



# THE SUPREME COURT

[Supreme Court Appeal No: 16/2020]

**Clarke C.J.**

**McKechnie J.**

**Charleton J.**

**O'Malley J.**

**Baker J.**

**BETWEEN:**

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

**PROSECUTOR/RESPONDENT**

**-AND-**

**CLEMENT LIMEN**

**ACCUSED/APPELLANT**

**Judgment of Ms. Justice Iseult O'Malley delivered the 18th of February 2021**

## **Introduction**

1. The issues in this appeal concern the proper treatment of evidence in trials of sexual offences where there is more than one complainant. Although such trials are now unfortunately common, the issues raised reflect, to some extent, the complexity of the various rules developed over the last one hundred years or so in relation to the admissibility of what is variously referred to as “misconduct” evidence, “similar fact” or “system” evidence, and also relate to the proper role of the rules of corroboration.
2. The facts of the case are somewhat unusual, in that the two complainants alleged that the appellant raped each of them in his home within a very short period of time, in what the parties at the trial were agreed could be regarded as one incident. The dispute giving rise to the appeal centres on the position taken by counsel for the prosecution in her closing speech, when she urged the jury to have regard to the “stark” or “striking” similarities between the accounts given by each complainant and

said that in the circumstances the jury could find that those similarities gave support to the evidence of each. It is contended by the appellant that the trial judge should have directed the jury that this was not a permissible approach.

3. As formulated in the determination granting leave to appeal to this Court, the questions for consideration are:
  - i) 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?
  - ii) 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?
  - iii) 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?

## **Background**

4. The appellant was convicted of raping two women, and sexually assaulting one of them, in his apartment in the early hours of the 2<sup>nd</sup> June 2014. The two complainants (who I will refer to here as Ms. B. and Ms. Q.) had been socialising together and met the appellant in a nightclub. They had not previously known him but, along with a number of other people, agreed to go back to his apartment for a party. CCTV footage suggested that they would have arrived there at around 3 a.m. Other people arrived and left at various times over the next couple of hours – the times are not entirely clear – but it appears that there were guests there, apart from the complainants, until at least 4.30 or 5 a.m.
5. In any event, at some stage the complainants were the last guests remaining. According to their evidence, the appellant gave them each a further drink, which one thought tasted “*funny*” and the other thought was “*strong*”. They also shared a joint

with him at some point at approximately 5 a.m. There was music playing and either or both may have danced for a while. It may be noted here that the complainants' evidence differed as to some incidents during the party and as to the precise sequence of events. Each complainant gave a description of remembering nothing beyond a certain point until waking up.

6. Ms. B. said that she awoke on the couch in the sitting-room to find the appellant engaged in penetrative intercourse with her. She was clothed apart from her underwear, which was on the floor. She succeeded in pushing the accused away and went into one of the bedrooms and found her friend, Ms. Q. She woke her and told her that she had been raped. Ms. Q. said that the same thing had happened to her, in the bedroom. They were both very upset and left the apartment together. They encountered the appellant, who was cleaning up in the kitchen, but did not confront him about what had happened.
7. Evidence from a security man in a nearby shopping centre indicated that he saw the two women leaving the apartment block together in a state of distress, not wearing shoes, at about 9.30 a.m. He went out to the street to see if they were alright. The appellant passed him and called out to the women, whereupon one turned and told him to stay away from them. The appellant said to the women (and then to the security man) that they had stolen a gold chain from him – this allegation was not pursued by the defence in the trial.
8. The complainants contacted Ms. B.'s husband. He collected them and brought them to the gardaí. The appellant was arrested shortly afterwards. His account to the gardaí was that Ms. Q. had initiated consensual intercourse with him in the bedroom, but that he had stopped at a certain stage because he did not have a condom. He said that he had had no sexual contact with Ms. B., that she had grabbed him and pulled him onto the sofa when he came out of the bedroom, but he had rejected her advances. He had then heard the two women crying in the bedroom. He said that they had slept together in the bed in that room.
9. Some days later Ms. Q. made a further statement in which she said that in addition to raping her, the appellant had assaulted her by performing oral sex upon her.

10. Toxicology tests on the complainants did not reveal the presence of any drugs, and nothing suspicious was found in the liquid remaining in glasses seized from the apartment. Medical evidence was consistent with the accounts given by the complainants, but was not inconsistent with consensual intercourse or other possible (unspecified) explanations.

### **The trial**

11. The defence did not seek to sever the indictment, and the trial proceeded on the basis that, as defence counsel said to the trial judge on the first day, the case essentially involved two complainants and one incident.
12. It is not necessary to go through the evidence in any great detail. However, it is relevant to one aspect of the submissions in the case to note part of the cross-examination conducted by counsel for the defence.
13. In a context where, as he said, the issue of drugging was implicit in the case but not expressly raised, counsel asked the first complainant whether she thought she had been drugged and whether she had discussed this with the second complainant. She replied in the affirmative and said that they both believed they had been drugged. It was put to her that the medical evidence would be that no trace of any drug had been found, and she confirmed that she was aware of that. The case made in cross-examination of this complainant was that she had had more to drink in the apartment than she was willing to admit, stayed there out of choice when others left, invited the accused into the bedroom and initiated consensual sexual activity which ceased because the accused did not have a condom.
14. It was put to the second complainant that she had wanted to stay, that she had made advances to the appellant in the sitting-room while her friend was out of the room, that he had rejected her and that he had eventually left the two women together in the bedroom.

## Speeches and charge

15. When the evidence was complete, counsel for the prosecution inquired as to the trial judge's attitude to the issue of corroboration, on the basis that she was prepared to submit that there was evidence capable of amounting to corroboration. The trial judge responded that he did not intend to give a corroboration warning, and there was therefore no necessity to direct the jury on the issue. Counsel for the defence agreed, stating that he had not intended to ask for a warning.
16. At the start of her closing speech, counsel for the prosecution told the jury (as she had in opening the case) that each offence had to be considered separately.
17. Counsel said that, as a matter of law, there was no requirement for evidence supporting the testimony of the complainants, whether of a medical, forensic or other nature. However, she argued that, in this case, the medical findings and the actions and distressed demeanour of the complainants in the immediate aftermath constituted supporting evidence, and that the complaints made immediately after the assaults were evidence of consistency with the evidence given by them in the trial.
18. The issues in the appeal arise from a later passage in the speech. Counsel said:

*“Now, I'd also ask you to consider ladies and gentlemen the fact that elements of the testimony of each girl is so similar. Now, there are very stark similarities in the evidence given I say independently by these girls to you. Independently of each other. It was never put to these girls in cross-examination, it was never put to either of them that they were colluding with each other, that they had got together to make up a story. That for some reason two of them together decided to make this up. Now, I submit to you that there are very striking similarities in what each girl alleges happened to them separately and that this is capable of supporting their testimony, one of them to the other to you. Both girls had fine clear recollections up to a certain point of the night. Then they were given a drink. Both of them were given a drink*

*by the accused. Then both of them have similar experiences of remembering nothing. Then each of them wakes up to the accused having vaginal intercourse with them. Both of them are still dressed according to their evidence apart from their underwear. Now, whether you find that any of these things does in fact support their evidence is a matter for you. But, I submit that the medical evidence, the evidence of their demeanour and the similarities in their testimony is capable of doing so and again Mr Justice Coffey will correct me if I'm wrong in relation to the applicable law."*

19. Before concluding, counsel repeated that the jury was required to treat each count separately.
20. Counsel for the defence then objected to the passage quoted above and complained to the trial judge that the prosecution, in using the words "striking similarity", was using a legal term of art and had thereby introduced the concept of similar fact evidence into the case. It had been done without notice to the defence and without any application to the trial judge, and in any event was not appropriate in the circumstances of the case. He asked the trial judge to instruct the jury that it was not of assistance to them.
21. Counsel for the prosecution submitted that she had made it clear to the jury that they did not have to accept what she said. She had not meant to convey that the trial judge would give specific directions on this aspect, but only that he would be directing them generally.
22. The trial judge referred to the fact that he had already ruled that he would not give a corroboration warning, and that therefore no direction would be given as to what, in law, could constitute corroboration. He expressed the view that insofar as the issue of similar fact evidence had been introduced, it was something not contemplated by his direction. He considered that counsel for the prosecution was entitled to say that support for the complainants' narratives could be found in, for example, the evidence of demeanour and the medical examinations. However, he stated that she should not

have suggested that he would be directing the jury that the similarities in the narratives could constitute support.

23. The application on behalf of the defence was for a direction to the jury that they should disregard the suggestion that the complainants could, in effect, cross-corroborate each other. The trial judge responded that he thought the best way of dealing with it was not to mention it at all. He made it clear that he felt it would do more harm than good to the defence case if he introduced the concept of corroboration, since by telling the jury that it did not arise in respect of the narratives he might be implying that it did indeed arise in relation to other evidence. He offered to hear counsel again after the lunch break, if there was a way of dealing with the matter that did not involve reference to corroboration.
24. Having considered the matter, counsel had no further application and proceeded to close the case on behalf of the defence. In doing so he pointed to certain discrepancies in the prosecution case and highlighted the absence of forensic evidence supporting the allegations of rape and assault. He argued that the prosecution, without saying it openly, was implying that the complainants had been drugged but that this was not supported at all by the scientific evidence, in circumstances where their blood and urine had been screened for a range of substances. In dealing with the loss of memory claimed by the complainants, he referred to the quantities of alcohol consumed and the fact that people can underestimate the effects of what they have taken.
25. It is important to stress that counsel made it clear from the outset that he was not accusing the complainants of deliberate lying. Indeed, he stated that his impression was that they “*absolutely*” believed that they were telling the truth. He pointed out that there was no onus on the defence to put forward any motive on the part of prosecution witnesses for telling lies and went on: “*Neither is it my job to start suggesting there is collusion because there’s as many differences as there are likenesses in the evidence of the two complainants in this case.*”
26. In charging the jury, the trial judge instructed them that each of the three charges on the indictment had to be considered as the subject of a separate trial. He said “*It*

*follows that merely because you come to a particular conclusion in relation to any given charge, it doesn't follow that you must come to the same conclusion in respect of the remaining charges. You treat each charge as being separate and distinct.*" He mentioned this principle again at a later stage, when pointing out that different issues arose in respect of the two complainants. In relation to one, sexual intercourse was admitted by the defence and the "live" issue was consent. In respect of the other, the question was whether sexual activity took place at all.

