



THE COURT OF APPEAL

UNAPPROVED

NO REDACTION NEEDED

Court of Appeal Record No. 99/20

Neutral Citation No: [2022] IECA 289

Edwards J.

Donnelly J.

Ní Raifeartaigh J.

BETWEEN/

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC
PROSECUTIONS**

RESPONDENT

-AND-

P. P.

APPELLANT

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 1st day of December, 2022

1. This is an appeal against conviction in which issues are raised as to severance of the indictment and “system evidence” in the context of a multi-complainant case of sexual assault. The case calls for the application of the principles recently clarified by the Supreme Court in *People (DPP) v. Limen* [2021] 2 IR 546.

Background

2. The appellant was initially charged with 7 counts of sexual assault in respect of four different complainants. On the (first) trial date, application was made on his behalf to have the indictment severed so that the case of each complainant would be tried separately. The Circuit Court ruled that counts 3 and 6 of the indictment would be severed, thereby removing one complainant from that trial, but that the remaining counts should be tried together (in respect of three complainants).

3. The appellant was then re-arraigned on a fresh indictment (Bill No. WX 32/2017) containing the 5 remaining counts (which were re-numbered) and pleaded not guilty. The trial proceeded in respect of those 5 counts involving the three different complainants (J, V and Y), each of whom was the appellant’s niece (in law). V and Y are sisters, and they are cousins of Y. In that trial, (a) the trial judge directed not guilty in respect of one of the counts; (b) the jury convicted the appellant in respect of one of the counts; and (c) the jury disagreed in respect of three counts.

4. The appellant was retried on a three-count indictment in respect of those counts where there had been a disagreement in the previous trial and was found guilty in this second trial of all three counts. Again, there were three complainants: Y, J and V. The Bill number of this indictment was WX 32A/2017.

5. The sexual assaults were described by each of the complainants as essentially involving the touching of their genitals under their underwear, on occasions when they were on sleepovers with cousins.

The ruling of the trial judge on severance at the first trial

6. In his ruling on the severance issue, the trial judge said:-

“Now, in relation to this matter, all of the counts on the indictment, with the exception of count 3 and 6, I’m satisfied are counts dealing with a particular system of allegations of sexual assault on young children while they are at a sleepover, or while they are asleep, or while they are on their own in a room in which the accused is alleged to have taken advantage of them. Counts 3 and 6 then have another set of evidence in relation to that. Now, in relation to all of the counts, except for counts 3 and 6, I’m satisfied that there is sufficient evidence of system to permit me to exercise my discretion to allow those counts to be heard together. I’m satisfied that the evidence in relation to those counts is more probative than prejudicial. In relation to counts 3 and 6, however, I’m not satisfied that those counts set out a system in relation to sexually assaulting young children while they’re at a sleepover, or while they’re asleep. Now, if I allow those counts to go to the jury, I would have to charge the jury in relation to system, and I would have to tell them why the evidence is admissible, as to system, and I would have to charge them in accordance with the CC No. 2 decision. I’m satisfied that the law doesn’t say that the allegations have to be identical, or that there has to be, as it’s referred to in some articles, as hyper-similarities. However, for it to be system evidence which is admissible, there must be some sufficient evidence of similar system, or nexus of system. In relation to counts 3 and 6, I’m not satisfied that they are sufficiently similar allegations to go within

the system of the remaining counts. So, what I'm going to do is I'm going to sever counts 3 and 6 from the indictment.”

Grounds of Appeal

7. The two grounds of appeal are: (1) in Bill 32/2017, that the trial judge erred by failing to sever the indictment to allow for separate trial for each of the complainants and the allegations made against the appellant; and (2) in Bill 32A/2017, the trial was unsatisfactory and the verdict unsafe, and that the trial judge erred in allowing the admission of system evidence in the course of the trial. It may be noted that neither ground of appeal takes issue with the manner in which the trial judge charged the jury.

8. In respect of ground number 1, the appellant submits that the trial of counts of sexual assault in respect of three different complainants created prejudice and embarrassment within the meaning of s.6 of the Criminal Justice (Administration) Act 1924. He relies on *Attorney General v. Duffy* [1931] IR 144, *R v. Boardman* [1975] AC 421, *R v. Scarrott* [1978] QB 1016, and *(People) DPP v. B.K.* [2000] 2 IR 199 and submits that unless the circumstances of the offence are “*sufficiently similar so as to bring them within the scope of similar fact rule*”, then the different counts in respect of different victims should be tried separately. He submits that no such “*similarity*” exists in the present case and that they were different in terms of the *locus* of the offences, the time of day of the offences, and the ages of the complainants. He submits that the sole similarity between them was the familial tie between the complainants and the appellant.

