THE COURT OF APPEAL

Record Number: 324/16

Birmingham P.
Edwards J.
Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

C.S.

APPELLANT

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

1. This is an appeal against conviction. The appellant was found guilty of nineteen counts including four counts of indecent assault and fifteen counts of sexual assault. The appellant was initially charged with 39 counts on the indictment in relation to two complainant sisters AB and LB but the appellant was only found guilty in respect of the counts relating to AB. On the 9th December 2016, the appellant received a sentence of seven years' imprisonment.

Background

2. The appellant is the uncle of the complainant. The abuse occurred between the period of the 14th of April 1988 and the 24th of December 1994 when AB was between 10 and 16 years of age. The assaults took place in the home of the complainant's grandmother and in AB's family home. Two of these counts relate to specific incidents when the complainant was aged ten and sixteen years old respectively and the remaining counts are sample counts.

3. The complainant described how the abuse occurred in the sitting room after school when the appellant would sit beside her, then kneel in front of her, touch her legs, rub her shirt, sit to the left of her, unzip his trousers and take out his penis, put her hand on his penis, his hand on her hand and then pleasure himself. The appellant would also kiss her on the neck and touch her breasts and vagina. The complainant described that these assaults would occur two to three times per week and if her parents went out at weekends. The final instance of abuse, which is the subject of Count 39 on the indictment, took place when the complainant was sixteen years of age and involved the appellant getting on top of her, touching her breasts and vagina and digitally penetrating her. Shortly thereafter the complainant left school and began working and the abuse stopped.

Grounds of appeal

4. The appellant put forward eight grounds of appeal but proceeded with seven of those grounds as follows:-

(1) The Learned Trial Judge erred in law in his ruling on the question of the admissibility of the evidence of the complainants at the outset of the case, in particular by deciding that the question could only be determined after the evidence had been admitted.

(3) The Learned Trial Judge erred in law and in fact in failing to issue a warrant so as to compel the attendance of PB at the trial in circumstances where it was established that he had material evidence to give to the Court.

(4) The Learned Trial Judge erred in law and in fact in failing to stay the Trial of the Appellant at the conclusion of the Prosecution case.

(5) The Learned Trial Judge erred in law and in fact in failing to warn the Jury of the dangers of convicting the Appellant on the uncorroborated evidence of the complainant.

(6) The Learned Trial Judge erred in law and in fact in failing to give an adequate account in his charge to the Jury of the Defence case in relation to the credibility of the complainant's testimony.

(7) The Learned Trial Judge's charge, taken as a whole, failed to sufficiently protect the Appellant's right to silence and privilege against self-incrimination, both in relation to the treatment of his custody interviews and his decision not to give evidence at Trial, and the Appellant was thereby deprived of his right to a fair Trial.

(8) The Learned Trial Judge erred in law and in fact in directing the Jury constituted of 11 members only, to continue with their deliberations.

Submissions of the parties

Ground 1- Admissibility of the complainants' evidence

5. On day one of the trial, counsel for the appellant made an application to the trial judge seeking to have the evidence of the complainants excluded due to issues with the manner in which the complaints were made to the Gardaí. This was based on the contention that there were two complainants, each of whom had made a number of statements to the same member of An Garda Síochána but who had asserted in those statements that they had not discussed the matter between themselves.

6. It was also contended that an unfairness arose in that the member of An Garda Síochána had not made any notes, and so it is said that it was unclear as to how the two complainants had apparently separately come to make their statements to An Garda Síochána. In effect it is contended that the issue of collusion arose and ought to have been determined by the judge in the context of admissibility.

7. The trial judge did not accede to the application, instead stating that any unfairness that may arise could only be dealt with once all of the evidence had been heard and an application could be made at that point.

Submissions of the parties

8. The appellant submits that the trial judge erred in ruling on the issue of the admissibility of the complainant's evidence and in particular was erroneous in ruling that the issue could only be determined after the evidence has been heard. Moreover, it is said that in refusing to determine this issue at the outset of the trial and prior to the evidence of the complainants, the trial judge erred in law in failing to hear evidence from the investigating Garda as to the circumstances in which the statements of the complainants were taken.

9. The appellant submits that the trial judge failed to engage with the specific facts of the instant case in terms of the delay which preceded the making of the allegations in question and the fact that each of the complainants made detailed entries in notebooks whilst maintaining that they had not spoken to each other in relation to the case.

10. The respondent submits that the trial judge's approach was correct as the issues raised by the appellant went to weight rather than admissibility. The respondent refers to *The People (DPP) v. MS* [2019] IECA 120, where the possibility of contamination or collaboration, inadvertent influence or suggestibility were found to be matters directed to weight and the probative value of evidence and therefore an issue for the jury.

Discussion

11. The application on behalf of the appellant was moved prior to any evidence following prosecution counsel's opening remarks. The application concerned the admissibility of the complainants' evidence and was in substance grounded on the fact that the two complainants made a number of statements to the Gardaí in early 2013, each complainant produced a notebook detailing the accounts of incidents and counsel expressed a particular concern regarding the manner in which the accounts given by the witnesses to the Gardaí interacted with their notebook entries. In truth, the basis for the application was founded on the possibility of collusion.

12. Moreover, when the complainants first approach the Gardaí in early 2013, a complaint was made on behalf of the appellant regarding the absence of notes on the part of the Gardaí.

13. Counsel on behalf of the appellant at trial readily conceded that his was a novel application but nonetheless contended that his application was appropriate notwithstanding the fact that an alternative remedy may be available at a later stage in the trial.

14. Counsel for the respondent pointed out that the appellant's legal team were informed there were no notebook entries but that statements were disclosed to the defence concerning the approaches made by the respective complainants.

15. It appears that the statement made by Garda Quinn stated, *inter alia*, as follows: –

> "I obtained statements from both [ ] and [ ] of [ ] in relation to the allegations of sexual assault over a number of years against their two uncles, [ ] and CS of [ ]".

16. The trial judge refused to determine the issue of admissibility prior to the commencement of evidence and, inter alia, stated as follows: –

> "Now obviously if that unfairness leads to an unfair trial, then it is open to Mr Guerin to apply to this Court on the PO'C basis. But I'm not going to accede to his application at this – in relation to admissibility…"

Conclusion

17. It is apparent from a perusal of the transcript of the judge's ruling concerning this application, that he was alert to the issue of collusion. Indeed in the course of his ruling, he indicated that an application could be made should matters arise which would render the trial unfair or which would tend to fatally undermine the evidence of the complainants in some way.

