**THE COURT OF APPEAL**

**Edwards J.**
**McCarthy J.**
**Kennedy J.**

**Record No: 257/2017**

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

**RESPONDENT**

**V**

**S. L.**

**APPELLANT**

**JUDGMENT of the Court delivered by Edwards J on the 8th of May, 2020.**

**Introduction**

1. On the 19th of October 2017 the appellant was convicted by a jury of eleven counts of indecent assault contrary to common law and as provided for by s. 6 of the Criminal Law (Amendment) Act 1935, being counts no's 1, 2, 3, 4, 5, 6, 14, 15, 16, 17, 18 and 25 respectively ("the first group"); eight counts of indecent assault contrary to common law and as provided for by s.10 of the Criminal Law (Rape) Act, 1981, being counts no's 7, 8, 19, 20, 21, 22, 23 and 24 respectively ("the second group"); and one count of sexual assault contrary to s.2 of the Criminal Law (Rape) (Amendment) Act 1990, being count no 26 on the indictment.

2. On the 27th of October 2017 the appellant was sentenced to twenty months imprisonment in respect of each of the offences in the first group with the exception of count no 25. The appellant received a sentence of sixteen months imprisonment on count no 25. The appellant was also sentenced to seven years imprisonment in respect of each of the offences in the second group. Finally, the appellant was sentenced to three years and six months imprisonment on count no 26.

3. The appellant has appealed against both his conviction and sentences. This judgment deals with the appeal against conviction only.

**The complainants' evidence**

4. The twenty-one counts of which the appellant was convicted related to offences involving three complainants, all of whom were sisters and neighbours of the appellant. Their father was a first cousin of the appellant, and the appellant lived within 200 yards of the complainants' home. Nineteen of the twenty-one counts related to complainant "F", one count related to complainant "M" and one count related to complainant "E".

5. The evidence was that all three complainants were members of a large family comprising their parents and nine children who lived in a farmhouse in a rural part of Ireland. M was the oldest, having been born in 1966, that F was born in 1967 and that E was the youngest in the family and was born in 1982.

6. The appellant was born in 1955. His father had died when he was quite young. At all times material to these proceedings he lived in a farmhouse with his widowed mother and four siblings. They were immediate neighbours to the complainants' family.

7. It was common theme in the evidence of all three complainants that their father and the appellant's father had always had a close relationship and that they were more like brothers than first cousins. Both men were dairy farmers and they were constantly helping each other out with farm work such as silage cutting, saving hay, moving cattle and so on. Further, they would lend each other machinery and share farm equipment. They also socialised and went drinking together. Because of their close relationship their respective wider families were also close such that they were in and out of each other's houses regularly and attended each other's family events, such as weddings, baptisms and so on, as though they were all part of one extended family. The complainants' family would also look out for and help the appellant's widowed mother, particularly as she got older and had some health problems.

*Evidence of the Complainant F.*

8. In her evidence to the jury F stated that she was abused by the appellant regularly, "*probably once a week, twice a week over the summer months*" over a four or five year period from when she was 11 or 12 years of age until she was 16 years of age. She said "*[i]t was basically always the same, nearly always the same that I would have to masturbate him and he would put his finger up my vagina*".

9. F told the jury that the first incident that she recalled occurred on an occasion when she was returning home after walking cows back from milking to a field located 400 or 500 yards away from her family's farmyard. Her route home took her past the appellant's farmyard. She claimed that she was 10 or 11 or 12 years of age at the time. Although pressed under cross-examination she could not be more precise. She accepted that she had said in her statement to Gardaí that "*I think I was between 9 and 12 years old*". She also accepted that she might have told her GP in 2015 that her abuse had started at 12 years of age.

10. F stated that the appellant was in his farm yard as she passed by. She then described what happened next:

> *"… So next thing I'm in the shed part of his dairy and it's a small part I'm in, it's about ten or 12 feet wide and about 15 foot deep, an old style house converted to a dairy. So I go in, he is there, I don't know did he tell me to go in or how I ended up in there. And there's a table with a bench kind of with all sorts of farm equipment on it on the right hand side. And he goes, he's in front of me and he*

*goes over to the wall plate in the shed which is on the far end, it's the opposite side of the door where I went in. And he reaches up into the wall plate and he pulls down this magazine that's fold up and then he comes towards me and he grabs me and he pushes the door closed behind him. And he pushes his back into the door and he has his arm around me, and he is holding the magazine in the other arm and he grabs my left hand and he shoves it down into his trousers. I didn't know what that hard and hairy thing was that he made me touch, he made me put my arm hand around it and move it in and out. And the magazine*

*Q. Can you tell us can you tell us what it was he made you made you put your hand on?*

