THE COURT OF APPEAL

Record Number: 50/19

Edwards J.
Kennedy J.
Ní Raifeartaigh J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

M.S. (No. 2)

APPELLANT

JUDGMENT of the Court delivered on 17th day of November 2020 by Ms. Justice Isobel Kennedy.

1. This is an appeal against conviction. On the 8th February 2019 the appellant was found guilty of twelve counts of indecent assault contrary to Common Law and one count of sexual assault contrary to section two of the Criminal Law (Rape)(Amendment) Act 1990 in respect of seven complainants.

Background

2. The appellant was a surgeon, who was employed in a hospital where he was appointed as a consultant from the year 1968 until his retirement in 1995. He also had private clinics in the locality. The offences concerned the assault of a number of male teenage complainants in both the hospital and his private clinics between the years 1971 and 1992.

3. In relation to four of the complainants, G.McA., I.F., P.McC. and G.T., there is one relevant count each. In relation to two others, P.L. and R.McQ., there are two counts. The assaults generally involved the groping or fondling of testicles, or the penis, on occasions when the complainants presented for a medical examination. However, in relation to one complainant P.C., there are five counts; two specific incidents and three sample counts. The sample counts refer to a period of time of approximately 20 days when P.C. was detained in hospital following surgery and M.S. assaulted him on several occasions.

4. Complaints were first made to An Garda Síochána in 2009 and all complainants issued civil proceedings.

Grounds of Appeal

5. The appellant initially put forward 24 grounds of appeal but the appellant no longer wishes to pursue grounds 1, 2, 3, 4, 20, 21 and 22. The remaining grounds as reflected in the Notice of Appeal are set out hereunder:-

"1. Ground 5: The learned trial judge erred in law and in principle to refusing to discharge the jury after evidence was given by one of the complainants, P.McC., that the accused had been struck off the medical register.

2. Ground 6: The learned trial judge erred in law and in principle to refusing to discharge the jury after evidence was given by one of the complainants, P.C., that the insurance company had settled the civil actions.

3. Ground 7: The learned trial judge erred in law and in principle to refusing to discharge the jury after evidence was given by one of the complainants, I.F., that there had been previous complaints made against the accused in the 1990s and that there had been an earlier criminal trial.

4. Ground 8: The learned trial judge erred in law and in principle in refusing to allow the contents of a document disclosed to the defence by the prosecution entitled "statement of P.C." to be put to P.C. as a previous inconsistent statement in cross-examination in circumstances where he denied authorship.

5. Ground 9: The learned trial judge erred in law and in principle in refusing to direct the prosecution to investigate the provenance of the document disclosed to the defence entitled "statement of P.C."

6. Ground 10: The learned trial judge erred in law and in principle in failing to grant a direction of no case to answer, in circumstances the offences were extremely old, where there were missing medical records, and medical records that appeared to contradict evidence of some of the complainants, in circumstances where the prosecution had not demonstrated that there was no suggestibility, contamination, copycat evidence or collaboration as between complainants.

7. Ground 11: The learned trial judge erred in law and in principle in failing to withdraw the counts relating to the complainant P.C. from the jury on the basis of the inconsistencies in his evidence.

8. Ground 12: The learned trial judge erred in law and in principle in failing to withdraw the counts relating to the complainant P.C. from the jury in circumstances where the prosecution were unable to confirm the source of a document which appeared to be a prior inconsistent statement of P.C. and where the prosecution had objected to the cross-examination of P.C. on this document

9. Ground 13: The learned trial judge erred in law and in principle in refusing to allow the accused give evidence about his prior relationship with X.X. and Dignity 4 Patients in circumstances where XX had had contact with all the complainants prior to trial.

10. Ground 14: The learned trial judge erred in law and in principle in interrupting the cross-examination of the accused indicating that in his view that the accused understood a question.

11. Ground 15: The learned trial judge erred in law and in principle in failing to discharge the jury in circumstances where he had expressed the view during the cross-examination of the accused that the accused was not answering questions and that they should have the "measure of him"

12. Ground 16: The learned trial judge erred in law and in principle in charging the jury as to how they should treat the evidence of each complainant for the purpose of assessing whether the evidence of one complainant could be supportive or corroborative of the evidence of another complainant and in particular, failed to tell the jury that they must be satisfied beyond reasonable doubt in relation to a particular count before the fact of that conviction could be used to support another count.

13. Ground 17: The learned trial judge erred in law and in principle in telling the jury that if they were satisfied that the evidence of the complainants was not influenced by materials published by the press and published by a particular organisation, then the fact that there were seven complainants became compelling evidence in the case.

14. Ground 18: The learned trial judge erred in law and in principle in re-charging the jury on the requisition of counsel for the appellant in relation to the grounds at [16] and [17] above in such a way as to further prejudice the appellant.

15. Ground 19: The learned trial judge erred in law and in principle in failing to discharge the jury on the request of counsel for the appellant following upon the matters complained of at [16 – 18] above.

16. Ground 23: The learned trial judge erred in law and in principle in failing to discharge the jury in circumstances where, during the course of his charge, the learned trial judge stated that evidence of multiple complainants in the absence of collusion is "compelling" evidence.

17. Ground 24: The trial was unfair in the circumstances of the accused's age (86), health and medical condition."

The grounds were addressed by the appellant and respondent in the following groups:-

Grounds 5, 6 and 7-

Ground 5: The learned trial judge erred in law and in principle in refusing to discharge the jury after evidence was given by one of the complainants, P.McC., that the accused had been struck off the medical register.

Ground 6: The learned trial judge erred in law and in principle in refusing to discharge the jury after evidence was given by one of the complainants, P.C. that the insurance company had settled the civil actions.

Ground 7: The learned trial judge erred in law and in principle in refusing to discharge the jury after evidence was given by one of the complainants, I.F., that there had been previous complaints made against the accused in the 1990s and that there had been an earlier criminal trial.

Grounds 5, 6 and 7 - Background and Evidence

6. In respect of P.McC., during the course of cross-examination, the following exchange took place:-

"Q. How did you know that there was a clinic in […] Street?

A. It would have been covered on the media

Q. You knew that from the media and had it been discussed with you during the Dignity 4 Patients meetings?

A. No.

Q. Was there mention of it in the Dignity 4 Patients meetings?

A. Not that I remember.

Q. Might there have been?

A. Might there have been? There might have been but then there mightn't have been.

Q. There might have been but there might not have been. Well, anyway, you said nothing about this until you saw media reports in relation to a M.S., isn't that right?

A. That's right. Earlier, I had years before that taken up the phone, the phone was in my hand to ring the guards but I didn't, that would have been a number of years before that, I was afraid. **But, yes, 2008, when I seen that he was struck off.**

Q. I see. So, you then phoned--you watched the media reports and a number was given, isn't that right, that you could phone?

A. I missed it, I missed the number. So I rang RTÉ myself and I asked where could I find this number."

7. A second reference to being struck off the medical register came about during the re-examination of P.McC. as follows:

"Now, I think you gave evidence that in response to Mr Hartnett -- that in 2008 that you thought that M.S. **was struck-off** and that you got a telephone number from RTÉ; is that correct?

A. That's correct.
Q. And I think you said you attended a meeting after that; is that correct?
A. Yes, the lady on RTÉ, I got speaking directly to her, the lady that was actually on it, Sheila O'Connor from Patient Focus, and --
Q. And what is Patient Focus?
A. Patient Focus. Well Patient Focus, they focused on needs of patients, so I was a patient in […], so I wanted to come -- at this stage, I'd made up my mind, I'm coming forward, so I contacted her.
Q. And you attended a meeting?
A. I attended a meeting that Patient Focus set up."

An application to discharge the jury was made to the trial judge which application was refused:-

> "JUDGE: I'm against you, Mr Hartnett, in your application. It seems the initial response by the witness was completely natural. It's basically you asked a question and he said he reported the matter to the guards as a result of certain events in the national media. It seems he gave evidence of actually contacting RTÉ and he received certain information from some director or producer or assistant at least. So I think we have to live with the fact that [P.McC.] decided to come forward and reveal what he thought he knew by reason of a television programme, and he gave an answer and it, let's say, he answered the question the way he wanted to, and basically it was a reasonable answer.
>
> In relation to the re-examination, obviously the matter arose again. I don't think I can blame Ms Noctor in a specific way, but sometimes matters are best left alone in re-examination. Basically, [P.McC.] had given his evidence. And sometimes when you ask questions, sometimes people get response they're not expecting. And sometimes in criminal cases witnesses are best left alone. But I'm against you"

8. Insofar as P.C. is concerned, during his cross-examination, he made reference to civil actions which had been settled. The following exchange took place:-

> "Q. I see. When did you last have communications with other people who had attended D4P?
>
> A. The last communication I had with anyone was on the day outside the Dáil in 2009.
>
> Q. I see. So, did you stop having any phone calls with them?
>
> A. **Well, as you can see in 2011, they were still ringing, coming up to the High Court. So, when the High Court was settled in --sorry, it didn't actually go to the High Court in the end. The insurance company settled without liability in 2012 and the case finished and contact with Lavelle Coleman ceased**.

Q. I see. I had asked you about contact with people who had attended at the meetings?

A. **As I said from 2012, from the settlement was made, there was no further contacts from anyone**." (our emphasis)

9. An application to discharge the jury as a result of this reference was refused by the trial judge. In so doing, the trial judge stated:-

> "In relation to the last interaction between Mr Hartnett and P.C. where P.C. gave evidence that the matter was indeed settled by the insurance company without the admission of liability. It couldn't be said that it specifically arose from a question but it didn't surprise me that P.C. answered it in the way he did because P.C. had his own way of answering questions.
>
> Now, the question is was it a deliberate attempt to damn Mr S. I don't think so. I think P.C. was answering the question in the way he thought was appropriate. The question is has been harm done to the case of--has the obligation to provide a fair trial to Mr S. been interfered with. Now, it seems to me the jury must have known that all of the parties or most of the parties or the complainants before this court had initiated civil actions. Indeed there was extensive cross-examination of all of the complainants in relation to their involvement with Lavelle Coleman and Dr Murphy. It seems I do recall that P.C. did say that the matter had been completed. Obviously he elaborated on that in relation to his last response. Do I think that his fair trial rights has been seriously impinged upon? I do not. I think the jury are well capable of dealing with the issues that arise in this case. It seems to me, if necessary, they can be told that the civil proceedings have no effect whatsoever on the criminal proceedings. It seems they have had to deal with it and they have heard about it in relation to--particularly in cross-examination, and obviously they can deal with it in relation to credibility and suchlike but the fact that an insurance company had decided, it could be termed, to cut their losses or it could-- nobody knows why insurance companies settle cases. So, I don't think this is a reason to discharge the jury. I do not think the jury -- I think the jury are well capable of trying the matter fairly in this case. I think they know all about the civil proceedings up to now and it seems that the response from P.C., in my view, will not affect the way they deal with the matter and they will not be prejudiced against Mr S in any way by reason of the response."

10. In respect of I.F., the following took place:-

> "Q. And did you ever tell anybody that they occurred later rather than earlier? In other words, after the time of making, or in or about the time of making the complaint?
>
> A. I don't recall stating a time. What I can say is that in the early '90s, I was aware of cases being taken and I --

Q. Well, it's not the question

A. -- discussed this with my wife --

Q. -- I asked you?

A. Well, if we're talking about flashbacks, I think it's --

Q. Well, do you recognise the following sentence, did you say the following;

"He had experienced flashbacks to the abuse since he made his garda statement"?

A. Yes.

Q. So you did say that?

A. I did and since-- I thought I had referred to that earlier. Once I had made that garda statement, the trauma came back much more to the forefront than it had been.

Q. It hadn't been, really, it hadn't been there? You had a very --

A. **Sorry, the memory was there and I described it to my wife in the early '90s when I heard there was a court case going on. Also in the early 2000s when there were more court cases going on, I discussed it with her. However, I did not go into a detailed statement until I made that garda statement.**" (our emphasis)

11. An application for a discharge of the jury was made in light of the foregoing, which application was refused.

Submissions of the appellant

12. It is submitted that the evidence given by each of the complainants above was inadmissible as the evidence did not relate to the charges before the Court and significantly, this evidence did not arise from the specific questions asked in cross-examination. Moreover, it is said that the suggestion by the trial judge as to whether this was a deliberate attempt to damn the appellant was not and could not be the test to be applied. The issue was one of prejudice and whether the appellant's right to a fair trial had been compromised.

13. The evidence that the appellant was struck off the register was inadmissible, and the prejudicial effect was compounded by the question asked in re-examination. This was unnecessary and repetitious.

14. The net effect of the impugned material caused the jury to be aware that the appellant had been the subject of previous trials, he had been struck off the register and that civil actions had been compromised. The appellant submits that the cumulative deleterious effect of the evidence was amplified in the context of this trial, being a case of historic

abuse, which rendered the prejudicial effect so significant that the trial judge ought to have acceded to an application to discharge the jury.

Submissions of the respondent

15. It is said that the appellant was on notice that in his statement, P.McC. had said he "kept [his] dark secret until November 2008", this date coincided with the date when the appellant was struck off the medical register and it was this aspect which attracted publicity. Moreover, it is pointed out that P.McC.'s unedited statement contained the following paragraph:-

> "I was at home watching the Six One News on RTÉ when the story of Dr S was related. He was walking on the street in Dublin with the news cameras on him. I recognised him as the doctor who examined and abused me following my surgery in August 1985. The news story was that he was struck off the medical register."

16. In relation to P.McC., the respondent observes that there are many reasons why a doctor might be struck off the register and furthermore, that no application to discharge the jury was made until after P.McC. was re-examined.

17. The respondent refers to *The People (DPP) v. Murphy* [2015] IECA 201 where the Court considered a trial judge's refusal to discharge the jury in circumstances where, while being cross-examined by counsel for a co-accused, evidence was adduced which tended to show that the appellant had previous convictions. The Court held that the evidence was of limited significance in the overall context of the case and therefore concluded that there was no injustice as a result.

18. The respondent further refers to *The People (DPP) v. WM* [2018] IECA 150. Here the complainant made reference to the accused being a sex offender during the course of her cross-examination. No application was made at that stage and the cross-examination proceeded. Three days later, counsel for the defence made an application to discharge the jury on multiple grounds including the complainant's reference to him being a sex offender. The trial judge refused this application. On appeal, the Court stated that the remark was of a highly prejudicial nature but the timing of the application led the Court to agree with the trial judge in this case that the manifestly strategic nature of the decision not to object at the time precluded him from entertaining the point after the fact.

19. It is submitted that the impugned evidence did not serve to identify the appellant as a sex offender or as having any previous convictions. Ms Noctor contends that the terms of the cross-examination must be examined. P.McC. was asked repeatedly on behalf of the appellant, as to why he came forward, in circumstances where it is clear from his statement that he did so as a result of publicity arising from M.S. being struck off the medical register.

20. In respect of P.C., it is said that it is evident from the transcript that the trial judge clearly posited the correct test, namely whether or not the impugned evidence resulted in an

unfair trial. The respondent refers to the judgment of the Court in the first trial (*The People (DPP) v. MS* [2019] IECA 120) where the Court stated as follows:-

> "Each complainant commenced civil proceedings in 2009 and five of the six complainants complained to the Gardaí in 2009 with DK making his statement of complaint in 2007. Counsel for the appellant was understandably concerned to ensure the jury were alert to the fact of civil proceedings and the circumstances in which such proceedings were commenced. However, once the issue was known to the jury, we are satisfied that the respondent was entitled to re-examine in order to ensure that the jury had a complete picture. The re-examination arose directly from cross-examination and although Mr Hartnett suggests that no direct question was asked of, or suggestion made to, any complainant, that the motivation in complaining to the Gardaí was financial, nonetheless it was implicit in the line of questioning that this was indeed so.
>
> It was a legitimate concern for the prosecution to ensure that the jury were aware that whilst civil proceedings had commenced in 2009, those proceedings in all instances had been settled with the hospital, without an admission of liability and without any involvement by M.S. This was necessary in order to rebut the suggestion that the complainants were proceeding with the criminal trial in order to bolster or support their outstanding civil proceedings. It was therefore important that it be made known to the jury that the civil proceedings had been finalised. To do otherwise would have caused an injustice and would have left the jury with a false impression of the situation. We are satisfied that the evidence was probative evidence in the context of the trial and the tenor of the cross-examination."

21. In terms of I.F., the respondent submits that it must be borne in mind that much of the cross-examination consisted of suggesting to the witness that he had no memory of any assault until after he saw the Primetime programme. The respondent submits that in these circumstances it must come as no surprise that I.F. would seek to reference occasions prior to the Primetime programme upon which, not only had he the memory but had discussed the memory with his wife and indeed the circumstances under which he did so.

Agreement regarding the evidence

22. It is well-known that prosecution counsel should not discuss their proposed evidence with witnesses. It is the practice that where it is anticipated that a witness may inadvertently introduce potentially irrelevant or prejudicial material, the prosecution may, by agreement, direct the witness accordingly in advance of the evidence being adduced. In oral submissions, Ms Noctor SC, on behalf of the respondent, says that the only concession that the appellant was willing to make in advance of the trial, in terms of permitting the prosecution to discuss matters with the complainants, was to advise each complainant that their direct evidence would be limited to the allegations of each particular complainant. The defence were not willing to give permission to the prosecution to address other issues, such as previous trials, civil litigation or the fact that the appellant was struck off the medical register. Whilst this might be somewhat surprising,

given the background to the trial and the fact of previous trials, it was an approach which the appellant was entitled to adopt, albeit not a decision without potential consequences.

23. Insofar as P.C. is concerned – there was additional permission to speak to him in terms of not adducing evidence of an alleged incident in 1982, which was not the subject of a charge.

24. In rejoinder, Mr Hartnett says that the prosecution do not need defence permission in this regard and says, moreover, that not every eventuality may be addressed in this way. Ms. Noctor makes the observation that it is in fact surprising that the witnesses did not refer to more extensive material absent permission to speak with the witnesses to limit possible inadmissible or overtly prejudicial material, given the overall circumstances concerning the appellant.

Discussion

25. First, to address the first complaint which concerns the evidence that the appellant was struck off the medical register and that as a consequence the jury ought to have been discharged. P.McC. was asked in cross-examination as to how he was aware that the appellant had a particular clinic. In that context he was asked whether there was mention of the clinic at a Dignity 4 Patients meeting. It was then put to him that he did not come forward until he saw media reports in relation to the appellant. The impugned evidence then unfolded. It is clear that there was extensive disclosure prior to this trial. In that respect, we have been informed that, as is usual, P.McC.'s unedited statement was furnished to the defence. This statement set out that the witness recognised the appellant from the television footage of 2008. It was this, it appears, which galvanised him into making a complaint.

26. This evidence came about in the early stages of cross-examination, but no application was made on the part of the appellant until the conclusion of the re-examination. Therefore, it can be assumed that this evidence did not cause grave concern at the time and that the appellant's real concern arose from the potential damage caused by the initial reference to being struck off being compounded in re-examination. It is important, therefore, to look to the re-examination.