18. The issues of collaboration, collusion, inadvertent influence and/or contamination were addressed by this Court in the decision of *The People (DPP) v. MS* [2019] IECA 120. In that case the issues concerned contamination, copycat evidence and suggestibility. The argument was advanced that before such evidence could be deemed admissible, it was necessary for the prosecution to exclude such possibilities. In MS, this Court found that the possibility of an issue such as collusion, save in the most exceptional cases, is an issue directed to weight and therefore falls for assessment by a jury. The fact of communication or contact between complainants prior to trial is not, in and of itself, indicative of collusion. In fact, to expect no discussion whatsoever between siblings is unrealistic.

19. In the present case, the height of the application was that the first complainant contacted the Gardaí and made a complaint, following which she returned in January 2013 bearing a notebook containing detailed accounts of her complaints, which was compiled in the intervening period. The second complainant then approached the Gardaí with a notebook containing a detailed account of complaints. The concern was voiced, but without elaboration, about the interaction between the accounts given in interview by the complainants and the accounts contained in the notebooks.

20. As we have stated, the possibility of issues such as collusion, inadvertent influence or contamination, generally speaking, are issues of weight and not admissibility. There is nothing in the view of this case to suggest the existence of exceptional circumstances.

21. In assessing the application opened to him, the judge made it quite clear that he retained a residual discretion to stop the trial should any matter render the trial unfair.

22. We are not persuaded that there is merit in this ground of appeal.

Ground 3- Failure to issue a warrant for PB

23. On day three of the trial, counsel for the appellant made an application for the prosecution to call as a witness PB, the father of the complainants. This application was moved on the basis that PB had heard the initial informal complaint of the complainants. The prosecution stated that they had received a report from PB's GP which outlined that he was unfit to attend court due to memory loss from the effects of a stroke. The trial judge issued a summons for the defence for PB on the understanding that both sides could cross-examine him.

24. When moving the application, counsel for the appellant referred the judge to a statement made by PB. Reference was made to a response allegedly made by LB regarding the allegations where PB in his statement said as follows:-

> "I asked L then was it true and she told me it was. She said that she had been abused by M more so than C but that C had abused A more".

25. It seems that the purpose of seeking to have PB called as a witness arose from LB's response when it was suggested to her that she made a remark to that effect, which she denied making in evidence. The defence required the prosecution to call PB as it is said that his potential evidence was material to LB's credibility.

26. On day four of the trial, counsel for the prosecution stated that they had received a further medical report on PB's behalf which concluded that he was not strong enough to endure any type of court proceeding. The trial judge refused to call PB's wife as a witness on the basis that he could not go behind the medical report even if she gave optimistic evidence of PB's health. The trial judge stated that the correct action to challenge the medical report would be to call the GP who issued it as a witness but counsel for the appellant did not choose to do this.

Submissions of the parties

27. The appellant submits that the trial judge ought to have issued a warrant for the arrest of PB in circumstances where the Court had determined that he was a person who ought to be called by the Court and available for cross-examination by both parties. It is further contended that the medical report that was handed in was hearsay and should not have been relied on by the Court. The appellant argues that the trial judge ought to have heard from Mrs B and he erred in refusing to do so.

28. The respondent submits that if the appellant had wished to call this witness, he should have taken steps to do so himself. It appears that no efforts had been made prior to trial to secure the attendance of this witness. As PB was not a witness who could give any evidence relating to the allegations themselves, he would never have been a witness that the prosecution could have called and indeed the particular piece of evidence would appear to be inadmissible as offending the rule against narrative.

29. The respondent argues that the trial judge did not err in failing to issue a warrant for PB in circumstance where the appellant appeared to accept the evidence of Garda O'Shea

that PB's memory had deteriorated and did not seek cross-examine the GP whose report has been furnished.

Discussion

30. The first point which occurs to this Court is that the appellant wished to cross-examine PB in respect of a comment which he attributed to LB. The reason the appellant wished to do so was in order to test her credibility. The jury disagreed on all counts concerning LB. The suggestion which was put to LB in cross-examination was in the following terms:-

> "Q. No, and then your father asked you if it was true and you told him it was true and that you had been abused by M more so than by C?
>
> A. No, I said C more so than M. I said C more so than M. I only remember two incidents with M. I remember a number with C."

31. It was contended on behalf of the appellant at trial that the respondent was obliged to call all relevant evidence and this is indeed correct. However, the evidence which the appellant sought to introduce would not appear to fall within one of the exceptions to the rule against hearsay, in that the date of the material conversation was 2010 and so would appear to fall foul of the criteria for the admission of recent complaint evidence.

32. Secondly, it was open to the appellant to call PB as a defence witness pursuant to s.4L of the Criminal Procedure Act 1967 through a witness summons. However, in the present case, the judge ultimately issued a summons but indicated that the defence would be permitted to cross-examine the witness. In so directing the judge said:-

> "I want the guards to go out to and serve the summons on him, and if this man is unfit to come to court, then we can't bring him to court. You know, if his memory, he says – he should come to court and he should explain his position,. And if I find he has no memory, I'll make appropriate decisions, but at this stage I'll issue a summons for him generally."

33. As matters evolved, the following day, following enquiries by the respondent, a medical report was furnished regarding PB, which indicated that he was unfit to attend court due to ill health.

34. It is now said that the judge ought to have issued a warrant for the arrest of PB and moreover should not have relied on the medical report, but ought to have received evidence from Mrs B.

Conclusion

35. No attempt was made prior or during the trial to seek a witness summons for PB on the part of the appellant. However, this is not of any great moment in the circumstances which presented themselves, that being PB's ill health. Even if a summons were served at an earlier stage, this would not have altered the position. The issue is whether the judge ought to have issued a warrant for PB's arrest in the circumstances.

36. The appellant contends that the judge ought to have heard from Mrs B, however, should the appellant have had a real concern regarding the contents of the medical report, the appropriate procedure would have been to seek the attendance of the author of the medical report.

37. On foot of the medical report, one would have to query the benefit of calling a witness suffering from memory loss as a result of a stroke and whom his treating doctor considered unfit to attend court.

38. In the circumstances, this Court is not persuaded that the appellant's right to a fair trial as guaranteed pursuant to Article 38 of the Constitution was not protected. We are even more firmly of this view where the jury disagreed on all counts concerning the witness whose credibility it was sought to impugn by calling PB.

39. Moreover, the absence of PB formed part of the application to stop the trial and the judge further considered the issue at that point of the trial having heard the evidence.

40. This ground fails.

Ground 4- Stay/Direction application

41. This ground is concerned with the trial judge's failure to accede to the direction application made on behalf of the appellant. There were three bases for the direction application: the manner in which statements were taken from the complainants, the missing witness PB and the vagueness of the allegations.