9. In respect of ground number 2, the appellant again refers to the decision in *B.K.*, and submits that the mere fact of the appellant being the uncle of the complainants did not in and of itself bring the evidence into the category of system evidence such that the evidence of one

complainant could be used as proof in the trial in respect of another complainant. He submits that neither the location of the offence nor the mere fact of physical touching can be seen as “*out of the ordinary in cases of this nature*”. He also refers to *B. v. DPP* [1997] 3 IR 140.

10. Curiously, the written submissions on behalf of the appellant did not refer to the recent and important Supreme Court decision in *People (DPP) v Limen* [2021] 2 IR 546 (hereinafter “*Limen*”) but counsel did address the Court on that decision after it was drawn to his attention.

11. The respondent submits that the question of joinder and severance is within the discretion of the trial judge. She refers to *(People) DPP v. S.T.* [2017] IECA 73 and *(People) DPP v. D. McG* [2017] IECA 98 where this Court upheld rulings by trial judges with regard to severance applications. She also refers to *Limen*. She submits that the trial judge was directed to and aware of the relevant authorities (having been the trial judge in *(People) DPP v. M.S.* [2019] IECA 120) and applied them with care. She says that during the retrial there was no further application to sever the indictment. Further, the trial judge opted to give a corroboration warning. She submits that the appellant took no issue at trial or on appeal with how the trial judge charged the jury on system evidence.

Relevant provisions of law

12. Section 5 of the Criminal Justice (Administration) Act 1924 (“the 1924 Act”) provides that “[s]ubject to the provisions of the rules under this Act, charges for more than one felony or for more than one misdemeanour ... may be joined in the same indictment”.

13. Section 4 requires an indictment to have a statement of the charge and to have a statement of what is alleged in such form as to furnish the accused with “*such particulars as may be*

necessary for giving reasonable information as to the nature of the charge". In that context, the indictment rules appended to the 1924 Act give examples of statements and particulars of various charges.

14. The indictment rules also provide at r. 3:

"Charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character". (Emphasis added)

15. S. 6(3) 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."

Three legal issues distinguished: Severance, admissibility and cross-support

16. In the last thirty or so years, the Irish criminal justice system has witnessed a vast increase in the number of complaints, investigations and prosecutions of allegations of sexual assault and rape. In many cases, adults have come to the Garda Siochana alleging that they were sexually abused as children, which allegations were not reported at the time and are then reported many years later. It is not uncommon for multiple complaints to be made in respect of a single accused person. Frequently, this arises where the accused (who will frequently be a male) occupied a similar position in relation to the complainants, such as where he is or was a father, stepfather, brother, uncle, teacher, priest, sports coach, or scout leader, to take some

examples. It may be helpful to refer to this type of case in this judgment, by way of shorthand, as multi-complainant sexual assault cases, even though many different sexual offences including forms of rape may be alleged as well as sexual assault.

17. Multi-complainant sexual assault cases have presented significant procedural and evidential challenges for the traditional criminal trial. This is partly because a criminal trial is based upon a paradigm of a single event. This is not to say that all criminal trials present that feature, but the rules of procedure and evidence are more easily applied with that paradigm in mind. The multi-complainant sexual assault trial typically involves not only a number of complainants but also a diffuse time-span (such as a period of years) and a number of different events. Such cases have brought into sharp relief certain related, but nonetheless distinct, *legal* issues, which may be enumerated as follows for present purposes:

- (a) whether and when multiple complainants' allegations in respect of a single accused should be tried together;
- (b) whether and when the allegations of one complainant are admissible in the same trial as another/other complainant(s); and
- (c) how a trial judge should correctly charge the jury as to how to deal with the multiplicity of complaints and, in particular, whether and when the evidence of one complainant provides support for the evidence of another.

18. These three issues may be described in shorthand, respectively, as (a) the severance issue; (b) the admissibility issue; and (c) the cross-support issue. (It may be noted that the term cross-corroboration was frequently used in the past, but since the decision in *Limen*, it seems to be more apt to speak of cross-support, as will be seen). Strictly speaking, the first issue is a procedural one while the second two are primarily informed by the law of evidence. However,

while the three issues should not be conflated, the three issues are inter-related and not hermetically sealed from each other. Nevertheless, it is useful to keep them conceptually distinct, not least because they involve, at the practical level, applications to the trial judge at different stages of the trial. An application to sever necessarily takes place before the trial commences. An application to have evidence ruled inadmissible may take place during the trial. Submissions as to how the trial judge should charge the jury take place at a late stage in the trial and sometimes, additionally, by way of requisition.

