THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 96

Record Number: 229/18

Birmingham P.
McCarthy J.
Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

S.O'S

APPELLANT

JUDGMENT of the Court delivered on the 9th day of April 2020 by Ms. Justice Kennedy.

1. This is an appeal against conviction. The appellant was convicted in Dublin Circuit Criminal Court of 24 counts of sexual assault relating to N.O. and 1 count of sexual assault relating to T.O. The appellant received an ultimate sentence of 8 years' imprisonment with the final year suspended on terms.

Background

2. The complainants in this case are sisters. The appellant is the partner of the complainants' aunt, effectively their uncle. In respect of NO, she was born in spring 1998. The counts in respect of NO outline sexual assaults perpetrated between January 2005 and October 2010 when the complainant was between 6 and 12 years old. NO gave evidence to the effect that she was often sent to stay with her aunt and the appellant, between 3-4 times a week, although the frequency decreased as she got older. On nights that the complainant stayed over she would sleep top and toe with her cousin. During the night the appellant would come into the bedroom and he would pull the complainant towards him, he would put his hands down her pyjamas, into her underwear and then into her vagina. The complainant described this as happening every night she stayed over. NO gave evidence of the last incident which occurred on the night of her brother's Debs in 2010. She had been minding the appellant's son in his flat in Dublin. The complainant believed that nothing would happen as she heard the appellant get into bed, but he then proceeded to get out of his bed and tell her that he loved her more than his partner and he put his hand into her pyjamas and into her vagina. This led to the complainant telling her brother and sister what had occurred.

3. In relation to TO, she gave evidence of an incident which occurred while she was staying at her grandmother's house when she was between 6 and 7 years of age. At the time, the appellant, his partner and their son were living in the house on the top floor. There was a bedroom with a double and a single bed. The appellant and his partner were in the double bed and the complainant was at the end of the single bed with her cousin. The complainant gave evidence that during the night she felt the appellant coming towards

her, he got into her bed and put his hand down her underwear and touched her vagina. The complainant stated that she got up and told the appellant she didn't like what he was doing, and he told her to come back and that he wouldn't do it again. The complainant gave evidence that she told no one at the time because she didn't understand what had happened and she eventually told NO on the night of her brother's Debs.

4. A formal complaint was made to Gardaí in 2015. The trial against the appellant commenced on 12th February 2018 in respect of 33 counts. On 14th February 2018, the jury was discharged, and the trial re-commenced on 15th February 2018. At the close of the trial, counts 1-8 were withdrawn from the jury and verdicts of guilty were returned in respect of the remaining counts.

Grounds of appeal

5. The appellant put forward 17 grounds of appeal, some of which were not pursued at the hearing on appeal leaving the following grounds of appeal:-

(i) The trial judge erred in law and in fact in refusing to sever the indictment and in refusing to order separate trials.

(iii) The trial judge erred in law and in fact in refusing the appellant's direction application and/or failed to properly consider and/or determine the submissions made on behalf of the appellant.

(iv) The trial judge erred in refusing to accede to a defence application for a direction to acquit at the conclusion of the evidence.

(v) The trial judge erred in fact and in law in failing to discharge the jury, in particular having regard to the significant change in the number of allegations made by NO, which was not apparent to the defence on the basis of the papers served in the case, and indeed was not the basis upon which the prosecution opened the case to the jury.

(vi) The trial judge erred in fact and in law in not having due regard to the significant shift in the evidence of the main complainant and the fact that the case against the appellant changed drastically from that which was opened, and moreover the trial judge erred in fact and in law in not having due regard to the fact that the significant shift in evidence undermined the very basis upon which the application for separate trials had been defeated.

(vii) The trial judge erred in law and in fact when charging the jury on the issue of sample counts and did so in an unfair and incorrect manner. The prosecution did not open the case on the basis of sample counts, and this allied to the significant change in the evidence of the complainant resulting in an unfair trial and consequently and unsafe verdict.

(viii) The trial judge, when charging the jury on the issue of sample counts, did so in an unfair and incorrect manner which was apt to suggest that the appellant may have

been suspected of further offending, which was not the case the appellant had been prepared to defend.

(ix) The trial judge erred in law and in fact in failing to address or deal with the matters of concern raised by the appellant in his application to the trial court for a direction/discharge, which highlighted significant unfairness in the appellant's trial.

(x) The trial judge erred in law and in fact in permitting Count 9 to go to the jury for consideration in circumstances whereby it was clear the appellant had not resided at the location in question for most of the time referred to in the charge.

(xi) The trial judge, when charging the jury, erred in law and in fact by mischaracterising the appellant's case and, in general, failed to put the appellant's case fully and fairly to the jury.

(xvii) The trial was unsatisfactory on the basis of the cumulative effect of the above factors rendered the jury verdict unsafe.

Submissions

Ground 1-Refusal to sever the indictment

6. On day one of the first trial, the trial judge refused an application to sever the indictment in the following terms:-

> "Now, having considered all of the submissions in this instance and having reviewed the jurisprudence, I am satisfied that there are sufficient aspects of the proposed evidence to be similar to allow the evidence of both complainants to be admissible and to quote the case law that the evidence be cross admissible in order to show a system or rebut accident. Regard has been had specifically to the authority of Mr Justice Barron in the BK decision where he analysed those principles applicable to those categories or cases in which he held that the rules of evidence should not be permitted to offend common sense. Now, in that regard in view of the following I view the following matters to be similar. One, that the location was in the accused's bedroom, be it as I've mentioned at the outset, in the grandmother's house or in the home of the maternal aunt. Secondly, the timing where both alleged complainants were in bed in the evening time. Thirdly, sorry, the relationship to the accused. In fact, both were nieces of his partner at the time and, fourthly, they were of tender years when this alleged offending began. Fifthly, the allegations of sexual assault involved the hand of the accused down the inside of both clothing and underwear of the two female complainants and with respect to TO the touching of her vagina and with respect to NO instances of touching then progressing to digital penetration, and on that basis I will not sever the indictment."

7. Following the discharge of the jury, this ruling was adopted into the trial which recommenced on 15th February 2018.

Submissions of the appellant

8. The appellant submits that the trial judge erred as there was insufficient nexus between the proposed evidence of TO and NO where TO's evidence related to a single allegation in which KO was present as opposed to NO where there were 32 counts on the indictment and KO was never present. It is submitted that the matters listed by the trial judge above as being "similar" did not amount to a sufficient level of system and the trial judge ought to have severed the indictment.

