An Chúirt Uachtarach

The Supreme Court

Clarke CJ
McKechnie J
Charleton J
O'Malley J
Baker J

Supreme Court appeal number: S:AP:IE:2020:000016
[2020] IESC 000
Court of Appeal record number 2018/10
[2019] IECA 318
Central Criminal Court bill number: CC DP 0074/2015

Between

The People (at the suit of the Director of Public Prosecutions)
Prosecutor/Respondent

- and -

Clement Limen
Accused/Appellant

Judgment of Mr Justice Peter Charleton delivered on Thursday 18 February 2021

1. When a jury is hearing from one person testifying to repeated sexual violence, perhaps over years, or is presented with multiple accounts from two or more individuals claiming to be the victims of the same accused, issues arise as to how such allegations may cross-relate in terms of proof. This raises the question of the relevance of the account of each such alleged victim to the allegations of the others. The purpose of this judgment is to concur with O'Malley J and, in so doing, to analyse the complex legal network of interlocking rules of evidence and procedure through which a necessarily simple path should be found for general application in future criminal trials of multiple allegations from several persons. Particularly often, multiple allegations characterise sexual violence trials. Those who perpetrate sexual predation on children rarely stop at one incident or with one victim. Serial incidents of sexual violence on adults can also occur. But, since adults can less easily be cowed into silence, that pattern is much less common and the perpetrator is often quickly reported after the first crime, though many incidents can be held back because of misplaced shame or because of worry about going to court. In the sphere of sexual violence, joint trials of several incidents and often involving several individuals recur in the criminal courts. Hence, the resolution of the issues posed by the conviction of this accused at a joint trial for raping two adult women in his apartment, after a party in June 2014, become of wider application.

Background

2. Two ladies in their 30s went for a night out in a large rural town. While at a venue they met the accused, who invited several people to a party at his home. There was music, dancing and the imbibing of alcohol and what is described as taking a puff of cannabis. How strong that cannabis was is not known but the plants yielding that drug have been selectively bred over the several decades of its popularity to strengthen the potency in its psychoactive components, tetrahydrocannabinol and cannabidiol. The ladies did not return home but camped there, one in a bedroom and the other on a couch. One woke up to find the accused raping her and on finding her friend she, in turn, related that the accused had sexually attacked her as well. Both ladies were brought to make complaints, by the husband of one, to a local Garda station.

3. They shared a suspicion that they had both been doped, that something had perhaps been slipped into a drink. Toxicology reports, however, gave no such indication. More likely was the interaction of drugs and alcohol producing a soporific state entirely accidentally. This was taken advantage of by the accused. The trial proceeded in an orderly way. Only at the end was any potential issue canvassed. In her closing address to the jury, counsel for the prosecution mentioned how the accounts of the two ladies were strikingly similar. For those familiar with the law of evidence this would have been a term of art, enabling evidence that the accused had committed a prior crime to be introduced to prove the accused's guilt; but for the jury it would have been no more than a piece of rhetoric. Here, in reality, two victims had given similar accounts of a sexual attack. It may be questioned as to why that does not strengthen the case against the accused? In reality, supposing that different accounts had been given, it was entirely open to the defence to turn that into an argument to the jury as undermining the soundness of the victims' individual complaints. Drawing a distinction here between a legal submission, which this is not, and a train of argument in a jury address, which this is, this might be a persuasive argument since the accused had told interviewing gardaí that one of the ladies had consented to sexual relations and that he had needed to repel the amorous attentions of the other. While the reference by counsel for the prosecution to striking similarity caused disquiet to counsel for the defence, in the end nothing was made of it and the trial judge did not touch on or analyse cross-support of evidence, corroboration or any relevance there might be to two separate complaints of a similar kind being given in the same trial against the same accused. In giving leave, this Court considered that analysis of the following issues to be important both to future trials and to considering the soundness of this conviction of the accused on two counts of rape and one of sexual assault:

> 1. Where there are two or more alleged victims in an alleged sexual violence case, can the account of one support the evidence of any other?
> 2. Can this occur only when the accounts are so similar as to be such as to otherwise admit their evidence under the similar fact principle, or is it enough that broadly concurring accounts are given?
> 3. What, if any, direction ought a trial judge give to the jury as to cross-support or as to corroboration where there are two or more alleged victims in a sexual violence case?

Prior Crimes

4. Within the trial process, the demonstration of guilt must proceed on the basis of logic because supposition or prejudice prove nothing. The issue of whether the jury can be satisfied that the accused committed the crime is demonstrated by facts, or deductions from those, pointing to that conclusion. Cases are not to be decided on the basis of emotion, which often coincides with illogic, or prejudice, which shuts out rational analysis, but on the shrewd application of common sense. At times the distinction between a fact which proves that a fact in dispute is more likely real, or is less likely, is not easy to draw. This may be exemplified. A man is charged with burglary and as part of proving the fact in issue, that it was this individual who entered the home of the victim and stole valuables, the prosecution proposes to disclose to the jury his multiple convictions for theft offences. Some might find that convincing. It does not, however, logically follow that because the man has committed burglaries before that he is guilty of any particular burglary on the basis of his record or prior crimes. Hundreds of people in the community have such convictions, so how can it prove that he was the one guilty of this crime? Perhaps even worse would be the supposition that because the person accused of a burglary is a prisoner on parole for murder or on bail for fraud that some kind of innate criminal propensity would lead him to enter an unlocked door and steal a handbag and contents. In terms of ordinary thought, however, were householders in a particular suburb to hear that a half-way house for released prisoners was to open in their area, they might become more security conscious. Wariness against persons in that facility might harden into suspicion were one or other of them found to be lurking in a front garden at night. They might have just wandered in innocently to find a bench to smoke. This natural tendency to leap to conclusions demonstrates that suspicion and prejudice are not the same as proof, but that suspicion based on reason may morph into a fact from which proof may be found through the analysis of circumstances and testimony. The difference between a university student found in the same circumstances and the inhabitants of the rehabilitative facility is that suspicion is more readily trained on the latter than the former; and that this happens out of supposition rather than being the product of rationality.