27. It is apparent that Dignity 4 Patients was a central theme in the cross-examination of the complainants. It was suggested, *inter alia*, that the organisation was 'of a campaigning type' and that the issue of advocacy training or advice was discussed at meetings. P.McC. was also questioned in respect of his involvement with the organisation, including the suggestion that he had a conversation with a X.X. of Dignity 4 Patients and that it was suggested he contact the Gardaí, that a solicitor addressed the meeting in relation to the potential for taking civil actions for damages, and that as part of that process, recommendations were made to attend a particular psychiatrist.

28. It is clear that the tenor of the cross-examination was to leave open the suggestion that Dignity 4 Patients was connected in some way with P.McC. making his allegations.

29. Insofar as it is said that the issue of civil proceedings caused insurmountable prejudice to the appellant, it is the position that while no direct question was posed as to the motivation for making complaints against the appellant, it is evident that this was a feature of cross-examination. Questions were asked regarding Dignity 4 Patients and the complainants' involvement with Lavelle Coleman Solicitors. Mr Hartnett sought to probe the complainants' communications with Dignity 4 Patients and communications with others who had attended the meetings. In that regard P.C. said:-

> "A. Well, as you can see in 2011, they were still ringing, coming up to the High Court. So, when the High Court was settled in, sorry, it didn't actually go to the High Court in the end. The insurance company settled without liability in 2012 and the case finished and contact with Lavelle Coleman ceased."

30. The issue of civil proceedings was, understandably, repeatedly canvassed with the witness and implicitly, the concept of financial gain peppered the cross-examination together with the involvement of Dignity 4 Patients. The complainant was asked when phone calls ceased with those attending Dignity 4 Patients and responded to that question.

31. Moreover, it is said that the judge applied the incorrect test in deciding whether to discharge the jury in that he considered whether the witness had deliberately attempted to damn the appellant, rather than assessing whether the appellant's right to a fair trial had been breached.

32. It is contended that the appellant's right to a fair trial was further compromised when I.F. gave evidence of other court cases concerning the appellant. It is important to note the context in which the impugned evidence came about. Again, the material entered the trial in cross-examination when the witness was asked about repressed memory and flashbacks. The issue as to the veracity of his memory featured in cross-examination.

Conclusion – Ground 5

33. The impugned material was clearly a matter of which the appellant was aware, it is was clear, therefore that care would have to be taken when cross-examining a witness, so as not to introduce potentially prejudicial material. In any given case, however, such material may find its way into a case despite every caution being taken. The question is whether it causes prejudice of the kind which would render a trial unfair. We are entirely satisfied that the reference to the fact that the appellant was struck off the register did not fall within this category. It follows that we are not persuaded that the re-examination compounded a pre-existing difficulty. In any event, it appears to this Court that the re-examination arose on foot of the cross-examination concerning the background to the complainant making his complaint. We are not at all persuaded that the judge erred in refusing to discharge the jury.

Conclusion – Ground 6

34. Again, this issue arose in cross-examination, indeed it was an important part of the cross-examination, and the fact that the civil action had been compromised, cannot have been unknown to the appellant. The judge, in refusing to discharge the jury offered to inform them in his charge that the civil action had no bearing on the criminal proceedings. In

addition, the evidence given by the witness made it clear that the proceedings had been settled without liability. In the circumstances, we are not persuaded that the judge erred in refusing to discharge the jury.

35. We are entirely satisfied that the proposition advanced on the part of the appellant that the trial judge erred in considering whether the witness sought to deliberately damn the appellant is entirely misconceived. It is quite clear that this suggestion arose in the course of cross-examination, and, quite properly, the judge considered it as part of his assessment as to whether the appellant's right to a fair trial had been breached. In fact, the judge firstly adverted to that suggestion, (and rejected it), and then correctly identified the principle by saying:-

> "….has the obligation to provide a fair trial to Mr S been interfered with."

Shortly thereafter, he said:-

> "Do I think that his fair trial rights has been seriously impinged upon? I do not"

36. It is patently clear that the judge's approach accords with established principles.

Conclusion – Ground 7

37. The tenor of the cross-examination was to the effect that I.F. had no memory of abuse until he saw a Primetime television programme, the publicity emanating from which generated the making of the respective complaints. The very first line of questioning of this witness concerned this programme.

> "Q I think you had watched a programme on television, on Primetime; is that correct?
>
> A. That is correct.
>
> Q. And I think that there was a phone number given out in that and that people could phone that if they so wished?"

38. It is clear that the impetus and motivation for making his complaint was very much a theme of the cross-examination, as was the concept of repressed memory and flashbacks. The impugned evidence arose in the following sequence of questions and answers:-

> "Well, did you at any stage say that the flashbacks occurred in or about the time of watching after watching the programme and making the complaint to Lavelle Coleman and the Gardaí?
>
> A. I don't recall stating that about the flashbacks but what I can say --
> Q. Well just pausing there a second --
> A. Okay.
> Q. -- before you say anything. You remember referring to flashbacks?
> A. Yes.

Q. And did you ever tell anybody that they occurred later rather than earlier? In other words, after the time of making, or in or about the time of making the complaint?

A. I don't recall stating a time. What I can say is that in the early '90s, I was aware of cases being taken and I --

Q. Well, it's not the question

A. -- discussed this with my wife --

Q. -- I asked you?

A. Well, if we're talking about flashbacks, I think it's --

Q. Well, do you recognise the following sentence, did you say the following; "He had experienced flashbacks to the abuse since he made his garda statement"?

A. Yes.

Q. So you did say that?

A. I did and since I thought I had referred to that earlier. Once I had made that garda statement, the trauma came back much more to the forefront than it had been.

Q. It hadn't been, really, it hadn't been there? You had a very --

A. Sorry, the memory was there and I described it to my wife in the early '90s when I heard there was a court case going on. Also in the early 2000s when there were more court cases going on, I discussed it with her. However, I did not go into a detailed statement until I made that garda statement.

Q. Are you saying you buried the memory of what you say happened?

A. I got on with my life. I put it to one side and got on with my life."

39. The respondent submits that the fact the witness had discussed the complaints with his wife at certain periods was apparent from the disclosure material, in particular, material arising from the Smyth Inquiry. However, whilst the appellant may have been on notice of the risk of cross-examining on this line of territory, clearly, it was important to explore the issue. This, of course, is one of the hazards of cross-examination and, in the present case, the possibility of the questions eliciting reference to an earlier trial was, undoubtedly, a concern. However, the ultimate question is whether the effect of the introduction of this material interfered with the appellant's right to a fair trial.

40. It was repeatedly suggested to the witness that he had no memory of alleged events prior to the Primetime programme. Therefore, it was not beyond the bounds of possibility that he would refer to previous occasions when the matter had come to mind.

41. The answer given was certainly prejudicial to the appellant, but in our view, it was not such so as to require the judge to discharge the jury. The judge considered whether the words spoken in the context of the trial as a whole interfered with the appellant's right to a fair trial and concluded, with some certainty, that this was not so. Moreover, he offered to rectify a factual inaccuracy regarding the year 1990, should it be required.

Cumulative effect

42. The manner of assessing the impact is dependent on the circumstances of each case and one within the discretion of a trial judge in the knowledge that the accused's right to a fair trial is guaranteed by Article 38 of the Constitution. The words 'due course of law' in the Constitution mandate that every criminal trial must be conducted in accordance with the principles of justice and fairness.

43. It is said that cumulatively, this material must have had a prejudicial effect, which effect was magnified by the fact that there were multiple complainants and that this was a very old case.

Conclusion

44. We are wholly satisfied that the judge did not err in refusing to discharge the jury, to which recourse should only be had as a last resort. The matters referenced when taken separately or collectively were not of the kind to justify a discharge of the jury. The trial judge offered to address any issues which were of concern, but even absent such a proposal, we do not believe that the evidence was such so as to justify a jury discharge in the circumstances. We do not believe that the point is well made that simply because a case is an old case or that there are multiple complainants renders remarks more prejudicial or requiring of a lesser threshold to be achieved in an application to discharge a jury. Each case must, without doubt, be considered on its own facts and circumstances, but, whilst those factors may be relevant in the overall consideration, they are not determinative or decisive of such an application.

Grounds 8, 9 , 11 and 12-The evidence of P.C.

Ground 8: The learned trial judge erred in law and in principle in refusing to allow the contents of a document disclosed to the defence by the prosecution entitled "statement of P.C." to be put to P.C. as a previous inconsistent statement in cross-examination in circumstances where he denied authorship.

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Ground 11: The learned trial judge erred in law and in principle in failing to withdraw the counts relating to the complainant P.C. from the jury on the basis of the inconsistencies in his evidence.

Ground 12: The learned trial judge erred in law and in principle in failing to withdraw the counts relating to the complainant P.C. from the jury in circumstances where the prosecution was unable to confirm the source of a document which appeared to be a prior inconsistent statement of P.C. and where the prosecution had objected to the cross-examination of P.C. on this document

45. The allegations of P.C. were the subject matter of five counts on the indictment. The first two counts were specific counts and related to an examination as an outpatient where the complainant gave evidence that the appellant touched the complainant's penis and testicles and performed an unwarranted rectal examination. The subsequent three

counts were sample counts relating to a period when P.C. was an inpatient in the hospital after an operation and the appellant sexually assaulted him on several occasions. In his garda statement and in evidence-in-chief, he indicated that the appellant would "examine my privates, my penis, my testicles" and when he was asked what the appellant did, he stated that "he would be palpating and pulling my foreskin back."

46. In direct evidence, the witness set out the nature of the allegations and said that after his attendance at the hospital as an outpatient, he again attended the hospital and was examined by the appellant where nothing untoward took place. This was prior to his admission as an inpatient.

The civil proceedings.

47. P.C. instituted civil proceedings, and in this regard, a statement was disclosed. This statement was prepared for the purposes of his civil action and was signed by P.C. It was pointed out to him that in the statement of claim, there was no mention of a rectal examination taking place on the initial examination, however, on the occasion when he returned to the hospital as an outpatient and was again examined by the appellant, the statement of claim referenced a sexual assault, to include rectal penetration. He was tested in cross-examination on this inconsistency and on claims in the statement of claim and replies to particulars. This included that it was said, in the replies to particulars, that he did not divulge the details to his GP, whereas the witness was cross-examined as to whether he had complained to his GP at the relevant time and was 'clattered' as a result, which he confirmed. He was also cross-examined about the fact that he informed the Smyth Inquiry that he told his GP.

The Smyth Inquiry

48. During the course of his cross-examination, P.C. was questioned on inconsistencies in his evidence and his statement to the Smyth Inquiry. In this regard, he was asked to account for the fact that he said that while he was recovering from his operation as an inpatient, he was digitally penetrated by the appellant on each occasion when the appellant attended him. This he had not mentioned in his statement to the Gardaí in 2009 or in his statement of claim.

The unsigned statement

49. The appellant sought to cross-examine P.C. regarding a statement (the unsigned statement) which had a similar appearance to the signed statement. The complainant asserted that he had not written this statement and he had not signed it. It appears this document formed part of the disclosure material within a set of documents identified as having been received from the witness' solicitors in his civil action.

50. Certain portions of this statement were put to the witness including those concerning the first medical examination and the issue of anal penetration. The witness indicated from the outset that the statement was unsigned. When certain inconsistencies were pointed out to him, he said that he had no explanation save to say that the statement was 'done as a kind of victim impact one.' The witness queried as to whether the document was a solicitor's note of attendance or an official statement. Ultimately, the witness was of the view that the document contained notes of an interaction he had had with a solicitor in

the context of his civil action. Following some limited cross-examination on the document, counsel for the respondent, Ms. Noctor SC interjected and expressed her concern. At a later stage the following exchange took place with the witness saying as follows:-

> "A. These, as I say it said, they were furnished from Lavelle Coleman, the first time I would have seen them. I was not party to writing this statement. I would have given—this was a note taking exercise, as you can respect when interviewing any client, you're taking any notes. I was not present, I did not sign off this statement.
> Q. Well, sorry, are you saying—
> A. And I deny that I actually had any part to it, only that I gave information to a junior solicitor.
> Q. Are you saying you weren't present when these notes were being taken?
> A. No, I didn't say that."

It continued:-

> "Q. Are you saying that you weren't present when notes were being taken?
> A. Handwritten notes were taken on a jotter or on a pad.
> Q. Do you remember that?
> A. Yes, I remember clearly.
> Q. I see?
> A. It was at the offices of Lavelle Coleman. But I did not--I was not party to the typing of this, I did not sign off on it, it was obviously just in their files or whatever.
> Q. I see. So, they have gotten it, the solicitor has --well, just bear me out, please?
> A. You're going to say they gotten it wrong, that's up to them.
> Q. Please listen to my questions?
> A. Yes, I will, yes, sorry.
> Q. Are you saying then the solicitors got it entirely wrong?
> A. No, they didn't get it entirely wrong. They, you know, I can't account for what that lassie, you know, wrote down. The bones of it is
> Q. "He did a very thorough examination of my testicles." Now that is a very plain--"

51. At this point the trial judge intervened and said that the witness thought the document to be an attendance. Following some further exchanges involving counsel, the judge and the witness, counsel for the respondent indicated that an issue arose which was canvassed in the absence of the jury.

52. Ms Noctor said as follows: –

> "But embarking upon what is being done now, when he's quite clearly not the author of the document, is to cross-examine him on a document, we don't know who wrote it, the circumstances under which it was written. And essentially what Mr Hartnett appears to want to do is, he could be reading out any document and

saying well, isn't that inconsistent with something you said somewhere else when it's not being--the way to deal with this would be to call someone to say Mr C told me on a different day X, Y and Z. But not merely putting a document that isn't a statement from him, nor is it accepted as being a record of that which he said, it just it offends the rule against hearsay in my view at this point. And he's being asked to take a document from somebody else and even though he says he disagrees with certain content and provide an opportunity to the jury to hear what somebody else, somebody else's recollection is or may appear to be of an attendance that we don't know when or where or whom."

53. The trial judge ruled as follows on the unsigned statement:-

> "I'm not worried when or if the document wasn't set out properly or it--let's say the defence were notified as to what it was, that's not an issue. They had this statement, the statement of P.C. P.C. says in response to questions by Mr Hartnett, that it is his view that this statement arose from an attendance he gave to somebody from Lavelle Coleman. He says probably a junior solicitor or a solicitor assisting a solicitor. He says that it is inaccurate to some degree. He didn't check it or he didn't sign it. It seems then, it seems--it seems to me it would be unfair to allow the putting of this document to him in this way because it would be essentially putting into evidence what a third party says. He, she heard, or she--information she received from P.C. and this third party is not here. And therefore, it seems to me that this would be unfair to the witness, P.C., and not an appropriate way of putting this evidence before a trial. It seems Mr Hartnett wants to cross-examine and put the attendance to him, thereby putting before a jury what's in the attendance and therefore it seems to me, he can't be allowed to do that. So, therefore I'm against you Mr Hartnett."

54. Following this ruling, the appellant sought to have the prosecution determine the provenance of the document and counsel for the respondent asserted that they had contacted the solicitors involved but had received no reply

Submissions of the appellant

55. It is submitted that in the context of this particular case, the prosecution should have made efforts to investigate the provenance of the statement provided to the appellant by the prosecution in disclosure, in circumstances where their witness appeared to be denying authorship. It is submitted that it was equally incumbent on the prosecution to endeavour to ascertain whether this was a prior inconsistent statement made by their witness. While of course, the witness was free to disagree with the contents, it is submitted that counsel for the appellant should have been entitled to put all of the inconsistencies in the statement to the witness.

56. In relation to Ground 12 and the failure to grant a direction, it is submitted that the issue of the delay and indeed the issue of the statement of the complainant formed part of the backdrop to the issue of whether the charges relating to P.C. should have gone to the jury and should not have been considered completely separately. It is submitted that the

changing stories of P.C., the fact that his allegations were significantly different to the allegations made by other complainants, his long history with Dignity 4 Patients and the length of time since the offences were committed were all matters that should have led the judge to conclude that the counts should have been withdrawn from the jury.

Submissions of the respondent

57. The respondent submits that it was clear that the unsigned statement was not authored by P.C. and therefore it could never meet the criteria for admission as a previous inconsistent statement. The respondent submits that the only matter that was established by cross-examination was that the unsigned statement was not authored by P.C. and, on the evidence, did not accurately record that which was said by P.C. to his lawyers. It was hearsay *simpliciter* that was not admissible under any exception to the hearsay rule.

58. In relation to the arguments that the respondent should have made further efforts to discover the provenance of the document, the respondent rejects this. It is submitted that the respondent acceded to a request by the appellant and sent a letter to Lavelle Coleman, to which there was no response. While the respondent does not accept that the appellant actually sought a direction from the prosecution to investigate the provenance of the Unsigned Document, as outlined in Ground 9, it is submitted that the absence of such a direction is not a sustainable basis for any appeal

59. In terms of Ground 12, the respondent submits that the appellant did not actually make an application to the learned trial judge on this basis, but either way the trial judge did not err in refusing to withdraw the P.C. counts from the jury on any basis.

60. The respondent refers to *The People (DPP) v. McCarthy* [2008] 3 IR 1 where Kearns J. stated that the duty to disclose must be seen in context:-

> "The Court is satisfied, however, that the obligations of disclosure are not limitless nor are they to be assessed in a vacuum or upon a purely theoretical or notional basis. Nor is a conviction to be regarded as unsafe per se simply because there has been a partial failure by the prosecution to meet the obligations of disclosure. It is a question of degree in every case, having regard to the nature and importance of the material in question."

61. The respondent emphasises that the document in question was disclosed to the appellant in April 2018. The respondent submits that to pause mid-trial and mid-witness, embark on something that is not an investigation, but essentially to provide to the defence a means of proving a document that it requires is not only unsupported by law but would be entirely unworkable.

62. In relation to Ground 11, the respondent, relying on the summary of principles in *The People (DPP) v. M* [2015] IECA 65, submits that while there may have been inconsistencies in the evidence of the complainants, these were issues of fact and therefore fell to be considered by the jury.

Discussion – Ground 8

63. It is said on behalf of the appellant that the trial judge erred in refusing to permit the defence to put the contents of the unsigned statement to the witness, P.C. It is readily apparent from a perusal of the transcript that the witness did not accept that he was the author of this document. He put forward certain explanations for the genesis of the document but did not accept at any point in time that he himself authored the document. It seems that ultimately, the witness gave evidence that the document was in the form of an attendance note compiled by a solicitor in the office of the firm representing P.C. in the civil proceedings.

64. Moreover, it is also clear from an examination of the transcript that the intent of the defence was to put extracts from the document to the witness for the purpose of attacking his credibility, but it does not appear that the defence intended to prove the document, absent the witness accepting that he created it.

65. It is also evident from a perusal of the transcript that certain portions of the document were in fact put to the witness for his consideration.

66. Cross-examination of a witness is one of the most effective tools available to the defence in terms of impugning the credibility of the witness and also in terms of adducing evidence which may be of assistance to the defence. In pursuit of this objective, the defence may seek to compare the evidence given under oath in the course of a trial with an account given by the witness on a previous occasion which serves to contradict the evidence. The credibility of a witness may be severely reduced if it can be demonstrated that a contradictory statement was made by the witness on an earlier occasion.

