admissions to lie to a suspect about what would happen. There was also a failure to take into account this appellant's history with bench warrants;

b) The reference to his criminal record was capable of being objectively relevant to either side of the case. From the defence perspective, his record showed that he was not used to being investigated for matters of sexual assault or violence;

c) The fact that there was no break in the interview did not support the prosecution case. Instead, counsel submitted, it supported what the appellant was saying; that the inducement had occurred at the very outset.

75. Counsel for the appellant submitted that a number of relevant factors supporting the appellant's case were not considered by the trial judge. These were:

a) The fact that he had made repeated references to getting out of the interview supported his contention that there was an expectation of release. He engaged with the Gardaí because he was told he would be in custody for a significant period of time. Counsel submitted that being told "*we'll be out as soon as we are finished…*" or being told nobody was "*making promises*" supported his version;

b) The reference to the subsequent interview with respect to allegations by his brother J indicated his belief that he was going into custody but also should have been considered in respect of the credibility of Sergeant K because he was present at that interview, yet claimed to be astonished by the claim of inducement, and then said he had no memory of this subsequent interview;

c) Counsel made references to certain of the contents of the interview; in particular the response by the appellant of "*[w]hat do you want*" when asked what happened between C and him. She said that this had to be assessed in the context of what the appellant alleged he had been told. She also referred to the concerns raised by the appellant at various stages about being held in custody and being able to obtain his clothes.

76. Counsel primarily submitted that the reasoning of the trial judge was inadequate; he had referred to matters he said objectively supported the prosecution and had not dealt with the points raised by the defence. On being questioned by this Court about whether the trial judge was entitled to assess the witness he had seen give evidence and reach his conclusion, counsel submitted that the trial judge specifically did so with regard to those "objective" matters he outlined. She said those issues were not as objective as the trial judge thought and that in particular he had not engaged with any of the points raised by the defence.

77. The prosecution, on the other hand, submitted that a review of the evidence does not support the contention that any inducement was made. For example:

a) The appellant was advised of his rights by the member in charge and accepts that he was aware of same;

b) He is a man who, by his own admission, had in excess of 100 previous convictions and was accustomed to procedures in Garda stations after arrest;

c) He was assessed as being fit for interview by an independent qualified medical doctor. The suggestion that the doctor would have found otherwise had he been told that the appellant had ingested intoxicants is not supported by the evidence. What the doctor

said was that this was a factor that would have also gone into the mix, not that it would have changed his view regarding fitness. The appellant chose not to tell either the member in charge or the doctor that he had ingested intoxicants earlier in the day. The doctor pointed out that the effect of intoxicants reduces over time;

d) None of the witnesses who interacted with the appellant before the interview noted any impairment by way of intoxication and the appellant himself told the member in charge that he had not taken any intoxicants and that he had no medical conditions;

e) He made no complaint to the member in charge or any other member on the day or before the admissibility was challenged in his trial;

f) He was told on a number of occasions by the interviewers that the interview would finish when it "*finished*" and that "*promises*" had been made – yet he did not refer to any purported inducement;

g) There was only one interview carried out, and the Gardaí could not have known what his attitude would have been in advance;

h) The statement "*[i]s that not good enough*", when reviewed in context, does not appear to be related to the quality of his admissions, but a reluctance to speak about sexual matters;

i) The nature and place of the purported inducement as alleged by the appellant differed to that put to Sergeant K and differed within his own evidence;

j) The trial judge had the opportunity to observe the demeanour of the relevant witnesses, to assess their credibility and also to assess their demeanour during the interview. It was open to the trial judge to make the finding he did in respect of credibility on the evidence;

k) The reference to the admissions during the subsequent interview (the "*only reason I said what I did was because I thought I was going into custody, took a load of Zimmers in town, me partner and me brother just died*") regarding J's allegations does not go as far as saying that there was any inducement made – it merely says that he thought he was going into custody, not that anyone had said to him that he would, unless he made admissions;

l) The last answer by the appellant regarding the purported inducement to the effect that he had "*a deadline to collect [his] stuff*" was the reason why he, of his own volition, dealt with the interview in the manner in which he did.

78. The prosecution submitted that the trial judge set out the basis on which he made his ruling – of particular note is that he found the evidence of the appellant not to be credible in all of the circumstances; having observed the demeanour of the witness and considered his evidence, including the inconsistencies within it, with what was put to Sergeant K and the other evidence called in the *voir dire*, that was a decision that was open to him on the

evidence. The prosecution submitted that the appellant's condition did not or could not lend support to the position that there was an inducement.

