THE COURT OF APPEAL

Record No. 249/2015

Mahon J.
Edwards J.
Hedigan J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND–

J G

APPELLANT

JUDGMENT of the Court delivered on the 23rd day of February 2018 by Mr. Justice Mahon

1. The appellant has appealed his convictions for fourteen sexual offences following unanimous jury verdicts at the Central Criminal Court on the 8th July 2015. The offences included one count of indecent assault contrary to common law and as provided by s. 10 of the Criminal Law (Rape) Act 1981, eight counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990 and five of rape, contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990. On the 9th October 2015 the appellant was sentenced to thirteen years imprisonment with the final five years suspended on conditions, in respect of one of the s. 4 Rape offences with the remaining thirteen counts taken into consideration. An earlier trial of the appellant in 2013 concluded with a jury disagreement.

2. The appellant and his family were close friends with the complainant's family and lived in close proximity to them. The offences were committed between September 1990 and July 1994 when the complainant was aged between four and eight years and the appellant was in his early fifties. The offending occurred in the appellant's home on occasions when the complainant and his two marginally older sisters stayed overnight in the appellant's home on occasions when their parents were away. The offending included indecent and sexual assaults, oral and anal rape. The first complaint made by the complainant to the gardaí was on the 7th July 2010 when he was about twenty four years old, some sixteen years after the last offence committed by the appellant. The appellant was interviewed by the gardaí within months of the complaint being made and a direction to prosecute was issued by the respondent in November 2012.

3. An unusual feature in the case concerned the fact that the appellant pleaded guilty to offences of sexually assaulting the complainant's two older sisters within the same period of time, at Castlebar District Court. Complaints against the appellant were made by the two sisters in July 1994 whereupon the appellant was prosecuted, pleaded guilty and was sentenced in January 1995. He was released from prison in May 1997. Between then and July 2015 when he went into custody in relation to the offences involving the complainant, he lived at home conviction free. The complainant maintains that he did not avail of the opportunity to make any complaint against the appellant at the time his sisters made their complaints, or indeed at any time between then and 2010, because he was in fear of the appellant.

The grounds of appeal
4. Twenty one separate grounds of appeal are made by the appellant. These have been summarised under three headings by the respondent in her written submissions and the Court is satisfied that they adequately encompass the essentially four points of the appeal outlined by Mr. McGuinness S.C. on behalf of the appellant at the commencement of the appeal. They are:-

> (i) The decision by the learned trial judge to admit the accounts provided by the complainant's sisters into evidence was erroneous;
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> (ii) the learned trial judge was wrong to refuse to discharge the jury in the light of the complainant's words and his demeanour in the course of his cross examination, and
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> (iii) the learned trial judge erroneously or inadequately charged the jury in relation to the issues of delay and corroboration.

The admissibility of the evidence of the complainant's sisters
5. The statements of the proposed evidence of the complainant's sisters were served on the appellant as additional evidence on the 17th October 2014. A *voir dire* on the first day of the trial was held for the purposes of determining whether or not the sisters evidence and the related convictions of the appellant ought to be admitted into evidence and in the course thereof similarities between the offences committed against the complainant's sisters and those alleged by him were considered. It was summarised on behalf of the respondent that the following similarities as between the sisters' abuse by the appellant and the complainant's allegations are evident:-

> (a) All the abuse took place in the early 1990's.
>
> (b) All three children were in the appellant's care while their parents were away.
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> (c) All the offences took place in the same house, namely the appellant's house, and likely, the same bed.
>
> (d) All three children were siblings.
>
> (e) All three children were of a similar age.

(f) Other children were present in the room when the sexual offending took place.

(g) In the course of the offending the appellant lay in bed with the children and read them bedtime stories.

(h) On all occasions the appellant waited for other children present to fall asleep before engaging in the abuse.

(i) All the children were told not to tell any third party.

(j) There was significant similarity as between the detail of the offending involving all children. In particular the appellant inserted his finger into each child's anus.

6. It was also submitted that there was no evidence of collusion as between the complainant and his sisters.

7. The dissimilarities emphasised on behalf of the appellant included the detail and nature of the sexual offending (to the extent that there were such differences) and the differences in the sex of this complainant and his two sisters. It was pointed out that the only common thread was the digital penetration of all three children's anus. The fact that the appellant readily acknowledged his guilt in relation to the offences committed against the complainant's sisters and the contesting of the complaints made by the complainant also were highlighted as radical differences between the offending alleged to have been committed against the complainant and that actually committed against his sisters.

