THE COURT OF APPEAL

Record Number: 49/2022

McCarthy J.
Kennedy J.
Donnelly J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

H.S.

APPELLANT

JUDGMENT of the Court delivered on the 24th day of April 2023 by Ms. Justice Isobel Kennedy.

1. This is an appeal against conviction. On the 29th September 2021, the appellant was convicted of one count of rape contrary to common law and s. 48 of the Offences Against the Person Act, 1861 and eight counts of indecent assault contrary to common law and s. 6 of the Criminal Law (Amendment) Act, 1935, concerning his sister MC, and four counts of indecent assault contrary to common law and s. 10 of the Criminal Law (Rape) Act, 1981 concerning another sister, RC.

Background Facts

2. The appellant is the older brother of the two complainants, MC and RC. The counts preferred on the indictment span from 1974 to 1981 when the appellant, with a date of birth in 1960, was aged between 14 and 21 years. He is five years older than MC and ten years older than RC.

3. RC, the younger of the two sisters outlined that she had been sexually abused by the appellant at three different addresses during the course of her childhood; in order to preserve her anonymity, we call those addresses BU, BE and MW. She described how on the 24th December 1977, at BU, the appellant entered her room dressed as Santa Clause in a karate suit, put her hand on his penis and caused her to masturbate him. On RC's account, after the family moved to BE, the abuse continued. She described that the appellant would take her into their mother's bedroom, close the door and digitally penetrate her and that he would sometimes masturbate while doing this. She further described that the appellant would force her to perform oral sex on

him and that he performed oral sex on her also. She said that she stopped speaking because of this abuse. Her mother confirmed that she was mute for a period during childhood. RC recalled that the appellant had threatened her and told her not to tell anybody. She outlined that the abuse continued after the family moved to a third address, MW. RC stated that the appellant raped her vaginally while visiting MW on the occasion of the announcement of his engagement on the 4th June 1981.

4. RC received a letter from the appellant in 2015. It stated that the appellant had decided to:-

> *"contact those who have been damaged by me. I believe you are one of those people. It is clear to me that I have damaged you directly by my conduct which was selfish, self gratifying, irresponsible and completely inconsiderate of your life and your emotions."*

5. MC, the eldest daughter of the family, outlined that the appellant had sexually abused her in BU from when she was 8 or 9 years of age. She described that the appellant would take her into his bedroom, lock the door, remove her clothes and perform oral sex on her. She said that he would masturbate during these incidents and that on occasion he would read to her from a pornographic book. She said that when it was finished he would tell her to get dressed and unlock the door. She recalled that the appellant told her not to tell anybody, to keep it to herself. MC stated that near the end of her time living at BU, when she was 11 or 12 years of age, the appellant raped her. She disclosed the abuse to her mother in 1993. This was confirmed by her mother. She also told her sister, RC. MC confirmed receipt of a letter of apology similar to that received by RC from the appellant.

6. On the 30th August 2015, RC made her first statement to An Garda Síochána regarding the sexual abuse she had suffered during her childhood. MC made her first statement on the 18th March 2016. She explained that she did not complain at the same time as RC as her son had significant medical difficulties in 2015 and she required a long time and much therapy to enable her to make a statement.

7. It was the appellant's position at trial that he was residing elsewhere at the relevant times, and this was inconsistent with committing the offences. He denied that the letters of apology related to sexual offending but admitted in evidence to touching MC's vagina externally on a number of occasions in BU and that he rubbed against her at their grandparents' house and had also touched her thigh. The appellant made no admissions in relation to RC.

Grounds of Appeal

8. While six grounds of appeal were originally filed, the appellant indicated during oral hearing that he was not pursuing ground six. The appeal proceeds on the following five grounds only:-

> *"1. The learned trial judge (Ms. Justice Carmel Stewart) erred in law and/or in fact in failing to direct that the indictment be severed such as to provide for separate trials of the historic allegations of each of the two complainants, which related to different periods of time and were different in their nature, location and frequency (having no overlapping feature or pattern other than a familial relationship), and where there was good reason to fear mutual contamination as between the complainants.*
>
> *2. The learned trial judge further erred in law and/or in fact in ruling admissible as 'confession' evidence (i) a typed note of an interview conducted by social workers with the*

Appellant on 1st November 2010 (subject only to a few redactions), and (ii) two pages of handwritten notes prepared by the Appellant in advance of that interview and provided to the social workers at the end of the interview.

3 (a) The learned trial judge further erred in law and/or in fact in deciding not to withdraw the case from the jury on the ground that there was a real risk of an unfair trial having regard to the passage of more than 40 years since the timeframe the subject of the allegations and the irremediable prejudice (both general and specific) arising therefrom.

(b) The learned trial judge erred in taking account, when considering the application made to her for the withdrawal of the case from the jury, the findings made by this Honourable Court when, in 2019, it overturned the decision of the High Court to grant prohibition to the Appellant in respect of the same allegations (H.S. v. DPP [2019] IEHC 107; [2019] IECA 266).

4. The learned trial judge further erred in acceding to an application to amend the indictment after all of the evidence had been heard, based on facts which were discoverable by the prosecution with reasonable diligence before the indictment was drafted, to the extent that counts 2-11 relating to the complainant R.C. were backdated to dates which did not feature at all on the indictment on which the Appellant was arraigned at the start of the trial, causing irremediable prejudice to the line of defence pursued by the Appellant.

5. The learned trial judge further erred in law and/or in fact in refusing to withdraw all counts on the indictment from the jury and to direct the jury to find the Appellant not guilty on all counts."

Ground 3- Irremediable Prejudice Arising from Delay

Submissions of the Appellant

9. The gravamen of this appeal rests with the fact that the appellant was tried in 2021 at the age of 61 in respect of acts he was alleged to have committed between 35 and 44 years previously. It is submitted by the appellant that as a result of the complainants' delay in bringing their complaints to Gardaí, he lost *"the real possibility of an obviously useful line of defence"* as per Hardiman J in *SB v DPP and Hartnett* [2006] IESC 67 and, as such, passed the threshold at which the Supreme Court has held a trial should be halted.

10. It is acknowledged as per O'Malley J in *PB v DPP* [2013] IEHC 401 that exceptional grounds must be shown in order for a case to be withdrawn from a jury owing to the prejudice caused by delay however, in the appellant's contention, this is one such exceptional case. Accordingly, it is submitted that the trial judge erred in refusing the appellant's application for a stay of the proceedings or for a directed acquittal and in so doing breached his constitutional right to be tried in due course of law.

General Prejudice

11. It is submitted that the appellant suffered not only general prejudice but specific prejudice by virtue of the delay in the bringing of proceedings against him. In terms of general prejudice, it is said that the appellant was confronted, after more than three decades, with multiple allegations occurring on non-specific occasions during wide windows of time, without, for the most part, any detail to anchor them to a time of day or night, a day of the week, a month or even a season. While it is acknowledged that this is a feature of many historical sexual abuse cases, the point is made that it is exceedingly difficult to engage with and or/counter such allegations without anything concrete to challenge or disprove.

Specific Prejudice

12. In terms of specific prejudice, the appellant identifies persons who were either deceased or infirm at the time of the trial that could have been of value to the defence:-

- The appellant's maternal grandparents with whom he maintains he lived with from Christmas 1974 until late spring/early summer 1976.
- The appellant's maternal uncle who frequented the grandparents' house.
- Two schoolteachers of the appellant's who drove him to school on a regular basis from his grandparents' house.
- Two neighbours of the appellant's grandparents.
- The appellant's paternal aunt with whom the appellant maintains he lived with in England from the end of July 1976 to the beginning of November 1976.
- The appellant's paternal grand aunt with whom the appellant maintains he lived with before he went to England.
- The owners of the hotel the appellant was employed at in 1977. The appellant maintains that he lived in while he worked there.
- The family's doctor.
- The appellant's ex-wife.

13. It is submitted that the evidence of these persons who were either deceased or infirm at the time of the trial could have served to disrupt the prosecution contention that the appellant had constant unimpeded access to his sisters during the relevant time by establishing that the appellant had lived outside of the family home for substantial periods. Moreover, that the evidence of these persons could have undermined the credibility of his mother and sisters' accounts. Further, it is submitted that the appellant's ex-wife could have given evidence regarding the occasion her and the appellant visited MW to announce their engagement.

14. Complaint is also made in relation to the lack of access to contemporaneous documentation. The appellant had seen a psychologist at the Granada Institute in 2002 and his father extended an invitation to MC to also attend but she declined. The records could have corroborated the appellant's account of events and disproved MC's. The Institute closed and the HSE did not retain records relating to appointments with that psychologist.

15. It is submitted that the loss of these opportunities was compounded in circumstances where the prosecution case had no forensic or scientific evidence. By the time the complaints were made, the relevant bedrooms were long past capable of producing forensic evidence. Moreover, the karate suit which was used as part of the abuse alleged by RC on Christmas Eve 1977 was

unavailable for forensic examination. It is said that this is significant as it was part of the defence case that at least some of the acts alleged against the appellant could have been perpetrated by his younger brother and an examination of the karate suit could have produced evidence which was exculpatory of the appellant and positively inculpatory of the actual perpetrator. It is submitted that *"a real possibility of an obviously useful line of defence"* was lost to the appellant.

