Joint Trials Involving Multiple Complainants in Sexual Cases[1]

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Introduction

1. Unfortunately sexual abuse by multiple victims in relation to teachers, priests or those in positions of authority, remains a common feature of Irish society and appears with significant regularity in the criminal courts. While the joinder of multiple complainants on an indictment will strengthen the prosecution case, it also raises a number of difficult and technical issues for the run of the trial and the charge to the jury. The refusal of a trial judge to sever the indictment will regularly provide grounds for appeal, as will the very significant confusion which can arise in the judge's charge in respect of the extent to which one complainant's evidence can be used to support of another's. Invariably, issues of collusion or contamination arise, which further complicates the issues of severance and cross-admissibility as well as considerations of whether the evidence provided by one complainant might corroborate the other.

2. The following considers some of the recent case law in this area with a view to attempting to clarify some of these issues. While the circumstances in which a trial judge should sever the indictment will vary from case to case, it is fair to say that the more recent case law evinces a view from the Superior Courts in favour of trying cases together and, to some extent at least, a willingness to defer to the discretion of the trial judge on their decision as to whether to allow the indictment proceed on a joint basis.

Jurisdiction

3. The jurisdiction to join charges on the same indictment arises from the Criminal Justice (Administration) Act 1924 provides in the First Schedule that charges 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*." Section 6(3) of the same Act then provides as follows:

> *"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*

[1] Paper by Anne-Marie Lawlor S.C. and Brian Gageby B.L.

any one or more offences charged in an indictment, the court may order a separate trial of any count or counts of such indictment."

4. The question of an accused being prejudiced or embarrassed "*in his defence"* is not meant in a general sense, and indictments with large numbers of counts or indeed a large number of complainants, are not in any sense unusual. However, prosecutors do not have a free hand in joining counts to the indictment and are bound by the jurisprudence in ***DPP v BK*** [2] and more recent cases. The question of joint trials in sexual cases raises two broad issues:

    i) How should the severance application be approached?

    ii) If joint trials are ordered, how is the evidence of multiple complainants to be treated?

How should the severance application be approached?

5. The starting point for considering whether an indictment should be severed is asking the question whether the evidence in respect of one count is admissible in respect of another. This was set out by Barron J. in ***DPP v BK*****:**

    "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."[3]

6. In considering whether the evidence on one counts is admissible on another, it must be remembered that the law prohibits misconduct evidence for fear that the jury might engage in the forbidden reasoning of assuming because an accused has acted inappropriately before, that he or she is likely to do so again. The law therefore requires that before such evidence can be called, that the probative value of such evidence must outweigh its prejudicial effect. In the past, the admissibility of such evidence was met where the evidence was strikingly similar *ie* the offence was perpetrated in a very particular way or with an unusual signature style. While this is no longer the requirement, where counts are sought to be joined in the same

[2] [1999] 2 I.R. 199.
[3] [1999] 2 I.R. 199 at 203.

indictment, there must be a *necessary nexus* between them which will bring them into what is termed a 'system' of offending.

7. At the outset of a trial where the prosecutor is presenting multiple counts on the basis of system evidence, this should be expressly set out by the prosecution at the opening of the case. The desirability for clarity from the outset is a repeated feature of the jurisprudence and was noted by O'Donnell J. in ***DPP v CC***[4]:

> *"..it is desirable in cases of complexity and where such so called system evidence looms large - as it undoubtedly did in this case - that the court, together with counsel for the prosecution and accused, should seek to address the question of system evidence, and the manner in which it may be admissible, at an early stage in the trial…so that all the participants are aware of the basis upon which such evidence is being admitted in the case."*[5]

8. Therefore it is advisable that a prosecutor indicates at the outset that evidence of system is being presented and that by virtue of the nexus between the counts, the evidence on each count will be admissible as against the other. The prosecution should then set out what matters he or she says brings the different counts within a system of offending. In order to determine what kind of matters the prosecutor might rely on in this regard, it is necessary first to look at ***BK*** itself and then the more recent case law.