8. Following the voir dire, the learned trial judge ruled in favour of the admission of the accounts provided by the sisters in relation to the offences committed against them by the complainant. He said:-

> *"…It's hard to, when one looks across the cases, to discern an approach that is absolutely consistent or indeed use of language that is absolutely consistent. Terms such as system, similarity, striking similarity are used interchangeably and indeed as described in one of the English judgments are compendious terms in this context. It really all springs out of what I think was identified by O'Donnell J. in a slightly different context in the McNeill case such as a tension between that which would appear to be logically relevant and that which would, although logically relevant, interfere significantly with the possibility of a fair trial. But it does seem that in circumstances where leaving aside expressions such as system and similarity, whether striking or otherwise, that where the individual circumstances of the evidence in the particular case are such to lend particular probative force and probative force that equals or indeed outweighs the obvious prejudicial effect of such evidence it would be admissible and it's admissible for a number of purposes, including the traditional one of rebutting defences that may be available, that is identified in the earlier authority but also as identified in the case opened by Mr. Condon as, if accepted as being corroborative, of the evidence in the current case. There are features in this case that are somewhat different to some of the other cases. The evidence from the other sources is not being introduced by way of them being complainants in the case. They have gone beyond that status because their account in relation to these matters has been validated by the accused himself by his admissions and subsequent plea of guilty…. The question is whether the misconduct admitted in those circumstances has features or took place in circumstances that lend particular probative force in the circumstances of the current allegations. I accept Mr McGuinness's basic principle that simple wrongdoing, even of a similar kind on other occasions, would be insufficient to trigger admissibility…However, it seems to me that cases establish that such evidence is admissible because there's an inherent improbability of several persons making up exactly similar stories. Now, stories are not exactly similar because there are obvious differences in terms of the allegations here and the activities admitted to in other cases but there are some striking similarities. First of all the complainant in this case and the victims in the other two cases (were all very) young at the time of the conduct or the alleged conduct. They were all siblings, members of the same family. The allegations that arise here and the offences committed in the other cases arise in some cases the same venue and in similar circumstances in some of the categories of allegation in this case. There is also the important thread of the digital penetration of the anus which, by itself perhaps would not be striking or very unusual, but even in the run or the flow of these cases is an unusual feature and when taken in combination with the other features that the other overlaps between the allegations in this case and the admitted conduct in the other case, it seems to me that necessarily one is operating in a grey area and the result is perhaps not always satisfactory for all or any point of view in relation to the case but it's necessary to come to some sort of view as to where the individual features of the case fit in and I am satisfied that having regard to the features mentioned by me as outlined by Mr Condon that in fact, not as Mr McGuinness suggests, that there is some sort of gulf or gap between the two sets of facts involved. I'm satisfied that having regard to the family, the neighbour aspect, the age, the fact that there was admitted misconduct in relation to young children who were neighbours, siblings and that there is a degree of similarity in relation to how the misconduct was carried out and is alleged to have been carried out, I'm satisfied that when one applies the balance of probative force and prejudicial effect the features of the case are sufficient to tip the balance in favour of the probative force being such that it ought to be admitted for the purposes mentioned by Mr Condon in his argument…I had thought initially listening to Mr Condon that this would be entirely straightforward, it wasn't entirely straightforward but I'm nonetheless convinced by his argument."*

9. The relevant information relating to the offences committed against the complainant's sisters and the appellant's acknowledgment of his guilt in relation thereto was provided to the jury in the course of sworn evidence given by Garda Paul Lafferty.

10. With specific exceptions evidence of previous convictions is inadmissible in the course of a trial. While similar fact evidence can represent evidence of system, it ought not to be inappropriately deployed merely as evidence of propensity and of misconduct. A distinction needs to be drawn concerning its use towards these very different ends. While it may be lead for the purposes of legitimately demonstrating system, because evidence of system will in most cases be significantly prohibitive and therefore relevant, or for some other manifestly relevant and significantly probative purpose, similar fact evidence must not be led merely to demonstrate propensity or a record of previous misconduct. If it is indeed to lead it, the legitimacy of the other purpose has to be demonstrated i.e. the evidence must be shown to be relevant and probative in some other way or ways apart from merely showing propensity of previous misconduct e.g. on the basis that it establishes system, or that it points up the inherently unlikelihood that the accused would be falsely accused by multiple accusers acting independent, or to rebut accident or innocent explanation.