27. Having summarised most of the evidence and sent the jury away until the next day, the trial judge asked whether counsel had anything to raise in respect of the legal portion of the charge. He referred to his earlier ruling that he would not give a corroboration warning and so would not direct the jury as to corroboration, and his view that he should not deal with the issue of similar fact evidence unless counsel wanted to revisit that matter. Counsel for the prosecution stressed that in her view she had not raised similar fact evidence. Counsel for the defence confirmed to the trial judge that he did not wish to revisit the issue. Accordingly, when summarising the case being made by each side, the trial judge did not refer to prosecution counsel's comments on the similarities in the complainants' evidence. There were no requisitions on the charge from either counsel.

## **The Court of Appeal**

28. It seems that the appellant changed his legal representation at least once before his grounds of appeal were finalised. Ultimately, five issues were argued. The first was that the trial judge had erred in law "or in principle" in failing to give directions and warnings to the jury in relation to system evidence. The fifth was that having regard to all of the circumstances, including the charge to the jury, the trial was unsatisfactory and the verdict was unsafe. These two grounds are considered together in the judgment delivered by the Court of Appeal.
29. It is noted in the judgment that there was agreement that, on the facts, there was no question in the case of "similar fact" or "system" evidence. The Court further commented, without elaboration, that there was evidence in the case that was capable



of being corroborative and that in those circumstances it was unsurprising that counsel for the defence had not sought a corroboration warning.

30. The judgment goes on to observe that the trial judge had formed the impression that prosecution counsel had, in her speech, raised the issue of corroboration despite his decision not to give a warning. The Court stated that she would have been entitled to do so in any event, whether a warning was to be given or not. However, there was a separate issue involved. The questions were, firstly, whether the impugned passage from the speech could have created the impression in the mind of the jury that similar fact evidence existed when it did not and, secondly, if it could, whether the manner in which the perceived difficulty was dealt with was correct.
31. The fact that the trial judge's view – that nothing more should be said about the matter – was confirmed with the explicit agreement of defence counsel was clearly seen by the Court of Appeal as being very significant. Counsel acting for the appellant in the appeal had, rightly, disclaimed any suggestion of error or incompetence on the part of the counsel who appeared in the trial, but nonetheless sought to argue that the prosecution speech, if it had raised the issue of similar fact evidence, had given rise to an unsatisfactory trial. In those circumstances the Court found it necessary to consider the application of the principles discussed in *The People (Director of Public Prosecutions) v. Cronin (No. 2)* ([2006] 4 I.R. 329) ("*Cronin*").
32. The Court stated that the argument now under consideration had not been raised by counsel in the trial, and no explanation had been given as to why this was so. It was obvious that an informed decision had been made by counsel to accept that the difficulty, if in truth there was a difficulty, was best dealt with in the manner proposed by the trial judge.
33. The Court of Appeal considered that in those circumstances, where there was no error, oversight or explanation, it was not required by the *Cronin* principles to go on to decide whether some fundamental injustice had occurred. However, for the avoidance of doubt, it stated that no possible criticism could be made of defence counsel. Use of the term "striking similarity" might understandably have triggered a

view on the part of counsel that the prosecution was making the case that the *modus operandi* adopted in the commission of the offences was such as to constitute similar fact evidence, so that the evidence of one complainant could, in that sense, corroborate the other. However, there was no real cause for concern that the jury could have fallen into the error of thinking that there was cross-corroboration on a “similar fact” basis. The words were terms of art, but when used in their ordinary and natural meaning could not have given rise to any injustice so far as the conclusion reached by the jury was concerned.

### **Submissions in this appeal**

#### *The appellant*

34. In written submissions the appellant approaches the first two questions posed by the Court in its determination – whether the account of one alleged victim can support the evidence of another, and, if so, whether this can only be the case if the accounts are similar enough to be admitted as “system” evidence – on the basis that the two accounts must, at a minimum, meet the criteria for “system” evidence. The case is made by reference to Rule 3 of the First Schedule to the Criminal Justice (Administration) Act 1924, which permits joinder of different charges on the same indictment if *inter alia* they “*form or are a part of a series of offences of the same or similar character*”.
35. The appellant submits that the test for joinder on this basis, where the offences do not arise from the same incident, is that set out in the judgment of Barron J. in *The People (DPP) v BK* [2000] 2 I.R. 199 (“*B.K.*”). It is argued that joinder in such cases requires that the evidence on each count must be admissible in respect of each of the other counts. In *B.K.*, a distinction was drawn between “similar fact” evidence (which the Court of Criminal Appeal held to be inadmissible because it invites an inference that simply because a person acted in a particular manner on one occasion, he acted similarly on the occasion in question) and “system” evidence (which it held to be admissible because the manner in which a particular act has been done on one occasion may suggest that that it was also done on another occasion by the same person and with the same intent).

36. Reference is also made to the judgment of O'Donnell J. in *The People (DPP) v C.C.* [2012] IECCA 86, (“C.C. ”), where the Court of Criminal Appeal was concerned with interlinked questions of corroboration and the admissibility of system evidence.
37. The appellant also makes extensive reference to *The People (DPP) v M.S.* [2019] IECA 120, where part of the argument made by the defence concerned the role of system evidence, corroboration and the possibility of contamination of the complainants’ evidence by reason of suggestibility, copy-cat evidence or collaboration. The convictions in that case were upheld because, *inter alia*, the trial judge had given a clear direction to the jury that they must decide whether the prosecution had proved beyond reasonable doubt that the complainants had come forward independently and that there was no connecting factor between them. It is submitted that the trial judge in the instant case should have given the jury guidance as to the possibility of collusion between the two complainants.
38. On the third question, which asks what directions should be given by the trial judge as to cross-support and corroboration, it is submitted that, whether the prosecution refers to the evidence in question as “supportive” or “corroborative”, specific legal directions should be given, appropriate to the circumstances of the case. If the trial judge considers that the prosecution is entitled to make the case that evidence in respect of one offence supports the evidence on another, or in effect corroborates it, the appellant proposes that the jury should be directed in accordance with the following:-
- a) The jury must decide whether the witnesses are truthful.
  - b) The jury must decide whether the factual circumstances common to the complainants amount to system evidence as opposed to similar facts (in the sense used in *B.K.*), that is, the *modus operandi* must be such as to make it inherently more likely that the two separate allegations are true. It is submitted that two complainants giving similar uncontroversial descriptions of the same events cannot meet these criteria.

- c) The jury members must first decide whether they can convict beyond reasonable doubt on one count without having regard to the contended system evidence.
- d) If the answer is yes to c) the jury must then consider whether the prosecution has excluded collusion or contamination; if and only if that has been excluded, the jury can rely on the evidence supporting the other count.
- e) If the answer is no to c), it was suggested by O'Donnell J. in *C.C.* that a jury could rely on system evidence if the system evidence was sufficiently strong in all the circumstances. However, it is submitted that such a legal finding should not be made in this case, and it is submitted that in any event, if such a finding were made, it would then be necessary to exclude collusion or contamination.
- f) Evidence of various complainants can amount to corroboration if it is proven not merely to be mutually uncontaminated, but if it is also proven to be independent in the sense that there was no relevant contact between the complainants; and if having regard to the nature of the evidence and all the circumstances, it tends to prove that the accused committed the other offence.

39. It is submitted that, although the word “corroboration” was not used, in reality the prosecution speech asserted that the two accounts corroborated each other. The trial judge should have directed the jury that there was no basis for contending, in this case, that the account of one complainant made it more likely that the account of the other complainant was true. Alternatively, the judge should have given directions in accordance with a) to d) above. Specifically, guidance should have been given in relation to the assertion by the prosecution that the evidence of each complainant was independent of the other, when they had clearly discussed the incident with each other and there was a risk of possible contamination. In using the word “contamination”, the appellant refers to the judgment of the Court of Appeal in *The People (DPP) v M.S.* [2019] IECA 120, where the Court stated that it included not only deliberate acts but also inadvertent or unconscious influence.

40. As far as the *Cronin* principles are concerned, the appellant submits that they are intended to apply only where the issue raised on appeal was not the subject of submissions in the trial *and* was not fundamental to the fairness of the trial. It is asserted that the argument now made is not a new one, never canvassed in the trial, but was in fact central to the case. The factors justifying full consideration of the appeal are stated as including the “contamination” issue and the nature of the purported system evidence, and the fact that the jury was told by prosecution counsel that the judge would address these matters in the charge when he had previously said that he would not.
  
41. Again, reliance is placed on *C.C.*, where the Court of Criminal Appeal set aside the convictions in circumstances where it considered that the issue of corroboration, although not the subject of submissions in the trial, should have been discussed with the trial judge before the closing speeches. Reference is also made to *The People (DPP) v. O’Shea* [2015] IECA 319 and to *The People (DPP) v. G.(L.)* [2003] 2 I.R. 517. In the latter case the convictions were quashed, despite the absence of requisitions, because, *inter alia*, the trial judge had not made it clear to the jury that they should consider the evidence in relation to each complainant separately.
  
42. At the hearing of the appeal the appellant’s core position was crystallised to the following effect – if there is more than one complainant, and the case is not run on the basis that corroboration arises from striking similarities, then the instruction to the jury that they must consider the evidence relating to each count separately must be amplified. The jury must be told which of the evidence they have heard can, or cannot, be taken into consideration in their assessment of each count. Otherwise, they may be left with the impression that the evidence of Complainant A is to form part of their deliberations on a count involving Complainant B, even in a case where there is no legal justification for such an approach and no applicable legal categorisation of the evidence.
  
43. It does require to be noted that no submission to this effect was made in the trial.

*The respondent*

44. The respondent submits that it was clear from the outset of this case that aspects and elements of the complainants' evidence would be similar. However, there was no "system" evidence as such and it was not a feature of the trial.
45. Dealing with the speech made by counsel, it is stressed that she told the jury clearly that they were required to treat each count separately (as did the trial judge in his charge). The use of the words "striking similarity" related to some elements of the testimony only, and the point being made was that these similarities were supportive. The words could not have been interpreted by the jury as meaning that there was cross-corroboration on a similar fact basis. Counsel's purpose was to convey that the similarities in the testimony of the complainants supported the credibility of each.
46. The respondent submits that the evidence demonstrated that the two complainants were very upset in the morning, and that they went to the gardaí within a very short time. It was not put to them on behalf of the defence that they had discussed the assaults in detail in the intervening period. In the circumstances there was no basis for concern about collusion or contamination.
47. Responding to the issues as framed by the Court in its determination, the respondent answers the first question with the broad proposition that there are circumstances in which it is permissible and appropriate for the account of one complainant to be allowed to support the evidence of another. This normally arises in cases involving "system" evidence. However, it is submitted that in the unusual circumstances of this particular case, where two victims were together in the same place and time frame, and were assaulted by the same person, it was legitimate for the prosecution to point to aspects of the narrative given by one as supportive of the similar aspects in the narrative of the other.
48. In answering the second question – whether this can be done only if the accounts are so similar as to be otherwise admissible under the system evidence category – the respondent refers to s.6(3) of the Criminal Justice (Administration) Act 1924. This provision confers a discretion on the court of trial to sever the counts in an indictment. It is accepted by the respondent that, in principle, the evidence relating to

separate complaints must be cross-admissible if the charges are to be tried together. In *M.S.* the Court of Appeal had observed that where similar allegations were made by persons who were unconnected with each other, such evidence would be seen as highly probative. The respondent therefore argues that similarity is the key criterion in deciding cross-admissibility.

