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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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CRIMINAL APPEAL (NORTHERN IRELAND) ACT 1980

THE KING

v

GERARD McKENNA

Applicant

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Mr Barra McGrory KC with Mr Michael Boyd (instructed by McIvor Farrell & Co Solicitors) for the Applicant
Mr Charles MacCreanor KC with Ms Nicola Auret (instructed by the Public Prosecution Service) for the Respondent

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Before: Keegan LCJ, Treacy LJ and McBride J

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KEEGAN LCJ (*delivering the judgment of the court*)

The complainant in this case is entitled to automatic lifetime anonymity in respect of these matters by virtue of section 1 of the Sexual Offences (Amendment) Act 1992.

Introduction

[1] This is an appeal from a conviction of 16 June 2021 when after a trial before His Honour Judge Lynch KC ("the trial judge") the applicant was convicted by a jury of the following offences against the complainant. (He was also convicted of offences against a second complainant):

Count 1 Sexual assault of a child under 13 by penetration, contrary to Article 13 of the Sexual Offences (Northern Ireland) Order 2008.

Count 2 Rape of a child under 13, contrary to Article 12(1) of the Sexual Offences (Northern Ireland) Order 2008.

Count 3 Sexual touching by an adult of a person under 16 years, contrary to Article 16(1) of the Sexual Offences (Northern Ireland) Order 2008.

Count 4 Offering to supply a Class A drug, namely cocaine, contrary to section 4(3)(a) of the Misuse of Drugs Act 1971.

Count 9 Taking and removing a child without lawful authority or reasonable excuse, from lawful control, contrary to Article 4 of the Child Abduction (Northern Ireland) Order 1985.

Count 10 Taking and removing a child without lawful authority or reasonable excuse, from lawful control, contrary to Article 4 of the Child Abduction (Northern Ireland) Order 1985.

[2] The applicant was thereafter sentenced to a period of nine years' imprisonment and three years extended sentence along with ancillary orders. The sentence is the subject of a reference by the Director of Public Prosecutions which is stayed pending this appeal. The co-accused pleaded guilty to similar offences and was sentenced to six and a half years' imprisonment. His case is also subject to a reference.

[3] Leave to appeal was refused by the single judge on 24 November 2022. The appeal is pursued on one core ground as to the admission of evidence comprised in a statement dated 14 May 2021 which supplemented the complainant's Achieving Best Evidence ("ABE") interview. There are two limbs to this appeal point which are framed as follows by the applicant:

(i) The trial judge erred in law by failing to exclude evidence in relation to count 1 which was improperly obtained. Had this been done by the trial judge there would have been no evidence relating to that count upon which a jury properly directed could convict the accused.

(ii) Furthermore, and, having regard to the manner in which this evidence was obtained by the police, the judge erred in refusing to stay the remainder of the case against the accused as an abuse of process of the court, so tainted was the remainder of the evidence by the manner in which the evidence on count 1 was obtained.

[4] Accordingly, this appeal breaks down into consideration of two issues regarding (i) exclusion of evidence and (ii) abuse of process.

Factual Background

[5] The charges arise from events of 23 December 2019. On that date the applicant and his co-accused attended at a children's home ("the home"). At the

time the applicant was 27, the complainant was 12 years of age. The co-accused was 23, and the second complainant was 15. When the two men arrived at the home, they became acquainted with the complainant and the second complainant. The evidence points to the fact that the applicant arrived at the home in the company of his co-accused at about 2:40pm. The co-accused is a former resident of the home.

[6] Having arrived at the home the two men were given a cup of coffee by one of the staff members who engaged with them for a short while and then encouraged them to move on. She overheard both males conversing with residents of the home and picked up from the conversation that the applicant may have known the brother of one of the residents who is the second complainant in this case.

[7] In or around this time the complainant, returned from a shopping trip with one of the other care workers and left with the two males and the other complainant despite concerns about this being expressed by staff and a warning issued to the men concerning the ages of these girls as they were at the time respectively 12 and 15 years (although staff indicated that she was 14). By contrast the applicant and the co-accused were grown men. It is noted in the papers that the staff at the home were concerned about the presentation of the men and had concerns as to why they were at the children's home. It is noted that a staff member tried to call the girls back when they decided to leave with these men and said to the co-accused, "they can't go with you, she is only 12 and she is 14, please don't take them away."