*A. Masturbate.*

*Q. Sorry?*

*A. Masturbate, he made me masturbate him.*

*Q. And what was it he made you put your hand on?*

*A. His penis.*

*Q. Thank you?*

*A. And his right arm then he put down into my underwear and he put his finger into my vagina and he took the magazine, he had left it on the wall, he made he had made me start masturbating him and then when he released his hand from my hand he took the magazine and opened it and there was all these women with their legs open and no underwear. So I couldn't look at them, it was absolutely disgusting, the whole lot of it was absolutely disgusting, and I continued to masturbate him until it got soft and then he would have taken his hand out of my underwear and then he'd open the dairy door and I stepped out into the sunlight in that yard knowing things had changed."*

11. When F was asked if he had said anything afterwards she replied that the only thing that she could remember was heavy breathing. She said that she was in total shock and that she didn't tell anybody what had occurred.

12. F went on to describe a further incident in the appellant's dairy in the late summer of the same year at an evening milking. She said that she had more clothes on her on this occasion than on the first time that he had abused her. She stated:

*"So the cows are being milked and there's that lovely smell of cows and milk in the dairy and the pulsating sound of the milking machine and he grabs me and he makes sure the dairy door is closed and puts his back to it. And again he gets my left arm and he pushes it into his underwear, makes me masturbate him and he puts his hand into my underwear and puts his finger up my vagina.*

*Q. And when he took your hand and put it into his underwear, was that skin on skin, what did he put your hand on?*

*A. Pardon?*

*Q. What did he put your hand on?*

*A. On his penis, I had to I had to masturbate him.*

*Q. What happened then?*

*A. I went home and I didn't say anything."*

13. When asked was there anything that caused that incident to finish, F stated: "*No, we weren't interrupted or anything like that, just stopped when his erection stopped and he ejaculated.*"

14. F described a further incident in the following terms:

> *" … I used to have to go to first mass every so often to mind the younger children that weren't they were too young to go to mass. So I'd gone to mass this Sunday, cycled up and down and got my 20p for my apple as a treat and chip sticks, my treat afterwards. So I cycled home and was at home getting things ready for the dinner, minding a baby in the pram and in comes Seamus. So the baby was in mum and dad's room, so I made sure the baby was okay, I went up to the room and he followed me into the room and once again proceeded to put my hand into his left hand into his underwear, touch his penis, masturbate him while he put his right hand into my underwear."*

15. F claimed that this incident also occurred during the summertime and she estimated that she was about 12 or 13 years of age. It was suggested to her during cross-examination that she would have been older, 15 years old in fact, on the premise that the baby she was minding was her sister E who is nearly 15 years younger than her. However, she would not accept that and insisted that she could not recall for certain which of her siblings had been in the pram.

16. F went on to describe yet another incident, which she claimed occurred on a summer's day when she was 12/13 and was wearing t-shirt and trousers. She related that:

> *"There's a high ditch separating our farmyard and the garden beside his house, we were on the [*appellant's family's*] side of the ditch, he has me pressed into the ditch, his trousers are open, the top of them and his knee he's leaning into me and his finger is up my vagina and I have to masturbate him and after it's all over he took great care to remove the semen from the pants of my trousers, I didn't know what that white sticky stuff was."*

17. F described another incident as having occurred on an occasion when she had been sent over to mind the appellant's mother. Her evidence was that when she or her siblings were doing so they would sometimes have to sleep over. Her evidence was:

> *"…you'd have to sleep in the bed with [*the appellant's mother*], she was a big woman, she snored a lot, normally you'd sleep in her bed but one time I was sleeping in the spare room. it was a small room with a single bed, you went in the door, the bed was at the far end of the room and there was a dresser on the left hand side. I woke up in the morning to see [*the appellant*] coming into the room, it was a summer's day, the sunshine was coming through the curtains, I think it was probably seven or eight o'clock in the morning. He comes up to the bed, I'm lying obviously on it and he takes down the covers. I am wearing a t shirt and underwear, he proceeds to take down my underwear and spread my legs and he then sticks his tongue into my vagina. He leaves again like nothing happened, I didn't say anything."*

18. F claimed that she had been roughly 12, 13, 14 when this event occurred and that nothing had been said by the appellant after it.

