THE COURT OF APPEAL

Record No: 157/2012

Ryan P.
Birmingham J.
Edwards J.

The People at the Suit of the Director of Public Prosecutions

Respondent

V

J. O'C.

Appellant

Judgment of the Court delivered on the 18th day of February 2015 by Mr. Justice Edwards

Introduction

1. This is a case in which the appellant faced trial on indictment in the Circuit Criminal Court for the South Western Circuit and County of Kerry in respect of 29 counts of sexual assault, contrary to s.2 of the Criminal Law (Rape) (Amendment) Act 1990 to which he had pleaded "not guilty" upon arraignment on the 8th March, 2012.

2. There were four female complainants: three girls from one family, L.H., S.H., and N.H., respectively, and another girl, G.K..

3. L.H.'s allegations spanned the period from the 1st March, 2004 to the 30th June, 2008. There were seventeen counts of sexual assault on the indictment relating to abuse of her, one for each three month period during that time span. N.H.'s allegations spanned the period from the 1st December, 2003, to the 31st October, 2008. There were eight counts of sexual assault relating to abuse of N.H., each covering a three month period during the relevant time span. S.H.'s sole allegation of sexual assault was the subject of a single count, charged as occurring between the 1st April, 2003, and the 30th June, 2003. Finally, there were three discrete counts of sexual assault relating to abuse of G.K., each of which was initially alleged to have occurred on a date unknown between the 1st July, 2003, and the 31st August, 2003. However, the indictment was amended in the course of the trial to expand the dates to cover a period from the 1st July, 2002, to the 31st August, 2003.

4. On the 23rd March, 2012, at the end of a ten day trial, a jury convicted the appellant by an 11:1 majority verdict in respect of counts 1 to 18 inclusive, and counts 20 to 29 inclusive, on the indictment. Later on the same day the jury also returned a guilty verdict on count 19, this time by a majority of 10:2.

5. Following his conviction, the appellant was sentenced, on the 4th May, 2012, to imprisonment for a term of three years on each count in respect of counts 1 to 17 inclusive (i.e., those relating to the complainant L.H.) and each such sentence was to run concurrently with the others. These sentences were backdated to the 23rd March, 2012, i.e., to the date on which he went into custody.

6. The appellant was further sentenced on the 4th May, 2012, to imprisonment for a term of two years on each count in respect of counts 18 to 25 inclusive (i.e., those relating to the complainant N.H.) and each such sentence was to run concurrently with the others in that group, but consecutively to the sentences in the first group i.e., those in respect of counts 1 to 17 inclusive.

7. The appellant was further sentenced on the 4th May, 2012, to imprisonment for a term of one year in respect of count 26 (i.e., that relating to the complainant S.H.) and this sentence was to run consecutively to the sentences in respect of counts 18 to 25 inclusive.

8. Finally, the appellant was further sentenced on the same date to imprisonment for a term of two years on each count in respect of counts 27 to 29 inclusive (i.e., those relating to the complainant G.K.) and each such sentence was to run concurrently with the others in that group, but consecutively to the sentence for count 26.

9. The total sentence imposed was one of eight years imprisonment.

10. The appellant appeals against his conviction in respect of all the offences.

Evidence before the jury

11. The principal evidence against the accused was the evidence of the four complainants.

The evidence of L.H.

12. L.H. was a nineteen year old college student at the time of the trial. She has two sisters and a brother. Her brother is the oldest; her sister S.H. is next and is just over two years older than L.H., and the youngest in the family is N.H., who is eleven months younger than L.H..

13. The H sisters' parents ran a family business. In addition, their father and mother each had part time employments. Prior to 2009, there were a number of drivers employed in the parents' family business, one of whom was the appellant. During the week the appellant drove a council van, but at the weekends he worked for the H's in their business.

14. The appellant was also the partner of the H sisters' aunt, who resided in their mother's old family home. The appellant and this aunt had been going out for as long as L.H. could remember.

15. L.H testified that as she was growing up the appellant was always in the house where she lived with her parents and siblings. He used to meet her aunt there on days when the aunt used to come to their house, leave her car there and go with the appellant to his home in another town in the same county. He used to call every other day as well. She stated he was there more often than he was not. He was also there on many evenings. L.H. stated that her parents trusted the appellant. He made himself at home in their house and treated it like it was his own.

16. L.H described being in fifth class in primary school, being aged ten or eleven, and making her confirmation during that school year. Their mother had organised a babysitter to mind L.H. and her sisters after school. The babysitter lived next to the school. However,

as they grew older, and particularly if the day was fine, they would not go to the babysitters and would walk home.

17. L.H. described an incident that occurred about a month before her confirmation. On the day in question she and her sisters had walked home. Their parents were both at work when they arrived home, although their father was due home before long. L.H. was watching television alone in the main living room when the appellant came in and sat beside her on the three seater couch. L.H stated that *"then, as time goes on, he just pushed himself close, like moved closer to and put his hand on your thigh and just keep rubbing it and just keep going up and down and he just make his way towards your private part."* L.H. was clothed at the time. The incident lasted only a few minutes. She claimed the appellant desisted because *"he probably heard a car",* either that belonging to her father or her aunt.

18. L.H. told the jury that numerous similar incidents happened over the next number of years until she was in third year in secondary school. Sometimes he would put his hand up her top and touch up her top as well. It mostly happened on the three seater couch in the main living room.

19. After L.H. moved from primary school to secondary school in September, 2005, she and her older sister S.H. used to travel home from school by bus. They would be dropped off at a handball alley close to their home and usually both of their parents would be at work. Sometimes the appellant was there when they got home. They would see his council van from the handball alley. On other occasions he would arrive after they came home. L.H. described an incident in September, 2005, where, having come in from school, she was using a computer in the sitting room to go on Bebo, a social media site, when the appellant came in and sat on the arm of an adjacent chair. She stated *"he started doing what he usually did",* and described him rubbing her thigh and stated that he then made his way inside her pants and started sticking his finger into her private part, and moving it up and down. He again stopped after some minutes because, she stated, *"someone must have came home".*

20. L.H. told the jury that thereafter there were many similar incidents and that they happened quite regularly - up to three times a week. Sometimes the appellant used to open the zip in his pants and catch her hand and would try to make her rub him on his private area. L.H. stated that she used to always take her hand away and he used to wait about 30 seconds and attempt the same thing again.

21. In September, 2006 L.H. commenced second year in secondary school. The appellant was continuing to perpetrate similar incidents, whereby he would rub her thigh and put his hand inside her pants, but by this stage they had become more frequent and were occurring four or five times a week. It could happen at weekends if L.H.'s parents were gone somewhere but it mainly happened on week days in the house after school before her parents got home.

22. L.H. described how the abuse continued into her third year in secondary school. On one occasion in that year he was doing the same thing he usually did but *"stuck up two fingers"* into L.H.'s vagina following which L.H. found she was bleeding.

The evidence of N.H.

23. N.H. gave evidence similar to that of her sister L.H. concerning the family circumstances, the family business, her parents' respective employments, the after school babysitting arrangement, the relationship between the appellant and her aunt, and the frequency with which, and circumstances in which, the appellant would visit their home.

24. N.H.'s first allegation pertained to December, 2003, when she was ten. It was before the occasion of her grand uncle's death which had occurred on the 17th December, 2003. N.H. stated that she was just home from school on the afternoon in question when, at about 3.30pm, the applicant arrived at her home. Her parents were still at work. He sat down on the three seater couch in the living room on which she was sitting. She was seated on the left hand side. Her sisters were upstairs. N.H. described how, after some brief conversation, the appellant *"sat in the middle and he took his right-hand and he put it down my pants and he was rubbing the outside of my vagina and after a few minutes he put his finger up inside of my vagina and then he took it down and started rubbing the outside of my vagina again and he stopped because I think he heard a car coming in from outside, which was my aunty, …, as far as I can remember."* The incident had lasted for up to ten minutes.