79. Counsel for the prosecution submitted that the defence was raising matters not raised at the trial, for example, the defence had not engaged with an analysis of the objective aspects of the evidence for either side. Counsel for the appellant took issue with that on the reply. We agree that matters had been raised by the appellant in submissions as to the contents of the memorandum concerning the appellant's references to getting out of custody and to his credibility based upon the subsequent interview. The implication of that for the credibility of Sergeant K was also raised.

Discussion and analysis

80. There is no doubt but that the trial judge correctly identified that the issue was a factual one for him to decide. He also correctly identified that the onus was on the prosecution to establish beyond reasonable doubt that there had been no inducement given to the appellant to make his confession. It is also clear that he viewed the video of the interview and heard the evidence *viva voce* of a number of witnesses including the appellant. There can be no doubt that the final determination that the trial judge made was one he was clearly entitled to make. The focus of the appellant however is on the manner in which he approached the task of deciding that factual issue. This arises because of the reasons the trial judge gave for his conclusion, and, in particular, what the appellant submitted was his failure to address those matters which had been raised on his behalf and which the appellant had submitted supported him in his assertion that there had been an inducement.

81. It is well established that a judge's ruling in a criminal trial does not have to be a discursive one. It must however be one in which each side knows why they have won or why they have lost and that an appellate or reviewing court will know the basis upon which the decision was made (see *People (DPP) v. Campion* [2015] IECA 274). The Supreme Court stated in *O'Mahony v. Ballagh and the DPP* [2001] IESC 99 that:

> *"every trial judge hearing a case at first instance must give a ruling in such a fashion as to indicate which of the arguments he was accepting and which he was rejecting and, as far as was practicable in the time available, his reasons for so doing".*

This was quoted approvingly by Hardiman J. in *Oates v. Browne* [2016] IESC 7.

82. In *Oates v. Browne* Hardiman J. also referred approvingly to the "*lively jurisprudence*" from the UK and European Courts in this area, quoting from a UK decision in which it was held that "*a decision maker must address the substantive points made on behalf of the person seeking review.*" Although both of the Supreme Court cases referred to above concerned District Court conviction cases which were judicially reviewed, we are satisfied that the same principles apply in a ruling on admissibility in a criminal trial. These rulings do not have to be extensive, nor must they necessarily cover every point raised; nonetheless the substantive points must be addressed in a manner which lets the parties know that the trial judge has considered the defence case and also the basis on which the decision is being made.

83. It is against that legal backdrop that the decision of the trial judge must be assessed.

84. It is important to return to the main issue as to whether or not the points raised by the appellant in the *voir dire* were dealt with by the trial judge, and also how they were dealt with by him. A major component of the submissions of counsel for the appellant at trial was to "*ask the Court to take account of [whether there was] a clear expectation as he was answering questions that he would be released [relying] on the repeated references to collecting clothes in relation to that*". She relied on the contents of the interview and submitted that it reflected the position that the appellant was giving the guards what they wanted in order to get out of custody. She submitted that when one read the interview as a whole, it reflected that position. She also referred to an assessment of his credibility by reference to the subsequent interview and his comment there about seeking to get out of custody.

85. There is nothing in the trial judge's ruling that expressly addressed any of the above points. The trial judge's focus on the interview itself was to refer to it as being a single interview. He did so by explaining in essence that it was more usual for a court to be dealing with a challenge to admissions where there was a break in an interview during which it was alleged that something had been said to an accused. He observed, correctly, that there was no such break. He also observed that it would be very unusual that such an inducement would be made at the beginning of an investigation *i.e.* before the Gardaí could know what approach the suspect might take. The defence challenged the entitlement of the trial judge to make that latter comment, but it seems to us that it was within an appropriate realm of judicial experience, particularly such an experienced and conscientious judge as this trial judge, which legitimately may be applied to this type of situation. That is not to say that such a view would be determinative, but it was an observation he was entitled to make. He also referred to the interview as a kind of scattered interview.