19. F described a further specific incident which occurred when she was "*probably about 14*". She stated:

> *"…some of our land is about four miles away, five miles away from the house in a [named place] which is near the beach in [*another named place*]. We had been making silage all day and it was time to go home. So to bring home the trailer and the tractor and I was standing beside him in the tractor on the way home, on his left he was in the middle, I was on the left hand side. So for the first mile or so of that journey it's a very narrow road, a lot of bends and then you come on to the main road which is [*a named*] Road. So we're turned down left after coming up from [*the named place*] to head back to [*home*] in this Massey Ferguson tractor, red 165 and he puts his arm -- hand into my underwear and he sticks his finger up my vagina. And I remember, how come there's nobody on the road to see this."*

20. F described yet another incident as follows:

> *"During that time while he was abusing me he had got married, I remember being in his sitting kitchen well, sitting room you'd call it, his kitchen was at the back of the house sitting on the sofa, he puts his arm under my jumper and he loosens my bra.*
>
> *…*
>
> *I turn around and I give him a kiss on the cheek and he lunges at me, sticking his horrible tongue into my mouth repeatedly, then we go to his bedroom, we're obviously alone in the house and we get under the sheets and he masturbates me*

*and I have to masturbate him and I think this is this must be what it's like to be married."*

21. F stated that during this incident no clothes been removed. She stated that she was about 15 at the time. She was cross-examined about the circumstances in which she had kissed him. She accepted that she had told the Gardaí: "*I thought at this stage that we were having a relationship and that he liked me even though he had just got married a short time before this happened.*" She explained to the jury that she had been deluded into thinking she had a relationship with him.

22. According to F the appellant stopped abusing her when she was 16. She described the final incident as follows:

> *"There was a final incident where it all finished, we were in his farmyard, it's summer, the hay has been made, his hay barn is full of hay, there's a nest made in the top of the bales where we would have been playing, or my brothers and sisters would have gone over there to play, climb the bales high in the barn. He is in the nest with me, he opens my trousers, he opens his trousers and he lays on top of me, I can feel his weight on me, I can't remember any more about that, only going home, I'm going to tell, I was going to say what's happening. I'm in our farmyard, it was a 50 yard walk between our farmyard and our house, I opened the gate to go over to the house, I see mum's face in the kitchen window, a lump comes in my throat, a black fog closes in, I know I cannot tell, that was the last time I remember him abusing me."*

*Evidence of the Complainant E.*

23. E, who was the youngest in her family, described a single incident in the course of which she claims to have been abused by the appellant. She stated in evidence:

> *"Okay. When I was I think between the ages of nine and 12 I was at a[n] L family event, which was held in [*a named*] Pub in [*a named place*] which is maybe about four miles from our home, and during this event I was sexually assaulted by S. L. I had been coming from the bathroom, there was a passage way leading from the bathroom to the rest of the pub, and I was on my own and S. L. approached me, and he made a move as if to kind of tickle me or put his hands on me, but instead he put his hands down my knickers and he put his finger into my vagina and it was a very fast, it happened very fast and then he took his finger out of my vagina and he continued to the toilet and as if nothing had happened.*
>
> *Q. And what did you do?*
>
> *A. I was really shocked and upset and I didn't know what to do, so I returned to the rest to the party where there was all of his family were there, all of his brothers and sisters were there and my lots of members of my family were there also. It was his mother's birthday or it was a celebration for his mother*

*B, and I was just shocked, I didn't know what to do. So I I didn't tell anybody and I just went back to the party."*

24. The defence made an admission under s.22 of the Criminal Justice Act, 1984 that the family event in question had been held in August 1994, at which point E was twelve years of age. She said that she thought that she was wearing a dress that she had got for her parents anniversary "*because I think when he assaulted me he had ease of access to my knickers, so I think I was wearing a dress and I think it was that dress*". E also stated that she recalled her cousin from London being at the event, and that she had wanted to tell him what occurred but had not dared to.

25. It was put to E in cross-examination that the event had been video recorded and that the recording, which was three hours long, had not captured the presence of her cousin. She then accepted a suggestion by defence counsel that it was possible that he was not there.

26. It was further put to E in cross-examination that the video recording showed her as wearing a wine or dark red coloured waistcoat together with a long skirt of heavy material, extending down to her ankles. She accepted a suggestion by defence counsel that it was possible that she was wearing a dress different to the one that she had mentioned.

*Evidence of Complainant M.*

27. The complainant M was the oldest in the family. She also described to the jury one incident of being abused by the appellant, and did so in the following terms:

*" Okay. We have land in a place called [*a named location*], which is you know maybe 400 or 500 yards from our house and we would be bringing cows over there after milking in the morning and collecting them in the evening time. On one particular occasion I was coming back, I assume it was summertime because we wouldn't have had cows over there during the winter, we would have dried them off and they would have been housed for the winter. So it was normal practice in the summertime that we would walk the cows over and you know and come back home afterwards. So on this one particular occasion I was passing by L's and S.L was in a stable that was opening on to the road that I would have passed by on the way home. And for some reason I went in, I don't know why, probably to have a chat which would have been kind of fairly normal for us. And while I was in there at one point he put his hand around me, I had my back to him, he put his hand inside I think it was trousers I was wearing, I don't have any memory exactly of what I was wearing. But he put his hand inside my trousers and he put his finger in my vagina."*

28. M went on to say that she had slapped him and told him never to do it again and that she then ran home. She stated that she didn't tell anybody, adding:

*"I knew what he had done was wrong because it felt wrong, it wasn't something I had ever experienced before but I knew it shouldn't have happened. I didn't tell anybody, I was embarrassed, I was ashamed and I said nothing."*

29. M recalled that this had occurred to her, to the best of her memory, when she was in primary school and so she estimated that she was either in fifth or sixth class and was probably aged between 10 and 12.