19. It is also necessary to point out that the three legal issues identified above are not confined to multi-complainant sexual assault cases. They can also arise, and have arisen, in a wide variety of cases encompassing many factual scenarios. Thus, the exercise of identifying and applying the correct principles in multi-complainant sexual assault cases, which Irish courts have undertaken many times in recent decades, has been undertaken against a much larger jurisprudential backdrop, involving a significant volume of caselaw stemming from a wide variety of different factual contexts. The breadth and volume of this jurisprudence can be seen from the authorities cited to the Supreme Court in *Limen*, which include cases well-known to criminal lawyers in many common law systems.

20. Accounts of the jurisprudence often commenced with the celebrated decision of the House of Lords in *Makin v. Attorney General for New South Wales* [1894] AC 57; and tend to include other landmark cases such as *Rex v. Bond* [1906] 2 KB 389; *Rex v Smith* (1915) 11 Cr App R 229, 25 Cox 271; *Rex v. Sims* [1946] KB 531; *Reg v. Straffen* [1952] 2 Q.B. 911; *Reg. v. Boardman* [1975] AC 421 *R v Scarrott*; (1977) 65 Cr App R 125; *DPP v. P.* [1991] 2 AC 447, and *Reg v. H.* [1995] 2 AC 596 in our neighbouring jurisdiction. Notable Irish decisions include *Attorney General v. McCabe* [1927] 1 IR 129; *Attorney General v. Joyce and Walsh*

[1929] IR 526; *Attorney General v. Duffy* [1931] IR 144; *Attorney General v Kirwan* [1943] IR 279; *People (DPP) v. B.* [1997] 3 IR 140; *People (DPP) v. B.K.* [2000] 2 IR 199; *People (DPP) v. McNeill* [2011] 2 IR 669; *People (DPP) v. McCurdy* [2012] IECCA 76; *People (DPP) v. C.C.* [2012] IECCA 86, and *(People) DPP v. M.S.* [2019] IECA 12. Only some of these involve multi-complainant sexual assault cases; others arise in very different factual contexts (e.g. evidence as to the presence of other infants’ bodies in the gardens of other premises lived in by the accused, where the instant prosecution concerned murder of an infant (*Makin*); evidence of bath drownings of previous wives of the accused in a case where he was accused of murder of his wife by drowning her in the bath (*Smith*); evidence of three girls being strangled by the same method with their bodies left unconcealed (*Straffen*); a case of murder involving six dead bodies in one house fire (*McCabe*); evidence of putting guano into a person’s milk on a previous occasion, where the instant prosecution concerned murder of the same person (*Joyce and Walsh*); evidence of learning skilled butchery techniques while in prison in a case of murder involving dismemberment of the victim (*Kirwan*); and criminal damage to valuable paintings in two different art galleries (*Shannon*).

21. As is clear from the judgments in *Limen*, which examine these authorities comprehensively, there has been an unfortunate tendency in the authorities, at times, both to conflate the three separate issues (namely, severance, admissibility, and jury direction on cross-support) and to set out bright-line rules (e.g. “striking similarity”, “similarity”, “system evidence”). Both of these unfortunate tendencies introduced a degree of unnecessary complexity into an area where clarity for trial judges is essential.

22. The decision of the Supreme Court in *Limen* in 2021 is a significant step forward in bringing the necessary clarity to Irish law in this area. For this reason, this judgment sets out the relevant passages from the judgments in *Limen* in some detail.

The Supreme Court decision in *Limen*

23. It is perhaps ironic that clarification in this legal context came in a case where none of the three issues (severance, admissibility, jury charge) arose directly in the case and much of what is said in the two judgments in *Limen* is strictly speaking, *obiter*. In *Limen*, the defendant had been convicted of the rape of two women and the sexual assault of one of them on the same night following a party in his apartment. Both women gave similar accounts of how they came to attend the party, how they ended up there together with the defendant after other people had left, how they had drunk alcohol and smoked cannabis, how they woke up to find the defendant raping them, how they told each other of what occurred, and how they left together in the morning, in a state of distress. In her closing speech to the jury, counsel for the prosecution had urged the jury to have regard to the “stark” or “striking” similarities between the accounts given by the complainants and stated that, in the circumstances, the jury could find that those similarities gave support to the evidence of each complainant. The Court of Appeal dismissed the appeal and the Supreme Court granted leave to appeal on the following questions:

1. Where there are two or more alleged victims in an alleged sexual violence case, can the account of one support the evidence of any other?
2. Can this occur only when the accounts are so similar as to be such as to otherwise admit their evidence under the similar fact principle, or is it enough that broadly concurring accounts are given?