[8] The police were alerted. As a result, the girls were ultimately recovered after being located by police in a wooded area near the river and the towpath. Police formed the view that the two young girls and the two adult men were intoxicated. The evidence discloses that a Constable Jenkins confirmed the identity of the two men and asked the applicant why he was hanging around with girls aged 12 and 14. He responded that he did not know them and that they had just tagged along. He also is reported to have said something to the effect of knowing that it would be "statutory rape."

[9] In any event police officers took the two girls back to the staff member and advised the two men to go home stating that the girls were 12 and 14 and that they should stay away. The males walked off. Around 4:30pm the two complainants returned to the home. However, the complainants immediately left again as they appeared to be angry at being brought back to the home. Once they got out of the van that had brought them back, they ran off. Again, staff followed them in their vehicle and saw the two men and the second complainant nearby. The staff member shouted again but was ignored and so called the police for a second time.

[10] After this second report the complainant was located by the deputy manager of the home who was involved in the search. The evidence discloses that he went down to the weir where he found the complainant with the applicant. His evidence was that he could see that they were lying on the grass and the applicant was lying on his side and had one leg over the top of the complainant. As he approached, the

applicant got up and walked towards him and was aggressive and swearing. The applicant was again told that the complainant was only 12 years old and he could not be with her. The applicant told the member of staff to "fuck off" and that he was doing nothing wrong. The applicant was getting angry at this stage with the manager who had tried to reason with the complainant. She was not receptive to moving away. The staff member therefore decided to get the assistance of police.

[11] The police then located the complainant around 6pm. The staff member picked up the complainant having been alerted to her whereabouts by police and drove her back to the home. At this stage the staff member reported that the complainant seemed quiet and withdrawn. She commented that she had been coming home as she did not want to be with him anymore.

[12] A short time later the complainant made an allegation to care home staff that she had been the victim of sexual assaults earlier that day and police were contacted. The first report is to Michelle McKenna, another member of staff, who after the complainant returned at 6:30pm is reported to have come into the living room where she was with another resident. She described the complainant looked upset but was not crying and then disappeared with the other resident. Ms McKenna went to check on her soon after that and after initial reluctance the complainant disclosed to her what happened. Ms McKenna subsequently submitted a statement of this attendance.

[13] In summary, the complainant said that both men had sex with her and had "fingered her." She referred to one pushing her head down trying to get her to suck his penis. She disclosed that she had been saying no and wanted them to stop. As a result of this the police were contacted. In this conversation the complainant who was visibly upset uses the terms "they fucked me" and "they fingered me."

[14] The police were notified of the complaint. This resulted in a second occasion when sexual abuse was alleged. This time it was by the complainant to Constable Brody Adair who spoke to the complainant at about 7:30pm. This interview took place on body worn video. During the interview the complainant identified one of the boys as Paul and refers to the applicant as the other boy. She referred to the other boy "fucking her and fingering her."

[15] The complainant was examined by Dr Diana Choo at the Rowan Centre in the early hours of 24 December 2019. It was reported to her by DC Smyth, the investigating officer, that the complainant had been assaulted on three occasions the previous day, twice by Paul and once by another male who is ultimately this applicant. This assault was said to have occurred on the grass by the riverbank and to have involved vaginal penetration without a condom. On examination some bruising was found on the upper thigh area, of a nature that was not determinative, one way or another of the allegations of sexual assault. No vaginal injuries were found but Dr Choo remarked that this was not determinative of the allegations of sexual assault either. Vaginal DNA swabs were taken. DNA analysis of swabs

taken from the applicant and the co-accused were subsequently analysed. Whilst a forensic link was found in relation to the co-accused, no forensic link was established by virtue of DNA evidence with this applicant.

[16] Thereafter, the complainant undertook an ABE interview on 30 December 2019. In her ABE interview she explained that she had arrived back at the home after Christmas shopping and she saw the applicant and another male. She said that she had not met them before that evening. She said that one of them had said to her friend, the other complainant, to come with them and then she decided to go with the group to the Lagan. They went to a garage on the way to get 7Up to mix with vodka and they started drinking vodka at the towpath. The ABE account continues that the complainant was left with Paul, the co-accused, and he started to finger her (count 5). She confirmed this was digital penetration and it happened for a short time and stopped when her friend, the other complainant, came to join her. She described the attendance of police and two members of staff from the home in a unit car and how she was taken back. However, she also described that she ran back to the Lagan and met up with the two men again having been returned to the home. She said members of staff pursued them and they tried to evade the members of staff. She said that when one member of staff, the Deputy Manager, approached the applicant said to him to "fuck off" when he said that the complainant was only 12. She said that when the manager left the applicant started to get on top of her and pulled her trousers down and her top up. He was licking her chest and stomach. She confirmed he had penile-vaginal sex with her while she was lying on the ground. She did not recall him saying anything but said they probably had sex for five minutes but "it felt like forever." It stopped when they heard the other two coming towards them.