67. However, as we have already stated, the rules of evidence apply equally to the defence and as a consequence, a cross-examining party may not seek to elicit inadmissible evidence. The rule concerning the procedure for cross-examination on foot of a previous inconsistent statement is governed by sections 4 and 5 of the Criminal Procedure Act 1865, commonly known as Denman's Act.

68. Section 4 provides as follows: –

> "If a Witness, upon Cross-examination as to a former Statement made by him relative to the Subject Matter of the Indictment or Proceeding, and inconsistent with his present Testimony, **does not distinctly admit that he has made** such Statement, Proof may be given that he did in fact make it; but before such Proof can be given the Circumstances of the supposed Statement, sufficient to designate the particular Occasion, must be mentioned to the Witness, and he must be asked whether or not he has made such Statement." (Our emphasis).

69. In the present case, it is readily apparent that the witness made it very clear that he was not the author of the signed statement.

70. Section 5 of the Act provides as follows: –

" A Witness may be cross-examined as to previous Statements made by him in Writing or reduced into Writing relative to the Subject Matter of the Indictment or Proceeding, without such Writing being shown to him; but if it is intended to contradict such Witness by the Writing, his Attention must, before such contradictory Proof can be given, be called to those Parts of the Writing which are to be used for the Purpose of so contradicting him: Provided always, that it shall be competent for the Judge, at any Time during the Trial, to require the Production of the Writing for his Inspection, and he may thereupon make such Use of it for the Purposes of the Trial as he may think fit."

71. Section 4 of Denman's Act applies to oral and written statements and section 5 of the Act applies to written statements only.

72. Where the witness, as in the present case does not admit to making the previous statement, then it is necessary for the cross-examining party to disclose sufficient information, in terms of section 4, to the witness to enable him to seek to identify the statement. It seems that this information was provided to the witness and he continued to assert that he did not create the statement but that it was, in effect, the attendance note of his solicitor in the civil proceedings.

73. In those circumstances, if the defence wished to contradict the witness using the unsigned statement, it was necessary for the defence to adduce evidence to prove that the witness was, in fact, the author of the statement. Only if and when the document was proven, would the evidence then become admissible and may be used to impeach the credibility of the witness.

74. If the party cross-examining a witness is unable to prove the document upon which it is sought to cross-examine the witness, then only very limited use can be made of the document. The use to which the document can be put is known as the "*Phipson Formula*" to which Edwards J. referred in his detailed analysis of the principles applicable when seeking to cross-examine on documents in *Leopardstown Club Ltd v. Templeville Developments Ltd* [2010] IEHC 152.

75. The procedure to be adopted in circumstances where it is desired to cross-examine a witness on a previous inconsistent statement in order to contradict the witness is the same as arises in the context of the examination of a hostile witness. See The People (DPP) v. Diver [2005] 3 IR 270.

76. Therefore in short, the cross-examining party is required to do the following: –

    1) The document should be provided to the witness, and the witness should be asked whether he wishes to alter his evidence in light of the contents. If the witness declines to do so, the cross-examining party may accept that and do nothing more.

    2) If the cross-examining party wishes to contradict the witness, then the document must be proved.

3) Once the document is proven, then the cross-examining party may use the document either by putting the entirety of the document or portions of the document to the witness in an effort to contradict the witness.

4) The document may then be in due course, inspected by the jury or portions thereof may be provided to the jury.

Conclusion

77. In the present case, it appears that the defence was of the view that the document did not require to be proved by the defence as it had been provided by way of a bundle of disclosure to the defence. This is incorrect. Simply because the prosecution have an obligation to disclose relevant documents to the defence does not mean that the document may then be used in disregard of the rules of evidence. Still less does it mean that the document is in effect "self – proving" simply because it has been disclosed by the prosecution.

78. We are wholly satisfied that where the witness denied that he was the author of the document and where the document was not proven in evidence, the trial judge did not err in refusing to allow the contents of the document to be put to the witness in cross-examination. We emphasise that the rules of evidence apply to all parties in a criminal trial and cannot be circumvented. This does not mean that the defence are hampered in the cross-examination of a witness, nor does it mean that the contents of the previous inconsistent statement cannot be put to the witness for the purpose of contradicting their evidence, but it does mean that there must be compliance with the rules of evidence.

79. Accordingly, we reject this ground of appeal.

Discussion – Ground 9

80. It is contended on behalf of the appellant that the trial judge erred in refusing to direct the respondent to investigate the provenance of the unsigned statement.

81. The unsigned statement was disclosed to the defence as part of the general duty to disclose. It is the position that all relevant evidence must be disclosed to the defence in order to vindicate the rights to a fair trial pursuant to Article 38 of the Constitution and Article 6 of the European Convention on Human Rights.

82. In the present case the argument is advanced that there was an obligation on the respondent to investigate the provenance of the document which had been disclosed to the defence. The appellant does not advance any jurisprudence in support of this argument and while it is not advanced in written or oral submissions, one can surmise that the argument stems from an attempt to expand the duty on the Gardaí to gather and retain evidence for the benefit of the defence even if the prosecution do not seek to rely on that evidence, to include an obligation to determine the provenance of documents disclosed.

83. In any event, in assessing the fairness of the trial, it is also important to note that the material was disclosed to the defence in April 2018. It seems, that on the date when this

issue arose, being the 22nd January 2019, the respondent wrote to Lavelle Coleman Solicitors in this regard and informed the appellant on the 23rd January 2019 that no response had been received. It seems that the issue rested at that point and the cross-examination continued.

Conclusion

84. A prosecution must be conducted fairly and this obligation underpins the duty to disclose. As far as we are concerned the issue is one of fairness and degree. We are satisfied that there is no absolute obligation or requirement on the respondent to investigate or seek out the provenance of a document disclosed to the defence in compliance with disclosure obligations in order to ensure a fair trial. Once the documents are disclosed to the defence, it is then for the defence to decide to what use they wish to put the documents in question. Indeed on occasion the defence will decide not to make use of documents disclosed. If the defence wish to rely upon a document, then it is for the defence to prove the document should that requirement arise. Mr Hartnett contends that the defence were reluctant to discuss the origin of the document with the solicitors engaged by the witness from a concern of legal professional privilege. However, we observe that the witness consented to the pleadings in the civil action being disclosed to the defence in the criminal trial. In those circumstances one might have thought the privilege would have been taken to have been waived, unless of course privilege was expressly reserved. This was a matter which could have been clarified by the defence. In our view, it is difficult to see how an enquiry could not have been made by the defence as to who took the attendance with P.C. We note that P.C. consented to the disclosure of documents, moreover, Ms Noctor indicated that the material was disclosed to the defence as being material which was obtained from the solicitors whom P.C. had instructed in the context of civil proceedings.

85. Moreover, there is no property in a potential witness, should the defence have desired to speak to the witness regarding the document, the usual guidelines concerning such contact could have been followed.

86. More generally, we wish to point out that if the defence propose to prove a document, the duty rests upon them to pursue the appropriate lines of inquiry to establish and prove authorship and it is not a matter for the prosecution authorities. If the defence consider that they cannot obtain the necessary proofs without the assistance of the prosecution, they should make this clear and make specific requests of the prosecution together with an explanation as to why they consider they cannot take the necessary action themselves. This did not occur in the present case.

87. Accordingly this ground fails.

Discussion and Conclusion– Ground 12

88. This ground concerns the trial judge's refusal to withdraw the counts in respect of P.C. on the basis that the prosecution were unable to confirm the source of the unsigned statement and where the prosecution had objected to the cross-examination of the

witness on foot of the document and as it is directly connected with the previous two grounds of appeal, we will address it at this juncture.

89. Firstly, we observe that it appears from a perusal of the transcript that the concern expressed on the part of the appellant in the context of the application for a direction was the objection on behalf of the respondent to the defence cross-examining P.C. on the unsigned statement in circumstances where he denied authorship of it. In that context, Mr Hartnett contended that an unfairness arose in the trial in accordance with the principles enunciated in *The People (DPP) v. PO'C* [2006] 3 IR 238. It seems that no specific argument was advanced concerning the absence of confirmation regarding the source of the unsigned statement, although the issue had again been ventilated on the 31st January 2019.

90. There can be no doubt but that the issue concerning the unsigned statement was a live one in the trial. Whilst the inability of the respondent to confirm the source of the unsigned statement was not canvassed in the course of the application for direction, and does not form part of the written submissions in respect of Ground 12 on this appeal, it is clear that Mr Hartnett was most concerned that the inability to cross-examine the witness on foot of the unproven unsigned statement was one which visited unfairness on his client.

91. In those circumstances we are satisfied to deal with the dual arguments advanced in this ground.

92. The question for this Court is whether there was, as a result of the above, a real risk of an unfair trial so as to require the judge to stop the trial in exercise of the court's inherent jurisdiction.

93. The trial judge refused permission to the defence to cross-examine on foot of the statement in circumstances where the witness denied he authored the statement and where the statement was not proven. We have already indicated that we are not persuaded that the trial judge erred in refusing permission to cross-examine on a document which was unproven. In the circumstances it is difficult to understand how such a refusal which was in accordance with the rules of evidence could then be utilised by the defence in order to underpin an application to stop the trial on the basis of a perceived unfairness to the appellant.

94. We are entirely satisfied that enquiries could have been made on behalf of the appellant as to the source of the unsigned statement and in assessing whether any unfairness arises we are influenced by the fact that disclosure was made to the defence of the document in and around April 2018.

95. In the circumstances we are not persuaded that the trial judge erred in refusing to stop the trial and accordingly, this ground fails.

Discussion – Ground 11

96. It is said that the trial judge erred in failing to withdraw counts concerning the witness, P.C., in circumstances where there were inconsistencies in his testimony. We have already set out the inconsistencies relied upon which relate to inconsistencies, *inter alia*, between the evidence of the witness and the pleadings in the civil action, the evidence in the Smyth Inquiry and a signed statement for the purposes of the civil action.

97. It appears that the application was made pursuant to the second limb of the seminal decision of *R v. Galbraith* in that:

> "2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

98. In *The People (DPP) v. Buckley* [2007] 3 IR 745, Charleton J. stated that the role of the judge was to determine whether the necessary proofs were present and that it was a matter for the jury to assess and weigh the credibility of that evidence.

99. The most recent Irish authority in this regard is that of Edwards J. in *The People (DPP) v. M* [2015] IECA 65 where he stated: –

> "49. At the outset the Court wishes to address a misconception that it occasionally encounters, that the second limb of Lord Lane's celebrated statements of principle in *R v Galbraith* represents authority for the proposition that a case must be withdrawn from the jury if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies. This Court wishes to emphasise that it is not authority for that proposition.
>
> 48. On the contrary, the emphasis in *Galbraith* is on the primacy of the jury in the criminal trial process as the sole arbiter of issues of fact. What Lord Lane was in fact saying in *Galbraith* was that even if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies, it is for the jury to assess that evidence and make of it what they will, unless the state of the evidence is so infirm that no jury, properly directed, could convict upon it. Accordingly, what *Galbraith* is in fact concerned with is fairness."

100. It is well established by this Court that the withdrawal of the case from the jury is one which should only arise as an exceptional measure. It is also well established that the judge in deciding whether or not to withdraw the case from the jury must examine the

case as a whole and must only withdraw the case if the evidence is so unsatisfactory, contradictory or unreliable that no jury, properly charged, could convict upon it.

Conclusion

101. It is clear that in the course of the evidence, the defence were in a position to point to inconsistencies in the evidence of P.C. However, it is not the position that there was an absence of the elements of the offence as alleged. The witness's evidence was detailed and he was cross-examined for a considerable period of time. He did not demur from his core allegations. There were, as stated, certainly inconsistencies in his evidence, but we are entirely satisfied that those inconsistencies were issues relevant to the assessment of the reliability and the credibility of the witness and as a consequence, were quintessentially matters within the province of the jury.

102. We are not persuaded that the inconsistencies were such so as to render the trial unfair and require the trial judge to direct the jury to return a verdict of not guilty. In the circumstances, it appears to us that the decision of the trial judge to refuse to withdraw the counts concerning P.C. from the jury was a legitimate exercise of the trial judge's discretion. The position that certain aspects of his evidence were inconsistent with the material he furnished to the Smyth Inquiry or with the statement of claim or other pleadings in his civil action did not, in our view, render it unfair that the matter be left to the jury for its consideration.

103. The issue of the alleged inconsistencies was one for the jury's consideration in determining whether the witness's evidence could be relied upon. There was in our view, no reason that it would be unfair to the appellant to ask the jury to assess P.C.'s evidence, notwithstanding inconsistencies contained therein.

104. This was not a case, in our view, where there was material in the evidence which caused the evidence to be of such calibre that the evidence was inherently unreliable. Accordingly we are not persuaded that the trial judge erred in refusing to withdraw the counts from the jury and we reject this ground of appeal.

Grounds 10 and 24-Failure to grant a direction

Ground 10: The learned trial judge erred in law and in principle in failing to grant a direction of no case to answer, in circumstances the offences were extremely old, where there missing medical records, and medical records that appeared to contradict evidence of some of the complainants, in circumstances where the prosecution had not demonstrated that there was no suggestibility, contamination, copycat evidence or collaboration as between complainants.

Ground 24: The trial was unfair in the circumstances of the accused's age (86), health and medical condition.

105. After the closing of the respondent's case, the appellant made a more general application to the learned trial judge to withdraw the case from the jury. In summary, this application was based on *Galbraith* and also on the cases of *The People (DPP) v. CC* (No. 2) [2012] IECCA 86 and *DPP v. PO'C* [2006] 3 IR 238. The main arguments advanced were the

inconsistencies in the evidence of the complainants, the issue of delay and associated problems and the possibility of collusion, contamination or suggestibility given the multiplicity of complainants. The Court refused this application in the following terms:-

> "Now, there's an application for the Court to take the matter from the jury on the basis of, I suppose, Galbraith, delay, and I suppose the number of complainants issue.
>
> Now, the first matter is Galbraith. I have no doubt there is a residual discretion given to Courts to take cases from juries by the assessment of the weight of the evidence. Obviously, this should only be done in the most extreme case where a judge comes to the conclusion that the evidence is so infirm that if a jury was to convict, it would be perverse. It usually happens I think in cases of identification, where a judge looks at the identification tendered by the prosecution and decides that it is so weak and infirm that no properly directed jury could convict. I always think this part of Galbraith is a judge should try to stop a jury coming to perverse conclusions and it's obviously very limited because factual issues are for the jury and judges shouldn't intrude unless where the evidence is incredibly tenuous or very weak.
>
> In this case, there are seven complainants. All seven gave their evidence. All seven were cross-examined. The jury had the benefit of seeing them in the flesh. They had the benefit of seeing them in the witness box, gauge their reaction and so on. The question I have to decide in relation to that, this application; was their evidence or any of the complainants' evidence so weak or infirm that I should take their case from the jury? I've come to the conclusion I should not. There is some infirmities that have been identified. There is some inconsistencies that have been identified. But all stuck to their central story in relation to this alleged abuse.
>
> Obviously, the jury can look at the evidence. They can decide whether they can adopt the evidence or not but it's for them. Obviously, credibility is everything in these types of cases or as a substantial part of it in most of these types of cases and obviously, a jury can assess the credibility of all of the complainants. Obviously, P.C. did change from his evidence-in-chief to when cross-examined by Mr Hartnett in relation to digital penetration. Mr Hartnett put to him what he said to the Smyth Inquiry and obviously, the jury have the benefit of his reaction to this and the way he answered Mr Hartnett in cross-examination. But that's for the jury. I have decided on the basis of what I've heard in this court that none of the cases are that weak or infirm that this Court must take them from the jury.
>
> In relation to the delay issue, obviously delay presents problems. This is well-trodden ground. This issue has been dealt with by numerous courts, from the circuit court to the Supreme Court. The decisions from the higher courts are clear; people can be tried for very old offences. Obviously, a considerable amount of judicial time has been expended in these types of cases but they all make a relevant point; that in most sexual abuse cases, there is no witnesses. In most

sexual abuse cases, it is done furtively. Obviously, surrounding information and evidence can be relevant but the higher courts have indicated to the lower courts that these cases can be tried and obviously, warnings can be given and juries are common-sensical enough to understand the problems about old complaints. But the higher courts have indicated that juries-- that parties can be tried for very, very old offences.

Now, they have their particular problems, as identified by Mr Hartnett, as identified in many cases, but in this case it is a very typical type of case in relation to these old complaints and basically, I see no reason in this particular case not to let this case, these cases or case go to the jury on this basis. I see that there is problems. I can see that submissions will be made to the jury on the basis of this and the jury will have to assess it, examine it and take it into account in coming to their conclusion in relation to these cases.

The last point is the technical issue of multiple complainants. Now, there was an application before the Court to sever the indictment. On the basis of submissions on the book of evidence, I decided that the cases would travel together and there would be no-- I did not grant severance. Obviously, I indicated to Ms Noctor that there could be consequences if certain events occurred. Now, obviously, if there was evidence of collusion between the complainants, this could have had severe consequences for the State's case, but all of the complainants gave evidence. There is no evidence before this Court that any of the complainants knew each other, there is no evidence before this Court at this point that any of the complainants talked to each other about their complaints and there is no evidence before this Court as I can see of collusion.

Now, Mr Hartnett submits to me that it's up to the State to rule out collusion beyond reasonable doubt. I take a different view; I take the view that the jury, before they can act on this type of evidence, must be satisfied beyond reasonable doubt that there has been no collusion in this case. I take the view before the jury can act on this type of multiple complainant type evidence, the jury must come to the conclusion beyond reasonable doubt that they are acting independently. Obviously, in deciding that issue, the jury can take into account all of the factors raised by Mr Hartnett and raised in the case generally of their involvement with Dignity 4 Patients, their involvement with the one solicitor's firm, the fact that they've taken civil proceedings in the case, the fact that they've all attended the same psychiatrist Mr Murphy and the fact that what excited them to bring these complaints was a deluge of publicity about Mr S.

But these are factors for the jury to assess. Did they come forward independently of each other? Did they collude with each other? And the jury will be certainly told, before they can act or consider acting on this type of multiple complainant type evidence, they must be satisfied beyond reasonable doubt that indeed the complainants acted independently and in the absence of collusion. Because the

application was made before the Court for severance, I refused it and obviously, if evidence, believable evidence had come out during the course of the trial that there was collusion in the case, that the complainants had acted together or didn't act independently, then this Court would have had to make some decisions in the case but no such evidence emerged in the case. In fact, there wasn't one question put to any witness; did they know each other? Did they ever encounter each other?

And as far as the jury is concerned or as far as this Court is concerned, the jury can make up their own minds on the issues. I've heard no evidence that would allow this Court to infer collusion or lack of independence. Obviously, I'm aware of why the complaints were made or I can infer that the reason they made their complaints was the deluge of publicity in the […] area in relation to Mr S. But in all of these cases, something activates people or excites people to make complaints. In one case, it was the guard going to actually members of particular classes in a particular school. In others, it's probably other reasons. But the question is did they act independently or did they collude with each other in relation to what they did and what they told the guards? At the present, I see no evidence of such behaviour and therefore, I refused to withdraw these cases from the jury on that basis.