Submissions of the respondent

9. The respondent submits that the facts of the present case established the necessary nexus to allow the counts to be tried together. These facts include: that the complainants were both, effectively, the appellant's nieces; they both refer to the presence of a son during the abuse; they refer to similar sleeping arrangements i.e. sleeping top and toe with their cousin; the abuse took place while they were asleep in bed and they were both of tender ages

10. The respondent submits that the differences highlighted by the appellant are not sufficient to merit severing the indictment and do not undermine the core nature of the assaults which involved accosting the complainants in their beds with the appellant's hand touching the vaginal area.

Discussion

11. An application was made on behalf of the appellant to sever from the indictment the count concerning the complainant TO. This application was refused by the trial judge. The application was moved on the basis that there was insufficient similarity between count 33 on the indictment relating to the allegation made by TO and the remaining counts on the indictment which concerns the complainant NO.

12. It was contended on behalf of the appellant that there were fundamental differences in the allegations, not least of which was the fact that there were many counts on the indictment concerning NO and a single count concerning TO. In oral hearing this particular factor was one on which considerable emphasis was placed.

13. The primary basis for this emphasis arose from the fact that in the course of NO's cross-examination in the first trial, it was suggested to her that if the events occurred as she said, from the time when she was 5 years of age until 2010, this amounted to over 600 occasions. This was despite the fact that when she made her statement to the Gardaí on the 2nd November 2015, she indicated that the appellant had touched her about 30 times.

14. In the course of the second trial, NO stated in direct testimony that the incidents complained of took place every time she stayed with her aunt and uncle-in-law. In cross-examination it was again put to her that the sexual assaults, on the basis of her evidence, must have occurred on hundreds of occasions.

15. Mr Carroll SC for the appellant says that the increase in the incidence of abuse from that of 30 to that of incidents in the hundreds serves to emphasise the disparity between the

allegations and the error on the part of the trial judge in refusing the application to sever the indictment.

16. Moreover, it is said that not only is there a grave disparity in terms of the number of counts concerning each complainant but also there are further disparities in terms of the location of the events complained of, the nature of the sexual activity and the ages of the complainants at the time of the offending conduct. It is also said that the trial judge erred in stating that there was an 'overlap' in the allegations.

17. The respondent argued in the court below and in this Court that there was sufficient nexus vis-à-vis the counts on the indictment to enable the trial judge to exercise her discretion to refuse the application for severance. The respondent relies on the relationship between the complainants and the appellant, the fact that the incidents took place in the appellant's bedroom, whether it was his bedroom in his own flat or his bedroom in the complainant's maternal grandmother's home is immaterial, the fact that the assaults were said to have taken place while both complainants were asleep in bed and finally that each complainant was of tender years at the relevant times.

Legal principles

18. The principles concerning the severing of an indictment in the context of system evidence was considered in the now well-known decision of *The People (DPP) v. BK* [2000] 2 IR 199. In *BK* Barron J. summarised the principles which he distilled for consideration of a number of cases as follows: –

> "(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) The categories of cases in which the evidence which can be so admitted is not closed.
>
> (iv) 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 the 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."

19. It is clear that a trial judge has a discretion whether to sever the indictment and an appellate court will not interfere with the exercise of this discretion unless it can be shown to give rise to an injustice.

Conclusion

20. In the present case there are, without doubt, similarities in the allegations made by the two complainants as against the appellant. It is also the position that there are some differences not only in terms of the nature of the sexual activity complained of but the most significant difference is that of the amount of complaints giving rise to a considerable number of counts concerning NO. In contrast there is a single count concerning the complainant TO.

21. However, it cannot be gainsaid that the nature of the sexual offending, whilst not precisely similar, is very similar indeed. The activity complained of by each complainant is that the appellant approached them whilst they were asleep in their respective beds, putting his hands down their pyjama bottoms and touching them under the clothing on the private parts. The fact of digital penetration in respect of one complainant means that the nature of the sexual activity was not precisely similar in terms, however there is no doubt but that the nature of the activity was sufficiently similar.

22. Moreover, the complainants were the appellant's partner's nieces, both complainants were children of tender years; the complainant, NO was aged between 6 and 7 years old and 12 years old and TO was aged between 6 and 7 years. It is the position that each child was abused when she was aged between 6 and 7 years, therefore in that sense there was an overlap in time in terms of the abuse of each child, when aged between 6 and7 years, which adds to the similarities and consequent nexus in the offending conduct.

23. Whilst the offending concerning NO took place in the appellant's home, and the offending concerning TO took place in her maternal grandmother's house, on each occasion the complainants were staying in the appellant's bedroom.

24. In those circumstances, whilst there are some differences in the complaints made, we are entirely satisfied that they are modest disparities. There is undoubtedly a sufficient nexus between the counts enabling the trial judge to exercise her discretion as she did. We are satisfied that the similarities were more than sufficient in the circumstances.

25. Accordingly, this ground is rejected.

Grounds 3 &4- Refusal of direction application

26. The trial judge refused the appellant's application for a direction at the conclusion of the evidence in the following terms:-

> "Now, while there is some explanation as to the subsequent five-year delay in reporting these allegations, the delay is not so extreme as many historical cases that come before these courts. All such cases wherein former child complainants give evidence as to what transpired many years ago have the same difficulties attendant upon the delay aspect. There's no perceived specific prejudice contended

for in this instant, and the accused has outright denied these allegations and has called evidence on his behalf.

Inconsistencies and vagueness are matters for the jury when assessing witness testimony and reliability. The jury has had the benefit of seeing and hearing the witnesses give evidence and these are matters properly left for their consideration. I am satisfied that the witnesses were expertly and forensically cross-examined while in the presence of the jury and they would also then be in a position to assess the conflicts in the evidence, wherein the defence also called evidence in this instance and prior to the application being made, in my opinion, that the trial has been fair and it is ultimately a matter for the jury to decide their approach to the evidence and the issues of vagueness and credibility, which go to reliability. They will be also given the appropriate warnings and advice to be careful in their approach to the evidence in the case. So, I'm refusing the application."