[17] There is a further stage to the events in that the four met up again and went into a garden. At this stage the complainant said the same thing happened with Paul but he was kissing her and holding her hand. She said that he fingered her (count 6) and then he said to her to suck his dick. She said she did "suck his dick" and he held her head to facilitate this (count 7). Reference is made to how they tried to have sex (count 8). This ended whenever the applicant and other complainant came back, then they left the garden. Reference is then made to what the complainant said about Paul and sexual assaults on her. She said she had also said no to the applicant but, again, felt that she had to do it. She said she had consumed two cups of vodka and the mixer. She said that the applicant looked "off his face" and was offering them yellows and cocaine (count 4) and that neither male used a condom.

[18] At the end of the ABE interview the police officer recapped what the complainant told her in relation to both the applicant and the co-accused. This included the allegations made in relation to Paul, that he made her perform oral sex and that he had sex with her. The complainant then went over the allegation that the applicant (Gerard) had sex with her and was licking around her boobs and so forth.

[19] At the conclusion of the ABE the complainant is specifically asked if there were any other sexual things with Gerard and she reports some kissing. She is asked again if there were any other things with Gerard and she replies "no." In addition, the complainant is asked if there is anything else she wants to say or to tell the police and she says "no." Finally, she is told that if there is anything else she thinks of when she gets home, she can mention it to her social worker and another interview can be arranged.

[20] It is common case that the ABE interview does not specifically refer to the applicant having engaged in digital penetration of the complainant. One part of the transcript of interview which is as close as it gets reads as follows:

> "Q. And youse went into the garden and then, em, Paul started to finger you again, and then, em, you said that he then made you suck his willie, and you were saying no to all of it, and then you said that he had sex with you.
>
> A. Yeah, Gerard did too."

The applicant's interviews

[21] The applicant was interviewed on 24 December 2019 in the presence of his solicitor. He was asked to account for his movements the day before. In reply he referred to purchasing a bottle of vodka and being "completely hammered" with the co-accused. He said that they were on a secluded path. When there he said that they were approached by two girls, and they asked to have a few glasses with them and so they all started to drink together. He said that he could not get rid of one of the girls who took the train to Belfast with him. He said he had kissed this girl who is the other complainant, but nothing else sexual had occurred. He said if there had been it would have been strictly consensual. He said that the other complainant had told him she was 17 or 18. He could not remember the complainant in this case's name and said she looked about 18 years old. He denied knowing her name. He denied being involved in rape stating that "he had his reputation to live up to."

[22] The applicant described the interaction with the complainant and her friend in the following terms; "these girls were two whores that were standing with us, begging us for drink, follow, followed me the whole way to Belfast on a train with no money, by the way didn't have a penny, expected me to pay for her train, she was just like, that's what's the word … a fucking vulture that was hounding off me cause she … she must have seen the expensive Grey Goose vodka and thought I was rich."

[23] During interview the applicant denied all offences and he maintains that position. In the course of his interview, he also made some further derogatory comments about the complainants calling them at various points during the interview "scumbags", "fucking wee tramps", and "dirty fucking tramps." He said

that he hoped they "burnt in hell for trying to ruin any man's reputation like that." He denied having sex with the complainant but said if he had it would be consensual. When it was put to the applicant that the complainant was 12 years of age, he stated that this was "bullshit", and if he had known she was 12 she would not have been near him. As the interview progressed the applicant said he was not even that drunk and that the second complainant had told him she was 17. He also said that the other girl might have said that she was around about the same age. He described the girls as "two sluts" and stated that the complainant must be a bad girl if she lives in a home.