25. N.H. described a further specific incident on a Sunday in September, 2004 when there was a GAA match on. She was at home and was initially watching the match with her mother and a sister. The appellant was there as well. Her mother and her sister left. N.H. was sitting on the couch. She stated that the appellant *"sat down next to me on the couch in the middle again. He would have put his right-hand inside my shorts and he was rubbing the outside of my vagina, and then he put a finger up inside my vagina and then he would have taken it out and started rubbing the outside of my vagina again. And I can't remember who came home this time."*

26. N.H. described yet another incident as having occurred in October, 2005. She was unsure if it was after school on a week day or at a week end. However, she was again on her own sitting on the couch in the living room. She told the jury that *"J came in. I can't remember what time or anything, and he again put his right-hand inside my pants. He started to rub the outside of my vagina and then he put his finger up inside my vagina again. And after a minute or so, he took it down and started rubbing the outside of my vagina again and, again, he stopped because a car came up outside and he probably heard it coming up, I can't remember."*

27. N.H. stated that she started secondary school in September, 2006 and again gave similar evidence to her sister concerning travelling home from school by bus. On one occasion in September, 2006, after she had come home from school, she was starting her homework in the main living room. She testified that the appellant entered the room and she stated *"he would have sat down next to me".* She then stated: *"he would have put his right-hand inside my pants and started to rub the outside of my vagina. Then he would have put his finger upside of me and taken it out and started rubbing the outside of my vagina again."*

28. N.H. also told the jury about two further, and similar, incidents that occurred in November, 2006 and again in or about April, 2007.

29. N.H. further described to the jury two incidents that occurred in September, 2008 and in October, 2008, respectively, when she was in her Junior Certificate year. In the first of these incidents she had just come home from school, and was sitting on the couch in the living room. She stated *"I can't remember if there was anyone in the house. J.O'C came in and sat down in the middle, next to me, and he put his left hand up inside my top and placed it on my boob and took it down again because I think he heard a car outside"*

30. The second incident in 2008, described by her as having occurred in October of that year, was again alleged to have occurred when she was alone in the living room and sitting on the couch, and again involved her being digitally penetrated by the appellant. On this occasion, N.H. further describes the appellant stimulating himself by touching himself over his penis outside of his pants while he was engaged in digitally penetrating her.

The evidence of S.H.

31. S.H. also gave evidence similar to that of her sisters L.H. and N.H. concerning the family circumstances, the family business, her parents' respective employments, the school babysitting arrangement, the relationship between the appellant and her aunt, and the frequency with which, and circumstances in which, the appellant would visit their home.

32. In her evidence, S.H. described an incident that had occurred when she was in sixth class, sometime between April and June, 2003, when she was about thirteen years old. It had occurred in what she described as *"the good living room".* There was a computer in that room and her sister N.H. was on Bebo at the time. N.H. was sitting in a single swivel chair. The appellant was sitting on the arm of an adjacent armchair, and somewhat behind N.H., and N.H. was showing him something on Bebo. As S.H. walked into the room the appellant pulled her on to his lap. N.H. had her back to them. S.H. described what then occurred in the following terms:

> *"I was sitting on his lap and whatever way he pulled me onto his lap, he put his hand down my pants, inside my knickers, and he kind of, like, thrust his leg upwards so as to, kind of, to pull me back closer to him so his hand went further down inside my pants, inside my knickers. So, his hand was on me and I remember just thinking for a split second, because I looked outside and it was, like, really sunny and that's why I remember, it was really sunny, and it just -- kind of was like about two seconds passed and I just got up and I walked away. Like, I remember vividly that I was wearing my pyjamas and I was still wearing my -- just kind of a hoody or something on top and he was in his work clothes. And [N] still had her back to us so she didn't even know any of this was happening."*

33. S.H. confirmed that in the course of this incident the appellant had touched her vagina.

Cross-examination of L.H., N.H., & S.H.

34. L.H., N.H., and S.H., were each cross-examined in relation to letters written by a solicitor to the appellant, purportedly on behalf of each of them respectively, threatening legal proceedings. In addition, they were asked about legal proceedings actually commenced against the appellant by S.H.

35. L.H. and N.H. denied knowledge of any such letters. It was suggested to them that they had a motive for making up a story about the appellant and that their motive was to sue him in order to get money. Both witnesses denied making up their accounts or being interested in obtaining money from the appellant

36. S.H. was also cross-examined on the basis that the appellant had been written to by a solicitor, and that proceedings had been issued against him on her behalf. She accepted that she had signed a piece of paper at the behest of her parents who wanted her to keep her options open as she was coming up to a certain age. She denied that she wanted any money off the appellant.

37. The prosecution later called the solicitor who wrote the letters and issued the proceedings in question. The solicitor testified that she had received instructions from T.H., the complainants' father. She never met or spoken to L.H. or N.H., who were minors at the time. She had never met S.H. either but she had spoken to her on the telephone and she had faxed her.

38. N.H. was further cross-examined in relation to the December, 2003 allegation (count 18). She had sought to anchor this in time by saying that it had occurred on an occasion prior to the 17th December, 2003, on which night her grand-uncle had died. Her parents had had to go to her grand uncle's house at short notice, and in those circumstances had asked the appellant to babysit for them. She had stated in her direct evidence that on the occasion that the appellant babysat he had been accompanied by a work colleague, B.M. It was put to N.H. in cross-examination that B.M. did not work for the local authority that employed the appellant; that the appellant did not babysit on the occasion of the death of her grand-uncle; and that B.M. had never been to her house in the company of the appellant. N.H. stated that she recalled B.M. driving a county council van. Notwithstanding the cross-examination, she did not resile from her initial account. She was 100% certain about B.M. driving a council van.

39. B.M. was subsequently called by the defence. He acknowledged having been in the H's house from time to time as he occasionally drove vehicles for Mr H., and the business was run from the house. He had no recollection of being there on the 17th December, 2003, or in the week or fortnight before that. He said he had never ever babysat for the H's. He admitted that while he did not work for the County Council in question, he had purchased a van from the relevant County Council in 2002. While the local authority crest had been taken off the van, the green and yellow colour scheme had remained unchanged.

40. N.H. was also cross-examined with regard to the September, 2004 allegation (count 19). She had anchored this in time with reference to an All Ireland football final that she believed had been between Kerry and Mayo. It was put to her that the appellant could not have been there as the 2004 All Ireland football final had been on the 26th September, 2004, and on that date he had been attending a christening. N.H. responded that *"They might have been playing someone else, I don't know. It definitely happened the day of a Kerry match."*

41. The mother of the child being christened was later called as a defence witness. She stated that the appellant had watched the match in their home after the christening and initial refreshments in a hotel. While seven and a half years had elapsed before she had had to direct her mind to who had watched the match in her house that day, certain aspects of the day were clear and she clearly remembered the appellant watching the All Ireland final in her house on that day.

42. S.H. was cross-examined in relation to her evidence concerning the occasion, between April and June, 2003 when she was in the sitting room with her sister Nicola, that N.H. was said by her to have been using the computer and on the social networking site "Bebo". It was put to her that Bebo did not exist at that time. The witness was adamant that Bebo did exist at the time, and would not accept that she was mistaken. Subsequently, a Detective Garda O'Keeffe, giving evidence for the prosecution, told the jury that while Bebo was not in fact launched until 2005, there were other sites in operation at the relevant time that provided a similar service.