11. In *R v. H* [1995] 2 A.C. 596 at 613, Lord Griffiths described similar fact evidence as:-

> *"Evidence which, although it discloses that an accused has committed other crimes, is, if true, so probative of the crime of which he is accused that fairness and common sense demand that it is admitted."*

12. Lord Hereschell, in *Makin v. A.G. for New South Wales* [1894] A.C. 57 at 65 stated:-

"It is undoubtedly not competent for the prosecution to induce evidence intending to show that the accused has been guilty of criminal acts other than those covered in the Indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the Indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.

13. In his book *Sexual Offences* (2nd Edition) Professor O'Malley suggests that the following three important legal principles need to be weighed in the balance in order to determine whether it is appropriate to admit such evidence:-

(i) All logically probative evidence should be prima facie admissible to facilitate the tribunal of fact in discovering the truth;

(ii) evidence showing the propensity towards criminality or other misconduct, and showing nothing more, should be excluded because of its prejudicial effect or impact, and

(iii) it would be wrong to deprive a tribunal of fact of logically probative evidence which may be of substantial assistance in determining whether the accused is guilty of the offence charged, even though the evidence reveals other misconduct for shows propensity and therefore has some prejudicial effect.

14. The Court was referred to the decision of the Court of Criminal Appeal in *DPP v. BK* [2000] 2 I.R. 199. That case concerned several counts of attempted buggery and indecent assaults against various young males and the argument that the various counts ought to have been tried separately insofar as they related to different complainants. The Court of Criminal Appeal allowed the appeal and quashed the convictions. It held that the test to determine if several counts should be heard together was whether the evidence in each count would be admissible on each of the other counts. It held that to be so admissible, it would be necessary for the probative value of such evidence to outweigh its prejudicial effect. Further, it held that the rules of evidence should not be allowed to offend common sense.

15. The following extracts from the judgment of the Court in *BK* delivered by Barron J. are useful to quote. They include:-

"For such evidence to be so admissible, it would be necessary for the probative value of such evidence to outweigh its prejudicial effect. In practice, this test is applied where there is a similarity between the facts relating to the severed counts. On the one hand, there is system evidence which is so admissible and on the other hand there is similar fact evidence which is inadmissible. In the latter case the reason is that, just because a person may have acted in a particular way on one occasion does not mean that such person acted in the same way on some other occasion. System evidence on the other hand is admissible because the manner in which a particular act has been done on one occasion suggests that it was also done on another occasion by the same person and with the same intent.

There is a clear line of division between these two types of evidence even though it may be difficult in an individual case to say which side of the line the particular case falls. While the Court uses the expressions "system evidence" and "similar fact evidence" to distinguish the two types of evidence, in some of the authorities to which we refer the words "similar facts" are used to describe what we refer to as "system". This in itself does not affect the reality of the distinction.

The basis test is applied to ensure that the effect of the natural prejudice which will arise from similarity of allegation is overborne by the probative effect of the evidence."

16. In *R v. Boardman* [1975] A.C. 421, Lord Hailsham said, at p. 454:-

"The "striking resemblances" or "unusual features" or whatever phrase is considerable appropriate, to ignore which would affront common sense, may either be in the objective facts…or may constitute a striking similarity in the accounts by witnesses of disputed transaction. For instance, while it would certainly not be enough to identify the culprit in a series of burglaries that he climbed in through a ground floor window, the fact that he left the same humorous limerick on the walls of the sitting room, are an esoteric symbol written in lipstick on the mirror, might well be enough."

17. In *B v. DPP* [1997] 3 I.R. 140, Budd J., when dealing with the reason for admitting evidence of multiple accusations, said (at p. 157):-

"It seems that the underlying principle is that the probative value of multiple accusations may depend on part on their similarity, but also on the unlikelihood that the same person would find himself falsely accused on various occasions by different and independent individuals. The making of multiple accusations is a coincidence in itself, which has to be taken into account in deciding admissibility."

18. In B.K. the Court suggested a number of principles that it considered emerged from the cases considered by it. They are:-

(i) The rules of evidence should not be allowed to offend common sense.

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

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

(iv) Such evidence is admitted in two main types of cases:-

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

or

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

In the latter case the evidence is admissible because:-

(1) there is the inherent improbability of several persons making up exactly similar stories;

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

19. The extent of the similarity that should exist in order to justify the admission into evidence of wrong doing of a similar nature was emphasised by Hardiman J. in *DPP v. McCurdy* [2012] IECCA 76. In the course of his judgment, Hardiman J. quoted the following extract from McGrath on Evidence (2nd Edition) at para 982:-

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

The nature of the sexual abuse of the three children varied to some degree, as it did also between the sisters.