9. In ***BK*** the applicant was convicted of various counts of attempted buggery and indecent assault upon a number of young boys in Trudder House, a residential home for traveller children run by the Eastern Health Board. Counts 1 and 2 charged indecent assault and buggery in respect of child "A". Count 8 charged attempted buggery on child "B". Count 9 charged attempted buggery on child "C". Counts 1 and 2 were said to have been committed in a dormitory of the home while counts 8 and 9 were said to have committed in a caravan which was the property of the Eastern Health Board and was used for recreational visits. At the outset of the trial, the applicant sought that the indictment, insofar as it related to separate complainants, would be severed. The application was refused. The judgment reviewed in some detail the rules in relation to the admissibility of evidence of multiple accusations. In particular, Barron J. considered in some detail the rejection, in both this jurisdiction and in neighbouring jurisdictions, of the so-called "striking similarity" test in favour of the requirement that the trial judge consider whether the probative value of the

[4] [2012] IECCA 86
[5] Ibid. at page 25. See also *DPP v L.G*. [2003] 2 I.R. 517 at 525 and *R v Boardman* [1975] A.C. 421 at 459.

evidence outweighed its prejudicial effect. Having considered the jurisprudence to date, Barron J. set out the following principles:

> *"(i) The rules of evidence should not be allowed to offend common sense.*
> *(ii) So, where the probative value of the evidence outweighs its prejudicial effect, it may be admitted.*
> *(iii) A category of cases in which the evidence which can be admitted is not closed.*
> *(iv) Such evidence is admitted in two types of cases*
> *(a) to establish that the same person committed each offence because of the particular feature common to each,*
> *or*
> *(b) where the charges are against one person only to establish that offences were committed.*
> *In the latter case the evidence is admissible because:-*
> *(a) there is the inherent improbability of several persons making up exactly similar stories;*
> *(b) it shows a practice which would rebut accident, innocent explanation or denial."*[6]

10. Critically, from the point of view of the Court of Criminal Appeal, the background to the first group of counts was that the applicant had acted openly in the knowledge of the alleged victim, while he had acted in a furtive manner in respect of the second group of counts. Barron J., in applying the test on the admissibility - "*the probative value of such evidence to outweigh its prejudicial effect*" - found the first group of counts lacked the "*necessary nexus"* to justify their being heard at the same time as the second group of counts. Thus, the Court found that the evidence:

> *"...went no further than saying that because the applicant was charged with the offences against one boy, he was more likely to have committed the offences alleged against the other boys. What the court is looking for is a series of facts relating to alleged criminal activity which are such that a jury properly charged, may hold that offences were committed in each case; that they were committed by the same person and, where necessary to prove a specific intent, with the same intent."*[7]

[6] Ibid. at 210-211
[7] Ibid. at 211

11. One of the difficulties for the practitioner in applying the judgement in ***BK***, is that while considerable detail is provided in the judgment about counts 8 and 9 (which included attempted buggery and fondling in the caravan at night), very little specific detail is provided about Counts 1 and 2 (indecent assault and buggery respectively). Because of this, it is not immediately apparent why the Court of Criminal Appeal deemed the two sets of counts to lack the "*necessary nexus*". The main reason given in the judgment is that the applicant acted openly in the knowledge of the alleged victim in respect of the first set of counts but in a furtive manner in respect the second set of counts (where the complainants were asleep and awoke to the abuse). Against this, it appears that both sets of counts were perpetrated by an identified person in a position of trust, both occurred in a residential institution setting at night-time, upon young traveller boys residing in that institution and both sets of counts included either buggery or attempted buggery. Ultimately, the Court of Criminal Appeal found that counts 8 and 9 were committed in "*unusual but identical circumstances*" on a visit to the caravan, while the two boys were sleeping in a double bed, in the same furtive manner. Therefore the Court found the similarities were sufficiently similar on the latter counts to allow the jury to consider whether the offence alleged on each of these latter counts had been committed.

