THE COURT OF APPEAL

[258/2017]

Peart J.
Edwards J.
Kennedy J.

BETWEEN

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

AND

M.S.

APPELLANT

Judgment of the Court delivered on the 10th day of April, 2019 by Ms. Justice Kennedy

1. This is an appeal against conviction. At the commencement of the trial before the Circuit Criminal Court, the appellant faced eight counts of indecent assault contrary to common law concerning allegations in respect of six complainants. At the conclusion of the prosecution case, the trial judge directed an acquittal on one count of indecent assault and on the 2nd November 2017, the appellant was convicted of three counts of indecent assault concerning two complainants, namely; M.W and D.K.

2. The appellant was acquitted by the jury of the remaining four counts on the indictment which concerned three complainants. He was sentenced on December 1st 2017 to a sentence of 20 months' imprisonment.

Background
3. The appellant was a surgeon, who was employed in a hospital where he was appointed as a consultant from the year 1968 until his retirement in 1995. He also had a private clinic in the locality. The offences concerned the indecent assault of a number of teenage patients, in both the hospital and his private clinic. The charges before the jury dated some 41-53 years prior to the trial. Complaints were first made to Gardaí in 2009, with the exception of one complaint which was made in 2007.

4. The nature of the offences concerned the inappropriate touching and fondling of the patients' genitals during the course of medical examinations. The patients were adolescent boys, aged between 13 and 16 years. All the complainants issued civil proceedings.

5. The notice of appeal sets forth 17 grounds of appeal However, ground 17 was not pursued. The remaining grounds are set out hereunder.

Grounds of Appeal
6. That the trial judge erred in law and in principle: -

1. In permitting the prosecution to re-examine the complainant D. K, and two other complainants, in order to adduce evidence that he had settled civil proceedings taken against the hospital at which the appellant worked and also allowed the prosecution to adduce the particular amount of the settlement;

2. In failing to discharge the jury in circumstances where the purported application to adduce evidence of the civil settlements was made by the prosecution to establish that there was no motivation for the complainants to give evidence where they had settled their civil cases, but in circumstances where it was then accepted by the prosecution that witness summonses had issued in respect of all complainants who were required by law to attend court and give evidence;

3. In permitting the evidence of the civil settlements by a third party and the amount thereof to be given in evidence, and in particular in circumstances where he then charged the jury that they should not draw any adverse inference as to evidence about settlement by the hospital;

4. In refusing to sever the indictment;

5. In ruling that he did not require to hear evidence in the context of an application to sever, in circumstances where the prosecution had refused to tender a witness at the request of the defence for the purpose of examining the background of the making of complaints, and the possibilities of suggestibility, contamination of evidence, copy-cat evidence or collaboration;

6. In ruling that the possibility of suggestibility, contamination of evidence, copy-cat evidence or collaboration was not relevant to the application to sever;

7. In failing to grant a direction in respect of the complaints of the remaining five complainants, in circumstances where the offences dated back between 52 and 42 years, where there were missing medical records, missing witnesses, and in which the prosecution were relying on system evidence;

8. When charging the jury in respect of the evidence of D B, the complainant in respect of whom he had directed an acquittal, that they were to disregard the evidence of the complainant, D.B, his mother P B, the medical records in respect of D.B and Dr. Stephens' evidence in respect of D.B and in further directing them that they could not use this evidence in favour of the prosecution or the defence in circumstances where the medical records appeared to directly contradict the evidence of D.B;

9. In allowing the question of system evidence to be considered by the jury in circumstances where he had refused to direct them on its potential effect and where the prosecution had requisitioned him to so advise the jury;

10. In his direction to the jury on system evidence, in particular in emphasising to the jury that in determining whether the complaints were independent they should consider whether there was collusion and whether they considered the complainants truthful;

11. In charging the jury that the defence case was that the complainants colluded with each other where no such allegation was made;

12. In his direction to the jury on system evidence in that he did not warn them that, if they found one of the complainants in the alleged system was not credible, as to what the impact of that finding would be on the system;

13. In refusing to re-charge the jury on the failure of system evidence or discharge the jury in circumstances where they had reached verdicts of acquittal in respect of the complaints of three complainants;

14. In circumstances where he ruled that he would give a corroboration warning to the jury and in circumstances where he ruled that there was no corroboration, in giving an insufficient warning by directing the jury that they should exercise caution before acting on unsupported evidence;

15. In failing to fully particularise and individualise the warning to the jury in his charge in respect of the substantial delay in respect of each complaint;

16. In ruling that Dr MJ could give evidence of recent complaint in respect of the complainant D K.

Grounds 1,2 and 3

The civil proceedings

1. In permitting the prosecution to re-examine the complainant D. K, and two other complainants, in order to adduce evidence that he had settled civil proceedings taken against the hospital at which the appellant worked and also allowed the prosecution to adduce the particular amount of the settlement;

2. In failing to discharge the jury in circumstances where the purported application to adduce evidence of the civil settlements was made by the prosecution to establish that there was no motivation for the complainants to give evidence where they had settled their civil cases, but in circumstances where it was then accepted by the prosecution that witness summonses had issued in respect of all complainants who were required by law to attend court and give evidence;

3. In permitting the evidence of the civil settlements by a third party and the amount thereof to be given in evidence, and in particular in circumstances where he then charged the jury that they should not draw any adverse inference as to evidence about settlement by the hospital.

7. These three grounds concern civil proceedings and the re-examination by the respondent of three complainants in respect thereof. Civil proceedings were instituted by the six complainants and were settled by the hospital without an admission of liability.

8. By way of background, the complainant, LW was cross-examined by Mr Hartnett SC for the appellant concerning a campaign run by a Ms. Sullivan regarding the appellant which involved discussion and advertisements on the radio, as a result of which LW made contact with Ms Sullivan's organisation who arranged for him to make a statement to the Gardaí and directed him to a solicitor to institute civil proceedings. The complainant agreed that he made a statement to the Gardaí and instituted civil proceedings in 2009. At the conclusion of the complainant's direct testimony, the respondent made an application to re-examine the witness on a number of bases to include the fact that these civil proceedings had been settled and that the complainant had received compensation. The reason advanced for such re-examination by the respondent arose from a concern that the jury would be left with the impression that the motivation in making the complaint was for financial gain. Therefore, the respondent was anxious to ensure that the jury were aware that the civil proceedings had been compromised prior to the criminal trial.

9. The trial judge acceded to the application and on re-examination by the respondent the witness confirmed that he had received a sum of €70,000 as a result of his civil action, by way of settlement with the hospital and without an admission of liability. It was clarified that the settlement took place some five or six years prior to the criminal trial. It was also confirmed that no compensation emanated from the appellant.

10. The complainants GC and DK were also re-examined in similar respects. The complainant MW was not.

11. The appellant submits that evidence concerning the settlement proceedings, was neither relevant nor probative evidence and says that it was not suggested in cross-examination that the complainants were financially motivated in their complaints and therefore the evidence upon which the prosecution re-examined was inadmissible. Mr Hartnett SC for the appellant argues that such evidence was prejudicial and of no probative value. The only conclusion, he says, that the jury could have come to is that the hospital accepted the complaints as credible and that the complainants were entitled to compensation. Moreover, the amount of the settlements was also revealed and Mr Hartnett argues that not only was this highly prejudicial to the appellant, but was evidence with no probative value whatsoever. Further, the trial judge failed to explain to the jury as to how they should treat this evidence, in directing them not to draw an inference adverse to the appellant. It is also contended on the part of the appellant that the judge refused to inform the jury that the complainants were in court on foot of witness summonses.

12. The respondent disagrees with the appellant's contention that the trial judge erred in this regard. Reference is made to *McGrath on Evidence*, wherein the author states: -

"A witness who has been cross-examined may be re-examined by the party who called him or her with a view to eliciting further evidence that is favourable to that party and to rehabilitate the credibility of the witness and the veracity, reliability and accuracy of the evidence given by him or her if this has been impugned on cross-examination…It should be

noted that evidence which was not admissible on examination-in chief may become admissible as a result of the nature of the cross-examination."

13. Further, Heffernan and Ní Raifeartaigh observe in their text '*Evidence in Criminal Trials*' at para. 2.103, that "*the cardinal rule indigenous to re-examination is that the material scope of the exercise is limited to matters that arise "out of" the cross-examination of the witness*" and refer to the case of R v. Coll (1889) 24 LR. Ir. 522, where, on re-examination of a witness, the Crown questioned him about an earlier statement where the witness had mentioned the accused by name, in circumstances where he had not named the accused in a previous statement. The accused was convicted of manslaughter, which was upheld. Holmes J. stated: -

> "Indeed, it seems to me that this branch of the law of evidence depends upon the principle which is applied every day in practice, that a witness had a right to explain a matter relied on in cross-examination for the purpose of discrediting him, provided it is reasonably capable of explanation."

Despite dissenting, Andrews J. supported the principle that: -

> "Cross-examination may, and often does, render evidence admissible on re-examination which would not have been admissible on the direct."

14. The respondent submits that the evidence on re-examination was admissible. The evidence in question was adduced in order to displace the suggestion that the complainants had an ulterior motive to come to court and give evidence. To fail to call the evidence in relation to the civil settlements would invite speculation on the part of the jury. The appellant's complaint that the trial judge failed to explain the purpose of that evidence and incorrectly informed the jury that no adverse inference should be drawn against the appellant arising from the evidence is to misunderstand the reason why the respondent was entitled to re-examine on this issue. The purpose of adducing the evidence was in order to displace the impression created throughout cross-examination that the evidence of the complainants was in some way financially motivated. It was crucial the jury had the full picture, specifically that they were aware that the civil proceedings had been compromised in advance of the trial and therefore that the criminal proceedings could not be used in any sense to bolster a civil action. The trial judge, it is contended by the respondent, was correct in instructing the jury not to draw any inference adverse to the accused that the proceedings had settled; but the jury were entitled to rely on the evidence in considering the issue of motivation on the part of the complainants in proceeding with the criminal trial. The respondent further relies on the decision of this Court in *The People (DPP) v. S O'C* [2017] IECA 23, where it was stated by Birmingham J. (as he then was) at para. 14: -

> "It is clear that the judge felt that there would be a real unfairness if the jury was left with the false impression that there was no complaint until recent times. The nature of the cross-examination brought the question of complaint centre stage and in those circumstances this Court cannot conclude that the judge exceeded his discretion when he permitted the jury to hear what the complainant had told her friend and the psychiatrist who was treating her. This ground of appeal therefore fails."