**The Basis of the Appeal**

30. Although the Notice of Appeal initially filed on behalf of the appellant lists a total of seventeen grounds of appeal against his conviction, it was confirmed to this Court (by email to the registrar) that the appellant would ultimately be relying on just a single ground of appeal, namely, ground of appeal number 2 which is in terms that:

> "The learned trial judge erred in refusing to direct separate trials in respect of the counts 25 and 26 on the grounds connected to the fact (sic) that the said counts related to different complainants."

**The Application to Sever the Indictment**

31. Counsel for the appellant had very properly flagged his intention to apply to sever the indictment when the case was called at first instance before the Circuit Criminal Court. This allowed the application to be heard before the accused was formally arraigned and the jury put in charge. The matter was argued at some length, following which the trial judge ruled against severance. In doing so, he succinctly summarised the arguments that had been advanced on both sides, and it is therefore useful to quote his remarks in full:

> *"Well, the defence submit that the indictment contains two counts which if they're allowed to remain will prejudice the defendant in his defence of the remaining counts. The defence submit that as a consequence, the Court should exercise the discretion to sever the indictment by removing these two counts. Now, the indictment contains as I understand it, 26 counts, 24 of which are related to allegations of indecent assault by F against the accused. The final two counts relate to allegations by two sisters of F, one older M and the other younger, E. The defence submit that these final counts should be severed as their prejudicial value exceeds any probative value that they may have. The defence admit there's insufficient nexus between the last counts and the remaining 24.*
>
> *In other words, the defence say there's no evidence in these last two counts that could constitute evidence either of a common system or strikingly similar facts and cite certain specific facts alleged by F that are not common to the charges by M and E in support of the submission. The prosecution for their part submit there is convincing commonality between all counts and advance comparators in support of this submission.*
>
> *Now, there is settled law of a relatively recent date which sets out the circumstances when a court should, in effect must, exercise its discretion to sever an indictment. This has been opened to me by both prosecution and defence and*

*there's no dispute as to the import of this law. The case of D McG which basically approves BK is the most pertinent relevant to this application and I'm bound by that. Now, I have carefully considered the statements of F, M and E. Each had the occasion on my reading of the book of evidence to discuss their experiences, the experience that they say they had with the accused with each other in advance of involving the gardaí.*

*Although it's not clear from the statements the extent of their discussions, the extent to which they went into detail about the nature of the experiences they allege they had. But it's clear from the statements that each alleged that they were digitally penetrated by the accused at a time when they were each between nine or ten and twelve years old. F alleges more extensive misconduct over a more lengthy period at their farm or the farm of the accused. While M, the eldest describes a single incident of digital penetration at the milking shed on the farm of the accused, following which she slapped the accused and told him not to do it again.*

*E, the youngest alleges a single incident of digital penetration at a public house where an extended family celebration was taking place. None of the sisters told anyone of their alleged experience for many years. Their statements reveal a close family group engaged throughout their childhood in farming, helping out on the family farm. The accused is a cousin of their father, lived and farmed the neighbouring farm, he appears to have shared farm activities with their father and they were close friends, described by one of the sisters as more brothers than cousins, working, drinking, socialising together. The accused appears to have been in and out of their home, farm and lives throughout and was in effect part of the furniture.*

*None of the sisters, F, M or E discussed their experiences with their parents. The similarities between the allegation made by M and those of digital penetration made by F where they happened and how seemed to me to show evidence of system. The more extensive misconduct alleged by F as against the single incident alleged by M can be viewed in light of the different reaction that each had. M reacted by immediately challenging the accused while F did not.*

*Nonetheless there is significant commonality between the methodology alleged by both as it relates to their initial incident, location, conduct and reaction and this is in my view sufficient to amount to evidence of system. In addition, while there is an age difference between both of these sisters they were both in the same age range when they alleged that they fell victim to the accused. The allegation by E also relates to when she was in a similar age group, aged between nine and 12 and involved sudden and uninvited digital penetration. It was a single incident and it is alleged to have happened in a corridor in a public house with members of both families in the immediate locality.*