3. What, if any, direction ought a trial judge give to the jury as to cross-support or as to corroboration where there are two or more alleged victims in a sexual violence case?

24. The Supreme Court stated that the case really involved two complainants and one incident. However, each of the judgments (Charleton J. and O'Malley J) nonetheless carefully examined the authorities and provided clear guidance on how trial courts should deal with each of the three legal issues already-identified more generally. Both judgments agree with each other, and the third judge, Baker J, agreed with both judgments. Given the unanimity of the Supreme Court on how such cases should be approached in what has for many years been an area fraught with difficulty, we have no hesitation in applying the principles identified in *Limen* on the basis that they now represent the current Irish law in the area. As we shall see, both judgments doubted the correctness of the decision in *B.K.* and in our view it is no longer helpful to rely on that judgment in applying the relevant principles as it is apt to lead to confusion rather than clarity, and the decision in *Limen* now contains the most recent authoritative statement of the correct principles in this jurisdiction.

The first issue: A ruling on severance of counts on the indictment

25. The first point made in *Limen* about approaching a possible severance of an indictment is that the test for severance is *not identical* to the test of admissibility of evidence or the question of whether a jury should be directed that the evidence of one complainant may provide cross-support for the evidence of another complainant. Charleton J, having set out the relevant provisions of the 1924 Act, said:

“[13] It is the Director of Public Prosecutions who decides in the first instance that a number of individual offences may be grouped together and sequentially numbered in the one indictment. Prior to trial, the defence may apply to the judge that each charge be tried separately. The analysis of when it is right to join charges in an indictment and when a judge ought, by way of judicial discretion, sever an indictment and order separate trials has become *incorrectly enmeshed* with the particular rules that were once current in attempting to draw lines as to where system evidence or strikingly similar evidence might be admitted... (Emphasis added)

[14] It could never have been the intention of the Oireachtas that only offences which occurred at effectively the same time were exclusively those which could be included in the same indictment. For instance, an accused enters a dwelling at night and steals (burglary), smashes a window to escape (criminal damage), and, because the owner has appeared at the door through which entry was effected, then assaults the householder in order to get away (assault causing harm). Furthermore, many crimes contain a lesser included offence, where for instance the jury may return manslaughter on a murder charge or theft on a burglary charge or assault on an assault causing harm charge. Often, those alternatives are spelt out in the indictment by separate charges. Such charges are “founded on the same facts”. *But that cannot be all that is permitted since “a series of offences of the same ... character” may be charged as may “a series of offences of ... a similar character”*. An instance might be a series of burglaries where the accused's fingerprints were found in some of the places targeted or where a confession related over several crimes or the accused was identified in respect of more than one. What is not required is that all the charges be the same, for instance rape, and nor is it specified that these occur against the same victim. It is clear that there may be, as in this case of the two women in the defendant's flat, different victims and it is clear as well that what may

be involved are instances of criminal conduct separated in time and by when these are alleged to have occurred. (Emphasis added)”

26. Further, Charleton J. was critical of the judgment in *B.K.*, saying that it was an appeal - “*where the issues surrounding cross-support of evidence from different victims were conflated with severance of an indictment*. It is not the rule that counts can only be joined in an indictment where each count cross-supports the evidence in all the other counts”.

27. He went on to say (at para 17):

“Were that to be so, an indictment could not contain a series of accounts from a single alleged victim as to how she was groomed and then sexually abused over months or years. Nor can it be the case, therefore, that accounts from two or more victims may only be joined where each supports the other as to detail in circumstance and method. An accused is not “prejudiced or embarrassed in his defence” because there is more than one witness testifying to a similar crime which forms part of the same series of events or which are of the same or similar character. Each such count must be proven. Apart from that, an indictment should not be overloaded with either counts or large numbers of alleged victims of offences. Thus the only rational rules are to seek a connection between the events referenced in the counts, to leave the analysis of fact to the jury, conscious that the prosecution and the defence will each point out the aspects which strengthen their side of the argument in closing speeches, that the judge will correct any errors, and that indictments should not be unwieldy.”