12. It is difficult to avoid the conclusion that there are aspects of the judgment in ***BK*** which might be read as being resonant of the older requirement that similar fact evidence requires a "*striking similarity*" before it can be admitted, particularly the reference to "*unusual but identical circumstances*". Barron J. stated that "*system evidence …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."* Writing in an extra-judicial capacity, Charleton J. expressed some concern for this aspect of the judgment in circumstances where both the English and Irish Courts had rejected the "striking similarity" test in favour of a broader test of asking whether the probative value of such evidence to outweighs its prejudicial effect:

> *"The introduction of a proxy test for probative force and prejudicial effect does not necessarily aid clarity. The negative and potentially worrying effects of constricting trial judges into hyper-specific categories of admissible misconduct evidence are well documented. It is for this very reason that the striking similarity test was expressly eschewed by the House of Lords in P. It seems to me that a*

similar clarification of the law has occurred in this jurisdiction through Budd J. in B."[8]

13. The reference to the decision by Budd J. in ***B v DPP***[9] is notable and Budd J.'s analysis, in applying the broader test, is worth restating. In particular, the fact that the probative value of multiple complainants depends only *in part* on their similarity, but also on the unlikelihood of multiple false allegations:

> *"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."***[10] Emphasis Added

14. This statement by Budd J. was strongly endorsed by Hardiman J. in the Court of Criminal Appeal in ***DPP v McCurdy***[11] in which he stated that the above statement was "*sound law and sound common sense, which we would disregard at our peril*."[12]

15. Having regard to the more recent case-law, it would appear that the Superior Courts have not endorsed a view that trial judges should confine themselves to *hyper-specific categories of admissible misconduct evidence*, but rather have employed the broader test set out in ***B v DPP***[13].

16. There have been a number of more recent cases in which the Court of Appeal has considered the question of severance and which judgments, it is suggested, reflect a less restrictive approach than was adopted on the facts in ***BK***. In ***DPP v JC***[14] the appellant was tried in respect of 13 separate counts covering six complainants. Counts 1-10 relate to a period from 1988-1992 and counts 11-13 related to a period from 2001-2011. Each of the complainants was a child at the time of the offence and the appellant was in a position of authority and trust in respect of each complainant. Each of the complainants was abused for the first time in the appellant's home and thereafter in the appellant's home and in other locations. Notably, in each case the appellant conducted the assaults in a similar fashion, directing the child to hold the

[8] Irish Journal of Legal Studies (2013) Vol 1
[9] [1997] 3 I.R. 140.
[10] Ibid. at 157-158
[11] [2012] IECCA 76
[12] Ibid. at page 11
[13] [1997] 3 I.R. 140.
[14] Unreported - Court of Appeal 19 November 2015

appellant's penis and thereafter directing the child into a rubbing action. It was submitted by the appellant that the indictment should have been severed in respect of each complainant or, failing same, into two separate tranches - the earlier counts and the later counts. The Court of Appeal found that the similarities were such as to properly allow the jury to consider the evidence in one case as supportive of that in another. Furthermore, the Court considered a number of previous judgments and, in particular, the following extract from Professor O'Malley's Second Edition of *Sexual Offences*:

> *"The one recurring theme in the jurisprudence on severance is that the decision on ordering separate trials is very much within the judge's discretion. An appeal court will not overrule a trial judge's decision to refuse severance, "unless it can see that justice has not been done or unless compelled to do by some overwhelming fact."*[15]

17. The Court further noted that issues of practicality arose and that there was a need to ensure that justice is administered as speedily as possible in light of limited court resources. While the Court noted that this need was always subject to ensuring that an accused person's right to a fair trial is not impeded, the Court commented that had the trial judge agreed to the initial application, that this would have resulted in six separate trials and that what were already difficult cases of child sexual abuse would be exacerbated by greater delays in court proceedings. It should be noted that leave to appeal to the Supreme Court in ***JC*** was sought, in which three points were sought to be determined which included a question as to whether there is an upper limit of complainants which might be included on an indictment without creating a prejudice to the accused. In a determination on 21 July 2017, the appeal was refused.