5. It is logical reasoning from deduction and inference alone that is the proper approach to proof in a criminal trial. In *King v Attorney General* [1981] IR 233 a provision whereby hanging around buildings could be proven to be an offence through the admission into evidence of the known character of the loiterer, through proof of prior convictions for larceny, was struck down as offending the requirement of certainty in criminal law and as being contrary to the fundamental fairness required of a criminal trial under Article 38.1 of the Constitution. What is a fact in issue in a criminal trial changes with both the nature of the charge and the nature of the evidence. In the past it was said that there is no confession and avoidance in a criminal trial, meaning that the prosecution always bear the burden of proof, save in limited instances where statute or common law reverses some aspect of a defence onto the accused, the accused never being under an obligation to admit facts and to put forward a defence, for instance a claim of right made in good faith in answer to a theft charge.

6. To an extent this has been modified by provisions allowing for admission of facts or for agreement as to facts under sections 21 and 22 of the Criminal Justice Act 1984. The use of this, however, is in practice limited to such mundane matters as proving the integrity of a crime scene. What is required in any trial is that the prosecution prove what is alleged in the indictment, but what facts are in issue changes with the nature of the

case and whatever limited concession or disclosure may have been made by the accused. In a sexual violence case it is rarely the identity of the accused that is in issue, but identity frequently is the pivotal point in theft by stealth cases. There, it may issues be the quality of a recognition or identification or the clarity of a fingerprint. In sexual violence cases the key issue is more likely to be whether the person complaining consented to intercourse. In this case the central issue was consent, vis-à-vis one lady, and whether there had been a sexual act at all in relation to the other. Evidence should be relevant to be admitted, but the relevance of individual pieces of evidence cannot be assessed in isolation from the entire factual matrix or by blinkered scrutiny; see *The People (DPP) v Almasi* [2020] IESC 35, [24-25]. Cole puts the matter well: relevance "denotes something which is variable and elastic: variable because a particular fact may be relevant in one context and irrelevant in another, elastic because the relevance of any relevant fact may vary in degree from being only minimally of interest to being highly or compulsively persuasive" Cole, Irish Cases on Evidence (2nd edition, Dublin, 1982) 1-2. Evidence may seem of no or little relevance considered in isolation but may become relevant, may have the potential to prove something, such as opportunity or motive or presence at the scene of a crime, because of an interrelationship with other evidence.

7. Relevant evidence is always admissible under our system of law. Evidence may be excluded but the burden of demonstrating that the law requires relevant testimony not to be heard with the jury, charged under Article 38.1 of the Constitution with trying fact, rests on the accused. Relevant evidence may cause both an emotional reaction, such as horror at what was done, and that evidence may also be logically probative. The fact of evidence being emotionally charged is not a ground for exclusion. Where evidence tends to cause prejudice, admission may require to be considered but that evidence is admissible unless the prejudicial charge of that evidence overwhelms its importance as an element of logical proof. That the accused has previously committed an offence is not of itself logical proof on a criminal charge. It evokes prejudice and is consequently rarely admitted and only then because it is of a character that makes it a strong logical component of proof. In that respect, the jury will be told that because evidence reveals a prior offence, that should not lead to any prejudice against the accused and that only if the evidence demonstrates proof as a matter of reason it should be acted upon. In Archbold - Criminal Pleading, Evidence and Practice (26th edition, London, 1922) page 353, that rule is stated thus:

> The general rule in criminal (as in civil) cases is, that nothing may be given in evidence which does not directly tend to the proof or disproof of the matter in issue. "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his conduct or character to have committed the offence for which he is being tried" *Makin v. Att.-Gen. for N.S.W.* [1894] A.C. 57.

8. The exceptions there laid down were derived from the case cited and are that prior offences may be proven, firstly, where the evidence is relevant to an issue before the jury and, secondly, in order to negative a defence, such as mistake or random coincidence, that may otherwise be open to the accused. What that defence may be must depend on the scope of the evidence. The two leading cases of that era continue to be instructive. In *Makin v AG for New South Wales* [1894] AC the presence in the garden of the accused of multiple burials of small infants was relevant to a homicide charge at a time when forensic pathology was less advanced; since a likely answer of accident or sickness

relating to the death of the infants charged was undermined by so many deaths in circumstances where the small children were previously taken in for care on minimal payment and died soon afterwards. In *R v Smith* (1915) 11 Cr App R 229, 25 Cox 271, on a charge of murdering his wife by drowning in their bath, the prosecution introduced as against the explanation of illness and accident for the death while bathing, the victims bearing no more marks of violence than slight bruising on the elbow, the evidence that two others had similarly died. An experiment was carried out which shewed that suddenly lifting the feet of a person in a bath, so that without warning their head slid rapidly under the water, caused immediate unconsciousness. That was of key relevance as were prior deaths. While that might be prejudicial, the focus on the evidence as a logical matter of proof diminished illogic to enable the engagement of reason. Hence, for such evidence of prior conduct to be excluded, the prejudicial effect must overwhelm the probative value of the evidence, which consequently must necessarily be limited.