The evidence of G.K.

43. G.K. told the jury that she was born in January 1989 and was two classes ahead of S.H. in primary school. After primary school she went to a different secondary school to that attended by the H girls. Her father was a farmer and her mother was a home help. Amongst those that her mother assisted in her capacity as a home help was P.O'C, father of the appellant. G.K. would often accompany her mother on visits to P.O'C's house in order to help her mother, and the appellant was frequently present.

44. G.K. told the jury about an incident that occurred during the summer after her first year in secondary school and before she had commenced second year, i.e, during the months of July and August, 2003. She stated she was fourteen at the time. She was in

P.O'C's house with her mother. She became bored and went down to the sitting room to watch TV. She was sitting in an armchair watching TV when the appellant entered the room. She stated that:

> *"…he knelt down on my left-hand side, he didn't say anything, and he put his hand inside my pants, inside my underwear, and started rubbing me, I don't know for how long and then he touched my breasts, and then put his hand inside my pants again."*

45. When asked as to where he put his hand, the witness replied: *"In my vagina, he put two fingers up inside my vagina".*

46. G.K. also told the jury about a second incident that occurred several days later. The appellant had been giving G.K. a driving lesson. At the end of the lesson they had returned to P.O'C's house and the car required to be reversed in order to be properly parked. As G.K. was unable to perform the reversing manoeuvre, she and the appellant swapped seats. He took over the driver's seat and she moved to the front passenger seat. She told the jury:

> *"After we'd switched seats, and he'd reversed the car he turned off the car, he didn't say anything, just put his hand inside my pants again."*

47. When asked what he did with his hand, G.K. said*: "The same as he did the first time, put them inside my vagina".*

48. G.K. then described a third incident that occurred on the following Saturday. She was travelling in the appellant's county council van for the purpose of helping him to read water meters. The procedure as she described it to the jury was that the appellant drove around the locality and stopped periodically to read a meter. He would get out of the van, read the meter, call out the reading to G.K., who was still seated in the van, and then G.K. would write it into a book. G.K. told the jury that at one point on the day in question they stopped at a gateway, and it was necessary for the appellant to walk into a field to read a meter. She then stated:

> *"He stopped the van at the gate, he got out and walked around to my side of the van, which I thought was to get the book, because I have couldn't go into the field because I didn't have wellies or boots or whatever. So I was going to stay in the van. He came up to my side of the van, he opened the door and again with his hand, he put it down inside my pants."*

49. Further, the witness again stated that the appellant had put two fingers inside her vagina.

Cross-examination of G.K.

50. G.K. was cross-examined primarily with respect to dates. It was also put to her that she had never been in a van with the accused between the 1st July, 2003, and the 31st August, 2003, when water meters were being read, or indeed at all, and accordingly that she could not have been sexually assaulted as she alleged.

51. A diary recovered by the Gardaí in a search of the appellant's home, contained 91 meter readings in the handwriting that G.K. claimed to be her handwriting. However, the readings in question were later established to have been made in October, 2002. It was suggested to G.K. that 91 readings would be a lot to do in a whole day never mind in a couple of hours as she had been suggesting, and she said she didn't know. It was further put to her that the appellant never worked on Saturdays. The witness was insistent that on the sole occasion that she had been helping the appellant with meter reading it had been a Saturday. It was put to her *"You didn't go on a trip with him reading meters on that Saturday at all, and you never went on a trip with him reading meters at any stage?"* to which the witness replied *"Well, I did."*

Other Material Evidence

52. Notwithstanding that it had been put to G.K. that she had never been in the appellant's van reading meters at any stage, there was evidence that in the course of being interviewed at a Garda Station while detained under s.4 of the Criminal Justice Act, 1984, the appellant admitted that G.K. had been in a county council van with him on a day he was when checking the water meters for his employer. He also admitted that she had made entries into his book on that occasion. While he did not admit sexually assaulting her, he told the Gardaí that the book in question was still at his home, and this had led to the search which recovered the diary referred to earlier in this judgment.

53. The appellant gave evidence in his own defence. He denied the allegations made against him by the said four complainants. Specifically in relation to G.K., he denied that she was ever out in his van when he was reading water meters. He was asked in the course of a wide ranging and forensic cross-examination as to why he had told the Gardaí that she had been doing that. He replied that he had told the Gardaí that because he was stressed out at the time, that he had wanted to go home, that he had been two days without a bite to eat, and had gone a night without sleep as well, and that he had made a mistake.

Grounds of Appeal Against Conviction

54. The appellant contends that his conviction is unsafe and unsatisfactory and seeks to have it set aside on the following grounds:

> 1. That the respondent failed to give, and the learned trial judge erred in failing to direct the respondent to give, adequate particulars of the offences alleged in the indictment preferred against the appellant.
>
> 2. The learned trial judge erred in law or in fact or in a mixed question of law and fact in failing to grant separate trials in respect of each of the four separate complainants referred to in the indictment preferred against the appellant.
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> 3. The learned trial judge erred in law or in fact or in a mixed question of law and fact in acceding to an application by counsel for the prosecution to amend the indictment in respect of counts 27, 28 and 29.
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> 4. The learned trial judge erred in law or in fact or in a mixed question of law and fact in failing to discharge the jury upon each application being made to him so to do by counsel for the appellant.
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> 5. The learned trial judge erred in law or in fact or in a mixed question of law and fact in admitting into evidence before the jury evidence of the suspension of the appellant's questioning in the early hours of the 31st August, 2010, and all consequential material.
>
> 6. The learned trial judge erred in law or in fact or in a mixed question of law and fact in failing to grant a direction on each and all counts on the indictment preferred against the appellant upon application being made to him so to do by

counsel for the appellant.

Ground 1

55. Counsel on behalf of the appellant had applied to the trial judge on day 1 of the trial for an order directing the respondent to give detailed particulars of what was alleged to have occurred on each occasion in respect of each of the counts on the indictment, and that application was refused.

56. The application was made on the basis that, in respect of certain counts on the indictment, it was very difficult to correlate individual counts with specific incidents of alleged offending behaviour described by the relevant complainant in her statement in the Book of Evidence. At the appeal hearing before this Court, counsel for the appellant accepted that the problem clearly did not arise in the case of S.H., in respect of whom just one incident was charged, nor in respect of G.K., in respect of whom three incidents were charged, in circumstances where each incident was clearly identifiable and capable of being differentiated on the Book of Evidence. However, he maintained the problem was particularly acute in respect of the counts relating to L.H., and to a somewhat lesser degree those relating to N.H.

57. Counsel contended that it was all the more acute in circumstances where, following *B v. Director of Public Prosecutions* [1997] 3 I.R. 140, in a case such as this, involving multiple accusations of similar offences by different victims, the evidence of one victim could potentially corroborate the evidence of another or other victims on the basis of the unlikelihood that the same person should find themselves falsely accused on various occasions by different and independent individuals.

58. The principal complaint related to lack of specificity with respect to dates and, in the absence of specificity with respect to dates, also to the absence of other details anchoring the complaint in time and place such as might have facilitated meaningful cross-examination and testing of the allegations.

59. Counsel for the respondent had submitted to the court of trial that the indictment had been preferred in the normal way. He submitted that dates or times were not essential ingredients of the offences in question. It was extremely common for complainants who were young at the time to be unable to identify dates with precision, and to be able to give only an approximation as to when an event had occurred. It was not at all unusual in those circumstances to prefer counts covering specific blocks or periods of time without specifying precise dates. Moreover, counsel for the respondent specifically relied upon *B v. Director of Public Prosecutions* in support of his position, and pointed to the similarities between the four complainants' individual accounts.