42. The trial judge refused the application on all grounds. In relation to the vagueness of the allegations the trial judge held as follows:-

> "Now, there is a submission made by Mr Guerin that the case shouldn't go forward by reason of vagueness, and that has been explained what that means very eruditely and eloquently by Mr Guerin. Obviously Ms Noctor has had her say in it, and on that basis I would not stop the trial. It seems to me the evidence has been given, obviously by the lapse of time there's certain missing details, and people are not all the certain about certain surrounding factors. But the two witnesses gave evidence of what occurred to them, and they're pretty clear on that. They're pretty clear of the time period by reason of their ages, and their schooling, and their movement between the two houses involved. So as cases go, it's not too vague. The evidence is very clear of what occurred. Obviously surrounding details can be somewhat opaque."

43. In respect of the missing witness PB, the trial judge stated:-

> Now, I should indicate that witnesses are not available for many, many reasons. Even in a case that comes on very expeditedly, witnesses can be unavailable. Even in lay cases witnesses can be available. And it seems to me that it would be very unfair to the process to grant a direction or a discharge in this case by reason of that.

> We don't know what he would say. We know what he said in his statement, we know there was disclosures made in that night, we can imagine it was a very emotional night, and we can say that his statement has been put to LB and she has denied it. Now, I do not think his unavailability deprives this process of fairness, and it seems that, obviously, if we thought this man wasn't going to be available his evidence could've been taken in a different way. But it seems his evidence became vital last Friday, and he wasn't available. The defence had his statement and had the book some period ago, and obviously they waited, as they're entitled to do, and waited for the trial, and this issue was raised. But the question I have to decide: does the absence of the evidence of the father of both complainants deprive this process of fairness? I do not think it does, because witnesses are unavailable for many reasons, and all the evidence he could give is that basically he heard LB say something opposite to what she's now saying. This has been put to LB and she's denied it, that she said that."

44. In relation to the complaints made to the Gardaí, the trial judge stated:-

> "I cannot say this is in any way objectionable. I think obviously these matters can be explored in relation to creditability or the strength which the Jury should attach to the evidence of these two witnesses. But as a practice I cannot condemn it, and as a practice I cannot see how it's unfair to the accused's right to a fair trial. So on that basis I wouldn't grant direction or a discharge"

Submissions of the parties

45. The appellant submits that the trial judge erred in failing to accede to the application to stop the trial. The appellant predicates his submissions on the dicta of Denham J. in *The People (DPP) v PO'C* [2006] 3 I.R. 238 and the comments of O'Neill J. in *MR v. DPP* [2009] IEHC 87where he considered the effects of the absence of evidence on the fairness of a trial:-

> "Of all of the features advanced above as amounting cumulatively to exceptional circumstances, one stands out as requiring particular consideration and that is the loss of the evidence of the complainant's mother. Describing it as a loss may not be accurate, because it is not known whether she would have relevant evidence to give, for the simple reason that the prosecution have adamantly refused to find out. In my view this refusal is extraordinary and in the circumstances of this case wholly unjustifiable. As said earlier, the only real island of fact through which credibility can be tested is the account given by the complainant of her movements before the first alleged incident. Insofar as there is a potential witness who even at this remove of time could have a recollection of whether the complainant was in the D. house on a Friday night when she was eleven years of age or whether she was ever there without other members of her family, it is, of course, her mother who, in all probability, was, at the time, acutely aware of the complainant's movements, particularly late at night.

77. In my view, the refusal to obtain a statement from the complainant's mother concerning these matters is in itself a wholly exceptional circumstance and taken in conjunction with the other factors listed above, in particular, the applicant's age, his blindness and state of general health, cumulatively, in my opinion, warrants prohibiting the trial of the applicant on the ground that there is a real risk that he would not get a fair trial."

(a) The manner in which statements were taken from the complainants

46. It is said on the part of the appellant that the manner in which the statements were taken from both complainants gives rise to a fundamental unfairness which rendered the trial unfair and therefore the judge erred in failing to stop the trial.

47. Before addressing the factual basis for this segment of the application to stay the trial, it is important to express the core issue. It is contended that it was not possible to exclude the risk of what was termed at trial, as untoward collusion between the complainants. It is said that the absence of Garda notes concerning the first meeting with the first complainant (LB) compounds the prospect of untoward collusion. Counsel for the appellant at trial clarified that it was not so much the possibility of collusion which was a concern, it seems that the risk of inadvertent influence was the concern insofar as there was said to be a risk that the testimony of each complainant was affected by the recollection of the other complainant.

48. As the application before the trial judge evolved, counsel for the appellant emphasised that a note ought to have been taken by Detective Garda Quinn when the complaint was originally made by LB. It was stressed that this was particularly significant where two people are involved in the making of complaints. As this Court understands, the argument being made is that the risk or possibility of contamination, inadvertent influence or collusion, where there is more than one complaint could have been tested if a note had been maintained. Thus underlining the importance of a note of LB's original complaint.

49. The respondent submits that there was no material within the evidence in respect of the taking of statements by the Gardaí which warranted the extreme step of withdrawing the case from the jury or the Court exercising its inherent jurisdiction to stop the trial. It is contended that the issues were matters which went to weight and thus could be explored in the presence of the jury.

50. Insofar as untoward collusion or contamination is concerned, the respondent argues that such a possibility was relevant only to a consideration as to whether each complainant was capable of providing corroboration for the other and as to whether evidence of system could be relied upon by the jury. Reliance is placed on the decision of this Court in *The People (DPP) v. MS* [2019] IECA 120 where this Court referred to the decision of *R v. H* 1995] 2 A.C. 596, and said:-

> "As stated in R v. H [1995] 2 A.C. 596, if the evidence of co-complainants is admitted and it transpires in the course of the trial that a jury could not accept the

evidence as free from factors tending to undermine it, such as collusion, contamination, suggestibility or inadvertent influence, in consequence thereof, the judge should direct the jury that the evidence is not capable of amounting to corroboration or of being used for any other purpose adverse to the accused."

Discussion

51. Evidence was given by Detective Garda Quinn stated that on the 1st January 2013 she spoke with LB in the garda station and brought her through the procedure regarding the taking of a statement. She then stated: –

> "I had suggested that she go away and think about it, that I would be in contact with her in a couple of days, that if she gathered her thoughts and wrote down whatever details that she could recall and that we would go to the statement at another date that was kind of – that both of us were amenable to".

52. A statement was subsequently taken from LB on the 10th January 2013 and a second statement on 19th January 2013. The evidence disclosed that LB had a notebook wherein she had written down details regarding her allegations.

53. Insofar as the second complainant AB was concerned the witness indicated that she also advised that witness to gather her thoughts and write down as much detail concerning the allegations which she wished to discuss and that a formal statement of complaint would then be taken. Two statements were taken from AB on 5th February 2013 and on 8th February 2013.

54. Moreover Detective Garda Quinn indicated that AB had made handwritten notes concerning her allegations.

55. Detective Garda Quinn accepted in cross-examination that she had not maintained a note concerning LB's original visit to the garda station on 1st January 2013. The witness indicated in evidence that LB was not making any allegations at that stage. The witness accepted in cross-examination that it was possible that the complainants were not informed that they should not speak to each other concerning the subject matter of the allegations.