18. In another recent case, ***DPP v FMcL and BW***[16] the appellants were convicted in respect of a number of counts against two complainants who were brothers. Both appellants sought to quash their convictions on the refusal of the trial judge to order separate trials. In her ruling in the trial court, the trial judge noted that having regard to the location, the dates and the manner of the commission of the offences, she was satisfied that there was a system of evidence and on that basis she refused the application to sever. Owing to very significant concerns that including any degree of specificity risked identifying the complainants, the judgement in the Court of Appeal

[15] At 14-43. It might be noted that this paragraph was also approved of the later case of ***DPP v McG*** cited below.
[16] [2016] IECA 307

does not detail the offences with great particularity, however the Court made general findings as follows:

> *"In the Court's view there are many factors present to justify a joint trial. The nature of the physical abuse described by each of the complainants was very similar. Both complainants were saying that they were abused by trusted employees of their parents business, who took advantage of their parents' absence in order to abuse the brothers in locations, which in a number of cases were linked to the parents' business… the Court will simply observe that the nature and circumstances of the abuse alleged against FMcL involving GS and KS meant that there was an overwhelming argument in favour of these counts being tried together. This was a case where the arguments for joint trials were particularly strong."*[17]

19. More recently, in ***DPP v ST***[18] the appellant was charged with seventy two counts of indecent assault against thirteen complainants. The offences occurred in a Christian Brothers School in Limerick where the appellant taught. He was convicted on thirty counts in relation to six of the complainants. The appellant sought to sever the indictment which comprised counts occurring in three consecutive school years (1979/1980/1981) and submitted that each set of counts in any one school year should be tried separately from those alleged to have been committed in any other school year. The trial judge gave a very detailed decision highlighting the reasons justifying the joint trial and of which decision the Court of Appeal approved:

> *"I have reviewed briefly the book of evidence and the statements which are relevant and having looked at them and having taken an overview, and having taken into consideration the age of the complainants, the location where they were and the degree of control which was exercised over them and also the time period during which this occurred, a time period which I remember and other people will remember, I'm satisfied that there is evidence of system evidence and also something Mr O'Sullivan relied on greatly was the establishment of evidence of dominion and control, I'm satisfied that somewhat more is required than the establishment of dominion and control. I'm satisfied that the, as I said, the various matters which were relevant to the age of the children, the location and so on and so forth are all relevant and important factors for consideration in arriving at a decision in relation to this matter. In particular, the nature of the location where the incidents occurred and the*

[17] [2016] IECA 307 at page 3
[18] [2017] IECA 73

modus operandi in a general way which was employed by the alleged accused, or by the accused, are important…

Each circumstance of alleged assault in the school is not exactly identical, even though some of them are very, very similar, but what is identical, that each takes place in the school in the first instance, irrespective of the locus therein, and in an area where as a teacher who belonged to a religious organisation in 1979/1980, he is a man who would have had absolute authority and control over the location generally. They took place within school time or when children were detained after school. All of these children were pupils in the accused's class and they were in his charge. The modus operandi would have been that he put his hand down their trousers; down jerseys, either front or back; and allegedly rubbed the pupils' private parts or bottoms; leant over pupils; used his cassock to shield himself; used threats of violence and was intimidating. I would not expect there to be an absolutely identical series of complaints in respect of each child, given the tender years that the children were at that time, but it seems clear to me that the system that was employed was broadly similar in all instances. He was not in any way discreet about his behaviour. That is another factor which is common. And having considered all matters I am satisfied that all of the counts relating to any of the alleged incidents in the school or in the curtilage of the school are proper matters for the indictment. The fact that there are three consecutive years' worth of pupils, and by that I mean that there's an intake for '78/'79, '79/'80 and '80/'81, so you've got three different classes. The fact that there are three consecutive years of pupils who have given statements must also be highly probative in itself. It seems to me that the possibility of three classes colluding in some way, shape or form must be, at best, minimal and boys of that age would not have a tendency to fraternise with children in higher classes than they are in in primary school. It's entirely appropriate there is such a spread of complaints over that three year period on the indictment."[19]

20. In endorsing the above decision the Court found that the law in ***BK*** had been properly applied and that there was clear evidence of system, striking similarities and of dominion sufficient to justify him in his decision.