60. In addition to *B v. Director of Public Prosecutions,* the trial judge had been referred to *People (Director of Public Prosecutions) v. M.R.* [2010] 1 I.R. 577 and *People (Director of Public Prosecutions) v. Barr* (unreported, Court of Criminal Appeal, 2nd of March 1992). At the appeal hearing before this Court, counsel for the appellant indicated that particular reliance was being placed upon the *M.R.* decision.

61. In the case of *M.R.,* the accused was charged with two counts of sexual assault and was tried in the Circuit Criminal Court before a judge and jury. In the course of the trial, the complainant gave evidence that she had been touched on both the breast and vagina by the accused. The accused gave evidence that he had only touched the complainant on the breast. The first count alleged simply that the accused had sexually assaulted the complainant. The second count alleged that he had sexually assaulted her otherwise than as set out in the first count. One of the grounds of appeal was that the counts were insufficiently particularised in that the complaints in relation to the touching of the various body parts were not specified.

62. Giving judgment for the Court of Criminal Appeal, Denham J. (as she then was) indicated that it was important to particularise the facts of an offence alleged and that this was so especially in a situation where one set of facts was admitted. The Court found that in that case there was a lack of particularisation on count 1. The complaints in relation to the touching of the breast and the touching of the vagina were not particularised. This led to a confused charge. The judge did not direct clearly that the jury must be unanimous on the act or acts which grounded their verdict. Accordingly, the Court of Criminal Appeal found the verdict to be unsafe and allowed the appeal.

63. In the present case, the trial judge, having heard the arguments on both sides, ruled as follows:

> "The … matter raised is a lack of specificity or particulars in each count of the indictment. Reliance is placed by the defence on the case of the *People (Director of Public Prosecutions) v. M.R.* [2010] 1 I.R. 577. However, the facts the facts in that case were different and distinguishable from in this case. In that case there were certain matters alleged and certain matters admitted and the basis of the decision, as I see it, was that it wasn't fair in those circumstances on the defence not to give particulars in the indictment. It has been held in the case, for example, of *B v. DPP* that the lack of specific dates in an indictment is not a ground for prohibition and I quote from the head note in that case: "The essence of the complaints against the applicant there was systematic sexual abuse by him over a long period in respect of each of the three complainants and it would have been unreal to expect children of the tender ages that they were to remember the actual date of each alleged incident." Now, I don't think there's any unfairness on the defence in not having particulars in the particulars of offence in each count of the indictment. There are sufficient particulars in the book of evidence, at least I'm told by the prosecution as good as they can give and better particulars cannot be given. The defence does not appear to be prejudiced just because such particulars are not included in the indictment when they are included in the book of evidence. I don't see any prejudice to the defence and borne out by the fact that the defence says they are able to meet the case made against the accused in count 19 because it appears in the book of evidence the allegation is that that incident took place on the day of the all Ireland time in September 2004 which allows the defence have an answer to that particular allegation. It's not usual, in any event, to include detailed allegations in an indictment and, as I say, there is a distinction to be made from the facts in this case and in that of *DPP v. M.R.* So, I do not find the indictment is deficient."

64. In this Court's view, the trial judge was correct in distinguishing the case *of People (Director of Public Prosecutions) v. M.R.* As Denham J. had pointed out (at p. 582 of the report) the problem in that case had been that the trial judge had left it to the jury to convict the accused on count 1 on two alternative bases, (a) touching of the breast (which the accused admitted), or (b) touching of the breast and the vagina. There was no direction to the jury that they had to be unanimous as to the act which formed the basis of the verdict. The result is that the jury could have found:-

> *i. that the complainant was correct and that the accused touched her on her breast and vagina, or*

ii. that the accused had touched the complainant on the breast only, as he admitted, or

iii. that some of the jury were satisfied that the appellant touched the complainant on the breast only and others of the jury that he had touched her on the breast and vagina, but all agreed he had touched her.

No such considerations arise in the present case.

65. The Court accepts that it is not at all unusual for there to be a lack of specificity with respect to dates and times in cases of historical sexual abuse. In O'Connor v Smith (unreported, High Court, 17th November 1994) Barr J., addressing a claim for prohibition on the grounds, inter alia, of a lack of specificity in the dates of alleged offences in an indictment, stated:

> "Bearing in mind that the essence of the complaint against the applicant is systematic sexual abuse by him over a long period, it would be manifestly unreal to expect that upwards of two years after the alleged offences, a child of thirteen years would remember the actual date of each alleged incident. What she has done is to specify that they happened every week (at least during school terms) for upwards of a year ending in January, 1990. In my view that information is sufficient to give the complainant a clear idea of what is alleged against him and when the alleged frequent on-going sexual abuse occurred. It will be appreciated that factors of particular importance in this case are, first, the tender age of the complainant and, secondly, that the complaint made does not relate to a single incident or isolated incidents, but to on-going frequent sexual wrong-doing over a minimum period from in or about the 1st January, 1989 to a date unknown in the month of January, 1990, all of which are alleged to have taken place in the applicant's own home."

66. This Court considers that the remarks of Barr J. are apposite in the context of the present case. The Court rejects the argument that the appellant was prevented or significantly inhibited from testing the allegations by lack of precision or specificity with respect to dates. It considers that, while precise dates may not have been given, each instance of offending behaviour as described by the complainants was sufficiently contextualised within the complainants' respective statements in the Book of Evidence, e.g., by reference to the nature of the abuse, to the location and place at which it occurred, to incidental activities that were also occurring, to opportunities presenting themselves and availed of, or by reference to other extrinsic factors, as to enable them to be differentiated one from the other, and to enable the evidence to be adequately tested in cross-examination. Indeed, all four complainants were in fact cross-examined at considerable length. Accordingly, the Court upholds the ruling of the trial judge and rejects this ground of appeal.

Ground 2

67. At the commencement of the trial the appellant's counsel applied for separate trials in respect of the offences relating to each of the complainants. The application was based upon s. 6(3) of the Criminal Justice (Administration) Act 1924, which provides:

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

68. The basis for the application was that the evidence of the various complainants did not disclose any system, and that, while there was superficial similarity as between certain aspects of the allegations, the natural prejudice that would arise from the similarity of the allegations was not overborne by the probative effect of the evidence. Moreover, counsel for appellant contended, there was considerable reason to be concerned about possible collusion where three of the complainants were members of the same family, and where legal proceedings against the accused had been threatened, and in one case actually commenced, by those three complainants. While the application was advanced in respect of all four complainants it was candidly conceded before this Court by counsel for the appellant that his case in that regard had been significantly stronger in the case of the three counts relating to G.K. than in respect of those relating to L.H., N.H., and S.H..

69. Counsel for the respondent had resisted the application, contending that the proposed evidence was capable of amounting to system evidence, and in any case the similarities were such as to be significantly probative, where the evidence of one victim could potentially corroborate the evidence of another victim or victims on the basis of the unlikelihood that the same person should find themselves falsely accused on various occasions by different and independent individuals alleging similar, or largely similar, conduct.

70. Counsel for the respondent pointed out the similarities in the complaints made by the alleged injured parties in their statements of proposed evidence. All the alleged victims were from the same parish and were in the same age group when allegedly assaulted. Three were from one family and one was a neighbour. The accused also lived nearby. There was great similarity, the prosecution said, about the acts of abuse alleged by the complainants, involving as it did the accused placing his fingers inside the underwear of the young girls and placing his hands on or inside their private parts. The abuse was perpetrated, the prosecution argued, when the complainants were approximately the same age, namely, in the last years of primary school/ first years of secondary school.