Complainant cross-examination

56. In the course of the cross-examination of LB the possibility of interaction between the complainants concerning the preparation of their notebook entries was canvassed.

> "Q. Did you discuss the idea of using a notebook with your sister?
>
> A. Not that I recall, no.
>
> Q. Well, again, it's a bit like the idea of whether or not you remember speaking to anybody else between the 10th and the 19th. Can I ask you to think very carefully about this; did you discuss the idea of the notebook with AB?

A. I can't recall if I did. I honestly can't say whether I did or whether I didn't. I cannot recall that now.

Q. Did you look at her notebook?

A. Her – AB didn't have a notebook. I wrote the notes myself.

Q. Well, I want to suggest to you that AB did have a notebook?

A. Okay.

Q. Another notebook?

A. All right, okay.

Q. Were you aware of that?

A. I think I remember something along the lines that she was writing about, that counsellors had suggested to her. I can't remember if I looked at her notes. I can't remember reading it. I can't remember.

Q. All right?

A. I do have a bit of a vague memory of something like that though.

Q. Yes, all right. So, it is possible that in fact you had looked at AB's notebook?

A. As I said, I can't remember. I probably did. I probably didn't. I cannot physically or mentally remember looking at it."

57. At a later stage the following exchange took place:-

"Q. What I'm suggesting to you, just to give you an opportunity to respond to it Ms B, is that the only way in which you were able to put together the narrative account which you made in your statement of 19th of January and which you've given in court to this jury, is because you were able to discuss the allegations that you intended to make with [ ]and your sister AB and because you were able to look at AB's notebook; isn't that correct?

A. That is not correct."

58. In the course of AB's cross examination the following exchanges occurred on the same issue:-

"Q. All right. Do you recall preparing a notebook and writing down the details of what you say happened?

A. Right at the beginning when statements were being made and I was really confused and I was trying to think, I didn't know where to start, I had never given a

statement before and I didn't know what to expect, and I had expressed this to Detective Quinn and she suggested that maybe it might help you if you wrote down what comes to you.

Q. And you did that then, did you?

A. Yes, I did that.

Q. Did you have any discussion with your sister LB about that?

A. Yes, I did, yes.

Q. Right. Was it LB who had arranged for to you go into the station to make the complaint?

A. No, I don't recall. I don't think LB made arrangements for us to go in. I really don't remember."

59. At a later stage the following took place:-

"Q. Now, you were asked about you were asked about making a notebook. I think you said it was Detective Garda Quinn who suggested you write it down and that might help?

A. Yes, that's correct.

Q. And I think you were asked then if you had a discussion with LB about it?

A. I didn't have a discussion with LB as such. She did know that that was what I was doing, she did know that I was writing those notes.

Q. Thank you."

60. It is argued that the recollection of each complainant impacted on the other complainant and such concern was illustrated by the fact that LB made an allegation against the appellant's brother of a sexual nature which was not recorded in her notebook entries were as such was reported in AB's notebook entries.

Conclusion on issue (a)

61. In the view of this Court, the trial judge properly considered the approach adopted by the very experienced Garda to be one which he did not consider to be objectionable. The issue with which the trial judge was concerned was one of fairness. There is no doubt but that the judge was alert to the issue of inadvertent influence/collusion insofar as it was contended that there was interaction between the complainants and, whilst he did not specifically refer to this issue in his ruling, it is clear that the judge discussed the issue with counsel for the appellant in the course of the application. Ultimately the issue was one of fairness which was acknowledged and addressed by the trial judge in accordance with the jurisprudence pursuant to *The People (DPP) v PO'C* [2006] 3 I.R. 238.

62. In any given case where complainants are siblings or are related to each other, it is unrealistic to entirely exclude the possibility of discussion regarding allegations in respect of a common perpetrator. However, this in and of itself is, of course, not necessarily indicative of collusion giving rise to concoction or, as in the present case, some form of inadvertent influence in respect of the bringing of the allegations or impacting on the nature of the allegations.

63. It is an issue to be determined by the judge in the context particular to any given case. Insofar as an application is made to stop the trial relying on the *PO'C* jurisprudence, the issue is one of a fair trial and if the reasonable possibility of contamination/collusion is disclosed on the evidence, that is a factor to be assessed in a consideration of the fairness of the trial. In the present case on a perusal of the transcript and in particular of the cross-examination concerning any potential interaction/discussion, we are not persuaded that the trial judge erred in his ruling. Unless there is evidence demonstrating a real risk of contamination/collusion which would jeopardise the fundamental fairness of the trial, the judge should not stop the trial on that basis alone.

64. In the circumstances, should the evidence disclose the possibility of contamination/collusion, which does not in the view of the judge, impact on the fairness of the trial, the judge, at the conclusion of the trial should then consider whether such evidence impacts on whether the complainants may provide corroboration as that issue is discussed on the basis of system evidence in *The People (DPP) v MS (No. 2)* [2020] IECA 309.

65. Should the trial judge decide, as in the present case, that there is no corroboration in law, then the possibilities of contamination, collusion or inadvertent influence, if such arise on the evidence are issues of fact for determination by the jury, in the context of assessing the credibility and reliability of the witnesses.

66. There may of course be exceptional cases where the evidence of collusion or contamination or inadvertent influence is such that the trial judge, at the conclusion of the prosecution evidence, may consider whether to accede to a directed acquittal or to stop the trial but this case is far removed on the evidence from such a nuclear option.

(b) The unavailability of Mr B

67. It is said on behalf of the appellant that as the witness was unavailable to come to court and his failing recollection due to the lapse of time caused the loss of relevant evidence.

68. In respect of PB the respondent submits that the trial judge was correct in his ruling. The respondent refers to the test laid out in *The People (DPP) v. CC* [2019] IESC 94 by Clarke CJ at para. 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."

69. The respondent argues that PB was not a witness as to fact but rather to the credibility of LB and since this appeal is concerned with the convictions relating to AB, his absence has no bearing on the matter at hand.

70. In terms of the vagueness of the allegations, the respondent submits that the state of the evidence was not so infirm that no jury, properly directed, could convict on it.

Discussion and Conclusion (b)

71. We have already discussed the nature of the potential evidence of this witness and the issue at this point is whether his absence gave rise to an unfair trial of such a calibre that it would have necessitated the trial judge to stop the trial. It seems to us at this point that this aspect of the application to stop the trial is somewhat moot in circumstances where the jury disagreed on the counts concerning the witness whose credibility it was sought to impugn through the evidence of PB.