21. In another decision of this year, in ***DPP v McG***[20] the appellant was convicted of sexual assault and rape under Section 4 as against his stepson and stepdaughter. In

[19] Ibid. at pages 6 & 7
[20] [2017] IECA 98

respect of his stepson, the appellant called him into his bedroom and offered him money to show him his private parts and allow him to be touched by the appellant. Other sexual favours for which the stepson was paid money included acts of oral and anal rape. The appellant also showed the boy various pornographic materials. In respect of the stepdaughter, the appellant touched her vagina and digitally penetrated her. The appellant also gave her money and photographed her. She did not allege that she had been shown pornographic materials.

22. At the outset of the trial, the accused applied to have the indictment severed in respect of the two complainants. It was submitted that the probative value of such evidence did not outweigh its prejudicial effect because, *inter alia*, there was insufficient similarity or nexus between the accounts of both complainants. While the trial judge noted that the complainants were different genders, she did not consider this to be of significance and noted the following particular matters of similarity: that both complainants were the accused's stepchildren, that both were minors, that the accused was alleged to have touched the private parts of both complainants and perpetrated oral rape, that there was an overlap in time in respect of the allegations, that the allegations occurred in the family home of the accused, that there was financial rewards for both complainants and both included a degree of secrecy.

23. The appellant sought to quash his conviction on the issue of severance, and highlighted a number of differences between the allegations, in particular the differences in ages of the complaints and the differences in the nature and frequency of the assaults. The Court of Appeal rejected the argument:

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

material, and one complainant only was photographed by the appellant. However these are differences, which in the overall context of the allegations are not of great significance. Repeated incidents of sexual abuse by an abuser are unlikely to be precisely similar in form or in nature and to expect them to be flies in the face of common sense and, indeed, also, the experience of the courts."[21]

24. The Court was satisfied that the refusal to sever the indictment was a decision properly made within the discretion of the learned trial judge. In a determination dated 3 November 2017, the Supreme Court refused leave to appeal and found that it was clear that the evidence was admissible in accordance with well-established principles of misconduct evidence.

25. It is apparent from the judgments cited above, that applications by the accused to sever indictments are regularly made on the basis that what is required is a very high degree of similarity between the offending itself. It would appear that these arguments are often met with the reply firstly that there is an inherent improbability in several persons making up exactly similar stories and secondly that the surrounding factors are such as to bring the allegations within a 'system' of offending, to use the language in ***BK***.

26. It is notable that in the more recent cases, the Superior Courts have recognised that dissimilarities in the manner in which the offending occurred are not something which necessarily brings the offending outside of a system of offending and would therefore justify severing the indictment.

27. In approaching the severance application it is suggested that the prosecutor should rely upon the decision ***BK*** and ***B v DPP***[22] that there is

    a) an unlikelihood that the same person would find himself falsely accused on various occasions by different and independent individuals and
    b) also the following non-exhaustive factors which the Superior Courts have recognised might bringing a series of offences within a 'system' of offending:

        - that each of the complainants was a child at the time of the offence;
        - the ages of the complainants;
        - that the accused was in a position of authority/dominion/trust/control;
        - the locus of offending;

[21] Ibid. at page 5
[22] [1997] 3 I.R. 140.

- the period of offending;
- the manner in which the offence is alleged to have occurred;
- the nature of the opportunity which allowed the accused access to the complainants;
- the use of threats/inducements/secrecy/violence;
- whether the offences were committed discreetly or openly.

If joint trials are ordered, how is the evidence of multiple complainants to be treated?

28. If a decision is made by the trial judge to allow the charges be joined on the one indictment, or if no severance application is made, careful consideration will have to be given as to whether the evidence can be considered as corroboration, how the evidence is to be considered by the jury and how the jury are to consider the question of collusion.
29. The law on system evidence and corroboration in multiple complainant trials is complex and difficult to apply, and causes significant difficulties in relation to charge, in particular the issue of corroboration. As to whether the evidence of one complainant might corroborate another, it appears to be settled that this evidence can amount to corroboration, subject to the facts of the case.