*It was either rebuffed it was neither rebuffed or accepted by E who reacted by effectively pretending that it never happened. And her evidence will be that it never happened again. She said that she was wary of him thereafter and effect in effect or this had the effect of denying him the opportunity of repeating what happened in the pub if he was so minded. There is to my mind a significant difference between the circumstances of the allegation by E and those of F and M. This is the fact that it happened in a place where discovery was a real possibility. That this was the case may have an explanation perhaps alcohol had disinhibited him to the extent that he was prepared to take the risk of public discovery, perhaps there was another explanation, whichever I'm not satisfied that the dissimilarities between this allegation and those of F and M are such as to require the count to be severed from the indictment.*

*The core similarities between all three sisters are their age at the time, the relationship in the loosest sense with the accused, the sudden initiation of digital penetration without prior discussion or preparation and the absence of any discourse whatever following such incident. The issue of potential collusion is pertinent, but the but the mere fact that there are differences in the detail of the allegations correctly identified by the defence are as the Court stated in D McG at paragraph 26, 'unlikely to have been present ...' sorry, I'm trying to read my writing. I'll quote from the judgment, that's the handiest. 'unlikely to have been present if the complainants had colluded to give evidence designed to support each other.' On that basis I am not prepared to sever the indictment."*

**Submissions on behalf of the Appellant**

32. The sole remaining ground of appeal is dealt with in paragraphs 30 to 48 inclusive of the appellant's written submissions, which were amplified by counsel at the remote oral hearing of the appeal.

33. The written submissions commence by rehearsing the submissions that were made by both sides to the trial judge in respect of the application to sever the indictment. They go on to point out that the judge was referred to recent case law on the jurisdiction to sever, in particular the cases of *The People (Director of Public Prosecutions) v. D. McG* [2017] IECA 98 and *The People (Director of Public Prosecutions) v. L.B.* [2015] IECA 37, and that he had taken the opportunity of considering the matter overnight. The written submissions then set out the ruling of the trial judge.

34. The appellant's position is that the test is as set out by Barron J. in *The People (Director of Public Prosecutions) v. B.K.* [2009] 2 I.R. 199. Having conducted an extensive review of the Irish authorities and of jurisprudence from other common law jurisdictions on the topic, Barron J stated:

*"A number of principles emerge from these cases.*

*(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 which 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.*

*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 explanationor denial."*

35. The appellant points out that this court recently confirmed in the case of *D.McG*. that it regards *B.K.* as still representing the law, subject to an acknowledgment that there is some uncertainty as to the admissibility "test" or threshold to be applied in relation to misconduct evidence where it is sought to use such evidence for one of the legitimate purposes identified by Barron J. in that judgment. In that regard, in sexual cases, *B.K.* has been applied over the years since it was decided so as to allow for the admission, in an appropriate case, of evidence of an accused having abused more than one complainant, for a number of possible purposes, typically: (i) to demonstrate system; or (ii) because of the inherent improbability of several persons (who have not colluded) making up stories which are either exactly similar, or which bear substantial similarities; or (iii) to rebut accident, innocent explanation or denial.

36. As Mahon J. pointed out in *D.McG*, to the extent that there is some residual doubt as to correctness of *B.K.* it is only as to whether a court, in considering whether to admit such evidence, which is of course evidence of "other" misconduct, should apply the relevance test commended by Lord Herschell in *Makin v Attorney General for New South Wales* [1894] AC 7, -previously adopted into Irish law in *People (Attorney General) v Kirwan* [1943] IR 279, or the somewhat different test subsequently adopted in England and Wales in *DPP v Boardman* [1975] AC 421 involving a balancing of prejudicial effect against probative value. The uncertainty exists because, while Barron J. appeared to favour the *Boardman* approach in *B.K*, in *DPP v McNeill* [2011] 2 I.R. 699 the Supreme Court has, in an *obiter dictum*, and in an admittedly somewhat different context, suggested that the Herschell test approved in the *Kirwan* case remains the law as to the correct approach to questions of the admissibility of misconduct evidence.

37. We would comment that it is perhaps unnecessary in most cases to get too hung up on the distinction, as many legal commentators (see, for example, McGrath on *Evidence*, 2nd edn, 2014 at paras 9-54 to 9-68) take the view that even if Lord Herschell's relevance test is the correct one with which to determine admissibility (and it seems likely post *McNeill* that it is and that Irish law has reverted to the pre-Boardman position) a trial judge would nevertheless retain a discretion to exclude otherwise admissible evidence if (to adopt the words of O'Byrne J in *Kirwan*) he/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."*

38. Although the cases of *D. McG* and *L.B.* both represent decisions on their own facts, in both of those cases this court was disposed for the reasons stated in the relevant judgments to uphold decisions not to sever the indictments.

39. The appellant's written submissions concede that the trial judge considered that he was bound by this court's view that *BK* remains good law, subject only to the uncertainty alluded to as to whether admissibility is to be governed by Lord Herschell's "relevance" test, or the "balancing test" advocated in *Boardman*. Neither the arguments in the court below, nor those in this court, were focussed on which test the court should apply. In circumstances where this issue was not the subject of specific argument it is not appropriate for this court to express a definitive view on that controversy.

