THE COURT OF APPEAL

(CRIMINAL)

Unapproved **Neutral Citation Number: [2024] IECA 100**

Record Number: 142/2021

Bill Number: 96/2017

Edwards J.

McCarthy J.

Ní Raifeartaigh J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

-AND-

L.N.

APPELLANT

JUDGMENT of the Court delivered on the 23rd day of April 2024 by Ms. Justice Ní Raifeartaigh

Introduction

1. This is an appeal against conviction in which the primary issue raised is whether the trial judge was correct in refusing to sever the 12-count indictment. . The appellant was convicted of two counts of rape and ten counts of indecent assault in the Central Criminal Court. There were four different complainants, three of which were nieces of the appellant and one of which was his sister's sister-in-law. An application to sever the indictment was made on a particular basis at the outset of the trial and was refused. The appellant's first ground of appeal is that the trial judge erred in refusing that application. The appellant also seeks to add a further ground of appeal to the effect that there should have been severance of the indictment but in a different manner and for a different reason to that which was advanced on his behalf at the trial. The appellant also appeals in respect of the trial judge's refusal to accede to a *PO'C* application to withdraw the case from the jury at the close of the prosecution case (*People (DPP) v PO'C* [2006] 3 I.R. 238).

2. A consideration of the severance issues raised in this appeal requires the application of the principles set out by the Supreme Court in *People (DPP) v Limen* [2021] 2 IR 546 (hereinafter "*Limen")* as discussed in *People (DPP) v. PP* [2022] IECA 289.

Evidence at the trial

The first complainant

3. The first complainant was a niece of the appellant and the first nine counts on the indictment related to her. Counts 3 to 9 related to indecent assaults alleged to have been perpetrated when she was a child visiting her mother's family in Ireland on holidays. Counts 1 and 2 related to rapes one of which was alleged to have taken place when she a minor, the other when she was an adult.

4. The earliest incident (count 3) was said to have occurred in 1971 when the complainant was nine years old. She alleged that the appellant put his hand on top of her crotch over her pyjamas for a period of seconds when she was briefly sharing a bed with him, another uncle, and her younger brother. The next incidents (counts 4-9) were alleged to have occurred the next time the complainant was visiting with her mother's family, in the summer of 1974, when she was twelve years old. She described a number of different occasions during which the following took place:

i. She described having been alone with the appellant in a car at various times during the holiday and said that the appellant had placed his hand on her thigh several times while driving, and also took her hand and put it on his crotch.

ii. There was an incident when she saw the appellant's penis protruding through his trousers.

iii. There was an incident when the appellant moved the complainant's hand towards his penis and 'moved [her hand] up and down' until he ejaculated, after which he gave her a scruffy old cloth from the car door to wipe her hand.

iv. There was an incident when the appellant stood by a bed which the complainant was in 'with his penis protruding' in the bedroom which was being shared by him with the complainant and another.

v. There was an incident in a laneway when the appellant's penis was exposed.

vi. There was an incident when she and the appellant were in a car on a laneway and the appellant stopped the car near a gate in one of the fields, walked to the gate, and produced his penis before ejaculating. It was the complainant's evidence that the appellant said, 'It'll be our little secret'.

5. Count number 1 on the indictment, an allegation of rape, was said to have occurred in 1977, when the complainant was again on holidays with her mother's family. She said she followed the appellant up a laneway that went up above the back of her grandmother's house, and through one gate before stopping at another gate. She described being on the ground, that he was on top of her and there was a painful, pushing sensation inside her; she said it was very quick. She said that the appellant had put his penis inside her vagina and that she noticed blood on her leg afterwards. She said, "*I'm bleeding*", and the appellant got a tissue out of his pocket and handed it to her. She stated that she had a memory of seeing him ejaculate as the appellant pulled himself off her. She said the appellant then continued on through another couple of gates to look at some cattle, and she had followed.