15. The appellant also contends that the judge erred in failing to discharge the jury on foot of the evidence of the civil settlement in circumstances where the complainants were before the court on foot of witness summonses.

Discussion

16. Each complainant commenced civil proceedings in 2009 and five of the six complainants complained to the Gardaí in 2009 with DK making his statement of complaint in 2007. Counsel for the appellant was understandably concerned to ensure the jury were alert to the fact of civil proceedings and the circumstances in which such proceedings were commenced. However, once the issue was known to the jury, we are satisfied that the respondent was entitled to re-examine in order to ensure that the jury had a complete picture. The re-examination arose directly from cross-examination and although Mr Hartnett suggests that no direct question was asked of, or suggestion made to, any complainant, that the motivation in complaining to the Gardaí was financial, nonetheless it was implicit in the line of questioning that this was indeed so.

17. It was a legitimate concern for the prosecution to ensure that the jury were aware that whilst civil proceedings had commenced in 2009, those proceedings in all instances had been settled with the hospital, without an admission of liability and without any involvement by M.S. This was necessary in order to rebut the suggestion that the complainants were proceeding with the criminal trial in order to bolster or support their *outstanding civil proceedings*. It was therefore important that it be made known to the jury that the civil proceedings had been finalised. To do otherwise would have caused an injustice and would have left the jury with a false impression of the situation. We are satisfied that the evidence was probative evidence in the context of the trial and the tenor of the cross-examination.

18. Moreover, on an examination of the verdicts returned by the jury; the counts in respect of which the appellant was found guilty concerned two complainants; namely; MW and DK. DK made a statement of complaint in 2007 and commenced civil proceedings in 2009. Those proceedings were compromised. MW made his statement of complaint in 2009 and instructed his solicitors to bring a civil action. Whilst DK was re-examined on the issue of the settlement of his civil action, MW was not. The appellant was found not guilty of the remaining counts. Each of those complainants had instituted civil proceedings. Two of the complainants were re-examined on the settlement of their civil actions and the jury returned verdicts of not guilty in respect of the counts concerning those complainants.

19. Therefore, the only logical conclusion that can be drawn is that the jury proceeded as they were directed by the trial judge and drew no inference adverse to the appellant on this issue. Any other conclusion would fly in the face of common sense. In any event, there is no reason to believe in any given case that a jury would chose to ignore the directions and instructions of the trial judge. In the instant case, the verdict returned by the jury serves to reinforce that proposition.

Conclusion ground 1

20. In conclusion, the impugned evidence adduced on re-examination was admissible evidence. Its probative value outweighed the prejudicial effect. Moreover, to leave the jury with an inadequate impression of the circumstances would have been unfair in the circumstances. This ground therefore fails.

21. The appellant asserts that the judge erred in failing to discharge the jury in circumstances where the impugned evidence was adduced in re- examination and where the complainants had each received a witness summons. Consequently, it was argued by Mr Hartnett, in applying to the trial judge to discharge the jury that whilst counsel for the respondent had sought to re-examine the three complainants on the basis of a suggestion by the defence, that the reason the witnesses were before the court giving evidence

was in order to promote a civil action, this was refuted by the defence and Mr Hartnett argued that the real reason for the witnesses' presence in court related to the witness summonses.

22. The trial judge refused to discharge the jury stating as follows: -

> "… I've already ruled in relation to this application on a previous occasion and this is a further application by Mr Hartnett on the basis that he has now discovered that the complainants were the subject of summonses which probably are in reality witness orders. Once a case is sent forward…As I understand it, witness orders are made by the trial judge. I don't see any difference between that situation and the application that was made by Mr Hartnett at the time. The defence were aware of that. If Mr Hartnett wishes to cross examine one of the prosecuting guards in relation to that issue he's free to do that. So, I don't propose to discharge the jury at this juncture..."

Conclusion ground 2

23. It is well settled that the discharge of the jury should only occur in exceptional cases and as a last resort. In the instant case, should the defence have wished to do so, it was open at any point to cross-examine the prosecution witnesses on the issue of witness orders. It is the position that a witness order is served on prosecution witnesses in a criminal trial requiring the attendance of witnesses and to enable an application to be moved before a trial court should the witness fail to attend. The witnesses were not asked about such orders in cross-examination. The application to discharge the jury was made before the conclusion of the prosecution's evidence and therefore witnesses could have been cross-examined in this respect if the defence had chosen to do so. We are fully satisfied that the trial judge did not err in refusing to discharge the jury. This ground fails.

24. On the issue of evidence concerning the settlement of the civil actions the trial judge in his charge to the jury, stated as follows: -

> "In relation to the civil actions, the prosecution have said that the complainants who brought civil actions have no reason, that they have no reason to be motivated by these proceedings, because these proceedings are now finalised. The other thing I want to say to you in relation to civil proceedings is, you heard from a number of the complainants that they received a settlement of their civil proceedings. That their civil proceedings with (sic) finished with; they received a settlement of, I think, it was €70,000 from the hospital, and that settlement was without an admission of liability. So the hospital did not admit liability, and obviously you've heard that M.S. did not make any admission of liability, and M.S. did not make settlement. So when you're dealing with the civil actions, you cannot draw any adverse inferences against M.S. from the evidence you have heard as to the settlement of the civil proceedings by the hospital. So you can't draw any adverse inferences against M.S. in relation to the civil proceedings settled by the hospital."

Conclusion ground 3

25. It is clear from the foregoing passage that the judge instructed the jury not to draw an inference adverse to the appellant from the fact that proceedings had settled. He instructed them that the civil proceedings had settled without an admission of liability and had been settled by the hospital. The trial judge was concerned to ensure that no possible unfairness was occasioned to the appellant by the evidence. It is clear that he did not direct the jury to disregard this evidence or 'change his mind as to its admissibility', as is contended by the appellant. On the contrary, he sought to ensure that the jury drew no inference adverse to the appellant from the fact that the hospital had settled the proceedings without an admission of liability, but left the issue for consideration by the jury in the context of motivation on the part of the complainants.

26. We are satisfied that the trial judge properly directed the jury as to how to treat the evidence. A further complaint is made that a jury may not have understood what was meant by the fact that the settlement was without an admission of liability. Should there have been any possible concern about this, it was addressed immediately by the trial judge when he instructed the jury that the hospital did not admit liability. It is difficult to conceive that a jury of 12 people would not have understood the terms used by the trial judge and we reject this ground.

Grounds 4, 5 and 6

The application to sever the indictment.

> *4. The learned trial judge erred in law and in principle in refusing to sever the indictment.*
>
> *5. The learned trial judge erred in law and in principle in ruling that he did not require to your evidence in the context of an application to sever, in circumstances where the prosecution had refused to tender a witness at the request of the defence for the purpose of examining the background of the making of complaints, and the possibilities of suggestibility, contamination of evidence, copycat evidence or collaboration.*
>
> *6. The learned trial judge erred in law and in principle in ruling that the possibility of suggestibility, contamination of evidence, copycat evidence or collaboration was not relevant to the application to sever.*

27. Before the jury was empanelled, an application was made on behalf of the appellant to sever the indictment as between the six complainants. As can be seen from the nature of the grounds there were a number of strands to the application. Counsel for the appellant submitted before the trial court that should the prosecution seek to rely on system evidence, the prosecution was first required to exclude the possibility of suggestion, contamination, copy-cat evidence, or collaboration as between the complainants. It was argued by the appellant that in order to do so, there was an onus on the prosecution to call evidence or at the very least to tender a witness for cross-examination to enable the trial judge to satisfy himself that the evidence was free from such contamination. In essence, it was contended on behalf of the appellant that the complainants had not come forward by accidental coincidence but had done so on foot of an orchestrated campaign and therefore the issue of cross-contamination or collaboration had to be excluded before the prosecution could rely upon system evidence. In effect, the defence contended that issues such as contamination or collaboration were relevant to admissibility. The appellant relied upon the decision of *The People (DPP) v. CC (No. 2)* [2012] IECCA 86 as support for this proposition whereas the respondent submits that this decision does not bear such an interpretation. The trial judge ruled there was no authority for the proposition that he should hear evidence in advance of the trial on this issue and he refused to do so. The application for severance therefore proceeded in the usual manner on foot of the content of the book of evidence.

28. The appellant argued that the indictment should be severed in light of the particular background to the allegations in the present

case, where the appellant had been acquitted in a previous trial in 2003 concerning other complainants and where there had been media interest and publicity, a campaigning organisation (Dignity 4 Patients), radio advertisements relating to the appellant, medical council hearings and civil proceedings. Furthermore, reference was made in the context of the application for severance of the indictment to the manner in which the various complaints were instigated with the suggestion being that the six complainants, either through contact with Dignity 4 Patients or in some other manner, concocted their complaints.

29. The application to sever the indictment was further argued on the basis of extraordinary delay, the absence or paucity of medical records for some of the complainants, the different locations of the alleged offending, and the nature of the allegations made.

30. The respondent relied upon the test in *The People (DPP) v. B.K* [2000] 2 IR. 199, and argued that the evidence concerning each complainant be tried together in accordance with the general principle that the evidence was admissible by virtue of system evidence.