40. Indeed, it is unnecessary to do so for the following reasons. In this case the prosecution contended that the evidence should be admitted because it was relevant and probative as demonstrating system, and because of the inherent improbability of coincidental fabrication. The defence in turn did not dispute that the evidence could be admitted if that was indeed the court's view. However, they had argued that the court would not be justified in taking that view and that the evidence should be excluded because such similarities as existed were generic and insufficiently substantial or "striking" to establish either system or the inherent improbability of coincidental fabrication. Moreover, the defence contended that the evidence should be excluded on the basis that its prejudicial effect outweighed its evidential value. Whether in so contending the defence believed that the necessity for probative effect to outweigh prejudicial effect represented an absolute admissibility threshold that required to be crossed, or merely a consideration that should influence the trial judge to exclude the evidence as a matter of discretion, is unclear. Be that as it may, there was a definite request that the evidence should be excluded on the basis that its prejudicial effect outweighed its evidential value.

41. The appellant makes the point in his written submissions that while the trial judge went on to analyse the similarities and dissimilarities between the different complainants in the present case, he did not address the issue as to whether the three complainants could be heard together because of either the inherent improbability of several persons making up exactly similar stories or that it shows a practice which would rebut accident, innocent explanation, or denial.

42. The appellant has submitted that while there are some similarities between the cases, there are no "striking similarities". While "striking similarities" are not essential or a pre-requisite in this type of case, it is contended that their presence or absence can be a useful guide as whether cases are appropriate to be tried together.

43. It is said that in this case, the complaints of F and M, respectively, exhibit similarities in terms of where the abuse happened and in terms of the nature of the sexual assault being digital penetration. It is submitted that these factors are not, in themselves, sufficient to show a system. In *D.McG.*, while Mahon J. identified the location of the assaults and the nature of the sexual assaults as being similar in the case of the complainants, he also noted that the complainants in that case were offered money as an inducement. While the appellant accepts that Mahon J. did not emphasise this latter point over the others, the appellant submits that the offer of money as an inducement is a very good example of a factor which constitutes an indicator of a system of abuse. In contrast, and while not disputing the potential relevance of similarity of location and nature of abuse, the appellant submits that such factors are generic. It is said that almost by definition, an allegation of sexual assault must involve touching of a sexual nature and must have taken place in a location where such could take place, typically in a private building rather than in public.

44. It was urged upon us that the position is even more marked when it comes to the complainant E because the trial judge characterised the location of this alleged incident as representing a "significant difference" between her complaint and those of her sisters. In this instance the alleged abuse is said to have occurred in a corridor of a public house with members of both families in the immediate vicinity. The trial judge considered that this took place in an area where discovery was a real possibility. He had speculated that perhaps alcohol may have disinhibited him, or that there may be some other explanation, but stated that in any event he was not satisfied that the difference was such as to justify severing the indictment. The appellant contends that this difference in location was a matter of great significance in the context of the application to sever. In effect, it left the only substantial similarities being the ages of the complainants at the time and the nature of the sexual assault itself. The appellant submits that these are generic factors in the type of allegation charged in this case and must exist in all cases involving a child complainant of sexual abuse. By contrast, the difference in location between where E says she was abused and where both F and M say they were abuse is stark, The former location was a place to which the public had recourse, it was during a family event taking place there, and involved a high risk of being discovered and caught in the act. In contrast, the other incidents occurred on private property in circumstances where there was little chance of being caught. It was submitted that sudden initiation, which was a feature of all three cases, was not such an unusual feature as to provide evidence of a system, and that as regards the nature of the relationship between the complainants and the appellant the trial judge had not identified this as representing a striking similarity.

45. It was argued that the trial judge's purported identification of evidence of system, fails to disclose precisely the basis for that finding. It was submitted that if, as is suspected, the

true basis for his decision was the inherent improbability rationale, - the trial judge failed to properly weigh the ostensibly significant differences against the relatively generic similarities in this case.

46. Finally, in amplifying these submissions in his oral presentation at the appeal hearing, counsel for the appellant sought to impress upon us that the jurisprudence requires the application of rigour in the analysis of the individual case, and he very strongly pressed a submission that the analysis of the trial judge in this case fails to exhibit the required level of rigour. We were referred to a series of cases as being illustrative of the level of analysis that is required, and of the type of factors that have been found to represent similarities of sufficient substance or which were sufficiently striking as to justify refusal of severance. These cases included, in addition to cases already mentioned: *J. O'C. v. Director of Public Prosecutions* [2000] 3 I.R. 478; *The People (Director of Public Prosecutions) v. L.G.* [2003] 2 I.R. 517; *The People (Director of Public Prosecutions) v. J.G.* [2018] I.E.C.A. 42; *The People (Director of Public Prosecutions) v. C.O'R.* [2016] 3 I.R. 322; *The People (Director of Public Prosecutions) v. N.R.* [2018] I.E.C.A. 20; and *The People (Director of Public Prosecutions) v. A.R.* [2019] I.E.C.A. 226.