9. In those kind of cases, what the prosecution seeks to accomplish is the proof of the accused committing the crime by establishing that other crimes were committed. All criminal trials are subject to the fundamental rule that evidence can only be accepted if the jury regard it as established beyond reasonable doubt. Thus, far from the creation of prejudice, the proof of a prior crime may be for the purpose of leading not to a verdict based on suspicion but on logic. Were reasonable persons to become aware of such a background to the crime but the jury not to hear of it, the thought might be as to the lack of logic in the law. The second aspect of the *Makin* case is that where the evidence, though prejudicial, is sufficiently probative to the prosecution case there is no rule of law requiring its exclusion though an appropriate comment to the jury on the importance of considering it only in the context of shrewdly analysing how it may prove a fact in issue is required. An example was *The People (AG) v Kirwan* [1943] IR 279. The accused was charged with murder. The body of the victim had been professionally dismembered, as if a carcase of mutton. It was thus relevant that the particular accused had trained to be a butcher. This had happened while serving a prison sentence as part of rehabilitative education. Evidence was not to be excluded since the prejudice of knowing of a conviction did not overwhelm a clearly logical item of proof. This principle is of universal application though, as O'Malley J comments, too often in the past the legal mind has sought unnecessary categorisations as to proof only of identity or motive or as to particular forms of crime. That is not the law.

10. While what were once simple rules diverged into complexity with subsequent rulings, so that system evidence and similar fact evidence came incorrectly to be seen as species of testimony enabling admissibility, in both the *Makin* and the *Smith* cases the prosecution were undertaking to present an exercise in logic and were not seeking to obtain a conviction through supposition or prejudice. That would not be permitted. But equally it may be wrong by the mis-application of the rules of evidence to reduce the proof offered by the prosecution so that the resulting testimony offered to the jury becomes an affront to logic.

Joinder and severance

11. Section 5 of the Criminal Justice (Administration) Act 1924 provides that "subject to the provisions of the rules under this Act, charges for more than one felony or for more than one misdemeanour … may be joined in the same indictment". Section 4 requires an indictment to have a statement of the charge and to have a statement of what is alleged in such form as to furnish the accused with "such particulars as may be necessary for

giving reasonable information as to the nature of the charge." In that context, the Indictment Rules appended to the 1924 Act give examples of statements and particulars of various charges. The Rules also provide at Article 3: "Charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character." It is the Director of Public Prosecutions who decides in the first instance that a number of individual offences may be grouped together and sequentially numbered in the one indictment. Prior to trial, the defence may apply to the judge that each charge be tried separately. The analysis of when it is right to join charges in an indictment and when a judge ought, by way of judicial discretion, sever an indictment and order separate trials have become incorrectly enmeshed with the particular rules that were once current in attempting to draw lines as to where system evidence or strikingly similar evidence might be admitted. Hence, s 6(3) of the 1924 Act provides:

> Where, before trial, or at any stage of a trial, the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in an indictment, the court may order a separate trial of any count or counts of such indictment.

12. It could never have been the intention of the Oireachtas that only offences which occurred at effectively the same time were exclusively those which could be included in the same indictment. For instance, an accused enters a dwelling at night and steals, burglary, smashes a window to escape, criminal damage, because the owner has appeared at the door through which entry was effected and then assaults the householder in order to get away, assault causing harm. Furthermore, many crimes contain a lesser included offence, where for instance the jury may return manslaughter on a murder charge or theft on a burglary charge or assault on an assault causing harm charge. Often, those alternatives are spelt out in the indictment by separate charges. Such charges are "founded on the same facts". But that cannot be all that is permitted since "a series of offences of the same … character" may be charged as may "a series of offences of … a similar character." An instance might be a series of burglaries where the accused's fingerprints was found in some of the places targeted or where a confession related over several crimes or the accused was identified in respect of more than one. What is not required is that all the charges be the same, for instance rape, and nor is it specified that these occur against the same victim. It is clear that there may be, as in this case of the two women in the accused's flat, different victims and it is clear as well that what may be involved are instances of criminal conduct separated in time and by when these are alleged to have occurred. With the growth since mid-1980s of the prosecution of sexual violence cases against children and adolescents, which were a rarity beforehand, it has become commonplace to indict a person thought to be a serial offender with predating on children within his care, either as a teacher, coach, uncle or father, by laying counts for each of several incidents and in respect of a number of alleged victims. But, here there is an important distinction from revealing prior convictions. What this involves is not, as in *Kirwan*, telling the jury that the accused was previously convicted, but in laying before the tribunal of fact a series of accounts from either the same alleged victim or from several witnesses as to the accused's alleged conduct in respect of which he is assumed to be innocent and where the prosecution bear the burden of proving each such count. Charging an offence, producing evidence relevant to a count on an indictment, is

not the same as proving a prior conviction, as in *Kirwan*. All such allegations are subject to proof.

13. Nonetheless, it is realistic to look at the stark difference in scenarios which present as between an allegation, or series of allegations, by a prosecution witness and the same kind of allegation made by two or more prosecution witness where both of them relate accounts of sexual violence as children or while in early adolescence. By far the greatest difficulties in the pursuit of justice in sexual violence cases are that the issue of consent is contested where the victim is of age or that all allegations are denied where the victim was a child or early adolescent and comes forward after years of silent suffering. These predatory events are rarely witnessed. An accused will, typically, claim consent by an adult and will assert a malicious report, or baffled disbelief, in the face of a claim by a child or early adolescent. Cases of false allegations by adults or by younger people do occur, albeit, as experience shows, rarely; though some few are well documented. Problems of proof are elevated when a criminal case rests on the word of one person against another. In reality, such misgivings in a jury that the criminal standard of proof could ever be reached surely must diminish in the common-sense analysis whereby on the evidence there is more than one witness claiming sexual violence against them by that accused.