Submissions of the appellant

27. The appellant submits that the trial judge did not have due regard to the prejudice which arose in the present case. It is said that the changing narrative of the complainants and the vagueness surrounding the allegations made it an impossible task to defend the appellant. The appellant focuses much of his submissions on the statement of NO to the Gardaí in 2015 wherein she said, "I'd say SO'S touched me in my vagina about 30 times." In cross-examination, NO was questioned as to the difference between this statement and her direct testimony:-

> "Q. And I think -- well, maybe we'll just get a look at the original of that statement. So: "I never stayed over in KO's house after PO's Debs, so it never happened again. I'd say SO'S touched me in my vagina about 30 times"?
> A. I'm aware I said that, yes.
> …
> Q. So that's what you told the Gardaí then, isn't it?
> A. But I also said in my first statement that it happened every time.
> Q. Mm-hmmm?
> A. Myself and Garda Weldon were trying to put a number on it. And, as I said, I didn't --
> Q. And you put the number 30 on it?
> A. But, as I said, I didn't sit and work out how many times a year I stayed there and -- but in my first statement it does say that it happened every time.
> Q. Mm-hmmm. Sure, I know, but, sure, I -- I read that out to you, didn't I? I said that to you. I asked you about that, and she said it happened. "I couldn't tell you how many times he touched me. It was a lot of times." I know you said all that, but this was specifically -- as you said yourself, you were trying to put a number on it, and the number you put on it was 30?
> A. It's just any number. As I said --

Q. Pardon?

A. -- I didn't work it out. I said it's just any number we put on it. As I said, we didn't work it out, but, as I mentioned in my first statement, that it happened every time.

Q. With the greatest of respect, it's not -- a matter for the jury ultimately. It's not just any number. You said: "I never stayed over in KO's house after PO's debs, so it never happened again. I'd say SO'S touched me in the vagina about 30 times"?

A. Because myself and Ms Weldon were looking to put a number on it.

Q. Yes?

A. But I mention in the first statement that it happened every single time, and I also mention that it happened a lot of times.

Q. Yes. You said that twice and you can keep saying that every time I ask you about why you said 30 times to the guards when you were making a statement -- an important statement, a detailed statement about these allegations. "I'd say SO'S touched me in my vagina about 30 times." It's a world of difference from what you'd have the jury accept on the basis of what you've said about every time, isn't it? It's a world of difference, isn't it?

A. Yes, I know, but, as I said, we were just looking to put a number on it. And obviously I underestimated the number, but --

Q. What do you mean, "we were"? What do you -- sorry, I'll have to -- what do you mean?

A. Myself and Garda Weldon were looking to put a number on the amount of times."

28. The appellant submits that the escalation in the quantity of allegations and the vagueness and lack of specificity regarding the allegations made it an impossible task to defend the allegations The appellant notes that there was no specificity in dates except that relating to the date of her brother's Debs in 2010 but that even so, the prosecution evidence adduced was inconsistent and contradictory.

29. The appellant submits that the evidence concerning the incorrect dates in relation to counts 1-8 is relevant to the credibility of the witness.

30. Moreover, it is said that while the delay itself may not be akin to some the courts have experienced, it was compounded by the lack of specificity in the complainant's allegations and emphasis is placed on the prejudice suffered as a result of the cumulative effect of these issues.

Submissions of the respondent

31. The respondent submits that the evidence of NO during the trial mirrored the evidence in her statement given to the Gardaí and she at all times stated that the abuse occurred on a regular basis every time she stayed at the appellant's flat. The respondent submits that there was no exaggeration of the allegations being made against the appellant but rather

the evidence accorded with what she had told the Gardaí and when questioned about the figure 30, the complainant gave a reasoned explanation.

32. In relation to lack of specificity, the respondent submits that such is not surprising given the age and lack of understanding of the complainant of the offences being perpetrated. However, it is noted that there was detail as to location and the manner of assault.

33. It is accepted that the complainant's initial recollection was incorrect as to the commencement of offending, but this can be readily explained by the reasons outlined above. In any case, the trial judge was correct in asserting that any issue as to credibility or inconsistency of a witness was a matter for the jury.

34. The respondent submits that the delay in this case was not of a nature to give rise to a real risk of unfairness. There was a five-year delay between the last offence and official complaint to the Gardaí. This gap is not unusual in cases of this nature and the appellant has failed to point to any specific prejudice suffered as a result.

Discussion

35. At the conclusion of the prosecution evidence, Mr Carroll advised the Court that he intended to move an application for directed verdicts and an application to stop the trial. However it seems, by agreement that the application would be made, rather unusually insofar as an application for direction is concerned, at the conclusion of the entirety of the evidence. Clearly, an application for direction is moved on the basis of the sufficiency or otherwise of the prosecution evidence and therefore is moved at the conclusion of the prosecution's case applying the principles stated in *R v. Galbraith*.

36. At the conclusion of the evidence, the inherent jurisdiction of the Court to stop the trial was invoked, wherein it was and is contended that the trial process was rendered unfair by virtue of the delay in making the complaints, which it is said gave rise to unique and extraordinary difficulties causing significant prejudice to the appellant, which became apparent in the course of the evidence.

37. An application, as stated, was also moved at this juncture in accordance with the principles in *R v. Galbraith*. It was contended that this was the case where there was inherent weaknesses and elements of vagueness in the evidence, so as to engage the second limb of the test in *Galbraith*. Many of the complaints made also concerns the application to stop the trial.

38. First, the situation arose in the course of the evidence called on the part of the defendant that the appellant and his partner did not take up residence in a flat in an inner city complex, where the offences were alleged to have occurred until sometime in March 2005, which had a direct impact on counts 1 – 8 inclusive , causing the prosecution to withdraw those counts and seek to amend the start date on count 9 on the indictment. Secondly, it was said on the part of the appellant that the enlargement of incidents of sexual assault concerning NO from the stated position on her statement, being 30 times to that of a possible 600 times not only rendered the trial unfair in terms of an application

to stop the trial but also impacted on her consistency, and so came within the ambit of the second limb in *Galbraith*. Thirdly, it was said that the counts lacked specificity in terms of dates which, it was argued, was the very heart of the issue; in particular it was contended that the breadth of the dates concerning TO was in itself unfair. The argument advanced concerned the evidence of the maternal grandmother where it was suggested to her in cross-examination that during that period she may have been with friends or on holiday and therefore was unaware if the complainant had stayed in her house. Fourthly, it is submitted that not only did the increase in the number of incidents concerning NO impact on the consistency of her account, but also the fact of the lack of certainty regarding the dates in itself rendered the trial unfair and finally, it was contended that there were inconsistencies regarding the terms of the complaint made by NO.