71. While it was accepted that the incidents involving G.K. were somewhat different in points of detail to those involving the H sisters, it was contended that such differences were superficial and that the offending conduct involving G.K. was still sufficiently similar to that involving the other complainants as to justify a joint trial of all matters.

72. Counsel for the appellant referred to *People (Director of Public Prosecutions) v. B.K.* [2000] 2 I.R. 199, while counsel for the respondent relied upon the case of *People (Director of Public Prosecutions) v L.G.*(unreported, Court of Criminal Appeal, 21st of May 2003).

73. In opening the *B.K.* decision, counsel for the prosecution directed the attention of both the court of trial, and this Court, to the following passage from the judgment of Barron J. (at p.203 of the report):

> "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.
>
> For such evidence to be so admissible, it would be necessary for the probative value of such evidence to outweigh its prejudicial effect. In practice, this test is applied where there is a similarity between the facts relating to the several counts. On the one hand, there is system evidence which is so admissible; and, on the other hand, there is similar fact evidence, which is inadmissible. In the latter case, the reason is that, just because a person may have acted in a

particular way on one occasion does not mean that such person acted in the same way on some other occasion. System evidence on the other hand is admissible because the manner in which a particular act has been done on one occasion suggests that it was also done on another occasion by the same person and with the same intent.

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

The 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."

74. In relation to *People (Director of Public Prosecutions) v L.G.,* counsel for the appellant pointed out that Keane C.J., giving judgment for the Court of Criminal Appeal, had re-iterated that the applicable principles were those set out in *B.K.* However, in *L.G.* the Court of Criminal Appeal had been satisfied that the evidence in respect of one complainant was admissible in respect of the other complainant, and that the trial judge had been correct in refusing to direct separate trials. Counsel for the respondent contended that the same situation obtained in the appellant's case.

75. The trial judge ruled as follows:

"Now, it is clear from the judgment of the *Director of Public Prosecutions v. L.G.,* judgment delivered by the then Chief Justice Keane in the Court of Criminal Appeal on the 21st of May 2003, that I have a discretion on whether or not to direct separate trials, depending on the particular facts in a case. Now, that was a judgment which considered the previous authorities, including, in particular, the case of the *Director of Public Prosecutions v. B.K.,* which has been opened here in this application. That was another decision of the Court of Criminal Appeal delivered in 1999. Now, in this case, the prosecution has indicated that there are similarities in the allegations to be made by the four complainants as to a number of matters, including when the incidents happened, the ages of the girls at the time, the surrounding circumstances and the nature of the acts complained of. Now, I know the defence is not admitting any of this, but they're not disputing either that these are the allegations which are going to be made which are contained in the book of evidence and as this if this is the case to be made by the prosecution and on that basis I find that these similarities are of such considerable probative force that the evidence of one complainant is admissible in a case relying on the complaint of another, if there was to be separate trials, but that being so, it seems to me that there is nothing wrong in proceeding with all these trials on the one indictment so I do not accede to the defence application on that point."

76. This Court has carefully considered the submissions made to it on both sides in respect of this ground of appeal. The Court has further considered the jurisprudence opened to it, and the provisions of the statute. In our view the statements of evidence of the complainants, as opened at the time of the application for separate trial, and as subsequently borne out in evidence, did disclose very significant similarities in the complaints of the four complainants, and certainly such as to be potentially of significant probative value, notwithstanding that they were also prejudicial. In this Court's view, the potential probative value of such evidence clearly outweighed its prejudicial effect and the trial judge was right not to direct separate trials. In addition, there was unlikely to be any major potential embarrassment to the defence in having the matters tried together. Issues such as potential collusion were capable of being addressed in cross-examination, and were in the event so addressed.

77. In the circumstances, the Court upholds the ruling of the trial judge and we are not disposed to uphold this ground of appeal.

Ground 3

78. The Court has already alluded at paragraph 3 above to the fact that the indictment was amended in respect of counts involving the complainant G.K., (i.e counts 27, 28 and 29 respectively), and that the effect of the amendments was to expand in each instance the date range within which the offending conduct was said to have occurred from between the 1st July, 2003, and the 31st August, 2003, to between the 1st July, 2002, and the 31st August, 2003.

79. Further, the Court has rehearsed at paragraphs 44 to 51 above the evidence given by G.K. that precipitated the application by the prosecution for leave to so amend the indictment.

80. The application to amend the indictment was made on day seven of the trial, and in reliance upon s. 6 (1) of the Criminal Justice (Administration) Act 1924, which provides:

"Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless the required amendments cannot in the opinion of the court be made without injustice, and may make such order as to the payment of any costs incurred owing to the necessity for amendment as the court thinks fit."

81. The application for an amendment was vigorously and robustly opposed by counsel for the appellant, who at the time variously characterised the application as "atrocious", "shocking", "outrageous", "absolutely unfair" and "unjustified". He fairly accepted before this Court that, though he was sincere in his protest, he may have indulged to some extent in hyperbole in registering his protest.

82. As counsel for the appellant explained at the appeal hearing, the basis of his objection was that to allow the proposed amendment at that stage of the trial, after the accused had given his evidence in chief and during his cross-examination, would be unfair, because the case had been defended up to that point on a particular basis, and amending the indictment in the manner proposed amounted to a moving of the metaphorical goalposts that could undermine that defence, or at the very least introduce confusion in the minds of the jury.

83. Counsel for the respondent explained the background to the application that was made. There was a statement of proposed evidence from G.K. which had placed the alleged offending in the summer of 2003. It was that account that had been put to the appellant in interview. The appellant had appeared to accept in interview that G.K. had been in his van on "a" day to read water meters, and appeared to agree that that was in the summer of 2003. He agreed that she was in the passenger seat and that she had made the entries in the diary. The Gardaí then got a search warrant after he was released from detention, went to his home, executed the warrant and obtained one diary from his home.

84. The diary that was recovered was the only diary that the Gardaí understood to be relevant. This was subsequently shown to G.K. who identified the fifth entry therein as having been made by her. The fifth entry did not itself indicate that it had been made on any

particular date. However, there was another relevant diary and a document, both of which had remained in the possession of the appellant, to which counsel for the appellant had had recourse in planning his cross-examination of G.K., and which had not been disclosed to the prosecution. It emerged in the course of counsel for the appellant's cross-examination of G.K. that there was a system, known only to the accused, with regard to the maintenance of dates and the recording of events in the diary recovered in the search, whereby it was possible, by reference to the other diary and document, to establish when entries were in fact made in the diary recovered in the search. Using these documents in combination, it was established that the fifth entry had been made on a date in October, 2012.

85. In addressing the trial judge on the issue, counsel for the respondent stated:

> "… up until now the prosecution did not have the evidence before it. It did have the accused's diary but it did not understand the system in the diary, and it didn't have the second diary by which the accused says he can identify the first date. And the situation is with regard to the diary that the system of dating is uniquely within the knowledge of the person who kept the diary; it's not within the knowledge of the prosecution, it's uniquely within the accused's knowledge and he kept that knowledge to himself, through his legal team, until the last moment. And that -- it is in that sense that the prosecution was ambushed, because the defence kept the code to -- the means to crack the code in the book was kept from the prosecution as the -- and I don't say anyone did anything wrong in that but, having done that, I do say that I'm entitled to amend with regard to dates. And if Mr Buckley wants to make points about credibility following on from that, I have no difficulty with that, he's entitled to that. What I submit, it would be manifestly unfair for the prosecution if your lordship failed to accede to my application to amend."

86. Counsel for the respondent further submitted that it was important, of course, to bear in mind that the principal issue in the case was whether or not G.K. was in the county council van on the occasion in question, whatever date it was. While the prosecution were contending that she was, the defence were saying that she was not. The issue as to the precise date on which that had occurred was something of a peripheral issue. However, there was no reason not to amend the indictment. The defence would not be prejudiced in that they could not be inhibited in exploiting the difference in dates in terms of any implications it might have for the jury's view concerning the witness's credibility and reliability.