16. It is submitted that the fact of the appellant being confined to present only his own testimony to counter his sister's evidence is all the more prejudicial in circumstances where he came before the jury as a man with a prior rape conviction. The appellant is described as being caught in a "Catch 22" situation where he could have maintained his entitlement for that conviction to be withheld from the jury however, he had little option but to waive this entitlement in order to demonstrate the defence position that the complainants' delay in making their complaints was motivated by the fact that the appellant's 16-year sentence was coming to an end.

The "Admissions"

17. In response to the defence's *PO'C* application, the prosecution relied on certain "admissions" made by the appellant in relation to MC. The prosecution evidence established that in 1993, the appellant told his mother he had "*petted*" MC and in 2010, he told social workers he had inappropriately touched and rubbed against her on four or five occasions between 1974 and 76. It is submitted by the appellant that in circumstances where the allegations against the appellant in respect of MC were confined to a specific form of indecent assault i.e. performing oral sex on her, these admissions were irrelevant to the *PO'C* application. While the appellant did make certain admissions in relation to touching or rubbing up against MC, he expressly denied the oral sex and rape allegations, being the offending the subject of the counts on the indictment. It is also pointed out that he made no admissions of any sort in relation to RC.

Complainant Delay

18. It is contended that there is blameworthy delay on the part of the two complainants, MC and RC in that they contrived to ensure their complaints to Gardaí coincided with the drawing to a close of his 16-year sentence as part of a campaign to keep him behind bars for life. Particular attention is drawn to a text message sent by RC to their mother via Facebook on the 6th July 2014, more than a year before she approached Gardaí with her complaint, which ended with the following:-

> *"My children and I are saving to ensure [appellant] never leaves that prison alive. We will kill him. You always know we would. We will because we can. Put that in your pipe and smoke it. I will kill him. I have absolutely nothing to lose."*

19. It is the appellant's position that this text message supports the contention that RC's allegations to Gardaí approximately a year later were calculated to coincide with his impending release from prison and motivated by a desire to ensure he was not released.

20. It is also contended that MC engaged in unjustifiable delay and that when she made her allegations to Gardaí, she acted in support of RC's campaign to ensure that the appellant did not leave prison alive. Uncontroverted evidence established that in 1993, MC made a complaint to her mother that the appellant had abused her and that in 2010, she made a disclosure of abuse to her counsellor. It is noted that MC could have made a complaint to Gardaí at either of these occasions

or indeed in 2015, when RC made her complaint but instead, she waited 23 years after the initial complaint to her mother and several months after RC's complaint to approach Gardaí herself.

21. While it is accepted there was evidence that MC required counselling to enable her to come to terms with the trauma of her childhood experiences and that her son was ill in 2015, it is submitted that it does not necessarily follow that her motivation for making a complaint was without ulterior motive. MC said in evidence that it seemed to her that a letter she received from the appellant in January 2015 was drafted to support him from getting early release from prison. It is therefore submitted that she had the appellant's impending release from prison in her contemplation at the time when she made her complaint to Gardaí in March 2016.

22. It is submitted that the blameworthy delay on the part of both complainants heightens the unfairness and injustice suffered by the appellant arising from that delay.

Prohibition Proceedings

23. It is the appellant's position that the trial judge erred in taking into account the findings made by this Court when it overturned the decision of the High Court to grant prohibition to the appellant in respect of these allegations in considering the appellant's *PO'C* application. In cases such as the present where delay is raised as a bar to a fair trial, it is said that it is necessary for trial judges to exercise their jurisdiction *"fully and conscientiously"* as per O'Donnell J (as he then was) in *People (DPP) v CC* [2019] IESC 94 and that this was not done where the trial judge relied on the findings made by the Court of Appeal before the trial.

24. It is submitted that if it was relevant for the trial judge to have regard to this Court's decision, she ought also to have taken account that this was one of the rare cases where prohibition was granted at first instance. Simons J stated at para 58 that "*the very significant lapse of time since the alleged offences occurred in this case has created a real risk of an unfair trial"* and, at para. 62, *that "the risk of an unfair trial in this case is obvious."* It is added that Simons J's concerns were borne out at the trial.

The Delay Warning

25. The appellant relies on the following from O'Donnell J in *People (DPP) v CC*:-

> *"[…] there comes a point when any dispute about events goes beyond the reach of fair litigation, and becomes, if anything, a matter for historical debate and opinion, rather than adjudication with all the legal consequences that may follow. At that point, the trial would not be the administration of justice."*

26. It is submitted that the delay warning given by the trial judge in the present case was not sufficient to cure the prejudice suffered by the appellant which was irremediable.

Submissions of the Respondent

General and Specific Prejudice

27. It is submitted by the respondent that a submission of unfairness arising from delay cannot reduce itself to a simple listing of people who had died in the intervening period. The likely relevance of their potential evidence and how it would interact with the evidence has to be considered and the appellant must engage with the facts to show the prejudice required.

28. Further, it is submitted that as the unfairness suggested by the appellant seems to relate to witnesses who might have shed light on his general whereabouts at times relevant to the charge,

the Google map put in evidence assists here. It is suggested that the most relevant witnesses in this regard were available and did give evidence in the trial; the appellant's mother, father and sisters. As such, it is submitted that the asserted positions of the appellant and the complainants were properly ventilated before the jury and the deceased witnesses could not have assisted in any disputed fact arising from the witnesses who did give evidence.

29. It is also of note in this regard that the evidence of both complainants was that the appellant would often appear unannounced wherever they were living at a time when there were no other adults present and that the appellant's asserted whereabouts were not particularly far from the complainant's locations during the relevant time period. The respondent characterises the absent witnesses of only tangential, if any relevance.

30. Attention is drawn to the fact that the appellant made admissions to having sexually assaulted MC on a number of occasions in BU and made admissions to abuse in his letters and in this way, it is submitted that the scope for there to be an unfairness arising from the absence of witnesses at the trial is much **more limited**. Moreover, it is noted that the appellant was able to put considerable material to the complainants by way of cross-examination, suggesting there were contradictions in their accounts.

Complainant Delay

31. It is pointed out by the respondent that the jurisprudence indicates that the courts can take judicial notice of the fact that childhood sexual abuse has a profound impact and can provide an explanation for a delay in making a complaint. It is further noted that the appellant was violent and threatened the complainants and that such threats continued in the form of letters written by the appellant to his mother and sister AC seeking to effect the withdrawal of RC's complaint. It is submitted that the appellant contributed to the delay by making these threats

32. In response to the contention that the complainants acted as part of a campaign to ensure that the appellant did not leave prison alive, the respondent submits that this was a matter for the jury to consider and not for the trial judge to trump their decision by *inter alia* ordering separate trials.

Prohibition Proceedings

33. In response to the submissions made under this heading, the respondent notes the following remarks of the trial judge:-

> *"it seems to me that clearly the Court of Appeal overturned the decision of the High Court and directed that this prosecution could proceed. Notwithstanding that obviously it's still and it's clear, and the authorities have been clear for many considerable years, that it's the ultimate responsibility of the trial judge to ensure that the trial is a fair process and I am satisfied that, having heard the prosecution case and the application being made at this juncture to either stop the proceedings or indeed to direct acquittals, I'm satisfied that the trial process has been a fair process…"*

34. It is submitted that it is clear that the judge did not abdicate her responsibility to the findings of the Court of Appeal and knew that it was for her to assess the evidence she had heard.

Discussion

35. On the conclusion of the prosecution evidence, an application was made for a stay in the proceedings or alternatively, for a directed acquittal on the basis of the delay in making a complaint and the prejudice arising therefrom. This ground concerns the *PO'C* application.

36. Trial courts retain an inherent jurisdiction to stop a trial should it be unfair to allow the trial to proceed. This jurisdiction differs from that of a directed acquittal. As stated by O'Malley J in *People (DPP) v CC* at paras. 45 and 46:-

> *"The whole point of the jurisdiction is that there will be cases where the prosecution has in fact presented evidence that should, by normal standards, go to the jury that where for some identified reason it is unfair to let the matter proceed. In the context of historic prosecutions, the unfairness may arise because the ability of the accused has been compromised by the lapse of time, to the point that he or she would not be receiving a fair trial.*
>
> *46. In determining whether or not the defence has lost a useful line of defence, it seems to me to be essential to consider the whole of the case. That will include the prosecution case is as actually made, where the application is made at the close of that case."*

General and Specific Prejudice

37. It is contended that general prejudice arising by virtue of the lapse of time has contributed to the overall unfairness of the trial. It is certainly the position that there was a lengthy delay in the present case, however, there are unusual features which indicate that the appellant was aware of certain allegations of abuse from 2010 when he spoke with two social workers. He attended the meeting with the social workers equipped with a handwritten note where he accepted that he had inappropriately touched MC and took issue with the dates of these occurrences. He had prior notice of the meeting which notice specified the time frame as relating to the period from 1975 to 1978. In the handwritten note, the appellant set out in some detail where he said he was residing for the relevant time periods, he refers to specific dates where he says that his sister, MC blackmailed him. In the same handwritten note, the appellant effectively sets up the defence which he ultimately sought to rely upon, that being that he resided at the family home in BU until Christmas 1974 during which time he had daily contact with his sisters but that thereafter, he was residing elsewhere.

38. The second unusual feature is that in 2015, the complainants each received a letter from him in similar terms where he states as follows in his letter to MC:-

> *"Clearly you are one of those most harmed by me. I realise that my actions were selfish, self-gratifying, utterly irresponsible and caused considerable and lasting emotional damage to you."*

39. MC was cross-examined about the letter, and it was suggested to her that the letter came about as part of the steps in an AA program. She disagreed and stated that it was a letter of apology to her for the abuse she suffered.