The legal principles

39. The classic statement of the approach for a trial judge in considering whether or not to withdraw the count or counts from the jury is as stated by Lord Lane C.J. in *R v. Galbraith*. The second limb of the well-known test is as follows: –

> "(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon us, it is his duty, upon a submission being made to stop the case. (b) Where however the prosecution evidence is such that it strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the fact there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

40. In the case of *DPP v. Buckley* [2007] 3 IR 745, Charleton J. stated that would only be in exceptional cases a trial judge would withdraw a case from a jury on the basis that the necessary proof was tenuous. It is, as has been stated time and again, a matter for the jury to assess the credibility and the reliability of the witnesses. As said by Charleton J. in considering the role of the trial judge at the stage where an application is made to direct the jury to return verdicts of not guilty: –

> "At that stage, the trial judge is not concerned with issues of credibility or with sufficiency of proof but with the technical nature of the elements of the offence and whether these have been reflected in evidence by proof. There can be exceptional cases where the nature of a necessary proof is found to be so tenuous that a trial judge would be compelled to make a conclusion that any consequent conviction would be unsafe. In those very rare cases the issue as to conviction might be withdrawn from the jury, or from the judge acting as the tribunal of fact."

41. Edwards J. in *The People (DPP) v. M* [2015] IECA 65 clarified the application of the test in the second limb of Galbraith as follows: –

"At the outset the Court wishes to address a misconception that it occasionally encounters, that the second limb of Lord Lane's celebrated statements of principle in R v Galbraith represents authority for the proposition that a case must be withdrawn from the jury if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies. This Court wishes to emphasise that it is not authority for that proposition.

On the contrary, the emphasis in Galbraith is on the primacy of the jury in the criminal trial process as the sole arbiter of issues of fact. What Lord Lane was in fact saying in Galbraith was that even if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies, it is for the jury to assess that evidence and make of it what they will, unless the state of the evidence is so infirm that no jury, properly directed, could convict upon it. Accordingly, what Galbraith is in fact concerned with is fairness.

Moreover, implicit in the Galbraith principles enunciated by Lord Lane, is that withdrawal of a case from a jury should be an exceptional measure, to which resort should only be had for the purpose of avoiding a manifest risk of wrongful conviction.

This Court considers that the matter is well put in the following quotation from Archbold, Criminal Pleading Evidence & Practice 2014 at page 484, where the authors state:

'In making the judgment in line with the second limb of Galbraith, as to whether the state of the evidence called by the prosecution, taken as a whole, is so unsatisfactory, contradictory or so transparently unreliable, that no jury, properly directed, could convict, the judge must bear in mind the constitutional primacy of the jury and not usurp its function.'"

Conclusion on direction ruling

42. Insofar as it is said that the absence of specificity concerning dates amounts to vagueness of such calibre so as to cause the trial judge to direct the jury to return verdicts of not guilty, we are not at all persuaded by this argument. It is the position that NO was in error regarding the time when she contended that the offending behaviour commenced. This caused the prosecution to withdraw the counts prior to March 2005 on foot of the evidence of KO . However, this was a matter properly within the remit of the jury to consider in assessing the credibility of NO's account. The jury were obviously aware that those counts were withdrawn, they were aware of the evidence given by KO that she and her partner had not moved into the flat until March 2005 and so were aware that NO was incorrect in stating that the event complained of started when she was five years of age. This material was before the jury and was for their assessment in deciding how to weigh and assess her credibility. Equally, the fact that NO had stated in her statement to the Gardaí that the events complained of had occurred on approximately 30 occasions, whereas this number increased to the hundreds on her evidence, was also a matter for the jury to assess.

43. The inconsistencies in the evidence of recent complaint was entirely a matter for the jury's assessment. The position is well established that evidence of recent complaint is relevant only in the context of consistency on the part of the complainant and whether it shows consistency or inconsistency is a matter entirely within the remit of the jury.

44. Insofar as it is said that the breadth of the count concerning TO impeded the defence, this Court is not persuaded either by that argument. Evidence was called on behalf of the appellant that TO had never stayed overnight in her maternal grandmother's home, this was then tested as is appropriate on cross-examination, thus leaving the material for the jury's consideration to assess and to weigh.

The PO'C application - discussion

45. Concerning the argument advanced that the trial judge ought to have exercised her inherent jurisdiction and stopped the trial on the basis of unfairness arising in the course of the trial, it is well established that the trial judge has a continuing obligation to ensure that an accused person receives a fair trial and to protect due process rights. In the present case the delay could not be said to have been the kind of magnitude sometimes seen by this Court. The issue the trial judge is to assess is whether the delay generates a real and serious risk that the accused person will not be able to get a fair trial, which risk cannot be avoided by the directions of the trial judge. It follows therefore that even a lengthy delay on the part of the complainant will not normally require the trial be stopped unless that delay creates a real risk of an unfair trial.

46. It is said that, in NO's case, there was an evolving and ever-changing narrative, culminating in the escalation of the quantity of the allegations rendering it almost impossible to properly defend the appellant. The arguments advanced in support of the direction application are also made in the context of this application.

47. A statement of complaint was made by NO on 21st August 2015, allegations extend from March 2005 until October 2010. In the case of TO, her allegation is on a date unknown between July 2000 and July 2002. She also made her statement of complaint to the Gardaí in August 2015. The delay cannot be said to be, in the circumstances of offending against a child, a lengthy delay.

48. Nonetheless, the question arises as to whether the trial judge was correct in refusing to stop the trial in the circumstances.

Conclusion

49. Whilst it is clear that the appellant engaged with the evidence and in particular insofar as this application is concerned, it was established that the appellant and his partner did not move to the flat in question until March 2005. However, the fact that this was established in evidence does not lead to prejudice on the part of the appellant. The material resulted in the prosecution withdrawing counts from the jury, of which the jury were aware and consequently alert to the fact that the complainant was incorrect as to when she asserted the offending conduct commenced.