14. Thus, which is a stronger prosecution case: where one girl of fourteen claims grooming and then sexual abuse, charged as five sample counts, or where three girls claim that, one twice and the others once? If the jury is told that each count in the indictment is to be considered separately, could walls of unknowledge be inserted into the minds of the jury, as a matter of reality, as between each bundle of evidence relevant only to a single count, or a single alleged victim? If accounts are similar, because, to take a representative example, each child went to the same gymnastics coach and abuse occurred in the changing room when he or she had been asked to wait behind, does that not become a case where each such account supports the inference that this is a method of operating by the accused? The alternative is an affront to reason: that the trial judge severs the indictment so that the three children give evidence in the absence of the testimony of those similarly abused and the jury, trying the case within those judicially-imposed blindfolds, enter a series of acquittals over several separate trials. That cannot be right. If later informed of the situation and asked what their analysis would have been having heard the three children, had the jury had the chance, a negative comment might validly be made by the jury members as to the relationship of law to the practical dispensation of justice.

15. Reference has been made to the decision of the Court of Criminal Appeal in *The People (DPP) v BK* [2000] 2 IR 199. This was an appeal where the issues surrounding cross-support of evidence from different victims was conflated with severance of an indictment. It is not the rule that counts can only be joined in an indictment where each count cross-supports the evidence in all the other counts. Were that to be so, an indictment could not contain a series of accounts from a single alleged victim as to how she was groomed and then sexually abused over months or years. Nor can it be the case, therefore, that accounts from two or more victims may only be joined where each supports the other as to detail in circumstance and method. 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. Each such count must be proven. Apart from that, an indictment should not be overloaded with either counts or large numbers of alleged

victims of offences. Thus the only rational rules are to seek a connection between the events referenced in the counts, to leave the analysis of fact to the jury, conscious that the prosecution and the defence will each point out the aspects which strengthen their side of the argument in closing speeches, that the judge will correct any errors, and that indictments should not be unwieldy.

The Scottish experience

16. English common law, adopted under Article 50.2 of the Constitution, allows conviction on the basis of the testimony of one witness. That one witness can be the accused making a statement against interest; a confession to crime can be the only evidence for the prosecution, apart from proof that a crime was actually committed. Some witnesses are subject to a warning, an accomplice being the sole remaining mandatory requirement, that it is dangerous to so convict. Other categories of witnesses allow for a warning to the jury where the judge considers it necessary, sexual violence allegations being here relevant, though there the warning may be in terms of potential rather than actual danger. In the Law of Moses, a single unsupported witness cannot suffice: "One witness shall not rise up against a man for any iniquity, or for any sin, in any sin that he sinneth: at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established." (Deuteronomy 19:1) This is repeated in the New Testament: "Moreover if your brother sins against you, go and tell him his fault between you and him alone. If he hears you, you have gained your brother. But if he will not hear, take with you one or two more, that 'by the mouth of two or three witnesses every word may be established.'" (Matthew 18:15-16, II Corinthians 13:1) Of course, through other testimony other than the mouth of a witness the truth may speak; as in motive or declarations, as in circumstances, and as in telephone or computer usage analysis, fingerprints, DNA, dyed hair comparison, bullet striation, blood spatter patterns, and forensic pathology.

17. Considerable confusion has been sewn into the proper instruction to a jury as to corroboration. In plain terms, corroboration is some evidence independent of the evidence about which a tribunal of fact must be especially careful, some evidence through human or forensic testimony that tends to show, but not necessarily prove on its own, that the accused committed the crime. The corroboration is to be considered first, as to whether the jury accepts it, and that evidence together with the evidence requiring care, such as the accomplice, are then considered together to see if proof is established. Before the jury hears about corroboration, counsel for the prosecution should point out the evidence sought to be so categorised as a matter of law, the judge rules what testimony, if accepted by the jury could corroborate the involvement of the accused in the crime, that must be accepted by the parties in their addresses to the jury, the judge then points to the evidence in the context of the warning and it is for the jury to assess if that evidence does as a matter of fact tends to demonstrate independently of the suspect evidence that the accused committed the crime; *The People (DPP) v FitzPatrick* [2018] IESC 58 [24-25]. In reality, corroboration is no more than independent evidence, apart from the testimony about which especial care must be taken, supporting the proposition that the accused committed the crime: consider first if that support is to be accepted in fact and then what weight is to be attached to it and all the evidence together: is that enough to convict or not?

18. Scots law has never proceeded to conviction on the basis of a single witness who is uncorroborated, in the sense of testifying to guilt without any other fact on the ground,

meaning forensic evidence, or other witness supporting the libel, meaning charge, of the complainer, meaning alleged victim. Thus, there must be two different and independent sources of evidence accepted in order to find the accused guilty. This requirement can be traced back to the Biblical sources and the caution that it embodies can be seen in the Code of Justinian, 'we have ordered that no judge shall in any case readily accept the testimony of only one witness: Institutes of Justinian (Book IV Title XX Concerning Witnesses, 334 AD). It is the latter reference that is most likely to have influenced the application of the rule by the institutional writers in both civil, 'twa witnessis at the leist makis lauchful probatioun' (Prackticks 1469-1579, p 373), and criminal law, 'no one shall in any case be convicted on the testimony of a single witness' (Hume ii, p 385). But two witnesses can, as ordinary sense would suggest, support the other where "time, character and circumstance" show that offences alleged against the accused "have underlying unity."