The Nature of the Allegations
31. In broad terms the trial concerned allegations made by six complainants each of whom were teenage boys, aged around 13-16 years old and who attended M.S. in his capacity as a medical practitioner. Each of the boys presented themselves for medical complaints in a medical setting and alleged that M.S. sexually abused them by touching them in the genital area.

Stated briefly, the allegations were as follows:

Complainant W: An allegation between November 1964 and November 1965 in a cubicle in a hospital which involved massaging of the testicles and stroking of the penis.

Complainant C: An allegation between November 1970 and May 1972 in a cubicle of The hospital which involved squeezing the testicles.

Complainant B: Two allegations between January 1976 and November 1976 in a cubicle in the hospital which involved touching testicles and stroking the penis. The second allegation concerning the same location and concerned touching the penis.

Complainant K: An allegation between May 1975 and May 1976 in a cubicle in the hospital and concerned the massaging of the testicles and groping of his private parts outside the clothing.

Complainant B: An allegation between June 1988 and June 1991 in a cubicle in the hospital and concerned the groping of the penis and the testicles.

Complainant W: Two allegations between March 1974 and September 1975, firstly at a private clinic and involved touching and massaging of the penis on each occasion.

Discussion
32. The starting point for an application for severance of the indictment is section 6(3) of the Criminal Justice (Administration) Act 1924 which provides: –

> "Where, before trial, or at any stage of the 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."

33. In child sexual abuse cases persons are frequently charged with offences concerning a number of different complainants. In those circumstances, the accused will face a number of counts on an indictment relating to different complainants. Frequently, an application is made to sever the indictment so that the accused person will only face an allegation/s made by a single complainant in a number of trials.

34. When an application for severance is made, it is ordinarily moved before the jury is empanelled to avoid any possible prejudice to an accused should a trial judge decide to accede to the application. Where such an application is made, the prosecution may seek to rely on evidence of system. In those circumstances, the invariable practice is that arguments are made based on the potential evidence contained in the book of evidence. The judge must then decide in accordance with the principles set forth in *The People (DPP) v. B.K* [2000] 2 I.R 199 whether the evidence relating to the separate complainants is cross-admissible. In this context, the court must consider whether the probative value of the evidence outweighs its prejudicial effect. Such evidence must be considered to be highly probative where a number of similar allegations are made by separate complainants. This is particularly so where each is unaware of the other. Obviously, it would be quite an extraordinary coincidence if those individuals made complaints of similar character against the same accused. The value of such evidence needs no elaboration.

35. System evidence has been the subject of many erudite judgments and in the seminal decision of *The People (DPP) v. B.K*, Barron J. stated the following test for admissibility at p. 203: -

> "While there may be cases where the trial judge may be able to charge a jury so that an accused is not unfairly prejudiced where evidence admissible on one count is inadmissible on another, in most cases the real test whether several counts should be heard together is whether the evidence in respect of each of several counts to be heard together, would be admissible on each of the other counts."

Barron J. distilled the principles to be considered: -

> "(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: -

(a) There is the inherent improbability of several persons making up exactly similar stories;

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

36. In *(People) DPP v. McCurdy* [2012] IECCA 76, Hardiman J. endorsed the judgment of *B v. DPP* [1997] 3 I.R 140, where at pp. 157-158 Budd J. stated that the probative value of multiple complainants "may depend in 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."

37. Therefore, it is clear that similar allegations by a number of complainants is undoubtedly probative evidence.

Collaboration/Collusion/Inadvertent Influence/Contamination

38. Mr Hartnett SC advanced the argument that before such evidence could be deemed to be admissible, the prosecution first had to exclude the possibility of contamination, suggestibility, copycat evidence or collaboration. In the course of this appeal Mr Hartnett deprecated the use of the word collusion and it appears to us that the reason for this is that Mr Hartnett's complaint stems from the manner in which the proceedings were originally instigated. It is the position that each of the complainants made contact with Ms. Sullivan and then attended meetings with Dignity 4 Patients. Arising therefrom each were encouraged to make complaints to the Gardaí and were furnished with the contact details of a solicitor for the purpose of a potential civil claim, thereby, on the appellant's argument, giving rise to a potential for contamination, copycat evidence or suggestibility.

39. Therefore, it is argued that the potential risk is not in the strict sense one of collusion, but rather that attending the meetings and receiving encouragement to bring civil and/or criminal proceedings, this had the result of tainting or contaminating the allegations made by each complainant, rendering the evidence of each complainant inadmissible in respect of the other complainants and thus requiring separate trials.

40. The argument appears to be that the contact or communication before the instigation of proceedings was such as to cause the possibility of suggestibility, contamination of evidence, copycat evidence or collaboration. However, this argument is fundamentally flawed in that it presupposes that the issue of collaboration or contamination or collusion is the touchstone of admissibility. In support of this contention Mr Hartnett relies upon the decision of O'Donnell J. in *The People (DPP) v. CC (No. 2)* [2012] IECCA 86 and in particular paragraphs 36 and 37 thereof. The relevant portions being as follows: -

> "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.**"[emphasis provided]

41. The Court went on to state: -

> "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".

42. When addressing the issue of collusion, the Court stated: –

> "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 factfinder** 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." [emphasis provided]

43. Firstly, we observe that in *The People (DPP) v. CC*, there was no application for severance of the indictment and therefore no discussion as to the basis of admissibility of the evidence of the complainants.

44. We are of the view that the proposition advanced by the appellant that a trial judge must first proceed to hear evidence and consider whether the evidence of the complainants is lacking in independence by virtue of collaboration or contamination, is to misinterpret and misconstrue the passages upon which reliance was placed in the course of legal argument.

45. It is our view that the passages refer to the desirability of an initial discussion regarding basis for the admissibility of the counts concerning the complainants' evidence. The references relied upon by the appellant then concern the charge of the trial judge as to how a jury should treat such evidence. This is evident from the use of the language by O'Donnell J. where he refers to the fact that a jury should be informed that the evidence of each complainant is in fact admissible and as to why the evidence of each complainant is cross-admissible.

46. In assessing the weight to be attached to such evidence, the Court of Appeal refers to a situation where complainants come forward independently and describe an offence with a "distinctive element or signature", in such a situation coincidence would of course, be extremely unlikely in the absence of deliberate collusion. It is clear in our view, that the Court was considering the question of weight as opposed to admissibility.

47. The key question is whether the possibility of contamination, copycat evidence, collaboration, inadvertent influence or collusion is an issue directed towards the admissibility of the evidence in the first instance as opposed to the weight of the evidence to be assessed by the factfinder.

48. Whilst in some instances, there may be contact between complainants prior to the commencement of the trial, this is not necessarily indicative of collusion or contamination or collaboration or indeed inadvertent influence. For example, allegations may be

made by complainants who attended the same school or were taught by the same teacher or may be made by siblings who lived in the same house for many years.

49. In *R v.H* [1995] 2 A.C. 596, the appellant was charged with sexual offences in respect of two complainants. The question of law before the House of Lords concerned how a trial judge should deal with a similar fact case where the defence demonstrate that there is a risk that the evidence is contaminated by collusion or other factors. The House of Lords determined that a trial judge should, where the possibility of contamination or collaboration or collusion is raised, proceed on the basis that the allegations are true and determine whether the probative value of the evidence outweighs its prejudicial effect. The question of contamination or collaboration was not considered to be a relevant consideration on the issue of the cross-admissibility of the evidence at that stage. The Court did not exclude the possibility of a trial judge finding it necessary to hold a *voir dire* in exceptional cases where a judge had difficulty in applying the balancing test. In this regard Lord Mackay stated: –

> "The situations in which collusion is relevant in the consideration of admissibility would arise only in a very exceptional case of which no illustration was afforded in the argument on this appeal but I regard it as right to include this as a possibility since it is difficult to foresee all the circumstances that might arise."

50. The Court went on to say that where the evidence is admitted, but circumstances arise in the course of trial which would indicate that no reasonable jury could accept the evidence as being free from collusion, the trial judge should direct the jury that the evidence could not be relied upon as corroboration or for any other purpose adverse to the defence. Finally, the House of Lords found that where the question of collusion has been raised, the trial judge should draw the importance of this to the attention of the jury for their consideration as to whether it could be relied upon as corroboration. The Court stated as follows: –

> "And fourthly, where this is not so but the question of collusion has been raised the judge must clearly draw the importance of collusion to the attention of the jury and leave it to them to decide whether, notwithstanding such evidence of collusion as may have been put before them, they are satisfied that the evidence can be relied upon as free from collusion and tell them that if they are not so satisfied they cannot properly rely upon it as corroboration or for any other purpose adverse to the defence."

51. We find the decision in *R v.H* to be persuasive. The evidence of several complainants may be cross-admissible in order to rebut innocent explanation, accident or denial as stated by Barron J. in *The People (DPP) v. B.K* [2000] 2 IR. 199 and if the allegations are accepted by a jury as being independent of each other and free from collaboration or collusion or some such factors as may arise on the evidence, then the evidence may have a corroborative effect. As stated by Hardiman J. in *The People (DPP) v. McCurdy* [2012] IECCA 76: -

> "Such evidence may in certain cases exhibit both of these characteristics, quite separately. It is very important that the law of evidence should be realistic according to the ordinary instincts of mankind."

Conclusion – grounds 5 and 6

52. Effectively, Mr Hartnett's argument is that each of the witnesses' account of events had been contaminated by virtue of attending meetings organised through Dignity 4 Patients. We use the word contamination to incorporate not only deliberate acts but also to include inadvertent or unconscious influence. This was a case where the initial objection to the admission of the evidence of all complainants in a single trial was on the basis of such a risk of contamination, suggestibility or collaboration. We observe that questions in cross-examination focused on the campaign with attendant publicity run by Ms. Sullivan. No questions were asked as to whether any of the witnesses actually engaged with each other in an effort to point to contamination, collaboration or suggestibility and nor was there any evidence or indeed suggestion that the fact of attending such meetings planted the notion of sexual allegations in the mind of any given complainant.