6. Count Number 2 on the indictment related to the last incident (and second rape) alleged by the first complainant. It was said to have taken place in 1986 when she was twenty-four years old. She had come to Ireland to visit an aunt who was unwell, and the complainant said he would take her to see this aunt. They stopped at a hotel along the way and went in for lunch. She stated that they were leaving after lunch when the appellant went

over to the desk and then reappeared and went up the stairs. She said, '*I followed him because I always did, because he'd never say what he was doing, you just went*'. She continued '*And went into a bedroom and raped me at the end of the bed and afterwards, I went in the bathroom and I looked in the mirror and I thought, what am I doing here, what am I doing here.'*. She further described the incident as follows *'...he was on top of me, he didn't - it wasn't a matter of let's take - oh this is fun, let's take off our clothes, it wasn't even in the bed, it was just basically at the end of the bed that he you know, I don't think he had his shirt on, he probably took his trousers off - well, he would have done, but yes, so he put his penis inside my vagina again as if I was a slab of meat really, there was no conversation, there was no - if anybody thinks that you know, there must have been some romance for that to happen, it was as if - because I'd just switch off, it was as if I wasn't - it was as if I didn't matter because I didn't matter, I was just a thing. […] you see I'd just switch off while it was happening because it had happened before, so I'd just switch off, but I wouldn't you know, I wasn't thinking, oh yes, this is really nice, it was like and I looked in the mirror in the bathroom and because it was somewhere different, because there was a hook to hang that memory on, to hang that experience on, I just thought, what am I doing here, what am I doing here. So after that, I just like that was it, I wasn't going to be used again.'*.

7. The complainant gave evidence that she and the appellant had then continued on to visit her sick aunt and that he had said nothing about what happened in the hotel and that there had been no conversation about it.

The second complainant

8. The second complainant is also a niece of the appellant (and a first cousin of the first complainant). Her evidence was that she was somewhere between eight and ten years old

when an incident involving indecent assault occurred following a visit to the appellant's home (Count 10 on the indictment). The appellant was driving her back to her grandparent's house, where she was staying, when he veered off the usual route and pulled the car into a yard off the road, told her he needed to check something, and asked her to get out of the car and go with him as it would be safer. They entered a building in the yard and the complainant said she wandered around before entering a particular room. The appellant came into the room behind her and urinated in the corner. She stated that he then asked her to help him to fasten his trousers. She said the appellant began to masturbate in front of her and attempted to place her hand on his penis. She said that she tried to leave, but the appellant came behind her and put his arm around her before finally opening the door and letting her out of the building. She said that when they returned to his car, he rubbed her leg, squeezed her hand, and asked her if she knew what she had done. The complainant stated that the appellant repeated these actions later in the car journey and told her that she would get into trouble if she told anybody about what had happened.

The third complainant

9. The third complainant, another niece of the appellant (and first cousin of the first and second complainants), gave evidence of an incident of indecent assault which took place when she was around eleven years old (Count 11 on the indictment). She was on her holidays with the appellant's side of the family, staying with an aunt. She recounted having been invited by the appellant to spend an afternoon with his daughters and that the appellant collected her in his car. She said she believed he had taken a wrong turn before pulling over to the side of the road beside a hedge. Her evidence was that the appellant then undid his trousers and masturbated in her presence. She said that he ejaculated onto her leg and that he later said, 'God don't tell [his wife's name], she'd stab me'.

The fourth complainant

10. The fourth complainant also has a family connection with the appellant because her brother had married his sister. She gave evidence of an incident of indecent assault which occurred when she was about sixteen years old (Count 12 on the indictment). She attended a dance with her sister and stayed until midnight. She said the appellant was standing at the exit as she left the dance and '*either he offered, or somebody had asked him if he would give me a lift home'*. She did not know him well. While she was sitting in the front passenger seat, the appellant drove slowly and put her right hand on his knee, unzipped his trousers, and began masturbating. She said that when a car was following them, the appellant put her hand back over on her knee. She said she got out of the car as soon as he slowed down outside the gate.

The severance application at the outset of the trial

11. On the first day of the trial, after the appellant had been arraigned on one count (only) before the jury, a *voir dire* took place during which the appellant's counsel made an application for severance of the indictment. During the application, both prosecution and defence referred to the judgments of Charleton J and O'Malley J in *Limen*.