And in general, I think there is no reason for this Court to take the extreme step of taking these cases from the jury. It seems long ago or 20 years ago or 15 years ago, decisions were made at a particular level in the judicial hierarchy to allow the trial of very old cases. It was indicated someplace in one of the courts or the decisions that the Courts did not feel that it was a matter for the judiciary to take that step. It was a matter for another organ of government. So, these cases go to the jury or if not go to the jury, at least they survive the applications made by Mr Hartnett."

Submissions of the appellant

106. The appellant submits that given the antiquity of the allegations and what the appellant characterises as significant gaps in the medical records of the complainants, this case was virtually impossible to defend. The appellant submits that this was compounded by the decision to prosecute seven complainants together.

107. The appellant refers to the dicta of O'Donnell J. in *The People (DPP) v. CC (No. 2)* [2012] IECCA 86 at para 56:-

> "The greater the number of accounts the more remote the possibility of collective error. This is a powerful line of reasoning but its force is dependent on the exclusion of any possibility of connection between those giving the accounts, particularly when it is otherwise limited in verifiable detail. It is necessary to take into account the possibilities of suggestibility, contamination of evidence, copycat evidence or collaboration, if only for the purposes of excluding them."

108. It is submitted that it is not only the jury that should take into account the possibilities of suggestibility, contamination etc., but also the trial judge at the direction stage. It is submitted that if, on the evidence, there is a possibility of such contamination, the trial judge should consider whether the appellant was actually in a position to receive a fair trial or whether there was a real risk that a jury would convict on the basis of the fact of multiple complainants where the prosecution had failed to establish that the complainants were actually independent from each other.

109. The appellant refers to the comments of Kearns J. in *The People (DPP) v. CC* [2006] 4 IR 287 where he stated that prejudice suffered as a virtue of delay is magnified in direct relation to the number of complainants who come forward.

Submissions of the respondent

110. The respondent submits that during the trial no issue was taken with the medical records and furthermore, unlike many cases of this kind there was an abundance of documentation available including psychiatric assessments arising from the civil actions, communications involving Dignity 4 Patients and transcripts of the Smyth Inquiry.

111. In relation to the potential for contamination, copycat evidence or suggestibility due to the manner in which the complainants came forward, it is submitted that no question was asked on cross-examination as to whether any of the complainants actually engaged or communicated with any other complainant in an effort to point to contamination, copycat evidence, collaboration or suggestibility. The respondent refers to the judgment of the Court of Appeal in the first trial (*The People (DPP) v. MS* [2019] IECA 120) where similar arguments were considered:-

> "Whilst in some instances, there may be contact between complainants prior to the commencement of the trial, this is not necessarily indicative of collusion or contamination or collaboration or indeed inadvertent influence. For example, allegations may be made by complainants who attended the same school or were taught by the same teacher or may be made by siblings who lived in the same house for many years"

112. The Court went on to say:-

> "The height of the evidence was to demonstrate that the complainants attended meetings and were encouraged, facilitated and advised in the making of complaints. It is a fundamental principle of law that any question of fact which can be determined by a jury should not be decided by a trial judge. This was precisely the position here; the question of contamination or some other factor is one of weight and probative value and we see no reason why this question should not have been left for the jury to consider with appropriate directions from the trial judge.
>
> 54. We are satisfied that the possibility of contamination or collaboration, inadvertent influence or suggestibility are, in all but the most exceptional cases, matters

directed to weight and the probative value of evidence and therefore an issue for the jury. This case was far removed from that which might be considered as exceptional. A suggestion that attendance at meetings gives rise to a possibility of suggestibility or contamination so that the evidence is not cross-admissible is not of an exceptional character so as to be relevant to the issue of admissibility. The trial judge did not err in refusing to hear evidence on the issue"

113. The respondent submits that the appellant's contention that there was an obligation on the trial judge to re-consider, at the direction stage, the possibilities of suggestibility, contamination of evidence, copycat evidence or collaboration, if only for the purposes of excluding them, is a misinterpretation of *The People (DPP) v. CC (No. 2)* [2012] IECCA 86.

Discussion

114. An application was made at the conclusion of the respondent's evidence to withdraw the counts from the jury in terms of R v. Galbraith and with reliance upon the decision of *The People (DPP) v. CC (No. 2)* [2012] IECCA 86. The application incorporated *The People (DPP) v. PO'C* [2006] 3 IR 238 relying on the inherent jurisdiction of the court of trial to stop a trial in the event of any unfairness arising.

115. In essence, it is said that due to the passage of time, multiple complainants, missing and/or contradictory medical records and inconsistencies in the evidence, that it would be unsafe to leave the issues for the jury's consideration. The application was one which is often seen applying the principles in *R v. Galbraith* and *The People (DPP) v. PO'C* [2006] 3 IR 238. Reliance is placed on Kearns J.'s remarks in *The People (DPP) v. CC* [2006] 4 IR 287 wherein he stated that:-

> "It seems to us that whatever prejudice arise by virtue of delay in the case of a single complainant can only be seen as exponentially magnified where there are multiple complainants and a single accused. His difficulties of recollection, his difficulties in finding witnesses or of even remembering the identity of individual complainants are all magnified in direct relation to the number of complainants who come forward. So, while the difficulties of delay may in such circumstances recede to some degree from the prosecution's point of view they are multiplied and exaggerated from a defendant's point of view."

116. The lengthy delay in this case underpins the submission made on these grounds. The recent decision of the Supreme Court in *The People (DPP) v. CC* [2019] IESC 94, wherein the Court considered the correct approach to be taken by the trial judge where there is an application to stop the trial, such as in the present case, on the basis of alleged unfairness arising from a lapse of time between the offences and the date of trial. The Court said that the issue mandates an assessment by the judge as to whether a trial is fair in light of the lapse of time and whether the accused person had been, as a result of that time lapse, deprived of a realistic opportunity of a useful line of defence. Clarke C.J. set out the elements of the assessment from paras. 9.2 – 9.5:-

"9.2. In that regard, the trial judge must (a) first consider the prosecution case as it has actually developed at the trial. Thereafter, the trial judge must (b) consider whatever evidence is available as to the testimony which might or could have been given but which is said to be no longer available. That exercise will generally involve two principal considerations. First, the court must (c) consider the available evidence about what might have been said by the missing witness or what might have been contained in missing physical evidence, such as documents or objects. The trial judge will be required to have regard to the degree of confidence with which it can be predicted that the particular evidence would have been available, while recognising that the very fact that the evidence is not available means that that exercise must necessarily be speculative at least to some extent.

9.3. 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.

9.4. 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.

9.5. 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."

117. O'Malley J. agreed with this approach, moreover, she also agreed with the principles set out in the judgment of O'Donnell J. These principles were set out at para. 46 of O'Donnell J.'s judgment as follows:-

"(i) The jurisdiction to determine whether it is just to permit a trial of an accused person on historic allegations to proceed, is one normally best conducted at the trial;

(ii) The decision the trial judge should make is whether he or she is satisfied that it is just to permit the trial to proceed;

(iii) The obligation on the trial judge is to make a separate and distinct determination in this regard, and the trial judge must do so conscientiously, in the light of everything that has occurred at the trial;

(iv) The test to be applied does not involve any assessment of the guilt or innocence of the accused, which is a matter for the jury, but rather the fairness and justice of the process by which it is sought to determine that matter;

(v) While an appellate court must recognise that a trial court has particular advantages in the making of this assessment, the decision of a trial court is subject to appeal, and trial judges should therefore set out clearly the considerations leading to the conclusion that it is or is not just to permit the trial to proceed."

Medical records

118. Medical records were disclosed to the defence prior to trial and it is certainly the position, as one might expect, that those records were utilised by the defence in cross-examination to test the credibility of the complainants. Moreover, the defence were furnished with statements arising from the respective civil actions taken by the witnesses, material from the Smyth Inquiry and communications with Dignity 4 Patients and, in some instances, psychiatric records and counselling material. The complaint stems from the fact that such records were scant or were not available; for example, there were no records available regarding the appellant's private rooms.

119. It appears to this Court that there was a considerable volume of material disclosed. The trial judge pointed out the difficulties that can be encountered in old cases. However, in the present case, whilst it was certainly a very old case, there was a considerable amount of documentary material. Moreover, the absence of material was addressed in some detail by the trial judge in warning the jury on the difficulties that can arise in the context of old cases.

120. The point was made at trial that if the missing records were available, such could assist in identifying doctors, nurses or those who worked in the particular area at the time. By way of underpinning the importance of records, Mr Hartnett pointed to the evidence of G.T., where his evidence was contradicted by the medical records.

121. It is certainly so that the records assisted the appellant in cross-examination. However, the fact that more extensive records were not available in the present case is not sufficient to justify a trial judge withdrawing a case from a jury. The issue of the absence of some records and the headway made by the appellant where there *were* records was a matter foursquare within the province of the jury in their assessment of the evidence. This assessment was assisted by the detailed and contextualised delay warning of the trial judge.

Inconsistencies, civil actions, publicity and Dignity 4 Patients.

122. In *The People (DPP) v. M* [2015] IECA 65, Edwards J. clarified the position concerning applications for a direction relying on the second limb of Galbraith and emphasised the primacy of the jury as follows:-

> "47. At the outset the Court wishes to address a misconception that it occasionally encounters, that the second limb of Lord Lane's celebrated statements of principle in *R v Galbraith* represents authority for the proposition that a case must be withdrawn from the jury if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies. This Court wishes to emphasise that it is not authority for that proposition.
>
> 48. On the contrary, the emphasis in *Galbraith* is on the primacy of the jury in the criminal trial process as the sole arbiter of issues of fact. What Lord Lane was in fact saying in *Galbraith* was that even if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies, it is for the jury to assess that evidence and make of it what they will, unless the state of the evidence is so infirm that no jury, properly directed, could convict upon it. Accordingly, what *Galbraith* is in fact concerned with is fairness.
>
> 49. Moreover, implicit in the *Galbraith* principles enunciated by Lord Lane, is that withdrawal of a case from a jury should be an exceptional measure, to which resort should only be had for the purpose of avoiding a manifest risk of wrongful conviction.
>
> 50. This Court considers that the matter is well put in the following quotation from Archbold, Criminal Pleading Evidence & Practice 2014 at page 484, where the authors state:
>
> > 'In making the judgment in line with the second limb of Galbraith, as to whether the state of the evidence called by the prosecution, taken as a whole, is so unsatisfactory, contradictory or so transparently unreliable, that no jury, properly directed, could convict, the judge must bear in mind the constitutional primacy of the jury and not usurp its function.'"

Conclusion – Grounds 10 and 24

123. In our view, the trial judge's decision on the application for a direction was one within his discretion and was certainly within jurisdiction. While there may have been aspects of the complainants' evidence which were inconsistent or contradicted by the medical records, each complainant was categoric in maintaining their core allegations of abuse at the hands of the appellant. The inconsistencies complained of were not such, in our view, so as to warrant the judge withdrawing all or any counts from the jury. These were issues for the jury's assessment as to the reliability and credibility of each witness.

124. Moreover, the issue of the civil actions was one within the domain of the jury to assess, as was the involvement of Dignity 4 Patients and the genesis of each complainant's decision to make a formal complaint. Again, these were not issues, either separately or collectively, which ought to have led the judge to direct counts of not guilty.

125. Evidence of the constituent elements of the alleged offences was before the Court and jury and the issues to which the appellant refers were matters properly to be considered in coming to their determination. How the complaints were made, the motivation for same and the involvement of Dignity 4 Patients were all relevant factors for the jury's consideration but were not matters which led to the exceptional jurisdiction of withdrawing the charges from the jury. As we have said, these were all issues which were relevant in the assessment of the credibility and reliability of each complainant and foursquare within the jury's domain.

126. The suggestion of contamination leading to a fundamental unfairness stemming from the manner in which the complaints came about was not an issue giving rise to a necessity to withdraw the matter from the jury either in terms of *R v. Galbraith* or on the exercise of the trial judge's inherent jurisdiction to stop the trial. Any such issue of collaboration or contamination, inadvertent or otherwise, is, in all but the most exceptional of cases, an issue for the jury in their assessment of the weight and the probative value to be given to the evidence. It appears from the evidence adduced that each complainant attended Dignity 4 Patients meetings, and it appears, received information regarding civil actions, solicitors and psychiatrists. Moreover, there was no suggestion made that any of the complainants gathered together to fabricate the allegations. The height of the evidence was that the complainants attended Dignity 4 Patient meetings and were advised and even encouraged in the making of complaints.

127. In the circumstances, we are satisfied that this was not one of those cases whereby the judge ought to have exercised his jurisdiction pursuant to *The People (DPP) v. PO'C* [2006] 3 IR 238 on the basis of unfairness. Whilst certainly if prejudice arises as a consequence of delay in a case, where there are several complainants, such prejudice may be greater than in a case of a single complainant. However, in the present case, we are not persuaded by the argument advanced; that is that given the lengthy delay and the age and infirmities of the appellant, that the alleged issues gave rise to a situation whereby the appellant could not be the recipient of a fair trial.

128. It should be noted that every accused is entitled to a fair trial, but that this does not mean that each trial must be a counsel of perfection. The issues complained of: the inconsistencies, the media publicity, the institution of civil actions and the involvement of Dignity 4 Patients, all of which, it is said are compounded by the fact of seven complainants, and the significant lapse of time, did not, in our view, render the trial unfair. The trial judge did not err in finding that it was just to proceed with the trial.

129. The institution of civil proceedings and the involvement of Dignity 4 Patients were central themes of the defence in the instance of each complainant. It seems to us that the purpose of adducing evidence, certainly insofar as Dignity 4 Patients was concerned, was to demonstrate a collective facilitation in bringing the complaints in order to undermine the credibility of the complainants. Whilst not expressly stated, it was certainly implicitly so, that in cross-examining the witnesses regarding the institution of civil actions,

emphasis was placed on the purpose of such actions; being for damages, again in an attempt to undermine the credibility of the complainants.

130. These were certainly legitimate avenues for the defence to pursue, but the involvement of Dignity 4 Patients or the institution of civil proceedings, do not in the circumstances render the trial unfair. The issues were ventilated and thus became part of the body of evidence and for assessment, ultimately by the jury.

131. Finally, it is apparent to this Court that the judge was more than alert to the inconsistencies in the evidence of the witnesses. While his ruling was succinct, he nonetheless addressed the relevant issues and correctly identified the legal principles. It is so, that he did not refer to the *PO'C* aspect of the application, but it is without doubt that the judge was cognisant of that application and gave a ruling which encompassed all issues. Indeed, it is inconceivable that the judge was not aware of Mr Hartnett's concerns, in circumstances where he had engaged with counsel in the course of the witness testimony.

132. This Court is satisfied that the trial judge was correct in the circumstances of the case to allow the evidence to go to the jury.

Ground 13-Evidence of the appellant's relationship with X.X.

Ground 13: The learned trial judge erred in law and in principle in refusing to allow the accused give evidence about his prior relationship with X.X. and Dignity 4 Patients in circumstances where X.X. had had contact with all the complainants prior to trial.

133. Counsel for the appellant sought to adduce evidence relating to X.X. who was connected with the group Dignity 4 Patients, which was engaged in an active media campaign in or around the time the seven complainants made their statements to An Garda Síochána. The Court also heard that an individual known to X.X. had been a complainant in a previous trial in which the appellant had been acquitted. The appellant sought to give evidence of his contact with X.X., it seems, to seek to show that there was a certain animus by X.X. towards him. The trial judge refused to admit this evidence and he stated that he did not believe that any alleged animus between the two parties was relevant in the circumstances.

134. The appellant submits that to prevent this evidence being given in circumstances where the prosecution was relying on the system as between the seven complainants, and where the jury were aware of the organisation Dignity 4 Patients and the role that it played in the investigation, was unfair to the appellant.

135. The respondent submits that the trial judge was obliged to intervene when the defence sought to introduce this inadmissible evidence. The respondent submits that this opinion evidence was not expert evidence and the complainants were not given the opportunity to address the claims made. The respondent further notes that X.X. was not called as a witness.

Discussion

136. In his direct evidence, the appellant sought to give evidence of his relationship with X.X., whom he said, had attended him for a medical examination arising from an insurance claim. It appears from the appellant's testimony that he was of the opinion that the claim was somewhat exaggerated. The relevant portions of the extracts are as follows:-

"A. ...but [X.X.] came to see me as a patient, the exact date I don't know, I've forgotten, it must be about in the 1980's. At that time, insurance companies asked me to examine people who were injured in accidents, especially road traffic accidents –

Q. For what purpose, might I ask you?

A. For the purpose of giving a report to the medical insurance company. And [X.X.], --[..] came to see me to be---to have---to be examined so that I could make a report, a medical report, for the insurance company, and that happened –

> …and this whiplash injury thing, I knew in my heart and soul that 90% of them were false, and as I said I tended to give the patients the benefit of every doubt, but [X.X.]...complaints were over, over the top."

137. At this point, the trial judge intervened and questioned the relevance of the evidence and ultimately ruled as follows:-

> "Obviously the ultimate issue in this case is for the jury. The jury will decide on the guilt or innocence or otherwise of the defendant. Obviously, before evidence is admissible, it must be, potentially at least, relevant to the case. Now, it seems there was general publicity in the […] area about Mr S. It seems X.X. […] this group, Dignity 4 Patients, and it seems if Mr S is to be believed, there was a certain at least, relationship is the wrong word, but at least they encountered each other prior to this publicity. The question is, Mr S, it seems, is going to give evidence that tends to show that there was a certain animus by X.X. towards him. The question is, is that relevant in this trial? It seems undoubtedly the complainants came forward as a result of this publicity. But for the life of me, I cannot imagine how animus on behalf of X.X. towards Mr S has any relevancy. No basis was laid in the cross examination by the defence in relation to this matter. Now, it is – [ ] has been mentioned and [Dignity 4 Patients] have been mentioned in the background, as part of the general setting. But I cannot see the relevance at all of any potential animus or animus between these two parties. I cannot see the relevance of it and therefore I'm making a direction that basically, this should not be explored any further in the matter."

138. It is said that this ruling was unfair to the appellant in circumstances where Dignity 4 Patients and its involvement was a feature of the trial. It is argued that where the jury had to consider the unlikely coincidence of seven complainants coming forward, that evidence of the appellant's belief as to the reason they came forward was relevant.

139. The purpose of direct examination or examination-in-chief is to seek to elicit relevant evidence in support of the party calling the witness. Evidence is admissible if it may lawfully be adduced at trial, and relevance is the touchstone of admissibility. Again in general, evidence which is relevant is admissible and material which is irrelevant is inadmissible. There may be situations where relevant evidence is inadmissible and admissible evidence may be irrelevant, but that does not concern us here. Regardless of whether the witness is called for the prosecution or for the defence, the same rules of evidence apply. Therefore, as a general rule, a witness may not give hearsay evidence or may not provide an opinion on an inference to be drawn from proven facts. The inference to be drawn from facts is a matter for the jury.

