THE COURT OF APPEAL

Mahon J.
Edwards J.
Hedigan J.

Record No: 79/2017

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

M.D.

Appellant

JUDGMENT of the Court delivered the 7th of June 2018 by Mr. Justice Edwards.

Introduction
1. On the 22nd of November 2016, the appellant pleaded not guilty to all counts on a 36 count indictment that included counts of rape (both oral and anal), indecent assault and sexual assault perpetrated against his nephew, the complainant. ("PD").

2. On the 25th of November 2016, the appellant was convicted by a jury in the Central Criminal Court, following a four day trial of eight counts of indecent assault, contrary to the common law during the period between the 12th of May 1988 and the 17th of January 1991; one count of (anal) rape, contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act, 1990, during the period between the 18th of January 1991 and the 30th of April 1991, and; one count of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act, 1990 during the period between the 18th of January 1991 and the 30th of April 1991. The appellant was acquitted by direction in respect of the remaining 26 counts on the indictment.

3. On the 20th of February 2017, the appellant was sentenced to ten years' imprisonment in respect of the anal rape; eight years' imprisonment in relation to the indecent assaults, and; four years imprisonment in relation to the sexual assault, with all sentences to run concurrently.

4. The appellant now appeals against his conviction and sentences. However, this judgment is concerned solely with the conviction issue.

The circumstances of the case
5. The complainant was born on the 12th of May 1980. The appellant was born on the 12th of July 1971, leaving nine years of an age gap between the two. As a child, the complainant originally lived with his immediate family, and the appellant, in a three bedroom house in a Dublin suburb ("the B house"). However, the offences forming the subject matter of the indictment took place when the family moved to another Dublin suburb ("the C house").

6. The complainant's family moved to the C house at some time during 1987 or 1988, when the complainant was around eight years old. The C house was a four bedroom house. The complainant's parents slept in the main bedroom, his sisters slept in the big bedroom at the back of the house, the complainant and his brothers slept in another bedroom, whilst the appellant, along with the complainant's other uncle (on his mother's side), who also stayed at the house from time to time, slept in a box bedroom. The complainant's parents separated when he was 14 years of age. It was also established in evidence that the appellant and the complainant's mother began a sexual relationship at some stage when the family were living in the C house and that the complainant had known of this relationship at the time.

7. The evidence at trial was that the appellant sexually abused the complainant in the C house *"three or four times a week"* during the period in question, when the complainant and the appellant would be *"the only one[s] in the house*". The abuse took place *"anywhere [the appellant] could get me…rooms, pigeon loft, back garden, front garden, doesn't matter. He would try any way to get me"*. Specifically, the complainant gave evidence of being abused in the sitting room after coming home sick from school one day. There was nobody else in the house and the appellant *"would sit down and then he would start feeling me and touching me and doing what he shouldn't be doing to any kid"*. The complainant described how the appellant would rub his hand along the complainant's leg, proceeding then to *"pull his trousers down, asking me to feel him and he would perform oral sex on me and he hurted me very bad"*. The complainant gave evidence that the appellant would ask him to have sex with him like an adult, to kiss him, and tell him he was *"a good little boy"*. The evidence was also that *"he would stick his penis in my anus and then he would ejaculate on my back, on my face sometimes".*

8. The complainant also gave evidence that the appellant abused him out in the pigeon loft and in the back garden of the C house. The complainant gave evidence that *"it was my weekly weekend job for myself to keep my pigeons clean and he would come out and he would start doing what he done in the house, he would continue on out in the back garden in the pigeon loft".*

9. The evidence was also that *"[the appellant] would assault me, he would tell me if I told anyone he will kill me and he would break everything I had. He's taken everything that I had and just demolished it."*

10. In September 2011, the complainant made a complaint to An Garda Síochána. On the 18th of July 2012, the appellant was arrested on suspicion of sexual assault and rape, and was detained at a Garda station under s. 4 of the Criminal Justice Act 1984 for the proper investigation of the offences for which he had been arrested. During this detention, the appellant was interviewed on two occasions in relation to the allegations made against him by the complainant. He denied sexually abusing the complainant and maintained that *"It's all lies. He wasn't happy with me and his Ma being together so he comes up with this idea".* On the 30th of November 2013, the appellant was again arrested and on this occasion was charged with offences of sexual assault, indecent assault and rape.

11. At the appellant's trial the prosecution's case was principally based on the evidence of the complainant, and the evidence of the Garda investigation including the interviews with the appellant. The appellant did not go into evidence. As indicated in the introduction to this judgment, the appellant was acquitted of 26 of the 36 counts on the indictment by direction of the trial judge. The other 10 counts then went to the jury and he was convicted of those.

Grounds of Appeal
12. In the notice of appeal, dated the 30th of March 2017, the appellant has appealed his conviction on the following four grounds:

> a) The trial judge erred in failing to accede to the appellant's application for a direction to acquit on the basis that the respondent, her servants or agents, failed to conduct any or any adequate investigation of the allegations made against the appellant such that it was impossible for the appellant to receive a fair trial.
>
> b) The trial judge erred in failing to accede to the appellant's application for a direction to acquit on the basis that the delay in the case, coupled with the inadequacy of the investigation, rendered the appellant's trial unfair.
>
> c) The trial judge erred in failing to direct the jury to acquit on all 36 counts on the indictment, having granted a direction in respect of 26 of the said counts.
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> d) The trial judge erred in failing to accede to the appellant's application for a direction to acquit on the basis that the cumulative effect of the above factors rendered the jury verdict unsafe on the remaining counts.