86. The trial judge then relied on those "objective" matters as supporting the view that the defendant was not being truthful with the Court. He also referred to the objective fact of the DPP's practice in charging as evidence to say this was supportive of Sergeant K. While arguably that is so, we consider that it is also arguable that such evidence does not resolve the issue of credibility only in favour of the prosecution. Arguably a witness who would be so unscrupulous as to induce a suspect into confessing could also falsely pretend that he would in fact be charged contrary to any such policy. Moreover, there was no evidence that this accused knew of that policy as there was no evidence that he had any previous convictions in relation to sexual offending or other means of obtaining that knowledge. The central feature of the defence case at trial, which was that the appellant repeatedly asked during the interview when he would be finished so that he could go and collect his belongings and that this supported an inference that he had been promised he would be released after co-operating with the Gardaí, was never addressed at any point by the trial judge. After the trial judge said that there was objective evidence to show the appellant was not being truthful, he went on to say he disbelieved the appellant. The trial judge did not comment at any point on the subsequent interview and its effect or lack of effect on the credibility of either Sergeant K or the appellant.

87. It is also true to say that the trial judge did not deal with the contents of the interview except to say that it ran as a kind of scattered interview. It appears to us that this comment was related to his view that the interview was a single interview without a break, which was the first interview in the investigation, and that it ranged back and forth over topics. In those circumstances the trial judge was making the comment that it was not a scenario in which an inducement was likely to have been offered prior to the interview. As we say, he was entitled to that view, but it could not be determinative.

88. Can it be said from the reasons given that it appeared that the trial judge sufficiently took into account the issues raised by the accused and gave sufficient explanation as to why, or on what basis, he was rejecting his points? Unfortunately, from the foregoing, it cannot be stated that expressly or implicitly he was so taking them into account. The matters to which he pointed were all viewed by him as favourable to the prosecution, a position that may or may not be correct, but at no point did he address directly the matters which the appellant said supported his view. In short, the trial judge did not engage with those aspects of the case at all to either accept or reject them. Instead he proceeded on the basis that the "*objective*" evidence all went one way without apparently considering the "objective" evidence relied upon by the defence.

89. As we said above, there is no doubt that the trial judge would have been entitled to reach a view beyond a reasonable doubt that no inducement had ever been made to the appellant. He was however required to explain his reasons and in doing so to engage with the substantive points of the appellant. We view the fact that the appellant raised the issue of the time of his release a number of times during interview and the fact that he alleged in a subsequent interview on a later date that he had only made admissions because he wanted to get out of custody were, in the circumstances of this case, matters of substance which required to be addressed in a ruling by the trial judge. The fact that the trial judge did not do so raises a dilemma for this Court. Is this Court entitled to enter into its own determination of whether the inducement was or was not made to the appellant?

90. It is certainly possible, from the vantage point of an appellate court, to make comments of an objective nature about the evidence. The trial judge's observations on the timing of the inducement *i.e.* before the first interview, are of some relevance to a consideration of the evidence. There are certain matters within the interview that could lean towards the view that there was no inducement; for example, the slow and roundabout path to making the admissions may support the view that they were not made as a result of an inducement but arose from the questioning of the Gardaí. Counsel's reliance on the appellant's question of "*[w]hat do you want?*" during the interview does not necessarily have the startling implications urged upon us but may well be a question clarifying what precisely the Gardaí wanted him to address in their question. Conversely, we do not think that the reference to the DPP's policy on charging can reach the level of an "*objective*" feature supporting the testimony of Sergeant K.

91. There are however, certain matters where it is not so straightforward to reach a concrete conclusion in the absence of making a judgment on the credibility of the witnesses at trial.

Examples of these are the references at certain times by the appellant in the interview querying when the interview would finish and stating that he wanted to be out in time to collect clothing. That could support the view that he knew he was getting out, but it may not. The subsequent interview which took place at the later date in relation to allegations made by another brother is also potentially equivocal; it could explain his own internal rationale for making admissions *i.e.* that he was under his own time pressure and not under an inducement, or it could reference back to a promise of release upon co-operation. These matters, which we view as being "substantive points" which were raised by the defence at trial, have to be considered in the context of the evidence as a whole in the assessment of the credibility of the appellant and the relevant Garda interviewers. Furthermore, what, if any, effect that interview has on the credibility of Sergeant K may well be marginal, but it is difficult to decide this without having heard the evidence.

92. We have concluded that, as the points raised by the defence, which were not addressed explicitly by an otherwise deeply conscientious trial judge in his ruling, are matters which in a material sense concern the credibility of the central witnesses in the *voir dire*, it is not appropriate or proper for this Court to reach a conclusion as to whether the admissions were the result of an inducement.

93. The admissibility of the memorandum of interview can only be assessed in the context of any further trial that may take place on these charges. We must therefore allow the appeal on this ground while emphasising that the error in admitting the memorandum of interview into evidence was the trial judge's lack of engagement with the substantive points of the defence case in giving his reasons for so ruling.