[24] A defence statement was filed by the applicant dated 27 January 2021. In the statement the applicant denied that the offences had occurred. Para [2] of this statement states:

> "… the accused robustly denies the allegations of rape and sexual assault. The defendant denies having any form of sexual intercourse whatsoever, with either of the two female complainants in this case. He asserts that having travelled…together on the train, he and his co-accused, were approached by the complainants while the defendants were drinking a bottle of vodka together. The complainants asked the defendants if they could have some of their drink. They all then had a drink together before the defendants began to make their way back to the train to return to Belfast. The second complainant tagged along with them and also returned to Belfast. At no time or place did any sexual activity take place between the defendant and any of the complainants. At all relevant times, the accused believed the complainant to be at least 16 years old."

The progress of court proceedings

[25] Prior to arraignment, which was in December 2020 the applicant's legal representatives indicated an intention to seek a No Bill on several of the proposed counts, including the allegation that the applicant had committed the offence of digital penetration. Written submissions were filed by both the defence and prosecution in relation to the No Bill application.

[26] During this application the applicant's lawyers did not advance the No Bill regarding the digital penetration charge (count 1). Rather, the applicant's legal team decided to concentrate on another point concerning the requirement for more than a de minimis act to ground a count of child abduction based on *R v A* [2001] Cr App 418. The application was unsuccessful. Thereafter, the applicant was arraigned on all counts on the indictment to which he pleaded not guilty.

[27] The trial was listed to commence on Monday 17 May 2021. It appears that in advance of this listing there had been what is being described as a mis-diarying of the case by the prosecution. This resulted in quite an extensive amount of activity in the immediate run up of the trial to ensure witnesses' attendance and readiness. The trial began on Monday 17 May 2021 when disclosure issues were dealt with. The evidence began later that week. The complainant's ABE interview was played before the jury. The complainant was cross-examined on the live link and challenged in relation to previous false statements and her failure to include the allegation of digital penetration during the ABE interview.

[28] The evidence of the investigating officer Detective Constable (DC) Phil Smyth was also heard between 20 and 21 May 2021. This evidence is central to the appeal because during his testimony the DC explained how the statement of 14 May 2021 from the complainant which clarified her ABE interview came about. In summary the evidence revealed that this statement was generated following an attendance on that day by DC Smyth at the home. This attendance was directed by the PPS to play the ABE interview for the complainant pre-trial and to clarify why the digital penetration allegation was not specifically referred to in the ABE.

[29] The defence argue that the DC Smyth effectively prompted the complainant into making a statement containing the digital penetration allegation and that this was improper. The attendance at the home was not recorded or noted. Whilst a social worker from the home was initially present with the police officer, she left at the complainant's request immediately before the statement was taken. It appears that the complainant was not interested in viewing her ABE and did not want to discuss matters in the presence of the social worker.

[30] At this point we set out the contents of the statement at issue. It is a short statement dated 14 May 2021 which reads as follows:

> "I have already spoken to police about my incident that happened on 23 December 2019 and I have given a video recorded interview to police about this. During the interview I forgot to mention something to police that I had told them on the night that it happened. I have spoken about how a male was with me on Lagan towpath and (the Manager of the home) came over to us. After the manager left the male pulled up my top and put his fingers into my vagina, I had forgotten to mention this but want it noted."

The relevant evidence given at trial

[31] This statement was served as additional evidence on the defence on 17 May 2021. The core complaint of the defence was put during the cross-examination of DC Smyth in the following way by Mr McGrory (verbatim):

> "The issue here is whether or not this witness (DC Smyth) has implanted in her mind that what it is she should say in a statement and the absence of any process or procedure around to safeguard against unreliable evidence being given and that is simply it … The defence are entitled to enquire as to how this witness who appears to have forgotten about the serious sexual offence between 23 December and 30 December and then suddenly remembered it a few days before the trial and it is quite clear that this police officer went down and told her she had not put it in her ABE."

[32] It is quite clear from the transcript of the cross-examination of DC Smyth that Mr McGrory comprehensively examined the rationale for this additional evidence. In reply to questions DC Smyth essentially said that the witness did not appear interested in the playing of her ABE and declined to watch it all and asked for a break. Then the police officer raised with her the absence of any mention of digital penetration in her ABE and asked whether she might want to comment upon this.

[33] The following question and answer sequence provides some further detail:

> "A. We started by discussing about the ABE recording and just to let her watch that before I then started about the next thing, so once we had concluded the matters with regards to her watching the ABE, then I clarified to her then about how there had been, during that recording, no mention about any digital penetration or if she could remember whether that had happened and, if so, when.
>
> Q. So, in other words it was you who told her that it wasn't in the ABE interview. You told a witness in a case about to give evidence within a few days that there was an omission in her statement.
>
> A. That's correct, yes."