The basis on which the directions to acquit were granted
13. On day 1 of the trial, during examination-in-chief, the complainant, having already stated, *inter alia*, that the appellant had performed oral sex on him, was asked to elaborate *"in terms of the type of activity that you say he performed on you"*. This gave rise to the following exchanges between counsel for the respondent and the complainant:

> *"[PROSECUTION COUNSEL] …do you recall [the appellant] doing anything else with his penis?".*
>
> *"[WITNESS]. Yes, he'd be ejaculating himself all over me, rubbing it up and down me and tried to put it in my mouth and all.*
>
> *[PROSECUTION COUNSEL]. Did he succeed?*
>
> *[WITNESS] No, because I would bite him.*
>
> *[PROSECUTION COUNSEL] So, you bit him?*
>
> *[WITNESS] No, I told him if he did I would bite."*

14. At the conclusion of the evidence in the case, counsel for the appellant made an application to the trial judge to direct the jury to acquit the appellant on all counts of oral rape, of which there were four, namely counts 13, 19, 25 and 31. Counsel for the respondent indicated that she could not object to this application in circumstances where the complainant had given evidence that he had not actually been orally raped by the appellant and there had merely been attempted oral rape. The trial judge indicated that he would direct the jury to return a not guilty verdict in respect of counts 13, 19, 25 and 31 on the indictment.

15. Further, during the complainant's cross-examination, counsel for the appellant put it to the complainant that, during the time that the family wereliving in the C house, the appellant moved out of the house for a year or so. The complainant confirmed that this was the case and stated that the appellant moved out due to the fact that the appellant's brother moved in, with whom the appellant didn't get on. The complainant confirmed that he wasn't abused by the appellant during this period of time. However, during cross-examination, the complainant was unable to state precisely what age he was when the appellant moved out. In that regard the following exchanges occurred:

> *"[DEFENCE COUNSEL] I think you said in your statement that you thought you were 12 or 13 at that time but you weren't sure?*
>
> *[WITNESS] Yes, yes, that's right, yes.*
>
> *[DEFENCE COUNSEL]. And if you had to put a figure on it you'd say 12 or 13?*
>
> *[WITNESS]. Yes, about 12 or 13, yes.*
>
> *[DEFENCE COUNSEL]. Could it have been when you were 11, as young as that?*
>
> *[WITNESS]. No, like, you wouldn't know because, like, there was so many people, like, the uncles who were there, like, you know, there was a few people there with us, like, you know.*
>
> *[DEFENCE COUNSEL]. Okay. And it is a long time ago obviously as well?*
>
> *[WITNESS]. I never knew what a mother and father was like to be with a mother and father and your other seven siblings, I don't know what that's like.*
>
> *[DEFENCE COUNSEL]. I understand?*
>
> *[WITNESS]. You know, because we always had people living in the house.*
>
> *[DEFENCE COUNSEL]. So, while you know that [the appellant] must have been gone for let's say a year?*
>
> *[WITNESS]. A year, yes.*

[DEFENCE COUNSEL]. I'm not going to put a date on it because you don't know, but it could have been 11, 12 or 13?

[WITNESS]. I knew I was safer."

16. Later in the course of being cross examined, the complainant confirmed that the appellant had not moved back into the C house until three months after his father had moved out, at which time the complainant was 14 years of age.

17. Again, at the conclusion of the prosecution's case, counsel for the appellant made an application to the trial judge to direct the jury to acquit the appellant on all counts relating to the period of time that the appellant was not living in the C house. Further, as the complainant was not able to specify what age he was during this period, counsel for the appellant indicated that this would *"take care of, I say reasonably conservatively, counts 15 to 36".* Counsel for the respondent did not object to this application. The trial judge indicated that *"it seems highly probable that it will be necessary to direct the jury to acquit on those counts as well but I will just make sure by checking the transcript".*

18. Ultimately, when charging the jury at the end of the case, the trial judge gave the following direction to the jury:

> *"Now, I'm going to pause there, ladies and gentlemen. You can see the vagueness generally of dates but you can see then why from the documents which were before you that I have directed a verdict of not guilty. It is because of the fact that [the complainant] could not give us details as to when it ended, coupled with the fact that during a period of time when [the appellant] was out of the house no events could or did occur on his evidence and obviously therefore, because of that those factors you would not be in a position to be satisfied beyond a reasonable doubt in respect of alleged offences pertaining to the periods in question.*
>
> *There were also other matters which I took the view, within that heading of, as I've described them to you, I think some 26 cases in respect of some of the counts, for a different well, I suppose an additional reason…..Yes, ladies and gentlemen, those pertained to a number of allegations of rape under section 4 and they pertained to the alleged insertion of [the appellant's] penis into [the complainant's] mouth, but I've just read out part of the evidence there to you in which you will recall he said that it didn't happen because of a threat to [the appellant] to bite him. So, obviously that being his evidence those charges wouldn't arise either. That, if you like those did come anyway within the periods about which there's a difficulty because of the year in question, that's how we ultimately came to the situation where there are only 10 charges before you, you're entitled to know that."*

The application to have the remaining counts withdrawn from the jury

19. When making her said applications to have counts 11-36 withdrawn from the jury, counsel for the appellant further indicated to the trial judge that those applications *"feed into a larger application"*, based on so-called *"P. O'C. grounds"*, and that *"the correct step that the Court should now take is to remove this case from the consideration of the jury"*. The reference to P.O'C grounds was a reference to issues potentially bearing on the fairness of a trial as discussed in *The People (Director of Public Prosecutions) v P.O'C*. [2006] 3 I.R. 238. Counsel on behalf of the appellant indicated that there were three facets to her application on *P.O'C.* grounds.