20. In this case while there are three accusers, it is in reality a case of two sets of accusations being made against the appellant, one set by his sisters and another by the complainant.

21. In *DPP v. CC (No. 2)* [2012] IECCA 86, O'Donnell J., in delivering the judgment of the Court said at p. 37:-

> *"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, copy cat evidence or collaboration, if only for the purposes of excluding them."*

22. Clearly there is a very fine line between what is admissible and what is inadmissible where evidence of previous or concurrent wrongdoing against others by an accused is admitted into evidence in the course of a trial. The danger in admitting such evidence is obvious. A jury may be inclined to believe that evidence of other wrongdoing is in itself suggestive of guilt. Arguably, that risk may even be greater where the evidence sought to be admitted is that of broadly similar and historical conduct by the accused in respect of which he, many years previously, pleaded guilty and was sent to prison.

23. It is necessary to consider in some detail the similarities and dissimilarities between the offending against the complainant's sisters and which was acknowledged by the appellant when confronted with them over twenty years ago, and the allegations belatedly made by the complainant. An obvious common theme in the two sets of allegations is the fact that the three victims involved were siblings and that the offending occurred at a time when they were under the appellant's temporary care from time to time. However, these are not sufficient in themselves to justify the admission into evidence of the appellant's conviction for sexual abusing the complainant's sisters.

24. The striking dissimilarity is that the complainant was a young boy, while his siblings were young girls. It is the experience of the Courts that most perpetrators of sexual abuse of children indicate a preference for one sex over the other.

25. An unusual feature of this case is the fact that approximately 15 years before the complainant alleged that the appellant had committed the offences in question the appellant had been accused of sexual offending the complainant's sisters in what might be described as broadly similar circumstances, had admitted his guilt and was convicted and sent to prison. Furthermore, at that time the appellant failed to take the opportunity which was offered to him to complain of his sexual abuse by the appellant. To the extent that the complainant was asked at the time if he had been abused by the appellant, and to the extent to which the subject of sexual abuse was necessarily discussed at that time, and indeed again some years later while the complainant was still in school, the opportunity to make his allegations against the appellant were not taken by the complainant. Common features in historical sex abuse cases are that victims keep their sexual abuse a closely guarded secret until reaching adulthood because no opportunity had arisen to disclose it earlier, as well as a fear of the abuser if the secret is disclosed, and a sense of shame. While such factors may well have been present in this case, it is however a fact that the complainant was aware that his sisters had exposed their abuse by the appellant without them suffering any reprisal and in circumstances where they received strong parental support.

26. In the particular circumstances of this case, it is difficult to comprehend circumstances where the fact of, and indeed the details of, the abuse suffered by the complainant's sisters at the hands of the appellant were not known to him, if not at the time, in subsequent years. There is no evidence that there was collusion. Nonetheless that very real possibility was there, and indeed it was alluded to by the learned trial judge in the course of his charge to the jury when he said:-

> *"Here, you have a slightly different situation, you have admitted and established wrongdoing from two decades ago and then a further complaint that arises 15 years later. So you know, I'm simply pointing out that difference and it's something that you should bear in mind that you know, that it's there. And clearly the complainant in this case must have had some knowledge of the fact that his sister has made the complaint, because it resulted in a prosecution and a plea of guilty and a jail sentence. And obviously, it goes without saying that he knew about all of that. So, there's a subtle different in the factual background in which this evidence is brought in in this case from the type of case where you're trying the three sets of complaints as one, members of the jury.."*

27. In *B* Budd J. referred to the *unlikelihood that the same person would find himself falsely accused on various occasions by different and independent individuals..* . In the context of the instant case it raises the question as to whether the complainant and his sisters can reasonably be considered to be *different and independent individuals*. There was however no evidence in the instant case that there was collusion either intentional or innocent.

28. It is also a feature of the instant case that the evidence of the abuse of the complainant by the appellant in the course of the

trial was strong and persuasive. He very ably dealt with robust cross examination from Mr. McGuinness. To this extent it may well have been the case that the jury would have reached a similar verdict in the absence of any knowledge on their part of the fact that the appellant had many years previously pleaded guilty to sexually abusing the complainant's sister. Arguably, this serves to reduce the probative value of the admission into evidence of the account of the earlier prosecution of the appellant.