28. On the issue of severance, O’Malley J said (at para 189):

“It may be the case, as Barron J believed, [in *B.K.*] that in practice joinder generally occurs only where the evidence in respect of the various counts will be cross-admissible

but *that is not an explicit requirement under the rules and it is at least theoretically possible for counts to form “part of a series of offences of the same or similar character” in a case where at least some of the proposed evidence in respect of one or more charges would not be admissible in respect of another.* That is permissible, provided the accused is not unfairly prejudiced as a result and provided it will be possible, in practical terms, for the trial judge to make it clear to the jury what evidence should be considered in relation to which charge.” (Emphasis added)

29. Thus, both judgments in *Limen* emphasise the need to keep the concepts of indictment-severance and admissibility/cross-support distinct from each other. An application for severing an indictment must be grounded on the tests set out in the relevant provisions of the 1924 Act set out above.

30. Nonetheless, while the question of severing an indictment and the question of admitting evidence are conceptually distinct, the differences between them in a multi-complainant sexual assault case is unlikely to make much difference in practice, as was pointed out by O’Malley J. If the case is one where the evidence of one complainant is going to be ruled inadmissible in the trial of another complainant, it seems unlikely that they should be tried together. The question of the admissibility of the evidence of complainants in each other’s trials is therefore relevant to the severance test (the 1924 Act test) although it is not exhaustive of, or identical with, it. For example, an indictment might need to be severed simply because of the large number of complainants, rendering a trial unwieldy, even though there are no evidence-admissibility problems.

The second issue; Ruling on the admissibility of evidence

31. Turning now to the second legal issue, namely the admissibility of evidence, the decision in *Limen* makes it clear that a test of “striking similarity” is not some kind of “bright-line” test

of admissibility in this area; it is *not necessary* to show striking similarity. Charleton J. referred to *(People) DPP v. P.* [1991] 2 AC 447, and *B. v. DPP* [1997] 3 IR 140 with approval, saying

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“In *D.P.P. v. P.* [1991] 2 A.C. 447, the House of Lords accepted that “striking similarity” was not the test that had to be met. It may be there, but it is not necessary. Instead what is required is that the evidence be so logically probative so as to diminish prejudicial effect. There, on a charge of incest, the accounts of the accused's two daughters of possessiveness and offer to pay for abortions would not be utterly unusual features for those who have experience of incest trials but would be unlikely common features for two young victims to have made up. According to Lord Mackay at p. 460, the endless round of similar fact evidence cases could be reduced to an “essential feature” which is merely the application of the standard rule that:

“... its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime ...”

That could be “derived from striking similarities in the evidence about the manner in which the crime was committed” but was not so restricted. This analysis was persuasively adopted by Budd J. in the High Court in *B. v. Director of Public Prosecutions* [1997] 3 I.R. 140. It must be remembered that in *D.P.P. v. P.* one of the certified questions was as to when a man is charged with sexually abusing his young daughter, assuming no collusion, is the evidence of another daughter of similar abuse admissible, absent striking similarities? The answer was affirmative. Lord Mackay positing at p. 462 that, firstly, a judge:

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

32. Later in his judgment (para 35), Charleton J also addressed how the issue of collusion might come into the admissibility question, and said that if the defence wishes to explore this, this was permissible “where circumstances or specific instruction reasonably suggests this”, but that

“It should only, however, undermine *admissibility* where any contamination is so blatant as to render the evidence unworthy of belief: *Reg. v. H.* [1995] 2 AC 596.” (Emphasis added)

33. O’Malley J also addressed the issue of the admissibility of evidence. She engaged in a comprehensive analysis of many individual authorities and said that the concept of “*similar fact evidence*” had been at times “*unclear and unsatisfactory*”. She said that there had been a tendency to categorize potential fact scenarios and to draw “*bright-line rules*”. She described *B.K.* as a case in which there was a “*mistaken approach*” (see para 192).

34. In passage which is very helpful for trial judges in this type of trial, O’Malley J. summarised the correct principles concerning admissibility of evidence in this area as follows (para 191):

(i) The court of trial must not permit such evidence to be introduced for the purpose of leading the jury to believe that the accused is likely, by reason of his or her criminal

conduct or character, to have committed the crime in respect of which he is charged. “Purpose” in this context does not refer solely to the subjective intent of the prosecutor, but is to be understood as including the objectively likely impact of the evidence. In other words, it would not be acceptable to admit the evidence on the basis, for example, that it might serve to rebut some theoretically available but practically unlikely defence.