Ground 3 – the trial judge erred in law and in fact in failing to accede to the jury's request to re-hear the closing speech of defence counsel

94. Although we have decided to allow the appeal on the basis of upholding ground 2, we consider it valuable to deal with the final ground that was advanced before us.

95. In the course of jury deliberations, the jury sent ten questions (or requests) to the trial judge. Those were answered by the trial judge to the extent that he could answer them; some concerned requests to see or hear things to which they were not entitled like the Book of Evidence. A further request was made thereafter that the defence closing speech be read over to the jury.

96. The trial judge heard submissions from the defence and prosecution. He was told by both counsel that there appeared to be no precedent for the request to read over the closing speech to the jury. The DPP adopted the approach that if the Court decided it was appropriate to read the total speech of defence counsel, then, for balance, the speech of prosecution counsel should be read. Counsel for the DPP outlined however that there might be problems in doing that as the trial judge had corrected aspects of the law in his charge. Counsel for the DPP pointed out that the trial judge had also dealt with certain aspects raised by the defence in a particular way also.

97. Counsel for the appellant began her submission by saying "*[Y]es, Judge, ultimately it is a matter for the Court.*" She went on to submit that the Court had said to the jury that if

they had any requests, the Court would facilitate them, and that as the request was to read her speech, then that should be done. She objected to the prosecution speech being read.

98. The trial judge ruled against reading the defence speech to the jury. He said he had reflected on it overnight and he had "*no doubt it would be inappropriate to do so.*" He thought *"that would lead to terrible precedent and the juries have to operate within the bounds of the evidence that they hear, that's what the charge says to them…*". The trial judge told the jury the following:

> *"I obviously gave the opportunity of counsel to address me on it, but also, I've reflected on it myself overnight and it wouldn't be appropriate for me to read out the defence counsel's speech to the jury. It's not evidence and the appropriate course that the Court should take in relation to a jury is that any matter of evidence in the trial, the direct evidence, cross examination and the exhibits, that if there's any of that matter that the jury require to have dealt with again, the Court has a duty to deal with it. But I don't think it's appropriate to read out the counsel's speeches or for that matter, the judge's charge, unless there is some issue of dispute in relation to the law or other matter.*
>
> *Now, having said that, if there's any issue in the evidence that is causing you any concern that you require clarification, I have no difficulty dealing with that in relation to the evidence of all the witnesses and the cross examination*."

99. In submitting that the failure to accede to the request of the jury was an error, counsel for the appellant characterised this as a policy decision by the judge *i.e.* that he would set a "*terrible precedent*". The appellant's concern was that there was no basis in law for this approach. If there had been a concern about balance, the Court could have reminded the jury of the speech for the prosecution. It was also submitted by the appellant that the trial judge had a duty to enquire, in a general way, as to why the jury wanted it and to try to facilitate them.

100. Counsel referred to s. 12 of the Criminal Procedure Act, 2021 (which has not been commenced) in submitting that there can be no reason in principle why this material cannot be furnished. Counsel also relied upon the decision of the Privy Council House of Lords in *Berry v. R* [1992] 2 AC 364 in support of the proposition that the jury were entitled to the judge's assistance and that the failure to ascertain what the jury's problem was and to give help was an error in law.

101. We are satisfied that this is not a valid ground of appeal. The appellant's main complaint is that this was a policy decision and as such was arbitrary and unfair to her client. We consider that this submission does not take into account the longstanding procedures under which jury trials have been conducted and, most importantly, the actual approach of the trial judge in this case. In the first place, it is undoubtedly the case that, as a matter of practice, counsels' speeches are not given in transcript form to the jury nor are they reread to a jury. That is longstanding and comes from the indisputable proposition that such speeches are not evidence. Indeed, it is only in the last few decades that counsels'

speeches have routinely formed part of the transcript (see *The People (DPP) v. Maples* (Unreported, Court of Appeal, delivered *ex tempore* by Egan J. on the 30th March, 1992) which refers to a specific request being made to transcribe counsel's speech). The speeches are not to be taken by the jury as a statement of law; that is the purpose of the judge's charge. The speeches amount to advocacy on behalf of the prosecution and the defence.