53. The height of the evidence was to demonstrate that the complainants attended meetings and were encouraged, facilitated and advised in the making of complaints. It is a fundamental principle of law that any question of fact which can be determined by a jury should not be decided by a trial judge. This was precisely the position here; the question of contamination or some other factor is one of weight and probative value and we see no reason why this question should not have been left for the jury to consider with appropriate directions from the trial judge.

54. We are satisfied that the possibility of contamination or collaboration, inadvertent influence or suggestibility are, in all but the most exceptional cases, matters directed to weight and the probative value of evidence and therefore an issue for the jury. This case was far removed from that which might be considered as exceptional. A suggestion that attendance at meetings gives rise to a possibility of suggestibility or contamination so that the evidence is not cross-admissible is not of an exceptional character so as to be relevant to the issue of admissibility. The trial judge did not err in refusing to hear evidence on the issue.

55. In our opinion, the current practice should continue where an application is made to sever an indictment and the suggestion is made of the risk of contamination or other factors, that the trial judge should rule on the admissibility of the evidence of co-complainants on the basis of the book of evidence in accordance with the test laid down in *The People (DPP) v. B.K* [2000] 2 IR. 199. The possibility of the risk of contamination, collusion or other factors should not be explored in a *voir dire* save in the most exceptional circumstances.

56. As stated in *R v.H* [1995] 2 A.C. 596, if the evidence of co-complainants is admitted and it transpires in the course of the trial that a jury could not accept the evidence as free from factors tending to undermine it, such as collusion, contamination, suggestibility or inadvertent influence, in consequence thereof, the judge should direct the jury that the evidence is not capable of amounting to corroboration or of being used for any other purpose adverse to the accused.

57. Finally, the jury should be instructed on the significance of factors that might have the effect of undermining the system evidence, such as those referred to in the preceding paragraph.

58. In our opinion, the possibility of collaboration or contamination or copycat evidence in the instant case was a matter which was foursquare within the province of the jury.

59. These grounds therefore fail.

The System Evidence

60. Hardiman J.'s observation in *The People (DPP) v. McCurdy* [2012] IECCA 76 bears repetition in that he stated: –

> "It is very important that the law of evidence should be realistic according to the ordinary instincts of mankind"

61. In our opinion, whether evidence which demonstrates that an accused acted in a similar way on a previous occasion is labelled as similar fact evidence, system evidence or misconduct evidence is not of the greatest importance. What is of importance is the purpose of the admissibility of such evidence. It is clear that the question of system evidence may become relevant at a point in time when an application is made to sever an indictment which contains several counts in respect of more than one complainant against the same accused. In those circumstances, should the prosecution oppose the application, (as one might expect, given that several counts have been preferred on the indictment), argument will be made by the prosecution that the allegations have a sufficient nexus or similarity, thus requiring all matters to be tried together.

62. Such an application is ordinarily made on foot of the contents of the book of evidence and requires a trial judge to determine whether the evidence of the various complainants is cross-admissible. The evidence of complainants is admissible for the purposes stated by Barron J. in *The People (DPP) v. B.K* [2000] 2 I.R 199 but may also be capable of providing corroboration where the allegations are accepted as being independent as stated by Hardiman J. in *The People (DPP) v. McCurdy*. Applying the ordinary principles; where the charges are against one person, such evidence is admissible in order to rebut a defence of innocent explanation, accident or denial, or is admissible because there is an inherent improbability of several persons making up exactly similar stories. Trial judges are therefore required to assess probative value and prejudicial effect. As stated by Barron J: –

> "The basic 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."

63. System evidence is admissible if there is sufficient nexus or similarity in the allegations. As stated by Mahon J. in The People (DPP) v. McG [2017] IECA 98 at paragraph 23:-

> "In the instant case there are indeed striking similarities in the allegations made against the appellant by the two complainants. The nature of the sexual offending is, while not precisely similar, broadly so. Its dissimilarity may simply be explained by the fact that one complainant was male, and the other was female. Importantly however, both were children. There is also the fact that both complainants were the stepchildren of the appellant, and that the locations in which the sexual abuse took place were, for the most part, the family home at the time. Another similarity is the allegation by both complainants of being offered money as an inducement to facilitate sexual abuse."

Conclusion – ground 4
64. The evidence must obviously be sufficiently probative in order to be admissible. In the instant case, we are satisfied that the trial judge did not err in refusing to sever the indictment. In fact, in this case the degree of similarity was very significant. The complainants were all teenage boys, all attended M.S. in his capacity as a medical practitioner for treatment of one kind or another in a medical environment and all were sexually abused in the most similar manner, involving allegations of the touching of the genitals of each boy. Whilst there are certain minor dissimilarities, such as the location in five instances being the hospital and in one instance the private clinic or the touching outside or under the clothing; these are insufficient in our view to render the evidence of each complainant inadmissible. Indecent assaults are unlikely to be carried out in a precisely similar fashion on every occasion and to so conclude would offend common sense.

65. This ground therefore fails.

Ground 7
The failure to grant a direction by the trial judge.

7. The learned trial judge erred in law and in principle in failing to grant a direction in respect of the complaints of the remaining five complainants, in circumstances where the offences dated back between 52 and 42 years, where there were missing medical records, missing witnesses, and in which the prosecution were relying on system evidence.

66. The appellant submits that the present case is one where the trial judge should have exercised his jurisdiction pursuant to the principles in *DPP v. PO'C* [2006] 3 I.R 238 to stop the case and pursuant to *R v. Galbraith* ought to have withdrawn all counts from the jury, firstly on grounds of fairness due to the absence of medical records and missing witnesses and secondly on the basis that it was contended there were internal contradictions and weaknesses within the evidence of the complainants.

67. In *PO'C*, it was stated by Denham J. (as she then was) that a trial judge has a continuing duty to: -

> "ensure fair procedures and due process, including issues arising because of any delay…this jurisdiction is exercised in the course of the trial on the evidence given in the trial..."

The appellant submits that the circumstances of the present case meant that, after the evidence was heard, a real risk arose that the appellant would not receive a fair trial.

68. The respondent submits that the trial judge acted in accordance with the relevant authorities in this regard. Reliance is place on *M.S v. DPP* [2015] IECA 309, where Hogan J. dealt with lapse of time in a portion of the judgment.

69. At the conclusion of the prosecution case an application was made to stop the trial or to withdraw all counts from the jury. This application was moved on the basis of the antiquity of the complaints, the unsuccessful attempts to identify personnel who were in the vicinity regarding the alleged events and missing medical records.

Discussion
70. These were cases of some considerable antiquity with the allegations dating from 1964 – 1991; a period of some 26 – 54 years' delay. There were no medical records concerning two complainants in respect of whom verdicts of not guilty were returned. Medical records were available concerning DB; in respect of whom the judge directed a verdict of not guilty and finally medical records were available regarding WB in respect of whom verdicts of not guilty were returned.

71. As regards the injured parties in respect of whom guilty verdicts were returned, namely; DK and MW. The situation regarding DK is as follows. A single count was preferred regarding the complaint of DK relating to a date between 1 May 1975 and the 31 May 1976, some 41 years ago. DK indicated in his direct testimony that when he presented to the hospital he was either 15 or 16 years old. He had difficulty with a recurring ingrown toenail. It was recommended that he attend hospital and an appointment was made with M.S..

He recalled M.S. and a female assistant being present whom he assumed to be a nurse. He said blankets were placed over him with cords of some kind wrapped around the blanket. He said the female assistant seemed to disappear and thereafter he described M.S. indecently assaulting him. Medical records were available regarding DK in the form of two letters, one of which was a referral, presumably to M.S. and a letter from M.S. indicating that he had carried out an operation on DK which might require further surgery in the future. M.S. accepted that he had examined DK. The application to stop the trial/withdraw the count regarding DK was made on the basis of a missing witness.

72. As regards MW, this complainant was the subject of two counts on the indictment; the first count referred to a date between the 31 March 1974 and 30 September 1975 and the second count concerned the 31 March 1975 to 30 September 1975. There were records to demonstrate that M.S. treated this witness on a number of occasions including, in 1975 which involved an operation concerning undescended testicles. A further operation in the same year took place a few months later for the removal of an appendix, he was again treated by M.S. in 1979 and in 1982 he was again operated upon by M.S.. The application was made in respect of this witness on the basis of inconsistencies and lack of clarity in his evidence.

The application to withdraw the counts from the jury.
73. The application in the instant case was moved pursuant to the second limb of the well-known decision in *R v. Galbraith*. This Court addressed this aspect of the test in *The People (DPP) v. M* [2015] IECA 65, where the Court stated that Lord Lane's statement of principle in *Galbraith* is not authority for the proposition that a case must be withdrawn from the jury if the prosecution's evidence is tenuous or inconsistent. The Court said as follows: –

> "On the contrary, the emphasis in *Galbraith* is on the primacy of the jury in the criminal trial process as the sole arbiter of issues of fact. What Lord Lane was in fact saying in *Galbraith* was that even if the prosecution's evidence contains inherent weaknesses or is vague, or contain significant inconsistencies, it is for the jury to assess that evidence and make of it what they will, unless the state of the evidence is so infirm that no jury, properly directed, could convict upon it. Accordingly, what Galbraith is in fact concerned with is fairness.

Moreover, implicit in the *Galbraith* principles enunciated by Lord Lane, is that withdrawal of a case from a jury should be an exceptional measure, to which resort should only be had for the purpose of avoiding a manifest risk of wrongful conviction".

74. The application was made as regards the injured party DK on the basis of a missing witness and therefore does not fall within the test in *Galbraith*. In any event, evidence was given by the complainant in direct and cross-examination which fell four-square within the province of the jury.

75. Concerning the application to withdraw the counts relevant to MW, having examined the transcript of the evidence, it is clear that the complainant was consistent in his core allegation. The matters raised by Mr Hartnett of treatment by M.S. before and after the date of the offences were issues of fact and therefore for the jury to determine. The fact that no complaint was made by the witness and he again returned to be treated by M.S. again was an issue of fact which again was for determination by the jury.