[34] Further cross-examination was directed at the fact that no record was taken of the consultation at the home. A disclosure request was then made by the defence. This did not bear fruit as no disclosure was forthcoming. The most that was offered by way of information was an acceptance that the police officer had been directed by the PPS to attend at the home to have the witness view the ABE and potentially take a second statement.

[35] Further questioning was directed at the fact that a social worker was not present when this clarification was made. However, it is apparent from the transcript that the complainant was not happy to speak in the presence of the social worker at the critical stage.

[36] Under cross-examination DC Smyth volunteered that he thought he had made a mistake in relation to how he obtained the additional statement. Specifically, he said as follows:

> "What I had done at the time was an error. I can only perhaps reason that it is through trying to make sure I was getting everything done in that week, that at some stage I've muddled that into I had to get the statement, but it wasn't my intention initially going that I was going to be doing that. You know, it wasn't something that had been discussed in emails or anything that you saw there. I obviously just made the error."

The application to exclude evidence

[37] Once the evidence of DC Smyth was complete and it became apparent that he had asked the complainant about the issue of digital penetration the defence made an application in the absence of the jury that in view of the wholly irregular way the additional statement had been obtained, such evidence as was contained within it and the subsequent oral evidence on that topic should be excluded from the evidence and the jury directed to acquit on this count.

[38] A second application was made to stay the prosecution on the basis that the way the additional evidence of the complainant came into existence constituted an abuse of process of a nature that required a stay of the entire proceedings in accordance with the principles established in cases such as *R v Horseferry Magistrate's Court ex parte Bennett* [1994] 98 Cr App R 114 and *Warren and others v Attorney General of Bailiwick of Jersey* [2011] UKPC 10.

[39] The application to exclude the evidence and direct an acquittal on the digital penetration count was refused by the judge on the basis that no unfairness would occur as, on balance, all matters were before the jury which could make up its own mind on unfairness. The judge also ruled that the abuse of process argument did not need to be considered further. This ruling is the outcome of a long discussion between the trial judge and counsel of the legal issues.

[40] As a result of the ruling of the trial judge the trial continued. The judge delivered the first part of his split charge on the afternoon of Friday 21 May 2021. No issue was taken with the charge at trial and, indeed, in this appeal no issue is taken with the judge's charge. The absence of any challenge to the charge is significant as it denotes an acceptance that the trial judge correctly outlined the

potential inconsistencies in the complainant's evidence and the issue of how the statement was taken and the digital penetration allegation added into a supplementary statement. Clarification was given at this appeal hearing that the defendant had also given evidence in this case. The appeal centres on whether the trial judge was correct not to exclude the statement of additional evidence referred to above.

The principles of law to be applied

[41] Article 76(1) of the Police and Criminal Evidence (Northern Ireland) Order 1989 empowers a trial judge to exclude evidence in certain circumstances as follows:

> "**Exclusion of unfair evidence**
>
> 76.—(1) In any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

[42] *Blackstone's Criminal Practice 2023* at section 26.23 refers as follows:

> "The Court of Appeal has often said that it will not interfere to quash a conviction on the basis of an erroneous exercise of discretion save in very limited circumstances (*Grondkowski* [1946] KB 369; *Selvey* v DPP [1970] AC 304; *Moghal* [1977] 65 Cr App R 56). The prospects of an appeal succeeding in relation to a matter in the judge's discretion are much improved if there has been a failure to exercise the discretion or a failure to take relevant factors into account, or the judge has taken irrelevant factors into account in the exercise of his or her discretion (*Sullivan* [1971] 1 QB 253; *Quinn* [1996] Crim LR 516). Occasionally, the Court of Appeal has suggested a wider approach to its function of reviewing the exercise of the judge's discretion. In *McCann* [1991] 92 Cr App R 239, the court said that the review was not limited to cases in which a trial judge had erred in principle or where there was no material on which the decision reached could properly have been arrived at. If necessary, the court could examine afresh the relevant facts and circumstances in order to exercise a discretion by way of review where

> the judge's ruling may have resulted in injustice to the appellants."