40. The above are relevant features for a consideration of whether the trial judge erred in failing to stop the trial. Insofar as general prejudice as a stand-alone ground is concerned, the aforementioned features militate against a contention that the issues to be resolved by the jury were beyond the reach of reach of fair litigation.

41. The ultimate question for a judge in this kind of application is to determine whether the accused has been *"deprived of a realistic opportunity of an obviously useful line of defence."* In her judgment in *CC,* O'Malley J agreed with the approach stated by Clarke CJ and the principles stated by O'Donnell J At para. 8 she says:-

> *"Where the issue is the absence of a witness or a piece of evidence, the judge must consider whether the evidence which is no longer available is "no more than a lost opportunity" or, by contrast, would have afforded "the real possibility of an obviously useful line of defence". O'Donnell J. sets out his view of the applicable principles in paragraph 46 of his judgment as follows:"*

42. The principles stated by O'Donnell J include at (ii) and (iii):-

> *"(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".*

43. Consequently, it is necessary to consider the evidence at trial and including that of the two complainants, their mother, the appellant's handwritten note (2010), the social workers' typed note (2010), the appellant's letters (2015), including to another sister, and the records showing the appellant's address when he enlisted for the army in 1978.

44. Firstly, we set out the ruling of the trial judge on the application at the close of the prosecution case and note that criticism is made that the trial judge relied on the judgment of this Court which overturned the decision of the High Court prohibiting the trial and that she did not therefore exercise her discretion to stop the trial fully and conscientiously. We are not persuaded that there is merit in this criticism which will be seen from the extracts below of the ruling which followed the judge's summary of the submissions made to her:

> *"Now, in relation to the question of potentially missing witnesses. It's my view that I fail to -- and I do not accept that the presence of these witnesses, the persons who are deceased such as [the appellant's ex-wife] and the circumstances giving rise to the annulment of the marriage, it seems to me that that's a totally peripheral issue and extraneous to the matters in question. [RC's] evidence was that her parents were at work. While she was robustly cross-examined by Mr White, she adhered to the evidence that her parents were not in the house and she was not in a position to say who was downstairs and at one stage she clarified by saying that her initial answer that she couldn't say who was downstairs was that she didn't know whether any of her brothers were outside playing and had come back into the house. So, she was not in a position when she alleges she was upstairs with her brother and her brother [the appellant] was there, that she was not in a position to say who precisely was in the downstairs part of the house.*
>
> *In relation to [the appellant's father], the father of the two complainants and the father of the accused man, [the appellant], he is not -- his statement was furnished to the defence; however, he has not been called by the defence. Mr White has suggested to the Court that the Court should call [the appellant's father] as the Court's witness. It seems to me that*

this is a matter that -- obviously the Court has a residual discretion as to whether or not to do such a thing. It has been clearly put to both [RC] and [MC] that their father says that -- the contents of some of his statements were put to them in their cross-examination. I don't propose to call [the appellant's father] as a witness of the Court and make him -- so that he would be available for cross-examination, indeed by both the prosecution and the defence, because it seems to me that that is a -- while it is ultimately at the discretion of the Court, it's one that should be, and the authorities are clear, it's one that should be exercised very sparingly and I do not propose to exercise my discretion in that regard at this point in time. I should also just for the record state that the prosecution in this case was already the subject of judicial review proceedings in the High Court where [the appellant] sought to have this trial prohibited from being brought forward for prosecution. He appears to have been successful in the High Court but on appeal the Court of Appeal, and through a judgment which was delivered by Ms Justice Whelan on the 22nd of October 2019, overturned the High Court decision and it would appear from a perusal of that judgment over the lunchtime period that all of the matters which are complained of here and are the subject matter of this application, they were canvassed as part of that judicial review application and it seems to me that clearly the Court of Appeal overturned the decision of the High Court and directed that this prosecution could proceed. ***Notwithstanding that obviously it's still -- and it's clear, and the authorities have been clear for many considerable years, that it's the ultimate responsibility of the trial judge to ensure that the trial is a fair process and I am satisfied that, having heard the prosecution case and the application being made at this juncture to either stop the proceedings or indeed to direct acquittals, I'm satisfied that the trial process has been a fair process, indeed that [the appellant], through his counsel so far, has mounted what could be described as a very robust defence of these allegations and appears well equipped and his counsel are well equipped, instructed and informed by [the appellant] with regard to the matters which are the subject matter of these proceedings and this prosecution and [the appellant] appears not to lack knowledge or recollection of the period in question, as is evident in the questions which have been posed, the detailed questions which have been posed on his behalf by his counsel, both Mr White and Ms Williams, throughout the course of this trial.*** *Now, lest these remarks be misunderstood in any way, for the avoidance of any doubt, of course the Court is aware that the trial has proceeded and proceeds and any jury deliberations will proceed on the basis that [the appellant] is presumed innocent of all of these charges and the jury will be so advised by me and indeed of the fact that not alone is he presumed innocent of the charges at the commencement of the trial and throughout the trial but that they must bear that in mind throughout the entirety of their deliberations in respect of each of the counts on the indictment. And indeed I will obviously be giving the relevant warnings in respect of delay and the length of time that has elapsed and the difficulties that that gives rise to, not just in this trial but indeed in any trial of this kind but indeed if there are any particular added warnings or additional warnings that are thought necessary by counsel, they can be brought to my attention in advance of my address to the*

jury and I will of course consider same." (our emphasis)

45. As can be seen from the above extract, whilst the trial judge referenced the decision of this Court, she was most alert to the importance of the role of the trial judge. She fully engaged with the evidence adduced in order to properly exercise the inherent jurisdiction to stop a trial. She considered the evidence and, in particular, the cross-examination and the fact that counsel for the appellant were well equipped to cross-examine robustly. We are not persuaded that there is merit in the criticism that the judge failed to fully and conscientiously exercise her discretion.

46. We now move to a consideration of the evidence to assess whether there was a reasonable possibility that the missing witnesses/documents deprived the appellant of a useful line of defence. In this regard, as stated by O'Malley J in *CC*:-

> *"To borrow from the language generally used to explain the concept of reasonable doubt, a finding of a "reasonable" possibility must be based on reason. It will, therefore, require at least some evidential basis."*

47. The application in the present case was made at the effective conclusion of the prosecution evidence which included evidence from the two complainants, their mother, the appellant's handwritten note (2010), the social worker's note (2010), the appellant's letter to the social worker (2011), the record giving the appellant's address when he enlisted in the army in 1978, the appellant's letters to the complainants in 2015 and his letter to another sister in 2015.

MC

48. The appellant was convicted of eight counts of indecent assault between October 1974 and October 1976 and one count of rape between October 1974 and October 1976. All offences concerned the family home at BU. She said the abuse at the hands of her brother started when she was around 8 or 9 years old where he perpetrated the acts referred to earlier in this judgment. The family moved to another address around the summer of 1978, the rape took place shortly before the move.

49. She gave evidence that she told her mother about the abuse in 1993 and that she then became aware that her sister RC had also been abused. She received a letter from the appellant in 2015, the contents of which were opened to the jury.

50. In cross-examination, the defence case was put to MC that the appellant was not present in the house and thus did not have the opportunity to commit the offences. The various addresses where it was suggested he lived and the time periods were put to the witness and then the following exchange took place:-

> *"Q. So just backtracking then, I just want to go through the periods of time where you've said he was living in [BU], save for a short period in England, when his case is that in fact he was moving back and forth and really spent very little time in [BU] during that time. So, just to backtrack it's his case that he did live in [BU] up to Christmas of 1974 but did not live there at all until he returned there with his father and [the appellant's brother] in July of 1976 at which stage you were no longer there and that he did not have any contact with you during the period when he was living in [BU] with his father and [the appellant's brother]. He then went to the UK, obviously had no contact with you during that time, returned to live with you in [BU] for a very short period of time in November of 1976 and thereafter lived*

elsewhere with minimal or no contact with you and did not live in [BU] at all after that period. Now, that doesn't tally especially well with the dates that you have given us for when these things were occurring to you?

A. We moved into [BU] in around 1973 and we left in 1978. So for the period I was eight till around 12. It's my memory that [the appellant] lived in that house with us. He came and he went, in terms of he didn't keep regular hours, he didn't attend school regularly. I know that he went to the UK for a short period of time and he came back. He didn't live with my grandmother for that length of time from 1974 till 1976. That just is not true.

Q. I think just to be sure that I have correctly put the dates to you, that's January of 1975 to June of 1976 that he lived with your grandparents?

A. That's 18 months, is that --

Q. In or -- it may be 16 months?

A. That's not my memory at all of him living with my grandmother for that length of time. As I said we regularly went to stay with my grandmother and also obviously to visit when things were bad at home. We would regularly go down there and even in between times we would visit my grandmother almost every weekend, every Sunday and that is not my memory at all. I can only remember him going to England for that period of time and coming back. Other than that, I remember him being resident in the house and being around.

Q. And I think you've said in evidence that the incidents of abuse that you've outlined ceased when he went to England; isn't that right?

A. That's my memory, yes.

Q. And I think I've shown you a document that illustrates that he was in England in October of 1976; isn't that right?

A. That's right, yes.

Q. Now, memories are a fickle thing, I think you'd agree with that. They're a difficult thing. They're a nebulous thing. They're not a scientific thing. They shift, don't they, memories?