(ii) Evidence may be adduced, despite the fact that it shows the commission of other crimes, if it is relevant to an issue of fact that has to be determined by the jury. It will be relevant if it has probative value in relation to that issue. The types of “issue” that may be in question include any defence that may realistically be relied upon (which may relate to whether the actions of the accused were intentional, innocent or accidental). The evidence may also be relevant, depending on the facts, where the accused simply asserts that the complainant's evidence is untrue.

(iii) As a separate consideration, evidence may be given of criminal behaviour if it is so connected with the offence charged as to form part of one continuous transaction, so that evidence of that behaviour is either necessary to the narrative in relation to the offence charged or demonstrates the nature of that offence (by, for example, demonstrating a motive for the offence).

(iv) The trial judge may in any case, in the exercise of his or her discretion, refuse to admit evidence that is strictly speaking relevant, if he or she considers that the evidence, if admitted, would probably have a prejudicial effect on the minds of the jury out of proportion to its true evidential value.

35. Later in her judgment, O'Malley J. said that the allegations (for the purpose of admissibility) must of the "same nature". She added that "*similarity may add to the probative value, and the greater the similarity is, the greater the probative value*".

36. Accordingly, it is now clear that "striking similarity" is not required for evidence to be admissible in such cases. The overall question is one of probative value as against prejudicial effect, although of course the greater the similarity, the greater the probative value. Thus, where "striking similarity" exists, it would no doubt be highly relevant and probably *sufficient* to ensure admissibility of evidence, but it is not *necessary* to show striking similarity. To repeat, the question is one of probative value over and above prejudicial effect, as described by O'Malley J above. Into the mix of the admissibility ruling also goes the evidence, if there is any, relevant to possible collusion or contamination, but bearing in mind that the issue at this stage is one of admissibility of evidence. The threshold for admitting evidence in a trial is never the same as the threshold for a jury in deciding the ultimate issues in the case.

The third issue: an appropriate direction to the jury on cross-support

37. It will be noted that both Charleton and O'Malley J.J. spoke of cross-support rather than cross-corroboration, for reasons which are explained by O'Malley J. (set out below), and the Court therefore adopts that terminology.

38. In relation to the issue of how to direct the jury on the issue cross-support as between different counts or complainants, Charleton J said (at para 31) that in some cases it may be necessary to explain to the jury not only that each count must be considered separately, but also that "*where accounts are to cross-support each other a basic explanation of how that may happen is important*". He gave the example of a case where "*some particular feature in the*

account of one witness who says that he or she is the victim of a criminal offence, tends to logically prove the account of another such witness” (referring to the judgment of O’Malley J in this regard). Later at para 34 he would return to this, saying that *“as O’Malley J rightly suggests...where the account of one victim has a factor which makes it relevant to the account of another in terms of cross-support as between their testimony, that usefully can be pointed out”*.

39. At paras 32-3 he said:

“A trial judge dealing with a multiple count and multiple alleged victim indictment is entitled to instruct a jury, firstly, to consider each count separately and, secondly, it may be useful, but it is not necessary, to state that merely because the account of one person as to sexual violence, or other crime, is regarded as proven in the context of the evidence relevant to that count, it does not follow that other accounts by other alleged victims are to be regarded as strengthened. This is not a matter of dominoes, where one alleged victim is believed, other alleged victims are not automatically regarded as more truthful: the jury must consider if there is enough evidence on that other alleged victim's account to convict the accused on one or more allegation. ...

Where there are several counts from different alleged victims, after hearing submissions, a trial judge may instruct the jury as to the features that are in common, if any, and which derive from the independent accounts of those individuals. Other than that, it must be remembered that fact is in the realm of the jury as is sense and shrewdness. If the case is made by the prosecution that some aspect of evidence of the account of one alleged victim is relevant to the proof of a count of another, that should be pointed out by the prosecution to the judge in the absence of the jury. Submissions from the defence should

be heard and a ruling should be made as to the validity of any such argument before counsel on each side address the jury. Then, everyone knows where they stand.”

40. O’Malley J. also deal with this topic. She started by saying that juries should not be unnecessarily instructed on issues which are not of relevance, including the issue of corroboration (at para 188):

“... I am also of the view that it is not helpful to a jury to attempt to instruct them as to the legal application of rules of evidence that do not require to be considered by them. I would agree, therefore, with the view of the trial judge in this case that the rules relating to corroboration should not be raised with the jury unless a corroboration warning is being given.”