30. In ***DPP v McCurdy***[23] the appellant had been convicted of three counts of sexual assault on three different girls. The appellant complained that the corroboration warning was incorrect insofar as the judge directed the jury that each complainant could corroborate the other. Hardiman J. disagreed:

> *"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...*[24]
>
> *At a trial, of course, it is for the trial judge to determine, and instruct the jury, whether particular evidence is capable of being corroborative. It is then for the jury, having been so instructed, to decide, as a matter of fact, whether the evidence is actually corroborative in the circumstances of the particular case. This*

[23] [2012] IECCA 76
[24] Ibid. at page 10

latter decision will naturally involve various factual issues including, in an appropriate case, the question of conspiracy or contamination."[25]

31. Similarly, in ***DPP v CC***[26] a case involved a religious brother who was charged and convicted of thirty five counts relating to a number of complainants during the 1960s and 1970s. There were numerous grounds of appeal, including a complaint as to the nature of the corroboration warning which was found wanting. O'Donnell J. had no difficulty with one complainant's providing corroboration for the other:

"Fourth, and perhaps most importantly, the jury were told, correctly in the view of this court, that the evidence of one complainant was admissible in support of the evidence of another, and could therefore provide corroboration."[27]

32. What is also clear, is that when a jury is being advised that one complainant's evidence might be admitted in respect of another, that the jury should be told in clear terms why this is so and a bald instruction that one complainant's evidence will be admissible in respect of another's will be insufficient. This was made clear in the judgment of O'Donnell J. in ***DPP v CC***[28]. The case involved a religious brother who was charged and convicted of thirty five counts relating to a number of complainants during the 1960s and 1970s. There were numerous grounds of appeal, including a complaint as to the nature of the corroboration warning which was ultimately found wanting by the Court. The judgment is worth reciting in some detail as it provides a very clear explanation on how the jury should be charged:

" It is desirable that the court should first address the question of whether in any given case such evidence is admissible in relation to the counts relating to other complainants. If it is decided that such evidence is admissible, (and in this case that was not really challenged) the jury should not only be informed of this, but also, and more importantly, why that is so… if for example, the same person had lived in a number of different places and complainants had come forward independently and described in varying degrees and detail offences containing perhaps a single distinctive element or signature, then any fact finder would be entitled to place considerable reliance on the fact that in the absence of deliberate collusion, it would be extremely unlikely that such witnesses could emerge by pure coincidence having the same mistaken or indeed false memory

[25] Ibid. at page 11
[26] [2012] IECCA 86
[27] Ibid. at page 24
[28] [2012] IECCA 86

involving the accused. The force of that reasoning is undeniable and explains why notwithstanding the risks, such evidence is admissible.

Drawing conclusions from the possibility of events occurring by random, rather than simply assessing the evidence in relation to a particular incident, is permissible, but it is an exercise in logic and probability: in the absence of some connecting factor, it is highly unlikely that individual independent accounts of similar conduct could emerge and yet be mistaken. The greater the number of accounts the more remote the possibility of collective error. This is a powerful line of reasoning but its force is dependent on the exclusion of any possibility of connection between those giving the accounts, particularly when it is otherwise limited in verifiable detail. It is necessary to take into account the possibilities of suggestibility, contamination of evidence, copycat evidence or collaboration, if only for the purposes of excluding them."[29]

33. Having considered that the evidence of one complainant could be admissible against another, and why this is so, O'Donnell went on to consider the more technical aspect of how that evidence could be considered by the jury:

"It was also important that the jury distinguish between two different processes of reasoning which may have been available to them. 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

[29] Ibid. at pages 24-25

statement that the evidence of one complainant is admissible in relation to another." [30]

34. What is notable about the above is that O'Donnell J. envisages that the jury are entitled, if they have come to a conclusion on one count beyond a reasonable doubt, that this count can then be used to support other counts. However, where the jury are not so satisfied to the criminal standard on any individual count, they might reach the criminal standard by relying on the evidence of system - *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.*

35. When considering whether one complainant's evidence can corroborate the other, and how the evidence of system is to be considered by the jury, it is also necessary to deal with the issue of collusion. System evidence is admissible because there is the inherent improbability of several persons making up similar stories and it shows a practice which would rebut accident, innocent explanation or denial. The logical defence is that the allegations arise by virtue of some deliberate collusion, accidental contamination or some form of 'copy-cat' complaint. This may be of particular significance where the complainants are related, where a group of complainants has emerged from a counselling or other therapeutic group, where they share the same civil solicitor or where there has been a deliberate campaign to find other victims of an alleged abuser.