19. In the case establishing the modern doctrine, several young seamstresses complained of their employer and supervisor abusing them over a period of seven years, for one group, and three years for another group. As might be anticipated, the abuse was private. There was but one witnesses, the girl herself, but similar testimony from the other girls as to their offences could support the guilt of the accused and so act as support. Thus, though each witness supporting the other as to the unity of the accused's criminal character and circumstance of commission, sufficient underlying unity could be established, as a matter of law, without forensic evidence or evidence of motive or a confession, to suffice as to the crime committed against herself: another witness in that position could support her and she in turn support that other witness's testimony; *Moorov v HM Advocate* [1930] JC 68, 1930 SLT, 596. A modern statement of the doctrine may be found, footnotes omitted, in Renton and Brown Criminal Procedure (6th ed, volume 1, part VIII) paragraph 24.87:

> Where the accused is charged with a series of similar offences, closely linked in time, character and circumstances, the evidence of one source as to each offence will be taken as mutually corroborative, each offence being treated as if it were an element in a single or particular course of conduct, but it is not enough that the offences display a general disposition to commit a certain type of offence. This rule, known as the rule in *Moorov*, or the *Moorov* doctrine, was thought at one time to be limited to sexual offences and to be explained by the difficulty of obtaining corroboration in such cases, but it has been applied to bribery, to assault, to reset and to theft. It requires to be applied with caution. It has been said that the doctrine cannot be applied unless there is some nexus linking the incidents relied on, some underlying unity which makes them part of one course of conduct, In sexual offences, it is enough that the accused is shown to have engaged in a course of sexual conduct, even where the nature of the specific incidents is different, or only some of them involve penetration and there is no evidence of penetration except that of the victim. The requirement of a single course of conduct has been rendered almost meaningless by the later cases on the length of time which may elapse between two incidents. In *Adam v HM Advocate*, however, the court held that in child abuse cases (other than where the time gap between incidents is exceptionally long) the length of the time gap is immaterial, because paedophilia is so peculiar that there already exists a special, compelling, or extraordinary circumstance sufficient for the jury to find the necessary course of conduct established. It is also now the law that a submission of no case to answer in respect of the rule in *Moorov* is not to be sustained unless the judge is satisfied

> that on no possible view could the episodes in question be regarded as component parts of a single course of conduct. It is not absolutely necessary that inter-relation of all three of the features of character, circumstances and time be present, but the absence or weakness of one may require extra force from the others in order to allow Moorov to be applied.

20. While this is a sane doctrine, one according to ordinary sense, it is not to be taken so far as to undermine the logic on which it is based. In *RBA v HM Advocate* [2019] HCJAC 56, 2020 JC 16, the accused had been indicted and found guilty in respect of five sexual offences in respect of two female complainers. He had been in a position of trust to both, the offences occurring within an extended family. In respect of the conduct alleged, as regards the first woman's account and the second, there had been a gap of about thirteen years but nonetheless the prosecution had relied upon mutual corroboration, the judge repelling a submission that the interval was too wide, and the jury being content to convict, finding corroboration based on the *Moorov* doctrine to overcome the insufficiency of one witness rule. Allowing the appeal, Lord Brodie applied the *Moorov* principles, as explained by the Lord Justice General (Carloway) in *HM Advocate v SM (No 2)* 2019 JC 183. That summary was:

> In any case in which mutual corroboration is relied upon, the court is looking for "the conventional similarities in time, place and circumstances in the behaviour proved in terms of the libel … such as demonstrate that the individual incidents are component parts of one course of conduct persistently pursued by the accused" (*MR v HM Advocate* , Lord Justice-Clerk (Carloway), delivering the opinion of the Full Bench, para 20): "Whether these similarities exist will often be a question of fact and degree requiring, in a solemn case, assessment by the jury …under proper direction of the trial judge." (Ibid.) In a case where there are similarities as well as dissimilarities, it has been said that a submission of insufficient evidence should be sustained only where "on no possible view could it be said that there was any connection between the two offences" (*Reynolds v HM Advocate*, Lord Justice-General (Hope), delivering the opinion of the court, p 146.) That is a shorthand expression which means simply that such a submission ought only to be sustained where, on no possible view of the similarities and dissimilarities in time, place and circumstances, could it be held that the individual incidents were component parts of one course of conduct persistently pursued by the accused (see also *Donegan v HM Advocate*, Lord Justice-Clerk (Dorrian), delivering the opinion of the court, para 38).

21. Lord Brodie pointed to the difficulties of any finding of similarities sufficient to demonstrate a single course of conduct persistently pursued. Time was a central consideration and while the doctrine enabled flexibility, where long intervals disturbed the course of conduct, it was less likely to be seen as one course, thus requiring that stronger features of similarity of approach. Evidence of threats linked the events despite the gap, but not sufficiently in terms of similarity to overcome it. At para 33, Lord Brodie stated:

> Where the Crown relies on mutual corroboration, the similarities which the court is looking for are similarities in time, place and circumstances in behaviour as between or as among what has been charged and spoken to by at least one witness. In such a situation, the difficulty about asking a jury to accept that offences separated by a gap of some 13 years demonstrate similarity in time and

> that they are component parts of one course of conduct persistently pursued by the accused, is obvious.