**Submissions on behalf of the Respondent**

47. In reply to the appellant's submissions the respondent rejects the assertion that the similarities between the complaints were merely generic and that the differences were significant to the extent that the indictment should be severed. The respondent has submitted that the jurisprudence relied upon does not support this contention.

48. While the appellant had pointed to two similar factors between the complaints made by F and M, respectively, being the location where the instance happened and the nature of the sexual assaults perpetrated, namely, digital penetration there were additional similarities that were specific and not generic. The was the similar age of complainants, the fact that the complainants were sisters, the fact that the complainants were all relatives of the appellant in the same degree relationship, namely daughters of his first cousin. The was the fact that the appellant was a neighbour and actively involved in helping to run the complainants' father's farm. With respect to the nature of the sexual assault the main assault in each case was digital penetration of the vagina and this was much more specific than and mere touching of a sexual nature. In addition, there was evidence that there was a particular way that the complainants were held, from the side or from behind as the digital penetration occurred.

49. This Court was referred to Professor O'Malley's work on *Sexual Offences* (2nd edition, at paragraph 14.43) where the respected author says that one recurring theme in the case is on severance is that the decision on ordering separate trials is very much within the trial judge's discretion. Quoting the English case of *R v Flack* [1969] 1 WLR 937, O'Malley suggests that 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 so by some overwhelming fact.*" The respondent asks us to note that the Court of Appeal has previously cited this proposition with approval in the cases of *D.McG* and *J.G.*, respectively, and we were referred particular to the facts and findings in both of those

cases. We were also referred to the case of *The People (Director of Public Prosecutions) v LG* (cited above) is authority for the proposition that the mere fact that there may be some differences as between the circumstances of a crime or crimes committed against individual complainants will not necessarily determinative of the issue, particularly if notwithstanding the differences there are also a number of similarities. In that case although differences had existed they were not such as to warrant separate trials in the view of the Court of Criminal Appeal in circumstances where there were also significant similarities between the complaints. Later in his submissions counsel the appellant also refers to *The People (Director of Public Prosecutions) v AR* (cited above) as further authority for the same proposition.

50. We were further referred to the decision of this Court in *The People (Director Of Public Prosecutions) v N.R* (cited earlier) as a further example of the cases which severance was refused. In that case there had been several indicia of system in the abuse of the complainants and the respondent suggests that most of those indicia were also present in the case now under consideration. In the same vein, we were again referred to *The People (Director of Public Prosecutions) v AR*.

51. Counsel for the respondent stressed the care that the trial judge had taken in arriving at his decision in this matter. He points out that the trial judge carefully studied the recent case law and considered the matter overnight before announcing his decision. Further, he had carefully scrutinised the statements of the complainants in the Book of Evidence. In the circumstances the suggestion of lack of rigour in the analysis conducted was rejected by the respondent.

**Discussion and Decision**

52. Having carefully considered the complainants' evidence (and there is no suggestion that their actual testimony differed in any very material respect from their intended evidence as notified in the Book of Evidence) we have no hesitation in concluding that the trial judge was correct in refusing to sever the indictment.

53. There were, in our assessment, striking similarities between the complaints, as well as some differences. Amongst the striking features of the case is that all three complainants were in the same degree of relationship to the appellant, they were all girls, and they all lived in the same farm house in which they were neighbours to the appellant and residing in close physical proximity to his family home and farm. Insofar as a possible system concerned it suggests the exploitation of common opportunities to abuse presented by that shared degree of familial and neighbourhood relationship.

54. Another striking feature is that the girls were each in approximately the same age bracket at the time of being abused. In the case of the complainant E, because the date on which the incident is said to have occurred has been admitted by the defence, namely a specific date in August 1994, E's age at the time is readily ascertainable with reference to her date of birth. The evidence suggested that she was twelve years of age on the admitted date. In her evidence, M estimated that she had been between ten and twelve years of age at the time of being abused. While it is true that F claims to have been abused over

several years from perhaps as early as age 9 until she was aged 16, it is certainly the case that if her complaint has substance she was also being abused when she was at the same age as her sisters were when they each suffered abuse on a single occasion at the hands of the appellant. There is a likely explanation grounded in the evidence for why M was only abused once, namely that she had reacted badly and had slapped the appellant. While there is no evidential basis for inferring an explanation as to why E was only abused once we think it is still of significance that she was the age she was when she contends that she was abused.