50. Insofar as lack of specificity regarding dates is concerned, it is difficult to see that there is any basis to the complaint of a lack of specificity in the first instance, much less that such complaint gives rise to any prejudice towards the appellant. Finally, the argument of the increase in the number of allegations does not give rise to any prejudice to the appellant. Insofar as all of the complaints are concerned, it is not at all clear that any of those complaints arise from the passage of time.

51. Accordingly, we reject these grounds of appeal.

Ground 9- Failure to deal adequately with discharge/direction application

52. The appellant submits that the trial judge did not deal with all of the issues raised by the defence during the direction application and in its determination the Court processed the issues canvassed by the appellant addressing the concerns as merely matters of inconsistency. It is submitted that the inconsistencies as presented throughout the trial resulted in a manifest unfairness to the appellant. As can be seen from the Court's determination, significant issues raised by the appellant were not even addressed, for example the issue relating to sample counts which only arose during the application was ignored in full, which in and of itself constitutes a ground sufficient to render the trial process unfair.

53. The respondent submits that while the trial judge did not necessarily deal with each individual argument made by the appellant in her ruling, she did outline the basis of the application grounded on the POC aspect with the issue of fairness and the general direction application pursuant to *Galbraith*.

Conclusion

54. The issues were fully litigated before the trial judge and it is quite clear from the perusal of the transcript that she engaged fully with the arguments as those arguments were advanced by both the appellant and the respondent. The application in terms of *R v. Galbraith* and the application to stop the trial were ventilated on Friday the 23rd February 2018. The trial judge gave the ruling the following Monday. Whilst the ruling is undoubtedly succinct, it is clear that the trial judge was more than aware that she was addressing two issues, namely; an application for a direction and an application to stop the trial.

55. The trial judge addresses the issue of delay, correctly alluding to the fact that the delay was not as extreme as in many historical sexual abuse cases. She then addressed the issue of the direction application and again properly indicated that inconsistencies and vagueness in an account were matters for the jury's assessment. She concluded that the trial was a fair one and that the question of reliability was one for the jury in circumstances where she intended to provide the jury with the appropriate warnings. We are satisfied that there was no error in her approach.

Grounds 5 & 6- Evidence of NO

56. These grounds are concerned with the evidence of NO during the trial outlined in the submissions of the appellant above.

57. The appellant submits that the shift in the complainant's evidence radically altered the factual basis on which the application for a separate trial had been made. As a result, the appellant submits that the trial judge ought to have discharged the jury in order to remedy this unfairness and to ensure the right to a fair trial.

58. The respondent submits that the counts were framed in a manner so as to present a sample selection of dates during which the offending was alleged to have occurred and the proposed evidence of NO reflected such.

59. The argument advanced by the appellant to the effect that the factual basis on which the separate trials application was made changed on foot of the viva voce evidence given during the trial is categorically refuted. Reference was indeed made to the number of counts pertaining to NO during the course of the preliminary application. The indictment was not amended at any stage during the trial in order to proliferate the counts levelled against the appellant. On the contrary, certain counts were withdrawn from the jury on foot of evidentiary revelations during the course of the trial. Save for this withdrawal of counts, the number of offences the appellant was charged with remained the same from the point of arraignment to the conclusion of the trial

Discussion

60. 32 counts were originally preferred on the indictment concerning the complaints made by NO. Counts 1 – 8 were ultimately withdrawn by the prosecution following the evidence given by KO. Each of the counts on the indictment were preferred on a quarterly basis with the exception of count 32 which provided for a specific date. The respondent contends that the counts were preferred on that basis in order to properly represent the offending conduct. In giving evidence, the witness stated that whenever she was in her aunt's flat, she would stay the night and that the appellant would come into the bedroom and touch her inappropriately. In her direct testimony, the following exchange took place: –

> "Q. And, how many times did you stay or would you have stayed with your aunt KO?
> A. Around three to four times a week, and that was because my mam wasn't able to look after us at that time.
> Q. And as you got older?
> A. As I got older, it decreased because obviously I had been gaining more friends and I had become closer to other family members, and obviously I didn't want to be staying there.
> Q. And, in terms of what you've described, what S'OS did, was that a regular occurrence?
> A. Oh, it was every time that I stayed.
> Q. Every single time you stayed?
> A. Every single time I stayed."

61. It is undisputed that in her statement to the Gardaí, NO stated that the appellant had inappropriately touched her "about 30 times". This was a matter which was explored in cross-examination to the following effect: –

> "Q. And this was hundreds -- hundreds of times, on your evidence; isn't that right?
> A. It could be correct. Anytime I stayed there, it happened.
> Q. But if we start when you were five, and you're six, and you're seven, it was three or four times, it was 15 to 20 times a month, whatever, there's no exact -- I'm not saying with any exactitude, but, sure, it's in the region of 150 times a year; isn't that right? Isn't that what you're telling the jury?
> A. I have never actually sat and worked it out.
> Q. And every time --?
> A. Every time that I stayed, it would happen."

At a later stage of the cross-examination the issue of "30 times", as in her statement, was put to the witness as follows: –

> "Q. And I think -- well, maybe we'll just get a look at the original of that statement. So: "I never stayed over in KO's house after PO's Debs, so it never happened again. I'd say S'OS touched me in my vagina about 30 times"?
>
> A. I'm aware I said that, yes."

The cross-examination continued: –

> "Q. MR CARROLL: We'll just try and save some time. So that's what you told the Gardaí then, isn't it?
> A. But I also said in my first statement that it happened every time.
> Q. Mm-hmmm?
> A. Myself and Garda Weldon were trying to put a number on it. And, as I said, I didn't --
> Q. And you put the number 30 on it?
> A. But, as I said, I didn't sit and work out how many times a year I stayed there and -- but in my first statement it does say that it happened every time.
> Q. Mm-hmmm. Sure, I know, but, sure, I -- I read that out to you, didn't I? I said that to you. I asked you about that, and she said it happened. "I couldn't tell you how many times he touched me. It was a lot of times." I know you said all that, but this was specifically -- as you said yourself, you were trying to put a number on it, and the number you put on it was 30?
> A. It's just any number. As I said --
> Q. Pardon?
> A. -- I didn't work it out. I said it's just any number we put on it. As I said, we didn't work it out, but, as I mentioned in my first statement, that it happened every time."