20. The first issue related to an allegation made on behalf of the appellant that the Gardaí did not adequately investigate the allegations that the complainant made against the appellant in September 2011. During the evidence of Garda Deirdre Walsh, counsel for the appellant put to the witness a number of factual matters which, it was contended, were not adequately investigated by the Gardaí. In particular, counsel for the appellant referred to the fact that no photos or plans of the C house were obtained during the investigation, notwithstanding the fact that the appellant's mother was still living in the latter house, which was the location at which, allegedly, all of the offending behaviour had taken place.

21. Counsel for the appellant had also put it to the complainant in cross-examination that he had, in his statement to the Gardaí, stated that the appellant had beaten him on several occasions and that several of his siblings had had to beg the appellant to stop. This was confirmed by the complainant in evidence. However, in further criticism of the investigation, counsel for the appellant put it to Garda Walsh that only one of the complainant's sisters had been interviewed. Moreover, the statement from the only sister to have been interviewed made no reference to any physical beatings alleged to have been perpetrated on the complainant by the appellant.

22. It was also put to Garda Walsh that no independent evidence was gathered concerning the size and nature of the pigeon loft structure that featured in some of the complaints. This, it was alleged, amounted to ineptitude in the investigation in circumstances where it was potentially of importance to know whether it would have been physically possible for the appellant to have abused the complainant in the pigeon loft in the manner alleged, having regard to the size and the nature of the structure. During this application to the court, counsel for the appellant made the following observation:

> *"So in those circumstances, I say that if the jury, as they must be, are left wondering, well why, for instance, why do we have no information about this pigeon loft in which Mr PD has made clear in cross-examination that it was a structure into which one could walk?.....*
>
> *Which was not apparent, necessarily, from what had been said beforehand, but this is a situation in which the prosecution could, with no effort, little or no effort, have actually obtained that evidence."*

23. Counsel for the appellant also made reference to alleged inconsistencies in the complainant's evidence as being a further indicator of a substandard investigation. In particular, she queried how it had come to pass that the complainant had in his direct evidence contradicted what he had said in his statement to Gardaí that the appellant had orally raped him; how it had come to pass that he had made accusations that the appellant had threatened to kill him (the complainant) if he told anyone, but had resiled from these; and how was it that the complainant could not state precisely what age he was when the appellant moved out of the C house.

24. The second limb upon which counsel for the appellant sought to withdraw this case from the jury was on the grounds of delay. In her submissions to the court, counsel for the appellant submitted that *"I don't lay any blame at any door but of course there has been a certain amount of delay even in just the case making its way to court at all, let alone the initial delay, which everyone understands when it's a complaint made by a child. But, we have our difficulties as regards dates."* The *"vagueness generally of dates"* regarding the testimony of the complainant has already been alluded to. Further, during the cross-examination of the complainant's mother, it emerged that, due to the historic nature of the allegations, she was unsure as to what date the family moved to the C house. In her examination in chief, she gave evidence that it was around the 29th of August 1987. However, during cross-examination, the following exchange took place with the defence counsel:

"[DEFENCE COUNSEL] I also think you're not great on times and that's fine, am I right, you're not great on dates?

[WITNESS] No.

[DEFENCE COUNSEL] Not good at all, in fact?

[WITNESS] No.

[DEFENCE COUNSEL] One of the reasons we know that is because you've told Ms Crowe it was August 1987 when you moved house, you think so because of the age of the twins?

[WITNESS] Yes, that's what it is, I made a mistake that time, it's 1987 that they were born.

[DEFENCE COUNSEL] Okay. So, you're wrong when you put in your statement that you thought it was definitely the 21st of February, do you remember telling the guards that?

[WITNESS] Yes.

[DEFENCE COUNSEL] That's wrong, is it?

[WITNESS] Well, I haven't got a very good memory, you know that way.

[DEFENCE COUNSEL] Okay. And you got the year wrong as well, didn't you?

[WITNESS] We got the daughters' years, yes.

[DEFENCE COUNSEL] And do you remember even what you told the guards when you moved?

[WITNESS] No.

[DEFENCE COUNSEL] Okay?

[WITNESS] It's so long, you know that way, I can't remember anything.

[DEFENCE COUNSEL] Well, can I can I be fair to everyone here, including [the appellant], and of course these people who have to make a decision on these facts

[WITNESS] Yes, I know what you mean, yes.

[DEFENCE COUNSEL] can we rely on your evidence about when the family moved? I mean

[WITNESS] Yes, you can, yes.

[DEFENCE COUNSEL] But well, which bit of it? Do you understand what I'm saying to you? You're not good with dates, it's over 20 years ago, it's nearly 30 sorry, it's 30 years ago?

[WITNESS] Yes, I'm 30 years living where I am now, yes.

[DEFENCE COUNSEL] But what I'm asking you is can you actually be sure well, maybe you can, can you actually be sure of the year you moved, now that you've thought about it, you've answered the guards, you've answered [counsel for the respondent] and I'm asking you can we really rely on you?

[WITNESS] Yes. Well, I know it was in February I moved.

[DEFENCE COUNSEL] It's February now?

[WITNESS] It's always February, I told them it was February.

[DEFENCE COUNSEL] I see, all right. And are you going to go for a year?

[WITNESS] A year.

[DEFENCE COUNSEL] A year, do you remember what year, February in what year, do you know?

[WITNESS] No, I don't know the year."