49. However, the respondent also contends that a judge would not be obliged to sever the indictment even if not satisfied that all of the evidence was cross-admissible. The respondent therefore sees the answer to the third question, which asks what directions should be given to the jury as to cross-support or corroboration between two or more complainants, as depending upon whether the evidence has been found to be cross-admissible.
50. It is submitted that if the evidence is not cross-admissible, the trial judge must instruct the jury to give separate consideration to each count and the evidence relating thereto. If it is cross-admissible, the precise extent to which the judge should instruct them that particular aspects of one complainant's account can support the evidence of another will depend on the facts of the case. In some cases, the evidence may amount to corroboration if it implicates the accused by confirming in some material particular that the crime was committed, and that it was committed by the accused.
51. The respondent makes the point that evidence can be supportive without amounting to corroboration. That is the case where, for example, evidence of a "recent" or "early" complaint is admitted and can be relied upon to support the credibility of the complainant.
52. It is submitted that in the instant case there was no question of similar fact or system evidence. It was not mentioned to the jury and was not an issue for their consideration. The trial judge stated that he did not intend to give an instruction on corroboration, a position which accorded with the wishes of counsel for the defence. Both counsel and the trial judge stressed to the jury that they were to consider each count separately.

*Discussion – applicability of Cronin principles*

53. It will be seen from the foregoing summary that the appellant’s case has travelled a considerable distance from the approach taken by counsel in the trial. That approach, adopted after time for consideration had been given, was to accept that it would not be in the interests of the defence to pursue the request for a specific direction to the jury in relation to prosecution counsel’s comments. Furthermore, in his own closing speech, counsel expressly disavowed any imputation of fabrication by the complainants and stated that he believed that they thought they were telling the truth. The case being made, and made with noticeable skill, was that their perceptions and memories were unreliable. It seems to me to be clear that his questions about whether they had discussed the possibility that their drinks had been drugged must be seen in a context where it was necessary for the defence to bring this issue into the open. In so doing, counsel was able to point to at least one plausible reason for making the case to the jury that the witnesses were not reliable – their mutual belief about drugging was simply not borne out by the evidence, and it was likely that they were more affected by alcohol than they thought. This did not, however, amount to an assertion, or even a suggestion, that they had fabricated the rape allegations together. Similarly, there was no suggestion made of mutual “contamination”, whether innocent or otherwise.
54. Counsel who have acted for the appellant in the Court of Appeal and in this Court have at no stage suggested that the defence was conducted incompetently, or that counsel had made a mistake, or that there had been any significant oversight on his part. It seems to me that, in truth, much of the case now made simply reflects a different view as to how the case could or should have been run, combined with an assertion that the trial was fundamentally unsatisfactory because the issues were not seen by the trial judge in the light of that different view. But the fact is that no two counsel would run a trial in an identical manner, and it is often the case that counsel can envisage different approaches, equally valid as defence strategies, that give rise to choices having to be made as to the conduct of the trial. It is appropriate to apply the principles in *Cronin* in such circumstances, unless the Court considers that a fundamental injustice has occurred. Therefore, I would not accept that it is now open to the appellant to maintain that the question of collusion, or mutual innocent



contamination, lay at the heart of the case and was not adequately dealt with by the trial judge. In these circumstances, this issue does not require to be considered further.

55. However, I consider that the issue as presented in the hearing of the appeal (despite the fact that it, again, was not raised in the trial) does indeed go to the heart of any case with multiple counts and multiple complainants, and requires further examination. From the point of view of trial judges and practitioners, these are complex issues. However, as framed by the facts of this case, the questions may be put in general terms. Could the jury, in principle, take into account the evidence of Ms. B. when considering a count relating to Ms. Q., and *vice versa*? Was it necessary for the judge to give specific instructions as to which evidence could be taken into account in relation to each count on the indictment?

### **The authorities**

56. In the instant case, obviously, allegations made by two complainants were tried together on the basis of one indictment. However, the discussion of the issues that can arise in such cases traditionally starts with the statement of principle that evidence of criminal behaviour by the accused on occasions *other* than those covered by the indictment is not admissible. The original authority is the decision of the Privy Council in *Makin v. Attorney General for New South Wales* [1894] A.C. 57 (“*Makin*”). The Makins were convicted of the murder of an infant whose body had been found in the garden of premises occupied by them. They had claimed that they had nothing to do with it. They said they had only ever received and cared for one baby, which they claimed to have looked after for a few weeks before returning it to its parents. It was established in evidence that the bodies of several babies had been found buried at premises previously occupied by them. The prosecution also led evidence that several parents, including the mother of the child named in the indictment, had given over their babies to the couple, together with, in each case, a sum of money that was too small to support the child for any length of time.

57. The Privy Council had no difficulty in finding that the evidence was relevant and was correctly admitted. The judgment contains the following well-known passage at p. 65:

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

58. On this analysis, therefore, evidence of this type must be relevant to an issue in the case. It will not be admitted if the only purpose or effect is to show that the accused has a particular criminal disposition, since the impact of that evidence would be prejudicial rather than probative. Presciently, the passage in the judgment continues by noting that the statement of these general principles was easy but that it might often be very difficult to decide whether a particular piece of evidence was on one side or the other.
59. *Makin* was expressly approved in a number of decisions by the Irish Court of Criminal Appeal in the 1920's. The case of *Attorney General v. M'Cabe* [1927] 1 I.R. 129 (“*M'Cabe*”) is a clear example. Six people were found dead in a house that had been set on fire. The medical evidence was that each of their deaths had been brought about before the fire was started. Six separate murder indictments were prepared. When the first one went to trial, evidence was given in relation to each of the bodies. In the appeal against conviction, it was argued that if the evidence about the other five deaths amounted to a felony or felonies, the jury should have been warned to exclude such evidence from their consideration of the question whether the accused had murdered the person named in the indictment. It was further contended

that they should also have been warned against the cumulative effect of such evidence upon the main issue.

60. The Court of Criminal Appeal found that the evidence relating to the bodies, their position and condition (including evidence of poisoning and of violence) was relevant and admissible. In its judgment, the Court quoted with approval from the 11<sup>th</sup> edition of Taylor on *Evidence*, where the reference to the above passage from *Makin* was followed by this sentence at p. 132:

*“Thus, when felonies are so connected together as to form part of one entire transaction, evidence of one may be given to show the character of the other.”*

61. Similarly, in *Attorney General v. Joyce and Walsh* [1929] 1 I.R. 526 (“*Joyce*”), evidence that one of the two accused in a murder trial had, to the knowledge of the other, put guano in the deceased’s milk “*a long time*” before the killing, was held to have been properly admitted. The incident was seen as one part of the entire transaction, presenting an aspect of the relations existing between the accused and the deceased. The length of time involved might affect the weight to be attached to it by the jury, but it was admissible. Lord Herschell’s principles in *Makin* were accepted by Sullivan P., with the further observation that evidence in a murder trial of, for example, former assaults on the deceased by the accused, or of expressions of malicious feeling, or of the existence of a motive likely to instigate the commission of the crime, would be admissible.
62. Along with *Makin*, reference was made to *R. v. Bond* [1906] 2 KB 389. In that case it was said that the general rule (that evidence must be confined to the point in issue) could not be applied if the facts said to constitute a different offence were, at the same time, part of the transaction that was the subject-matter of the indictment. Evidence was necessarily admissible if the acts in question were so closely and inextricably mixed up with the history of the offence charged that they formed part of one chain of relevant circumstances, so that they could not be excluded in the presentation of the case before the jury without making that case unintelligible.

63. In *Attorney General v. Kirwan* [1943] 1 I.R. 279 (“*Kirwan*”), the Supreme Court upheld a conviction for murder which was based in part on evidence involving proof that the accused had served a lengthy sentence of imprisonment. The contentious evidence of witnesses from the prison established three matters – that the accused had received training as a butcher and worked as such in the prison; that he had been treated for insomnia while in prison and was familiar with the effects of a certain drug which had been used to treat that condition; and that he had been in prison for four years, and therefore unable to earn money, until shortly before the death of his brother.
64. On appeal, the defence submitted that such evidence could only be adduced if it came within a well-established exception such as a necessity to negative accident or mistake, or to prove system or design. In effect, the argument was that the words used in the second limb of *Makin* amounted to an exhaustive list of the purposes for which such evidence could be introduced. The prosecution contended that it was admissible if it was relevant to an issue before the jury, unless the trial judge, in the exercise of his discretion, excluded it on the ground that the evidential value was so slight and the prejudicial effect so great that it should not be admitted.
65. Giving the lead judgment on this aspect of the case, O’Byrne J. endorsed Lord Herschell’s formulation in *Makin* as a correct statement of the law in the following terms (at pp.299-300 of the report):-

*“The rule, so enunciated, has been considered in a great number of subsequent cases in this country and in England, and I am not aware of any case in which its accuracy has been questioned. Various additions and amplifications have been suggested ; but these are merely for the purpose of testing the question of relevancy and the consequent application of the rule. It is stated in the rule that the proposed evidence may be relevant if it bears upon the question whether the acts alleged to constitute the crime were designed or accidental, or is required to rebut a defence which would otherwise be open to the accused. It seems clear that these tests were stated merely by way of illustration and were not intended to be comprehensive and*

*exclusive. The various subsequent cases to which we were referred in the course of argument were merely instances of the application of the rule to widely divergent facts, and of the qualification upon the strict enforcement of the rule where the proposed evidence has very little real value but is highly prejudicial to the accused.”*

66. Accordingly, it was considered that two propositions could be taken as established:

*“1. That evidence that the accused has committed offences, other than that charged in the indictment preferred against him, is never admissible for the purpose of leading the jury to hold that the accused is likely, by reason of his criminal conduct or character, to have committed the crime in respect of which he is being tried; and*

*2. The mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to some issue of fact which the jury is called upon to determine.”*

67. O’Byrne J. then added:-

*“As a corollary to, rather than a qualification upon, the foregoing rules, it must be taken as established that the trial Judge, in the exercise of his discretion, may refuse to admit evidence which is, strictly speaking, relevant to an issue before the jury if he 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.*

*There is another rule of law which is well established and is not the subject of controversy :- viz., that where felonies are so connected as to form part of one entire transaction, evidence of one may be given to explain and show the character of the other. See Attorney-General v. M’Cabe.”*

68. There are clear factual differences between *Makin* on the one hand, and *M’Cabe*, *Joyce* and *Kirwan* on the other. *Makin* was a relatively straightforward case,

involving a single count on the indictment, where evidence that the accused had committed other crimes in the past was clearly relevant to material issues in the case. The force of the evidence came, in the circumstances of that particular case, from its similarity to the evidence supporting the charge on the indictment. The finding of the bodies of other infants, at other premises linked to the defendants, effectively ruled out the defence made by the accused that they had had nothing to do with the death of the infant found buried at their current residence. Any suggestion of coincidence was simply incredible.