The legal principles

62. A trial judge is vested with the discretion to discharge the jury in certain circumstances but, it is well settled that this is considered to be an option of last resort. Each case must be considered in its own particular circumstances. Such a situation may come about when a jury has been so prejudiced in some manner against an accused person that a trial judge may consider that there is no alternative in the interests of a fair trial, but to discharge the jury.

63. In the instant case, it is said that the complainant's narrative evolved in such a manner rendering the trial process unfair. Moreover, it is contended that there was a significant shift in the evidence which fundamentally undermined the basis upon which the application for severance had been defeated.

64. It is noteworthy that following NO's testimony, no application was made at that point to discharge the jury. The evidence continued and on conclusion of the evidence for the prosecution, counsel for the appellant indicated to the trial judge that there was an intention to make an application to the trial judge in terms of the direction application and an application in accordance with the jurisprudence in *POC*. However, as stated previously, somewhat unusually these applications were moved at the conclusion of the defence evidence. However, we have been unable to locate on the transcript any application to discharge the jury.

65. In those circumstances, it appears to us that the principles enunciated in *The People (DPP) v. Cronin* (No 2) [2006] 4 IR 329 apply. However, this issue has not been addressed by either party. No explanation has been offered as to why such an application was not made and neither has the respondent pursued the *Cronin* principles.

66. However, this Court finds that even leaving aside the principles in *Cronin* and applying the common law principles regarding the circumstances where the jury will be discharged, we are not in any way persuaded that there was any basis to discharge the jury.

67. We have no hesitation in rejecting these grounds.

Grounds 7 & 8- Charge on sample counts

68. The appellant submits that an unfairness arose as to the counts on the indictment being classified as sample counts. The appellant submits that at no time prior to day 7 and throughout the application for a separate trial was there a reference to sample counts, while there was ample reference to the 32 single counts. As a result, it is said that the trial was unfair.

Submissions of the respondent

69. The respondent submits that the case was always presented as having occurred on a regular and continuing basis and it was always clear that the charges against the appellant were representative in nature.

Discussion

70. It is said on behalf of the appellant that it was apparent from the application for a separate trial that the focus on the part of the appellant was in respect of 32 discrete counts and not representative counts. However, whilst the grounds of appeal address the trial judge's charge, there is no specific submission highlighting the particular portion of the charge with which issue is taken. We have therefore taken the position that the complaint rests with the entirety of the judge's charge and we have considered the grounds in that respect.

71. It is apparent from the charge that the trial judge correctly advised the jury that they should consider each of the counts on the indictment separately, she also advised the jury that each count referred to specific incidents and highlighted NO's evidence that the offence had occurred on many occasions and that she had indicated in her statement that the incidents had occurred around 30 times. The trial judge did so to enable the jury to assess the credibility and reliability of the witness. She then proceeded to advise the jury as follows: –

> "So, that's 23 years later or more that were waiting for the legislation, but that has set the parameters as to how an indictment is laid out where there is a complaint of multiple offending over a protracted period of time. So therefore you should consider all of the evidence in respect of each count separately and independently and consider in full all the evidence that has been adduced in respect of each charge. You must be independently satisfied in respect of each individual charge that the prosecution has adduced evidence in respect of that charge, which is sufficient to satisfy you beyond a reasonable doubt on the evidence, and only if you are so satisfied can you convict S'OS in respect of the individual particular separate charges."

72. Having explained that to the jury, the trial judge then proceeded to warn the jury about the difficulties facing accused persons in defending allegations at some remove from the date of the offending conduct, an extensive corroboration warning was given and having directed the jury separately concerning both of those issues, the trial judge then summarised her warnings as follows: –

> "So, in summary, you must be cautious in light of the fact that it is the word of the complainants only in this case, and that carries certain dangers. And further, you must be cautious in light of the passage of time in relation to the inherent dangers such time lapses can bring. However, you consider the evidence and you are convinced to the required standard that that's when you're entitled to convict on the counts on the indictment. So, it's a matter for you to assess all of the evidence and all the matters and ask yourselves the question, does what has been pointed out to you amount to such as would warrant you to disregard, in part or in total, the evidence or account given by any or all of the witnesses."

73. In the final stages of the charge the trial judge again reminded the jury that each count constituted a separate trial.

Conclusion

74. The complaint advanced is that the trial judge's charge was unfair and incorrect. Having carefully examined the judge's charge, we are satisfied that the charge was a fair and balanced one. The trial judge advised the jury of the legal principles relevant to the evidence and was, in the opinion of this Court, careful to ensure balance and fairness. In the view of this Court, the charge was appropriate to the needs of the case and we are not persuaded that the trial judge erred in her charge.

75. Accordingly we reject these grounds of appeal.

Ground 11- Mischaracterisation of the appellant's case

76. The appellant submits that the trial judge did not charge the jury fairly and repeatedly glossed over conflicting prosecution evidence. The appellant refers to certain portions of the judge's charge in this regard:-

> "When her first statement was put to her, she said it was a lot of times and then the fact that she made a second subsequent statement and she said around 30 times in relation to what happened to her, in relation to these allegations. So, these are matters for you to consider in the context of reliability and the weight that you attach."
>
> "You recall in relation to her evidence, she indicated from the age of five onwards to seven or eight, she was there on a regular basis, three to four nights a week, while as she got older there was other places to stay and other people to stay with and she got older and knew what was going on. Again, ladies and gentlemen, these are all matters for you to bear in mind when remembering the evidence of the witnesses and what was put in cross-examination"
>
> "You've heard from the various witnesses about how they interpreted the comment, "Maybe I thought it was you, KO." Words were spoken, the interpretation of the listeners, which is in conflict, are matters for you, ladies and gentlemen"
>
> "You'll recall also that BO made a statement to the guards in the course of the investigation and that statement was utilised as well, again by way of cross-examination matters put to her. So, the answers and the demeanour of the witnesses are important for your assessment, ladies and gentlemen, in relation to the evidence when you're weighing up whether you're going to accept it or reject it. And again, in respect of parts of the evidence, you can accept or reject, or the totality of the evidence you can accept or reject. All matters for you."
>
> "Then you've heard the evidence of KO, who indicated she never left the flat and she conceded that she smoked outside. But, again, in relation to NO staying over, KO had said she didn't stay over a maximum of 10 times in all of that time period would have been the amount of times that NO stayed. So again, ladies and gentlemen, all of these answers are matters for your assessment and for your consideration and deliberation upon. "

> "He said -- left NO there and she was asleep. And you will recall NO's evidence, where she says she was awake before -- left and wanted to go home with him. All again, ladies and gentlemen, in relation to the weight you attach to the witness's testimony, matters for you"

77. The appellant refers to *The People (DPP) v. Rattigan* [2017] IESC 72 in submitting that the above passages highlight the trial judge's error in taking an unfavourable view to the defence case.