[43] The simple lesson to be taken from this summary of the law in relation to Article 76(1) is that it is a matter of judicial discretion whether to exclude evidence. The judge at a trial is uniquely placed to assess that having heard evidence and experienced the nuances of any trial. The discretion has been described in the jurisprudence as an evaluative exercise. The aim of the judicial exercise is to ensure that there is a fair trial for any defendant in accordance with the article 6 rights that a defendant enjoys under the European Convention on Human Rights ("ECHR").

[44] In this case there is no suggestion that the judge considered irrelevant factors or omitted consideration of relevant factors. That is plain from the comprehensive transcript of the hearing that took place before the judge gave his ruling. The key point made by Mr McGrory is that the unfairness occasioned by the collection of this evidence, which was a mistake could not be cured.

[45] In examining this argument we first turn to the standards of good practice to be expected in this area. We have been referred to various matters of good practice in relation to ABE interviews, particularly, the need to avoid leading questions. The ABE 2012 Good Practice guidance in Northern Ireland and the 2022 England and Wales guidance is clear in relation to the standards to be applied. We have also been referred to the PPS Code for Prosecutors which specifically highlights the requirement not to prejudice the process by raising inconsistencies with the witness.

[46] The facility for evidence to be given by ABE finds its statutory imprimatur in the Criminal Evidence (Northern Ireland) Order 1999 ("the Order"). The opportunity to have evidence either corrected or added to is strictly circumscribed by virtue of the terms of Article 15(5)(b) of the Order in that an application must be made to permit supplementary questioning. That is what happened in this case as the prosecution asked additional questions of the complainant after the ABE based on the supplemental statement.

[47] *Blackstone's Criminal Practice 2023* discusses the special measures available for witnesses such as the complainant at section D14.32 to D14.43. As to the admissibility of the video evidence, section D14.38 highlights the fact that flaws in the video evidence may still result in admissibility in certain circumstances. This legal position flows from the broad view that is taken of such evidence, because of its special nature.

[48] Section D14.38 referred to above contains a valuable synopsis of the core principles in play as follows:

"**Admissibility of the Video Interview**

The planning and conduct of an interview eligible to serve as evidence-in-chief are governed by ABE 2022 (see in particular chapters 2 and 3), which provides extensive checklists and practical steps to be followed in the investigation, pre-interview and interview phases, to enable best evidence and to protect its integrity. Any significant failure by an interviewer to comply with the guidance is just one factor to be taken into account in deciding whether to exclude all or part of the recording in the interests of justice under section 27(2) (*G v DPP* [1998] QB 919; ABE 2022, para B.9.15). The guidance is intended to set out best practice, and is not a legally enforceable code (*R (AB) v Chief Constable of Hampshire Constabulary* [2019] EWHC 3461 (Admin) at [68]–[69]). Nevertheless, it may be useful for the defence to seek to undermine the weight of the evidence elicited by challenging the interviewer's strategic decisions and choice of questions in cross-examination, for example concerning the exploration of the difference between truth and lies, failure to allow free narrative, and the use of props, images, and leading questions, which can be especially sensitive for children and witnesses with learning difficulties (for a useful example of a police-led ABE investigation so flawed that the Court of Appeal in its Family Law jurisdiction overturned a finding of abuse against a mother, see *Re JB (A Child) (Sexual Abuse Allegations))* [2021] EWCA Civ 46). ABE 2022 reminds practitioners that significant departures from the good practice advocated in the official guidance may have to be justified in the courts (para 1.1). Most instances of non-compliance can be dealt with in summing-up as being relevant to weight; only if there is real prejudice to the defendant should an interview be ruled entirely inadmissible (*F* [2011] EWCA Crim 940 at [8]–[14]). The test is: 'could a reasonable jury properly directed be sure that the witness had given a credible and accurate account on the video tape regarding the central issues in the case against the accused, notwithstanding any breaches?' (*Hanton* [2005] EWCA Crim 2009; *K* [2006] EWCA Crim 724; *Krezolek* [2014] EWCA Crim 2782, [2015] 2 Cr App R (S) 2 (12) at [52]–[53]; *Boxer* [2015] EWCA Crim 1684 at [19]–[31]). This assessment must not subject children's accounts to forensic analysis as if they were 'miniature adults' (*Krezolek* at [51]–[53]). The same principle seems

> to apply to an intermediary assisting a witness in an ABE interview, but the intermediary must be given latitude to tailor the guidance to the individual witness and the circumstances of the case, providing a full written record of intermediary involvement (*LA* [2013] EWCA Crim 1308 at [52]). While the trial judge may consider other evidence corroborating the video evidence in ruling on its admissibility, considerable care should be taken (*K*, explaining dicta in *G v DPP*). It is not necessary that the witness have an independent recollection of events entirely apart from the video interview for it to be admitted, as that would defeat the purpose of the pre-trial recorded interview as a special measure (*R* [2010] EWCA Crim 2469 at [21]–[22])."