69. In *Kirwan*, on the other hand, there was no question of similarity and the dispute was in reality about the admission of evidence that showed the accused to be a person of bad character. The facts of the crime committed by him in the past were entirely irrelevant to the murder charge before the court, but it was relevant to prove that as a consequence of that earlier crime he had spent time in prison. The evidence that he had carried out skilled animal butchery while serving his sentence accounted for the manner in which the corpse of the deceased had been dismembered; his familiarity with luminal as a treatment for insomnia went to explain the fact that a potential witness in the household had slept through the relevant night; and evidence that he had not been in a position to earn money for the previous four years was relevant in circumstances where he had plenty of money after the death. The jury were not told the nature of the offence for which the sentence of imprisonment had been imposed and were specifically warned not to hold it against the accused.
70. In *M'Cabe*, the scenario was different again, in that the "misconduct" alleged was contemporaneous with the offence charged on the indictment. In theory, it could be argued that evidence relating to any one or more of the deceased persons not named in the indictment was not, in itself, probative of the accused's guilt in respect of the named person. However, the trial judge was held to have been correct in telling the jury that it would not be possible for them to segregate the case on the indictment from the evidence of the other deaths, and that they must deal with the case in the setting in which they found it. That setting was a burnt house with six bodies. This seems entirely sensible – it would have been impossibly artificial to run the trial on the basis that only one death had occurred, in circumstances where it was overwhelmingly likely that the same person was responsible for each of the deaths. In

different circumstances, in *Joyce*, the evidence relating to an incident that was not contemporaneous was nonetheless seen as being part of one transaction, demonstrating hostility or malice towards the victim.

71. The main point to be made here is that the Irish courts saw no difficulty in applying *Makin*. While it was accepted that the general principle was that evidence must be relevant to a matter in issue in the trial, it was also accepted that there would be some cases where a dividing line would be impossible to draw, but where it might be that the evidence was admissible as relating to the overall event or transaction giving rise to the charge.
72. A different approach seems to have been taken in *Attorney General v. Duffy* [1931] 1 I.R. 144 (“*Duffy*”), where the issue was framed in terms of joinder of counts and a requirement for a corroboration warning. The rules for indictments are set out in the first schedule to the Criminal Justice (Administration) Act 1924. Rule 3 provides that charges for any offences 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”. However, s.6(3) of the Act provides for severance of counts where it would be unfair to proceed with all counts:

*6(3) 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.*

73. In *Duffy*, the Court of Criminal Appeal quashed convictions relating to charges of indecent assault and gross indecency involving four young male complainants. The Court saw the evidence as indicating that each had consented to the actions of the accused and should therefore have been considered his accomplice. That meant that the jury should have been warned about the dangers of convicting on the basis of

uncorroborated evidence. It was argued on behalf of the appellant that the charges were unconnected, and that to try them together was to, in effect, supply corroboration for the evidence of each complainant where in law there was none. The Court agreed. In a short *ex tempore* judgment, Kennedy C.J. noted that the trial judge had stressed to the jury that they were to segregate the counts and consider the evidence relating to each one separately. However, the Court considered that human nature was too strong to have allowed the jury to disregard the cumulative effect of evidence given at the same trial in respect of four distinct offences of almost precisely the same character.

74. There is no reference in the judgment to *Makin*, or to any possibility that the similarity between the offences, or the number of accusers making similar accusations, might in fact have been an argument in favour of trying them together. The judgment does leave open the possibility of a trial involving connected charges, but in the following terms (at p.150):-

*“Nothing in our present judgment is to be taken as indicating that, in a proper case, a series of such similar or connected charges may not be tried together. The determination of whether this course is advisable or desirable or not depends on the circumstances of each case in which the question arises. It is because, in the circumstances of the present case, the trial of these four charges together may have contributed or led to a conviction, which could not have been obtained on a separate trial of any one of the counts in the indictment, that we hold that, in the interests of justice, a new trial should be ordered.”*

75. It might be thought that *Duffy* is in one sense closer to the issues raised in this appeal, in that it deals with the problem that arises when the “other” criminal behaviour is in fact also featured on the indictment, and it is intended that the jury is to hear all of the evidence, relating to all counts, in one trial. However, it was the development of the jurisprudence in relation to precisely that problem that made *Makin* the foundation of a body of authority dealing with what in English courts is generally called “similar fact” evidence. That jurisprudence has to some extent been adopted here, although



the Court of Criminal Appeal in *B.K.* preferred to use different terminology – hence the occasional use of the term “system” evidence.

76. *R. v. Sims* [1946] 1 K.B. 531 (“*Sims*”) may have been the origin of the phrase “striking similarity”. In that case, the appellant had been tried for a number of sexual offences alleged to have been committed with four other men, on four separate occasions. In his appeal it was argued that the charges should have been tried separately, on the basis that the evidence of offences against each of the men was not admissible in respect of the other men, and he had thereby been improperly prejudiced in his defence.
77. The Court of Appeal agreed that if the evidence was not admissible then, in the circumstances of the case, the appellant would indeed have been prejudiced and there should have been separate trials. (However, the court emphasised its view that the mere fact that evidence was admissible on one count and inadmissible on another would not in itself be a ground for separate trials, since the trial judge could often make matters clear in summing up without causing prejudice to the accused.)
78. The Court considered that, in principle, evidence of a series of similar acts by the accused on other occasions could be admissible for various reasons. One would arise if there was an issue as to whether the actions of the accused on the occasion under consideration was designed, accidental or done with guilty knowledge, because it was unlikely that a series of acts “*with the self-same characteristics*” would be carried out accidentally or inadvertently. Another was where there was an issue as to the nature of the acts done with or to another person, because “*human nature has a propensity to repetition and a series of acts is likely to bear the same characteristics*” (p.537). A third was where the identity of the perpetrator was in issue, where evidence of similar acts done by the accused could be relevant because of the unlikelihood that a number of witnesses would be mistaken as to identity.
79. Looking at the facts of the case before it, the Court of Appeal found a “striking similarity” in the evidence of the acts described by each of the men. The probative force of all of the acts together was much greater than one alone “*for, whereas the jury might think one man might be telling an untruth, three or four are hardly likely*

*to tell the same untruth unless they were conspiring together. If there is nothing to suggest a conspiracy their evidence would seem to be overwhelming.”*

80. While certain passages in *Sims* were subsequently firmly disapproved, both the phrase “striking similarity”, and the examples given of situations where the issue could arise, appear to have become embedded for some time in English law. However, it continued to be a problematic area. There are four decisions of the House of Lords from the early to mid-1970s, with several judgments in each. The final case in this sequence was *DPP v. Boardman* [1975] A.C. 421 (“*Boardman*”), which appeared to have settled the law for the next quarter of a century.
81. In *Boardman* a number of schoolboys had made allegations against a master. Under the rules applicable at the time, corroboration was a central issue in the trial. The trial judge had applied similar fact criteria in admitting, as potential corroboration, evidence of what he saw as “*abnormal*” acts where the accused had sought to play the passive role in an act of buggery. He had excluded other evidence that, in his view, demonstrated “*normal*” homosexual acts, because of the absence of any “striking” feature.
82. In the House of Lords, Lord Hailsham analysed the rationale for the first principle set out in *Makin*. There were two theories, both of which he considered correct, that justified this principle – either a) the evidence was simply irrelevant, as no number of similar offences committed by a person could go beyond making him a suspect and actually connect him with a particular crime, or b) the prejudice created by admission of the evidence outweighed its probative value. However, the second rule in *Makin* – that the mere fact that the evidence tended to show the commission of other crimes did not by itself render it inadmissible – was an independent proposition that should not be seen as an exception to the first. The point was that the door should not be opened so widely as to merge the two propositions together.
83. He noted (in dealing with the circumstances in which evidence of other crimes would be admissible) that the rules of logic and common sense were not susceptible of exact

codification. He went on, (at p. 425), with reference to both the Scottish and English authorities:-

*“The truth is that a mere succession of facts is not normally enough whether the cases are many or limited to two... There must be something more than mere repetition. What there must be is variously described as ‘underlying unity’ ..., ‘system...’, ‘nexus’, ‘unity of intent, project, campaign or adventure’ ..., ‘part of the same criminal conduct’, ‘striking resemblance”.*

84. Lord Hailsham noted that these expressions were *“highly analogical, not to say metaphorical”* and were not to be applied pedantically. He adopted the formulation of Lord Wark in *Ogg v. H.M. Advocate*, 1938 J.C. 152:-

*“The test in each case, and in considering each particular charge, is, Was the evidence with regard to other charges relevant to that charge?”*

85. The jury could treat the issue as one of degree and weight, but it was necessary for the trial judge to assert a line of principle before permitting the evidence to go to the jury. It was perhaps helpful for the judge to remember that what was not to be admitted was the prohibited chain of reasoning – if that was the only purpose to be served then the evidence would be inadmissible. The judge would have to ensure that the jury could properly come to the conclusion that to treat the matter as one of pure coincidence would be an affront to common sense. The cases where the evidence was admissible could not be codified into a series of tight propositions or categories, and each case had to be looked at in the light of its own facts.