76. It was not unfair that the jury should be asked to consider the evidence. They were matters for consideration by the jury in assessing whether the complainant's evidence could be regarded as credible and reliable. Thus, we are satisfied that the trial judge did not err in refusing to withdraw the counts of indecent assault from the jury.

The POC application
77. A trial judge has an inherent power to protect its own processes and this includes ensuring a right to a fair trial. The court has an inherent jurisdiction to stop the trial from continuing if a matter should arise in the course of the trial which abrogates this right.

78. The primary issue in relation to this application concerning DK related to the contention that a nurse who may have been present for the procedure could not be found. Concerning the complainant MW, Mr Hartnett stated, inter alia, that whilst the witness was attended by M.S. before and after the date of the offending conduct, he was nonetheless prepared to be treated by him. Concern was expressed also as regards the clarity of his memory. Underpinning the application with the fact that these were old cases where the events complained of took place in a busy hospital with nurses and doctors and patients all about.

79. The trial judge, in instructing the jury regarding the issue of delay drew their attention to missing medical records but also and significantly in the context of DK drew their attention specifically to the fact that the nurse who may have been present for the procedure was unavailable. In the decision of *The People (DPP) v. WT* [2015] IECA 140, this Court addressed the issue of missing witnesses. In that case a witness for the appellant was deceased which witness the complainant indicated witnessed the abuse complained of. In considering the evidence, the Court said: -

> "In assessing the significance of the absence of Ms A, the Court has considered what evidence she might have had to give. One possibility is that her evidence would have been that she recalled the occasion as described by the complainant. If that was so, her evidence would have corroborated the complainant's account. A second possibility is that she would have said that she had no memory of going to the storeroom and witnessing anything. Her evidence would therefore have been entirely neutral. A variation on this would have been that she had no recollection of the incident as described, but believes she would have remembered any such incident if it had occurred, even at a time far removed. It is possible that she would have been so firm in her belief that she would have said that the incident of abuse was not witnessed by her… However, what her evidence would have been is, at this stage, pure speculation. The suggestion that she might have had evidence to give which would have served to undermine the prosecution case is also no more than speculation."

80. We would go further in the instant case, in that the evidence of the complainant DK was that whilst a female assistant was present initially, he said that she then disappeared. Consequently, the value of her evidence, was entirely speculative.

Conclusion on ground 7
81. As stated above, the application to withdraw the case and/or stop the trial from proceeding was premised on the fact of missing witnesses, missing records and tenuous inconsistent evidence. The entirety of the application was underpinned by the antiquity of the allegations.

82. It is well settled that a trial will be stopped where there is a real risk of an unfair trial which cannot be avoided by the appropriate rulings and directions by a trial judge. Missing records alone will not necessarily suffice to stop the trial. Moreover, missing witnesses will not necessarily be sufficient to stop a trial. What is important is a consideration of the evidence and an engagement with that evidence. In our view, the absence of records in this case did not give rise to a real risk of an unfair trial which could not be avoided

by the appropriate directions of the trial judge. Indeed, in the case of DK, records were available and M.S. agreed that he examined this witness. The greater concern obviously expressed in the case of DK was the fact that a witness who may have been present was on identified. However, in the context of a POC application, it was for the jury to determine whether this potential witness was present for the procedure or whether she was not. That was a matter of fact for the jury to resolve. However, her ability to give evidence was highly speculative.

83. We are fully satisfied that the trial judge did not err in refusing the hybrid applications and therefore this ground fails.

Grounds 9, 10, 11 and 12

***The trial judge's charge on system evidence*.**
9. The learned trial judge erred in law and in principle in allowing the question of system evidence to be considered by the jury in circumstances where he refused to direct them on its potential effect and where the prosecution had requisitioned him to so advise the jury.

10. The learned trial judge erred in law in his direction to the jury system evidence in particular in emphasising to the jury that in determining whether the complaints were independent they should consider whether there was collusion and whether they considered the complainants truthful.

11. The learned trial judge erred in law and in principle in charging the jury that the defence case was that the complainants colluded with each other were no such allegation had ever been made.

12. The learned trial judge erred in law in his direction to the jury on system evidence in that he did not warn them that, if they found that one of the complainants in the alleged system was not credible, as to what the impact of that finding would be on the system.

84. In summary, the appellant complains that the trial judge failed to adequately charge the jury on the issue of similar system and in particular failed to accede to the requisition raised on the part of the respondent. Secondly, it is submitted that the trial judge placed undue emphasis on the issue of collusion and the jury were left with the impression that they should only disregard the evidence of system if they were satisfied of the presence of collusion. The appellant took issue with this and asserted that no suggestion of collusion was made on behalf of the appellant. It is further submitted that the trial judge failed to direct the jury as to whether the evidence of system was capable of amounting to corroboration.

85. The respondent contends that the trial judge comprehensively charged the jury on the issue of system evidence and whilst the trial judge did not direct the jury that the evidence was capable of amounting to corroboration in law, this in fact favoured the appellant. Reliance is placed on the fact that the trial judge directed the jury to consider each count separately and instructed the jury that they could reject the system evidence completely. Moreover, the respondent submits that when the issue of collusion was raised on behalf the appellant by requisition, the trial judge indicated that he would inform the jury that the defence were not making a case of collusion, which invitation received no response on behalf of the appellant.

Discussion Ground 9
86. The argument is advanced on behalf of the appellant that the trial judge refused to direct the jury on the potential effect of system evidence. The trial judge directed the jury extensively on system evidence. He instructed the jury as to what may constitute system evidence and explained to the jury as follows: –

> "System evidence can be described as the same modus operandi, the same system, it's evidence that's based on similarities of accounts given truthfully, independently and without collusion. So, in order for it to be system evidence, there has to be a similarity, there has to be the same system or the same modus operandi...because you have to consider the defence position; the defence have submitted that the complainants are not independent, that they may be colluding or that they are colluding, that they were motivated by the civil actions."

87. The trial judge then proceeded to direct the jury at some length on system evidence and at the conclusion of the charge concerning this issue advise them as follows: –

> "In relation to each complainant, you have to decide the evidence of each complainant separately in relation to this issue. You have to decide what weight to give. This is a matter for you to decide based on your careful assessment and weighing up of the evidence of each complainant.… in relation to system evidence, you'll obviously be asking, well, how is system evidence relevant to our deliberations? How do we apply it, if we do apply it? And remember, you don't have to apply it; it's a matter for you. But when dealing with this issue you take each count separately. So you take every count separately, every count is a separate trial. So you take each count separately. And if on any one count you're satisfied beyond reasonable doubt of the guilt of the accused, then you could consider that it's more likely that the account given by another complainant of a similar incident is true. So if you find you take each count separately firstly, if you find that if you're satisfied beyond reasonable doubt of the guilt of the accused in relation to any one count, then you could then consider that it's now more likely that the account given by another complainant of a similar incident is true. Now if you are to take this step, you must be satisfied, again, that the prosecution has proven beyond reasonable doubt that there is system evidence. So you must be satisfied the prosecution has proved there is system evidence, and you must be satisfied beyond reasonable doubt that the complainants in question are truthful and are not colluding. You must be satisfied beyond reasonable doubt that there is system evidence and that the complainants are truthful, that they're not colluding. If you find, therefore, beyond reasonable doubt that the accused is guilty of a count in relation to we'll call him complainant A. So if you deal with each count separately and you find beyond reasonable doubt the accused is guilty in relation to complainant A. And if you find beyond reasonable doubt that there is similar system evidence between the evidence of complainant A and the evidence of complainant B, then you could consider that it's more likely that the account given by complainant B is true when you are considering this count. So if, for example, you are to find that the accused is guilty in relation to count A complainant A, beyond reasonable doubt in relation to a single count, and then you find that there is similar system evidence between the account given by complainant A and complainant B, then when you're dealing with the allegation by complainant B, you can consider that it's more likely that the account given by complainant B is true. Now equally, you can reject the system evidence in relation to any counts or counts. You're perfectly free and you're perfectly entitled to reject the system evidence in relation to any count, or in relation to all of the counts. If you reject the system evidence, then you simply deal with the counts separately or any count separately, without reference to the system evidence."

88. As can be seen from the foregoing extracts from the judge's charge, the trial judge charged the jury at some length and in considerable detail in relation to system evidence and directed them on the effect of such evidence. In the first instance, he made it clear to the jury that if they were satisfied beyond a reasonable doubt on the evidence of any one complainant, they could then consider that the account given by another complainant of a similar allegation was true.

89. It is true that he did not advise the jury that if they were not satisfied beyond reasonable doubt on the individual evidence concerning any individual complainant, that they could, nonetheless, reach the point of being so satisfied as a result of the evidence of a number of similar offences. However, this, it could be argued, favoured the appellant as the trial judge left with the jury only the option of considering using the evidence of a single complainant in respect of another complainant *only* if they were satisfied beyond a reasonable doubt on the evidence of that complainant.

90. The requisition raised by the prosecution concerned the issue of directing the jury that the evidence of each complainant was capable in law of corroborating the other complainants. The trial judge did not accede to this requisition and whilst the appellant takes issue with this, it is clear that again this favoured the appellant in that the system evidence was left with the jury only on the basis that the evidence was admissible in order to report innocent explanation, accident or denial or because of the inherent improbability of persons making up exactly similar stories. The jury were not instructed that the evidence was also capable of amounting in law to corroboration once the jury were satisfied that it was independent, free from collusion or contamination or concoction by the complainants. The jury were told by the trial judge that there was no corroboration in the case and they were given a corroboration warning. Therefore, the jury, having been advised to treat each count separately and to reject the evidence of system if they were not so satisfied beyond reasonable doubt, can only have used the evidence of system for the purposes set out above.