A. I think that when something happens, when something significant happens to you, it doesn't matter what age you are, it stays in your memory in a very clear way. I think dates can be -- can shift. Like I was a child. To me 1975, 1976, 1977, 1974, it all just goes into one. I can't distinguish one date from another date from another date because there was so much going on. It was -- like I was 11 in 1976. I said [the appellant] went to England in 1977 or whatever, 78, I wasn't writing down the dates. I was a small child.”

51. The witness recalled the appellant going to the UK and living with her father’s sister, she recalled her father living with her aunt in BU Woods after the house in BU was sold, but she had no recollection of the appellant living in the aunt’s house. She denied that he left the family home at BU and lived with their maternal grandparents. When it was suggested to her that he worked in a hotel and lived in around September 1977, she said she had no recollection of him working there. In cross-examination it was suggested that the appellant, when confronted by his parents (it

seems when MC was 27 years old) admitted touching but maintained it was harmless and not a sexual assault.

52. MC gave evidence that her parents worked, her mother working full time and that her maternal grandparents lived about a half hour drive away. Concerning the address at BE, where her sister RC alleged she was abused, she said that the appellant would often arrive unannounced and would often have an army kit bag. She was frequently in the house without an adult.

RC

53. RC gave evidence of her father's alcoholism and violence and also the appellant's violence. Her evidence concerned incidents of abuse at three family homes and ultimately the appellant was convicted of abuse at one of those addresses, MW between December 1980 and June 1981. She said there was an incident in BU on Christmas Eve 1977, and that when the family moved to BE, he would arrive with his army kit bag and abuse her.

At MW, she said he abused her, sometimes ejaculating in her mouth. She said she was raped around the time he announced his engagement which it is said was in June 1981.

54. RC gave evidence that she was threatened with violence by the appellant not only towards her, but also towards any daughters she might have in the future, the future threats were of rape. She informed her partner of the offending.

She told the jury of receiving a letter from the appellant stating:-

> *"….whose who have been damaged by me. I believe you are one of those people. It is clear to me that I have damaged you directly by my conduct which was selfish, self-gratifying, irresponsible and completely inconsideration of your life and your emotions."*

55. In cross-examination, RC said that she stopped talking for a period of time whilst living in BU and in BE. She had attended a doctor for physical ailments and was admitted to hospital for a time.

The Appellant's Mother

56. This witness outlined the toxic atmosphere in the family home. She confirmed that her daughter RC did not speak for a period saying:-

> *A."….. She was never confrontational, even when she was 10, 12, 14, she was always very good and would do anything she was told but she sat like this as a child, not saying anything, just rocking like that."*

57. The witness said that she worked full time, and that the appellant would have been in charge of the house when they were living in BU. She denied that he lived with her parents saying:-

> *"Q. I'm not talking about his going there as perhaps a teenager for weekends or for holiday for a week, I'm talking about him living there with your grandparents and going to school from your grandparents?*
>
> *A. For how long or to where?*
>
> *Q. I think it's a period of perhaps up to two years?*
>
> *A. Oh never.*
>
> *Q. Never?"*

58. When it was suggested again that he lived with his maternal grandparents and was taken to school by two teachers, this was also emphatically denied.

> *"Q. You see I must suggest to you he was living in [the maternal grandparent's house] and in fact he was getting a lift to school from two school teachers?*
>
> *A. For how long?*
>
> *Q. For a period of up to two years I think?*
>
> *A. Never.*
>
> *Q. Never?*
>
> *A. Maybe for a month.*
>
> *Q. Maybe for a month?*
>
> *A. Maybe for two weeks but never for two years."*

59. The witness agreed that the appellant went to England and lived there with an aunt, she had no recall of him working in a hotel, and was definite that he did not live in the hotel.

AC (Sister)

60. The complainant's sister gave evidence that she also received a letter from the appellant in 2015, significantly, that letter omitted the words "*self-gratifying*."

The Social Workers

61. Two social workers spoke of the meeting with the appellant whilst he was incarcerated in 2010 during which he made admissions to touching MC on four or five occasions whilst living in BU.

Army Records

62. An army captain gave evidence that the appellant enlisted in the army in March 1978 and was discharged in September 1979. He gave his address as BU when enlisting. Evidence was also adduced that he was absent without leave on several occasions.

The unavailability of the maternal grandparents, the maternal uncle, the school teachers and neighbours.

63. It is said that the above witnesses would have been in a position to give evidence that the appellant resided with his maternal grandparents for a period of two years from December 1974 until spring/summer 1976. Thus, it is argued that the appellant did not commit the offences alleged during that period as he had no opportunity to do so. Moreover, if those witnesses were available to him, he would have been better placed to impugn the credibility of the prosecution witnesses and to seek to show that the complainants were untruthful. Therefore, it has been necessary to set out aspects of the prosecution evidence in order to determine whether there was a reasonable possibility that the appellant was deprived of a useful line of defence by virtue of the absence of any one of the unavailable persons.

64. It is the position that the appellant admitted to touching MC on 4-5 occasions in BU in 1974 by way of the meeting with the social workers. It is true that the admissions did not extend to the nature of activity with which he was charged, but nonetheless, it goes to demonstrate that he had contact with MC in BU, albeit (on his admission), for a limited period in 1974. The appellant states in the note regarding the period when he contended he was living with his grandparents that he had *"very minimal contact"* with his sisters. A further conclusion which may be drawn from the

handwritten document (2010) is that it shows a detailed recall on the part of the appellant of dates and times which he later relied upon in his defence.

65. The letters to the complainants and to their sister in 2015 formed part of the body of evidence, it was open to the jury to view those letters as amounting to an apology for the sexual abuse by the appellant.

66. Insofar as the credibility of the complainants was concerned, their mother confirmed that RC was silent for some of her childhood, that the appellant resided in the house, the atmosphere of fear and violence, the moves to the various addresses and that the appellant went to England for a period to reside with an aunt. She also gave evidence as to the confrontation with the appellant following the disclosure by MC when she was 27 years old.

The maternal grandparents

67. First, it must be said that the person best placed to state whether the appellant resided in the family home at BU at the relevant period was, in fact, his mother. While his father gave evidence, this was at the behest of the defence and so did not form part of the *PO'C* application. However, it is important to note that his father *was available* to him at the time of trial. His mother gave very clear evidence that he never resided with her parents for the time frame alleged by the appellant.

68. In any event, even if the grandparents were available, and even if evidence were given that he resided in their home, where would that in fact bring the appellant? The determination as to whether he was deprived of a useful line of defence requires at least some evidential basis. Evidence was adduced that the grandparents lived approximately a half an hour drive away, thus, giving the appellant reasonable opportunity to visit BU and therefore an opportunity to have contact with his sisters.

69. Insofar as it is argued that *his maternal uncle, school teachers or neighbours* could have assisted the defence in undermining the credibility of MC, RC or the appellant's mother this is pure speculation without any foundation in evidence.

Paternal grand-aunt

70. This witness, it is said, could have given evidence that the appellant lived with her before travelling to the UK. This it is said would have narrowed the period during which he had *regular* contact with his sisters. Again, this is speculative, moreover, even if he had resided with his grand aunt, it seems she lived a mere few fields away from BU, thus, the opportunity would still have been there, bearing in mind the witnesses gave evidence that he would often turn up "*unannounced.*" It is instructive that the word "*regular*" is used.

Paternal aunt

71. The appellant maintains he lived with his paternal aunt in England from the end of July 1976 to the beginning of November 1976. There was no dispute but that he went to England for a period of time and resided with an aunt whilst there. MC placed this whilst the family were still in BU which was sold in the summer of 1978. She said he was not in England for very long and that when he returned, he joined the army. The evidence disclosed that he enlisted in March 1978 and that he gave his address on enlisting as BU. The defence also adduced evidence that the appellant was entered on the national insurance scheme in the UK in October 1976. There was therefore

evidence before the jury that he went to the UK and that he resided with an aunt while there. The issue of dates was for their consideration on the evidence. We do not see that the absence of the paternal aunt deprived the appellant of a useful line of defence.

The owners of the hotel

72. The appellant contended that he was employed in a hotel in 1977 and maintained that he lived in while he worked there. This was disputed by his mother. She was cross-examined robustly on the issue. It is argued that the owners could have undermined her credibility regarding her attendance at a party. This, again, is speculative, and it is difficult to see any relevance to the issues in dispute. Again, any evidence the owners could have offered is highly speculative and would not meet the test of a reasonable possibility of a loss of a useful line of defence.

The family doctor

73. It is submitted that the doctor could have given evidence on whether he used the word "*psychosomatic*" regarding RC either written on a piece of paper which she saw or in a conversation with the appellant's mother. This is of no relevance to the issue of whether or not the offences occurred. It is also very difficult to see that the potential evidence would have had any impact on the credibility of the witnesses.

The appellant's ex-wife.

74. Her presence, it is said related to an allegation of rape by RC on the announcement of her engagement to the appellant. He was not convicted of this count, but the argument is advanced that her evidence would have undermined the credibility of the complainants. The appellant's contention was that he only visited the house for a day, whereas the complainant RC said he stayed several days. Again, this is in the realms of speculation, equally, it could be posited that her evidence may even have assisted the prosecution.

Notes from the Granada Institute

75. Notes from the Institute it is said would have served to undermine MC's credibility, in that it is said she declined to attend a session at the invitation of her father. We do not see how this would have advanced the appellant's case.