22. Lord Glennie had misgivings in assenting as to the result and considered that in reality the *Moorov* doctrine had been applied so flexibly in many cases that had come before the Senators as to demonstrate that a single underlying course of conduct persisted by the accused might no longer be the appropriate test.

> *Moorov* itself was a case where the repeated transgressions of the accused each spoken to by a different witness lent itself to the characterisation of what had occurred as a single or unitary course of criminal conduct persisted in by the accused. It was therefore not surprising that the court should express itself in those terms. What is perhaps more surprising is that, in its adoption and repetition in subsequent cases, the principle derived from cases such as *Moorov* has usually been expressed as being confined to such circumstances (ie to circumstances where the different incidents can be seen as part of a single course of criminal conduct persisted in by the accused) whereas it might legitimately have been treated as but one example of a broader principle allowing similar fact evidence to be admissible where its relevance is established. Why should it be an essential part of the doctrine of mutual corroboration that the several incidents must all be part of a single course of conduct persisted in by the accused? Surely the doctrine can work just as well without being tied to such a requirement – why is it not enough that the conduct of the accused in relation to each separate incident, as spoken to by the different witnesses, can reasonably be regarded by a jury as supporting (or corroborating) the evidence of other witnesses to other incidents of a similar kind, without the need to wonder whether the various incidents can or cannot be regarded as all part of the one course of conduct persisted in by the accused?

Dubious requirement

23. Thus, while the law in Scotland has enabled mutual support by reason of similar accounts of an underlying course of conduct by the accused, the argument of Lord Glennie is that where two independent accounts reasonably support an analysis that the accused was acting in a criminal way against two victims, the evidence of each would support the other without the necessity of any attempt to find a persistent course of conduct. In a similar way, it may be wondered if a rigid rule that conduct against an alleged victim which is repeated in broadly similar terms against another alleged victim requires some form of striking similarity before any common-sense appraisal is enabled to see the repetition of complaints as part of the proof of guilt?

24. In this regard, the sensible submission of counsel for the accused is logical, that in the accumulation of broadly similar accounts, there must come a point where "the entire pot" of evidence must be taken into consideration. Yet, many cases are like this one currently under appeal, where two witnesses speak to similar conduct, here making criminal opportunity out of the deep sleep of the victim to initiate sexual violence. Can an argument then be made, because there are a few victims saying effectively the same thing, that the similar fact evidence rule is to be restrictively interpreted against the natural course of reasoning? Such a proposition confronts the sanity of the logic which urges that two women, or two or more children, giving a similar account are mutually strengthening. What is involved in that train of thought is not at all prejudice, of the kind

'he did it before and must have done it now', but rather an analysis of a body of evidence which fits together by reason of what it demonstrates about the accused's conduct. Thus, in so far as it is argued on behalf of this accused that the so-called similar fact evidence rule, meaning the admission only of highly strikingly similar accounts, stands in the way of that logical approach, the decided cases demonstrate otherwise.

Similarity as support

25. In Canada *R v Handy* 164 CCC (3d) 481, 2 SCR 908 (2002) governs the admissibility of prior bad conduct by the accused. Such will be admitted in evidence where the prosecution satisfies the judge on a balance of probabilities that, in the context of the particular case, the probative value of the evidence in relation to a specific issue outweighs its potential prejudice and thereby justifies its reception: a straightforward rule as opposed to one which hunts for what is striking. When what is charged are several counts, the prosecution are considered to be in the act of claiming that proven character assists in determining that the charge current against the accused is proven. Again, this is applicable to multiple counts or multiple counts of several victims. All must be proven. There is no domino effect, that if one is found proven that the others follow. Rather, the issue is if an earlier count is found proven, would that give weight as a matter of evidence to other counts? That can be so, but in Canada a specific direction would only be necessary where the trial judge does not direct separate consideration. As a matter of standard common law, where facts as between incidents are strikingly similar, these can be used, as in *R v Scarrott* (1977) 65 Cr App R 125, to prove that the person who murdered the victim was the accused; there because on the instant occasion, on escape from a psychiatric facility, he had used similar methodology as in his prior crimes. Equally, where a person is proven to enthusiastically join with her husband in acts of sexual sadism, it becomes unlikely that the bodies of the murder victims found in their back garden were killed without her collusion; *R v West* [1996] 2 Cr App R 374. These are matters of logic, ones where potential prejudice is seen as diminished by the strength of common reasoning.

26. These cases are the apogee of the utility of prior conduct as demonstrating participation in, or sole perpetration of, the crime charged. Striking similarity in conduct was required in those very difficult and outlying cases because of the burden of the fact to be proven: the identity of the murderer as being the accused, *Scarrot*, and collusion in murder on the other, *West*. What is incorrect, however, is to draw out from such authorities any requirement of striking similarity as being always required. Sometimes, as in *R v Boardman* [1975] AC 421, it may be as slight as a sexual preference; but there a propensity to seek sexual congress with children, which is not at all usual. Thus, in that case the reality of boys in a dormitory being propositioned by a teacher should be enough to make the evidence of each relevant to what the other victims were asserting.