41. In cases where a direction on cross-support was appropriate, this should be done in a manner which is as succinct and straightforward as possible:

Similarly, in general, I do not think that it would necessarily be of benefit to the defence to give the jury a detailed explanation as to which evidence from which complainant may be taken into account in relation to a given count on the indictment. The defence is of course entitled to challenge the admissibility of any evidence, and the trial judge must be satisfied as to admissibility. In that sense, it is true that there must always be a legal, explicable basis for the admission of contested evidence. However, as the trial judge indicated in discussion with counsel, giving the jury a detailed analysis might simply have the effect of highlighting aspects of the prosecution evidence. I think it would be more helpful to look at this question from the other direction, and to suggest that, if there is any single piece of evidence that is relevant to one count only, it could be appropriate

to give a tailored warning that that evidence is to be considered only in relation to that count.

Overall summary of principles relating to severance, admissibility and directions on cross-support

42. O'Malley J provided the following guidance to trial judges with regard to the approach to all of the three issues:-

- (a) A judge may in any case sever the indictment if of the opinion that it would be unfair to the accused to proceed with the indictment as drafted.
- (b) Where the accused is charged with multiple offences of the same nature against several individuals, some probative value may be found in the inherent unlikelihood that several people have made the same or similar false accusations. The accusations need not be identical or “strikingly similar” but must be of the same nature. However, similarity may add to the probative value, and the greater the similarity is, the greater the probative value.
- (c) The inherent unlikelihood of multiple false accusations, and therefore the probative value, rises in situations where the complainants are independent of each other and there is no reason to fear collusion or mutual contamination.
- (d) Where an application is made to sever the indictment (or, indeed, if the trial develops in such a way as to give rise to the issue), the judge will have to consider whether or not the complainants are independent of each other, and whether there are any grounds for concern that there may have been either collusion or innocent mutual contamination. This does not mean that, for example, accusations by a number of family members against a relative cannot be tried together. They may not be independent of each other, and may very probably have discussed the matter

together and with other family members, but there may nonetheless be probative value in the content of their various accounts.

- (e) Depending on the judge's assessment of the situation either at the outset (based on the statements of proposed evidence), or during the trial (if the evidence raises concern) it may be necessary to either sever the indictment or give the jury an appropriately tailored warning about the possibility of collusion or contamination.
- (f) In a case involving multiple complainants, if it is determined that the evidence of each complainant is admissible in respect of counts relating to other complainants, there is no requirement to explain that ruling to the jury other than in general terms. The jury may be told that they need to be sure that the witnesses are truthful and have not been influenced in their evidence by each other. If they so find, they can regard any similarities that they find between the witnesses' accounts of what the accused did as supportive evidence in relation to each count.
- (g) Where any material part of the evidence can be regarded as admissible only in respect of an individual complainant, the jury should be instructed to take it into consideration in respect of that complainant only.
- (h) The weight to be attached to supportive evidence of this nature is a matter for the jury, but they should be warned that they can convict on any individual count only if satisfied beyond reasonable doubt that the accused committed the offence charged, and that they must not reach that conclusion solely on the basis that there are multiple accusers.
- (i) It is unnecessary, and may be unhelpful, to direct the jury in relation to the rules about corroboration unless the trial judge decides to give a corroboration warning. In that situation, the ordinary definition of corroboration applies. Evidence given

by other complainants may or may not come within that definition. If it is not within the definition, but is capable of being found by the jury to support the prosecution case in respect of any particular count, there is no reason why counsel should not say so.

The decision in (People) DPP v. T.P. [2021] IECA 276

43. For completeness, we should refer to the post-*Limen* decision of this Court in *People (DPP) v. T.P.* which dealt, *inter alia*, with the question of severing the indictment. The appellant contended that the indictment (which contained counts in respect of two complainants, a brother and sister) should be severed because there were differences of a significant nature as between the two sets of allegations. These included, he said, the fact that the second complainant (female) was some years older when the offending behaviour began; and that the first complainant (male) shared a bed with the appellant from time to time and the offending was said to have occurred on occasions where they had shared a bed, whereas the second complainant shared a room with other female relatives. Counsel for the Director submitted that the two complainants were brother and sister, that they were both minors at the time of the alleged abuse, and that both travelled up to a family residence in Donegal to the grandmother's house, which is where the abuse was alleged to have occurred. In refusing the ground of appeal relating to severance, the Court (judgment delivered by Birmingham P) said:-

“In the view of this Court, the fact that the complainants are siblings, that they were alleging abuse by the same person who is in the same degree of relationship to each of them, that they were both alleging that the abuse took place in the same location, and in a particular context (family visits to their grandmother's home), added a unity and a coherence to the allegations which justified the trial judge in refusing the application for separate trials...”