25. Finally, counsel for the appellant submitted that, due to the *"fact that the jury is about to be told that they cannot consider at least 26 counts on the indictment….that the jury will always be warned about these things but it is difficult to see how such allegations in such numbers, having now been rehearsed in front of this jury, even if they're told you're not considering 26 counts now, they're going to be taken from you, how could it not produce an effect on their minds? It is an almost impossible task we set this jury. How can we say it is safe to convict on the remainder given the evidence they've heard".*

26. Thus, counsel for the appellant submitted to the trial judge that, taking the cumulative effect of all of these factors together, the remaining counts should not be allowed go to the jury and that the trial judge should withdraw the case from the jury.

27. The trial judge ruled in the following manner:

"Well, I am satisfied [that] this case, on the counts, subject to the directed counts to which I have referred, I satisfied that this case should go to a jury. This is a classic case of the application of the common sense of 12 people. [In The People (Director of Public Prosecutions) v CC (No. 2) [2012] IECCA 86] Mr Justice O'Donnell referred to - as has [Defence counsel] - to a quotation from I think it was Lord Atkin in the course of a judgment in the House of Lords about the

infirmities, so to speak, of cross-examination, or the danger, so to speak, of relying excessively on cross-examination as a tool with which to test a witness. Of course everybody knows that that is the case, but that, it seems to me, is an infirmity which arises in many if not most of the cases like this and would not, of itself, be enough, certainly to mean that the case should not proceed before a jury. But in any event, I don't think Mr Justice O'Donnell was doing more than making the point that one must be wary, so to speak, of concluding that because there is a capacity, so to speak, to cross-examine, it is the be all and end all, so to speak, of permitting a case of this type to proceed before a jury.

[Defence counsel] is quite right: One is entitled to take what might individually not be, if I could use the general term, infirmities of sufficiently weighty kind as to render it appropriate to withdraw a case from the jury under the rubric, to put it shortly again, of PO'C. And of course then I have to look at them as a totality, but before doing that one must look at each item relied upon, and ask oneself whether it is in fact an infirmity, because it is only, if you like, the cumulative effect of, we shall call them actual infirmities which can be relied upon. One cannot rely upon factors in the case which do not themselves fall into that category. And even then, of course, when one takes the matter in the round, as one would be obliged to do, one might well be of the view that the matter should still proceed."

28. After finding that each of the three arguments raised by the appellant's counsel, namely delay, inadequate investigation and the withdrawal of the majority of the counts from the indictment, did not, when taken in isolation or cumulatively, justify withdrawing the case from the jury, the trial judge held:

"Now, there are two points here. One is the PO'C decision and the duty of the judge to withdraw a case from the jury if he feels that there is any reasonable possibility that the jury, properly directed -- or, sorry, if he feels that there is any reasonable possibility that the accused would fail to receive a fair trial notwithstanding proper directions and appropriate rulings during the course of a trial by a judge, and I am of the view that there is no such reasonable possibility. Of course I have regard to the duty upon me in the Charge to warn the jury pertaining to the difficulties with old cases. Various forms of words have been canvassed; I will give such a warning in due course. And that, of course, the purpose of that is to cater for residual concerns which might exist, which warnings, of course, must be given on the facts of every case -- or, sorry, I should say the evidence; I don't decide facts. And, of course, I will do that.

In relation to the Galbraith point, it seems to me that this is not a case where, on the authorities springing from that or the case itself, the evidence is of such class as to render it appropriate to direct an acquittal; this is classically a jury matter. I mentioned the question of cross-examination otherwise and Mr Justice O'Donnell's dictum to the effect that juries may well not appreciate the difficulty -- or at least the fact that cross-examination may not be as effective or otherwise. One might equally say that 12 people with common sense and applying their experience of life is far better than one judge. That, however, is a different day's work."

Appellant's submissions

29. Counsel on behalf of the appellant has largely re-iterated before this Court the arguments made before the trial judge in respect of the application to withdraw the case from the jury. Counsel for the appellant again took issue with the inconsistencies in the complainant's evidence: that the complainant had in his direct evidence "reversed" the allegation made in his statement that the appellant had orally raped him; that he had made accusations that the appellant had threatened to kill the complainant if he told anyone, which he had subsequently resiled from; and that he could not state precisely what age he was when the appellant moved out of the C house.

30. Counsel for the appellant submits that there were several obvious lines of enquiry which would have enabled the defence to test the credibility of the complainant, but which were not pursued by the prosecution. She points to the absence of a map or plan of the C house, the failure to take statements from all of the appellant's siblings as to whether or not they witnessed the alleged beatings between the appellant and the complainant, and the failure to produce engineering evidence in respect of the size and structural features of the pigeon loft. Similarly, she takes issue with the fact that no effort was made on the part of the prosecution to seek out or preserve any evidence relating to the "islands of fact" identified by both the appellant and the complainant, particularly the pigeon loft. In this regard, counsel on behalf of the appellant drew this Court's attention to the remarks of Denham J in *Savage v. The Director of Public Prosecutions* [2009] 1 IR 185, highlighting the duty of An Garda Síochána in *"their unique investigative role to seek and preserve all evidence having a bearing or potential bearing on guilt or innocence."*

31. Counsel for the appellant submitted that there is an analogy to be drawn between the alleged paucity of facts in the present case and the case of *The People (DPP) v CC* (No. 2) [2012] IECCA 86, where O' Donnell J, delivering judgment for the Court of Criminal Appeal, noted (at para 17) that the evidence in that case *"was devoid of any surrounding detail apart from the identification of the school and the accused by name. There was no detail as to the timing of any of the events of indecent assault by reference to a particular year, a period in the year, or by reference to any other memorable* event whether public or private. The evidence was generalised, and almost generic".