140. Generally speaking, relevance is dependent on the circumstances of each case, and the manner in which the case is conducted. It is difficult to define the word 'relevance' but in *R v. Kilbourne* [1973] A.C.729 at p.756, Lord Simon of Glaisdale said:

> "Evidence is relevant if it is logically probative or disprobative of some matter which requires proof."

141. We now turn to the evidence which was sought to be adduced by the appellant. It was contended that Dignity 4 Patients had been engaged in a campaign against the appellant and he wanted to put forward reasons why there might be such a campaign against him.

142. The judge identified his view as to the rationale behind the appellant's desire to give this evidence when he said:-

> "Judge: Well, Mr Hartnett is seeking to adduce evidence that basically speaking the reason .... campaign was that .. was disappointed with a medical report given …. in relation to a personal injuries claim by this witness, Mr S."

143. Mr Hartnett did not appear to agree with this statement by the trial judge and indicated that he thought his client was about to indicate that he did not stand over X.X.'s physical complaints. Moreover, he indicated that he wished to advance the proposition that an individual known to X.X. was 'a disappointed complainant'.

144. It is trite law to say that evidence may be tested by cross-examination. Cross-examination, is, undoubtedly, one of the most valuable tools available to the defence and fairness dictates that if an issue is to be canvassed in direct testimony, that matter should be put to witnesses to enable them to comment on the suggestion.

145. At no point in detailed cross-examination regarding the complainants was it suggested to any of them that the reason they came to court to give evidence was as a result of being exhorted to do so by X.X. due to the negative view of M.S. for whatever reason. The height of the evidence was that X.X. had, in some instances suggested that the witnesses contact the Gardaí and had facilitated and advised the complainants through Dignity 4 Patients on civil actions. It was never suggested X.X. bore an animus towards the appellant.

146. It is clear that the background to the complainants coming forward was as a result of publicity concerning the appellant. What is also clear is that there was no suggestion in the trial that the reason the complainants came forward was as a result of animus on the part of X.X. towards the appellant.

147. There was robust questioning of the witnesses regarding the reasons why complaints were made, the involvement of Dignity 4 Patients and media attention which focused on the appellant. There was never a suggestion that X.X. had a particular animus or malintent in respect of the appellant. X.X. was not called by the respondent and it would appear that the appellant had no intention of calling X.X. as a defence witness. Therefore, the purpose of the intended evidence was simply to enable the appellant to malign X.X. in some fashion in circumstances where no cross-examination had taken place on the motivation behind the organisation.

Conclusion – Ground 13

148. It is abundantly clear that the organisation Dignity 4 Patients had relevance to this trial. There is no doubt that the complainants attended meetings with Dignity 4 Patients and received information, advice and encouragement from that organisation regarding their complaints. Evidence of that type was relevant and admissible

149. However, what is not clear is why any alleged ill-feeling towards the appellant on the part of X.X. was relevant in the trial. There was no suggestion that such ill-feeling (if it existed) related to the origins of the organisation or indeed caused the complainants to make their complaints. In those circumstances, while the organisation Dignity 4 Patients and its involvement with the complainants was relevant, the evidence which it appears the appellant wished to give arose from *his view* that he did not stand over X.X's physical complaints. Whilst the transcript of the submissions by counsel for the appellant does not go so far as to state that X.X. was motivated by this to generate a campaign against the appellant, he was anxious to adduce the evidence concerning X.X. and the appellant's examination of X.X.

150. We cannot see and are not persuaded that the proposed evidence was relevant. The proposed evidence was not probative or disprobative of the guilt of the appellant, and thus did not come within the definition of relevance as expounded in *Kilbourne*.

151. This ground fails.

Grounds 14 and 15- Interventions by the trial judge

Ground 14: The learned trial judge erred in law and in principle in interrupting the cross-examination of the accused indicating that in his view that the accused understood a question.

Ground 15: The learned trial judge erred in law and in principle in failing to discharge the jury in circumstances where he had expressed the view during the cross-examination of the accused that the accused was not answering questions and that they should have the "measure of him"

152. Grounds 14 and 15 are concerned with interventions by the trial judge during the course of the cross-examination of the appellant. The appellant was being questioned on the presence of a nurse during his examination of the patients and this culminated in the following exchange:-

"Q. If you saw and examined 18,000 patients a year, I'm asking is it possible, on your evidence, that there wasn't a nurse present for every such appointment?

A. There was a nurse present in the wards when I saw patients, there were nurses present in the outpatients when I saw patients. There were nurses present in the outpatients' department when I saw patients.

Q. You're not allowing for the possibility that there wasn't a nurse present for any one examination of a patient?

A. That would be, if I saw a paediatric patient

Q. It's actually a yes or a no answer, Mr S. Are you not allowing for the possibility that of 18,000 patients in a year, that there was an occasion or occasions when there was no nurse?

A. There was always-- I worked in complete--

Q. It's a yes or a no question?

MR HARTNETT: If he could be allowed to answer.

A. I think, yes, I think

JUDGE: Sorry, Ms Noctor, at this--**you should have got the measure of this witness and you're going to get what answer**--he has given answers.

MS NOCTOR: That's why I'm trying to give him a question that will elicit a yes or a no.

JUDGE: Sorry, the jury will make their-- will form their impressions of the witness.

A. At this stage in my life, I have got some senile dementia."

153. At another point in the cross-examination the trial judge interjected as follows:-

"Q. Well, in terms of-- you're unwilling to provide an answer to that in principle?

A. Yes.

Q. Is that

MR HARTNETT: Sorry, that is unfair.

MS NOCTOR: Well, I've asked the question the number of times. You won't say it's inappropriate

JUDGE: Sorry, you've asked a very clear question of the witness, the witness hasn't given you a response.

MR HARTNETT: I'm sorry, that in my-- I object to that, Judge.

JUDGE: Well he hasn't. He's been asked to express an opinion on the basis of the question put and he's refused to do it.

MS NOCTOR: A proposition has been put.

A. No, it would be unusual.

MR HARTNETT: Well, he should be asked does he understand the question.

JUDGE: Well

MR HARTNETT: In fairness now.

JUDGE: In fairness, it seems to me he understands the question fine.

MR HARTNETT: It seems to you.

JUDGE: Yes.

MR HARTNETT: But we, at this end of the room, took the opposite view I should say.

JUDGE: Well and Mr Hartnett, that may be the case but it's for the jury to decide eventually, not the judge or the barristers.

MR HARTNETT: No, and it's not usual for the Judge to give his opinion before the jury, might I say."

154. An application to discharge the jury on the basis of the remarks by the trial judge was refused in the following terms:-

"The cross-examination was taking place, it was my view and it was obvious that he wasn't answering directly the questions put by Ms Noctor. I took the view I wasn't going to force him to answer, I wasn't going to force him to answer one way or the other. I could have directed him to answer the question. I took the view that basically the jury were watching the cross-examination and it was up to them to make what they wished from the cross-examination and I said so. And it'll be reiterated on many occasions before we finish it trial and it's been stated already that the facts are for them; any commentary made by you, Ms Noctor or me on the facts is totally irrelevant. They have to make their own mind up on what they've heard. And they will be told that at least on three occasions."

155. In his charge to the jury, the judge reminded them of the requirement to assess the credibility of each witness and specifically advised the jury in respect of the appellant as follows:-

> "It's essentially a jury's job to look at each witness and complainant and look at their credibility, as well as that of Dr. S. You've had, you had him before you for a day, I think, and you've listened to him and looked at him, and you're going to have to decide on the credibility. And, I make this warning again in relation to Dr. S; just because – if you come to the conclusion that he has misled you in any way or was evasive in any way, or – sorry needless to say, I shouldn't have to say, that you dislike him, it doesn't matter. But just because if you find he's wrong, you should not go to automatic conviction. I think you know that. You know that you must bring all of the evidence and look at it all, the same with the complainants."

156. The appellant submits that the trial judge's interventions throughout the evidence of the appellant, interrupting the direct examination to prevent a relevant issue being explored and then by insinuating that the appellant was being deliberately evasive and not answering questions would have left the jury in no doubt as to his view of the appellant and his evidence.

157. The respondent submits that despite the fact that a concise, unambiguous question was repeatedly put to the appellant, there was nonetheless a consistent failure by the appellant to answer it. The trial judge had the benefit of observing the appellant's demeanour whilst giving evidence-in-chief and whilst under cross-examination. The trial judge correctly stated that the jury would form their own impressions of the appellant as that is their sole function. The trial judge in his charge specifically warned the jury that even if they came to the conclusion that he was misleading, evasive or simply dislikeable, this did not automatically make him guilty.

Discussion

158. In *The People (DPP) v. McGuinness* [1978] IR 189, the Court of Criminal Appeal considered whether the extent of the trial judge's interruptions in the examination and cross-examination of various witnesses should cause the Court to quash the conviction. It appears the real concern of the Court related to interruptions in the cross-examination of the complainant in a rape case. The interventions in that case were of a significant number and the Court observed that:-

> "The Judge must be patient and confine his interventions to the minimum necessary for a fair trial. He should intervene only when cross-examining counsel misstates evidence already given or asks a question which the witness may not understand or when he thinks that the witness has misunderstood the question."

Conclusion – Grounds 14 and 15

159. In *The People (DPP) v. McGuinness* [1978] I.R. 189, the interventions were of a significant number, whereas in the present case, the impugned interventions were extremely limited. It is said that such were unfair to the appellant and in effect, that the

judge's interventions may have conveyed to the jury a particular view of the appellant on the judge's part and thus rendered the trial unsatisfactory.

160. We do not agree with that submission; the judge was careful to limit his interventions; interventions by a trial judge should be as infrequent as is possible in the circumstances of any given case and this is particularly so in the instance of cross-examination. The reason for this is quite obvious, that is, that only by cross-examination can a witness's testimony be tested. Somewhat unusually, in this case, the criticism is not one levied by the cross-examining party but on the part of the appellant and on the basis of alleged unfairness to the appellant arising from such interventions, which it is said were indicative of a lack of impartiality on the part of the trial judge.

161. We have carefully considered the transcript of the impugned interventions and we do not find fault with the judge's approach. Moreover, the judge was careful in his charge to emphasise the primacy of the jury and the necessity to assess the credibility of each witness. He specifically referenced the appellant in this respect and cautioned the jury against taking a view that the appellant was evasive or indeed against taking any negative approach to him.

162. Accordingly, this ground fails.

Ground 16, 17, 18, 19 and 23

Ground 16: The learned trial judge erred in law and in principle in charging the jury as to how they should treat the evidence of each complainant for the purpose of assessing whether the evidence of one complainant could be supportive or corroborative of the evidence of another complainant and in particular, failed to tell the jury that they must be satisfied beyond reasonable doubt in relation to a particular count before the fact of that conviction could be used to support another count.

Ground 17: The learned trial judge erred in law and in principle in telling the jury that if they were satisfied that the evidence of the complainants was not influenced by materials published by the press and published by a particular organisation, then the fact that there were seven complainants became compelling evidence in the case.

Ground 18: The learned trial judge erred in law and in principle in re-charging the jury on the requisition of counsel for the appellant in relation to the grounds at [16] and [17] above in such a way as to further prejudice the appellant.

Ground 19: The learned trial judge erred in law and in principle in failing to discharge the jury on the request of counsel for the appellant following upon the matters complained of at [16 – 18] above.

Ground 23: The learned trial judge erred in law and in principle in failing to discharge the jury in circumstances where, during the course of his charge, the learned trial judge stated that evidence of multiple complainants in the absence of collusion is "compelling" evidence.

163. Prior to the charge to the jury, the Court heard lengthy submissions on the issue of system evidence and how the trial judge should present the issue to the jury. The trial judge stated that he would approach it as follows:-

> "So, I think, from what I hear from people, what I'm going to say to the jury, I think, is that, basically, the BK type evidence is certainly corroborative. If you do not accept the BK evidence, you're thrown back onto the individual accounts of the seven complainants, and before you can convict, you must be satisfied beyond reasonable doubt of their-- of that evidence. And obviously, I must-- I will indicate to them that there's absolutely no corroboration in the case in relation to those matters. And I will give the old-fashioned corroboration warning. And basically, I think that's as far as can I go, because if I go down your route of indirect/direct BK systems evidence, I think the jury will be looking at me totally confused. They'll be confusion will reign. And I am satisfied that, basically, there's some merit to what you say about the independent-- or the system evidence independent of the BK evidence, I think you have support there. But I think there's huge confusion-- there's huge confusion betrayed in their judgments to the lower Courts. I'm not saying they have any confusion about it at all, they are probably very clear in their own minds, but they always almost swing, inevitably, from similar facts to the, sort of, the unlikelihood of independent complainants coming forward."

164. The trial judge went on to address the issue of system evidence in his charge to the jury in the following manner:-

> "Now, there's a next matter I have to address you in some detail. Now, that's the fact that in this case, you have heard evidence in relation to multiple complainants. Seven men have come forward and said Dr S indecently and sexually abused them. How do you use that evidence? Normally, the normal orthodox situation would be the Court would only allow one complainant at a time. In other words, the Court would, normally they would be what's known as separate trials. That basically speaking, that one complainant would come in here and said, and say, give his evidence and you would decide on that matter. Now, the Courts have allowed multiple complainants on a certain basis. And it is a certain precise basis. And multiple complainants are allowed where it is deemed, and it's for you to find eventually, that there is similar fact evidence - I'll explain to you what that means - and that the complainants have come forward independently of each other, and there is no evidence of collusion. Now, the similar fact evidence the State say exists in this case is that all of the complainants at the time were young boys. They also say that the assaults were fairly similar, and they all occurred in a medical setting, and the places where they occurred. Now, the second point to say that allows, allows this case to be heard, all these cases to be heard together is that basically, they say that all of the complainants came forward independently and that there is no evidence of collusion. Now, you're going to have to examine that. Now, because before you act on this evidence you must decide that the crimes themselves, or the allegations made are similar. Secondly, before you act

upon it, this evidence, you must be satisfied that all of the complainants made their complaints independently, and in the absence of collusion and also suggestibility, copycat type behaviour and contamination. Now, how do you do that? So, basically, the force of this evidence is this; that it would be unlikely that seven individuals would come forward making similar complaints about Dr S unless they were true, in the absence of collusion, that they acted independently, that they weren't contaminated by certain people or sources, or that there wasn't evidence of suggestibility or copycat. Now, Mr Hartnett has suggested to you that by reason of the publicity, and there had there was extensive, because it's common case that all of these complainants came forward as a result of certain complicity or media, or publicity they became aware of in relation to Dr S. There is evidence, and it's uncontested evidence, that all had contact with Dignity 4 Patients. They also, there's uncontested evidence that they all attended with and engaged the same solicitor. And there's uncontested evidence that they all attended for medical examination with a Dr Murphy in Tallaght. Now, he says that's evidence of contamination or suggestibility, lack of independence. Now, you're going to have to engage with that. But I should say to you there is no evidence in the trial that any of the seven complainants knew each other. There's no evidence in the trial that any of the seven complainants spoke to each other before they made their complaints. There's no evidence in the trial that basically, they didn't act independently. But that suggestion is made. And you must be satisfied beyond reasonable doubt that one, all the alleged crimes are roughly similar, or similar. And secondly that all the complainants came forward independently in the absence of collusion without being contaminated by without contamination in relation to what say. And basically, suggestibility means that basically, that basically by reason of the publicity, either the complainants in this case made up the allegations or exaggerated the allegations, or copycat, that basically you're going to have to examine the possibility that these complainants, some of these complainants, heard what was happening and decide, decided to make up an allegation to get on the gravy train. Now, that's putting it in a very blunt way, but I think you understand what I mean. Before you can act on this type of evidence the multiple complainant, because you can imagine that if, say if there was no publicity in this case, say all of a sudden without any publicity or any of what occurred around the […] area, seven or eight people arrived into the garda station who didn't know each other and made similar complaints about the same person, I think logically you would all understand that would be compelling evidence. Why would seven totally unrelated people, with no connection whatsoever, arrive into a garda station and make roughly similar complaints about a similar about the same person? You can imagine that is, you could see on a matter of common sense, that is compelling evidence. Now, it's for you to decide, in this case, does that situation arise. Because the State are advancing this in support of the individual allegations made in all of the cases. They're saying that they cut it in two. You have the evidence of each individual complainant and in support of that or in corroboration of it, in support of it, they say these seven independent people made allegations, and you

must take that into account and that is what we call corroboration, independent support tending to show Mr S committed these offences. Now, if you've a doubt, and you must be satisfied beyond reasonable doubt that they acted independently and in the absence of collusion, you must consider contamination, copycat, and suggestibility. You must do that. But you have to be honest in this case. If you say, by the way we've a doubt about this evidence. We're not so satisfied beyond reasonable doubt that one, it's similar, that the case the crimes are similar, or secondly, we're not satisfied that they are independent. That's a matter for you. You must be satisfied beyond reasonable doubt of that, then you must discard his evidence. You mustn't take it into account. You understand? If you you must perform that task and you must perform that task on the basis of what you heard in court. As I indicated to you, you must engage with the evidence. And I must say, it was never put to any of the complainants that they ever talked to each other because there's no evidence that they did. There's no evidence that they even knew each other. But there is evidence that they attended certain meetings and contacted Dignity 4 Patients. There is evidence that they went to Dr Murphy and had the same solicitor. There is all of that evidence and there is evidence that can be accepted by everybody that what brought everybody forward in this case was the publicity. And that's a you're going to have to look at that, and you're going to have to decide whether these complainants came forward independently in the absence of collusion, suggestibility, copycat, and contamination. That's for you. If you decide beyond reasonable doubt that they did, then you can take into account in coming to the conclusion in relation to all of the counts. Because it is compelling evidence if seven people have made similar allegations against Dr S in the absence of collusion, suggestibility, independently and such like. That is a matter you have to take into account. And then you must look at all of the evidence. Then you have two strands of evidence in relation to each case. You have this seven-complainant evidence, and you have the evidence of each one of them in relation to what they say occurred to each other then. Now, that's for you. Now, if you discard and you do not accept this multiple complainant type evidence, then there is no corroboration in this case at all for the complainants. And there was an old warning, and I'm going to give you it because of the circumstances of this case. It's called the corroboration warning. Now, this was given historically in all sexual assault cases, by an act, I think, in probably the early 2000s. I'm not sure when it became optional for judges whether they should give it or not. I have decided to give it in this case if there's and it's put in a very Butler was the judge, the one, and it was I think Dental Board v. O'Callaghan. "The rule is that the tribunal of fact, that is you, the jury, must clearly bear in mind and be warned that it is dangerous to convict upon the evidence of a complainant, unless it is corroborated." Corroboration means independent support for the allegation. Now, in the absence of the multiple complainant type evidence, there is no independent support for any of these type of allegations, none. If you discard the independent, or the multiple complaint type evidence, what you must do is you must decide this case in relation to all of the 13 counts, in relation to the complainant evidence

alone. You have literally 13 trials, I think five involving P.C., and two involving you'll see them, it'll be clear to you. And you must say, the only evidence I have in this case is the complainant evidence. And you must and obviously you must take into account the evidence of Dr S in all of these cases. And you must look at it and there's no corroboration in the case. And you must then be satisfied beyond reasonable doubt in relation to the credibility of each of the complainants. Unless it is corroborated, but in having borne that in mind and having given due weight to the warning. "If the evidence is nonetheless so clearly acceptable that the jury is satisfied beyond a reasonable doubt of the guilt of the accused to the extent that the danger which is generally inherent in acting on the evidence of the complainants not present then the, then you may convict." It is saying it is dangerous to convict on uncorroborated evidence, but nonetheless, if you've examined that danger and decide still there is enough evidence for you to decide beyond reasonable doubt, you can convict. Now, this is an unusual case and basically you have to be very honest in your jury room with yourselves. In relation to the multiple complainant evidence, you have to go through it, clearly and forensically and see, can I rely on it. If you can rely on it, then you can use it in your assessment of all the counts. If you can't, you're driven back to the evidence of each complainant in relation to each count. I think it is complicated, it is unusual but it's, those warnings I must give to you. And if you've a problem in what I've said to you, please ask me when you go inside. But it is, so let's go back over it again for a second. Multiple complainant evidence is evidence that you can act upon because of its nature as I explained. But before you act upon that, you must be satisfied that it is independent, no collusion, no contamination, no copycat, no suggestion. You must be satisfied beyond reasonable doubt. You must be satisfied all of these seven men came forward independently of each other, bearing in, and that decision should be based upon the evidence you've heard in court and obviously, you can take into account the submissions made by various parties on it. But that's a matter for yourselves"

165. Following requisitions, the trial judge recharged the jury:-

"If I used the word "compelling" in relation to any evidence that was a I shouldn't have. Compelling is a matter for you. It's evidence that you should take into account. Compelling is, by definition, a comment. If I mention it in relation to any of the evidence, it's for you to decide whether evidence is believable or compelling or not. Do you understand? That's entirely for you.

