



THE COURT OF APPEAL

CIVIL

[2021 No. 45]

[2021 No. 46]

**The President
Edwards J.
Ní Raifeartaigh J.**

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

BK

APPELLANT

JUDGMENT of the President delivered on the 24th day of May 2022 by Birmingham P.

1. The appellant is facing trial in the Circuit Court on charges relating to the sexual abuse of minors. 270 charges involving six complainants have been preferred, and the offences are alleged to have occurred in the period between December 1978 and March 1993. There have been two returns for trial, each involving three complainants. The appellant applied to the High Court seeking prohibition of the two criminal trials but was unsuccessful in his efforts to secure judicial review. He has now appealed to this Court against the orders and judgment of the High Court (O'Regan J.) delivered on 26th January 2021.
2. Of central significance to the applications for judicial review is the fact that the appellant was previously charged with the sexual abuse of other minors, pleaded guilty to offences involving ten complainants, and, in February 2016, was sentenced to a term of

fourteen years and two months' imprisonment, which he is now serving. The initial prosecution came about after a complainant attended Waterford Garda Station in December 2012 and disclosed that he had been abused by the appellant at various locations during the 1980s. It was suggested that the appellant had abused a number of boys during this period. An investigation was commenced, and a search warrant was obtained in respect of the appellant's home. When that search warrant was executed on 13th December 2012, the appellant spoke to Gardaí. It is said that during the course of this conversation, the appellant voluntarily admitted that he had molested "a good few" boys, that is "[a]bout 20 ... I'd put an estimate of 20 in total".

3. At present, each of the two cases involve three complainants, but if the matter proceeds to trial, it is not impossible that the prosecution might endeavour to consolidate the two trials. It is also possible that the accused might seek to sever one or the other, or both indictments.

4. The judicial review proceedings raise issues about what is said to be undue delay in the prosecution of the alleged offences. The appellant contends that he has been irreparably prejudiced by the delay and by virtue of the fact that a number of people who would have had relevant evidence to contribute are now dead or unavailable.

5. While there is very considerable overlap between the two sets of judicial review proceedings, the issues identified as giving rise to prejudice and the circumstances of the delay are not identical in the case of each complainant. In fact, counsel on behalf of the appellant went so far as to contemplate a situation where the charges in respect of some complainants would be permitted to proceed while others would be halted. Therefore, it is necessary to consider the position in relation to each of the six complainants.

Background

Complainant A

6. 39 of the charges that the appellant faces relate to complainant A. These are alleged to have taken place between 1983 and 1988. It appears, by reference to the papers, that A spoke to his family about the complaints in 2001 and 2002, and that while he was invited to make a complaint to Gardaí in 2013, he declined to do so and “was informed of the implications” of that decision.

7. A then made a formal statement of complaint on 25th October 2016. The appellant alleges that there was deliberate delay on the part of A in making a complaint, that he only did so following contact with the Gardaí as well as with JC (a central figure in the earlier prosecution), and that he did so in response to coverage of the appellant’s guilty pleas in the original trial.

8. The appellant’s attitude to the complaints made by A diverges from his approach to some other complainants, in that he accepts that there may have been sexual activity with this complainant, but he says that any such activity was consensual, and was at a time when the complainant was over the age of fifteen.

Complainant B

9. B is the younger brother of A. 59 of the charges relate to B and are alleged to have occurred between 1988 and 1992. B made a formal complaint on the same day that his brother did, and similarly, made disclosures to his family in 2001 and 2002. The point was also made that B did not make a formal complaint until after speaking to JC, and after he had seen coverage in the media around the time of the first trial.

10. Similar to the situation of A, the appellant accepts that there may have been sexual activity with B, but he says that any such activity was consensual, and was at a time when the complainant was over the age of eighteen. In the course of the conversation with Gardaí while the search warrant was being executed in December 2012, the appellant made reference

to B, and moreover, a videotape labelled as referring to B was discovered and seized. The appellant explained that the video was for his own personal viewing and also acted as collateral against a loan that he said he had provided to B.

11. The appellant argues that there are inconsistencies in the explanations offered regarding the delay in the cases of A and B, in that the parents of both complainants were of the view that no formal complaints were made at the time of first disclosure because A and B were not ready, while the two complainants have indicated that their father objected to the making of complaints at the time. It should be noted that A and B, in their statements of complaint, referred to the fact that the appellant was a family friend. It appears that neither A nor B, nor their family, had any involvement with the Gardaí in 2002.

Complainant C

12. The third complainant featuring in this book of evidence is C. He made a complaint on 9th January 2017, and one count on the indictment relates to him. This complainant alleges that on the day after he finished his Intermediate Certificate in 1985, he was the victim of a sexual assault. It appears that C went to Gardaí the following day but was told to return with an adult. However, he did not follow through as he did not want to tell his parents. He eventually made a formal complaint following the coverage of the appellant's guilty plea at the time of the first trial, contact with JC, and having undergone counselling.

13. The appellant notes that C had spoken to his wife about the situation in 1991, and that C had identified the appellant as the perpetrator in 1996. The appellant contends that Gardaí should have taken the statement of complaint in 1985, and that the failure to do so was unreasonable and amounted to culpable prosecutorial delay.

Complainant D

14. The first complainant in the second book of evidence is D, and no less than 136 counts relate to him, covering the period 1980 to 1988. When interviewed, the appellant denied any wrongdoing involving D.

15. It appears that D remained in contact with the appellant until after the appellant's conviction, as there seems to have been a relationship of accountant/client between them. There are indications that this complainant had discussed the situation with A back in 2002, and also that he was contacted by Gardaí as part of the investigation then underway (in or around 2013), but at that stage, did not wish to pursue a complaint.