The handwritten note, the letters of 2015, the social workers note

76. The contents of the above were admitted in evidence at trial and so were relevant to the *PO'C* application. It is clear that the admissions in the handwritten note and the typed note of the social workers did not relate to the charges actually preferred but were admissions to inappropriate touching during some of the period alleged regarding MC. Moreover, it was suggested to MC, prior to their admission into evidence, that the appellant touched her on a number of occasions. Whilst the admissions did not directly concern the specific allegations, nonetheless, the appellant admitted to sexual misconduct both in the handwritten note, the meeting with the social workers and when confronted by his parents. The letters of 2015 contained material upon which the jury could infer acceptance of misconduct, particularly when the letter to another sister did not contain the word "*self-gratifying*." This material was part of the body of evidence and constituted criminal behaviour towards MC. It is very difficult to see how in light of this evidence, the trial was unfair.

77. The appellant called his father to give evidence on his behalf. It is argued that his evidence was denigrated by the prosecution by reference to the impact on the family due to his alcoholism.

We do not consider this a persuasive submission. Every individual is entitled to a fair trial, not a perfect trial. No further application was made to stop the trial thereafter. It must be said in conclusion on the issue of the missing witnesses, that the appellant's parents were in the best position to give evidence as to his residences and whereabouts at the relevant time.

78. The contention that the witnesses conspired to make allegations in order to ensure the appellant remained in custody is raised. This was an issue for the jury to consider whether it had any basis in reality and to assess the motivation of the complainants. The delay in making complaints was before the jury for their consideration.

79. Accordingly, we do not find the judge erred in refusing the application to stop the trial.

Ground 1-Severance of the Indictment

Submissions of the Appellant

80. It is the appellant's position that the trial judge erred in rejecting an application made for the indictment to be severed so that separate trials would take place in respect of each of the complainants and that he was *"embarrassed in his defence"* pursuant to s. 6(3) of the Criminal Justice (Administration) Act, 1924 as a result.

81. It is acknowledged that in *People (DPP) v Limen* [2021] 1 ILRM 61 the Supreme Court clarified that allegations need not be *"strikingly similar"* in order to be tried together, they need only be *"the same or similar."* It is submitted that while RC and MC share a background insofar as they are sisters and grew up together, the allegations made by them could not be characterised as being of *"the same or similar"* nature.

- In the case of MC, all of the allegations were alleged to have occurred in the appellant's own bedroom in the family home, he locked the door each time and read from a pornographic book. In terms of the indecent assaults, she made no mention of digital penetration, of him placing her hand on his penis or of him penetrating her mouth with his penis.
- In the case of RC, the allegations were spread across three family homes and never took place in the appellant's bedroom. There was no mention of a door being locked or of any pornographic material. In contrast to her sister, she alleged that the appellant digitally penetrated her and forced his penis into her mouth.

82. In *Limen*, O'Malley J noted *that "the greater the similarity is, the greater the probative value."* It is submitted because of the extent to which their allegations differed, such probative value was minimal at best and was outweighed by the clear prejudicial effect of the two sisters' allegations being tried together.

83. It is submitted that a further distinction can be drawn between the manner in which the appellant was informed of the allegations. He made admissions to his parents in 1993 when confronted with MC's complaint and again when approached by the HSE in respect of MC in 2010. However, the appellant only became aware of RC's complaint in 2015. She gave evidence that she was *"maybe 15"* when she had been abused by the appellant but her evidence was contradicted by her mother who said she did not know of RC's allegations at the time of MC's allegations several years later in 1993.

84. The appellant expressed his surprise and concern over RC's allegations in a letter to his mother in July 2015 and a letter to his sister in January 2016. He acknowledged he had touched and rubbed against MC but vociferously denied all of RC's allegations. It is submitted that the jury's exposure to the appellant's "admissions" in relation to MC prejudiced him when they were considering RC's allegations.

85. While the appellant does not accept that this is a case in which probative value may be drawn from the inherent unlikelihood of both sisters making false allegations, it is noted as per O'Malley J in *Limen* that such value may only be drawn if "*the complainants are independent of one another and there is no reason to fear collusion or mutual contamination."*

86. It is submitted that there is evidence that MC's allegations were innocently contaminated by her knowledge of the allegations made by her sister RC and vice versa. It was established that the two sisters acted in support of one another during the investigative process with the pair accompanying each other to the Garda Station on a few occasions. It is described that there was a *"disconcerting symmetry"* between the two sisters' evidence and that MC's account changed under cross-examination in line with what was told by RC.

87. It is submitted that the failure of the trial judge to sever the indictment exacerbated the prejudicial effect of the delay in bringing these allegations to trial and that this amounted to a *"double injustice."*

Submissions of the Respondent

88. The respondent outlines that it is well-settled law that the severance of an indictment is a matter of discretion for a trial judge. It is submitted that the offences in this case were clearly of the same nature and that both they and the accused's defence to them arose out of the same interlinked factual nexus and therefore, it is difficult to see how this Court might be persuaded to interfere with the trial judge's exercise of her discretion, when the defence clearly made much of the similarities in each victim's evidence.

89. The respondent goes one step further and submits that the facts of the present case would have met the old view of *"striking similarity."* The following common features are identified:-

- That the abuse was perpetrated on two sisters who were available to the appellant to be so abused and were junior to him.
- That all offences involved sexual assaults.
- That the complainants were a similar age when the abuse took place, being young girls making the transition to early teen years.
- That the timeline of the abuse was consisted with the appellant abusing MC first and then moving on to the younger sister, RC when he was finished abusing MC.
- That both grew up in the same household with a chaotic and traumatic family life.
- That both alleged that the appellant was very careful to carry out the abuse in secret.
- That the abuse always took place at the girls' home.
- That both reported that the appellant would often arrive in their homes unannounced and perpetrate the abuse.
- That both reported the absence of any adult in the house on a regular basis thereby facilitating the abuse.
- That each alleged that he performed oral sex on them.

- That each alleged only one rape.
- That both described their brother as being violent and uncontrollable and the fear that arose from this was a feature in ensuring they didn't tell anyone.
- That both reported being threatened by the accused not to tell anyone.
- That both reported that he would on occasion have a kit bag with him.
- That both complainants made their complaints later in life.
- That both complainants received letters of apology from the appellant, in strikingly similar terms.
- That both reported a stark lack of support from their parents on making their complaints.

90. In response to the emphasis placed by the appellant on the difference between the abuse perpetrated on the two complainants, it is submitted that the law cannot operate on a naïve view that offenders are sexual automatons that always behave in the same fashion nor does the caselaw reflect this.

91. The case of *People (DPP) v DMcG* [2017] IECA 98 is relied on wherein one of the complainants was male and the other female and the accused was their stepfather. There were a number of similarities and dissimilarities in how the offences were alleged to have been committed and McGrath stated as follows:-

> *"The Court of Appeal did not regard the differences to be of great significance in the overall context of the allegations and expressed the view that repeated incidents of sexual abuse are unlikely to be precisely similar in form or in nature and to expect them to be so flies in the face of common sense and the experience of the courts" before concluding that even in the case of only two complainants "the bar for similarity for cross-admissibility of evidence in respect of sexual abuse offences is not set very high."*

92. In terms of the complainants' purported desire to ensure that the appellant remained in custody, it is submitted that there was no actual evidence that the complainants had conspired in this way and that when asked this directly in cross-examination, the appellant could not account for why they had made their complaints.

93. In terms of the risk of contamination, the respondent relies on the following dicta of O'Malley J in *Limen:-*

> *"This does not mean that, for example, accusations by a number of family members against a relative cannot be tried together. They may not be independent of each other, and may very probably have discussed the matter together and with other family members, but there may nonetheless be probative value in the content of their various accounts."*

94. It is further submitted that the question of contamination is a matter for the jury. In *People (DPP) v MS* [2019] IECA 120 this Court stated as follows:-

> *"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.*

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."

95. The respondent suggests that it is hard to see how the appellant was *"embarrassed in his defence"* by the failure to sever the indictment in circumstances where he elected to tell the jury that he had been convicted of a rape serious enough to warrant a sentence of 16 years' imprisonment. It is submitted that the allegations of either RC or MC did not offer any prejudicial value over that of this previous conviction and thus there was only probative value. It is noted that the jury only recorded convictions on four counts concerning RC.

96. In response to the contention that there was a difference in the manner in which the appellant approached the allegations, the respondent draws attention to the very similar letters of apology written to both MC and RC which were characterised by the prosecution as being inculpatory.

Discussion

97. It is contended by the appellant that the nature of the sexual offending alleged by the complainants was such as ought to have caused the trial judge to sever the indictment. Moreover, that the locations of the offending in respect the two complainants differed, the offences in relation to MC occurring at one single address where the family resided, whereas three addresses featured in the offences concerning RC. It is also said that the manner in which the appellant came to know of the allegations differed and the fact that he made admissions of inappropriate sexual contact with MC, albeit not the subject of the counts on the indictment further served to prejudice him in the eyes of the jury. Finally, it is argued that there may have been innocent contamination.