12. Counsel for the appellant relied on the fact that there had been communication between some of the complainants in connection with the matters the subject matter of the trial and which predated the making of statements of complaint, as evidenced by electronic communications between them which had been furnished to the appellant by way of disclosure. He noted that all of the complainants made statements during the period 2014-2016. He submitted that the communications gave rise to a concern about collusion and/or

contamination to such an extent that the indictment should be severed so that the cases of each of the four complainants would be tried separately. Later he clarified that in reality he was relying on the concept of contamination rather than collusion. Counsel said that he was not relying on communications such as those in which one complainant asked something like "Have you been asked to make a statement?" or "Are you going to make your statement?", but rather those in which there was "discussion of the very specifics of the allegations". In this regard, he referred the court to certain specific Facebook messages between complainants, including:

- A communication on the 3rd of February 2014: "…I'm going through all that happened to me for my statement on Monday and because I've blocked it all out years ago and I'm finding it hard to pinpoint things. Can I ask, as I'm trying to put a timeframe on it" [she nominates years] ...." I remember you came to Ireland and I told you what happened to me but was it that year or the year before. If you remember, it would help me a lot, I want to try and remember as much as I can". There was then a conversation as to whether 1985 or 1986 was the correct year for a particular event.
- A communication on the 26th of April 2014 which said, "Hi, I spoke to Garda [name] and [the first complainant] phoned me. I said I would let you know what is happening. He said when he makes the first arrest he will let me know and therefore I will tell my ma, and the lads and [name] was going on, only after the arrest". There is some reference later to their hope that the appellant would be convicted.
- A communication in September 2014 when a complainant was asked, "Do you by any chance remember when [name] got married" and response "I don't think I was there, I don't remember it anyway, it's just my mum thinks it was the same year that

[the appellant] picked me up from [name]'s", together with a reference to the offending complained of and a conversation about dates.

- A conversation of the 15th of November 2014 when parties were conversing about trying to pin down previous offending separate from any allegation on the indictment in respect of the appellant.
- A communication from the 15th of December 2014 which counsel described as including speculation about a payout. However, we wish to make clear that the precise terms of the communications do *not* involve the complainants speculating about a payout as a result of their allegations. The conversation appears to be about why a particular family member is not supporting them and they speculate why this might be, with comments such as "I reckon she and the rest of them have a bigger secret tha they are trying to keep under wraps" and the response "I have the same feeling, not sure what it is but there is something, wonder if it shas something to do with the girls on the bike, it went to court and there was a payout". We say this to avoid any suggestion that counsel's general comments about "speculation about a payout" might sound more sinister than it is.

13. Counsel again referred to the principles to be applied as per *Limen* and submitted that the court was required "to police and make a judgment with respect to the independence of the allegations being made by the respective complainants…". He said that it was "appropriate for the court to be concerned with respect to the possibility of a mutual contamination between the accounts given in their statements of proposed evidence by the four expected complainants…".

14. The following point is important to note. At one stage the trial judge inquired of counsel as to what counts would be left if he acceded to the severance application, and counsel responded by saying that counts 1 to 9 would be left and that the other three complainants would be separated out. He added that he had considered the difference between the factual matrix in counts 1 and 2 (being the rape counts) but said that the gravamen of his application was based upon the other material and the concerns with respect to collusion or contamination. Again, the judge sought clarification that what the appellant was seeking was that all of the counts relating to the first complainant would proceed together (with counts relating to the other three complainants severed from the indictment). Counsel indicated that was indeed what he was seeking. He therefore specifically disavowed any application based on the difference between the rape counts and the indecent assaults and sought to have the first complainant (Counts 1-9 inclusive) separated from the other complainants (Counts 10-12 inclusive) by reason of alleged mutual contamination.

15. Counsel for the respondent pointed out that there had already been a successful severance application insofar as the appellant was originally on an indictment with his brother as co-accused but a different judge had acceded to the application for severance as between the two men. He submitted that all of the offences in respect of the four complainants were of a broadly similar legal character. He said that all of the complainants were (with the exception of count two) children at the time, either prepubescent or entering puberty, being aged between nine and fifteen. Most of the counts on the indictment related to periods of time in the summer holidays or early autumn, when they were on holidays and living a life that was "less supervised", and the appellant was in a position of some authority, particularly as he had access to a motor vehicle. He had "masqueraded himself as someone who could assist the management of the children by giving them lifts here and there and

collecting them in the course of those summer months" and it was in that context that much of the offending behaviour occurred. He submitted that in that broad sense, the allegations were similar to the point where they should be tried together so a jury could have a full understanding of the nature of the allegations.