Now, we were talking about the multiple complainant evidence. A point has been raised that basically, for instance, if you believe one of the complainants or the witnesses is not acting independently obviously you take that into account. Say if you decide, and this is for yourselves, if you decide all of them are acting in collusion or not independently obviously you discard it completely, that type of evidence. If you find, for instance, five are acting independently and without collusion and two are not, then obviously you discard the two and say they are not

acing and discard but then you've only five left, and obviously, I would say as a matter of common sense seven independent complainants would be somewhat could be, you could find is somewhat stronger than five. I think that makes sense; does it? Now, so basically on the other hand, if the number reduces and reduces and reduces, it could be argued that the strength of this type of evidence reduces further down. So, if you decide that there's seven independent non-colluding witnesses, obviously you take that into account. That would be stronger, I suggest to you, than four, or three, or two. Five would be stronger than four, seven I think might be strongest. That's a matter for you, I think it's a matter of common sense. Now, how do you use this evidence? A suggestion has been made that you look at the each count in the absence of this evidence and see can you be satisfied beyond reasonable doubt on the basis solely of the evidence of the complainants. And if you cannot if you can, so be it. If you cannot, then you call in aid or take into account the multiple complainant type evidence and the system evidence. I called it similar type evidence, it's better known as system evidence. So, there's, so you understand that that's a way of approaching it. You could say, well I'll examine count No. 1, I think it's R.McQ. and you say, I am or I'm not satisfied beyond reasonable doubt of his guilt. Obviously, if you're satisfied beyond reasonable doubt of his guilt without using the system evidence and the multiple complainant evidence that's so be it. But obviously then, if you are not so satisfied beyond reasonable doubt then you add both of them together and see where that brings you. Does everybody understand? I know it's complicated.

Now, obviously it's been argued in certain case that if you, if you find without the use of systems evidence that some-- that one of the counts are found or you can find him guilty, the defendant guilty without the use of it, it could help you in the next counts. But you must-- the test is, you must be satisfied beyond reasonable doubt of the defendant's guilt before you consider convicting. Now, if you discard the system evidence, or the multiple complainant evidence altogether, then you're driven back solely on the complainants' evidence themselves. Now, I should have also, it seems that I gave you a corroboration warning that it's dangerous to convict on the-- in cases such as this without corroboration. I didn't have to give you that warning. It was discretionary on the Court. In this case, I gave the warning because of the age of the cases essentially and the difficulties, by reason I've explained to you why old cases cause such great difficulty particularly for the prosecution and the defence. But I gave the warning to you principally by reason of the age of the cases. Now, the historical reasoning for giving of the corroboration warning was that it used to be said that basically, a complaint of sexual assault was easily made and terribly difficult to disprove, and therefore, in the old cases, that basically the warning was given that it was dangerous to convict on the un-corroborated testimony in these type of cases, but nonetheless, if you were satisfied you could so, beyond reasonable doubt. But I principally gave the corroboration warning because of the age of the cases, they're very, very old cases."

Submissions of the appellant

166. The appellant submits that the charge on system evidence was confusing and this confusion was amplified because the trial judge gave the corroboration warning at the same time which, it is submitted, was an error on his part and it should have been a standalone warning.

167. The appellant further submits that since the trial judge spent so much time discussing and emphasising the role of system evidence and the significance of this being a multiple complainant trial, the jury would have been under the impression that the system evidence was the most significant piece of evidence in the trial.

168. While it is not accepted that this was a case where the jury should be told that they can rely on multiple complainants even where they are not satisfied on the evidence in respect of any one complainant, it is submitted that if the Court wished to charge the jury as per *The People (DPP) v. CC (No. 2)* [2012] IECCA 86, great care needed to be taken to ensure that the jury understood what they were doing and why they were doing it. It is submitted that despite the best efforts of all involved, the charge on system evidence was confusing and inadequate.

169. The appellant also takes issue with the use of the word "compelling" by the trial judge on multiple occasions as it was a clear error and the situation was not improved by the re-charge. The jury would have been under the impression that the fact of there being multiple complainants was a significant factor pointing towards guilt rather than being cautious not to convict of an offence just because there were multiple offences alleged.

Submissions of the respondent

170. The respondent notes that in submissions before the trial judge, the prosecution sought to have the system evidence presented to the jury on two bases: the *BK* basis and on the basis that system evidence is capable of providing indirect corroboration, as outlined in *The People (DPP) v. McCurdy* [2012] IECCA 76. As can be seen from the above excerpt, the trial judge chose to present the system evidence on the *BK* basis only. It is submitted that this decision was entirely beneficial to the appellant.

171. The respondent submits that it is clear from an examination of the charge to the jury that they were clearly instructed as to system evidence and they were instructed on three occasions that they must disregard that system evidence unless satisfied beyond reasonable doubt that (1) the alleged crimes were similar or roughly similar in this regard and (2) all complainants came forward independently in the absence of contamination, copy-cat etc. The use of the term corroboration as it appeared in the charge was in the context of system evidence and was clearly used only in the context of seven complainants alleging similar crimes and the matter of whether or not the jury were satisfied beyond reasonable doubt that the complainants acted independently and in the absence of collusion and contamination in terms of making those complaints.

172. The respondent submits that the appellant continually failed to appreciate that the trial judge ruled that he would instruct the jury on the *BK* basis only. The trial judge's decision to re-charge the jury on the basis advocated for by the appellant in terms of the manner

in which they might approach the matter if they were not satisfied of the independence of one or more complainants meant that the position remained as it had at the outset, with respect to system evidence, i.e. the jury were being instructed only on the *BK* basis, with the initial added benefit for the appellant of being informed of the beyond reasonable doubt standard requiring to be achieved in respect of the system evidence before the jury could consider that evidence and with the clarification given in the re-charge that, if the jury took the view that one or more of the complainants was not independent, then the evidence of any such complainant was to be entirely disregarded in terms of system.

173. In terms of the corroboration warning, the respondent submits that the trial judge was correct to knit these two issues together as it demonstrated the nexus between them.

174. In terms of the use of the phrase "compelling", the respondent submits that the trial judge instructed the jury that they were to ignore this comment, as it was a matter for them whether they thought such evidence was compelling and following requisitions, he made it clear in his re-charge that such was to be disregarded.

Discussion – system evidence.

175. We note that the judge indicated that aspects of system evidence can be somewhat confusing for a jury. Consequently, we believe it is necessary to attempt to provide guidance in this respect. In pursuit of this objective, we have considered many of the judgments, both in this and in the neighbouring jurisdiction. We do not propose to address the law concerning the admission of system evidence, but we intend to consider system evidence and how it may be considered by the jury.

176. As is well known, the seminal decision in this area is that of *The People (DPP) v. BK* [2000] 2 IR 199 where Barron J. analysed the relevant cases and distilled principles therefrom. He distinguished between system evidence and similar fact evidence. It is the position that system evidence is a category of misconduct evidence and evidence of similar offences committed in similar circumstances may be highly relevant evidence in a trial.

Corroboration

177. Firstly, we wish to address the issue of corroboration. Mr Hartnett queries whether there is a distinction between corroboration and supporting evidence. Lord Simon of Glaisdale in *R v. Kilbourne* [1973] A.C.729 in quoting with approval from *R v. Hester* [1973] A.C. 296 said:-

> "Corroboration is therefore nothing other than evidence which "confirms" or "supports" or "strengthens" other evidence (Lord Morris of Borth-y-Gest, pp. 229 and 919H–920A; Lord Pearson, pp. 238 and 925F; Lord Diplock, pp. 224 and 927C, 928G). It is, in short, evidence which renders other evidence more probable. If so, there is no essential difference between, on the one hand, corroboration and, on the other, "supporting evidence" or "evidence which helps to determine the truth of the matter."

178. The true purpose of corroboration is to confirm and support evidence that is itself credible. This does not mean that corroboration serves to bolster evidence which is incredible.

179. So, as said by Professor O'Malley in his text *Sexual Offences* (2nd ed) at para. 19-03, with which we agree:-

> "Corroboration is not a term of art, but an ordinary word to be given its plain meaning, and therefore corroborative evidence is that which confirms, supports or strengthens other evidence."

180. Moreover, as Lord Reid said in *R v. Kilbourne* [1973] A.C. 729 at p. 750:-

> "There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; the better it fits in, the more one is inclined to believe it."

181. In *The People (DPP) v. Cooke* [2009] IECCA 55 at para 68 Macken J. with reference to *The People (DPP) v Gilligan* [2006] 1 I.R. 107, said, when considering the nature of corroboration, it "is really one of common sense to be determined in the context of the entire proceedings".

182. In *Gilligan,* it was held that true corroborative evidence has three strands. Firstly, it *tends* to implicate the accused in the commission of the offence by rendering it more probable that the accused committed the crime. Secondly, it should be *independent* of the evidence desiring corroboration and thirdly, it should be *credible*. In considering credibility, Denham J. (as she then was) went on to say that:-

> "It should be supporting evidence which has a degree of credibility."

183. Finally, Denham J. stated that corroboration is not a two-stage process. She stated that it:-

> " …is a matter of common sense. Corroboration arises where the evidence to be corroborated has a degree of credibility. However, corroboration is not a two-stage process. It is not a process in which there is first a determination as to whether a witness is credible, and, if he is credible, then the issue of corroboration is addressed. I would distinguish any two-step approach based on an interpretation of *R v. Hester* [1973] A.C. 296."

184. Corroboration is therefore a simple concept, but one which has caused difficulty in application. Each case is fact dependent and the issue of corroboration is one of common sense in the application of the factual matrix in any given case. Corroboration is not a term of art, or of a technical nature, but is evidence which supports or strengthens the evidence desiring of corroboration.

System evidence and multiple allegations

185. Whether the evidence is termed system evidence, misconduct evidence or similar fact evidence, the purpose of admission is all important. Similar system is a term used to describe the principle which permits of the admission of evidence of two or more complainants in the same trial where the evidence is cross-admissible as there exists a sufficient nexus between the allegations charged to demonstrate system.

186. As stated by Barron J. in *The People (DPP) v. BK* [2000] 2 IR 199 at p. 203:-

> "While there may be cases where the trial judge may be able to charge a jury so that an accused is not unfairly prejudiced where evidence admissible on one count is inadmissible on another, in most cases the real test whether several counts should be heard together is whether the evidence in respect of each of several counts to be heard together, would be admissible on each of the other counts."

187. Naturally, the evidence that an accused is alleged to have committed an offence of a sexual nature in respect of a complainant does not, in itself, make that evidence cross-admissible in a trial of multiple allegations by different complainants. The manner in which offences are committed is, of course, a central issue in determining the presence of a system.

188. Whilst similarity of system is required, broad similarity between allegations is sufficient, but it is, of course, dependent on the facts alleged in any given case. As observed by Budd J. in *B v. DPP* [1997] 3 IR 140, sufficient probative value may be taken from the fact of multiple complainants in itself, without the necessity for especial similarity between allegations. Budd J. also addressed the issue of collusion and properly identified that this could be either by conspiracy or unconscious influence, to which we will return at a later stage in this judgment.

189. The observations of Budd J. bear repetition where he stated the applicable principles:-

> " I should add that the mere existence of multiple accusations of similar offences does not mean that the evidence will be admissible as it is still essential that there should be a sufficient degree of probative force to overcome the prejudicial effect of such evidence. Whether the accounts of each of several complainants are corroborative and also the risk of collusion, either by conspiracy or where one witness has been unconsciously influenced by another, may well be relevant factors at the trial. It seems that the underlying principle is that the probative value of multiple accusations may depend in part on their similarity, but also on the unlikelihood that the same person would find himself falsely accused on various occasions by different and independent individuals. The making of multiple accusations is a coincidence in itself, which has to be taken into account in deciding admissibility."

190. Hardiman J. in *The People (DPP) v. McCurdy* [2012] IECCA 76 refers to para. 9-71 of McGrath on *Evidence* (1st ed.) wherein it is stated: –

"It can be seen... that the probative force of multiple accusations is not dependent on any particular degree of similarity between the accusations. In circumstances where there are a large number of accusers, who have independently made allegations of a similar type of conduct against the accused, sufficient probative force might derive from the number of complainants alone without need for their allegations to be very similar in substance. As the number of accusers falls, so the level of similarity required to maintain the required level of probative force based on the unlikelihood of coincidence arises, until the point is reached in which there are only two accusers and the similarity must be very great indeed."

191. It is clear that the evidence of multiple accusers may be cross-admissible on the basis of what has been termed by Hardiman J. in *The People (DPP) v. McCurdy* [2012] IECCA 76 as "ordinary principles in order to show system or to rebut accident."

192. It is worthwhile at this point to reiterate the principles concerning the admission and the purpose of admission of this category of evidence as stated by Barron J. in *The People (DPP) v. BK* [2000] 2 IR 199 : –

"(1) The rules of evidence should not be allowed to offend commonsense.

(2) So, where the probative value of the evidence outweighs its prejudicial effect, it may be admitted.

(3) The categories of cases in which the evidence which can be so admitted is not closed.

Such evidence is admitted in two main types of cases:

(a) to establish that the same person committed each offence because of the particular feature common to each; or

(b) where the charges against one person only, to establish that offences were committed.

In the latter case the evidence is admissible because:

(a) There is the inherent probability of several persons making up exactly similar stories;

(b) it shows a practice which would rebut accident, innocent explanation or denial." (Our emphasis).

193. The evidence of multiple accusers, if the evidence is accepted as being independent, may also have a corroborative effect. Therefore, the evidence of multiple complainants in a single trial may be cross-admissible on the ordinary principles identified above and may also have a corroborative effect. It is of course the role of the trial judge to determine whether such evidence is capable of amounting to corroboration and it is then necessary

for the judge to so instruct the jury and to enable the jury to come to a determination as to whether the evidence is **in fact** corroborative.

Collusion, collaboration or inadvertent influence.

194. Collusion is a complex issue and includes not only deliberate collaboration to fabricate allegations but also inadvertent influence. However, as we have previously stated in *The People (DPP) v. MS* [2019] IECA 120, the fact of communication or contact between complainants prior to trial is not, in and of itself, indicative of collusion. Such an issue, generally speaking, is one of weight to be assessed by the jury and is not generally relevant at this stage of assessing admissibility save in exceptional circumstances. Should matters evolve during the course of the trial which would lead the judge to the conclusion that a reasonable jury would be unable to accept the evidence is free from collusion, then the judge should in the words of Lord Mackay, in *R v. H* [1995] 2 AC 596, direct the jury that the evidence cannot be relied upon for the purposes of corroboration or indeed for any purpose adverse to the accused. However, if in the course of the trial it transpires that there is indeed a *risk of collusion*, but that it is not of the calibre mentioned above, then it is necessary for the trial judge to give the jury appropriate directions concerning that risk.

195. The probative force of the evidence of multiple complainants is undeniable, however a trial judge must take care to ensure to properly instruct the jury concerning the risk of collusion or collaboration or inadvertent influence. As stated in *R v. H* [1995] 2 AC 596:-

> "And fourthly where this is not so but the question of collusion has been raised the judge must clearly draw the importance of collusion to the attention of the jury and leave it to them to decide whether notwithstanding such evidence of collusion as may have been put before them they are satisfied that the evidence can be relied upon as free from collusion and tell them that if they are not so satisfied they cannot properly rely upon it as corroboration or for any other purpose adverse to the defence."

196. O'Donnell J. in *The People (DPP) v. CC (No. 2)* [2012] IECCA 86 recognised the importance of the independence of the various accusers and stated: –

> "If it is decided that such evidence is admissible, (and in this case that was not really challenged) the jury should not only be informed of this, but also, and more importantly, why that is so. Initially such evidence was treated with considerable caution by the courts because of the potential for prejudice and the shifting of the focus from whether the accused was guilty of a specific offence on an identified occasion, to more generalised consideration of the accused's character and propensities. But if for example, the same person had lived in a number of different places and complainants had come forward independently and described in varying degrees in detail offences containing perhaps a single distinctive element or signature, then any factfinder would be entitled to place considerable reliance on the fact that in the absence of deliberate collusion, it would be extremely unlikely that such witnesses could emerge by pure coincidence having the same mistaken or

indeed force memory involving the accused. The force of that reasoning is undeniable and explains why notwithstanding the risks, such evidence is admissible."

O'Donnell J. went on to say: –

> "Drawing conclusions from the possibility of events occurring by random, rather than simply assessing the evidence in relation to a particular incident, is permissible, but it is an exercise in logic probability: in the absence of some connecting factor, it is highly unlikely that individual independent accounts of similar concept could emerge and yet be mistaken. The greater the number of accounts the more remote the possibility of collective error. This is a powerful line of reasoning **but its force is dependent on the exclusion of any possibility of connection between those giving the accounts particularly when it is otherwise limited in verifiable detail. It is necessary to take account the possibilities of suggestibility, contamination of evidence, copycat evidence or collaboration, if only for the purposes of excluding them.**" (Our emphasis)

The judge's charge

197. O'Donnell J. emphasised the importance of the judge's charge in the context of system evidence. Obviously, the jury should be told as to the purpose of the admissibility of the evidence of multiple complainants. As stated by Hardiman J. in *The People (DPP) v. McCurdy* [2012] IECCA 76, the evidence may be cross-admissible on ordinary principles and the evidence may also have a corroborative effect.