98. The Supreme Court decision in *Limen* (O'Malley J) is now the seminal decision on the issue of severance. In an extensive judgment, O'Malley J analysed the jurisprudence and in commenting on the facts in *People (DPP) v BK* [2000] 2 IR 199 and the concept of "*similarity*" said at para. 107:-

> *"107. It might be observed here that, in an era when the courts have considerably more experience of trials of this nature, a key feature of the case against the accused would probably now be seen in the fact that a number of individuals who had during their childhood been in his care, and under his control, had alleged that he abused them when opportunities presented themselves. It is by no means apparent why it should be thought significant that some of those opportunities arose in a dormitory, and some in a caravan, when on each occasion the accused was the adult in charge of young boys. In my view, this result reflects the risk of treating the concept of similarity as setting down some form of "bright line" rule of admissibility, when it should be seen as simply an illustration of one way in which evidence of other offences may have probative value."*

99. The above dicta clearly recognises how the courts have garnered greater knowledge of the nature of this type of sexual offending and as to how the assessment of whether the allegations made by one or more complainants are of such a character so as to be tried on the same indictment may be considered.

100. The dicta quoted above is, in our view, largely dispositive of the arguments advanced for severance in the present case. The fact that offences concerning one complainant were committed in one location, being a family residence and that the offences in respect of the other complainant were committed in three family residences is, in our opinion, of limited if any, moment. The residences were family homes, the offences were committed in secret, the fact that the nature of the offending differed is again of little moment. It must be recalled that the appellant apologised to the complainants in similar terms, the offences were sexual in nature, involved two sisters, young girls to whom the appellant had ready access, providing him with the necessary opportunity. These elements all serve to underline the current approach of the courts to applications for severance. Again, with reference to the dicta of O'Malley J in *Limen,* at para. 155 relating to guidance, she says:-

> *"The accusations need not be identical or "strikingly similar" but must be of the same nature. However, similarity may add to the probative value, and the greater the similarity is, the greater the probative value."*

101. In our view, the factual matrix disclosed many similarities between the complainants' allegations. There were dissimilarities, but they were limited and certainly not such so as to lead to severance.

102. Insofar as the argument is advanced that the appellant was prejudiced by his own admission to inappropriate conduct concerning MC and that this may have impacted on how the jury would consider the evidence of RC, thus prejudicing the appellant's right to a fair trial, we are not persuaded that this is so. It must be recalled that the appellant introduced into the trial his conviction concerning an unrelated complainant for rape. It is difficult therefore to see how his admission to inappropriate touching of MC would have caused the kind of prejudice leading to severance. That evidence would have been given in a trial involving only MC, the contention that it would prejudice how the jury viewed the evidence of RC is not, in our view, a realistic one. That evidence was undoubtedly probative and, in our view, the prejudicial effect did not outweigh its probative value.

103. Finally, on the issue of innocent contamination, the decision in *Limen* is again apposite as are the dicta of this Court in *MS* Firstly, this Court said in *MS:-*

> "*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."*

And O'Malley J observed in *Limen* at para. 155:-

> *" d) Where an application is made to sever the indictment (or, indeed, if the trial develops in such a way as to give rise to the issue), the judge will have to consider whether or not the complainants are independent of each other, and whether there are any grounds for concern that there may have been either collusion or innocent mutual contamination. This does not mean that, for example, accusations by a number of family members against a relative cannot be tried together. They may not be independent of each other, and may very probably have discussed the matter together and with other family members, but there may nonetheless be probative value in the content of their various accounts.*

> *e) Depending on the judge's assessment of the situation either at the outset (based on the statements of proposed evidence), or during the trial (if the evidence raises concern) it may be necessary to either sever the indictment or give the jury an appropriately tailored warning about the possibility of collusion or contamination."*

104. We are not persuaded that the trial judge erred in the approach to severance and consequently, this ground fails.

Ground 2-Admissibility of "Confession" Evidence

Submissions of the Appellant

105. The appellant places reliance on the following quote of Charleton J in *People (DPP) v Doyle* [2018] 1 IR 1:-

> *"The maxim nemo tenere prodere se ipsum, that nobody is required to act as a witness against themselves, is the foundational authority for the judiciary's control of such confessions to crime as are regarded as untrustworthy. Over centuries, it has been on this principle that all rules governing confessions have been based. These have ranged from rules against torture in late medieval times, to a requirement that confessions be the rational product of a free mind in the 18th century, to the requirement of note-taking in the early 20th century, to the mandatory provision of legal advice to suspects closer to our time, to video recording as of the present era. […] While safeguards against compelled confession are numerous, and at times highly detailed, the underlying principles have remained constant: the reception into evidence of what is both reliable and fairly taken is the weft running through the case law while the rejection of coercion makes up the web. Voluntariness is the legal shorthand for the process of adjudication by a judge to determine whether a confession has proceeded from a coerced mind or from a free one. Through sustained and unremitting pressure, torture, or sometimes through suggestion, a person may make a decision to give way and accept that police suspicions as to their involvement are correct. Such a confession could not be a reliable basis for a finding of guilt. […] There is a constant guard by the judiciary against coerced confessions because that kind of unreliable admission may possibly be mistakenly seen by the jury as the acceptance of the validity of the entire prosecution case."*

106. Objection was raised by the defence as to the admissibility of "confession" evidence to be given by two HSE social workers arising from their interview with the appellant in Arbour Hill Prison in 2010 and documents proffered by them including a typed note of the interview and a handwritten chronology prepared by the appellant in advance of the interview. It was argued that the responses given by the appellant at the interview were neither reliable nor voluntary, but the trial judge ruled the evidence admissible. It is submitted that this "confession" evidence further served to prejudice the appellant in the eyes of the jury, rendering his conviction unsafe.

107. In terms of reliability, it is said that the social workers could recall very little about what was said at their interview and were instead reliant upon a typed note prepared by one of the social workers, Ms W, after the interview. The complaint is made that the handwritten notes upon which the typed note was based were unavailable at the trial and that the Judges' Rules were not adhered to in respect of the meeting. Attention is also drawn to the fact that when asked about a

typed note prepared by the same social worker following an interview with her, MC said that the note was inaccurate in material respects.

108. In terms of voluntariness, it is submitted that the interview served the function of assessing the potential risk that the appellant posed to his granddaughter who had been visiting in prison and that in circumstances where the continuation of that relationship lay in the balance, it cannot be said that he attended in a voluntary capacity and of his own free will.

109. In terms of the probative value of the impugned documents, it is said that they did not represent a clear indication of the appellant's response to MC's allegations because he was not told the specific details of the allegations. Indeed, he sought more detail at the interview and in subsequent correspondence about the allegations made against him. Therefore, it is submitted that the notes cannot be considered to be probative of his response to the specific allegations made against him at the trial, only to a broad vague assertion that he had sexually abused his sister MC.

Submissions of the Respondent

110. The respondent expresses surprise that this ground of appeal is being pursued in circumstances where at the time of *voir dire* in relation to the admissibility of this evidence it had already been put to MC, albeit obliquely, that there had been sexual contact between her and the appellant and the jury had also been told of his cooperation with the HSE investigation as set out in the letters to his family members. It is submitted that the prejudice is hard to see and that the correspondence with the social workers is highly relevant.

111. The voluntariness of admissions to third party investigators was upheld by this Court in *People (DPP) v BK* [2022] IECA 248. The following statement of the court is relied on:-

> *"It seems to us that the question is not whether the procedure that would have ordinarily been followed had this been a Garda interview in a Garda station was in fact followed, but whether what actually occurred was unfair."*

112. The respondent identifies elements of voluntariness such as *inter alia* that the appellant turned up to the meeting with prepared notes about the date range suggested and then chose not to contest that there had been sexual contact but to contest the dates upon which it occurred. He further proffered some instances of alleged blackmail by MC in relation to the incidents by way of partial defence.

113. It is noted that the appellant had experience of the law and being questioned by virtue of his numerous previous convictions which involved detentions and his previous experience of a criminal trial. Further evidence of his intelligence can be found in the fact that he had completed degrees while in prison and quoted a High Court judgment as to his entitlements in his correspondence with the HSE. He also indicated that he had availed of and ignored legal advice on the issue of his interaction with them. Therefore, it is submitted that it cannot be said that any aspect of the interviews with the social workers were unfair.

114. It is noted that the appellant did not give evidence in the *voir dire* on this issue and therefore there was no actual evidence that his admissions to the social workers were involuntary.

115. It is further contended that the admission of the sexual abuse of MC and two other persons during the interview were not the actions of someone who was motivated by a fear of losing access to his granddaughter.

116. In terms of the reliability of the note prepared by the social workers, it is submitted that the account contained in the note matches that put to MC by the defence counsel and that given in evidence by him on oath so it cannot be credibly suggested that there was unreliability and that the trial judge erred in admitting the notes.

Discussion

117. The evidence of the two social workers regarding the appellant's admissions to them in 2010 of inappropriate sexual contact with MC is challenged on three bases; voluntariness, reliability and prejudice.

118. Evidence was given by the social workers at trial. Ms W stated that she met with MC in October 2010 and took typed notes of that meeting. MC informed her of the allegations due to concerns she had with visits in prison to the appellant by his granddaughter.