Conclusion ground 9
91. The trial judge clearly advised the jury on a number of occasions how to treat system evidence, to reject the evidence if they were not satisfied on the evidence beyond a reasonable doubt and to treat each complainant separately. The charge in this respect in our view favoured the appellant and thus, in light of the above, ground 9 fails.

Grounds 10 and 11
92. The appellant takes issue with the use of the word 'collusion' by the trial judge in his charge where it is contended the appellant did not raise or suggest collusion on the part of the complainants but rather that the manner in which the complaints originated raised the possibility of contamination, copycat evidence or collaboration or suggestibility.

The relevant portions of the charge are as follows: -

> "so, system evidence is admissible if you find that the manner in which the act was done on one occasion suggests that it was done on the other occasion by the same person with the same intent, ***but I'll be telling you in a moment that you have to outrule the possibilities of suggestibility, contamination, copycat evidence et cetera***."

93. The trial judge directed the jury as to the purpose of the evidence saying: –

> "Now, why or how, you might ask, is system evidence admitted in this case; what is the reason that this system evidence is admitted? The system evidence is admitted, in this particular case, where the charges are against one person only in order to establish that the offences were committed because number one, there is the inherent improbability of several persons making up exactly similar stories, so it's admitted, number one, because of the inherent improbability of several persons making up exactly similar stories and number two, it shows a practice which would rebut a defence or an innocent explanation or a denial. So, number two is the chosen practice and that would rebut a defence or an innocent explanation or a denial. ***Now, when you're dealing with system evidence, remember this; it's up to you decide whether the complainants have come forward independently and remember, the prosecution has to prove this beyond reasonable doubt. So, you have to decide whether the complainants have come forward independently***. In the absence of any connecting factor, so in the absence of anything that would connect them all together or any connecting factor, it's highly unlikely that individuals would come forward with a similar account of conduct and that there would be a mistake… ***Whether you decide or whether you find that the prosecution has proven the system evidence beyond reasonable doubt depends on the exclusion of any possibility that there is a connecting factor.*** So, you have to be satisfied beyond reasonable doubt that the prosecution has proven there is no connecting factor between the complainants. In other words, you have to be satisfied beyond reasonable doubt that there is no connecting factor, and I'll list out a number of things in a moment, ***but such as collusion, improper collusion, lack of independence, contamination***; you have to be satisfied there are none of those matters, that the prosecution has proven there are none of those matters before you can take the system evidence into account. The prosecution has to exclude this possibility."

Discussion
94. The essence of the appellant's complaint is that the trial judge focused on the issue of collusion and consequently the jury would not have been aware that in order to consider evidence of system, they had firstly to discount the possibility of contamination or suggestibility.

95. It is apparent from what we have stated above, where the suggestion of contamination, copycat evidence, suggestibility, unconscious influence or collusion is raised, the jury need to consider such a possibility and must be given a clear direction that they should not accept the evidence unless they are satisfied that the evidence is credible and truthful and is not undermined by such factors.

96. The complaint is made that the jury would not have been aware that in order to consider system evidence they firstly had to discount the possibility of contamination or suggestibility. Specifically, objection is taken to the portions of the judge's charge wherein he instructed the jury: –

> "you have to consider the defence position; the defence have submitted that the complainants are not independent, that they may be colluding or that they are colluding, that they were motivated by these civil actions" and "if you decide that the evidence is given truthfully, independently and without collusion".

97. This however ignores the portions of the charge highlighted above where the trial judge informed the jury that they had to rule out the possibilities of 'suggestibility, contamination, copycat evidence et cetera'.

98. Moreover, the trial judge instructed the jury that they had to be satisfied beyond reasonable doubt that there was no connecting factor between the complainants and he again reminded them in this context that they were required to be satisfied that matters such as 'collusion, improper collusion, lack of independence, contamination" were not present before they could take the system evidence into account. He advised the jury that they had to consider whether the complainants had come forward independently, which was precisely the complaints made on behalf of the appellant. The suggestion of the risk of contamination, collaboration or copycat evidence was premised on the manner in which the complaints originally came about.

Conclusion on grounds 10 and 11
99. The trial judge repeatedly advised the jury that they could reject the evidence of system. It is true that the trial judge referred to the possibility of collusion on a number of occasions but he also informed the jury again on a number of occasions that they had to take into account the possibilities of suggestibility, collusion, lack of independence, contamination of evidence, copycat evidence or collaboration and further advised the jury that they had to be satisfied beyond reasonable doubt that the prosecution had proven that the evidence of each complainant was truthful before relying upon the evidence of system.

100. In fact, when addressing the potential risks associated with the system evidence, the trial judge placed all the potential possibilities before the jury and emphasised to them before they could rely on the evidence of system they should exclude those potential risk factors. We are satisfied that the trial judge properly instructed the jury in this regard. He could indeed have gone further and advised the jury that the evidence of each complainant was capable of corroborating the other complainants if they were satisfied that the complaints were independent. He did not choose to do so and such, as we have stated above, served to favour the appellant. These grounds fail.

Ground 12
101. The appellant contends that the trial judge erred in that he failed to warn the jury of the impact on the evidence of system should they find that a complainant was not credible. It is submitted on behalf of the appellant that whilst the trial judge directed the jury on system evidence, he failed to instruct them on how to apply such evidence.

Discussion
102. At the risk of repetition, it is apparent from the trial judge's charge that he directed the jury that before they could rely on system evidence they had to be satisfied that the accounts given by the complainants were truthful, independent and free from collusion. He repeated this on a number of occasions. It can be readily seen from the trial judge's charge that he instructed the jury that before relying on evidence of system they had to be satisfied that the evidence was credible evidence.

Conclusion on ground 12
103. We are satisfied that there is no merit to this ground.

Ground 13

The refusal of the trial judge to discharge the jury.
13. The learned trial judge erred in law and in principle in refusing to recharge the jury on the failure of system evidence or discharge the jury in circumstances where they had reached verdicts of acquittal in respect of the complaints of three complainants.

104. The appellant submits that the trial judge ought to have recharged the jury in relation to system evidence, or, should have discharged the jury in circumstances where they had reached verdicts of acquittal in respect of three of the complaints. Following the trial judge's charge to the jury, counsel for the appellant was concerned about the emphasis the judge placed on collusion and was concerned that the jury would be left with the impression that they should only discount system evidence if they were satisfied that there was collusion between the persons making the complaints, despite the fact that such a proposition was never put forward by the defence. In circumstances where the jury acquitted the appellant in respect of complaints made by three complainants, LW, G.C, and W.B, and having heard evidence of six complainants and the jury were left considering two complaints, counsel for the defence applied for the jury to be discharged. It is submitted that the trial judge erred in not doing so.

105. In response, the respondent submits that the issue of whether collusion was a feature was entirely a matter for the jury and the trial judge properly took that view in his ruling. There was no basis upon which to discharge, or recharge, the jury and no error by the trial judge can be identified.

Discussion and conclusion – Ground 13
106. The gravamen of this ground rests with the fact that where the trial judge directed a verdict of not guilty in respect of one complainant and the jury acquitted the appellant in relation to the counts concerning three further complainants, that the system had failed. The complaint rests with the contention on the part of the appellant that the jury were not given guidance as to how to treat the evidence in respect of those complainants where verdicts of not guilty were returned.

107. The trial judge charged the jury extensively on system evidence and advised the jury in particular to consider each count on a separate basis. The jury were also instructed that it was within their remit to reject the evidence of system entirely. Significantly, the judge directed the jury that in considering the evidence of each complainant, they must be satisfied beyond a reasonable doubt on the evidence of each complainant and that such evidence was free from contamination, suggestibility collusion, copycat evidence or collaboration.

108. Again, it is a worthwhile exercise to consider the verdicts returned by the jury. The jury were advised in the usual way as to the burden and standard of proof. In returning verdicts of not guilty in respect of the counts concerning three complainants, the jury cannot have been satisfied to the required standard of proof in respect of the evidence of those complainants. They were advised that they could reject the system evidence entirely and in those circumstances, it is inconceivable where the jury were not satisfied beyond reasonable doubt on the evidence of three complainants that they would then have proceeded to entirely ignore the directions of the trial judge and proceeded to use the evidence to support the evidence regarding the remaining complainants. It is well settled that the discharge of the jury is a step only to be taken in exceptional circumstances. This Court will only interfere with the decision of a trial judge if there is a real and substantial risk of an unfair trial.

109. We are satisfied that the trial judge did not err in refusing to redirect the jury on system evidence and did not err in refusing the application to discharge the jury once verdicts of not guilty had been returned in respect of some of the complainants. This ground therefore fails.

Ground 14

Corroboration warning
14. The learned trial judge erred in law and in principle in circumstances where he ruled that he would give a corroboration warning to the jury and in circumstances where he ruled that there was no corroboration, in giving an insufficient warning by directing the jury that they should exercise caution before acting on unsupported evidence.

110. While the appellant acknowledges that a corroboration warning was given by the trial judge, it is submitted that the warning fell short of the standard required by O'Donnell J. in *The People (DPP) v. CC* (No. 2) [2012] IECCA 86. The warning given by the trial judge in the present case to the jury that they should "*exercise caution*" before acting on uncorroborated evidence was not suitably robust. Reference is made to *The People (DPP) v. CC* where O'Donnell J. stated: -

> "Accordingly, over and above the degree of care and caution they would normally expect to exercise in coming to a verdict of guilt beyond any reasonable doubt, the jury should recognise that it is the law's experience that it is dangerous to convict on the uncorroborated evidence of a complainant, and should only do so when, having considered the warning, they nevertheless feel a very high degree of assurance that the evidence is true. ***Unless something of this nature is conveyed to the jury there seems little benefit in giving a corroboration warning at all***." [emphasis provided]

111. The respondent submits that the trial judge did not err on the terms of the corroboration warning. The respondent relies upon the decisions of *The People (DPP) v. Jason Murphy* [2013] IECCA 1, and *The People (DPP) v. WL* [2016] IECA 284, where this Court, in *The People (DPP) v. WL*, stated at para.35 that there is no authority to suggest: -

> "...that it is incumbent on a trial judge who has decided to give a corroboration warning to rehearse all the arguments relied on by the defence, or still less to make a speech for the defence."