44. The Supreme Court decision in *Limen* was not referenced in that part of the Court's judgment, although there is undoubtedly consistency between the Court's decision on severance and what was said in *Limen*.

Application of the principles as set out in *Limen* to the facts of the present case

45. As appears from the two grounds of appeal described earlier, the appellant challenges the decision on severance of the indictment, and the admissibility of the evidence of all three complainants in a single trial. He does not contend that the trial judge incorrectly charged the jury, and the therefore issue (described as the "third issue" above) as to directing the jury on cross-support does not arise in the appeal the present case.

46. The Court is of the view that the trial judge cannot be criticised for exercising his discretion in the manner that he did by refusing to sever the indictment so that the counts relating to each of the three complainants would be tried separately from each other (or the counts relating to one complainant would be tried separately from the other two).

47. The trial judge, rather typically, used the language of "similar fact" or "system" evidence in ruling on the issue of severance, whereas the test, strictly speaking, is one of fairness, or more particularly, as set out in the 1924 Act i.e. whether the acts alleged "*formed or were a part of a series of offences of the same or a similar character*" (rule 3) and whether the appellant was "*prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or ... for any other reason it [was] desirable to direct that the person should be tried separately for any one or more offences charged in an indictment*" (s.6(3)). However, as O'Malley J pointed out in *Limen* the difference between the two tests (that for severance and that for admissibility) is largely theoretical. Indeed, the appellant makes the same complaint about the admissibility of the evidence as he does in respect of the

severance issue. For both of his grounds of appeal he relies upon the same submission, namely that there were insufficient similarities as between the allegations of the three complainants.

48. It will be recalled that the trial judge said the allegations did not have to be “*identical*” nor did they have to present what he described as “*hyper-similarities*”. He thought that there was “*a particular system of allegations of sexual assault on young children while they are at a sleepover, or while they are asleep, or while they are on their own in a room in which the accused is alleged to have taken advantage of them*” and that this was “*sufficient evidence of system*”. He also said that he considered the evidence to be “*more probative than prejudicial*”.

49. We are of the view that it was not unfair that the counts in respect of the three complainants be tried in a single trial on one indictment. The offences were of a “*similar character*” within the meaning of rule 3 of the indictment rules in the 1924 Act; and, taking into consideration the test in s.6(3) of the Act, we are not satisfied that the appellant was “*prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or ... for any other reason it [was] desirable to direct that the person should be tried separately for any one or more offences charged in an indictment*”. In this regard, we take into account that it was correct to view the evidence in each complainant’s case as being admissible in the other complainants’ cases by reason of the following:

- The multiple allegations were “*of the same nature*”, to use the language of O’Malley J. (sexual assault);
- There were some similarities between them in terms of the factual circumstances of their alleged commission (uncle and nieces; sleepovers; being touched on their genitals under their underwear while on sleepovers);

- While the complainants were cousins and therefore would have had opportunities to converse with each other (in contrast to unconnected strangers, for example), there was no evidence supporting collusion to the extent that the evidence (or any of it) was inadmissible; indeed, the appellant's counsel did not make any application to have the evidence of any of the complainants ruled inadmissible on that basis;
- In those circumstances, the existence of multiple allegations from three different people had (at the very least) some probative value which could be derived from the inherent implausibility of several complainants inventing the same story, which made it appropriate that their cases should be tried in a single trial.

50. Accordingly, the evidence satisfied the criteria for admissibility and thereafter it was a matter for the jury to assess the evidence in respect of each count. The degree of dissimilarity (or similarity) as between each of the complainant's accounts, and how that affected the probative value to be placed on the fact that there were several and not merely one complainant, was also thereafter a matter for the jury, once the initial criterion of admissibility had been satisfied. Likewise, it was a matter for the jury to assess, if the appellant wished to cross-examine the complainants and others on the topic, the degree to which (if any) there was a possibility of collusion or contamination of the complainants' evidence.

51. The Court has already noted that the appellant does not take issue with the manner in which the trial judge directed the jury.

52. In the circumstances, the Court not satisfied that either of the grounds of appeal is made out. The indictment did not require severing in accordance with the tests set out in the 1924

Act, and the test for admissibility of the evidence of each of the three complainants in the trial of the other was satisfied, having regard to the principles set out in *Limen*. We would dismiss the appeal.