55. Another similarity between the cases is the existence of a degree of trust, between each of the complainants and the appellant arising from the familial and neighbour relationships between their family and his, and which relationship of trust created or assisted the opportunity to abuse.

56. The single greatest, and most striking, similarity in all three cases is the nature of the abuse perpetrated. In all three instances there was digital vaginal penetration. Moreover, there was evidence, as counsel for the respondent pointed out, that there was a way in which the complainants were held from the side or from behind as the digital penetration occurred, and this was a further similarity.

57. It is certainly true that there are differences as between each case. F's abuse was not confined to one occasion but continued over several years. While the manner of her abuse was not confined to digital vaginal penetration, and included masturbation of the appellant and of the complainant, and other sexual contact including penetration of F's vagina by the appellant with his tongue, digital vaginal penetration featured in the majority of the incidents recounted by F. Other differences included the fact that in F's case alone she was shown pornographic material (on the first occasion she was abused) and her abuse took place in more than one location, although predominantly on the appellant's farm premises, either in farm buildings or in the farmhouse itself.

58. Counsel for the appellant was right to point to the fact that the location of E's abuse was significantly different to the types of location in which her sisters had claimed to be abused. It was a public place, and the abuse appears to have been perpetrated at some risk to the appellant of being caught or discovered. As regards whether engaging in such risk was a dissimilarity the point might be made that the abuse of F in a bedroom in his home while his (admittedly infirm) mother slept in an adjacent bedroom, would be regarded by some as having also been risky. Be that as it may, the trial judge, rightly in our view, acknowledged that the location in E's case did represent a significant dissimilarity. However, we agree entirely with the correctness of trial judge's understanding of the law that the existence of such a dissimilarity, in circumstances where there were also significant similarities, ought not necessarily to be regarded as determinative. We find no error of principle in the trial judge's approach in that regard.

59. The trial judge concluded that the degree of similarities between F's case and M's case readily allowed him to be satisfied that they potentially provided evidence of system. Moreover, he further concluded notwithstanding the acknowledged dissimilarity with the

other cases in terms of the location of the abuse, E's case still exhibited sufficient similarities with the other two cases as would not justify him in severing the count relating to E from the indictment. Therefore, it is clearly to be inferred that he was also satisfied that E's complaint supported evidence of system. We are satisfied that there was an evidential basis for these findings and can identify no error of principle.

60. We are also satisfied to reject any suggestion that the trial judge failed to exhibit sufficient rigour in his analysis. He heard lengthy argument, had relevant authorities opened to him, and had reserved his decision overnight. Moreover, while his actual ruling was delivered ex tempore, and therefore could not reasonably be expected to exhibit the degree of precision, and nuancing, in its reasoning that one would expect to see in a formal reserved judgment, we do consider that it was suggestive of any lack of care or rigour in analysing the relevant considerations. In our assessment it was cogent and adequate in the circumstances.

61. We consider that once it was decided that the complaints' of M and of E, respectively, potentially provided evidence of system in the case involving F, and vice versa, and that, accordingly, they were *prima facie* relevant and admissible on that basis, it remained for the trial judge to consider whether the prejudicial effect of such evidence would outweigh its probative value to such an extent as to require its exclusion in the interests of justice. Although the trial judge's ex tempore ruling does not expressly indicate a specific decision on this issue we are satisfied, in circumstances where he does expressly acknowledge that *"[t]he defence have submitted that these final counts should be severed as their prejudicial value exceeds any probative value that they may have"*, that it is to be inferred from his overall decision that the misconduct evidence in relation to M and E could legitimately be relied upon as potentially providing evidence of system, that he was satisfied that severance of the counts relating to these complaints was not otherwise required in the interests of justice, either on the basis that it was disproportionately prejudicial or otherwise unfair. We see no basis on which such a decision could be criticised on the evidence in this case.

62. Counsel for the appellant has observed that the trial judge did not in fact address the alternative basis on which severance was opposed, namely based on the inherent improbability rationale, and he is correct in that. The appellant's suspicion is that the trial judge may have conflated the purpose of demonstrating system with the inherent improbability rationale, and that his true reasons for refusing severance may have been based on the latter rather than the former. We reject any such suggestion. There trial judge was clearly of the view that the complaints of M and E potentially provided evidence of system. That having been said we would observe that, had he been minded to do so, it would arguably have been open to the trial judge to have also justified his refusal of the application on the basis of the inherent improbability rationale. He in fact made no such finding and, of course, having found that the complaints of M and E potentially provided evidence of system he was not obliged to go any further. It is not appropriate or necessary for us to make any such additional finding at this remove. We simply observe

that an additional finding to that effect might well have been open to him on the evidence.

63. In conclusion, we are satisfied that no error has been demonstrated with respect to the trial judge's decision not to sever the indictment. That being the only ground of appeal, the appeal against conviction must be dismissed.