32. Counsel for the appellant also submitted that the facts of the present case are very similar to those in *MR v. The People* (DPP) [2009] IEHC 87. In that case, there was also quite a significant period of time between the alleged offences and complaint being made - 29 years. Further, the Gardaí in MR failed to obtain statements from the complainant's mother. In granting an injunction restraining the respondent from proceeding further to prosecuting the applicant, O' Neill J held (at p. 23) that:

"It must be borne in mind that the whole purpose of a trial is to conduct an enquiry to determine forensically the guilt or innocence of the accused. Implicit in this is the understanding that this process can be accomplished. This means inter alia the issues of fact can be explored and tested by means of normal methods, namely, examination and cross-examination. Essential for that purpose is the availability of evidence relevant to the issue in dispute".

33. Counsel for the appellant also submitted that, given the fact that the trial judge had directed an acquittal in respect of 26 of the 36 counts on the indictment, it was asking too much of *"even a conscientious jury"* to fairly try the remaining ten counts in circumstances where they had heard evidence on a range of offences to which they were no longer required to adjudicate on. In conclusion, the appellant submitted to this Court that the cumulative effect of delay, the inadequacy of the Garda investigation and the withdrawal of 26 of the total of 36 counts from the jury, rendered the verdict unsafe. Hence the trial judge erred in failing to withdraw the case from the jury. The Court's attention was also drawn to the decision of White J. in *JH v. The Director of Public Prosecutions* [2016] IEHC 509, where he noted (at para 33) that:

"In the light of the developing jurisprudence it is the duty of the trial judge at the conclusion of the evidence for the

prosecution or at the conclusion of all the evidence and in the context of an application to withdraw the case from the jury to take into consideration both general and specific prejudice to the accused, which may have arisen because of substantial delay in bringing the prosecution"

29. In response, counsel for the respondent submits that any statements taken from any of the complainant's siblings would not have been pertinent to the allegations at the heart of the present case, as the complainant in his direct evidence stated that the appellant would *be "the only one in the house"*. Counsel on behalf of the respondent also seeks to distinguish both CC and MR from the present case on their respective facts. The respondent points out that, in MR, there was evidence that the complainant had told a number of people about the abuse she had allegedly suffered at the hands of the appellant. Some of these people had not been interviewed by the Gardaí as part of the investigation so that it was not possible to determine whether the content of the complaints were consistent. Secondly, unlike in the present case, in *MR*, there had been a refusal on the part of the authorities to seek a statement from the complainant's mother regarding the time the complainant had spent with the appellant and whether she had been on her own with him. The respondent submits that there is no evidence in this case that the complainant told anyone aboutthe abuse he was suffering, and that both sides accept that the appellant lived with the complainant's family in the C house for the majority of the period in question, apart from the year or so that the appellant moved out.

34. In terms of the CC decision, the respondent again invites this Court to distinguish that case on the basis that it was very particular to its own facts. The prosecution in *CC* related to five different complainants and one of the main reasons identified by O' Donnell J for allowing the appeal against conviction was that the prosecution relied upon system evidence so that once errors appeared in relation to individual counts undermining convictions recorded for one or two of the five complainants it was not possible to isolate other counts from those frailties. This was because it was not possible to be satisfied that a jury would have convicted on the counts on which no errors were identified without the evidence and conviction on the other counts. Counsel for the respondent highlights that these considerations do not apply in the present case.

35. Counsel for the respondent also draws this Court's attention to the decision of *The People (DPP) v. B.O'R.* [2016] IECA 157. In that case, the appellant had appealed his conviction, on the ground inter alia that the trial judge had refused to withdraw the case from the jury on the basis of an alleged failure by the Gardaí to thoroughly investigate all matters, particularly on the failure by the Gardaí to interview parents of other students of the appellant (he having been engaged as a part time music teacher), to establish what colour car he was driving at the time, to clarify whether the complainant had travelled by coach with the appellant and others to an event in Dublin, and to inquire of the appellant if he had kept records of classes he had given at the relevant times. In dismissing the appeal, Sheehan. J observed (at. para 29):

"The gardaí interviewed a number of relevant witnesses including the complainant's former English teacher as well as a person who worked for the ISPCC in 1992 and to whom the complainant had confided at that time. The fact that the gardaí had not investigated the colour of the appellant's van was immaterial given that both the complainant and the appellant (in garda interviews) accepted that transport was involved on more than one occasion. Furthermore the gardaí cannot be criticised for not interviewing other parents. In this context it needs to be noted that there was nothing to prevent the appellant's solicitor making his own inquiries about the colour of the van he drove, nor was there anything to prevent him from interviewing parents or taking photographs of the various locations. That said we do not see how any of these matters could have advanced the appellant's defence. Again it was the appellant who introduced his diary for the first time during the course of his own evidence. Had he so decided or wished he could have furnished this diary to the gardaí prior to his trial. In light of these matters we hold that the alleged inadequacies of the garda investigation are of no import."

36. In this regard, the respondent submits that the appellant's submissions on the apparent inadequacies inherent in the Gardaí investigation must be considered in the context of the facts as established in evidence that the appellant and the complainant would be the only two people in the house when the offending conduct was occurring.