16. With regard to the suggestion of collusion or contamination, counsel referred to *Limen* and the fact that both Charleton J and O'Malley J had indicated that a certain amount of discussion between victims of sexual offences was to be expected. He said that the defence could explore in front of the jury how any such understandable support might lead to an inference of concoction if circumstances or specific instruction reasonably suggested this, but it should only undermine admissibility "where any contamination is so blatant as to render the evidence unworthy of belief", as had been said by Charleton J at para 34 of his judgment in *Limen.* Counsel submitted that the Facebook messages did not in any way come close to that mark. He submitted that there was nothing in the material to suggest that any of the complainants were putting each other up to describing the sexual conduct and on the contrary, almost all of the communications related to the effects of that conduct. He said that exchanges in relation to dates and matters of that sort in passing did not change that. Essentially the communications amounted to the sort of mutual support that one would expect in such circumstances but no more than that.

17. The trial judge refused the severance application. Having set out the counts in the indictment, a summary of the evidence, and the principles emerging from *Limen,* the trial judge noted that the principal ground for the application was a concern about mutual contamination and said that he had considered the correspondence and statements to which his attention was drawn in support of the proposition that such a risk had been demonstrated

in the present case. He concluded that the risk of contamination in this case was not of such a nature as to fall foul of the guidance given in the *Limen* case. He drew a distinction between familial support, on the one hand, and pressure to make a statement to the Gardaí and/or influencing the content of a statement, on the other. He was of the view that the communications tended to show support only, and that it had not been established that there was a risk of contamination or collusion such as to require the severance of the counts or any of the evidence to be ruled inadmissible. He therefore refused the severance application.

The PO'C application at the close of the prosecution case

18. At the end of the prosecution case, counsel for the appellant applied to have the case withdrawn from the jury on foot of the principles set out in *DPP v PO'C* [2006] 3 I.R. 238 on the ground that there was a real risk of an unfair trial. Submitting that no direction could cure the situation, he relied upon the following:

(i) That one of the complainants could not narrow the period during which the alleged offence was committed beyond stating that she was between the ages of eight and ten, resulting in the extension of the period of time in the relevant count from a six-month time period to one of three years.

(ii) That numerous potential witnesses who were actually present when the offending occurred at the very outset of the offending were not in a position to be produced to speak to their memory, due to the lapse of time. Counsel referred in this regard to the fact that it was contended by the first complainant that the first occasion of offending occurred when she was present in the home in Carlow and was invited by her mother to get into bed with two of her uncles and with her

brother. The grandparents were no longer available, nor was the first complainant's mother, nor was the first complainant's aunt "B", the latter having died only a few years previously; and

(iii) The fact that the rape allegation in respect of the first complainant when she was an adult was 'in the mix' with indecent assaults of both her and others as children, in a wholly different context.

19. The respondent submitted that the defence was simply that the offences did not happen and that many of the details, such as the family set-up, the holidays, where people stayed and so on, were largely uncontested. As to the wide time period in respect of one of the complainants, counsel stated that the factual allegations made by this complainant were clear and her difficulty lay only in particularising the date on which the incident was alleged to have occurred. As to the individuals who were no longer alive or available to be called as witnesses, the respondent further submitted that every allegation of wrongdoing was said to have occurred when the appellant was alone with the complainants and there was no suggestion from the complainants that the wrongdoing was witnessed by anybody else.

20. In his ruling refusing the application, the trial judge said there were three legs to the application made by the appellant. In relation to the wide time period in respect of one of the complainants, he said that it was clearly a difficulty that the court must deal with in its charge, but he did not believe that it was a ground upon which the trial ought to be brought to a conclusion. In relation to the incident alleged to have taken place in a bedroom in a home that other people lived in in 1971, the complainant did not say that the incident itself was witnessed by anybody. As to the non-availability of witnesses more generally, this could

and should be dealt with by way of warning to the jury. He said that he was not satisfied that it had been established that any particular unfairness or prejudice arose such as would push the court to exercise its jurisdiction to stop the trial.

Grounds of Appeal

21. In the original notice of appeal, the first ground was that the trial judge erred in refusing the defence application to sever the counts on the indictment such that a separate trial would be held in respect of each of the four complainants on the grounds that there was potential collusion or contamination as between the complainants. The effect of the proposed severance would therefore have been to hold four separate trials i.e., Counts 1-9; Count 10; Count 11; Count 12.