86. Lord Morris asked, rhetorically, (at p. 440) what one boy’s evidence on one count proved in relation to the evidence of another boy on a different count:-

*“The answer must be that his evidence, having the striking features of the resemblance between the acts committed on him and those alleged to have been committed on John, makes it more likely that John was telling the truth when he said that the appellant had behaved in the same way to him.”*

87. Like Lord Hailsham, Lord Morris cautioned that the phrases and expressions to be found in the authorities must be used only as guides to principle. It was always for a jury to decide what evidence to accept, if told that they could take one incident into account when making a decision in relation to another. It was for the trial judge to rule, in his or her discretion, whether the circumstances were such that evidence directed to one count could be admissible as evidence when consideration was being given to another count “*if between the two there is such a close or striking similarity or such an underlying unity that probative force could fairly be yielded.*”
88. Lord Cross stated that the question must always be whether the similar fact evidence, taken together with the other evidence, would do no more than raise or strengthen a suspicion of guilt, or whether it would point to guilt so strongly that, if it was accepted as true, only an ultra-cautious jury would acquit in the face of it. He also observed that the evidence must be excluded if there was “*any real chance*” of the witnesses having concocted false evidence together.
89. Lord Wilberforce considered that words such as “*system*” or “*underlying unity*” were so vague as to be liable to misapplication. In his view, the same principle had to apply whether the charges were tried jointly or separately. The question had to be whether, if the accused had been tried only on a charge related to one complainant, the prosecution could have called a second complainant to give evidence in relation to a separate incident involving that second complainant. The general rule was that such evidence was not admissible and required exceptional circumstances to justify admission. Evidence that an offence of a sexual character was committed by A against B could not be supported by evidence that A committed an offence of a sexual nature against C, or against C, D, and E. He found that the distinctions such as that drawn by the trial judge, between “*normal*” and “*abnormal*” acts, lent an “*unattractive unreality*” to the law.
90. Although he ultimately concluded that the ruling had been within the trial judge’s discretion, Lord Wilberforce preferred the “*striking similarity*” analysis in *Sims*. Something more than similarity and absence of proved conspiracy was needed. Where the evidence was admissible, the probative force was derived from the

circumstance that the facts as testified to bore such a striking similarity that they must, when judged by experience and common sense, either all be true or be pure coincidence. The jury could, therefore, properly be asked whether the right conclusion was that all were true, so that each account was supported by the others.

91. Lord Salmon stated that the exclusionary principle was fundamental. It was not based on logic, but on policy – to admit such evidence would be unjust and would offend against the concept of a fair trial. In his view, the question was whether the evidence was capable of tending to persuade a reasonable jury of the guilt of the accused on some ground other than his bad character and his disposition to commit the sort of crime with which he was charged.
92. It may be noted that, although the convictions were upheld, there were differing views as to the features of the evidence which justified that conclusion. In general, the desire attributed to the appellant (to play the passive rather than active role) was considered to be just about sufficient, combined with other matters, although Lord Cross said that he had no idea whether or not such behaviour was unusual for a man of the appellant's age. Lord Salmon found support in the implausible nature of the appellant's account to the police, compared to what he would have expected to be the natural behaviour of a schoolmaster in a boarding school.
93. In 1991 the House of Lords returned to the issue in *DPP v. P.* [1991] 2 A.C. 447 (“*P.*”). The case concerned allegations of incest and rape by two daughters of the accused, and an application for separate trials had been refused by the trial judge. The Court of Appeal had quashed the convictions on the basis that the offences had not demonstrated sufficiently striking similarities. However, that Court indicated that it might be time for the House of Lords to reconsider this branch of the law, with the statement that it was “*difficult to understand and even more difficult to apply in practice*”.
94. On this occasion only one judgment was delivered in the House of Lords, by Lord Mackay. Having considered *Boardman* in some detail, he expressed the view that the case had led to an overemphasis on the question of “striking similarity”. It was not appropriate to single this out as an essential element in every case where a question

arose as to whether evidence of an offence against one victim should be heard in connection with an allegation against another. The essential feature was that the probative force of the evidence must be sufficiently great to make its admission just, notwithstanding its prejudicial effect. The probative force might be provided by striking similarities in the evidence about the manner in which the crime was committed, but admissibility did not depend upon that feature. Whether the evidence had sufficient probative force to outweigh the prejudicial effect must in each case be a question of degree.

95. The question for the trial judge, then, was whether there was material upon which one could conclude that the evidence of one victim, about what happened to that victim, was so related to the evidence given by another victim, about what happened to that other victim, that the evidence of the first provided strong support for the evidence of the second. Lord Mackay observed (at p. 462) that such a relationship could take many forms:-

*“...[A]nd while these forms may include ‘striking similarity’ in the manner in which the crime is committed, consisting of unusual characteristics in its execution the necessary relationship is by no means confined to such circumstances. Relationships in time and circumstances other than these may well be important relationships in this connection. Where the identity of the perpetrator is in issue, and evidence of this kind is important in that connection, obviously something in the nature of what has been called in the course of argument a signature or other special feature will be necessary. To transpose this requirement to other situations where the question is whether a crime has been committed, rather than who did commit it, is to impose an unnecessary and improper restriction upon the application of the principle.”*

96. *P.* remained the leading authority in England and Wales until the enactment of legislation in that jurisdiction in 2003 dealing with evidence of bad character. The position in the interim, therefore, was that the prosecution could introduce evidence that the accused had committed offences other than those covered by the indictment if the probative value of such evidence outweighed its prejudicial effect.

97. The decision in *P.* was cited in the judgment of the High Court in this jurisdiction in *B. v. The Director of Public Prosecutions* [1997] 3 I.R. 140 (“*B. v. DPP*”). The applicant sought an order of prohibition in relation to charges of a number of sexual offences. He argued, *inter alia*, that there was an unfair number of charges on the indictment. On this aspect, Budd J. ruled that the question of fairness would ultimately fall to be determined by the trial judge. However, he also found the authorities on “similar fact” evidence to be relevant. Having cited *Makin* and *Boardman*, he stated, with reference to *P.*, that the latter laid emphasis on the positive probative value of the evidence, rather than using “striking similarity” as the test for admissibility. That was, as he saw it, because such similarity was just one of the ways in which evidence might exhibit the exceptional degree of probative force required for admissibility. Therefore, to insist upon it to an equal degree in all cases would be incorrect.
98. Significantly, Budd J. considered that the principles to be applied in cases of multiple charges did not differ materially from those applicable where similar fact evidence was used to rebut an explanation otherwise open to the accused – indeed, the function of evidence of multiple accusations was often to rebut such an explanation. Therefore, where an accused faced more than one allegation of a similar nature, the evidence of one accuser might be admissible to support the evidence of another and might in some cases amount to corroboration.
99. However, at p. 157 of the judgment Budd J. stressed that he was not suggesting that the mere existence of multiple accusations made the evidence admissible. It was still essential that there should be a sufficient degree of probative force to overcome the prejudicial effect of such evidence. Consideration would have to be given to factors such as the potential corroborative status of the evidence, and any risk of collusion or unconscious influence. Concluding on this aspect, he said:-

*“It seems that the underlying principle is that the probative value of multiple accusations may depend in part on their similarity, but also on the unlikelihood that the same person would find himself falsely accused on various occasions by different and independent individuals. The making of*

*multiple accusations is a coincidence in itself, which has to be taken into account in deciding admissibility.”*

100. In *The People (DPP) v. B.K.* [2000] 2 I.R. 199 (“*B.K.*”), a staff member in a residential institution was charged on one indictment with assaulting five young boys. An application for the severance of the indictment was made on the basis of the argument that had succeeded in *Duffy* – that to try all the counts together would, in effect, provide corroboration where there was none in law. The prosecution relied on the Indictment Rules and on the proposition that there was a sufficient similarity between the offences to justify a joint trial. The trial judge accepted a proposal by the prosecution that it should proceed with the counts relating to three complainants only. The jury disagreed on the two counts relating to one complainant, but convicted the appellant on two counts of attempted buggery with respect to the other two individuals. He appealed on the ground, *inter alia*, that each of the counts insofar as they related to a different boy should have been tried separately.

101. Delivering the judgment of the Court of Criminal Appeal, Barron J. stated the general proposition in the following terms (at p. 203):

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

102. The judgment continues by setting out the test for such admissibility (at p. 203):

*“For such evidence to be so admissible, it would be necessary for the probative value of such evidence to outweigh its prejudicial effect. In practice, this test is applied where there is a similarity between the facts relating to the several counts. On the one hand, there is system evidence which is so admissible; and, on the other hand, there is similar fact evidence, which is*



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

*There is a clear line of division between these two types of evidence even though it may be difficult in an individual case to say which side of the line the particular case falls...*

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

103. Barron J. went on to consider the authorities as they stood at that time. Having referred to *Sims, Boardman, P. and B. v. DPP*, he set out (at p. 210) the following principles as deriving from them:-

- (1) “The rules of evidence should not be allowed to offend common sense.*
- (2) So, where the probative value of the evidence outweighs its prejudicial effect, it may be admitted.*
- (3) The categories of cases in which the evidence can be so admitted, is not closed.*
- (4) Such evidence is admitted in two main types of cases: -*
  - (a) to establish that the same person committed each offence because of the particular feature common to each; or*
  - (b) where the charges are against one person only, to establish that offences were committed.”*

104. In a case where (4)(b) applied, the evidence would be admissible because (at p. 211):

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- a) *“there is the inherent improbability of several persons making up exactly similar stories;*
- b) *it shows a practice which would rebut accident, innocent explanation or denial.”*

105. Applying this analysis to the facts of the case, the Court of Criminal Appeal quashed the convictions because, in its view, there was not a sufficient nexus between certain of the counts involving different complainants. This conclusion appears to have been reached on the basis that some allegations involved the dormitory, while others involved a caravan. Also, some offences were alleged to have been committed openly, so far as the complainant was concerned, while others were furtive.
106. It is not easy, in truth, to make out from the judgment why these differences were thought to be conclusive, unless the Court was applying a standard of “exact similarity”. There is no discussion of the potential applicability of the rationale for admitting evidence in a situation covered by No.4(b) or of the principles already set out in the judgment. The Court did take a different view in relation to two counts, involving allegations of “broadly” similar actions committed furtively in the caravan, while the accused and complainant slept in the same bed. These were found to have displayed sufficient similarities to make it a jury question as to whether the offence alleged on each count had been committed. However, the inclusion of evidence relating to the other counts was held to have created unfair prejudice resulting in an unfair trial. That was so, despite the instruction given to the jury that each count should be treated separately.
107. It might be observed here that, in an era when the courts have considerably more experience of trials of this nature, a key feature of the case against the accused would probably now be seen in the fact that a number of individuals who had during their childhood been in his care, and under his control, had alleged that he abused them when opportunities presented themselves. It is by no means apparent why it should be thought significant that some of those opportunities arose in a dormitory, and some in a caravan, when on each occasion the accused was the adult in charge of young boys. In my view, this result reflects the risk of treating the concept of similarity as setting down some form of “bright line” rule of admissibility, when it

should be seen as simply an illustration of one way in which evidence of other offences may have probative value.