72. Nonetheless, we have considered whether his absence deprived the appellant of a fair trial. The issue concerned LB's credibility. This was a case where the trial judge was in a position to assess to some degree the materiality of the evidence and also the purpose of the admission of the evidence which was, as we have stated to impugn the credibility of one of the complainants. The trial judge quite properly took the view that he could not say with certainty what evidence PB would give.

73. In our view the trial judge's approach to the missing evidence was unimpeachable. He posed the correct question in his consideration which was whether the absence of the evidence of PB deprived the process of fairness and he properly concluded that it did not.

(c) The vagueness of the allegations.

74. In the written submissions, the appellant contends that the evidence of AB concerning the time she returned from school altered in the course of the trial and particularly so in order to accommodate her sister's return. Moreover it is said that the broad timespan of the counts on the indictment caused a difficulty in attempting to defend the allegations and in tying allegations to surrounding facts. Finally it is said that AB gave different accounts of the movements of the appellant's sister between Ireland and England which was significant due to the appellant's account to Gardaí that he was with his sister in England for much of the time when the offences were alleged to have been committed.

75. Such issues were compounded by the fact that this was an old case. The trial judge in his ruling said as follows: –

> "[I]t seems to me the evidence has been given, obviously by the lapse of time there is certain missing details, and people are not all the certain about certain surrounding factors. But the two witnesses gave evidence of what occurred to them, and they're pretty clear on that. They're pretty clear of the time period by reason of their ages, and their schooling, and the movements between the two houses involved. So as cases go, it's not too vague. The evidence is very clear that occurred. Obviously surrounding details can be somewhat opaque."

Conclusion (c)

76. While the application before the trial judge was primarily moved on the basis of the court's inherent jurisdiction to stop the trial, nonetheless, the principles established in the decision of *Galbraith* and as considered by this Court in *The People (DPP) v. M* [2015] IECA 65 are also relevant.

77. It is quite clear to this Court that the complainants gave evidence concerning their core allegations, where there are elements of the evidence which may be vague or where there is a lack of detail relating to surrounding circumstances or events does not mean that a case should be withdrawn from the jury. These are issues relevant to reliability and credibility and are therefore within the province of the jury. As stated by Edwards J. in *M*:-

> "What Lord Lane was in fact saying in *Galbraith* was that even if the prosecution's evidence contains inherent weaknesses, or display, or contain 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 its fairness."

78. In the circumstances we are not persuaded that the trial judge erred in failing to stop the trial or in failing to direct an acquittal. The three issues raised on the part of the appellant when considered separately or cumulatively do not render the trial unfair and consequently this ground fails.

Ground 5- Failure to give a corroboration warning

79. The trial judge indicated that he would not give a corroboration warning as there were no great unusual feature in this case. He also ruled that due to the possibility of collusion the complainants could not corroborate each other and nor could the respondent rely on evidence of system. In terms of corroboration, the trial judge addressed the jury as follows:-

> "Now, the second issue I'll deal with today is corroboration. Corroboration is independent support for the charges that are made. I have to warn you, there's no corroboration in this case. It's basically the case rises and falls on the evidence of both complainants. Now, obviously there's some support for the surrounding circumstances of the case. Obviously, there's some support to say where they were and their movements but there's no actual independent support as to the actual alleged crimes themselves, so there is no corroboration in this case."

Submissions of the parties

80. The appellant argues that this was an appropriate case where the corroboration warning was essential due to the absence of corroboration in circumstances where reliance was not placed on evidence of system and the issues raised at trial in relation to the recollection of the complainants, the absence of detail, the delay and issues raised in relation to the admissibility of their evidence.

81. The respondent submits that the decision as to whether or not to give a corroboration warning is one which falls squarely within the discretion of the trial judge. The respondent refers to *The People (DPP) v. KC* [2016] IECA 155where the Court stated at para 25:-

> "The starting point for consideration of this issue is that the decision to issue a warning or not is a matter for the trial judge's discretion. The Court will be slow to intervene with the exercise of that discretion by a trial judge and a court will intervene only if it appears that the decision was made upon an incorrect legal basis or was clearly wrong in fact."

82. The respondent further contends that there existed nothing on the evidence that elevated this case to one requiring a corroboration warning. Whilst counsel conceded that a different trial judge may well have taken a different view insofar as corroboration was concerned, this he says is not the test and this Court will not, it is submitted, intervene in the exercise of the discretion by the trial judge unless such discretion is exercised on an incorrect legal basis or is wrong in fact. Counsel for the respondent says that the issue of collusion must be considered by the jury but the simple possibility of collusion or contamination does not mandate that a corroboration warning given. It simply means on counsel's argument that where the judge is satisfied on a consideration of the evidence that there is a risk of collusion or contamination to such an extent that the complainants cannot corroborate each other and that reliance cannot be placed on the system evidence.

Discussion

83. Having heard submissions regarding a corroboration warning and in particular the argument that where the reasonable possibility of collusion or contamination could not be excluded, the evidence of each complainant could not corroborate the other and nor could evidence of system be relied upon. The judge in ruling on this issue said as follows: –

> "The basic question obviously the delay warning will be given, read in full, and secondly, I don't intend to give a corroboration warning in this case. There's no great unusual features in these types of cases. The jury will be told in strong terms that they must believe the evidence of both complainants beyond reasonable doubt before they can consider convicting. Now, whether there's corroboration in the case, that's a matter for the jury. But in relation to the systems evidence, I have come to the conclusion that it's not admissible in this case. I agree with the submissions by Mr Guerin that what's been alleged is not unique, unfortunately. It's, and I hate using this phrase, run-of-the-mill type sexual abuse. Secondly, I think his second submission is particularly strong that the danger of collusion in this case cannot be ruled out. And basically it seems to me, therefore, that both cases, if you want to call them that, the AB counts and the LB counts, must stand on their own evidence, and there's no interdependence at all, because I will not allow system evidence in this case because I think it would be unsafe. I don't think the danger of collusion, particularly, has been ruled out."

84. The judge went on to say as follows: –

> "JUDGE: The background evidence, I will say basically that the evidence given in this matter is merely for background and provides no great assistance for the jury. They must decide the case on the evidence given by both complainants in relation to what occurred to them, and they must concentrate solely on that. I don't think there's any need for corroboration. I don't think it's out of the ordinary. I think they're given the case is about prolonged sexual abuse in this case, and basically I don't think there's a great problem, and I don't think the jury will pursue there's as much problems in people remembering what occurred to them 20 years ago. If it happened often enough, the question is do they believe it enough; as simple as that."

85. The basis for the application for a corroboration warning is set out above. There is no doubt that this was an old case, with the concomitant difficulties in recollection and the absence of detail. However these are not necessarily features which raise the case to one where a corroboration warning ought to be given.

86. A delay warning was given by the trial judge which addressed the obvious fact that the jury were dealing with a historic case of sexual abuse, that there were difficulties in recollection and an absence of detail, none of which could inure to the benefit of the respondent.