22. The second ground of appeal on the original notice of appeal was to the effect that the trial judge should have acceded to a PO'C application.

23. The appellant seeks to add a further ground of appeal which was not on the original notice of appeal to the effect that the appellant's trial was unsatisfactory and his convictions unsafe by reason of the fact the two counts of rape (counts 1 and 2) were not tried separately from each other and from the other counts on the indictment (all of which were counts of indecent assault).

24. We pause to note the precise terms of the proposed new ground of appeal. It advances two propositions: (i) that the two rape allegations (first complainant) should have been tried separately from each other; *and* (ii) that the rape allegations (first complainant) should be

tried separately from the indecent assaults (first, second, third and fourth complainants). The logic of this would lead to three separate trials i.e., Count 1; Count 2; Counts 3-9.

25. The cumulative effect of the appellant's two severance applications (which are advanced cumulatively rather than as alternatives) is that there should, in total, have been six different trials: (i) trial of the first complainant's adult rape allegation; (ii) trial of the first complainant's child rape allegation; (iii) trial of the first complainant's indecent assault allegations; (iv) trial of the second complainant's indecent assault allegation; (v) trial of the third complainant's indecent assault allegation; and (vi) trial of the fourth complainant's indecent assault allegation.

The first issue: severance of the indictment

26. The difference between the first ground of appeal in the original notice of appeal and the proposed new ground of appeal lies in the precise basis for severance advanced on behalf of the appellant. The proposed new ground of appeal focusses on the fact that the first complainant's allegations included two allegations of rape, one when she was a minor and one when she was an adult, whereas the remaining counts in respect of both her and the other complainants were in respect of sexual/indecent assault. The original ground of appeal concerning severance concerned the refusal of the trial judge to sever the indictment so that separate trials would be held in respect of each of the four complainants, and the basis for the application and the ground of appeal was the alleged risk of collusion/contamination said to arise by reason of certain electronic messages exchanged between the complainants. We will deal with both issues in this section of the judgment because both concern the issue of severing the indictment.

27. As to the original ground of appeal, we are satisfied that the trial judge did not err in refusing to order severance on the ground of collusion/contamination. In *Limen,* Charleton J said at para 35:

> "Naturally, if there is a reasonable possibility of joint concoction, that undermines both credibility and cross-support; see *Hoch v. The Queen* [1988] HCA 50, (1988) 165 C.L.R. 292. It is hardly unnatural, however, and as O'Malley J. points out, for people in a family or a school, or who otherwise know of each other, to discuss a hideous experience or to form support groups or offer friendship to each other. That is not contamination. Nor is it an undermining of independence. If the defence wishes to explore how any such understandable support might lead to an inference of mutual concoction, that is of course permissible where circumstances or specific instruction reasonably suggests this. It should only, however, undermine admissibility where any contamination is so blatant as to render the evidence unworthy of belief; *Reg. v. H.* [1995] 2 A.C. 596."

28. At para 193 of her judgment, O'Malley J set out certain general principles at (a)-(i) inclusive, of which three dealt with the issue of collusion/contamination in the following terms:

> "(c) The inherent unlikelihood of multiple false accusations, and therefore the probative value, rises in situations where the complainants are independent of each other and there is no reason to fear collusion or mutual contamination.

(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."

29. The appellant in the present case relies upon the electronic messages passing between the complainants. It may be noted that they are all members of the same extended family and would therefore know and have reason to be in contact with each other, particularly as they had in common the fact that they were each claiming to have been the subject of abuse at the hands of the appellant. The fact of their contact and general discussion of matters relating to the alleged abuse is not, therefore, in and of itself a matter of concern. Further, while a very large volume of electronic messages passed between the complainants, most of them can be characterised as expressing mutual support, and few, if any, discuss the specifics of the offending. The height of the appellant's case in that regard is that some of the

messages involved a complainant trying to firm up on the date of a particular incident with reference to events such as weddings and the like. As we have seen, the reference to "payout" did not refer to any potential compensation to the complainants in respect of the alleged abuse. In our view the conversations evidenced by these messages did not raise the level of concern to one which required the severing of the indictment and instead fell to be dealt with as a matter in front of the jury in terms of the complainants' credibility and reliability. We would therefore uphold the ruling of the trial judge in this regard.