119. By letter dated the 22nd October 2010, the appellant was informed of the disclosures as follows:-

> *"…. "Dear [appellant], I wish to inform you that allegations of sexual abuse have been made against you. The allegations are retrospective in nature and relate to the period from 1975 to 1978. The alleged victim of the abuse has stated that she was aged nine years when the abuse began and 12 years when it ended. I have arranged a professional appointment for you at the prison on Monday the 1st of November 2010 at 11 am in order for you to have your views known to the HSE on the matter. My team leader, [ER], will also be in attendance."*

120. The social workers duly met with the appellant in prison on the 1st November 2010, evidence was given that notes were taken by Ms W and subsequently typed up. The following evidence was adduced:-

> *"Q. And did you take a note of that meeting?*
>
> *A. I did take notes at the meeting.*
>
> *Q. Did you subsequently type up your note of that meeting?*
>
> *A. Yes.*
>
> *Q. What was [appellant's] response to the allegations?*
>
> *A. He would have pointed out that he was certain that the dates provided by [MC] were incorrect. He admitted to inappropriate touching and what he referred to as rubbing up against his sister on four or five occasions but said that this would have happened between 1974 and 1976.*
>
> *Q. Okay. Did he provide you himself with a chronology?*
>
> *A. He did, yes. He produced some notes that he had made prior to the meeting that would have explained his whereabouts during the periods being spoken about.*
>
> *Q. And can I ask, Ms W, for a copy of my documentation back and if I refer to anything I'll hand it over. Now, first of all in terms of you produced a typed account as it were of your meeting; is that correct?*
>
> *A. Yes.*
>
> *Q. Can you put your hand to that please?*
>
> *A. Yes, I have it here.*

Q. And again would you just read it into the record please. The Court has the same record.

JUDGE: This is the prison visit note.

MR COLLINS: Exactly.

A. The notes of the interview taken is it?

Q. MR COLLINS: If you could read the typed notes please, yes.

A. Yes, okay. So the allegations of sexual abuse were put to [appellant]. In response [appellant] stated that the dates put in the letter to him were incorrect. He admitted inappropriate touching and rubbing up against his sister on four or five occasions but stated that this had occurred between 1974 and 1976. [appellant] stated that it was not possible for it to have occurred between 1975 and 1978 as he had been in the Armed Forces and working in the UK during the years before and after 1974 and 1976. He had written down his activities and employment in chronological order in preparation for our visit in order to discuss the allegations against him. [appellant] denied any sexual intercourse with his sister….."

Voluntariness

121. It is said that the circumstances which gave rise to the interview with the social workers related to any access risk posed by the appellant towards his granddaughter. Consequently, it cannot be said that the "admissions" were an exercise of free will.

122. The starting point for this discussion is that a confession will not be admissible unless it is proven to be voluntary. If a confession is obtained by threats, inducements or oppression, then it cannot be said to be freely given. It is for the prosecution to prove that any threat or inducement did not cause the confession.

123. It is clear from the foregoing extract from the evidence that the appellant, knew that allegations had been made prior to the meeting with the social workers and arrived with a pre-prepared document which related to a chronology of events. He accepted inappropriate contact with his sister but said that this concerned inappropriate touching and rubbing against her. He disputed the dates. The relevant portions of the chronology as given in evidence read as follows:-

"Q. And when you attended at the interview he had that document with him already; is that correct?

A. Yes.

Q. He volunteered it to you; is that correct?

A. He did.

Q. Okay. And I think he outlines -- I suppose I'll just ask you to read it, it might be the easiest thing.

A. Okay. It says, "Early 1974 to 1976 (in June) I was between 13 and 15 years old. ***M was between eight and 10 years old."***

Q. M is presumably [MC]?

A. [MC], yes. "In 1974 in [BU], maybe four/five occasions. In 1976 in [maternal grandparents' house] on two occasions."

Q. What did you understand occasions to mean? What was he referring to in those two sentences?

*A. His admissions of when he -- **what he described as inappropriately touched and rubbed up against M.**"*

124. Moreover, in his letter to the social worker dated the 16th March 2011, and obviously following the meeting, he wrote *inter alia* as follows:

> *"As you are very well aware, it is unfortunate that my cooperation appears not to be reciprocated by your office. In my dealings with you I have ignored legal advice and been open and indeed provided you with documentation which I was not required to."*

125. It is true that the meeting did not have the safeguards associated with normal Garda procedures in the context of a Garda interview, the appellant was not cautioned and the meeting took place as a risk assessment concerning his granddaughter.

126. We are not persuaded that the fact the meeting concerned his possible risk to his granddaughter rendered the content of the admission involuntary, there is no suggestion on the evidence that he was obliged to attend, in fact, in terms of his letter in March 2011, it is quite clear that he had sought and disregarded legal advice. He came to the meeting with a pre-prepared document in which he accepted inappropriate contact with a child. That the document may have been prepared with access to his granddaughter in mind, did not render the admission to such conduct involuntary. Whilst the visit from the social workers may have caused him to write the document for a particular purpose, that in and of itself does not make the content involuntary.

127. So, the appellant knew in advance of the meeting that allegations had been made, he prepared a document, he engaged in the process, and he did not seek to leave the meeting, he made suggestions of blackmail in the document. All the above have the indicia of fairness and voluntariness.

Reliability

128. In essence, the suggestion is also made that the social worker notes are unreliable; it is said that they could recall little about what was said at interview and were depending upon a typed note prepared by Ms W.

129. The respondent says the contents of the note corresponds with that put to MC in cross-examination and with the appellant's evidence and so it cannot be credibly suggested that there was unreliability and that the trial judge erred in admitting the notes.

130. It appears to us that there is merit in the Director's submission. The question skilfully put in cross-examination by Ms Williams BL concerned the alleged consistent approach of the appellant to the allegations as follows:-

> *"Q. I want to put it to you that while you have been inconsistent about the way you have described what you say happened to you, your brother has been quite consistent in the manner that he has met those allegations and I want to put it to you that when he was confronted by your parents, and they will say this when they are called to give evidence, assuming that they say what they told the guards in 2015, they will say that **your brother***

admitted to touching you but that he maintained it was harmless and that it did not go as far as sexual assault *and I put it to you that that has* ***consistently been his position since these allegations have been put to him.*** *Do you want to comment on that?*

A. I have no knowledge of any conversation that my parents had with [the appellant] around my abuse." (our emphasis).

131. In his own evidence on this issue, the appellant said:-

"A. That I remember in [BU] that I had touched my sister. That was what was being alleged.

Q. That's what had been alleged at the meeting with your mother and [MC] all those years earlier?

A. Yes.

Q. And I think as regards your responses to Mr R and Ms W, I think you described it as touching her externally?

A. Yes, that's correct.

Q. When you say externally, what do you mean? Does it mean that you're touching her outside her clothing?

A. It means that I did not have any -- externally of her body, yes, not necessarily without her clothing or with her clothing, externally to her body, like, there was no -- what I meant was that I didn't have any form of penetration or penetrative sex with my sister. I touched her on the outside of her body.

Q. And by touching are you talking about manually touching?

A. Yes."

132. It is readily apparent from the foregoing, that the above extracts do indeed correspond with the typed notes subsequently prepared by Ms W following the meeting with the appellant in November 2010. Whilst the appellant had not given evidence prior to the trial judge's ruling as to the admissibility of the social worker's notes, nonetheless, his evidence supports the judge's ruling in terms of reliability. In cross-examination, the appellant does not resile from the contention of touching, albeit classified as "*harmless*."

133. Accordingly, we are not persuaded that the judge erred in her ruling as to reliability of the document.

Prejudice

134. The appellant questions the probative value of this evidence in that he argues that the documents did not represent, in effect, a clear indication of his response to MC's specific allegations. Moreover, that the material was not probative of the specific allegations made by her.

135. It is obvious that evidence adduced by the respondent will be prejudicial and the issue is whether the probative value is outweighed by the prejudicial effect. Firstly, the appellant was aware that allegations had been made and came willing to meet the social workers. Secondly, he made admissions to inappropriate touching, with which he was not charged. Thirdly, the material was relevant to the background as it showed he had an indecent interest in MC and fourthly, it is clear that the appellant sought to put forward a narrative of alibi in terms of his chronology of events. The material was undoubtedly relevant and probative.

136. We are not persuaded that the judge erred in her ruling and accordingly this ground fails.

Ground 4-Amendment of the Indictment

Submissions of the Appellant

137. It is the appellant's position that the trial judge erred in acceding to a prosecution application to amend the indictment. In particular, RC's allegation of rape was initially framed based on her garda statement that it had happened when she was 13 or 14 years of age however, she also anchored the rape to the occasion of the appellant's engagement announcement which occurred on the 4th June 1981 and the indictment was amended to reflect same.

138. It is submitted that the date of the appellant's engagement was readily discoverable by the prosecution in advance of the trial. In *People (DPP) v NR and RN* [2016] IECCC 2 Eager J held that:

> *"it is not the court's function to act as substitute for the Director of Public Prosecutions in relation to the counts in the indictment nor is it the court's function to act as substitute for the Director of Public Prosecutions in relation to adding counts to the indictment."*

Eager J declined to add counts to the indictment commenting that *"having regard to the accused's right to a fair trial and not a trial by ambush."*

139. It is the appellant's position that the amendment of the indictment permitted by the trial judge fell beyond what is permissible under s. 6(1) of the Criminal Justice (Administration) Act, 1924 and further caused irremediable prejudice to the line of defence pursued by the appellant. The defence had sought to establish that RC's evidence was incorrect in material respects, and this included her timeline of events.

Submissions of the Respondent

140. It is pointed out by the respondent that it is commonplace in historical sexual abuse cases and indeed, the courts have come to expect, that there will be an application to amend the indictment at the conclusion of evidence. It is submitted that any argument that this was unfair on the appellant does not hold any water in the context of the case.