108. It is also somewhat unclear whether Barron J. was to any extent endorsing the various English authorities cited in the judgment. The reference to “exactly similar stories” seems to reflect the tenor of the judgments in *Sims* and *Boardman*. The passage from *P.* set out in para. 90 above was quoted, with the comment by Barron J. that the last sentence in it had “an element of obscurity”. He read it as meaning only that if the identity of the perpetrator was unknown then some special feature was necessary before evidence would be admissible to show that it was the same perpetrator in each case. However, that special feature would not be necessary where the identity was known, because the issue in such cases was whether or not the crime had been committed. There is no indication as to what the Court thought of the analysis of Budd J. in *B. v. DPP*, who saw the decision in *P.* as cautioning against overemphasis on similarity and urging concentration on relevance.
109. In *DPP v. G.(L.)* [2003] 2 I.R. 517 (“*G.(L.)*”), the *B.K.* judgment was seen as an affirmation that *Duffy* and *Sims* represented the law in this jurisdiction, i.e. that if evidence on one count was inadmissible on another then the court would have to consider whether the accused would be prejudiced in his defence so as to make it desirable to order separate trials. However, the judgment in *G.(L.)* (delivered by Keane C.J.) stressed that there was no inflexible rule requiring separate trials purely because of such inadmissibility.
110. The Court in *G.(L.)* also saw *B.K.* as affirming the principle that, although a corroboration warning might no longer be required, the views expressed in *Duffy* and *Sims* were still the basis for treating evidence in respect of a count concerning one complainant as inadmissible in respect of a count concerning a different complainant. *B.K.* was also cited for the proposition that the principles to be applied in determining whether such evidence was admissible differed, depending on “*whether the offences are alleged to have been committed by the same person*”. Where that was the case, then, as Budd J. had said in *B. v. DPP*, the probative value of multiple accusations might depend upon their similarity but also on the unlikelihood of false accusations from different and independent individuals relating to various occasions.

111. The complainants in *G.(L.)* were sisters of the accused. He had made an unsuccessful application for severance of the indictment. As summarised in the judgment, the evidence of the first complainant was that he had raped her on some fifteen to twenty occasions over a five-year period, and had otherwise indecently assaulted her, when she was aged between 8 and 13. The second complainant's allegation related only to a single occasion during that period, when he had attempted penetrative intercourse and then had oral sex with her, when she was aged between 4 and 6. The appellant contended that the evidence in respect of the counts concerning the first complainant was not evidence in respect of the count concerning the second complainant, and *vice versa*. He submitted that in those circumstances there was a danger that the jury would have regard to the cumulative effect of evidence in respect of offences of the same character.
112. The Court of Criminal Appeal thought that it was "clear" that the evidence in respect of each count could properly be regarded as similar fact evidence, as the phrase was used in the (English) authorities. The evidence of each complainant would not, therefore, have necessarily been inadmissible in relation to counts concerning the other, on the grounds that its probative value outweighed its prejudicial nature. While it would have been preferable if the trial judge had expressly ruled on the question of admissibility at the time of the application for separate trials, the Court was satisfied that the evidence of one complainant was admissible in respect of the other complainant. Accordingly, it was within the trial judge's discretion to refuse to direct separate trials.
113. However, the Court found that, although the evidence was admissible, it was a case in which it was incumbent on the trial judge to direct the jury in clear terms that they should consider the evidence in respect of the counts relating to each complainant "entirely" separately, and to arrive at their conclusions in respect of each complainant's version separately. Instead, it was possible that his charge might have been treated by the jury as an invitation to consider the evidence cumulatively. The convictions were quashed because of this and other defects in the charge.

114. As with *B.K.*, I have some difficulty in discerning the basis for the conclusions of the Court of Criminal Appeal in *G.(L.)* that the evidence in the trial under consideration met the standard for “similar fact” evidence. It may have been clear on the transcript, but the judgment does not seem to me to reveal any particularly solid basis for finding that the *B.K.* test had been met, particularly if one is to look for exact similarity. Having found that there was sufficient similarity to render the evidence admissible, the Court seems to have considered that that finding disposed of the question whether the evidence was more probative than prejudicial. Finally, it is unclear why, exactly, if the evidence of each complainant was admissible in respect of the other, the trial judge should have told the jury to consider the account of each complainant entirely separately. The difficulty here may, however, arise from the entanglement of issues relating to separate trials and the cross-admissibility of evidence.
115. It is not entirely clear what the Court meant by distinguishing cases where it was alleged that all of the offences in question were committed by the same person, but it seems to derive from the interpretation of *P.* by Barron J., referred to above. I am not sure that this interpretation is correct. Lord Mackay was not, in my view, proposing a different test for the category of cases where the prosecution seeks to rely on striking similarities between several distinct offences to prove that the same person committed all of them, as opposed to the category of cases where a number of people have alleged that the accused committed distinct offences against each of them. The point was that in the former category the similarities could, *if sufficiently relevant and probative*, justify the admission of evidence that would otherwise fall foul of the general rule against the giving of evidence tending to show that the accused had committed crimes other than those being considered by the jury.
116. So, for example, the fact that a person charged with burglary had previous convictions for burglary would not in principle be admissible, but it might be otherwise if each of his previous burglaries had some very striking feature that was also present in the case before the jury. However, what the House of Lords was saying was that similarity was not a requirement in every case where it was sought to establish an exception to the general rule, because the necessary probative force could arise from some circumstance other than similarity.

117. In *The Director of Public Prosecutions v. McNeill* [2011] IESC 12, [2011] 2 I.R. 669 (“*McNeill*”), a decision of this Court, the single complainant had alleged that the accused had subjected her to prolonged and frequent sexual abuse over a period of about eight years when she was aged between 9 and 17. The prosecution had preferred an indictment with eight counts of rape and indecent and sexual assault, but made it clear at the outset of the trial that it was intended to lead all the evidence outlined in the complainant’s statements. The counts on the indictment were intended to represent different offences, in different locations, at different times. The specific problem giving rise to this course of action was, as described in the judgment of O’Donnell J., the commonly observed fact that in most cases where an adult alleges prolonged abuse when a child, he or she will rarely be able to distinguish separate incidents of abuse and will tend to recall only that the same, or similar, things happened on a regular basis. However, the prosecution took the view (shared by the defence and, indeed, all members of the Court) that it would be manifestly oppressive to the accused to present an indictment alleging separate offences on a daily or weekly basis over a number of years.
118. The defence argued that the misconduct evidence sought to be adduced did not come within the exceptions to the rule against “background” evidence in Irish law. The trial judge ruled that since the issue of consent was going to be a feature in the case, the admission of evidence relating to the background of continuous engagement between the two, involving offences not in the indictment, was necessary to attain justice.
119. The Court of Criminal Appeal referred to *B.K.* as having established that the balancing test (between probative value and prejudicial effect) was the “touchstone” of admissibility. Although it affirmed the convictions, the Court certified a point of law for an appeal to this Court in the following terms:-

*“Is evidence of connected background history, which might disclose matters not laid down in the indictment and, possibly prejudicial to the accused, but which is essential or helpful to the jury understanding the charges actually laid in the indictment, admissible in a criminal prosecution?”*

120. The issue was thus framed in terms of “background” evidence, meaning evidence admitted because it forms part of the background context within which the offences are alleged to have occurred, as opposed to misconduct, similar fact or system evidence. *McNeill* appears to be the first Irish authority to consider the admissibility of such evidence under this description, but it is clear from the judgments that it was well-established in some other common law jurisdictions. Nonetheless, the overlap with the other concepts is clear from the fact that the leading judgment, that of Denham J., refers to and approves *R. v. Bond, Joyce, Kirwan and Boardman*.
121. Denham J. (with whom Macken J., Finnegan J., and O’Donnell J. agreed) defined “background” evidence as follows in paragraph 48:-

*“‘Background evidence’, in the context under consideration, has a specific meaning. It is evidence which is relevant and necessary to a fact to be determined by the jury. It may be admitted to render comprehensible the relationship between the complainant and the accused. Thus it may relate to such issues as consent, or the absence of a complaint over many years. These examples are not exhaustive of the circumstances where background evidence may be admitted. In such circumstances, even if the ‘background evidence’ is of alleged criminal acts not charged on the indictment, such background evidence is not inadmissible and it should not be excluded as such.*

*Background evidence may be admitted to give a jury a relevant picture of the parties in the time prior to the offences charged. Background evidence may be admitted because if it were not admitted it would create an unreal situation. It arises in situations where if no background evidence was admitted, the evidence before the jury would be incomplete or incomprehensible.*

*Background evidence is evidence which is so closely and inextricably linked to the alleged offences and/or the relations between the relevant persons so as to form part of the body of evidence to render it coherent and comprehensible.”*

122. The test for admissibility, accordingly, was whether the evidence was relevant and necessary, and not merely whether it was helpful to the prosecution. Denham J.

reaffirmed the general rule that evidence that an accused has committed offences other than those charged on the indictment is not admissible for the purpose of leading a jury to hold that the accused is likely, by reason of his criminal conduct or character, to have committed the crime with which he is charged. However, the mere fact that the evidence adduced tends to show the commission of other offences does not render it inadmissible if it is relevant and necessary to some issue of fact which the jury is required to determine. Then, with particular reference to background evidence, she stated that it was admissible if it was necessary to render comprehensible the fact or facts to be determined.