102. We do note that there has been some statutory encroachment into what may be provided to the jury by way of transcript. The Criminal Justice (Theft and Fraud Offences) Act 2001 provides at s. 57 (commenced on the 1st August, 2011) that *inter alia* transcripts of the opening and closing speeches of counsel may be provided to the jury. That provision only applies to the trial of offences under the Act. It is not difficult to see that such a provision may assist in trials that are particularly complex. The arguments of prosecution and defence counsel may be easier to follow by seeing them in written form. That is a specific exception to what appears to be the general practice, potentially amounting to a rule, that those speeches should not be so provided in transcript form at least. Providing a transcript and reading from a transcript may be slightly different, but we do not think that the difference is relevant to what is the longstanding principle: the speeches are not generally repeated to the jury. We do accept however that practice, procedure and even a rule of law, must accommodate the protection of constitutional rights and therefore ensure that the trial is one in due course of law; a trial must be fair.

103. It cannot be said however that the ruling here was unfair. Merely because the jury asked for information did not create an entitlement to it; nor did the fact that the judge had told them their requests would be facilitated. As demonstrated above, their request to see the Book of Evidence was not facilitated nor could it have been. The judge was obliged to ensure there was a fair trial. The longstanding practice ought not to be set aside unless not to do so would create an unfairness. It has to be recalled that this was not a complex trial. It involved no documentary evidence (apart from the memorandum of interview). It was relatively short in terms of the number of days at hearing.

104. The judge here was conscious of fairness in his remarks to the jury. He told them he would facilitate them if there was any issue of evidence or law that they required to be dealt with again. He even repeated that he would assist them with any matter of evidence.

105. The case of *Berry v. R*, relied upon by the appellant, is not a relevant authority for what is at issue in this case. The jury in that case had returned to court and informed the judge that they had a problem. The judge ascertained that their problem related to evidence and not to law. He did not enquire precisely what the problem was but said that the facts were for them as they had seen all the witnesses in the case and they had to assess them. He gave a brief and accurate summary of the factual contest, adverted again to the burden of proof and reminded the jury that they were the sole judges of the facts. The Privy Council held that no one knew whether the problem was resolved because no one knew what the problem was.

106. The Privy Council held:

> *"The jury are entitled at any stage to the judge's help on the facts as well as on the law. To withhold that assistance constitutes an irregularity which may be material depending on the circumstances, since, if the jury return a 'Guilty' verdict, one cannot tell whether some misconception or irrelevance has played a part. If the judge fears that the foreman may unwittingly say something harmful, he should obtain the query from him in writing, read it, let counsel see it and then give openly such direction as he sees fit. If he has decided not to read out the query as it was written, he must ensure that it becomes part of the record. Failure to clear up a problem which is or may be legal will usually be fatal, unless the facts admit of only one answer, because it will mean that the jury may not have understood their legal duty. The effect of failure to resolve a factual problem will vary with the circumstance, but their Lordships need no decide how in this case they would have viewed such failure, seen in isolation*."

107. The Privy Council did not in *Berry v. R* outline a bright line test; withholding of assistance may constitute an irregularity which may be material depending on the circumstances. Even if one accepts that statement of the law, there is nothing here to demonstrate materiality. In the present case, the request was for the defence speech; a piece of advocacy that practice and procedure have not permitted to be repeated to the jury. The jury were reassured, however, that if there was any difficulty with the law or with the evidence, they could request that. The jury chose not to do so. It is also of significance that there was no requisition on the judge's recharge to the jury on this issue and that would suggest that at the trial-experienced counsel viewed the approach of the trial judge to what had occurred as appropriate. There was no suggestion that he should have a) made any further enquiry of the jury or b) told them they could specifically draw to his attention any particular issue they required to be clarified.

108. It is important to bear in mind that in a jury trial the jury must make its determination on the evidence and on the law. There was no suggestion here that the jury were given improper or inadequate information on either the evidence or the law. The jury were specifically told by the judge that if they sought further information on "*any issue in the evidence that is causing [the jury] any concern that [the jury] require clarification, [he had] no difficulty dealing with that in relation to the evidence of all the witnesses and the cross-examination.*" The appeal must bear a relationship to the trial. In all the circumstances, where the jury were fully and properly instructed, and there was never any further requisition of the sort now contended for, we are satisfied any alleged failure of the trial judge to enquire further of the jury in these circumstances, did not produce any material risk that there has been an unfair trial.

109. We reject this ground of appeal.

Conclusion

110. We have rejected ground 1 and ground 3 of the appellant's notice of appeal. In relation to ground 2 we allow the appeal on the basis that the trial judge erred in admitting the

memorandum of interview while emphasising that the error in admitting the memorandum of interview into evidence was the trial judge's lack of engagement with the substantive points of the defence case in giving his reasons for so ruling. The admissibility of that interview may be determined afresh in any new trial.

111. We will hear counsel for the appellant on whether there is any reason why we should not remit this case for retrial.