87. The trial judge addressed the issue of the absence of corroboration in his charge to the jury where he said: –

> "Now, the second issue I'll deal with today is corroboration. Corroboration is independent support for the charges that are made. I have to warn you, there's no corroboration in this case. It's basically the case rises and falls on the evidence of both complainants. Now, obviously there's some support for the surrounding circumstances of the case. Obviously, there's some support to say where they were and their movements but there's no actual independent support as to the actual alleged crimes themselves, so there is no corroboration in this case."

88. The judge then went on to address a particular issue which was raised by requisition the previous day and to which we will return presently when we address Ground 6. In this respect the trial judge addresses the jury as follows: –

> "Now, I indicated to you at the start of my charge yesterday that basically you have to decide these cases independently of each other in relation to LB's tranche of allegations and AB's tranche of allegations. That is still the case. But you've heard both giving evidence in the case and obviously in deciding those, you can take into account their evidence in relation to any part or in relation to any of the charges if you find them relevant. Obviously in assessing their credibility, you can use LB's evidence against AB and vice versa. This could bolster their credibility or it could lessen their credibility, it's a matter for you, but you've seen both of the witnesses and complainants give evidence in the case and that's evidence that you must consider in relation to all aspects of the case and obviously that's for you."

89. It is of course undoubtedly so since the enactment of section 7 of the Criminal Law (Rape) (Amendment) Act 1990, a trial judge is vested with a discretion as to whether or not to give a corroboration warning. This Court will not intervene unless it can be shown that the exercise of the trial judge's discretion was effected on an incorrect legal basis or was wrong in fact.

90. In assessing as to whether or not to give a corroboration warning the trial judge will take into account the nature and content of a witness's testimony, the circumstances of the case and any other issues which the judge may consider to be relevant in determining whether or not a corroboration warning is required.

91. As we have stated, the fact that the case is an old case and memory is impaired or the absence of detail are not issues which in and of themselves mandate a corroboration warning. The basis of the application in the present case related to those issues, but counsel also addressed the judge as to whether in fact the evidence of the complainants corroborated each other. The trial judge, as we have stated, ruled that he was not satisfied that the complainants could corroborate other given the risk of collusion. However, where there is evidence of the possibility of collusion or contamination or inadvertent influence, this is material which is relevant to the assessment of the credibility and the reliability of a complainant.

92. It is for a trial judge in any given case to decide whether the evidence in a case is capable of providing corroboration and in the present case the trial judge adjudicated as a matter of law that there was no corroboration in the case.

93. In determining not to give a corroboration warning, the trial judge was careful to explain his reasons for not doing so and in the view of this Court we are not persuaded that he erred in the exercise of his discretion. Whilst it is true to say that a different trial judge may have taken a different view, this is not the relevant question. The relevant question is whether the trial judge in this case exercised his discretion in a lawful manner in refusing to give a corroboration warning.

94. The judge considered the submissions made and refused to give a warning. Whilst a delay warning is separate and distinct from a corroboration warning, it is relevant to observe that in the present case an extensive warning in the context of delay was given to the jury which addressed the obvious issue of delay, absence of detail and lack of recollection which formed part of the basis of the application for a corroboration warning.

95. He also instructed the jury that there was no corroboration in the case and that the evidence of each complainant had to be considered on a stand-alone independent basis.

96. A trial judge has the opportunity of hearing the testimony first-hand and is therefore in a very good position to determine whether on the facts of any given case a corroboration warning is required. That in and of itself does not prevent an appellate court's intervention, however, this Court will not interfere in the exercise of a trial judge's discretion, on the facts of any given case, unless the failure to give a warning was clearly an incorrect exercise of that discretion and we are not so persuaded in the present case.

97. This ground therefore fails and we now move to consider the associated ground hereunder.

Ground 6- Failure by the trial judge to give an adequate account in his charge of the defence case in relation to the credibility of the complainants' testimony.

98. Although the appellant accepts that there is no absolute requirement to sum up in every case, this case would have benefited from a summing up of the relevant evidence given the similarities of allegations and the fact that collusion and contamination of the complainants' evidence loomed large. While the appellant's submissions are very limited in written submissions, this point was elaborated upon by Mr Dwyer SC on behalf of the appellant in oral submissions.

99. In that respect, it is said that where the judge determined that the complainants could not corroborate each other due to the risk of contamination/collusion, he erred in instructing the jury as follows:-

> "Now, I indicated to you at the start of my charge yesterday that basically you have to decide these cases independently of each other in relation to LB's tranche of allegations and AB's tranche of allegations. **That is still the case**. But you've heard both giving evidence in the case and obviously in deciding those, you can

take into account their evidence in relation to any part or in relation to any of the charges if you find them relevant. Obviously in assessing their credibility, you can use LB's evidence against AB and vice versa. This could bolster their credibility or it could lessen their credibility, it's a matter for you, but you've seen both of the witnesses and complainants give evidence in the case and that's evidence that you must consider in relation to all aspects of the case and obviously that's for you."(Our emphasis).

100. When the judge initially instructed the jury, he clearly identified that each complainant's testimony should be considered on a standalone basis and said:-

> "Now, this is a case where there's two complainants and they have been brought together for what could be said administrative convenience, they've been tried at the counts in relation to both of them are being tried together. In one sense there's two tranches of trials. Every count on the indictment you will see is a separate trial. But they can be broken down into two, LB and AB's cases. And before you can convict Mr S of in let's say the cases of LB's counts, you have to be satisfied beyond reasonable doubt of the evidence that relates to those counts. Now the only evidence that relates to those counts is the evidence of LB. As simple as that. Then you have AB's counts have I that right? Have that right, I mean?
>
> ...
>
> JUDGE: AB, I'm sorry, AB's counts and basically it's similar there. So basically just because both of them are both tranches of counts are being heard in this Court at the same time you cannot use any of the evidence from AB's counts against LB or vice versa. As simple as that. And you cannot take into account the fact that there has been complaints made by two parties against Mr S. You must look at the evidence adduced in relation to every count separately. So basically you cannot take into account at all that there's actually two complainants in this trial. You must look at the evidence in relation to each count individually and you must if you look at the LB count, the only evidence in relation to LB counts is the evidence of LB. And the only evidence in the AB counts is the evidence of AB. Now so basically in relation to these both tranche of counts, that's the only evidence. And obviously in relation to all of the counts you take into account what Mr S said in his statements and obviously you take into account what I initially said about that type of evidence."

101. Mr Dwyer properly points out that counsel on behalf of the appellant at trial, prior to the judge concluding his charge, requested the judge to direct the jury in those terms as follows:-

> "MR GUERIN: It's my submission that the Court should tell the jury that the evidence of one can be used for assessing the credibility of the other for and for impugning the credibility of the other, but that the

JUDGE: Yes, I'd asked you're absolutely right on that

MR GUERIN: Yes.