29. Ultimately, the deciding factor in admitting the evidence relating to the abuse of the complainant's sisters is that its probative value exceeded its prejudicial effect to a reasonable degree. It goes without saying that there is a clear probative value in admitting the evidence. Equally, its prejudicial effect is also clear.

30. In the Court's view, and in the particular circumstances of this case, evidence of the abuse by the appellant of the complainant's sisters and his conviction for those offences ought not to have been admitted because of their overwhelming prejudicial effect before the appellant. While the learned trial judge very effectively and comprehensively charged the jury in relation to the manner in which the evidence relating to the sister's abuse ought to be approached and considered by them in the course of their deliberations it was, in the Court's view, a very considerable risk that the jury would convince themselves of the appellant's guilt because of that information alone. This ground of appeal must therefore succeed.

The application to discharge the jury
31. An application to discharge the jury because of certain words spoken by the complainant and his demeanour in the course of his evidence to the trial was rejected by the learned trial judge.

32. The words spoken by the complainant and complained of by the appellant were as follows:-

> *"Q. Well, you appear to be suggesting to the jury that he had in fact abused you in your own house?*
>
> *A. The man abused me everywhere he was with me.*
>
> *Q. In a similar way; is that right, reading you stories in bed in your own house; is that right?*
>
> *A. I don't recall. My head is fucking fucked man. Give me 10 minutes with that bastard in the bathroom, I'll have him singing like a fucking tweety bird.*
>
> *Q. You see isn't this why you've invented these -*
>
> *A. Now, be careful with your next words.*
>
> *JUDGE: No, no, Mr H, he's entitled, on whatever instructions he's been provided with, to put whatever a case is so -*
>
> *Q. You've invented these allegations against Mr G because you're angry with him; isn't that right?*
>
> *A. No, I'm over the bastard.*
>
> *Q. What?*
>
> *A. I want to move on with my life. I want to get a bit of fucking justice for myself so I can finally move on and put this cunt behind me and move on."*

33. The complainant also stated:

> *"There was two or three people at my door that night, they asked me that question and I said no when I should have said fucking yes that man raped me and he abused me for fucking years. He's a dirty dog. He should be shot. He shouldn't have his day in court."*

34. Mr. McGuinness strenuously objected to the words uttered by the complainant. The basis for his objection and for his application to discharge the jury was the prejudicial effect on the jury of that outburst. He contended that the appellant's right to a fair trial had been breached and could not be remedied other than by discharging the jury. Mr. McGuinness emphasised that the words spoken and the demeanour of the complainant were loud aggressive and entirely inappropriate.

35. In the course of his ruling refusing the application to discharge the jury, the learned trial judge stated:-

> *"..I've made my feelings in the matter perfectly clear. I share the views of the previous judge in charge of the affairs of this court that juries should rarely, if ever, be discharged. I have some sympathy with the general sentiments expressed by Mr McGuinness in the course of the application but on the other hand it's a trial by jury and trials of this nature come with the rough and the smooth, in this case it is the former rather than the latter, subject to appropriate direction, and I think this case, comment, I think I might depart from my normal practice of not commenting on witnesses or their evidence. I think that any difficulty that arises by means of the obvious contemptuous display here and the gratuitous sort of behaviour that's on offer, he may well be hurt, angry and all the rest of it, many people who give evidence in these courts are such and they manage to convey that without behaving in this way. I wonder really if Mr H thinks he's doing his cause any good by this carry on, but it's a matter for him. We'll proceed for the moment and perhaps, without issuing any direction to Mr H to behave in a good, bad or indifferent way, he might like to reflect on the last portion of my remarks in his continued testimony."*

36. It is clear from the remarks of the learned trial judge that while he was not prepared to discharge the jury in the particular circumstances, he was highly critical of the complainant's outburst. Short of expressly directing the complainant to behave himself, the remarks of the judge amounted to a severe admonishment of his behaviour.

37. Anger outbursts, raised voices and the inappropriate use of expletives occur in many trials albeit not in the majority of trials. In an ideal world evidence in jury trials would always be given in a calm and even dispassionate manner, and without anger or rancour of any kind. However, the world is not ideal and outbursts of any of the type experienced in this trial are part and parcel of human nature and will be seen as such by the jury. When strongly directed by the learned trial judge, as occurred in this case, to reach a verdict based on the evidence heard in court there is no reason to believe that such a direction would have been ignored by the jury. A jury can reasonably be expected, based on their own common sense, to assume and indeed to be aware of the fact that in cases

of alleged sexual abuse a complainant will harbour feelings of anger and animosity towards the alleged abuser, and that some people are less able than others to control those feelings in the stressful atmosphere of the courtroom.