37. In terms of the delay issue raised by counsel on behalf of the appellant, the respondent submits that the appellant has not pointed to any prejudice arising therefrom beyond what was contained in the charge and that no issue was taken with the judge's warning. Thus, counsel for the respondent submits that they failed to meet the test as set out in *SH v The Director of Public Prosecutions* [2006] 3 IR 575 at 620, *namely "whether there is a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay. The test is to be applied in light of the circumstances of the case."*

38. Finally, in terms of the appellant's argument that the withdrawal of 26 counts rendered a verdict on the remaining 10 counts unsafe, the respondent draws this Court's attention to the case of *The People (Director of Public Prosecutions) v MR* [2015] IECA 286, where one of the grounds of appeal related to the failure by the trial judge to grant a direction on nine counts, having withdrawn a total of 12 from the jury. The appeal on that ground was dismissed on the basis of the finding by the Court that the decision taken by the trial judge to allow the relevant counts to be considered by the jury was one which was legitimately open to him and which was within his jurisdiction to make. The Court's attention was also drawn to the statement in *MR* that *"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".*

39. In the appellant's written submission the Court was also referred to one of its earlier decisions in the case of DPP v. M [2015] IECA 65, in which the Court said that one of the most significant factors to be considered in the context of an application under the second limb of Galbraith was the primacy of the jury in the criminal trial process.

The Court's Analysis and Decision

Failure to direct an acquittal based on inadequacy of the Garda investigation

40. It is correct to say that the Gardaí have a unique investigative role and that in that regard they have a duty *"to seek and preserve all evidence having a bearing or potential bearing on guilt or innocence".* The critical words here are *"having a bearing or potential bearing on guilt or innocence".* In this case,maps, plans, or photographs, of the "C house" would not have constituted evidence of that sort. Certainly, maps, plans or photographs of the C house, if they had been available might perhaps have rendered cross-examination of the complainant by defence counsel somewhat easier, and it might also have aided presentation of the prosecution case, but these items would have been no more than aids to presentation. There was no conflict in the case concerning the layout of the C house, or its dimensions, that would have rendered such evidence vital in order to determine the truth or otherwise of the core allegations being made by the complainant. Neither was this ephemeral material or perishable evidence that could not be re-produced in response to a requirement in defence counsel's advice on proofs. While it is acknowledged that the house

remained in the occupation of the complainant's mother up to the date of the trial, there was nothing to stop the defendant's solicitor from seeking, via the Chief Prosecution Solicitor, her consent to its inspection by an engineer retained on behalf of the defence, if the defence had considered it desirable to have the benefit of maps and plans and/or photographs in advance of the trial. Seemingly, no such request was made.

41. We are satisfied that any duty owed by An Garda Síochána related to the proper investigation of the crime with a view to uncovering evidence relevant to the crime, and the guilt or otherwise of the person charged (the appellant), but that it did not extend to a requirement for them to have to assist the defence by anticipation and pre-emption of the "advice on proofs" of defence counsel concerning presentational aids that might assist in the cross-examination of prosecution witnesses, and/or the presentation of any defence case should the defence decide to go into evidence. We have no hesitation in dismissing this ground of complaint.

42. We take a similar view of the complaint in relation to the pigeon loft. While it is recognised that it is frequently important to the defence in a case such as the present one to be able to test the complainant's evidence in relation to being abused with reference to available island's of fact, there is nothing in the evidence in the present case to suggest that the pigeon loft represented an "island of fact" against which a specific allegation could be fact checked. While the complainant did give evidence that he was sexually abused by the appellant *"anywhere he could get me …rooms, pidgeon loft, back garden, front garden, doesn't matter"*, no specific incident of abuse or rape was attributed to the pigeon loft that could have been explored in cross-examination with reference to some feature of the structure in question. There were non-specific allegations of incidents of abuse and rape having occurred in the pigeon loft in the back garden on occasions when the complainant was cleaning out the pigeon loft, which was a weekly job of his.

43. There was the following cross-examination of the complainant with respect to the pigeon loft:

> *"Q. I see. I think you've described also a pigeon loft in Foxdene?*
>
> *A. Mmhmm.*
>
> *Q. That's in the back garden as I understand it?*
>
> *A. That was in the back garden, yes, yes.*
>
> *Q. And I think it had perches for the birds; is that correct?*
>
> *A. Landing perches, yes.*
>
> *Q. Yes. And feeding troughs?*
>
> *A. Just an aul tray, you'd put a bit of corn and water in, yes.*
>
> *Q. Okay, yes. As I understand it, if you were in to feed the pigeons you had to reach in to clean it, would that be correct?*
>
> *A. No, you could walk in and clean it.*
>
> *Q. You could walk into it?*
>
> *A. It's called a pigeon loft, you could walk you could pull the door on it and you could walk in and you have*
>
> *Q. Okay?*
>
> *A. You could divide your loft into sections for*
>
> *Q. Okay. Now, just correct me if I'm wrong, as I understand it, this is a pigeon loft that is about a foot off the ground?*
>
> *A. No, it wasn't a foot off the ground, it was on top of the wall.*
>
> *Q. I see. Well, I'm told it was about a foot off the ground with double doors?*
>
> *A. Sliding door.*
>
> *Q. So, there was certainly access to it. You say it was a sliding door?*
>
> *A. Sliding door, yes.*
>
> *Q. Okay. And wooden doors, essentially a cage again?*
>
> *A. Yes, maybe.*
>
> *Q. Is that*
>
> *A. Maybe, yes, for them to sit out and sunbathe in the summer.*
>
> *Q. Now, if we'll just stop there, there's also an aviary but it's a separate thing, Mr D.?*
>
> *A. No, it's not.*
>
> *Q. You say it's one*
>
> *A. It's an aviary and a pigeon loft put together. You have a pigeon loft here, you have an aviary here, you could open the sliding door and close it and you could leave your pigeons in there to sunbathe and have a bath in.*
>
> *Q. All right. Well, can I just I'll just give you my instructions and you can correct me and tell the ladies and gentlemen if*

I've got this wrong?