JUDGE: and I will say that too. And if I don't, remind me somehow.

MR GUERIN: May it please the Court."

102. In response, the trial judge further directed the jury in the terms of which complaint is now made.

103. The respondent argues that in circumstances where the trial judge had not summed up the evidence he was not obliged to give an account of all the inconsistencies which the appellant contended existed in the complainants' accounts. These had been addressed by counsel in his closing speech and ultimately were a matter for the jury.

104. Mr Rahn, on behalf of the respondent contends that the request to address the jury on the issue of the assessment of the complainants' credibility is significant. Moreover, he argues that the issue of the possibility of collusion and interaction between the complainants was part of the defence case and clearly addressed in closing arguments by counsel for the appellant.

Discussion

105. We have considered the options where the evidence discloses a risk of contamination/collusion/inadvertent influence in the preceding paragraphs of this judgment.

106. The trial judge in the present case was more than alert to the issue and ruled on the basis of the evidential risk of, in effect inadvertent influence/contamination that the evidence of each complainant could not corroborate the other and he instructed the jury that there was no evidence capable of amounting to corroboration in the case.

107. Nonetheless, the aforementioned issues remain relevant to the assessment of the credibility and reliability of the witnesses. In this respect, whilst the trial judge did not specifically refer to contamination/inadvertent influence in direct terms, in our view the jury were properly instructed the jury that the assessment of the credibility of the complainants was central to the case and he emphasised the remarks made by defence counsel in this respect. He made it very clear that the jury had to be satisfied beyond reasonable doubt before proceeding to conviction. Moreover, he pointed out the following to the jury:-

> "Now, the two complainants in this case made complaints that they were over a period of three to four years, or years, abused on many occasions. You're going to have to ask yourself whether people could misremember that. And that's an awful American phrase, I know. It's the only way I can think to put it. Can they misremember? Did they get -- in other words, did these events occur at all? Would somebody remember this type of abuse if it didn't occur? **In other words,**

> **you're going to have to consider whether these people, two complainants, are total fantasists and they remembered something that didn't happen, or are they two falsifiers that made it up. There's the two possibilities. That they fantasised it or they made it up. That's for you. You're going to have to make and you must be satisfied beyond reasonable doubt of their credibility before you can convict him**." (Our emphasis).

108. In our view, given the nature of the evidence concerning the interaction between the complainants, the trial judge's approach was not erroneous. He clearly pointed out the important of the assessment of the credibility of the witnesses and emphasised the issues of fabrication and false memory.

109. Insofar as the appellant now complains that the judge, having been requested to do so, directed the jury that they could use the evidence of each complainant to assess the credibility of the other, it is important to note that prior to doing so, he reminded the jury that the cases had to be determined independently of each other. In acceding to the defence request he then informed the jury that the evidence of each complainant could bolster or lessen the credibility of the other. It is instructive to look at the words used by the trial judge – he advised the jury that in assessing the witnesses' credibility, they could use the evidence of one complainant against the other. He then went on to say that this could either bolster or lessen their credibility.

110. It is also important to observe that ultimately, the jury disagreed on the counts concerning LB.

111. In the circumstances, we are not persuaded that any injustice occurred.

Ground 7- Comments of the trial judge

112. In his charge to the jury the trial judge commented on garda interviews of the appellant in the following manner:-

> "There's also material that will be made available to you of what CS said to the guards when he was interviewed. The facts of the complaints were put to him, as the guards must do, and he responded. That will be before you. May I warn you that is not sworn evidence? You haven't heard the evidence being cross-examined. What you will have is mere paper, his responses to the guards. The gold standard in evidence is evidence given under oath where the giver of the evidence is cross-examined and where you have the opportunity to assess that person. That is not the case in this the in relation to the evidence that was given or the statements were given to the guards."

113. The trial judge referred to the garda interviews again at the end of the charge. Counsel for the appellant requisitioned the trial judge on this point, arguing that the Court never told the jury that the appellant was under no obligation to give evidence and he was not obliged to answer any questions during garda interview. The trial judge recharged the jury in the following manner:-

"I forgot to tell you something; I was asked to do it previously and I forgot to tell you. Basically you understand that CS in this case has no obligation whatsoever to give evidence. Basically no inference can be drawn from that; that is his right and you can't draw any inference in relation to that. Secondly, he had no obligation or he didn't have to give a statement to the guards. He did. And that can have disadvantages to people if they give a statement to the guards because the guards can check it out and if there's any discrepancies, they can point that out to the Court and to you, the jury. So, those are three points I want to make to you. I think they're implicit but I want to make explicit, that basically he had no obligation whatsoever to give evidence, quite the contrary, and no inference can be drawn from that. Secondly, he made a statement which he didn't have to do and, thirdly, he made that statement and it was open to the guards to go off and check that statement and check the discrepancies in it."

Submissions of the parties

114. The appellant submits that the direction given to the jury was an unfair direction which effectively directed the jury to discount the exculpatory remarks made by the appellant in his garda interviews. It further created an impression that the appellant had done something wrong by not making himself available for cross-examination so that the jury could assess him. It further failed to direct the jury not to draw any adverse inferences from the appellant's failure to give evidence. Although the trial judge did recharge the jury, the appellant argues that this only served to confuse the jury, as evidenced by the fact that they asked if they could view video footage of the garda interviews.

115. The respondent submits that that the jury were clearly told in the recharge that that they could not draw any inference from the fact that the appellant opted not to give evidence and that he had no obligation to do so. It is submitted that the trial judge was entitled to tell the jury that there was a difference between a memorandum of interview and evidence which is subject to cross-examination in court.

Discussion

116. There is a qualitive difference between sworn testimony and the contents of a statement or memorandum of interview. The jury are entitled to be aware of such a distinction and to assess the weight to be given to the respective forms of evidence. It is entirely correct to say that the contents of a memorandum of interview are not subject to cross-examination where an accused person does not give evidence. The issue in the present case is whether by identifying sworn testimony as the 'gold standard', the trial judge in some way undermined the value of the appellant's account in interview.

117. Moreover, it is said that by charging the jury in this manner, the judge gave undue priority or drew adverse attention to the fact that the appellant did not give evidence.

118. This aspect of the charge was subject to requisition and the trial judge re-charged in the manner set out above at para. 111. However, it is said that the judge failed to fully address the concerns expressed, and that the content of the re-charge served to confuse

the jury. It is noted that no further requisition was raised on this issue following the re-charge at this point.