78. The respondent submits that the trial judge was very careful in her summary of the evidence and she emphasised throughout that the facts were solely a matter for the jury to decide upon and they were free to disregard her synopsis of the evidence.

79. The respondent further argues that the passages referred to by the appellant only seek to highlight the efforts of the trial judge to ensure a level playing field when summarising her evidence. It is further noted that there were no requisitions made by the appellant following the judge's charge.

Discussion

80. When charging a jury, a trial judge must be careful to ensure that the dual aims of balance and fairness are met. The appellant points to a number of aspects of the trial judge's summary of the evidence wherein it is said that the trial judge in effect favoured the evidence adduced by the respondent.

81. It is well established that the trial judge's charge must be considered as a whole. There is no doubt that the trial judge carefully directed the jury regarding the fundamental principles of a criminal trial. She then carefully directed the jury in respect of the issue of corroboration and the issue of delay. The trial judge summarised the evidence and consistently reminded the jury that the issues of reliability and credibility were for their assessment. Moreover, in her opening remarks, the trial judge advised the jury as follows: –

> "So again, as in what counsel have said to you at the start, in relation to the comments they make on the facts, they're trespassing on that area if they're highlighting facts that you might not agree with, or you might agree with, and similarly with me, if I'm highlighting facts, you might not agree with my highlighting the fact and say, "Well, I remember something differently." These are all matters for you, so just remember, again, when I go on to talk about our roles in the case and in relation to a criminal trial, the area of facts are all for you, just to bear that in mind."

82. It is clear that when the trial judge engages with the facts of the case, she must be careful to emphasise that the facts are exclusively a matter for the jury. It cannot be gainsaid that the trial judge in the present case repeatedly advised the jury that issues of fact are for their consideration. Indeed, in the extracts referred to on behalf of the

appellant, on the conclusion of each impugned paragraph, the trial judge advises the jury in terms that the issues are for their consideration.

Conclusion

83. In the circumstances and on an assessment of the charge as a whole, we are led to the inevitable conclusion that the trial judge's charge in the present case met with the dual criteria of balance and fairness. In those circumstances this ground is rejected.

Ground 10- Permitting count 9 to go to the jury

84. Count 9 related to the sexual assault of NO on a date unknown between January 2005 and March 2005 in an inner city complex. It was established during the trial that the appellant was not resident in that flat until March 2005. A majority verdict of guilty was returned in respect of this count and the appellant argues that the trial judge erred in allowing this count to go to the jury.

85. The appellant submits that this determination is unsafe in that it exemplifies the jury's disregard to the directions and law as given to it by the Court vis- à-vis benefit accruing to the accused arising where there exists two potential versions available on one reading/viewing of the evidence, the one most favourable to the accused must be observed and the benefit given to the accused. In this scenario the appellant had not resided within the property for two thirds of the time frame identified within the charge and could *prima facie* not have carried out the conduct alleged at the location addressed throughout that whole period, yet he was convicted of it nonetheless.

86. The respondent submits that count 9 covered a three-month period including March 2005, at which point the appellant was resident in the flat and therefore it was open to the jury to find the appellant guilty on count 9 which detailed a sexual assault on a date unknown between 1st January 2005 and 31st March 2005.

Conclusion

87. The particulars of count 9 on the indictment provided follows: –

> "S.O'S, on a date unknown between the 1 January 2005 and the 31 March 2005, .. inclusive, at…, did sexually assault one NO, a female by…"

88. Following the evidence of KO, the prosecution sought to amend the indictment so that the commencement date was March 2005, thus reflecting the date when the complainants' aunt's partner took up residence in the particular location.

89. In our view, it was certainly open to the trial judge to amend the indictment in accordance with s. 6 of the Criminal Justice (Administration) Act, 1924, which states: –

> "Where, before trial, *or at any stage of the trial*, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless the required amendments cannot in the opinion of the court be made without injustice..."(our emphasis).

90. It is clear that the counts on an indictment should, insofar as it is possible, reflect the evidence. An amendment may take place at any stage in a trial so long as the amendment does not cause an injustice. In the present case, we are certainly of the view that it was open to the trial judge to accede to the application made on the part of the respondent to amend the indictment. However, the trial judge clearly took the view that such an amendment was not appropriate and she refused the application.

91. Section 6 is expressed in mandatory terms, that is, that the trial judge should amend the indictment unless to do so will cause an injustice.

92. In *The People (DPP) v. Walsh* [2010] 4 IR 746, the trial judge amended the indictment so that the counts corresponded with the evidence given at the trial. The offences concerned related to historical sexual abuse. Although the amendments were made at the close of the prosecution case, there is no indication that the accused suffered prejudice arising from the amendment. Clearly the later an amendment, the more likely that an accused will be prejudiced. However, as long as an injustice will not be caused, an amendment may be made at any stage of a trial.

93. In the present case, the trial judge did not amend the indictment and the appellant contends that she erred in allowing the jury to consider count 9 where it was established in evidence that the appellant had not resided at the particular location until March 2005.

94. The particulars of count 9 referred to *a date unknown between 1 January 2005 and the 31 March 2005*. It is clear therefore, that the timeframe on the indictment permitted an occasion of abuse in March 2005, thus within the terms of the indictment.

95. We surmise that the trial judge may have been of the view that to amend the indictment would cause an injustice to the appellant. Whilst this Court would not necessarily agree with that view, it was one which favoured the appellant. In these circumstances we are not satisfied that the trial judge erred in permitting the jury to consider count 9 and accordingly this ground is rejected.

New Evidence and Additional Ground of Appeal

96. By notice of motion grounded upon the affidavit of the appellant and the affidavit of KO, the appellant seeks leave to adduce new evidence and to add a further ground of appeal in the following terms: –

Ground 18

> "The convictions of the Appellant are unsatisfactory and unsafe having regard to the fact that evidence given by the Complainant, in relation to the layout of the bedroom which was the location of the alleged offending was wrong, which casts doubt upon both the reliability and credibility of the complainant's testimony."