A. Yes, work away.

Q. And it could be me, but this is what I'm told, I'm told that there was a pigeon loft with is a structure with a wire cage around it. It had perches in it for the birds obviously and I called it a feeding trough, it could be I've no idea what, but I'll take your word for it, they were trays, some way of feeding the birds?

A. Yes.

Q. I'm told that that was a structure that wouldn't have come any higher than your knee and that it had doors that you'd have to reach in to clean that out?

A. Sure, if you have doors to reach in to clean it out how are you going to get the rest of the part of the loft clean then?

Q. Okay. Well, that's so, that's completely wrong anyway?

A. Yes.

Q. Okay. I'm told there's a separate structure and aviary which is a wire cage?

A. For budgies and canaries.

Q. Exactly?

A. They're different than pigeons.

Q. I know, that's what

A. You can't keep a pigeon or a budgie in a wooden shed because they have to breed so you need an aviary to put them to breed.

Q. Exactly, exactly?

A. So, a pigeon loft and aviary are two different things.

Q. Which is exactly what I've been told and what I'm asking you about, all right?

A. Mmhmm.

Q. So, I'm told there's a pigeon loft?

A. Mmhmm.

Q. And I'm told it's so high and I'm for the record, I'm just leaning it down towards my knee, very low structure with wooden doors and perches and a way of feeding the birds?

A. The way you would build a pigeon loft, yes.

Q. And that's for pigeons?

A. Yes.

Q. Am I right about that?

A. It's for pigeons, yes.

Q. Have you described a thing that you can recall?

A. No, you've described it wrong.

Q. Okay. And I understood when you corrected me and I wanted to make sure we weren't at cross purposes?

A. All right, okay.

Q. And moving on to the aviary now which is doctor?

A. The bird aviary.

Q. Pardon me?

A. The bird aviary.

Q. Where the birds were?

A. With the cages and finches and budgies.

Q. Exactly. Totally different

A. Totally different birds.

Q. because you wouldn't keep that's exactly what I understood and I'm told the aviary was not the same as the pigeon loft?

A. Of course it's not the same, they're two separate ones.

Q. Well, perhaps the ladies and gentlemen understood something different, I understood you to tell me that they were the two things together, a loft?

A. No.

Q. Okay?

A. No, they're not two things together. An aviary he and a loft is two different things.

Q. I think so too. So, the aviary I'm told is a wire cage, completely see through?

A. Mmhmm, chicken wire you could use for it, yes.

Q. Yes, exactly. That's what I'm told?

A. Mmhmm.

Q. And both were in your back garden at Foxdene?

A. We had loads of things in our back garden.

Q. I'm asking you about these?

A. Yes, we had loads of things in our back garden.

Q. Okay?

A. We're animal lovers.

Q. Am I right, that both of these things were in your I might be wrong about the description you say?

A. There's both of them and plus six other things, stables and other things and all, you know.

MS GEARTY: I'm sure there.

JUDGE: Yes, you might just confirm to Ms Gearty whether or not those two items were there.

Q. MS GEARTY: I really don't want to make this anymore difficult for you than I have to?

A. You're not making it difficult.

Q. Oh, good, okay. Because the reason I'm asking you about it, just if it helps you, is because that's what you're talking about in the statement. I'm

A. I wasn't talking about birds in my statement, I was talking about a pigeon loft.

Q. Okay, it happened in a pigeon loft as well?

A. Mmhmm.

Q. That is what I expected you to say in evidence, that is what you did say in evidence, I'm describing the pigeon loft

A. I know what I said in evidence.

Q. to you so that you can help us in trying to assess whether or not we can rely on your evidence, that's why I'm asking you about it, all right?

A. No problem.

Q. I've no real interest in anything else in your back garden, it's not relevant to the allegations you're making?

A. Okay, okay.

Q. That's what okay. Now, I think that, in any event, we totally disagree on what the size of the pigeon loft is and whether or not you can walk into it. You say you could walk into it, I say you can't?

A. Fair enough."

44. While it is clear from this cross-examination that it was being suggested on behalf of the defence that one could not "walk into" the pigeon loft, the complainant remained at all times adamant that that this suggestion was incorrect. He was not impeached on this. While this would have been a matter of importance if, for example, the appellant had told the Gardaí in the course of being interviewed that he could not have abused the complainant in the pigeon loft because it was too small for him to enter it, the appellant made no such suggestion. The only reference to the pigeon loft in his statement to An Garda Síochána was when he was asked: *"Q: How come he's talking about incidents in pigeon lofts?"*, to which he replied: *"A. My pigeon loft and nothing happened in there or anywhere".*

45. It is, we would suggest, of significance that it was never put to the complainant in terms that a sexual assault or rape could not have taken place in the pigeon loft because of the size and nature of the structure. If the defence legal team had received positive instructions to that effect, as opposed to deciding on their own initiative to canvas that possibility on a speculative basis, and in the absence of evidence of any reasonable grounds for the prosecution to have anticipated that such a case might be made, we would have expected the cross examination of the complainant to have been prepared for by the appellant's solicitor seeking consent, to be negotiated with the householder through the Chief Prosecution Solicitor, to an inspection of the pigeon loft by an engineer retained on behalf of the defence. Again, it seems that no such request was made.

46. We are of the view, having regard to the overall run of this case, that the size and structure of the pigeon loft was a collateral matter and not central to any allegation or allegations being made. The availability of a survey of the pigeon loft, or plans or photographs of it, might have assisted either or both sides in this court drama, but we do not believe that there was a duty on An Garda Síochána to have commissioned them or produced them. They would not have represented evidence *"having a bearing or potential bearing on guilt or innocence".* The complainant was available for cross-examination with respect to the pigeon loft and his evidence in regard to it was tested. No contrary evidence was adduced, and his testimony was unimpeached. We see no unfairness in any of that, and we are not therefore disposed to uphold this complaint.