198. This must be carefully explained to the jury. O'Donnell J. explained the importance of this in *The People (DPP) v. CC (No. 2)* [2012] IECCA 86 when he said at para. 38:-

> "It was also important that the jury distinguish between two different processes of reasoning which may have been available to them. In the first place, if a jury concluded in relation to any one complainant that the case was compelling and that they were satisfied beyond any reasonable doubt of the guilt of the accused in relation to such incidents, then they could consider there was now more likely that the account given by another complainant of a similar incident was true. However, it is also logically possible the jury not to be satisfied beyond any reasonable doubt on the individual evidence relating to any single complaint or incident, but nevertheless to reach that point of being satisfied beyond reasonable doubt by virtue of the range of offences in respect of which evidence has been given, their interconnection, and the unlikelihood that the evidence in respect of each of the complaints is either the product of collusion or chance. But it is important that the jury should recognise which of these courses it is contemplating because it is obviously important to recognise, if indeed that is the case, the jury is not satisfied beyond reasonable doubt on the individual evidence taken alone, and therefore the reliance being placed on the system evidence is that much greater."

199. O'Donnell J. set out two processes of reasoning available to the jury. That is, whether the jury assessed the evidence in terms of its corroborative effect; if the jury come to the conclusion of satisfaction to the requisite standard on the evidence of a complainant, that evidence could be used to support the other counts on the indictment. But where the jury are not satisfied to the criminal standard, such satisfaction might be achieved by relying on evidence of system, that is as described by Hardiman J. in *The People (DPP) v. McCurdy* [2012] IECCA 76 as the ordinary principles; to rebut innocent explanation, accident or denial or the inherent improbability of multiple complainants making up similar allegations. In both situations, the risk of collusion is a relevant consideration.

200. It is also important to note that while the judge may decide as a matter of law that the evidence is not capable of providing corroboration as no reasonable jury could accept it as being free from collusion, nonetheless, the issue of collusion is one relevant to weight and is a matter for the jury's assessment.

201. We set out hereunder the issues on which the jury may need instruction, which we hope is a useful synthesis of the principles set out in the above authorities:

Where to begin?

(1) We suggest that the jury should be told at the outset that although they have heard evidence from "x" number of complainants, it is recommended that in the first instance they should isolate and group the count(s) against the accused involving each individual complainant.

(2) Then, within each of those groups, they should consider the evidence relating to each individual count separately.

Stage 1

a) At this stage when considering each count separately, they should approach their task on the basis that the fact that there may also be counts on the indictment relating to another or other complainant(s) is irrelevant at this point, with one important exception.

Collusion, collaboration, contamination or copycat evidence

b) That exception is that the jury must, in determining whether any individual complainant's evidence then under consideration is credible or reliable, exclude any reasonable possibility, if it arises on the evidence, of concoction, collusion, contamination or copycatting as between that complainant and any other complainants. Clearly, a complainant's evidence cannot be regarded as credible and reliable if it is the product of concoction, collusion, contamination or copycatting. Unless the jury is satisfied beyond reasonable doubt that the evidence of a complainant is free from concoction, collusion, contamination or copycatting they cannot act on it to the detriment of the accused.

c) It may be helpful to explain to the jury the differences between concoction, collusion, contamination or copycatting, while also pointing out that there may

sometimes be a degree of overlap, between these things e.g. two complainants may have colluded or collaborated to advance a concocted account. Whilst concoction, collusion or copycatting are readily understandable terms, contamination is not always so easily understood. Contamination may arise where a complainant has learned what another or others have said, thereby raising a reasonable possibility of conscious or unconscious influence, which may have influenced them in making the allegations in the first place or may have influenced the detail of the allegations.

What next, assuming that the possibilities of concoction, collusion, contamination, or copycatting can be excluded by the jury

d) If, having excluded the reasonable possibilities of concoction, collusion, contamination or copycatting, they conclude that the account of the complainant concerned is sufficiently credible and reliable to enable them to be satisfied beyond reasonable doubt as to the guilt of the accused in respect of any one or more count(s), they should record a conviction in respect of that count or those counts.

e) The jury may also be told that if, having done so, they conclude in respect of any one or more count(s) that they are **not** satisfied beyond reasonable doubt of the guilt of the accused, then that is not necessarily the end of the matter in so far as that count or those counts are concerned, and they should move on to Stage 2.

Stage 2

a) In this stage, the jury may then, in respect of each such count, proceed to consider whether any assistance is provided to them by the evidence of any other complainants. Although the jury have not yet been satisfied beyond reasonable doubt on the evidence of an individual complainant relating to a count or counts under consideration taken alone ; they may, **at this point**, look to the evidence provided by other complainants to see if that assists them in ascertaining whether the guilt of the accused has been proved beyond reasonable doubt, in respect of this count or these counts.

b) If the jury conclude that they are satisfied beyond reasonable doubt on the evidence of one complainant, that evidence may be used to support the evidence of other complainants.

c) If the jury are not satisfied beyond reasonable doubt on the evidence of any individual complainant, they may come to the requisite standard of proof in reliance on the evidence of system.

Potential assistance from the evidence of other complainants.

202. The evidence of other complainants may be of assistance to the jury where it suggests the existence of systematic offending, i.e., the utilisation by the offender of a system, either to facilitate, or during the commission of, offending against more than one person including the complainant whose complaint is under consideration. Various features may

suggest the existence of such a system, e.g., similarities between victims, similarities in the nature of the offending and the modus operandi employed, similarities in the opportunity for offending, similarities in the location(s) utilised and other such matters. This is by no means an exhaustive list.

203. Assuming no concoction, collusion, contamination or copycatting, evidence of system can, depending on the circumstances of the case, potentially operate to assist the jury in one, or other, or both of the following ways:

(i) The provision of corroboration

204. Such evidence could potentially, although it will not necessarily, corroborate the evidence of an individual complaint under consideration.

205. A jury will only be allowed to consider possible corroboration if the trial judge is satisfied that the evidence of another, or other, complainant(s) is **at least capable** of providing corroboration of the complaint under consideration. In that event, the jury will receive an instruction to that effect from the trial judge. Whether or not the evidence of more than one complainant in fact provides corroboration, and is of assistance in that way, is then a matter for the jury to decide.

206. If the issue of corroboration is being left to the jury, they should be provided with a clear explanation of what corroboration is, bearing in mind that there is nothing technical about corroboration , but rather bears its ordinary and everyday meaning. The concept should therefore be explained in ordinary language.

207. In considering whether an individual complaint is corroborated by evidence of system, the jury should be directed to take into consideration the number of complainants and allegations, the degree to which the allegations are similar in detail and circumstance, and any other matter which tends to support or rebut the suggestion of an underlying system. The stronger the similarity, and the greater the numbers of complainants describing similar allegations, the more weight there is to support the suggestion of a "system". Conversely, the lesser the similarity and the fewer the number of complainants describing similar allegations, the less weight there is to support the suggestion of a "system". These are matters of fact which are entirely within the province of the jury.

(ii) Through cumulative effect suggesting unlikelihood of fabrication, innocent explanation or accident.

208. In this instance the cumulative effect of the evidence of multiple complainants may, depending on the cogency and quality of that evidence, and the degree to which it is suggestive of system, invite an inference that it is unlikely that several persons (who have not colluded or whose evidence has not been contaminated) will make up similar stories about the accused person and/or that the alleged offending conduct has an innocent explanation, that it occurred by accident or that a denial is credible.

209. Again, the jury should be directed to take into consideration the number of complainants and allegations, the degree to which the allegations are similar in detail and circumstance, and any other matter which tends to support or rebut the suggestion of an underlying

system. The jury may be told that the probative force of multiple accusations is not dependent on any particular degree of similarity between the accusations. In circumstances where there are a large number of accusers, who have independently made allegations of a similar type of conduct against the accused, sufficient probative force might derive from the number of complainants alone without need for their allegations to be very similar in substance. As the number of accusers falls, so the level of similarity required to maintain the required level of probative force based on the unlikelihood of coincidence rises, until the point is reached in which there are only two accusers and the similarity must be very great indeed.

210. The stronger the similarities, and/or the greater the number of complainants describing similar allegations, the more weight there is to support the suggestion of a "system", and in turn to support an inference based on cumulative effect. Conversely, the lesser the similarity and the fewer the number of complainants describing similar allegations, the less weight there is to support the suggestion of a "system", and to support such an inference.

211. Once again, these are issues within the exclusive competence of the jury to determine.

212. In applying the two processes of reasoning which may be available to a jury, they may be satisfied beyond reasonable doubt on the evidence of one complainant and use this to conclude that it was now more likely that the account given by another complainant of a similar incident was true. If so, they may proceed to record a conviction/s. However, it is also open to the jury to not be satisfied beyond a reasonable doubt in respect of any of the individual complainants but nonetheless by virtue of the range of offences in respect of which evidence has been given, their interconnection, and the improbability that the evidence in respect of each of the complaints is either the product of collusion or chance to conclude that they are satisfied beyond a reasonable doubt. At which point, they may proceed to record conviction/s. This second process of reasoning clearly places more emphasis on the system evidence.

213. Whichever process of reasoning is applied by the jury, at its conclusion, the jury, if not satisfied to the requisite standard of proof on a count or counts will acquit on that count or counts.

Summary

214. The jury should consider the evidence relating to each count individually and, at least initially, without reference to the evidence of other complainants concerning other complaints. If, having done so, they are satisfied beyond reasonable doubt that the accused is guilty of the count or counts in question they should record a conviction on that count or those counts.

215. If, having done so, they find they are not satisfied beyond reasonable doubt that the accused is guilty of the count or counts in question on the evidence of that complainant alone, they may at that point consider whether the evidence of other complainants concerning other complaints is suggestive of system and, if so, consider whether that

assists them either by providing corroboration, or by inviting the inference that coincidence, innocent explanation, accident or denial may all be safely rejected.

216. It is necessary to take account of the possibilities of suggestibility, contamination of evidence, copycat evidence or collaboration. Only if they can be excluded beyond reasonable doubt can the evidence be relied upon.

217. If with the benefit of such assistance the jury are now satisfied beyond reasonable doubt of the guilt of the accused on any count they should convict.

218. Conversely, if notwithstanding the provision of such assistance, they continue to have a reasonable doubt as to the guilt of the accused on any count, they should acquit.

219. The jury must reach separate verdicts on each count. That does not mean that they cannot use the evidence in relation to the other counts to help reach a verdict in respect of the count that they are considering.

220. The above is intended as general guidance as to the principles to be applied, but it is for a trial judge to apply the principles and to adjust the charge on the basis of the evidence before the jury.

Directed acquittals

221. We make one final observation before moving to the grounds of appeal concerning system evidence in the present case. Notwithstanding what we have said in the above paragraphs regarding the role of the jury in fact-finding concerning evidence of "system", there may be exceptional cases where the trial judge, at the conclusion of the prosecution evidence, may consider whether to accede to a directed acquittal on some or all counts by reason of evidence regarding the nature and/or extent of the evidence of collusion or contamination, or to take other measures to ensure the fairness of the trial process.

Application of the principles to Grounds 16, 17, 18, 19 and 23

222. It is said that a judge must carefully charge a jury on system evidence, and that in the present case the trial judge gave an incoherent charge, reversing the appropriate order of issues and in particular erred in advising the jury to consider the system evidence before assessing the evidence of each complainant. The trial judge advised the jury at some length on system evidence. Prior to doing so, he indicated:-

> "Now, we all have our limitations instructing juries in relation to complicated matters. I try to keep it simple for them and for myself, more importantly. But I'd be inclined to say, Ms Noctor, basically speaking, if the BK evidence, if they don't find that convincing, then they're solely thrown back on the individual accounts of each of the parties, and there is absolutely no corroboration there at all."

The judge indicated he would charge the jury as follows:

> "So, I think, from what I hear from people, what I'm going to say to the jury, I think, is that, basically, the BK type evidence is certainly corroborative. If you do not accept the BK evidence, you're thrown back onto the individual accounts of the

seven complainants, and before you can convict, you must be satisfied beyond reasonable doubt of their of that evidence."

223. Mr Hartnett argues that the judge put the cart before the horse by saying:-

> "And obviously, I must I will indicate to them that there's absolutely no corroboration in the case in relation to those matters. And I will give the old-fashioned corroboration warning. And basically, I think that's as far as can I go, because if I go down your route of indirect/direct BK systems evidence, I think the jury will be looking at me totally confused. They'll be confusion will reign. And I am satisfied that, basically, there's some merit to what you say about the independent or the system evidence independent of the BK evidence, I think you have support there. But I think there's huge confusion there's huge confusion betrayed in their judgments to the lower Courts. I'm not saying they have any confusion about it at all, they are probably very clear in their own minds, but they always almost swing, inevitably, from similar facts to the, sort of, the unlikelihood of independent complainants coming forward."

224. It is said on behalf of the appellant that the charge was not of assistance to the jury in understanding the concept of system evidence and how they were to address that evidence:-

> "Now, there's a next matter I have to address you in some detail. Now, that's the fact that in this case, you have heard evidence in relation to multiple complainants. Seven men have come forward and said Dr S indecently and sexually abused them. How do you use that evidence? Normally, the normal orthodox situation would be the Court would only allow one complainant at a time. In other words, the Court would, normally they would be what's known as separate trials. That basically speaking, that one complainant would come in here and said, and say, give his evidence and you would decide on that matter. Now, the Courts have allowed multiple complainants on a certain basis. And it is a certain precise basis. And multiple complainants are allowed where it is deemed, and it's for you to find eventually, that there is similar fact evidence - I'll explain to you what that means - and that the complainants have come forward independently of each other, and there is no evidence of collusion. Now, the similar fact evidence the State say exists in this case is that all of the complainants at the time were young boys. They also say that the assaults were fairly similar, and they all occurred in a medical setting, and the places where they occurred. Now, the second point to say that allows, allows this case to be heard, all these cases to be heard together is that basically, they say that all of the complainants came forward independently and that there is no evidence of collusion. Now, you're going to have to examine that. Now, because before you act on this evidence you must decide that the crimes themselves, or the allegations made are similar. Secondly, before you act upon it, this evidence, you must be satisfied that all of the complainants made their complaints independently, and in the absence of collusion and also suggestibility,

copycat type behaviour and contamination. Now, how do you do that? **So, basically, the force of this evidence is this; that it would be unlikely that seven individuals would come forward making similar complaints about Dr S unless they were true, in the absence of collusion, that they acted independently, that they weren't contaminated by certain people or sources, or that there wasn't evidence of suggestibility or copycat.** Now, Mr Hartnett has suggested to you that by reason of the publicity, and there had there was extensive, because it's common case that all of these complainants came forward as a result of certain complicity or media, or publicity they became aware of in relation to Dr S. There is evidence, and it's uncontested evidence, that all had contact with Dignity 4 Patients. They also, there's uncontested evidence that they all attended with and engaged the same solicitor. And there's uncontested evidence that they all attended for medical examination with a Dr Murphy in Tallaght. Now, he says that's evidence of contamination or suggestibility, lack of independence. Now, you're going to have to engage with that. But I should say to you there is no evidence in the trial that any of the seven complainants knew each other. There's no evidence in the trial that any of the seven complainants spoke to each other before they made their complaints. **There's no evidence in the trial that basically, they didn't act independently. But that suggestion is made**. And you must be satisfied beyond reasonable doubt that one, all the alleged crimes are roughly similar, or similar. And secondly that all the complainants came forward independently in the absence of collusion without being contaminated by without contamination in relation to what say. And basically, suggestibility means that basically, that basically by reason of the publicity, either the complainants in this case made up the allegations or exaggerated the allegations, or copycat, that basically you're going to have to examine the possibility that these complainants, some of these complainants, heard what was happening and decide, decided to make up an allegation to get on the gravy train. Now, that's putting it in a very blunt way, but I think you understand what I mean. Before you can act on this type of evidence the multiple complainant, because you can imagine that if, say if there was no publicity in this case, say all of a sudden without any publicity or any of what occurred around the […] area, seven or eight people arrived into the garda station who didn't know each other and made similar complaints about the same person, **I think logically you would all understand that would be *compelling* evidence.** Why would seven totally unrelated people, with no connection whatsoever, arrive into a garda station and make roughly similar complaints about a similar about the same person? You can imagine that is, you could see on a matter of common sense, ***that is compelling evidence***. Now, it's for you to decide, in this case, does that situation arise. Because the State are advancing this in support of the individual allegations made in all of the cases. They're saying that they cut it in two**. You have the evidence of each individual complainant and in support of that or in corroboration of it, in support of it, they say these seven independent people made allegations, and you must take that into account and that is what we call corroboration, independent support**

tending to show Mr S committed these offences. Now, if you've a doubt, and you must be satisfied beyond reasonable doubt that they acted independently and in the absence of collusion, you must consider contamination, copycat, and suggestibility. You must do that. But you have to be honest in this case. If you say, by the way we've a doubt about this evidence. We're not so satisfied beyond reasonable doubt that one, it's similar, that the case the crimes are similar, or secondly, we're not satisfied that they are independent." (Appellant's emphasis)

225. It is said that the judge conflated similar fact and the standard of proof. The charge went on:-

"That's a matter for you. You must be satisfied beyond reasonable doubt of that, then you must discard his evidence. You mustn't take it into account. You understand? If you you must perform that task and you must perform that task on the basis of what you heard in court. As I indicated to you, you must engage with the evidence. And I must say, it was never put to any of the complainants that they ever talked to each other because there's no evidence that they did. There's no evidence that they even knew each other. But there is evidence that they attended certain meetings and contacted Dignity 4 Patients. There is evidence that they went to Dr Murphy and had the same solicitor. There is all of that evidence and there is evidence that can be accepted by everybody that what brought everybody forward in this case was the publicity. And that's a you're going to have to look at that, and you're going to have to decide whether these complainants came forward independently in the absence of collusion, suggestibility, copycat, and contamination. That's for you. If you decide beyond reasonable doubt that they did, then you can take into account in coming to the conclusion in relation to all of the counts. **Because it is *compelling* evidence if seven people have made similar allegations against Dr S in the absence of collusion, suggestibility, independently and such like**. That is a matter you have to take into account. And then you must look at all of the evidence. Then you have two strands of evidence in relation to each case. You have this seven complainant evidence, and you have the evidence of each one of them in relation to what they say occurred to each other then. Now, that's for you. Now, if you discard and you do not accept this multiple complainant type evidence, then there is no corroboration in this case at all for the complainants. And there was an old warning, and I'm going to give you it because of the circumstances of this case. It's called the corroboration warning. Now, this was given historically in all sexual assault cases, by an act, I think, in probably the early 2000s. I'm not sure when it became optional for judges whether they should give it or not. I have decided to give it in this case if there's and it's put in a very Butler was the judge, the one, and it was I think Dental Board v. O'Callaghan. "The rule is that the tribunal of fact, that is you, the jury, must clearly bear in mind and be warned that it is dangerous to convict upon the evidence of a complainant, unless it is corroborated." Corroboration means independent support for the allegation. Now,

in the absence of the multiple complainant type evidence, there is no independent support for any of these type of allegations, none. If you discard the independent, or the multiple complaint type evidence, what you must do is you must decide this case in relation to all of the 13 counts, in relation to the complainant evidence alone. You have literally 13 trials, I think five involving [P.C.], and two involving you'll see them, it'll be clear to you. And you must say, the only evidence I have in this case is the complainant evidence. And you must and obviously you must take into account the evidence of Dr S in all of these cases. And you must look at it and there's no corroboration in the case. And you must then be satisfied beyond reasonable doubt in relation to the credibility of each of the complainants. Unless it is corroborated, but in having borne that in mind and having given due weight to the warning. "If the evidence is nonetheless so clearly acceptable that the jury is satisfied beyond a reasonable doubt of the guilt of the accused to the extent that the danger which is generally inherent in acting on the evidence of the complainants not present then the, then you may convict." It is saying it is dangerous to convict on uncorroborated evidence, but nonetheless, if you've examined that danger and decide still there is enough evidence for you to decide beyond reasonable doubt, you can convict. Now, this is an unusual case and basically you have to be very honest in your jury room with yourselves. **In relation to the multiple complainant evidence, you have to go through it, clearly and forensically and see, can I rely on it. If you can rely on it, then you can use it in your assessment of all the counts. If you can't, you're driven back to the evidence of each complainant in relation to each count. I think it is complicated, it is unusual but it's, those warnings I must give to you.** And if you've a problem in what I've said to you, please ask me when you go inside. But it is, so let's go back over it again for a second. Multiple complainant evidence is evidence that you can act upon because of its nature as I explained. But before you act upon that, you must be satisfied that it is independent, no collusion, no contamination, no copycat, no suggestion. You must be satisfied beyond reasonable doubt. You must be satisfied all of these seven men came forward independently of each other, bearing in, and that decision should be based upon the evidence you've heard in court and obviously, you can take into account the submissions made by various parties on it. But that's a matter for yourselves." (Appellant's emphasis)

226. Mr Hartnett says that despite all the judge said, he erred in his direction to the jury which was not rectified following requisitions. When he re-charged the jury, the judge said:-

> "Thank you very much, ladies and gentlemen of the jury. If I used the word "compelling" in relation to any evidence that was a I shouldn't have. Compelling is a matter for you. It's evidence that you should take into account. Compelling is, by definition, a comment. If I mention it in relation to any of the evidence, it's for you to decide whether evidence is believable or compelling or not. Do you understand? That's entirely for you.