The Court went on to say that the evidence required "*careful consideration*" by the jury, which is akin to the impugned comment in the present case that the jury should exercise "*caution*".

Discussion and Conclusion on ground 14
112. When the trial judge addressed the concept of corroboration, he firstly explained the meaning of the term corroboration, he advised the jury that there was no corroboration in respect of any of the complainant's testimony and he then proceeded to warn the jury in the following terms:

> "I have to warn you that it is dangerous to convict on the uncorroborated evidence of any of the complainants. So, you have to bear that in mind. It's dangerous to convict on the uncorroborated evidence of any of the complainants. Now, bearing in mind the warning, you are nevertheless entitled to proceed to convict the accused on any count or counts on the issue paper, provided you are satisfied of his guilt beyond reasonable doubt. So, you're entitled you have to take the warning into account, the warning is it's dangerous to convict on the uncorroborated evidence of any of the complainants in this case; so, you have to take the warning into account. You are entitled to convict on any count, provided you are satisfied as to the guilt of the accused beyond reasonable doubt. Now, the reason the law has always exercised caution in this area is because in these cases, it's very much a case of one person's word against another and the jury has to exercise a special care in deciding whether you believe each complainant or whether you are satisfied beyond reasonable doubt of the truth of each complainant's allegation. So to put it another way, you have to exercise caution before acting on the unsupported evidence of any of the complainants. Having borne this in mind, and having given due weight to it, you are entitled to convict if you're satisfied beyond reasonable doubt of the guilt of the accused."

113. The complaint on the part of the appellant stems from the penultimate sentence where the trial judge informed the jury that they had to exercise caution before acting on the unsupported evidence of any of the complainants. It is contended that by using this language, specifically the words "exercise caution", this had the effect of diluting the corroboration direction. It is contended on the part of the appellant that the corroboration warning given fell short of that required by *The People (DPP) v. CC* (No. 2) [2012] IECCA 86. Moreover, in requisitioning the trial judge on the terms of the corroboration warning, counsel for the appellant indicated that the use of the words "exercise caution" was expressly disapproved in *The People (DPP) v. CC*.. The Court in *The People (DPP) v. CC* concluded that the corroboration warning given in that case was insufficient to convey "the essence required by the law once it is decided, within the court's discretion, to give such a warning."

In that case, the Court of Criminal Appeal was of the view that in directing the jury "the law requires care and caution to be exercised before you arrive at a view of guilt" was likely to be confusing for the jury.

114. The purpose of a corroboration warning is to equip the jury to deal with the matter under consideration and the terms of the warning rest within the discretion of the trial judge in accordance with section 7 (2) of the Criminal Law (Rape) (Amendment) Act, 1990. The purpose of the warning is to provide comprehensible guidance to the jury on the facts of the particular case and therefore the words used are determined by those facts. As a consequence, the trial judge, has a considerable margin of discretion as to the words used.

115. In our view, it is difficult to conceive of a more comprehensive corroboration warning. The word dangerous appears on no less than three occasions in the course of the warning. We reject the contention that advising the jury to exercise caution before acting on the unsupported evidence of any of the complainants undermined the corroboration warning. We are satisfied that the warning to the jury was given by the trial judge in clear and unmistakable terms and that the jury were provided with an appropriate instruction in order to convey the essence of the warning as required by law. This ground therefore fails.

Ground 15

Delay
15. *The learned trial judge erred in law and in principle in failing to fully particularise and individualise the warning to the jury in his charge in respect of the substantial delay in respect of each complaint*.

116. The appellant submits that the delay warning given by the trial judge was inadequate. The respondent states that the appellant cites no authority for this ground. Reference is made to *The People (DPP) v. RB* (Unreported, Court of Criminal Appeal, February 12 2003), in support that the warning was adequate.

Discussion
117. It is the position that this trial took place at a very significant remove from the dates of the allegations. It is well settled that there are inherent dangers in a trial which takes place in such circumstances. To address those dangers, a trial judge will warn the

jury of the dangers associated with old cases and will refer to concerns such as the diminution of memory, the death of or the unavailability of witnesses or potential witnesses, that the allegations lack specificity and that the ability to cross-examine a witness on peripheral detail has been wholly lost.

118. There is no doubt that there was a requirement on the part of the trial judge to give a delay warning in the instant case where there had been such a lengthy delay. The trial judge highlighted the difficulties for the appellant in defending the allegations of indecent assault due to the passage of time where there was little evidence beyond that of the complainants and the appellant. Quite clearly, in giving the warning, the trial judge drew from the seminal decision of *The People (DPP) v. RB* (unreported, Court of Criminal Appeal, February 12 2003). Having given a warning and what might be termed general terms, the trial judge then proceeded to direct the jury as follows: –

> "If the complainants had complained of the conduct or the allegations they allege within a short time, it might have been possible, it may have been possible, it could be possible - it's a matter for you - but for the accused to call, for example, doctors, nurses, other staff who were on duty at the time. He could have checked in his diary, he could have checked with more detail on the hospital records, he could have records of attendance in the cases where these are missing. He could have details of the layout of the various locations if that were relevant. Photographs could be produced, there could be detail of the locations of the cubicles, the way the cubicles are set out. He could have checked with his colleagues, nursing staff, he could have called witnesses on his behalf. He could have checked his memory in the cases where he can't remember and in the other cases, he could have checked his memory with greater detail. In the complaint made by DK, you'll recollect that DK gave evidence that there was a female assistant present initially, and the matter for you, the evidence is a matter for you, that this female assistant, there's a suggestion she may have been present at the examination. If the case had proceeded earlier, this witness could have been identified and may have been in a position to give evidence to you.

Now, if you have a reasonable doubt in relation to this issue, you must give the benefit of the doubt to the accused. Similarly, in relation to the medical records, if you have a reasonable doubt due to the delay in the case in relation to the medical records of any of the complainants, you must give the benefit of the doubt to the accused. So, evidence or witnesses could have been called, for example, as to the whereabouts of the accused, his demeanour or his actions at the time, the circumstances of the accused and of each complainant might have been explored, and probably would have been explored in much greater detail and by persons with fresher recollection."

119. At the conclusion of the evidence in the case, counsel discussed the charge with the trial judge and in that respect Mr Hartnett drew the Court's attention to the following: –

> "… One has to address the difficulties caused in an ancient case where there are very significant gaps in the evidence, loss of important witnesses, potentially important witnesses, loss of hugely important and demonstrably important records."

120. At a later stage of the discussion, Mr Hartnett advised the judge that he would be required to identify the problems of missing witnesses and missing records in respect of each individual complainant.

121. When the trial judge was requisitioned regarding delay the following was said: -

> "Mr Hartnett: … Now, you didn't give the particulars in the – – I think it has been decided that it is not sufficient just to give a general warning that in each case you have to bring the attention of the jury to the particular dangers and the particular difficulties that are faced by an accused person.
>
> Judge: Is this the delay warning?
>
> Mr Hartnett: The delay warning.
>
> Judge: Yes.
>
> Mr Hartnett: And that wasn't done. That must be particularised, otherwise the jury are at sea."

Conclusion on Ground 15

122. Whilst it is not elucidated in the course of written or oral submissions, it seems that the complaint made by Mr Hartnett at the requisition stage of the trial concerned the fact that the judge did not refer to each complainant when addressing the jury on missing witnesses or medical records. These are matters which were highlighted on behalf of the appellant at the conclusion of the evidence in the trial.

123. However, as one can see from the extract above, the trial judge referred to the complainant DK and the fact that there was a missing witness. Furthermore, the judge quite clearly referred the jury to the fact that medical records were missing and advised them that if they had a reasonable doubt due to the absence of such medical records they should give the benefit of that doubt to the accused. Moreover, in his concluding remarks on this topic the trial judge advised the jury that the appellant could not be disadvantaged because the case was old and that they had to consider each count separately in the context of the issue of delay. In the circumstances therefore, we are satisfied that the trial judge administered a comprehensive charge on the issue of delay both in the general and the particular. We therefore reject this ground of appeal.

Ground 16
Recent Complaint

The learned trial judge erred in law and in principle in ruling that MJ could give evidence of recent complaint in respect of the complainant DK.

124. The appellant submits that in circumstances such as the present case, where the allegations were more than forty years old, the trial judge had to be particularly cautious in considering the evidence of the complainant DK. DK gave evidence that the appellant had massaged his testicles outside of his trousers during the course of a procedure on his foot. He said that he had told a school friend of his about what happened. This friend, Dr. M. J, gave evidence that the complainant had told him that "*the doctor had*

examined his testicles and external genitalia". The appellant submits that this evidence failed the criteria for admission in that it was not consistent with the complainant's testimony in circumstances where the recipient of the complaint referred to "an examination". The jury should not have received this evidence as it was not consistent with the evidence of the complainant.

125. The respondent submits that the evidence given by Dr. M.J was consistent with the central issue of the complaint, in that the appellant had inappropriately touched the complainant's genital area.

Discussion
126. In his direct evidence DK indicated that the appellant massaged his testicles outside his pants and his private parts in general. An application was made in the absence of the jury to call evidence of witnesses to whom a complaint was made, one of whom was MJ. Having heard the evidence in the absence of the jury, the trial judge permitted MJ to give evidence of the complaint made to him in the aftermath of the offence. In his evidence MJ said the following: –

> "Q. All right. And what did he tell you?
>
> A. He-- he told me that he went to the hospital and when he was examined that the doctor felt his testicles. That's what I remember".

127. In written submissions, the complaint is made that the evidence of MJ failed the basic test of consistency when the recipient of the recent complaint referred to "an examination".