87. The trial judge ruled in favour of the amendment, expressing the view that the defence had ambushed the prosecution and stating that it would be grossly unfair not to allow the amendment. He added:

> "I have a duty to ensure there's fairness to all sides. Not to allow the amendment would create a great injustice to the prosecution. There -- accordingly I'm going to allow the amendments of counts 27, 28 and 29."

88. This Court considers that the trial judge was correct in allowing the amendment sought. The Court notes that in the present case, the dates of the offences of sexual assault charged in counts 27, 28 and 29, respectively, were not essential ingredients of those offences. The complaints of the appellant's counsel, that to allow the proposed amendment at the stage of the trial at which it was sought would be unfair, because the case was being defended on a particular basis, and that to amend the indictment might introduce confusion, ring hollow in circumstances where the case being made by the appellant was not that the incident in the council van could not have happened on a particular date, but rather that it never happened at all. The Court agrees with counsel for the respondent that in those circumstances the precise date was of peripheral importance.

89. Moreover, while the proposed amendment was unquestionably going to cause some prejudice to the defence, it was not unfair to them to amend the indictment in the circumstances of the case. The trial judge was correct in asserting that, on the contrary, it would have caused injustice to the prosecution not to do so. In that regard, the Court notes that the relevant statutory provision does not prohibit an amendment from being made simply because it is prejudicial. Rather, the provision states that a court "shall" order an amendment unless the amendment sought "cannot in the opinion of the court be made without injustice". The trial judge was clearly of the view that not only would it not cause injustice to the defence to allow the prosecution's amendment, but that not to do so would positively give rise to injustice on the other side, i.e., to the prosecution. This Court considers that the granting of the amendment sought was a matter within the discretion of the trial judge and that that discretion was properly exercised in the circumstances of the case.

90. The Court finds additional support for its view in *R v Dossi* (1919) 13 Cr App R 158, where it was held that a date mentioned in the indictment could be amended even after the verdict provided that the date was not an essential element of the offence. The issue for determination in *Dossi* was whether an indictment could and should be so amended where the jury had convicted the accused of having committed the offence on a date different to that specified in the indictment. While the English Court of Criminal Appeal, as it then was, seemed to think that an amendment was not strictly necessary in the circumstances, it was willing to countenance the amendment.

91. In the circumstances, the Court upholds the ruling of the trial judge and we are not disposed to uphold this ground of appeal.

Ground 4

92. The complaint here relates to the failure of the trial judge on day seven to discharge the jury in response to an application by counsel for the appellant that he should do so. The basis for the application was that counsel for the respondent had allegedly breached an early ruling of the trial judge concerning the parameters within which he might re-examine L.H., in light of the evidence given by Detective Garda O'Keeffe concerning the non-existence of Bebo in 2003.

93. Counsel for the appellant disputed that he had crossed the line drawn in the trial judge's earlier ruling, contending that at the time of counsel for the appellant's interjection he was in fact re-examining L.H. concerning an allegation that she had made in 2005 when Bebo undoubtedly existed.

94. The trial judge agreed and refused to discharge the jury.

95. Perhaps wisely, counsel for the appellant indicated at the hearing of the appeal that he was not pressing this point although it was not being formally withdrawn. The Court remarks that even if the factual dispute could be resolved in the appellant's favour, and the transcript in fact supports the other version, the trial judge would not have been justified in discharging the jury after seven days of trial. Any potential prejudice that might have inured to the defence by a breach of the judge's earlier ruling was capable of being addressed by appropriate warnings and directions to the jury.

96. In the circumstances, the Court upholds the ruling of the trial judge and we are not disposed to uphold this ground of appeal.

Ground 5
97. This ground of appeal challenges the correctness of a ruling by the trial judge following a *voir dire* to admit evidence concerning a number of interviews with the appellant that occurred on the morning of the 31st August, 2010, before the jury.

98. The evidence was that the appellant was arrested on Monday 30th August, 2010, at 7.30 am, and was taken to a Garda Station, where at 8.16 am he was detained by the member in charge pursuant to the provisions of s. 4 of the Criminal Justice Act 1984.

99. At 1.20 pm on the 30th August, 2010, a Garda Superintendent extended the period of detention of the appellant for a further period of six hours, and at 7pm on the same date a Garda Chief Superintendent extended the detention of the appellant for a further period of twelve hours.

100. At 12.10 am on the 31st August, 2010, the member in charge purported to suspend the appellant's period of questioning pursuant to the provisions of Section 4(5A)(a) of the Criminal Justice Act 1984. So of the second twelve hour period at the time of the purported suspension of questioning, 4 hours and 40 minutes had elapsed leaving 7 hours and 20 minutes remaining. At 8.00 am on the 31st August, 2010, the suspension of questioning of the appellant was lifted and the appellant was further interviewed by members of An Garda Síochána. He was released from custody at 3.15 pm on the 31st August, 2010.

101. The appellant contends that his questioning was not validly suspended, and that accordingly the period of his detention continued to run through the night and expired at 7.30 am on the 31st August, 2010. He contends that from that point until his release at 3.15pm that afternoon he was in unlawful detention, and that any evidence gathered from him, including interview material, during his unlawful detention ought to have been excluded from the jury.

102. Before reviewing the evidence given on the voir dire concerning the matters in controversy, the Court considers it appropriate to set out the terms of S.4(5A) of the Criminal Justice Act 1984, which provides:

> "(a) If a person is being detained pursuant to this section in a Garda Síochána station between midnight and 8 a.m. and the member in charge of the station is of opinion that any questioning of that person for the purpose of the investigation should be suspended in order to afford him reasonable time to rest, and that person consents in writing to such suspension, the member may give him a notice in writing (which shall specify the time at which it is given) that the investigation (so far as it involves questioning of him) is suspended until such time as is specified in the notice and shall ask him to sign the notice as an acknowledgement that he has received it; and, if the notice is given, the period between the giving thereof and the time specified therein (not being a time later than 8 a.m.) shall be excluded in reckoning a period of detention permitted by this section and the powers conferred by section 6 shall not be exercised during the period so excluded:
>
> Provided that not more than one notice under this paragraph shall be given to a person during any period between midnight and 8 a.m.
>
> *(b) A notice under paragraph (a) may, for serious reasons, be withdrawn by a subsequent notice given in like manner, and in that event any time subsequent to the giving of the second notice shall not be excluded under that paragraph.*
>
> *(c) A member of the Garda Síochána when giving a notice to any person under paragraph (a) or (b) shall explain to him orally the effect of the notice.*
>
> *(d) The following particulars shall be entered in the records of the Garda Síochána station without delay—*
>
> *(i) the time of the giving of a notice under paragraph (a) and the time specified therein as the time up to which the questioning is being suspended,*
>
> *(ii) whether the person being detained acknowledged that he received the notice, and*
>
> *(iii) the time of the giving of any notice under paragraph (b).*
>
> *(e) Records kept in pursuance of paragraph (d) shall be preserved for at least twelve months and, if any proceedings are taken against the person in question for the offence in respect of which he was detained, until the conclusion of the proceedings (including any appeal or re-trial)."*

103. Garda Claire Hanrahan told the court of trial that she came on duty at 10.00pm on the 30th August, 2010, and took up duty as member in charge, relieving a colleague. She was briefed by the colleague who was going off duty concerning the circumstances in which the appellant was in custody. At 10.10 pm, she visited the appellant in an interview room and introduced herself to him. He was being interviewed by Detective Garda Mackey and Detective Garda Healy. She checked the prisoner again at 11.06 pm, and again at 11.45 pm. He had no requests on either occasion. At 12.10 am, she received three sealed video tapes from Detective Garda Mackey in respect of the appellant's interview which had ended five minutes earlier at 12.05 am. Then at 12.11 am, the appellant was brought to the public office of the Garda Station by Detective Garda Healey. Garda Hanrahan, stated that at this point he signed a form 6, designated "Suspension of Questioning Form".