119. However, on day 7, the jury requested to view the videos of interview and were properly instructed by the judge in this respect. Counsel then raised the issue again as follows:-

> "I'm just concerned that the jury may proceed on the basis that they're unable to confirm or satisfy themselves of Mr S's account because they don't have the opportunity of seeing them and I would ask the Court to give them a direction that they should not hold the fact that they don't see those interviews against him because-"

120. The appellant contends that the judge's charge taken as a whole failed to protect the appellant's right to silence.

121. On a careful perusal of the entire charge, we cannot find that the judge erred. The judge's instruction to the jury emphasised the distinction between sworn and unsworn testimony, so that the jury would be in position to assess the weight to be attributed to the appellant's account in interview. He did not convey that the interviews were not evidence.

122. Moreover, in the re-charge he emphatically instructed the jury that the appellant was under no obligation to give evidence and that no adverse inference could be drawn from that decision. He informed the jury that the appellant did not have to make a statement to the Gardaí, thus emphasising the right to silence and made the jury aware of the consequences of making a statement.

123. The fact that the jury requested the appellant's videos of interview is not unusual in our experience and the trial judge properly addressed this question. The jury had the written memoranda of interview and in our view there was no necessity whatsoever to advise the jury not to draw an inference adverse to the appellant by virtue of the fact that the videos were not made available to the jury.

124. We can find no error in the judge's approach and reject this ground of appeal.

Ground 8 – Allowance of an 11-person jury

125. The jury began deliberating on day six of the trial. On day seven of the trial, the Court was informed that the foreperson of the jury was unavailable as her child was sick. Both counsel indicated a preference to adjourn the matter and continue with a jury of twelve in circumstances where it was the foreperson of the jury. Enquiries were made and it transpired that the juror in question would not be available to return until after the weekend. As such, the trial judge stated that he would continue the trial with only eleven members.

126. A new foreperson was elected and a majority warning was given to the jury before they recommenced deliberations.

Submissions of the parties

127. The appellant argues that the trial judge erred in discharging the foreperson without hearing evidence as to reasons for her not continuing to act as a juror. In a situation like this where the deliberations had begun on the previous date with the juror and there was no indication from her of any difficulty, it was appropriate that evidence be given before the Court in relation to her difficulty.

128. It is further submitted that given that there were only eleven jurors and there was significant disruption to their deliberations, they should have been encouraged to reach a unanimous verdict.

129. The respondent submits that the trial judge acted within his discretion in discharging the juror and that this was permitted by section 23 of the Juries Act 1976. It is not accepted that this section does not provide for discharge once deliberations commence. It is submitted that in circumstances where the jury were still required to bring in verdicts with which ten of them agreed, there was no unfairness to the appellant.

Discussion

130. When it became apparent on Thursday 17th November 2016 (Day 7) that the foreperson was unavailable, the judge indicated the following:-

> "JUDGE: Now, my view on it is that obviously if that is the case, if this juror is available for tomorrow I'll probably accede to your application. But if she's not available for tomorrow I'm afraid my view would be that if she's not available until Monday that we'll continue at 11 today. So if she's available tomorrow I'll allow the matter to go back for a day."

131. It transpired following enquiries that the juror would be unavailable until the following Monday and consequently, the judge decided to proceed with eleven jurors and stated:-

> "JUDGE: Well, I think it's within my discretion to make this type of decision and I think juries have made decisions with 10 and 11 and 12 and basically this jury has been here since last week and basically they have been deliberating now for four or five hours and you're asking me to put them back until Monday. Obviously there's an obvious danger that the thread of their thought may be disturbed in the delay and I'm inclined to make the decision that basically we'll go on at 11 with matter."

132. At this point the jury had deliberated for 4 hours and 40 minutes. The trial judge instructed the jury to elect a new foreperson and advised them as to majority verdicts. He instructed the jury that their deliberations would not commence until they had elected a new foreperson and to advise the jury minder of the new foreperson. The judge then advised the registrar to commence the clock once she became aware of the name of the new foreperson. Verdicts were returned after 6 hours and 45 minutes deliberation.

133. Section 23 of the Juries Act 1976 provides:-

> "Whenever in the course of the trial of any issue a juror dies or is discharged by the judge owing to his being incapable through illness or any other cause of continuing

to act as a juror, or under section 9 (7) or 24, the jury shall, unless the judge otherwise directs or the number of jurors is thereby reduced to below 10, be considered as remaining properly constituted for all the purposes of the trial and the trial should proceed in a verdict may be found accordingly."

134. The appellant contends that the judge erred in discharging the foreperson during deliberations without hearing evidence regarding her unavailability. It is said the judge ought to have adjourned the trial. It is further submitted that the jury ought to have been instructed to seek to reach a unanimous verdict once a new foreperson was elected and should not have been given the majority direction until time had passed.

135. The Juries Act 1976 permits a trial judge to discharge a juror in the course of a trial, which of course includes during deliberations. The judge may do so on his/her own initiative, as in the present case, but must of course have a basis for doing so. Circumstances may arise in the course of a trial where the numerical composition of a jury alters, a jury will nonetheless remain properly constituted unless the number falls below ten.

136. No request was made by either the applicant or respondent for medical evidence concerning the foreperson's child. Enquiries were made of the juror concerning her availability through the registrar and conveyed to the parties. When it transpired that it would be necessary to adjourn the trial for, in effect four days, the trial judge took the decision to procced with eleven jurors.

137. The first issue raised is the absence of evidence. In circumstances where enquiries were made and where no issue was taken with the veracity of the reason given, we do not see any merit in this submission.

138. Secondly, the concern is expressed that the trial ought to have been adjourned to permit of the attendance of the foreperson and particular emphasis is placed on the fact that the missing juror held this role. The foreperson of a jury is elected to act in effect as the chairperson of the jury, he or she plays no greater or lesser role in the adjudication process but will convey questions to the judge or issues that may arise. Therefore, the fact that the missing juror was the foreperson only held significance from the necessity to elect a new foreperson.

139. The jury had been deliberating for 4 hours and 40 minutes, if the judge had adjourned the trial, this would have resulted in an interruption in the deliberation process of four days. Whilst this in and of itself is neither unusual (given adjournments over a bank holiday weekend for example) or detrimental to the fairness of the trial, it was in the view of this Court entirely within the judge's discretion to firstly, proceed with eleven jurors and secondly, to permit the jury to continue its deliberations.

140. Finally, it is said that the judge ought not to have given the majority direction when he did so. It must be remembered that the jury had been deliberating for 4 hours and 40 minutes and so the judge was fully entitled to give the majority direction. The only

difference in composition being that the number had reduced by one member. This had the effect of requiring majority verdicts of 10:1 as opposed to 10:2. The jury continued with its deliberations for a further period of 2 hours and 5 minutes approximately thereafter. We are not persuaded that giving the majority direction rendered the trial unfair or the verdicts unsafe. We cannot see an error in the judge's approach and this ground fails.

141. Consequently, the appeal against conviction is dismissed.