128. In his direct testimony DK says the following: –

> "He slipped his hand under the blanket and he started massaging my testicles outside of my pants which I thought again was the whole thing was getting kind of weirder and weirder, like it seemed in no way like a medical examination, how could it be when it's kind of outside your pants and it was just kind of a groping kind of a random ... Groping of my testicles and my private parts in general, my penis, my testicles"

Conclusion on ground 16
129. The sole purpose of evidence of recent complaint is to show consistency. That is that the complainant previously made a complaint to another, the terms of which are consistent with the complainant's testimony. Evidence of recent complaint will be admissible if it satisfies the criteria pursuant to the decision in *The People (DPP) v. Brophy* [1992] ILRM 709. If the terms of the complaint are completely inconsistent with the complainant's evidence, then the evidence may be inadmissible in any given case. However, in the instant case it is difficult to see the inconsistency complained of but even if we were to accept that there was some minor inconsistency, this would not in and of itself be sufficient to render the evidence inadmissible. Thus, we are satisfied that the trial judge did not err in permitting evidence of recent complaint. Consequently, this ground fails.

Ground 8
The learned trial judge erred in law and in principle, when charging the jury in respect of the evidence of DB, the complainant in respect of whom he had directors in acquittal, that they were to disregard the evidence of the complainant, DB, his mother PB, the medical records in respect of DB and Dr. Stevens 'evidence in respect of DB and in further directing them that they could not use this evidence in favour of the prosecution or the defence in circumstances where the medical records appeared to directly contradict the evidence of DB.

130. The appellant submits that the trial judge was incorrect to tell the jury to disregard the evidence of DB entirely, and in particular to instruct the jury that they could not use the evidence in favour of the accused.

131. The trial judge directed the jury to return a verdict of not guilty on the single count concerning DB on the conclusion of the prosecution's case. Mr B had given evidence that a nurse was present when he was indecently assaulted by the appellant. The trial judge directed the jury to return a verdict of not guilty on the basis of a missing witness, namely; unidentified witness to the assault.

132. The charge on the indictment was preferred between 1988 – 1991. The witness gave evidence that he attended the hospital for a broken ankle in around 1990/1991. There were no medical records for attendance for a broken ankle in at that time but there was an attendance for an x-ray on his left foot in 1988. Furthermore, it emerged that the witness had surgery to his testicle in 1988 to which he had not referred in his direct testimony or in any statement to the Gardaí.

133. In his closing address, Mr Hartnett SC drew these matters to the attention of the jury in order to highlight the difficulties present in consequence of missing medical records in order to emphasise the importance of medical records in the context of the jury's consideration regarding the testimony of the remaining complainants.

134. It is submitted on behalf of the appellant that in advising the jury to disregard all evidence connected to DB, the trial judge undermined the importance of the argument advanced to the jury on behalf of the appellant.

135. The respondent submits that the trial judge was correct in directing the jury to entirely disregard the evidence of DB and contends that the appellant cites no authority for the countervailing proposition.

Discussion
136. The trial judge advised the jury that as he had directed them to return a verdict of not guilty in respect of the count concerning DB that they were to disregard all evidence concerning that complainant and instructed the jury as follows: –

> "Now, you cannot use any of the evidence in relation to DB, you simply disregard it completely. So, you can't use any of that evidence in favour of or against the prosecution, and you cannot use any of that evidence in favour of or against the accused. There was a reference by Mr Hartnett before lunch to the records, the medical records or the evidence, but I'm telling you now, you simply disregard the evidence and the records in relation to DB"

137. The key question is whether in circumstances where the trial judge had directed a verdict of not guilty in respect of the count concerning DB; whether the evidence adduced in the trial concerning that complainant could be relied upon by the defence to underscore a particular point, namely; the effect of the absence of medical records.

138. On this issue neither the prosecution or defence have, in written or oral submissions, referred to any authority in favour of or

against the proposition argued by the appellant. In the neighbouring jurisdiction, the issue as to whether a defendant is entitled to rely on a previous acquittal has been ventilated and whilst not directly on point is of some limited assistance. Ordinarily, evidence of a previous acquittal is not admissible in a subsequent trial as the fact that an accused has been acquitted of an offence on an earlier occasion is usually irrelevant and only serves to unnecessarily obscure the issue at trial. However, on occasions reference to a previous acquittal may be permitted and the test is one of relevance. In the decision of *Sambasivam* [1950] A.C. 458; referred to in the 6th edition of *May on Criminal Evidence*, p.89, the principle for admission was stated by Lord Macdermott as follows: –

> "The mere fact that there has been a previous trial is usually irrelevant and, therefore, inadmissible on a re-trial. This does not mean that it is never permissible to refer to an earlier trial, for it may be necessary to do so to establish some relevant fact as, for example, in identifying the occasion which some particular statement or admission was made."

139. The defendant in that case was entitled to rely on his acquittal so far as it might have been relevant to his defence.

140. Whilst the above reference is not entirely apposite, it seems to this Court that the test is one and the same; that being one of relevance. In the instant case, the position from a defence perspective was obviously stronger – the evidence was adduced in the course of the trial. The fact that the trial judge had directed a verdict of not guilty did not necessarily mean that the evidence could not be relied upon by the appellant. It is undoubtedly so that it was necessary to inform the jury that the evidence concerning DB could not be used in support of the system evidence on the part of the prosecution. This did not mean however, that the evidence could not be relied upon by the defence in order to emphasise a particular point relevant to the appellant's defence.

141. It is readily understandable that the trial judge had concerns that the jury would consider the evidence as evidence of system and therefore from an abundance of caution and from a concern to ensure a fair trial for the appellant, inform the jury to disregard the evidence. This concern is evident from the trial judge's remarks in discussion with counsel on the issue when he stated as follows: –

> "…is there not a danger in relation to DB that in I don't charge the jury and having to disregard everything that was said in relation to DB, that they might simply start examining the evidence of DB? There was evidence of a complaint by his mother, and that they would start to use or examine or debate that evidence in the context of the case."

Conclusion on ground 8

142. The material which counsel for the appellant relied upon in the course of his closing address to the jury was relevant evidence which counsel sought to use in order to emphasise a particular point. In the circumstances, we are satisfied that it would have been appropriate for the trial judge, after counsel for the appellant had raised the issue in the course of his closing speech, to direct the jury that the evidence concerning DB could not be used by them as part of evidence of system but should not have instructed the jury to disregard the evidence completely. In that respect, we are satisfied that the trial judge fell into error and it is necessary to examine the effect of this finding.

143. The issue which Mr Hartnett sought to emphasise was the possible consequences of the absence of medical records, the corollary being that the presence of medical records could call into question the credibility of a witness.

144. The jury returned verdicts of guilty in respect of two complainants, namely; MW and DK. In both instances, some medical records were available. DK's evidence was that he suffered from ingrown toenails and consequently when he was either 15 or 16 years of age attended M.S. for treatment. He gave evidence that the appellant slipped his hand under a blanket and started massaging his testicles outside his clothing. On a perusal of the transcript, no questions were asked in cross-examination arising from the medical records which were available. Indeed, in the instance of DK, it was accepted that M.S. attended him for his medical complaint. Furthermore, it is apparent from the cross-examination that the appellant accepted that he carried out a minor procedure in respect of DK and did in fact examine his groin area but for a legitimate purpose. Thus, as some medical records were available and as there was no cross-examination on foot of those records one must question the potential usefulness of the records particularly and in circumstances where it was accepted not only that the appellant treated the witness for the particular medical complaint but also accepted an examination of the groin area took place.

145. MW gave evidence that he knew M.S. as a visitor to his home and that when he was turning 15 years of age he was referred to M.S. who examined him in his private rooms. He said he was diagnosed with non-descended testes and hernias, requiring an operation in April 1975 when M.S. performed the surgery. He had a number of appointments thereafter post-surgery with M.S. in his private rooms. He was admitted for a second operation in July 1975 and again attended for subsequent appointments post-surgery with M.S.. He then gave evidence of two occasions when M.S. massaged the base of his penis with his fingers and thumb for a considerable period of time. On the second occasion in order to bring the situation to a close, the witness said he ejaculated. He also gave evidence of again attending M.S. with appendicitis but had no recollection of follow-up appointments at M.S.'s private clinic thereafter. Reference was made in the course of cross-examination to the fact that the witness had bilateral undescended testes requiring an operation. It may be gleaned from that, that counsel was referring to medical records. The witness was also cross-examined on his operation for appendicitis and the tenor of the cross-examination indicates an acceptance that M.S. did attend on this witness for his medical procedures. It is clear from the cross-examination therefore that use was made of medical records for the purpose of cross-examination.

146. In the instance of the witnesses in respect of whom verdicts of guilty were returned, the defence had access to medical records and therefore, the impact of the trial judge directing the jury to disregard the evidence concerning DB, where the defence sought to use aspects of the evidence in order to emphasise the difficulties which may arise in a trial due to the absence of medical records, cannot be said to be significant.

Section 3(1) of the Criminal Procedure Act 1993

> "3(1) On the hearing of an appeal against conviction of an offence the Court may –
>
> (a) affirm the conviction (and may do so, notwithstanding that it is of opinion that a point raised in the appeal might be decided in favour of the appellant, if it considers that no miscarriage of justice has actually occurred)."

147.In light of the fact that this Court has found an error in the trial judge's charge to the jury, the question now arises as to whether we ought to apply what is commonly known as the proviso. The key issue in considering whether to apply the proviso is a consideration of the possibility that there has been a miscarriage of justice as a result of the identified error. In assessing whether this is so, the Court has had regard to the evidence against the accused. In the instance of the accounts in respect of which the

jury returned verdicts of guilty, we are influenced by the fact that there were some medical records available from which the defence were in a position if so desired to use in cross-examination. The very existence of some medical records defeats the contention that the trial judge's direction adversely affected the appellant. We therefore uphold the conviction notwithstanding the identified error.

148. Accordingly, the appeal dismissed.