27. In *DPP v P* [1991] 2 AC 447, the House of Lords accepted that "striking similarity" was not the test that had to be met. It may be there, but it is not necessary. Instead what is required is that the evidence be so logically probative so as to diminish prejudicial effect. There, on a charge of incest, the accounts of the accused's two daughters of possessiveness and offer to pay for abortions would not be utterly unusual features for those who have experience of incest trials, but would be unlikely common features for two young victims to have made up. According to Lord Mackay, the endless round of similar fact evidence cases could be reduced to an "essential feature" which is merely the application of the standard rule that "its probative force in support of the allegation that

an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime." That could be "derived from the striking similarities in the evidence about the manner in which the crime was committed" but was not so restricted. This analysis was persuasively adopted by Budd J in the High Court in *B v DPP* [1997] 3 IR 140. It must be remembered that in *P* one of the certified questions was as to when a man is charged with sexually abusing his young daughter, assuming no collusion, is the evidence of another daughter of similar abuse admissible, absent striking similarities? The answer was affirmative. Lord Mackay positing that firstly, a judge:

> must decide whether there is material upon which the jury would be entitled to conclude that the evidence of one victim, about what occurred to that victim is so related to the evidence given by another victim, about what happened to that victim, that the evidence of the first victim provides strong enough support for the evidence of the second victim to make it just to admit it notwithstanding the prejudicial effect of admitting the evidence.

28. That ruling would generally be given after a concise discussion with counsel in the absence of the jury. The second step would be to point out the relationship and tell the jury how to deal with the evidence.

29. What can be missing in criminal trials where the standard direction of separate counts – separate consideration is to be given to each count, ladies and gentlemen of the jury – is not given is some basic guidance to the jury as to how similar accounts may support each other. In Scotland, this is overcome by the *Moorov* direction but there is in this jurisdiction, up to this case, no standard direction. Telling the jury that each count should be considered separately is surely to benefit the accused, as opposed to being in any sense a misdirection. That is what occurred in the instant trial. But, where accounts are to cross-support each other a basic explanation of how that may happen is important if, as O'Malley J points out, some particular feature in the account of one witness who says that he or she is the victim of a criminal offence, tends to logically prove the account of another such witness. This was the feature missing in *The People (DPP) v CC* [2012] IECCA 86. Giving a direction that each count on each alleged victim is separate cannot be wrong but it is inadequate to merely say that if one victim is believed, that then supports the account of others; here pupils in a school were abused in front of the class by the teacher. Even though each such account needed proof, any direction to say that when one falls all fall is simply wrong. O'Donnell J's observations are in that regard pertinent:

> Fourth, and perhaps most importantly, the jury were told, correctly in the view of this court, that the evidence of one complainant was admissible in support of the evidence of another, and could therefore provide corroboration. However, as counsel for the accused observed at the outset of the case, the law relating to such system evidence is far from clear or indeed satisfactory. It is unfortunate that after some initial skirmishing on the issue there was no debate on the admissibility of this evidence, the circumstances for such admissibility or the manner in which it should be addressed by the jury. Indeed, it is desirable in cases of complexity and where such so called system evidence looms large – as it undoubtedly did in this case – that the court, together with counsel for the prosecution and accused, should seek to address the question of system evidence, and the manner in which it may be admissible, at an early stage in the trial, and

certainly before the speeches to the jury, so that all the participants are aware of the basis upon which such evidence is being admitted in the case.

Had such a debate taken place, it seems probable that the jury would have been given more guidance, and therefore more help, in relation to this aspect of the case. Given the fact that the evidence of individual complainants was given at a level of generalisation and abstraction, it seems likely that the jury were significantly influenced by the fact that evidence of indecent assault was given by a number of different complainants. It is desirable that the court should first address the question of whether in any given case such evidence is admissible in relation to the counts relating to other complainants. If it is decided that such evidence is admissible, (and in this case that was not really challenged) the jury should not only be informed of this, but also, and more importantly, why that is so. Initially such evidence was treated with considerable caution by the courts because of the potential for prejudice and the shifting of the focus from whether the accused was guilty of a specific offence on an identified occasion, to a more generalised consideration of the accused's character and propensities. But if for example, the same person had lived in a number of different places and complainants had come forward independently and described in varying degrees and detail offences containing perhaps a single distinctive element or signature, then any fact finder would be entitled to place considerable reliance on the fact that in the absence of deliberate collusion, it would be extremely unlikely that such witnesses could emerge by pure coincidence having the same mistaken or indeed false memory involving the accused. The force of that reasoning is undeniable and explains why notwithstanding the risks, such evidence is admissible. However if the jury was to adopt that line of reasoning in this case, it had to also take account of the fact that there were a number of other confusing factors which were relevant. First, these allegations involved a teacher and a limited time span. The complainants came from two classes in the same school in the same location. There was also, it appears, a history of severe corporal punishment in an atmosphere that was tough and challenging. There are now civil proceedings in being. All of these features tend to some extent, against the classic picture of individual unconnected complainants. Drawing conclusions from the possibility of events occurring by random, rather than simply assessing the evidence in relation to a particular incident, is permissible, but it is an exercise in logic and probability: in the absence of some connecting factor, it is highly unlikely that individual independent accounts of similar conduct could emerge and yet be mistaken. The greater the number of accounts the more remote the possibility of collective error. This is a powerful line of reasoning but its force is dependent on the exclusion of any possibility of connection between those giving the accounts, particularly when it is otherwise limited in verifiable detail. It is necessary to take into account the possibilities of suggestibility, contamination of evidence, copycat evidence or collaboration, if only for the purposes of excluding them. There was also the unusual feature of this case that it was alleged that the incidents occurred in full view of a class of between 60 and 70 boys, and although necessarily furtive, contained elements which were undeniably public such as the vigorous rubbing of the accused's face against that of the complainant. Furthermore the case had been the subject of a comprehensive garda investigation, which appears to have sought out pupils in the relevant classes.