30. As to the proposed new ground of appeal, the obvious difficulty facing the appellant is that the argument that the cases should be severed on the basis that the rape charges, and in particular the second rape charge, should be kept separate from the indecent assaults was never advanced before the trial judge. Indeed, as we saw earlier, when the appellant's counsel was specifically asked by the trial judge whether the appellant wished to raise this issue, counsel answered in the negative. The trial judge then gave a careful and detailed written ruling on the severance application *as it had been advanced* at the trial.

31. No issue arises as to the competence of the counsel who represented the appellant at the trial. On the contrary, the new legal team acting for the appellant in the appeal obtained an adjournment when they were instructed at a late stage in respect of this appeal, and this Court specifically gave them an opportunity to take instructions on whether they wished to raise any issue as to the competence of their legal representation at the trial, they having flagged this as an issue which they wished to consider. After consultation with his new legal advisers, the appellant decided not to raise the issue of competence of counsel at the trial.

32. We therefore have a situation where the precise point now sought to be added as a new ground of appeal is one which competent counsel instructed by the appellant expressly declined to pursue at the trial even when the trial judge raised it with him. The Supreme Court decision in *People (DPP) v Cronin* [2006] 4 IR 329 therefore represents a considerable obstacle for the appellant. This is as far from a situation of accidental oversight of an issue at trial as one could imagine, and no explanation has been offered for the complete *volte face* by the appellant on the point. While the solicitor's affidavit in support of the motion to add a new ground of appeal set out a history of how the change of legal team came about, the motion appears essentially to have come about simply because of a difference of opinion between the two legal teams.

33. Counsel argues that *Cronin* requires the Court to consider a point not raised if it indicates that due to some error of substance, some fundamental injustice has occurred. For the avoidance of doubt, we should say that we do not consider that this threshold has been reached.

34. The fundamental principles in this area of the law were set out in *Limen* [2021] 2 IR 546 and discussed further by this Court in *People (DPP) v. PP* [2022] IECA 289. What has to be considered is whether the allegations which are sought to be severed from each other are of the "same or similar character" within the meaning of Rule 3 of the indictment rules attached to the 1924 Act, and/or whether the trial of the allegations together would 'prejudice or embarrass' the defence within the meaning of s.6(3) of the same Act.

35. In the first instance, we have no hesitation in holding that an allegation of rape and an allegation of indecent or sexual assault are allegations "of a similar nature". The difference between them lies only in the different points of gravity they represent within the spectrum of sexual assaults. They are not qualitatively different, in the way that, say, an offence of fraud and rape would be. This disposes of the suggestion that the two rapes should have been tried separately from each other which is encompassed within the motion to introduce a new ground of appeal.

36. In truth, the appellant's argument revolves not around the difference between rape and indecent/sexual assault but rather around the fact that one of the two alleged rapes was alleged to have been carried out when first complainant was an *adult*. This is encompassed within the proposed new ground of appeal insofar as it is sought to suggest that there should have been severance not only as between each of those rape allegations and the remaining counts (all the indecent assaults), but as between the adult and child rape allegations.

37. We are of the view that there is no bright-line rule in the sense that one can say that adult rape allegations should *never* be tried in conjunction with indecent assaults in respect of the same person when a minor, nor conversely can one say that they should *always* be tried together. All depends on the facts of a particular case. In the present case, the terms in which the complainant described the rape of her as an adult created a nexus or connection between the pattern of sexual abuse that her uncle had subjected her to as a minor and the incident when she was an adult. We have earlier set out her description of this incident as contained in her Garda statement. We emphasize her use of phrases such as '*I followed him <u>because I always did</u>, because he'd never say what he was doing, <u>you just went</u>*'; "*…he put his penis inside my vagina again as if I was a slab of meat really, there was no*

conversation"; "....because I'd just switch off, it was as if I wasn't - it was as if I didn't matter because I didn't matter, I was just a thing. ... you see I'd just switch off while it was happening because it had happened before, so I'd just switch off" and "*So after that, I just like that was it, I wasn't going to be used again"* (emphasis added). The language used by the appellant herself creates a strong connection between her experience of what was happening to her as an adult and what had previously happened to her as a child. In those particular circumstances, there was in our view a sufficient nexus to warrant the case being viewed as falling within Rule 3.