[49] We have also derived benefit in an extract from *Blackstone's Criminal Practice* 2023 D 14.40 which refers to para 18C.1 from the Criminal Practice Direction, England & Wales which reads as follows:

> "18C.1 Witnesses are entitled to refresh their memory from their statement or originally recorded interview. The court should enquire that the PTPH or other case management hearing about arrangements for memory refreshing. The witness's first viewing of the visually recorded interview can be distressing or distracting. It should not be seen for the first time immediately before giving evidence. Depending upon the age and vulnerability of the witness several competing issues have to be considered and it may be that the assistance of an intermediary is needed to establish exactly how memory refreshing should be managed."

[50] We were told by counsel that a similar practice is followed in Northern Ireland. There are important points to be drawn from the above discussion of the law which we distil as follows. First it must be remembered that the witnesses who avail of special measures such as ABE interviews are young and vulnerable. There is also well-established good practice in relation to the taking of evidence by way of ABE. However, issues may arise given the very nature of this work that may offend good practice.

Conclusion on issue (i): exclusion of evidence

[51] In this case it is clear to us that a mistake was made about how the supplementary statement was taken. We do not find the same force in the argument about the need for a supplementary statement. That is because there was good sense in clarifying the issue pre-trial particularly as it was flagged by virtue of the

preceding No Bill application. A supplemental statement on the complaint of digital penetration cannot have come as a bolt out of the blue. However, once a statement was required there should have been a note of how it was taken and there should not have been such an obvious prompt from the police officer to the complainant.

[52] We think it clear that there was breach of good practice. However, that is not the end of the matter. The real question is whether this approach had led to unfairness in the trial of the applicant.

[53] The trial judge's view that the jury could decide was crisply put as follows:

> "All these matters are questions of balance, fairness to the accused and fairness to the prosecution. These matters can and will be put before the jury in their full context. It will be a matter, in my view, for the jury to determine whether or not the way that this evidence was obtained was such that it is so unreliable that it should not be relied upon. I take the view that this a matter for the jury and not me at this stage and refuse to exclude the evidence and, therefore, the abuse of process application does not come into play."

[54] In deciding whether the judge was correct the case must be considered as a whole and in context. Once that exercise is undertaken the frailties of the argument advanced by Mr McGrory become apparent for the following reasons.

[55] First, on the facts of this case, the complaint of digital penetration was made prior to ABE, immediately after the alleged events to both a social worker and a police officer. There was evidence of an almost immediate complaint to a social worker at the children's home that both men had digitally penetrated the complainant. That includes the applicant. The complaint of digital penetration had been recorded on body worn video in the initial stage of the investigation.

[56] Second, the issue was fully canvassed at trial in the presence of the jury. The evidence of the circumstances in which the child had been prompted were fully before the jury, the officer accepted what he had done and described this as a mistake. In addition, the defence points were clearly before the jury. The complainant was available as a witness and her reliability and credibility was clearly tested. The applicant also gave evidence on his own behalf. It follows that the reliability of what the injured party said about digital penetration was clearly a matter for the jury.

[57] Third, it must be remembered that the complainant was only 12 years of age when these events took place. She was also a vulnerable child in care who rightly was afforded special measures to give her best evidence. It must also be borne in mind that digital penetration was not the most serious allegation as the applicant

faced charges of vaginal rape, abduction of a child, and provision of drugs. The child in her handwritten statement, stated that she had forgotten to mention the digital penetration in her ABE video. To our mind, this is not so surprising when the personal characteristics of the complainant are borne in mind.

[58] Fourth, as counsel accepted, a witness in these circumstances is entitled to have his or her memory refreshed. In addition, it seems sensible to us to have any issues with evidence clarified pre-trial. There could not feasibly have been another ABE so close to trial and there is in fact no prohibition upon a statement being taken.