38. In his judgment in the case of *Dawson and Ors. v. Irish Brokers Association* (6th October 1998, The Supreme Court) O'Flaherty J. stated:-

> *"... Once again, it is necessary to reiterate, as this court is doing with increasing frequency, that the question of having a jury discharged because something is said in opening a case or some inadmissible evidence gets in should be a remedy of the last resort and only to be accomplished in the most extreme circumstances. Juries are much more robust and conscientious than is often thought…" .*

39. In *D v. DPP* [1994] 2 I.R. 465, Finlay C.J. said (in a case which was concerned with the potential prejudicial effect of newspaper articles being seen by a jury):-

> *"I am satisfied that there is much strength in the argument submitted on behalf of the DPP on the hearing of this appeal that this Court should not disregard both the capacity of a trial judge strongly and effectively to charge a jury in a manner which would indicate beyond question their obligation to try the issues before them only on the evidence adduced, and the robust common sense of juries who might well ignore dramatic or sensational newspaper articles."*

40. While the unruly and anger prompted outbursts from the complainant were unfortunate. They were not sufficient to justify the discharge of the jury. Accordingly this ground of appeal fails.

Corroboration and delay

41. It is submitted on behalf of the appellant that the learned judge's charge to the jury on the subjects of corroboration and delay were erroneous or inadequate.

42. At an early stage in his charge to the jury, and before embarking on a review of the evidence, the learned trial judge briefly referred to the issues of corroboration and delay, indicating to the jury that he would address those subjects later in his charge. He said:-

> *"I want to speak to you then in that context about the context of or the concept of corroboration, what it is. You decide whether in fact it's present. I want to give you a warning which is a conditional warning. It depends on your view as to whether corroboration is or is not actually present, as to whether the warning is operative, and I want to speak to you about the question of delay and how that should feed into your deliberations, and when I've done all that I'll be pretty much complete."*

43. Later in the course of his charge to the jury, the learned trial judge then specifically addressed the issue of corroboration. He said:-

> *"…I want to turn to the - it's perhaps a related question of corroboration. I'll first of all tell you what corroboration is, and maybe something about what it isn't and then I'll speak about how it might apply to the - this particular case. The first thing is, I've decided that in the particular circumstances of this case I should warn you as to the dangers of acting upon the uncorroborated testimony of the complainant. And I emphasise, it's a warning only, and it's a condition - a conditional warning because it doesn't apply if you are satisfied beyond reasonable doubt that his evidence is in fact corroborated by the evidence in the case that it's capable of being corroborative. And that of course is the evidence of the two sisters and perhaps before I move to that, I should remind you very briefly in relation to what the two girls said…"*

44. The learned trial judge went on to summarise the statements of the complainant's two sisters. They described in fairly graphic detail the sexual abuse perpetrated against them by the appellant. Having done so, the learned trial judge then continued:-

> *"So they're the statements, members of the jury. And I've already dealt with one of the purposes for which they are admitted, they are admitted potentially for another purpose too, members of the jury, and that's on this topic of corroboration. I first of all want to tell you as to the meaning of the term corroboration. In essence, corroborative evidence is independent testimony or evidence which affects the defendant by connecting or tending to connect him to the crimes alleged. Its evidence which implicates him which confirms in some material particular, not only evidence that the crime has been committed but also that the accused committed it. So it's got a number of characteristics, members of the jury. Whilst the evidence must implicate him in some material particular, and that's very important, it will not directly prove that the offence was committed, nor does it have to corroborate all of the evidence of the person whose testimony requires corroboration because it's supporting evidence only. It's not directly probative of the offence itself, if it was perhaps there'd be no need for corroboration.*
>
> *So it doesn't have to cover the whole territory, members of the jury, it doesn't require all of the evidence of the person whose testimony requires corroboration, it doesn't have to be corroborated. Neither - neither need it directly prove that the offence was committed, it's not a form of substitute proof for the central allegation. Corroborative evidence has three qualities, let me repeat again, it must tend to implicate the accused by rendering it more likely than less that he committed the crime charged. And this is where the system and similarity come in, members of the jury. Secondly, it must be independent of the evidence to be corroborated. So you know, they can't contaminate or feed off each other in any way, members of the jury and before evidence can be corroborative, it must have this independent quality. Thirdly, both the corroborating evidence and the evidence to be corroborated should be credible. And that's important, members of the jury, in this case there is no doubt about the credibility of the corroborating evidence. Everybody accepts Mr G most importantly of all accepts that he abused these young girls in the manner described by them. On the other hand in this case, the credibility of the evidence to be corroborated, that's the evidence of Mr H, is disputed in the strongest possible terms by the accused Mr G. So members of the jury, corroborative evidence is therefore that which confirms, supports or strengthens other evidence. To be truly corroborative, the supporting evidence must be independent of that which requires corroboration. So what the girls said back in 1994 and what Mr G admitted in the Mayo Circuit Court in 1995 must be independent of Mr H's allegations.*
>
> *So therefore, members of the jury, you should not accept evidence for this purpose. If for example, you think it's reasonably possible that the evidence to be corroborated, that's Mr H.'s, in some way springs from or is motivated by the corroborating evidence. And that is one of the suggestions that is made in this case. Consequently, members of the*