Elements of the direction

30. A trial judge dealing with a multiple count and multiple alleged victim indictment is entitled to instruct a jury, firstly, to consider each count separately and, secondly, it may be useful, but it is not necessary, to state that merely because the account of one person as to sexual violence, or other crime, is regarded as proven in the context of the evidence relevant to that count, it does not follow that other accounts by other alleged victims are to be regarded as strengthened. This is not a matter of dominoes, where one alleged victim is believed, other alleged victims are not automatically regarded as more truthful: the jury must consider if there is enough evidence on that other alleged victim's account to convict the accused on one or more allegation. There is no reason to doubt that a jury will heed such a direction. Experience shows that where a single person, or more than one or two, gives an account of multiple events of abuse that juries carefully consider each such event and do not proceed to conviction on more than each count of which they are convinced, if any. Jury verdicts in those case tend to be both very carefully arrived at and are selective as to conviction on particular counts. Similarly, there is nothing to suggest that juries would rush to assume that counts should fall like dominoes because one of two or more alleged victims is regarded as reliable in the context of the evidence relevant to that count. This is not prescriptive as no special warnings are required by law.

31. Where there are several counts from different alleged victims, after hearing submissions, a trial judge may instruct the jury as to the features that are in common, if any, and which derive from the independent accounts of those individuals. Other than that, it must be remembered that fact is in the realm of the jury as is sense and shrewdness. If the case is made by the prosecution that some aspect of evidence of the account of one alleged victim is relevant to the proof of a count of another, that should be pointed out by the prosecution to the judge in the absence of the jury. Submissions from the defence should be heard and a ruling should be made as to the validity of any such argument before counsel on each side address the jury. Then, everyone knows where they stand.

32. In her separate judgment, O'Malley J comments that an over-detailed instruction to a jury is unlikely to be heeded; in good faith, and helpfully, a six-point plan was proposed by counsel for the accused but is unlikely to assist. It is not suggested that complex legal directions or means of analysis are to be served up to juries and it is agreed that that would not have efficacy. Instead, O'Malley J rightly suggests that where the account of one victim has a factor which makes it relevant to the account of another in terms of cross-support as between their testimony, that usefully can be pointed out. That restrained judicial approach must be right. In this context, the trial takes place by jury: the judge gives general legal directions and defines the offence and any defence that might have been raised, if raised, such as duress or insanity; the judge summarises the evidence; and the judge asks for a verdict. For the judge to enter into the field of evidence pointing out this and that as important or tending to prove a central fact is in danger of moving into the jury's fact-finding realm. After all, in all criminal cases the individual items of evidence are all admitted because of relevance, because this or that tends to prove a central fact; presence at the scene, motive, opportunity, forensic connection, concealment, absence of consent, identity of the perpetrator, facts supporting the soundness of a confession statement. The jury then consider from a standpoint of shrewdness and common sense if that evidence amounts to compelling proof of the commission of the offence or offences as charged. That is the way to leave matters.

Cases from other jurisdictions where corroboration has proven over-complex are a warning. These illustrate the wisdom of leaving well enough alone since the process of jury trial that leaves facts to the jury works best. That decision of the jury as to whether there is sufficient proof of guilt is, after all, made only after hearing closing argument as to why particular facts are important and as to how these add up, or may not add up, through closing speeches from the prosecution and defence.

Collusion

33. There should be considerable reluctance for a judge to descend into the technical language as to corroboration or cross-support. What generally common accounts in terms of commission or circumstances do is enable the trial judge to supplement in appropriate cases the separate counts – separate consideration direction by pointing to features of the evidence which may offer cross-support as between the accounts of alleged victims on particular counts. The form of the suggested direction has already been given. In the law as to corroboration, the evidence tending to suggest the commission by the accused of the crime under consideration must be independent of the suspect evidence. In other words, an accomplice may put the accused at the scene of a crime but a jury is told that it is dangerous to act on his or her evidence without corroboration and the judge points out that the evidence tending to show that the accused committed the crime is a random pedestrian who saw the accused at the relevant time walking away from the burgled house, or a dyed hair in the house matching the accused's dyed hair, or a footprint impression in the drive, or a fingerprint. Each of these might be attached different weight by a jury, the latter being enough to convict where the accused had no legitimate business being inside the house, such as fixing a cooker or hoover, prior to the burglary.

34. Naturally, to attach weight to cross-support from one alleged victim's account to that of another alleged victim, the two witnesses cannot have conferred and concocted a story. Reference is made in some of the authorities to contamination. In others, authorities with no psychological training reference "unconscious contamination". That means nothing. Naturally, if there is a reasonable possibility of joint concoction, that undermines both credibility and cross-support; see *Hooch v R* (1988) 165 CLR 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 wish 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; *R v H* [1995] 2 AC 596.

This case

35. O'Malley J rightly characterises this case as one where the jury was dealing with the events of a night as recounted from the testimony of two women on whom similar attacks were perpetrated. The trial judge gave the jury the direction to consider each count separately. He did not say anything about cross-support and consequently there is nothing to suggest that the directions were anything other than favourable to the accused. In terms of what counsel may have said, nothing there would have justified the trial judge in thinking that a direction from him would not have corrected it. A rhetorical

reference to legal theory, one beyond any but an advanced student of the law of evidence, could not have done any harm, as indeed the trial judge sensibly decided. He might have considered whether the circumstances of sexual violence on two women who were deeply asleep so that they could not resist was enough to enable cross-support for the account of each. In terms of the test set out herein, there was certainly sufficient evidence so to do. The appeal should be dismissed.