97. In this respect, the appellant seeks to rely on the contents of his affidavit and the affidavit sworn by KO. The respondent opposes the application.

98. This application arises from the appellant's contention that in the course of his trial, NO gave evidence regarding the layout of the furniture in the bedroom and in particular in respect of the beds in the bedroom. It is said that a photograph has come to his attention following his conviction which was not available to him or his legal team at the trial.

99. The appellant avers in his affidavit that the photograph shows his two sons sitting on a double bed and not on a bunk bed, as contended by NO. Moreover, he says that the layout of the bedroom had occurred by June/July 2008. The point he seeks to make is that the photograph proves that the layout and the bedroom had changed some two years prior to that indicated by the complainant. He says that this casts doubt over the specific convictions recorded on counts 22 – 30.

100. KO in her affidavit avers that in and around July 2019 she discovered the photograph in a large plastic bag at the bottom of her wardrobe.

The legal principles

101. Section 3(3) (d) of the Criminal Procedure Act, 1993, permits this Court to receive and consider the affidavit evidence in terms of the principles stated in *The People (DPP) v. O'Regan* [2007] 3 IR 805. The appellant also relies on s.3(3)(e) of the 1993 Act. The relevant provisions of the Act provide as follows:

> "3(3) The Court , on the hearing of an appeal or, as the case may be, of an application for leave to appeal, against a conviction or sentence may –
>
> (d) receive the evidence, if tendered, of any witness;
> (e) generally make such order as may be necessary for the purpose of doing justice in the case before the Court."

102. The principles which govern the admissibility of fresh evidence are as stated in *Willoughby v. DPP* [2005] IECCA 4 and as approved by the Supreme Court in *The People (DPP) v. O'Regan* [2007] 3 IR 805;-

> "a) Given that the public interest requires that a defendant bring forward his entire case at trial, exceptional circumstances must be established before the court should allow further evidence to be called. That onus is particularly heavy in the case of expert testimony, having regard to the availability generally of expertise from multiple sources.
> b) The evidence must not have been known at the time of the trial and must be such that it could not reasonably have been known or required at the time of the trial.
> c) It must be evidence which is credible and which might have a material and important influence on the result of the case.
> d) The assessment of credibility or materiality must be conducted by reference to the other evidence at the trial and not in isolation."

Discussion

103. We consider it appropriate to assess whether the photograph might have had a material and important influence on the outcome of the trial. In this respect it is necessary to consider the photograph in the context of the evidence at trial.

104. In her testimony, NO said that on the occasions when she was sexually assaulted by the appellant this took place when she stayed in the flat in Dublin. She firstly said that she and her cousin who were around the same age slept together in a top bunk bed – top to tail. She said there was only one bedroom in the flat and that the appellant, his partner and their son stayed in that bedroom. In describing the layout of the bedroom she said: –

> "Yes. You'd walk into the door, and where the clotheshorse is there was bunk beds, but they weren't just normal singles bunk beds, so there was a double bed on the bottom and a single bed on the top"

Prior to that evidence, the witness had said: –

> "It would be during the night. I'm not sure of what time or anything, but KO would leave the house, and SO'S would come into the bedroom, and he would stand on the bottom bunk, and he'd be pulling me closer."

105. She was then asked to describe the occasion of her brother's Debs in 2010 and in describing the layout of the bedroom on this occasion she said: –

> "-- was on the bottom bunk. There was a new layout in the bedroom whereas there was a double bed and then normal bunk beds, and -- slept on the bottom bunk in them normal bunk beds."

106. In describing the incident on that particular occasion in 2010, the complainant said that she was in the top bunk in the bedroom and that she heard the appellant getting into the double bed. She said she was around 12 years of age. In further describing and explaining the layout of the bedroom she referred to 2 sketches which she had prepared when she gave her statement to the Gardaí. On the first sketch there is a notation 5+; the witness explained that that was her age at the time of the layout depicted in the sketch. With reference to the first sketch, the witness described the layout as consisting of bunk beds with a double bed as the bottom bunk and a single bed on the top bunk. She in fact described it like a triple bunk bed. On the second sketch, she was referred to a notation'12', which she explained referred to the night of her brother's Debs and the layout depicted in that sketch. In describing the contents of the sketch, she explained that there was a double bed in the bedroom and a set of normal bunk beds.

107. The appellant contends that the photograph illustrates that the change in the layout in the bedroom must have occurred by June/July 2008 and that this is proof that the layout of the bedroom changed some two years prior to that indicated by the complainant.

Conclusion

108. The general principle is that an appeal must be conducted on the basis of the evidence which is presented at trial and it is only in exceptional circumstances that the public

interest in finality can be overridden by the admission of new evidence on appeal. In the present case, having scrutinised the evidence, we are satisfied that the photograph would not have had a material influence on the verdicts recorded by the jury.

109. We say this because it is clear on an assessment of the witness evidence at trial, she does not in fact state when the change in the layout of the flat took place. She simply says that there was this triple bunk arrangement and that on the night of her brother's Debs, there was a double bed and normal bunk beds. Moreover, her cross-examination included references to the beds in the bedroom. In addition, whether the appellant was in a position to produce the photograph or not, he must have been aware of the position and nature of the beds in the bedroom in his own home. We are not satisfied that the photograph reaches the required threshold for admission and consequently we refuse to grant leave in terms of the notice of motion.

110. KO has stated on affidavit that she did not find this photograph until after the trial. The photograph was located in one of a number of loose plastic bags at the bottom of the wardrobe. In accordance with the *Willoughby* principles, not only must the evidence not have been known at the time of the trial but it must be such that it could not *reasonably have been known or acquired at the time of the trial*. It seems to this Court, in any event that the appellant might have had some difficulty meeting paragraph (b) in *Willoughby*.

Ground 17

111. This ground concerns an assertion that the cumulative effect of the grounds rendered the jury verdict on safe.

112. We do not find any merit in this ground. We are satisfied that the appellant received a fair trial.

113. Accordingly, the appeal is dismissed.

Addendum

114. Material was received by one member of the Court from the appellant which was returned forthwith.