jury, you should bear in mind that the essential elements at the core of corroboration are that it is evidence which is independent in nature and it must have the effect of tending to connect the accused to the crimes alleged in some material particular. Now, members of the jury, in this particular case the evidence which is capable of being corroborative is the evidence of conduct underlining the previous convictions, and I've just read that to you. I hope I have told you in clear terms what is meant by corroborative evidence. You decide whether those two statements actually and factually amount to corroboration of Mr H's evidence in the circumstances of this case. You decide whether it fits the corroboration bill that it's independent, that it tends to connect the accused in a material way to the commission of the crimes actually charged before this court. It is for you to decide whether the possible corroborative evidence in this case fits into that category. The weight and significance of the evidence as with any evidence is a matter entirely for you. If you decide that it is corroborative in the sense that I have explained to you, and if you are satisfied of such beyond reasonable doubt that's the only way of looking at it, if there's a reasonable possible way of looking at it that's consistent with innocence. I told you about that this morning, well when you don't look at it as being corroborative, members of the jury. So if you are satisfied that the only way beyond reasonable doubt is that it can be used as corroboration, well then you may act upon it in that sense.

If however, you consider that there are reasonable doubts as to the credibility of Mr H and his evidence in terms of his complaints and his evidence being fabrication subsequent to the corroborating evidence, well then clearly the evidence of A and F can't be corroborative in those circumstances, members of the jury….If and only if that is the case, I am giving you this conditional warning because it's conditional on you finding that his evidence is not in fact corroborated. And I'm giving you this warning, members of the jury, it's a warning that you must be careful about convicting on his evidence without corroboration."

45. On its face, the corroboration warning provided to the jury was adequate and comprehensive. However, the finding of this Court that the evidence of the statements of the complainant's sisters ought not to have been admitted any issue relating to the corroboration warning is rendered academic.

46. In relation to the issue of delay, the learned trial judge addressed the jury as follows:-

"Such allegations are very easy to make and very difficult to rebut. But specifically in relation to this case, there is the question of delay which impinges on this, and this is separate to the question of delay in its own right, which I will deal with in a moment. But feeding into the question of the necessity for warning you about acting, if such be your judgment without corroboration, you know delay is a feature as to why you should be careful because time does strange things - strange things to people's memories. And as Mr Condon said to you, you don't need experts for that, you're here because your knowledge and your experience of life will tell you about memory and how it works. How your own memory works and how you've seen other people's memory work in the course of your lives. The absence of a timely complaint is relevant and this is relevant as a factor, even though there may be good reasons why there was not a timely complaint."