123. O'Donnell J. delivered a separate judgment in which he agreed with Denham J. He observed that the statement that evidence of previous bad character was inadmissible, or inadmissible save in exceptional circumstances, had been the source of much confusion. He considered that the true position was as set out in *Makin* – the evidence was inadmissible if the purpose of introducing it was to show that the bad character of the accused made it more likely that he had committed the offence for which he was being tried. O'Donnell J. therefore saw the purpose of the evidence as being the crucial consideration. What was forbidden was to decide on guilt or innocence “*by a reasoning process that gives credence to the adage of giving a dog a bad name.*” As Lord Salmon had pointed out in *Boardman*, this fundamental rule was based on policy rather than logic. The reasoning process was excluded, not because it had no value (as it clearly would in a police investigation) “*but rather because it is toxic to the forensic process of a fair trial.*”

*“Evidence of propensity to commit an offence by reference, for example, to previous convictions for the same offence, infects and corrupts the careful process of the sifting of evidence by reference to the standard of proof required in criminal cases. In some cases it will overwhelm that process. It is evidence, or perhaps more correctly, reasoning which in every sense of the word is prejudicial. It deflects the jury from the task of considering the evidence to allow it to determine whether it is satisfied beyond a reasonable doubt that the accused did the act alleged, and encourages it to conclude instead that he must have done it because he was proved to have done something wrong on another occasion.”*



124. This passage encapsulates the fundamental basis for the general rule excluding evidence of other offences. O'Donnell J. continued:

*“This also explains the second limb of the observation contained in Lord Herschell’s speech. In any case, evidence which tends to show bad character on the part of the accused may nevertheless be adduced in a trial if it is adduced not for the purpose of proving guilt by propensity but rather for the purposes of tending to prove something that is an issue in the case. It follows that where such evidence is admitted, the jury should be informed as to the true purpose for which such evidence is admitted and warned of the danger of treating evidence of previous wrongdoing as itself proof of the wrongdoing charged.”*

125. In the light of those principles, O'Donnell J. considered that the evidence was admissible. It was not adduced for the purpose of inviting the jury to conclude that the appellant was guilty because he had a predisposition to commit this type of offence. It was admitted because it was an intrinsic part of the story necessary to understand the circumstances in which the complainant said she was abused by him over a protracted period of time. The essential issue in the case was the credibility of the complainant, and the evidence of incidents other than those charged had the same strengths, and the same weaknesses, as her evidence in relation to the incidents charged.

126. It must be noted that Denham J. did not refer to *B.K.*, and that O'Donnell J. did so only in relation to the statement that it would be an error to attempt to draw up a closed list of the sort of cases in which the principles under consideration operate. What was important was the application of principle, and the use of labels or definitive descriptions could not be either comprehensive or restrictive.

127. In *The People (DPP) v. McCurdy* [2012] IECCA 76, the appellant had been convicted on three counts of sexual assault against three complainants. One ground of appeal was that the trial judge had erred in instructing the jury on the issue of corroboration as between the complainants. The defence had not applied for

severance of the indictment. The prosecution had not made an application for the admission of system evidence, but had opened the case to the jury on the basis that while there were similarities in the way each girl was assaulted, the counts were to be approached as three separate cases. However, when the question of a corroboration warning arose, the prosecution contended that it was a clear case of system evidence. The trial judge commented that this was why the charges were being heard together.

128. Giving the judgment of the Court of Criminal Appeal, Hardiman J. cited a dictum of Lord Cross in *Boardman*, quoted in *B.K.*, to the effect that the admissibility of similar fact evidence should if possible be determined in the absence of the jury at the outset of the trial. If it is decided that the evidence is inadmissible, the charges relating to the different persons ought to be tried separately. Hardiman J. observed that there had been no application to sever, which would have been the logical step to take if the defence thought that the evidence of each complainant was admissible only in respect of the count alleging assault against her. The defence were, therefore, fully on notice that the prosecution case was that the evidence on each count was relevant to the other counts, and that the evidence showed that the type of assault in each case “was of a specific type”.
129. The judgment notes that evidence of the kind in question could be admissible on a number of grounds. In this context the following passage from McGrath, *Evidence* (1<sup>st</sup> ed., Thomson Roundhall, 2005) was quoted with approval:

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

130. The judgment continues:

*“Accordingly, it seems that evidence of multiple accusers may be admissible or ‘cross-admissible’ on ordinary principles in order to show system or rebut accident. It may, if the accusations are accepted as being independent of each other, also have a corroborative effect. Such evidence may in certain cases exhibit both of those characteristics, quite separately. It is very important that the law of evidence should be realistic according to the ordinary instincts of mankind. This aspect is very well put by Budd J. in B. v. D.P.P. [1997] 3 IR 140 at p.157/8 where he said:*

*‘It seems that the underlying principle is that the probative value of multiple accusations may depend in part on their similarity, but also on the unlikelihood that the same person would find himself falsely accused on various occasions by different and independent individuals...’*

*[I]n our view, this statement of Mr. Justice Budd is sound law and sound commonsense, which we would disregard at our peril. The learned judge was not, of course, ignorant of the risks of collusion...”*

131. Hardiman J. then dealt with the question of corroboration. It was for the trial judge to determine, and instruct the jury, whether particular evidence was capable of being corroborative, and for the jury to decide whether the evidence in question actually was corroborative in the circumstances of the case. The trial judge’s directions had been correct in this regard. The evidence of each of the complainants was available to be considered as system evidence and also, to the extent it was accepted, as evidence corroborative of the other accounts.

132. *The People (DPP) v. C.C.* [2012] IECCA 86 was a judgment of the Court of Criminal Appeal delivered in December 2012. It involved allegations against a retired teacher, made by three complainants who had been taught by him between 1968 and 1972,

and a further two who had been his pupils between 1973 and 1978. Ultimately, 35 counts involving four complainants, each of whom alleged that they had been indecently assaulted in class, were left to the jury. The prosecution presented its case in terms of “system” evidence, and, with reference to the reasoning of Barron J. in *B.K.*, argued that it was admissible “because of the inherent improbability of several persons making up exactly similar stories, or by showing a practice which would rebut accident, innocent explanation or denial”.

133. In charging the jury, the trial judge had given a corroboration warning with the instruction that the evidence of each complainant was capable of acting as corroborative support for the complaints of the others. He distinguished certain incidents where there was direct eyewitness evidence, and also pointed out that certain evidence (such as general evidence that boys were brought up to the teacher’s desk) could not amount to corroboration but could be considered in the overall context of the assessment of credibility.
134. The judgment of O’Donnell J. in the Court of Criminal Appeal deals with a number of issues that might be expected to arise in a case of such antiquity but describes the interlinked questions of corroboration and the admissibility of “system” evidence as being at the heart of the case. It is important for present purposes to note that the Court accepted that the evidence of one complainant was admissible in support of another “and could therefore provide corroboration”. However, it considered that on this aspect the judge’s charge was insufficiently clear and detailed, and had misdescribed the effect of certain evidence. The general proposition that the evidence of each complainant could be corroborated by the evidence of the others had been followed by an instruction that the evidence of two of them was unsupported by corroborative evidence. Further, in the context of a trial where the evidence of the complainants was largely lacking in detail, it seemed likely that the jury would have been significantly influenced by the fact that evidence was given by a number of complainants.
135. It is noted in the judgment that there had not been submissions from counsel about either the admissibility of evidence or the instruction to the jury that the evidence of one complainant was admissible in support of the evidence of another, and could

therefore provide corroboration. The law on this area was described being “*far from clear or indeed satisfactory*”. The Court considered that the question of admissibility should have been specifically addressed. Where evidence was found to be admissible, this should have been explained to the jury. More importantly, in the view of the Court, the jury should have been told why it was admissible. The general rationale – that a fact finder is entitled to place considerable reliance on the fact that a number of people have, independently and in the absence of collusion, come forward and described incidents “*containing perhaps a single distinctive element or signature*” – was acknowledged to be a strong argument for admissibility. However, where a jury is inclined to adopt such a line of reasoning, it must also be made aware of and take into account any factors that tend against such a clear-cut case (such as any indication of suggestibility, contamination of evidence, copy-cat evidence or collusion) if only for the purposes of excluding them.

136. At paragraph 38, the judgment stresses that the jury must be conscious of the process of reasoning that it is adopting:-

*“In the first place, if a jury concluded in relation to any one complainant that the case was compelling and that they were satisfied beyond any reasonable doubt of the guilt of the accused in relation to such incidents, then they could consider that it was now more likely that the account given by another complainant of a similar incident was true. However, it is also logically possible for a jury not to be satisfied beyond any reasonable doubt on the individual evidence relating to any **single** complainant or incident, but nevertheless to reach that point of being satisfied beyond reasonable doubt by virtue of the range of offences in respect of which evidence has been given, their interconnection, and the unlikelihood that the evidence in respect of each of the complaints is either the product of collusion or chance. But it is important that the jury should recognise which of these courses it is contemplating because it is obviously important to recognise, if indeed that is the case, that the jury is not satisfied beyond reasonable doubt on the individual evidence taken alone, and therefore the reliance being placed on the system evidence is that much greater. None of this is comprehended by a*

*general statement that the evidence of one complainant is admissible in relation to another.” (Emphasis in the original.)*

137. It is acknowledged in the judgment that neither this issue, nor questions relating to possible contamination or collusion, whether conscious or unconscious, had been raised by the defence. Nonetheless the Court found that that the lack of effective guidance for the jury called the safety of the convictions into doubt.
138. While the analysis in relation to the two possible processes of thought is undoubtedly logical, I have reservations about the extent to which it would be permissible to engage in the second. I do not consider it appropriate to instruct a jury that they may convict, even if not satisfied beyond reasonable doubt by the evidence in respect of any single count. Although the passage stresses that this could only arise having regard to the range of offences, their interconnection and the unlikelihood of collusion or coincidence, it may come perilously close to a suggestion that an accused may be convicted simply because of the number of people who have made allegations against him, regardless of the poor quality of the evidence. In my view, the fundamental point is that while the inherent improbability that a number of individuals have independently made false allegations can be seen as supportive evidence, it cannot act as a substitute for proof of guilt.
139. The case of *DPP v. Shannon* [2016] IECA 242 presents unusual facts. The appellant had originally been charged with damaging a painting in the National Gallery in 2012. His defence was that he had suffered a coronary episode and fell against the painting, with the resulting damage being accidental. A trial took place in December 2013, the jury could not agree on a verdict and the matter was put back for retrial. In January 2014, two paintings in an empty function room in the Shelbourne Hotel were damaged. It was established that the appellant and his nephew had been in the vicinity of the room. He denied culpability and said that he had been looking for the hotel spa.
140. An indictment was then preferred containing counts in respect of each of the three paintings. The defence sought separate trials, arguing that to combine the two incidents in one trial was to introduce inadmissible and prejudicial similar fact

evidence. The prosecution contended that it was entitled to proceed on the basis that the evidence of the second incident went to negative the defence of accident in relation to the first, and that the two incidents together showed a motive on the part of the appellant that distinguished him as a suspect, in contrast to his nephew. The trial judge refused to sever the indictment at that stage. However, at the close of the prosecution case he directed verdicts of “not guilty” in respect of the Shelbourne paintings. This was, apparently, on the basis that the prosecution had not called expert evidence to establish the rarity of criminal damage to publicly displayed artworks. The jury convicted in relation to the National Gallery incident.