Now, we were talking about the multiple complainant evidence. A point has been raised that basically, for instance, if you believe one of the complainants or the witnesses is not acting independently obviously you take that into account. Say if you decide, and this is for yourselves, if you decide all of them are acting in collusion or not independently obviously you discard it completely, that type of evidence. If you find, for instance, five are acting independently and without collusion and two are not, then obviously you discard the two and say they are not acing and discard but then you've only five left, and obviously, I would say as a matter of common sense seven independent complainants would be somewhat could be, you could find is somewhat stronger than five. I think that makes sense; does it? Now, so basically on the other hand, if the number reduces and reduces and reduces, it could be argued that the strength of this type of evidence reduces further down. So, if you decide that there's seven independent non-colluding witnesses, obviously you take that into account. That would be stronger, I suggest to you, than four, or three, or two. Five would be stronger than four, seven I think might be strongest. That's a matter for you, I think it's a matter of common sense. Now, how do you use this evidence? A suggestion has been made that you look at the each count in the absence of this evidence and see can you be satisfied beyond reasonable doubt on the basis solely of the evidence of the complainants. And if you cannot if you can, so be it. If you cannot, then you call in aid or take into account the multiple complainant type evidence and the system evidence. I called it similar type evidence, it's better known as system evidence. So, there's, so you understand that that's a way of approaching it. You could say, well I'll examine count No. 1, I think it's Mr R.McQ. and you say, I am or I'm not satisfied beyond reasonable doubt of his guilt. Obviously, if you're satisfied beyond reasonable doubt of his guilt without using the system evidence and the multiple complainant evidence that's so be it. But obviously then, if you are not so satisfied beyond reasonable doubt then you add both of them together and see where that brings you. Does everybody understand? I know it's complicated.

Now, obviously it's been argued in certain case that if you, if you find without the use of systems evidence that some that one of the counts are found or you can find him guilty, the defendant guilty without the use of it, it could help you in the next counts. But you must the test is, you must be satisfied beyond reasonable doubt of the defendant's guilt before you consider convicting. Now, if you discard the system evidence, or the multiple complainant evidence altogether, then you're driven back solely on the complainants' evidence themselves. Now, I should have also, it seems that I gave you a corroboration warning that it's dangerous to convict on the in cases such as this without corroboration. I didn't have to give you that warning. It was discretionary on the Court. In this case, I gave the warning because of the age of the cases essentially and the difficulties, by reason I've explained to you why old cases cause such great difficulty particularly for the prosecution and the defence. But I gave the warning to you principally by reason of the age of the cases. Now, the historical reasoning for giving of the corroboration warning was that it used to be said that basically, a complaint of

sexual assault was easily made and terribly difficult to disprove, and therefore, in the old cases, that basically the warning was given that it was dangerous to convict on the un-corroborated testimony in these type of cases, but nonetheless, if you were satisfied you could so, beyond reasonable doubt. But I principally gave the corroboration warning because of the age of the cases, they're very, very old cases."

227. Reference is made to the extract to which we have already referred in *The People (DPP) v. CC (No. 2)* [2012] IECCA 86:-

> "It was also important that the jury distinguish between two different processes of reasoning which may have been available to them. In the first place, if a jury concluded in relation to any one complainant that the case was compelling and that they were satisfied beyond any reasonable doubt of the guilt of the accused in relation to such incidents, then they could consider that it was now more likely that the account given by another complainant of a similar incident was true. However, it is also logically possible for a jury not to be satisfied beyond any reasonable doubt on the individual evidence relating to any single complainant or incident, but nevertheless to reach that point of being satisfied beyond reasonable doubt by virtue of the range of offences in respect of which evidence has been given, their interconnection, and the unlikelihood that the evidence in respect of each of the complaints is either the product of collusion or chance. But it is important that the jury should recognise which of these courses it is contemplating because it is obviously important to recognise, if indeed that is the case, that the jury is not satisfied beyond reasonable doubt on the individual evidence taken alone, and therefore the reliance being placed on the system evidence is that much greater."

228. Ms. Noctor says there was full compliance with *CC (No. 2).* She argues that the trial judge only charged the jury on one basis, that being that the evidence was cross-admissible in terms of *BK*, moreover, that the matter was clarified in the judge's re-charge to the jury following requisition, which clarification, she says, was to the benefit of the appellant.

229. Ms Noctor submits that the use of the term corroboration was in the context of system evidence, where seven complainants were alleging similar crimes. She says that the term corroboration as it appears in the charge was inextricably connected to the charge on system evidence. Ms. Noctor contends that the charge was in terms of *BK* with the addition of what she termed an 'add on'; that being the concept of indirect corroboration. By this, the Director is referring to the fact that the jury, where not satisfied to the required standard on a single complainant's evidence, may in accordance with *CC (No. 2)*, consider that the standard is met when assessing the evidence of system.

230. Ultimately she says that the judge instructed the jury in terms of *BK* in his initial charge with the added benefit that they had to be satisfied beyond a reasonable doubt on the evidence before relying on the system evidence. Thus the net effect of the charge and re-charge was to the benefit of the appellant in that there was no bar to the judge advising the jury that the evidence of any individual complainant could serve to corroborate the

evidence of other complainants once the risk of collusion and inadvertent influence was excluded.

Grounds 16 and 18

231. Ground 16 concerns the judge's charge as to the manner in which the jury should treat the evidence of each complainant for the purpose of assessing its corroborative effect vis-à-vis the other complainants. It had been established that the trial judge failed to inform the jury that they have to be satisfied beyond reasonable doubt in relation to a particular count before the fact of that conviction could be used to support another count. Ground 18 concerns the trial judge's re-charge in this respect.

232. It is undoubtedly so that the trial judge instructed the jury at some length concerning system evidence and emphasised repeatedly the importance of the jury considering the risk of collusion and undue influence and urged the jury to consider the independence of each of the respective complainants. He identified the evidence upon which the respondent relied as being evidence of system and explained the evidential force of system evidence. He clearly advised the jury on the issue of collusion or inadvertent influence and that they had to be satisfied that the evidence was independent before they could act on the evidence.

233. However, the trial judge went further and advised the jury that if they were not satisfied as to the independence of any of the complainants, then they should disregard that complainant's evidence insofar as system was concerned. He also instructed the jury that if they were not satisfied beyond reasonable doubt that the evidence of any given complainant was free from collusion they could not use that evidence in respect of any of the other complainants.

234. Prior to the charge, the trial judge was of the view that he ought to instruct the jury that the evidence of system could be relied upon in terms of the ordinary principles referred to by Hardiman J. in *The People (DPP) v. McCurdy* [2012] IECCA 76 and as stated by Barron J. in *The People (DPP) v. BK* [2000] 2 IR 199. In the interests of clarity, the evidence of multiple complainants may be cross-admissible in order to rebut innocent explanation, accident or denial and/or is admissible because of the inherent improbability of several persons making up exactly similar stories. It was on this aspect of system evidence that the trial judge decided to charge the jury.

235. As can be seen from the jurisprudence, evidence of system may be considered by a jury on the aforementioned basis and may also have a corroborative effect if the jury are satisfied that the evidence is free from collusion or inadvertent influence. Obviously, the latter, as we stated, is relevant to the jury in assessing the weight to be assigned to the evidence of system.

236. It is clear from an examination of the transcript that the judge advised the jury repeatedly that they had to be satisfied that the evidence of each complainant is free from contamination, or suggestibility and indeed if they were not satisfied, that they had to disregard that evidence and not take it into account.

237. He emphasised the involvement of Dignity 4 Patients and the various meetings attended by the various complainants. Then he advised the jury as follows: –

> "And that's a-- you're going to have to look at that, and you're going to have to decide whether these complainants came forward independently in the absence of collusion, suggestibility, copycat, and contamination. That's for you. If you decide beyond reasonable doubt that they did, then you can take into account in coming to the conclusion in relation to all of the counts. Because it is compelling evidence if seven people have made similar allegations against Dr S in the absence of collusion, suggestibility, independently and such like. That is a matter you have to take into account. And then you must look at all of the evidence. Then you have two strands of evidence in relation to each case. You have this seven-complainant evidence, and you have the evidence of each one of them in relation to what they say occurred to each other then. Now, that's for you. Now, if you discard and you do not accept this multiple complainant type evidence, then there is no corroboration in this case at all for the complainants."

238. The trial judge then proceeded to warn the jury in very strong terms concerning the absence of corroboration. It is clear from the aforementioned passages quoted that in advising the jury in relation to the evidence of multiple complainants, that he was referring to the evidence of system and distinguished that evidence from the evidence of the individual complainants. In other words, he advised the jury to examine all the evidence and in so doing to examine the evidence of system, which if they rejected, the remaining evidence was that of the evidence of the individual complainants.

239. It is clear that when the judge used the term "corroboration", he did so in terms of explaining the concept of system evidence. Whilst it may have been prudent not to use that term when explaining how the evidence of system could be used in the context of the dicta of Barron J. in *The People (DPP) v. BK* [2000] 2 IR 199, nonetheless it is so that the word may bear of the highest scrutiny from lawyers, but perhaps it is of less significance for a jury. What is important is to consider the overall charge in order to ascertain whether the jury received the appropriate directions and instructions from the trial judge.

240. The evidence of multiple accusers could most certainly have been utilised by the jury as being potentially corroborative if they were satisfied concerning the risk of collusion, copycat evidence or inadvertent influence.

241. The jury were advised repeatedly by the judge to disregard the evidence of system unless they were satisfied as to the similarity of system and the independence of the complainants in terms of the absence of collusion or contamination and indeed to disregard the evidence of system if they were not so satisfied. Indeed, it must be said that when the word "corroboration" was used by the trial judge, he did so having advised the jury that if they rejected, what he termed as the "multiple complainant type evidence', the evidence of each complainant was uncorroborated. He then proceeded to give a corroboration warning. In giving the corroboration warning, the trial judge informed the jury that: –

"Now, in the absence of the multiple complainant type evidence, there is no independent support for any of these types of allegations, none. If you discard the independent, or the multiple complaints type evidence, what you must do is you must decide this case in relation to all of 13 counts, in relation to the complainant evidence alone."

Conclusion – Grounds 16 and 18

242. The appellant contends that the trial judge erred in his directions to the jury regarding the treatment of the evidence of each complainant.

243. It is apparent from the perusal of the entirety of the judge's charge that he instructed the jury in terms of *BK* and that is, the inherent improbability of several complainants making up similar allegations. He carefully advised the jury repeatedly on the elements of collusion or collaboration, cross-contamination and copycat evidence. It could be said that he went further than was absolutely necessary, but the manner in which he advised the jury was undoubtedly of benefit to the appellant. He emphasised to the jury that if they were not satisfied on the evidence of any given complainant then the use to which system evidence could be put was set at nought.

244. It is contended on behalf of the appellant in Ground 16 that the judge erred in failing to tell the jury that they must be satisfied beyond reasonable doubt in relation to any given count before that count could be used to support another count on the indictment. However, it is true that the judge did not direct the jury that evidence of any given complainant could be used to support the evidence of another complainant, if the jury were satisfied to the requisite standard on the evidence of the first complainant. However, he did not do so in circumstances where he decided not to direct the jury as to the potential corroborative effect of the respective complainants' evidence, but, instead he directed the jury that they could look to the evidence of system on the basis of the inherent improbability of several complainants making up reasonably similar allegations. In other words, he instructed them in terms of ordinary principles, with which it appears, the appellant was satisfied prior to the judge's charge.

245. The trial judge advised the jury in terms of *The People (DPP) v. CC (No. 2)* [2012] IECCA 86 of the different forms of reasoning open to the jury in that he confined the jury to one aspect of assessing the system evidence and that was in the context of the inherent improbability of multiple complainants making up broadly similar allegations. He was careful to balance the charge with repeated references to the importance of excluding the risk of contamination or collusion.

246. Moreover, when the trial judge recharged the jury on the requisitions, the judge advised the jury that they could examine the evidence on each count without having regard to the evidence of system, to determine whether they were satisfied beyond reasonable doubt on the evidence of any given complainant. He then advised the jury that if this was not possible they could examine the system evidence and consider whether, in effect that evidence assisted them in their deliberations. This accords with the dicta of O'Donnell J. in *CC (No. 2)* :-

> "However, it is also logically possible for a jury not to be satisfied beyond any reasonable doubt on the individual evidence relating to any single complainant or incidents, but nevertheless to reach that point of being satisfied beyond reasonable doubt by virtue of the range of offences in respect of which evidence has been given, their interconnection, and the unlikelihood that the evidence in respect of each of the complaints is either the product of collusion or chance."

247. We are satisfied in the circumstances that the trial judge conveyed the necessary information to the jury in a manner which was fair and balanced to the appellant and accordingly this ground fails.

Ground 17

248. This ground concerns the criticism of the judge's charge. It is said that he erred in informing the jury that if they were satisfied that the evidence of the complainants was not influenced by materials published by the press and published by particular organisations, the fact that there were seven complainants became compelling evidence in the case.

249. It is submitted in this regard that the only possible impression which could have been taken by the jury in respect of the judge's use of the word "compelling" on a number of occasions was that the judge considered the fact of multiple complainants to be the most significant feature in the case. It is said that when he addressed this matter in his re-charge, matters further deteriorated.

250. The word "compelling" came about in the first instance in circumstances where the judge advised the jury on the importance of the independence of the complainants. To set out context as follows: –

> "And secondly that all the complainants came forward independently in the absence of collusion without being contaminated by without contamination in relation to what say. And basically, suggestibility means that basically, that basically by reason of the publicity, either the complainants in this case made up the allegations or exaggerated the allegations, or copycat, that basically you're going to have to examine the possibility that these complainants, some of these complainants, heard what was happening and decide, decided to make up an allegation to get on the gravy train. Now, that's putting it in a very blunt way, but I think you understand what I mean. Before you can act on this type of evidence the multiple complainant, because you can imagine that if, say if there was no publicity in this case, say all of a sudden without any publicity or any of what occurred around the […] area, seven or eight people arrived into the garda station who didn't know each other and made similar complaints about the same person, I think logically you would all understand that would be compelling evidence. Why would seven totally unrelated people, with no connection whatsoever, arrive into a garda station and make roughly similar complaints about a similar about the same person? You can imagine that is, you could see on a matter of common sense, that is compelling evidence."

251. In this portion of the charge, the trial judge repeatedly emphasised the matters which had been canvassed in cross-examination on behalf of the appellant, issues such as the involvement with Dignity 4 Patients, civil actions on the part of the respective complainants and the manner in which each complainant came forward. It was in that context, in advising the jury to be cautious because of those issues that the use of the word "compelling" came about. The trial judge was clearly pointing out to the jury that if it were not for the circumstances outlined above, common sense would dictate that seven or eight persons coming forward without that particular background would indeed amount to compelling evidence.

252. The trial judge then went on to emphasise that there was evidence that the complainants had attended Dignity 4 Patients meetings and had met with a Dr Murphy and all have the same solicitor. He again emphasised that the reason the complainants came forward was as a result of publicity and urged the jury to examine that in order to decide whether the complainants came forward independently and absent contamination, suggestibility et cetera. He then said: –

> "Because it is compelling evidence if seven people have made similar allegations against Dr S in the absence of collusion, suggestibility, independently and suchlike. That is a matter you have to take into account."

253. In his remarks and re-charge the trial judge emphasised to the jury that he ought not to use the word compelling and that whether evidence was compelling was a matter for them.

Conclusion – Ground 17

254. In the opinion of this Court, even if the trial judge had not instructed the jury in the re-charge that he ought not to have used the word "compelling", it is simply not possible to see how this impacted negatively on the appellant. It is very clear when one examines the transcript and the context in which the word was used by the trial judge that he was clearly pointing out to the jury that they ought to examine carefully the background to each of the complaints made by the complainants. It is the view of the Court that when read in its entire context, what comes across is that the judge was saying that the jury had to look at the background to the complaints, and the jury could then reach the conclusion either that the multiplicity of complaints had come about by reason of the publicity and were therefore not reliable, or they were independent; and if the latter, the number of complaints would make the evidence compelling. We see nothing wrong in his having said that.

255. We can find no substance in this ground and accordingly we reject it.

Ground 19 and Ground 23

256. This concerns the failure to discharge the jury following the charge on foot of the matters complained of at Ground 16 – 18 inclusive and the failure to discharge the jury following the use of the word "compelling".

Conclusion

257. We are satisfied that we can deal with these grounds in short order. We have already rejected Grounds 16 – 18 in circumstances where we have not found that the trial judge erred in his charge or re-charge to the jury. It is well established that the option of discharging the jury is one of last resort, but even if this were not so, as we are not persuaded of the arguments advanced in Ground 16 – 18, it follows that these grounds also fail.

Decision

258. Accordingly as we have rejected all grounds of appeal, the appeal against conviction is dismissed