36. In this regard reference is sometimes made to a line of case law in Australia and Canada which suggests that where there is a possibility of joint concoction, there exists a rational view of the evidence which is inconsistent both with the guilt of the accused person and with the improbability of the complainants having concocted similar lies, which destroys the probative value of the evidence which is a condition precedent to its admissibility and so, presumably, to the joinder of complainants. This jurisprudence was raised in ***DPP v McG***[31] but it did not appear to the Court of Appeal that there was any particular basis for it:

"The risk of collusion is almost always present in sexual offence cases where siblings or close friends are involved. However, in this case, there are important differences as between the detail of the allegations given by the two complainants, such as, for example, the allegation by one complainant only of

[30] Ibid. at pages 26 and 27
[31] [2017] IECA 98

being shown pornographic material and the allegation by one complainant only of being photographed. Such differences are unlikely to have been present if the complainants had colluded to give evidence designed to support each other."[32]

37. Interestingly, the application for leave to appeal to the Supreme Court specifically asked the Supreme Court to consider the application of this case law, in particular the Australian decision of ***R v Hoch***[33], and whether or not it is incumbent upon the trial judge to definitively exclude the possibility of collusion before evidence can be deemed cross-admissible. The Supreme Court was satisfied that in circumstances where there was no evidence of actual collusion at the time when the trial judge was asked to consider the issue of severing the indictment and that what was at issue was the potential of collusion, no issue of law of general public importance arose on the facts of this case.

38. As to how a jury are to be charged in relation to the possibility of collusion or contamination, the matter was raised in in ***McCurdy*** where Hardiman J. stated that it was for the trial judge to determine, and instruct the jury, whether any particular evidence was capable of amounting to corroboration. Hardiman J. stated that it was then a matter for the jury, having been so instructed, to decide, as a matter of fact, whether the evidence was actually corroborative and which decision will involve various issues including the question of conspiracy or contamination.

39. This accords with the judgment of O'Donnell J. in ***DPP v CC***[34] in which he set out that the weight of system evidence depended upon the exclusion of any possibility of connection between those giving the accounts, particularly when it is otherwise limited in verifiable detail and the necessity to take into account the possibilities of suggestibility, contamination of evidence, copycat evidence or collaboration, if only for the purposes of excluding them.

Conclusions/Practical Considerations

- Where a case is presented on the basis that multiple counts should be joined on the basis of system, this should be expressly set out by the prosecution at the opening of the case and the reasons why the prosecution say that the evidence is cross-admissible and so justifies joinder;

[32] Ibid. at page 6
[33] [1988] 165 CLR 292
[34] [2012] IECCA 86

- The prosecution should identify at the outset that there is an inherent improbability of several persons making up similar stories and allowing the evidence of counts to be cross-admissible will show a practice which would rebut accident, innocent explanation or denial;

- The prosecution should identify particular similarities between the offences themselves as well as the surrounding factors which will bring the offences within a system of offending so that the jury can consider the evidence of each complainant admissible as against the other;

- If the Court determines that the evidence of one complainant is admissible as against the other on the basis of system evidence, the jury must be instructed that such evidence is admissible but also, and more importantly, why that is so - *"because there is the inherent improbability of several persons making up exactly similar stories and it shows a practice which would rebut accident, innocent explanation or denial"*[35]*;*

- The question of corroboration should be clarified in advance of the charge to the jury, as per ***DPP v M(L)***[36]*,* in order to ensure that there is a proper discussion about what evidence was capable of amounting to corroboration;

- The jury should be warned that they cannot consider the evidence of one complainant as being corroborative of another unless they are satisfied beyond a reasonable doubt that the complainants are truly independent of each other, that there is no collaboration, contamination or copy-cat evidence.

[35] Ibid. at 210-211
[36] [2015] IECA 82