38. Of course, one would expect the jury to approach an allegation of rape of an adult and a child somewhat differently. Whether it was credible that the complainant went along with the appellant to the hotel room in the manner described, and whether or not she consented, and whether or not she might have behaved a particular way because of what happened when she was child were all factual issues for the jury to decide. However, she herself was asserting that this adult rape occurred precisely *because of what had gone before*, in other words that it was in effect part of a pattern of offending and that her reaction even as an adult was conditioned by what she had been subjected to when she was a child. Her credibility and reliability were for a jury to assess, but in the meantime, in terms of the severance question, her statement did disclose a sufficient nexus within the allegations themselves for them to fall within the terms of Rule 3.

39. It may be helpful to observe that a different factual scenario in terms of an adult rape allegation in respect of a person who also alleged child sexual abuse might have yielded a different conclusion on a severance application. Our conclusion on the point in this case is based upon the precise terms in which the first complainant herself described the adult

incident which in our view created a nexus between the various allegations sufficient to satisfy the test of offences of "same or similar character".

16. The next question is whether the appellant can show that he was "prejudiced or embarrassed" within the meaning of s.6(3) of the Act. Obviously, the prejudice that has to be shown in this regard, to warrant a severing of the indictment, is not simply the prejudice caused by admissible, probative evidence. As Charleton J said at para 17 of *Limen*, "An accused is not "prejudiced or embarrassed in his defence" because there is more than one witness testifying to a similar crime which forms part of the same series of events or which are of the same or similar character".

17. Again, we are of the view that by reason of the precise terms in which the first complainant described the adult rape in this case, in effect as being part of a pattern of offending which started when she was a child, the evidence was both admissible and probative and not prejudicial with regard to the allegations of indecent assault (as against the first complainant and the remaining three complainants) within the meaning of S6(3) of the 1924 Act. In our view, the trial judge would have been acting within discretion if, having been asked to sever the indictment to siphon off the adult rape allegation from all the indecent assault allegations, he had refused the application. That being so, we consider that the case falls well below the threshold of a misapplication of fundamental principles described in *Cronin.*

18. The proposed ground of appeal is therefore rejected.

The PO'C application

19. On appeal, the appellant essentially repeats the submissions made to the trial judge at the time of the making of the application to withdraw the case from the jury. He submits that the offences charged occurred in the 1970s and 1980s and that the lapse of time was such that one of the complainants could not identify the timing of the alleged indecent assault beyond a two-year period during which the alleged offence against her was said to have occurred. He submits that the non-availability of potential witnesses prejudiced the appellant, in circumstances where most of the incidents were said to have occurred in the context of family holidays and a number of relatives and others might at least have been able to provide evidence of surrounding circumstances, and in one case were actually in the same room and building as one of the complainants when one of the alleged offences was said to have occurred. He also relies on alleged prejudice caused by the trial of the rape offences with the indecent assaults, particularly the adult rape allegation.

20. There is no doubt that in principle a trial judge has the power to halt the further progress of a criminal trial if, whether by reason of delay or other factors or a combination of the two, there is a real risk of an unfair trial. However, in the circumstances of this case we are not persuaded that the trial judge erred in the conclusion that he reached, namely that the matters drawn to his attention should be dealt with by way of direction to the jury in his charge and not by way of halting the trial itself.

21. We agree with the trial judge'sconclusion that the question of the broad time-period in respect of one of the complainant's allegations and the question of witnesses who were no longer available did not warrant the withdrawal of the case from the jury but rather could

be dealt with by way of direction. As to the alleged prejudice caused by the joint trial of the rape allegations with the indecent assaults, we repeat our earlier observations as to the precise manner in which the adult rape was described, and consider that all of the offending was described as part of a pattern of behaviour which took place when the complainants were children (second, third and fourth complainant) or had been set in motion when one of them (the first complainant) had been a child with the dynamic continuing into her teenage years and into adulthood. In those circumstances, the prejudicial effect was outweighed by the potentially probative value of the evidence, and it was within the trial judge's discretion to conclude that all matters should be heard together and evaluated at the conclusion thereof by the jury.

Conclusion

22. In the circumstances, the Court, having rejected all grounds of appeal, dismisses the appeal.