104. The witness produced the form which stated:

> ""I, JO'C, hereby consent to any questioning of me for the purpose of the investigation in relation to which I am detained, be suspended from 00.11 midnight/am on date 31/8/2010 at time 8 am on date 31/8/2010, in order to afford me reasonable time to rest." Signed: [the appellant's signature appears]

105. The witness was asked whether, when the appellant was brought to the public office at 12.11 am she had made any decision with respect to him. She responded:

> *"A. Judge, the decision I had made well, I didn't really have a decision made at before he came out, only that when he came out, he's entitled to a rest period and that I was going to bring that to his attention when he was brought to the public office.*

Q. When he came out to the public office, did you have a conversation with him?

A. Yes, Judge.

Q. Can you tell the judge about that conversation?

A. Judge, I the prisoner when the prisoner was brought up to the public office, I informed him that he was entitled to a rest period, that he was entitled to have his suspension of questioning suspended from a period from then until 8 am.

Q. Did you inform him of the consequences of that?

A. also informed him, Judge, that the clock would be stopped, that his period of detention would be stopped and that the hours would be made up from 8 am that morning.

Q. Did you give him an alternative?

A. Yes, Judge, I also informed the defendant that if he didn't want to avail of his rest period, that the suspension of questioning would not happen and that the questioning would continue throughout the night.

Q. Mr O'C, how did he react to that information?

A. Judge, Mr O'C agreed to have the suspension of questioning to have a rest period."

106. The witness agreed under cross-examination that she had not recorded the fact that she had had a conversation with the appellant in the custody record. She stated that the appellant had not filled out form 6, rather that she had. He had merely signed it. She agreed that she had stated in her statement of evidence that the appellant had completed the form and stated that that had been an error on her behalf.

107. It was put to the witness that at all stages the appellant had had a firm intention not to agree to a suspension of his questioning. The witness replied:

"A. Well, Judge, the form is signed here three times. So, in my opinion, he did want to suspend it.

Q. And, further, that the evidence will be that there was no discussion between you and Mr O'C concerning the suspension of detention, that insofar as there was anything said, it might have been said down the hallway by one of the interviewing guards, but there was nothing said by you, you simply produced a form and Xs were placed on the form for him to sign. There are Xs on the form?

A. There's one X on the form, yes."

108. It was further put to her:

"Q. In other words, an X was put, a form was shoved under his nose and he was told to sign it?

A. That is incorrect."

109. The witness agreed that it was usual practice for the member in charge to enter the interview room approaching midnight, and to explain the provisions relating to the suspension of detention, in the interview room, on camera. She agreed she had not followed that usual practice.

110. Detective Garda Healy testified to the effect that after the member in charge had visited the appellant in the interview room at 23.45 he and his colleague were conscious that the appellant would shortly be entitled to a rest period and so they hastened the conclusion of the interview and their reading out of notes of the interview, so that they could bring the appellant up to the member in charge. He was asked what happened when the appellant was brought up to the member in charge, and replied:

> "Garda Hanrahan asked him would he like to avail of a rest period between I think the time was 00.11, which was 11 minutes past 12 at that stage, until 8 am, and she explained to him that he was entitled to this rest period or to continue to be questioned, but if he did avail of the rest period, it would have been added on to his detention at 8 am that morning, 31/8. J.O'C agreed to take the suspension of questioning, the rest period, and he signed that consent form."

111. It was put to Detective Garda Healy in cross-examination that, while they were still in the interview room after the interview had come to an end, and after the tapes had been ejected, he had commented to the appellant that his speech was becoming slurred and his answers had not been coming across clearly, and that the appellant had responded to this by saying something to the effect that, "No", he was ready to go on, that he had consulted with his solicitor and wanted to go on. It was further put that Detective Garda Mackey had then said words to the effect: "No, you're going to the cells". The witness rejected these suggestions, characterizing them as total lies, and pointing out that the video record of the interview was there and that it would show that the appellant's speech was not slurred. Detective Garda Mackey in turn denied that any such thing had occurred

112. The appellant himself gave evidence on the *voir dire* and told the Court that he had seen his solicitor in the Garda station at 8.40 pm on the evening of the 30th August, 2010, and that his solicitor advised of his options as he was going forward into the night, and in particular in relation to his entitlement to have his questioning suspended between midnight and 8.00 am. He was asked what was his position having received this advice, and he stated:

"A. We had a discussion with Pat Mann, my solicitor, and I said to him he asked me was I okay. I said I'm okay. I said I'm grand, I'm able to continue my interview with the guards. Are you sure, he said. Yes, I'm grand, I said, my intention is to continue, is to continue with the guards, to get out of it, continue, my lord.

Q. So, did you want a rest a suspension of questioning between midnight and 8 o'clock in the morning?

A. Definitely not, my lord."

113. The witness then testified that towards the end of his time in the interview room with Detective Garda Healy and Detective Garda Mackey:

> "Garda Healy said to me, he's the guard at my right hand side, this is Garda Healy, he said to me that my speech was getting slurred and I should take I should take a break, that I wasn't coming across clear and I should take a break. That was the guard on my right."

And that Garda Mackey, who was still in the room then said:

> "You that you are taking a break, you're going down to the cells."

The witness claimed that he had then stated that he was okay, that he had discussed it with his solicitor, and that they had all then agreed that he could continue.

114. The witness was asked about the circumstances in which he had signed the form 6, and stated:

> *"A. And there was an X put in a book and I was just told sign that, my lord.*
>
> *Q. Did that female guard say anything to you about suspension of questioning?*
>
> *A. Definitely not, my lord.*
>
> *Q. Was there any discussion with that guard about suspension of questioning or resting or anything of that nature?*
>
> *A. Absolutely not, my lord."*

115. Under cross-examination, the witness was asked to explain how he could have failed to appreciate what it was he was signing. This gave rise to the following exchange:

> *"Q. And then a document is put in front of you, with very heavy, bold, large, capital letters, suspension of questioning?*
>
> *A. This document to me, my lord, was completely new to me. I didn't know anything at all about this suspension of questioning ever before, my lord.*
>
> *Q. Is that fair to say, Mr O'C, because just three hours earlier, you'd had a consultation with your solicitor, where it had all been explained to you; do you see my point?*
>
> *A. I see your point, my lord. This was all new to me. I was when Pat Mann came into me, I had two more hours of interrogation after that again, my lord.*
>
> *Q. It's not really that you signed the document once*
>
> *A. I had an X put there was an X put for me there was an X put on a leaflet for me to sign my name to.*
>
> *Q. It's not really that you signed the document once. You signed it three times?*
>
> *A. Correct. Correct, my lord, yes.*
>
> *Q. Why did you sign it three times?*
>
> *A. Because I was told sign it three times, my lord."*

116. The final witness on the *voir dire* was the appellant's solicitor, who told the court that he had called to the Garda station at 8.20 pm on the 30th August, 2010 and got to visit the appellant at 8.40 pm He stated that he had advised him of certain matters including his entitlement with respect of suspension of questioning. He added that within 27 minutes of leaving the Garda station he had dictated a memo concerning his consultation, and he read the relevant portion of the contents of his memo for the benefit of the court. The relevant evidence was:

> "Yes, if I may quote. "I told him that we were coming up now towards night time and he had already been extended by Chief Superintendent O'Sullivan" That's an error, that should be Chief Superintendent Sullivan. "And that the choice was his now as to whether or not he wanted to rest from 12 midnight until 8 am or whether he wanted to keep going through. I told him that the clock stopped at 12 midnight if he took the rest period and he said that what he would do is he would keep going. I asked him if he was sure about that now in case he was tired or anything and he could say the wrong thing, not meaning to say it, and he said that he was fine and he would keep going." And I go on then to say we discussed the bare bones of the allegations that were made against him."