47. The complainant further complains that no statements were taken from the majority of the complainant's siblings. This is true. However, the complainant did not at any time maintain that his siblings, or any of them, had witnessed any incident of sexual assault or of rape. Rather, as the respondent correctly points out, he stated expressly that these things happened when he was *"the only one in the house".* While it is the case that the complainant told Gardaí that some of his siblings had witnessed him being beaten by the appellant on occasions, and that they had begged the appellant to stop, these were not the central complaints made by the appellant. The central complaints were of serious sexual assaults and of rapes when no one was present. Accordingly, the siblings who were not interviewed could only have spoken of collateral matters, and there was no unfairness in the fact that they were not interviewed by Gardaí.

48. Moreover, there is no property in a potential witness. In circumstances where it would have been evident from the Book of Evidence and the unused material disclosed by the prosecution that the complainant's siblings had not been interviewed by Gardaí, and they were not therefore State witnesses, or potential State witnesses, the defendant's solicitor could have approached them to see if they were willing to volunteer to be interviewed and to give statements. There is no suggestion that this was attempted.

49. We are not therefore disposed to uphold the aspect of the complaint relating to the failure to take statements from the complainant's siblings.

50. Moreover, we are satisfied that the overall complaint of an inept or inadequate Garda investigation is simply not made out, and consider that there would have been no justification for a directed acquittal on the basis of such a complaint.

Failure to direct an acquittal based on delay

51. We are in agreement with counsel for the respondent that the appellant has failed to satisfy the test in *S.H. v The Director of Public Prosecutions* [2006] 3 IR 575. He has not established prejudice based on delay sufficient to give rise to a concern that such delay created a real risk of an unfair trial. The trial judge carefully considered the potential effect of such delay as had occurred, and concluded that it could be adequately addressed by means of a detailed delay warning. No complaint or criticism has been made concerning the delay warning that was actually given. We are therefore not satisfied to uphold this complaint. On the contrary, we are satisfied that the trial judge correctly exercised his discretion, and that he would not have been justified in directing an acquittal on the grounds of delay had he been minded to do so.

Failure to direct an acquittal on remaining counts having regard to the number of directed acquittals on other counts..

52. We have no hesitation in dismissing this ground of appeal. It is a normal hazard of a criminal trial based on an indictment involving multiple counts, that some counts may end up being withdrawn from the jury, while others proceed to the jury for their consideration. Whenever this occurs the jury will usually have heard at least some evidence relating to the counts on which there were directed acquittals. It is well established that juries are robust and are in general well capable of following the instructions and directions of a trial judge, and of disregarding evidence in relation to counts no longer before them. In the present case the trial judge correctly told the jury that they had to decide the case on relevant evidence, and that while they could draw inferences they should not speculate. He also reminded them that they were to record verdicts of not guilty by direction of the trial judge on the counts that he was withdrawing from them. It is true that he did not instruct them in express terms that they should not have regard to evidence adduced in support of the charges in respect of which there was to be an acquittal by direction. While it might have been better if he had done so, we are nevertheless satisfied that viewed in the round his instructions to the jury were sufficient and adequate to dispel any concern about possible prejudice to the accused by virtue of the jury having heard such evidence. We do not believe that knowledge by the jury of the fact that the accused had originally faced more counts in relation to sexual offences than were ultimately entrusted to them to decide upon would have given rise to additional prejudice, in circumstances where the other counts were representative or sample counts, charged in respect of bracketed periods of time, in respect of sexual offences of one form or another and where none of them were based on specific alleged incidents.

Cumulative effect of the matters complained of

53. Notwithstanding our conclusion that none of the complaints made would individually have justified a directed acquittal on the remaining counts, we are still obliged to consider the cumulative effect of them. We have done so and are also satisfied that they did not cumulatively provide grounds for a direction on the remaining counts on fairness, or so-called, *P.O'C* grounds.

54. In addition we have considered whether directions were required based on the second of Lord Lane's statements of principle in *R. v Galbraith* (1981) 73 Cr App R 124 ; [1981] 1 WLR 1039. We note the appellant's reliance on alleged inconsistencies in the complainant's evidence, the fact that he had initially alleged oral rape against the appellant and changed his account in that regard to allegations of attempted oral rape, and the fact that he had originally contended that the appellant had made threats to kill him, but later resiled from that. We also note that reliance is placed on the fact that much of the evidence was generic and non-specific, and somewhat vague with respect to times and dates. We take these criticisms seriously, and regard them as legitimate in so far as they go. However, in our view the evidence was not so infirm that no jury, properly charged, could convict on it. The criticisms levelled at the evidence were quintessentially matters for the jury. The trial judge was correct in our view to allow the evidence to go to the jury. Thereafter it was a matter for the jury to resolve the conflicts and the issues thrown up by the criticisms that have been levelled at the evidence. The trial judge conducted the trial with impeccable fairness. He gave both a delay warning and a corroboration warning, and no criticism is made of either. Notwithstanding these warnings the jury, having considered the evidence, returned unanimous verdicts of guilty on all ten counts in respect of which they were required to decide and, in circumstances where there was evidence capable of supporting them, these verdicts are deserving of respect.

Conclusion.
55. We consider that the appellant's trial was satisfactory in all the circumstances of the case and that the verdicts recorded were safe. Accordingly, the appeal against conviction must be dismissed.