141. The respondent notes that the defence relied upon the following dicta of Fennelly J in *People (DPP) v Walsh* 4 IR 746:-

> *"The Court is satisfied that section 6 (1) of the act confers a broad discretionary power on the trial judge to amend the indictment. The purpose of any amendment must be to ensure that the jury will address the true issues when they come to deliberate on their verdict.* ***The counts on the indictment should correspond as closely as is reasonably possible with the real case for the prosecution.*** *The section requires such amendments to be made as the Court thinks necessary to meet the circumstances of the case. The section sets no time limit to the exercise of this power. It may occur at any stage of a trial. It may well be that, in a particular case, a late amendment cannot be made without injustice and a court should not exercise the power in circumstances involving prejudice to the defendant in the defence of the charges against him. This is prejudice in the legal sense. It does not mean that an appropriate amendment should be refused merely because it would lessen the chance of an acquittal."* (emphasis)

142. In line with the above, it is submitted that the amendments sought by the prosecution were designed to ensure that the jury would address the true issues in the case and were required arising from matters that emerged in evidence. The imprecision in timelines can be put down to RC's highly traumatic upbringing.

143. It is pointed out that the appellant did not deny assaulting RC on a given date *but at any point* and that this was made emphatically clear. The real question for the jury was therefore not whether the abuse occurred on specific dates but whether it occurred at all and so no real prejudice was suffered by the appellant arising from the amendment of the indictment. Similarly, in respect of MC, while accepting he had sexual contact with her, the appellant denied the nature of this and the date alleged. The dates were of less relevance to the jury than the fact of the sexual offending having taken place and the nature thereof.

144. It is further submitted that the appellant could not have been surprised or ambushed by the amendments made as it is clear that the issue of the timeline was in his contemplation far in advance of the trial at the time he was dealing with the social workers.

Discussion and Conclusion

145. Section 6(1) of the Criminal Justice (Administration) Act, 1924 provides the power to amend an indictment:-

> *"Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless the required amendments cannot in the opinion of the court be made without injustice…."*

146. As far back as 1918, in *R v Dossi* [1918] 13 Cr App R 158, it was found that the dates specified on an indictment have never been material unless the date is an essential ingredient of the offence alleged. There is a broad discretion to amend an indictment so long as such amendment does not result in injustice. As stated by Fennelly J in *People (DPP) v Walsh*:-

> *" The purpose of any amendment must be to ensure that the jury will address the true issues when they come to deliberate on their verdict. The counts on the indictment should correspond as closely as is reasonably possible with the real case for the prosecution."*

147. In reality, it frequently arises in cases of historical prolonged sexual abuse where time has passed that an application may be made to amend the indictment. Injured parties giving evidence as adults as to what is alleged to have been occasioned to them as children cannot be expected to point to dates with pinpoint accuracy. Frequently, this will unfold in the evidence and whilst accuracy is to be sought out and indictments drafted with care and attention to detail, amendments of the sort that occurred in this case are commonplace and necessary in order to enable a jury to determine the real issues in dispute.

148. An indication that an amendment would be sought was given before the appellant's evidence which further underlines the absence of any unfairness. Obviously, any amendment should be sought as soon as is reasonably possible to enable an accused address the issue meaningfully.

149. Dates were not essential to the offending in the present case. Indeed, the appellant's case was one of absolute denial and not that the incidents did not occur on particular specified dates but that the incidents giving rise to the offences never occurred at all. The appellant asserted that he was living elsewhere at the time of offending, however, the central point is that the appellant

denied the offending ever occurred at all regarding his sister RC and not simply a denial that the offending had not occurred on a particular date.

150. Insofar as MC was concerned, his admissions to the social workers pointed to inappropriate conduct at a certain time, conduct for which he was not charged. Again, his defence was one of denial of the allegations, not a denial that the offending had not occurred on a particular date. In those circumstances, we are not persuaded that the trial judge erred in permitting the amendments to the indictment.

151. Insofar as it is said that he was deprived of an acquittal which may have been returned should the dates have remained unamended; the issue was one of prejudice and fairness. Fairness cuts both ways, the jury were entitled to assess the real issue in dispute which was not date-related.

152. This grounds fails.

Ground 5-No Case to Answer

Submissions of the Appellant

153. Following the amendment of the indictment and relying on the *Galbraith* principles, the defence applied for all counts on the indictment to be withdrawn and a directed verdict of not guilty on all counts. This application was rejected. It is the appellant's position that the trial judge erred in so rejecting having regard to the weakness of the evidence and the material inconsistencies therein.

154. The appellant outlines the following inconsistencies of RC:

- That she first alleged that abuse had gone on "*for over 15 years*" from when she was seven years old and she wrote in an email to Gardaí that it had spanned "most of my childhood" yet the counts on the indictment covered just two and a half years.
- That she wrote in an email to her father that her other brother "*used to make me read out loud while he abused me*" but then denied this at trial.
- That she said at trial that she did not recall visiting the appellant, his partner and their daughter but agreed that photos produced showed otherwise.
- That she said she told her parents she was abused by the appellant as a teenager but both her mother and father denied this; in particular, her mother stated that she would have remembered if RC made an allegation of sexual abuse.
- That she said at trial she saw the word "psychosomatic" written on a piece of paper on the nurse's desk at her GP's surgery but this did not appear in her medical records and her mother said the doctor used that term in a conversation when they met on the street.

155. The appellant outlines the following inconsistencies of MC:

- That the social workers recorded her as saying that she was abused "in her bedroom" which she shared with her two younger sisters, but she said at trial that it happened in the appellant's bedroom and that the social workers' note was inaccurate.
- That the social workers recorded her as saying she had intercourse with the appellant "*on at least one occasion*" but she told Gardaí and said at trial that there was just one rape and, again, that the social workers' note was inaccurate.
- That in a supplementary statement to Gardaí on the 29th April 2017, after reiterating an allegation of rape, she said "*he committed sexual abuse of me several times subsequent to*

> *this*" but she said at trial that the rape incident was the last incident and no further assaults occurred after that.

156. It is further submitted that the principal witness called by the prosecution to corroborate the evidence given by MC and RC, their mother, was also unreliable in that she had attempted to prevent the appellant from gaining access to documentation which undermined her daughters' evidence and thereafter denied that a recording of her voice was her voice.

157. It is acknowledged that the reliability and credibility of witnesses is a matter for the jury to decide however, the following dicta of Denham J in *People (DPP) v M* (Unreported, CCA, 15th February 2001) is relied *on "if the inconsistencies were such as to render it unfair to proceed with the trial then the judge in the exercise of his or her discretion should stop the trial."*

158. Further reliance is placed on the following portion of Charleton J's judgment in *People (DPP) v Buckley* [2007] 3 IR 745:-

> *"There can be exceptional cases where the nature of a necessary proof is found to be so tenuous that a trial judge would be compelled to make a conclusion that any consequent conviction would be unsafe. In those very rare cases the issue as to conviction might be withdrawn from the jury, or from the judge acting as a tribunal of fact."*

159. It is submitted that the evidence in this case fell into the category of exceptional cases contemplated by Charleton J; the evidence was so tenuous and unreliable that no jury, properly directed could have convicted upon it.

Submissions of the Respondent

160. It is the respondent's position that the direction application was unstateable in circumstances where this was a case where two complainants gave clear *prima facie* evidence of having been abused by the appellant as children, the appellant wrote letters capable of being regarded as letters of admission and he also admitted to at least some sexual abuse against one of the complainants.

161. It is submitted that the inconsistencies as identified by the appellant were matters to be considered by the jury but could not ground an application based on the *Galbraith* principles as inconsistencies are to be expected in any criminal trial, particularly in cases of historical sexual abuse. It is further submitted that this Court is required to give due deference to the trial judge who heard the two complainants give evidence at length.

162. Additionally, the respondent does not accept that the appellant's mother attempted to pervert the course of justice but nonetheless describes this as a tangential issue which ought not fall for the cognisance of this Court in the course of this appeal.

Discussion

163. We do not intend to rehearse the inconsistencies set out by the appellant, but the argument made in essence is that the complainants' evidence was inconsistent to such a degree that the judge ought to have exercised her discretion in accordance with the second limb of *Galbraith* and directed not guilty verdicts. The inconsistencies were further compounded by their mother's evidence which it is said was unreliable.

164. The true question as identified by Edwards J in *People (DPP) v M* [2015] IECA 65 is the issue of fairness. As stated, commencing at para. 47:-

> *"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.""*

165. The first point of note is that the jurisdiction to withdraw a case from a jury is an exceptional one. We are not persuaded that there is anything in this case which brings it into that exceptional category.

166. The complainants each gave evidence and were robustly cross-examined. Each maintained their core allegations. It is for the trial judge to consider whether the prosecution have adduced sufficient evidence which might enable a safe conviction on a consideration of the evidence as a whole.

167. A judge cannot usurp the role of the triers of fact who must assess and weigh all the evidence. At the direction stage, the issues of credibility and reliability are not for the judge's consideration but as stated in *M* (2001):-

> *"These inconsistencies are matters which go to the issues of reliability and credibility and thus, in the circumstances, are solely matters for the jury. The learned trial judge therefore was correct in letting the trial proceed. These are matters quintessentially for the jury to decide. However, if the inconsistencies were such as to render it unfair to proceed with the trial then the judge in the exercise of his or her discretion should stop the trial."*

168. The question of the reliability of the complainant's mother and the issue of inconsistencies on the part of witnesses fell four square in the jury's domain.

169. The trial judge's decision was, in our view, one which was made within jurisdiction and a legitimate exercise of her discretion. There was nothing to suggest any unfairness arising.

170. Therefore, this ground fails.

Decision

171. Accordingly, as we have not been persuaded of the merit of any of the grounds of appeal, the appeal is dismissed.