[59] Finally, whilst we accept that there has been a breach of good practice in how the statement was taken, that does not automatically result in its exclusion as a matter of law. The fact of the matter is that in this area imperfections can arise in the collection or taking of evidence. The guidance is intended to set out best practice but is not a legally enforceable code. The test in relation to admission of video interviews is: 'could a reasonable jury properly directed be sure that the witness had given a credible and accurate account on the video tape regarding the central issues in the case against the accused, notwithstanding any breaches?' By analogy, in this case it seems to us that the judge must answer this question and decide, do any breaches result in such unfairness that the evidence should be excluded rather than left to the jury with suitable warnings. Whilst we consider that the way the statement was taken was unsatisfactory, the judge was correct not to exclude it based on Article 76. In this case the judge exercised his discretion in a manner which cannot be faulted. He considered the mistake made by DC Smyth and placed it in context.

[60] Going forward, it seems to us that this case is a timely reminder of the need to take care when the complainant who gave evidence by way of ABE is shown the ABE to refresh memory and where additions or corrections are made to evidence. It may be in some cases that a trial cannot proceed if matters arise which are problematic and cause insuperable unfairness to a defendant. However, this is not such a case for the reasons we have given above.

[61] Whilst Mr McGrory skirted around the edges of making a bad faith argument, he plumped for this being a matter of "serious carelessness." He was wise to take that approach. We do not discern any bad faith on the part of the police officer, who on any reading, was taking instructions from the PPS to deal with this issue. He also admitted his mistake. We agree that his candour is not the end of the matter however it does satisfy us that there was no attempt to cover up or conceal what was a flawed process.

[62] We bear in mind that the PPS were rushing to get this case into shape because it had not been properly put in the court diary. We find it astonishing that such an elementary error should occur in such a serious and sensitive case as this. It is also unsatisfactory to say the least that we do not have the full picture of PPS actions disclosed. Arguably, the main fault lies with the lack of clarity of the PPS directions

going forward. We think that this is a matter of enough concern to warrant some review by the Director to ensure that there will not be a repeat.

[63] Overall, we consider that the judge was entirely correct to refuse to exclude the evidence and leave this matter to the jury. This approach did not result in unfairness to the applicant.

Conclusion on issue (ii): abuse of process

[64] The second pillar of this appeal relates to abuse of process. We can deal with this in short compass as we consider this argument to be totally without merit and divorced from the reality of this case. The argument is based on the second limb test for abuse of process explained in *Warren and others v Attorney General for Jersey* [2011] *UKPC 10* In the second category on the ground of misconduct, the court would consider the circumstances of the individual case and, exercising a broad discretion, strike a balance between the public interest in ensuring that those accused of serious crime were prosecuted and the competing public interest in ensuring that the misconduct did not undermine public confidence in the criminal justice system and bring it into disrepute. In *Warren* there had been grave prosecutorial misconduct without which there would have been no trial, however, the abuse of process argument failed.

[65] Patently, the test under the second limb of abuse of process is an extremely high one and successful applications will be rare. A balance must be struck between the public interest in ensuring that those accused of serious crime are prosecuted and the competing public interest in ensuring that the misconduct did not undermine public confidence in the criminal justice system and bring it into dispute. In this case, there can be no argument that the applicant was going to stand trial notwithstanding the additional statement. This was a serious case involving several offences. The application if granted, would have led to the applicant not facing trial at all for any of the six charges against him.

[66] Whilst there was a mistake made and a breach of good practice, this comes nowhere near the misconduct which would be needed to ground an abuse of process application. In the case that we have referred to of *Warren* there was grave prosecutorial misconduct but nonetheless the ruling of the court was upheld, essentially in the interests of justice. That overriding principle pervades the argument in this case. We consider that the trial judge was fully versed on this argument by virtue of reading the transcript of the hearing. Clearly the trial judge considered the *Warren* case and the case of *Horseferry Road Magistrate's Court ex parte Bennett* [1994] 98 Cr App R. 114. The abuse of process argument is one which has no strength whatsoever. The trial judge did not need to spell out his conclusions any further.

Conclusion

[67] Accordingly, we dismiss the appeal against conviction. Applying the test in *R v Pollock* [2004] NICA 34 we consider that this verdict is safe. As we have taken some time to examine the law in this area, we consider that the threshold for leave is met, however, we dismiss the appeal.