117. In cross-examination, the solicitor stated that the question of signing a document never arose in any discussion between himself and the appellant. He agreed that when he saw the appellant at the 8.40 pm consultation he was aware that the Gardai had only discussed the allegations of two of the complainants with the appellant and that there were two more to be discussed. When asked if he had considered the question whether the interviewing should continue on or be broken until the following day, he responded:

> "Yes. Well, you see, I knew from talking with him that he was very coherent talking to me and telling me what he wanted to do and how he wanted to just get finished and get out of the Garda Station as soon as possible, that was his thinking behind it. I have nothing in here in my memo that tells me that I would have thought he should have taken a break."

118. It was further elicited from the solicitor in cross-examination that the explanation given to him by the appellant on the following morning was that the Gardaí had been pressurising him, that "they had kept saying it was the thing to do etc, and he eventually gave in."

119. At the conclusion of the evidence, counsel for the appellant applied to exclude all evidence gathered after 7.30 am on the 31st

August, 2010, on the grounds that his client's questioning had not been validly suspended, with the result that time had continued to run during the night such that his continued detention ceased to be lawful at 7.30 am on the on the 31st August, 2010.

120. The basis for the contention that there had not been a valid suspension of questioning was two-fold. First, it was submitted that the member in charge is required by s. 4(5A)(a) to be "of opinion that any questioning of that person for the purpose of the investigation should be suspended in order to afford him reasonable time to rest". It was submitted that the evidence did not establish that Garda Hanrahan had formed any such opinion. Secondly, s. 4(5A)(a) imposed a further, conjunctive, requirement that the detained person should consent to the suspension of his questioning. It was submitted that the evidence did not support the conclusion that the appellant had given informed consent. The application was opposed by counsel for the respondent who contended that there was ample evidence to infer both that Garda Hanrahan had formed the requisite opinion, and that the appellant had given informed consent.

121. The trial judge ruled as follows:

> "JUDGE: Now, it appears that at 20 past 8, 20 to 9, [the solicitor for the appellant] called to the station on this evening, the 30th of August 2010, and he had a consultation with his client and he gave him advices, including explaining to him the what were his rights as regards the suspension of questioning at midnight and also the option of declining that suspension and continuing with the questioning. Now, [the solicitor] has given that evidence and I accept all of [his] evidence, I want to make that quite clear, everything he said and he took a careful note of it at the time. But it is Mr O'C's evidence agrees with the fact that he was given this information by [the solicitor] about the question of suspension the possibility of the suspension of questioning. So, he knew about it. He knew this was an option that he could exercise when it came to midnight. Now, he did say something about being told that he was going to be given a form to sign. [The solicitor] says he didn't make any mention of a form. So, I accept that he wasn't given any mention there was no mention of a form. But Mr O'C, when it comes to midnight, and shortly after it, he is given a form to sign. The first thing to say is that the garda evidence in this case has been that he was advised about the fact that he questioning could be suspended until 8 o'clock, that if it was stopped if there was a suspension of questioning, that the clock would stop and until 8 o'clock and that the questioning would continue, would be renewed at that time, if the questioning was suspended. And the evidence from the gardaí was that he also was told that he could continue on, he could decline the offer of having the questioning suspended.
>
> Now, having considered all the matters, I accept the garda evidence in this case, without any doubt, and that it is whatever discrepancies have been tried to be hung on their evidence doesn't, in any way, undermine it in my view. In addition to that, Mr O'C is given a form, which has to do with suspension of questioning, which is written in bold letters on the top, he signs it three times. He knew that this was an option to come up. I don't think know what else he could have imagined the form was about. He said to [the solicitor] the next morning that they made me they kept at me sorry: "They kept saying that it was the thing to do." And that was a reference to suspending the question, and he eventually gave in. Now, that implies the clear inference from that is that the gardaí were talking to him about suspending the questioning, which is inconsistent with his assertion, his own assertion in evidence, that the subject wasn't mentioned. Accordingly and it's clear from the evidence of the guard, that an inference can be drawn without any difficulty at all that she had come to the opinion that it was in the interest of the accused to suspend the questioning. She says that her intention in going to the interview room at a quarter to midnight well, she didn't say it, at the time one of her intentions was to let the interviewing gardaí know that it was coming up to midnight for this purpose. Accordingly, I the suspension of questioning is valid and any evidence subsequent to it is admissible."

122. Apart from being in disagreement with the trial judge's ruling, counsel for the appellant was unable to point to any legal basis for challenging it, other than to suggest that it was against the weight of the evidence and accordingly perverse. This Court does not agree. The trial judge's ruling carefully weighed the evidence that had been given on the voir dire, and his decisions on those issues of fact that he had to determine were rational, were within his jurisdiction to make, and were legitimately open to him on the evidence that he had heard. The Court agrees that the necessary inference as to the formation of the requisite opinion by the member in charge was capable of being drawn, and that the weight of the evidence in fact supported the trial judge's conclusion that the appellant gave informed consent.

123. In the circumstances, the Court upholds the ruling of the trial judge and we are not disposed to uphold this ground of appeal.

Ground 6

124. This ground is based upon the trial judge's refusal to grant a direction at the end of the prosecution case, and to withdraw the case from the jury.

125. The application for a direction was based upon the second leg of *R v. Galbraith* [1981] 1 W.L.R. 1039. In *Galbraith,* Lord Lane had stated:

> "(2) The difficulty arises where there is some evidence but it is of tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence
>
> *(a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.*
>
> *(b) Where, however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."*

126. In a lengthy submission which focussed on his cross-examination of the complainants, counsel for the appellant sought to persuade the trial judge that he ought to withdraw the case from the jury due to alleged inconsistencies in some of their testimony, and issues that he had raised concerning their credibility and reliability. The application was strongly opposed by counsel for the respondent who contended that the issues raised were quintessentially issues for consideration and determination by a jury.

127. In ruling on the application, the trial judge stated:

> " …the matters raised by defence counsel relate to the credibility of the witnesses and relate to matters of fact, and they

are in my view, essentially matters for the jury. I do not think that one could say that if the jury was to bring in a verdict of guilty on any one of these counts, that that would be perverse. Accordingly, I refuse the direction"

128. This was a ruling by a highly experienced and conscientious trial judge. It seems to us to be unassailable on the state of the evidence that was before him. Moreover, it was one that was entirely within the scope of his remit to make. This Court agrees with counsel for the respondent that the issues raised, and doughtily advanced by counsel for the appellant, were all matters that were properly for the jury to assess and weigh in their consideration of the evidence. We also agree with the trial judge's assessment that, at the time of the application for a direction, the state of the evidence was such that, were a jury to bring in a verdict of guilty on any count, it could not be contended that it was perverse or that there was no evidence on which the jury could have acted.

129. In the circumstances, the Court upholds the ruling of the trial judge and we are not disposed to uphold this ground of appeal.

Conclusion

130. As the appellant has failed to sustain any of his pleaded grounds of appeal, the appellant's conviction may be regarded as safe and the appeal against it dismissed.