47. The learned trial judge later returned to the issue of delay when he said:-

"…I want to turn now briefly to the question of delay and this is separate to the issue of delay as it arises in relation to corroboration. But I just want to speak to you about how you should approach it in this case. You've heard that this is a case of an old complaint, members of the jury, it certainly is that. It was made between 15 and 20 years initially after it happened and it comes to be tried by you between 20 and 24 years after the allegations are said to have taken place. So when you're being asked to decide about events so long ago, that obviously makes your task much more difficult, I would suggest to you. These kind of cases and this case is perhaps no exception, they tend to generate into a "You did", "I didn't" a sort of tit for tat, a Punch and Judy sort of arrangement. And sometimes when you're dealing with events and complaints from a long time ago, that's all you're left with. The problem with old complaints is that they generally lack position - precision and detail. And that makes it is very difficult for the person who is the subject of such a complaint to engage with that and to deal with it. And if you think about that for more than a moment, that's self-evident. But I want to talk to you about it in the context of defending a case in such circumstances. …If I say that one of you had assaulted me back in 1986 or in the middle 1980s and left it at no more than that, well those of you that were around and old enough to commit such an act then, you know it would be very hard for you to deal with that, wouldn't it, because it's a long time ago and it's very hard to put detail on that. So you're - you're probably left saying - instructing your barrister to go in and say, "Look, it didn't happen and that's really all you can put to him". But if I had said that well, in fact one of you assaulted me on the 16th of May 1986 and I was as specific as that, well turn it the other way around, if I was making that complaint, well I might - or if the complaint was made against me, I'd be able to say, "Well 1986 is a long time ago, but that was my 21st and I had a party that night and it was in such and such a place". And you see, there you are, bingo, there's detail you can hang your hat on and I can send my man in to cross examine on that particular basis. So, where there's detail you can engage better with the detail. If there's a particular date and if it's in the recent past, if it's on the 16th of May last year, well you have your diaries, you have your work records, you have holidays, you've stuff on a laptop or something like that, it's much easier when it's recent and when it's detailed to be able to defend against it. This is self- evident but I want you to bring this into play when you are considering the evidence, members of the jury. But I mean, how are you supposed to contest an allegation with any subtlety or in any forensic way if you are told it is that you did it 15 years ago over a period of 18 months. That's obviously much more difficult to engage with. So I suggest to you that makes it much more difficult to defend than it is to prosecute and I used to do a bit of both, perhaps more prosecution back in my time. But it's much easier to prosecute if you don't have to nail your colours to a specific mast because there's less you can be cross examined on.

Now, members of the jury, the law doesn't say that old stale cases cannot be tried. But what I have to tell you is this, the accused cannot in your minds be put at a disadvantage because this case is old, because the complaint relates to events from a long time ago. You have to be all the more careful and it should be much harder to satisfy you in relation to an event that is phrased in a vague and general way, rather than an event which carries detailed particulars. You cannot let the fact that Mr G may be handicapped by reason of the lack of precision on these charges make it easier for you to come to a decision adverse to him. The state should not be - should not benefit from being able to take old cases. You have to do with your hands on your heart recognise the huge difficulty that a person faced with such an allegation or allegations that they have because dealing with old cases requires care and requires you to take into account the difficulties that arise - that arise from that antiquity, members of the jury…He is grappling about allegations over a long period of time, a long time ago. So I want you to bear that in mind, because you know as much as can be said is that there was other people in the room at the time these things happened. But at this remove it's difficult to be detailed about who was in the room, where there might be more detail in the complaint is made at a much earlier time…

But you know, the state's path isn't cleared and it's not made easier to bring an old case simply because it's harder to defend and cross examine in relation to such allegations. And it makes you very - it makes it difficult to deal with the question of coming up with an alibi…So you take these things into account, added difficulties to your task and they can't inure to the benefit of the State, that's really what I'm saying to you. You must be able to say to yourself that it's all the harder to be satisfied if there's vagueness and if you're not satisfied you acquit, members of the jury, that's the way your mind must work. However, the law doesn't preclude old cases from being taken. And if having borne all that in mind, you're satisfied beyond reasonable doubt notwithstanding everything I've said to you on this aspect of the case, you're entitled to return and indeed obliged to return a verdict of guilty.

So that's the specific position in relation to delay and you'll.. what Mr McGuinness said to you, that there's a real aspect of it in this case, an illustration of how things can work if there isn't delay in relation to the girl's, quick complaint, quick investigation, steps taken."

48. While the learned trial judge recharged the jury in relation to a number of issues, including corroboration, no further reference was made by him to the issue of delay.

49. In the Court's view, the instruction provided to the jury on the issue of delay was perfectly adequate. It was couched in understandable language and in a way which was clearly indicated to the jury the problems in prosecuting a case, and more particularly, the difficulty facing an accused person defending himself, where there is a significant gap in time between the dates of the alleged offending and the date of complaint. The Court is satisfied that the learned trial judge more than satisfied the guidance provided in the decision of the Supreme Court of Canada in the case of *R v. Daley* [2008] 1 W.W.R.1 where at para 32 it was stated:-

"The trial judge must set out in plain and understandable terms the law the jury must apply when assessing the facts. This is what is meant when it is said that the trial judge has an obligation to instruct on the relevant legal issues."

Conclusion

50. For the reasons stated at para 30 above, the Court will allow the appeal, will quash the jury verdict and conviction, the Court will proceed to hear and determine any application for a retrial.