141. In upholding the conviction, the Court of Appeal (in a judgment delivered by Edwards J.) disagreed with the submission by the prosecution that the adoption in *B.K.* of the balancing test, advocated by Lord Wilberforce in *Boardman*, could be relied upon as still representing the law in this jurisdiction. *B.K.* had received no support in *McNeill*, where the approach of *Makin* and *Kirwan* had been affirmed. Edwards J. proposed, therefore, (at paragraph 39) the following set of principles as applying to the question of admissibility:-

*“(a) “Misconduct evidence is not admissible for the purpose of inviting the jury to infer from it that the accused is a person who, by reason of his disposition or bad character, is likely to have committed the offences charged.*

*(b) Misconduct evidence can be admitted in evidence if (i) it is relevant to and sufficiently probative of an issue in the proceedings, (ii) its admission is necessary, and (iii) there is sufficient proof of the commission of the acts of misconduct.*

*(c) A trial judge has a discretion to exclude misconduct evidence which would otherwise be admissible if its probative force is outweighed by its prejudicial effect.*

*(d) In any case where misconduct evidence is admitted and there is a risk that the jury may draw the inference that the accused is likely, by reason of his other criminal conduct or character, to have committed the offences upon which he or she is charged, the trial judge should instruct the jury as to the*

*limited purpose for which the evidence has been admitted and warn them not to draw such an inference.”*

142. On the facts of the case, the Court of Appeal considered that the trial judge had correctly exercised his discretion not to sever the indictment, on the basis that the Shelbourne evidence could be relied upon in the respect of the National Gallery incident. It was evidence that could properly be described as “system” evidence, it was sufficiently probative, and it potentially rebutted the defence of accident. There were some striking similarities that made it inherently probable that the appellant had committed the offence charged.
143. It was noted in the judgment that the trial judge had expressed concern about the converse proposition – that the National Gallery evidence could be relied upon in respect of the Shelbourne incident. However, the Court of Appeal found it unnecessary to consider this aspect, given the fact that the judge had directed acquittals on the Shelbourne charges. The judgment then moved on to consider whether the jury should have been discharged after the directions had been granted. The trial judge had refused a discharge, but instructed the jury that they were to ignore all of the evidence that they had heard in respect of the Shelbourne. The Court of Appeal considered that this was sufficient in the circumstances, given that the two incidents were separated in time and space and there was no overlap of witnesses.

### **The treatment of misconduct evidence when admitted**

144. In *R. v. Kilbourne* [1973] A.C. 729, Lord Simon said that if it was accepted that direct evidence on one count was relevant to another by way of circumstantial evidence, it followed that it was available by way of corroboration, if corroboration was required. In *P.*, Lord Mackay stated that the principles which determined whether evidence in relation to one offence was admissible in respect of another were the same as those which determined whether one piece of evidence could corroborate another, indicating, again, that the evidence played the same role as corroborative evidence.



145. The House of Lords addressed the relationship between similar fact evidence and corroboration again in *R. v. H.* [1995] 2 A.C. 596. The trial judge had directed the jury that if they were sure that the two complainants had not collaborated with each other, then the evidence of one, if found to be reliable, could corroborate the other as similar fact evidence. For the purposes of this issue, Lord Mackay initially distinguished between corroboration and similar fact evidence, noting that independence was a requirement of the former but not of the latter. However, having stressed the view that any circumstances pointing to collusion or other contamination should be before the jury so as to assist in the assessment of its reliability, he considered that if a jury could be sure that the evidence was not contaminated, and was reliable, then it could be treated as corroboration. The other members of the House of Lords came to similar conclusions, albeit with varying nuances.
146. The English authorities on this aspect must however be treated with caution, for two reasons. The law relating to corroboration has diverged to a certain extent between the two jurisdictions, and in England “corroborative” may in some cases simply mean what would be described here as “supportive”. In this jurisdiction evidence is capable of being regarded as corroborative only if it fulfils the classic criteria of being independent evidence that implicates the accused in the offence charged (see *The People (DPP) v. Gilligan* [2005] IESC 78, [2006] 1 I.R. 107 and, more recently, *The People (DPP) v. Power* [2020] IESC 13, [2020] 2 I.L.R.M. 279. However, admissibility is a separate issue. Evidence may be admissible without being corroborative, and if it is admissible then it is open to either side to argue, as best they can, that it supports a particular case being made. It may also be the case, depending on the facts, that the evidence does in some respect provide corroboration.
147. In the instant case, counsel for the appellant has suggested that misconduct evidence, where admitted, should perhaps be seen as a form of circumstantial evidence. I think that this is a useful description, that might well be used to explain to juries the manner in which it should be considered by them.

## **Discussion and conclusions**

148. The foregoing lengthy summary of the case law may seem to have been unnecessary in circumstances where one of the few items of agreement between the prosecution and the defence is that this case did not involve “system” or “similar fact” evidence. However, it will have been seen that the same or similar questions, dealt with in accordance with the same or similar principles and authorities, can arise in relation to the admissibility of that type of evidence, in relation to the joinder of charges in an indictment, and in relation to the treatment of the evidence of multiple complainants as potentially supportive or corroborative.
149. There are certain important principles that must be borne in mind at all times. The first is that an accused person should be convicted of a criminal offence only on the basis of evidence that is lawfully presented to the finders of fact. The second is that the rules of evidence are intended to assist in the fulfilment of that objective. They should not, as Barron J. said, offend the rules of common sense. If they are not comprehensible and soundly based they are likely to be ignored. That means that they must, where necessary, be capable of being explained to and applied by a jury of laypersons hearing them for the first time. Any proposed rule that would, for example, require a jury to follow a six-step process in considering some piece of evidence is likely, in my view, to fail to meet that test.
150. For similar reasons, 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. 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.

151. The rules relating to the joinder and severance of charges are as set out in the Indictment Rules and s.6 of the Criminal Justice Act. It may be the case, as Barron J. believed, 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.
152. If the defence believes that it is indeed prejudiced by the joinder of charges, or wishes to challenge the admissibility of some part of the evidence, the appropriate time to raise that issue is, if possible, before the opening of the trial to the jury.
153. So far as it is relevant here, it should be reiterated that in this jurisdiction the principles relating to the admission of evidence that the accused person committed offences other than those charged in the indictment are those established in *Makin*, *Joyce* and *Kirwan*. Those principles may be summarised as follows:-
  - 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.

154. It seems clear that over the intervening decades the concept of “similar fact” evidence has at times been found unclear and unsatisfactory. This may be due to a tendency, noticeable in many areas of law, to attempt to categorise potential fact scenarios and to draw “bright line” rules. This tendency can often result in increasingly artificial distinctions, as seems to have happened with the *Sims/Boardman* line of authority. An insistence on “striking similarity” between the acts alleged against the accused overshadowed the underlying, consistent nature of the factual circumstances and the relationship between complainants and accused. Thus, the English Court of Appeal in *P.* had concluded that the convictions had to be quashed because it could not find similarities that went beyond what was referred to in *Boardman* as “the incestuous father’s ‘stock in trade’”. Here, the Court of

Criminal Appeal in *B.K.* found the difference between assaults in a dormitory and assaults in a caravan to be significant to the point of invalidating the convictions. I would hold that this is a mistaken approach.

155. I have read in draft the judgment of Charleton J. and I agree with it. Having regard to that judgment and to the foregoing discussion, I will attempt to avoid setting out categories, or illustrations, that might tend to be read as exhaustive. The following principles are intended as guidance to trial judges, subject at all times to the overriding requirement to ensure a fair trial:-

- 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.

### **Decision in this case**

156. In my view, the evidence of each of the two complainants in this case was admissible in respect of each count on the indictment, under the principles set out above. This

conclusion is reached, not because of any underlying feature of “system” or “striking similarity”, but on the basis that each of them could properly have been called to give evidence in a trial involving only the counts relating to the other. It is, I think, uncontroversial to say that if the prosecution had for some reason elected to proceed firstly with the case involving Ms. Q., Ms. B. could clearly have been called to give evidence as to how the pair had spent the evening, how they met the accused, their interactions with him, how they came to attend the party and how they ended up there together with the accused after other people had left. Similarly, the fact that they both remained in the apartment and left together in the morning, in a state of distress, would have been admissible.

157. Further, Ms. B.’s evidence in relation to falling asleep, waking to find herself being raped by the accused and her subsequent conversation with Ms. Q. would also have been relevant and admissible for a number of reasons. One could start here with the evidence of the complaint made to her by Ms. Q. If a complaint is admissible, so also are the terms of the complaint. In this instance, Ms. Q.’s complaint was a response to what Ms. B. said to her, and it would have been incomprehensible to a jury without Ms. B.’s account.
158. Another way of looking at it would be to consider how the evidence of either of the two women could have been presented in a trial where only the allegations made by one were to be presented. The other, if successful in attempting not to give evidence of what happened to her, would have had to give the jury the entirely misleading impression that she had slept entirely undisturbed, and accompanied the complainant away from the apartment in the capacity of a supportive friend only.
159. A third consideration arises from the defence that could be anticipated from the account given by the appellant to the gardaí. He claimed that each of the two women made advances to him, and that he had consensual intercourse with one and rebuffed the other. It was highly relevant, in those circumstances, that there were two persons saying that he had assaulted them while they slept and that there was no consent involved.

160. Overall, perhaps the best way of describing what occurred in the apartment was that adopted by defence counsel when he said that the case involved two complainants and one incident. I do not wish to seem to place undue weight on his words, or to categorise them as some form of legal concession. Rather, I regard it as an apt description of a case where the facts were so entwined as to bring it squarely within the *Makin/Kirwan* principles.
161. In the event, the trial judge instructed the jury that they were to consider each count separately. While in some cases, this might require drawing the attention of the jury to some particular evidence that is admissible in respect of one count only, the instruction in this case can only be seen as having been in the interests of the defence. The phrase “striking similarity”, as used by prosecution counsel, was entirely unlikely to have conveyed any special legal meaning to the jury.
162. In the circumstances I would dismiss the appeal.