16. In respect of D, the appellant states that he had contact with the principal of his secondary school – Brother C – in or about 1987, who questioned him about the appellant's activities. This, it is suggested, is significant as Brother C is now deceased. It is contended that, as a result, a potentially fruitful line of enquiry from the perspective of the defence has been cut off.

Complainant E

17. The next complainant in the second book of evidence is E. He indicates that he considered making a formal complaint against the appellant following the media coverage of the first trial. According to his statement, E was in contact with JC from the first trial. Four counts dating back to 1984 relate to this complainant.

Complainant F

18. The third and final complainant in the second book of evidence is F, whose statement indicates that he was the subject of abuse between 1978 and 1982 in the appellant's van, in the appellant's home or in woodlands. In his statement, F refers to an incident in 1979 or 1980, when he would have been in sixth class or first year, when, along with two others, he came to the attention of An Garda Síochána. He says that he was involved in money being taken from a local garage and that he was brought to the "barracks" in relation to it. He says

that he was assaulted by Gardaí while detained and that they asked him if he knew anything about the appellant.

19. F says that around the time of the appellant's first arrest in 2013, he phoned Waterford Garda Station with a view to making a complaint, but says that on foot of that contact, it was indicated to him that Gardaí had enough complainants. The Garda record of this contact is somewhat different. It indicates that a phone call was made to Waterford Garda Station from the United States in 2013. Garda enquiries suggest that the call was made on 18th May 2013 (it has been possible to date it by reference to the fact that the appellant was detained in custody on that date), and that the caller appeared to be intoxicated. He was asked to call in to the Garda station in person when he was back in Ireland that summer, but it doesn't seem that he did.

The High Court Application

20. In seeking to halt both forthcoming trials, the applicant identified a number of issues with both cases which, it was submitted, would deprive him of the opportunity to establish certain islands of fact in order to properly defend himself should the trials be allowed to proceed.

21. The applicant submitted that there had been both prosecutorial and complainant delay. It was said that the delay on the part of the complainants arises by virtue of the fact that disclosures were made well in advance of the formal complaints made to An Garda Síochána. It was argued that the prosecutorial delay arises because earlier investigations had been carried out which might have brought forward the current allegations had the investigations been properly conducted. It was further submitted that in light of the delay, evidence had been lost and certain witnesses who would have been significant are now deceased or unavailable.

22. The applicant submitted that there was a Garda investigation into him from 1987, and that he had no culpability in respect of matters alleged to have occurred post-1987. It was further submitted that the original trial and subsequent conviction and sentence received media coverage so extensive that the applicant could not hope to have a fair trial. This, it was argued, could not – contrary to the Director’s assertion – be remedied by seeking a transfer of the trial to Dublin.

23. It was also said that the level of interaction between the complainants from the first trial (when pleas of guilty were entered) and complainants in the forthcoming trials gives rise to concerns about cross-contamination. This, it is said, is a further reason why a trial now would not be a fair one.

24. The Director disputed the applicant’s submission that there is little or no public interest in proceeding with the prosecutions. She said that insofar as there was extensive media coverage, this was partially caused by the actions of the applicant himself, and insofar as there is any ongoing concern, it could be alleviated by moving the trials to Dublin.

Regarding the specific complaints that the applicant had in relation to the individual complainants, it was submitted that the trial judge would be best placed to deal with those by way of appropriate directions or otherwise. It was pointed out that the applicant was alert at interview, that he had made certain admissions in relation to consensual sexual relations with certain complainants post-1987, and that there was no medical evidence to support any suggestion of memory failure.

25. Having reviewed a number of authorities in the area, the High Court judge was of the view that even if prosecutorial delay had been established, the appellant had not established the wholly exceptional circumstances which would be required in order to justify intervention by way of prohibition. She felt that the situation of the applicant had much in common with the well-known case of *MS v. DPP* [2015] IEHC 84 and [2015] IECA 309, involving a

medical consultant and multiple complainants. I will be commenting further on the *MS* jurisprudence in the course of this judgment.

26. The High Court judge concluded that in the circumstances, the appellant had not discharged the burden placed on him to establish that there was a real or serious risk that by reason of the matters he had identified, he could not obtain a fair trial, or that the matters identified were incapable of being dealt with by way of appropriate rulings and directions on the part of the trial judge.

The Appeal

27. This is the latest in a long line of cases to come before the courts where a person is accused of historic sexual abuse crimes and has sought relief by way of judicial review. At one stage, such applications were commonplace, but in recent times, a consensus has emerged that such issues are generally best left within the ambit of the trial judge, who will be in a position to make decisions and give appropriate rulings and directions, having actually heard the evidence at trial.

28. Within the many examples of prosecutions brought long after the alleged offending which formed the subject matter of the charges, it is possible to identify a number of categories or subsets of cases. One such subset relates to cases involving multiple complainants outside the family context, and another subset involves cases where it has been sought to put an accused on trial on more than one occasion as additional complainants come forward and have their allegations investigated. Examples of cases in the latter category include (i) *MS v. DPP* [2015] IEHC 84, [2015] IECA 309, as well as *MS v. DPP* [2020] IEHC 659, [2021] IECA 193, to which there has already been reference, which involved a medical consultant accused of abusing young male patients, and (ii) earlier in time, the case

of *O'R v. DPP* [2004] IESC 52, which involved a swimming coach who had already been prosecuted twice, pleaded guilty and was sentenced.

29. The accused in *O'R* sought to stop a third prosecution but was unsuccessful. Of note is the fact that it was a case where an independent inquiry was established into the background of the offending; the significance of this being that an inquiry has also been established in the present case. Another case which falls into the second category of cases identified is *J(S)T v. The President of the Circuit Court* [2015] IESC 25. This involved a Christian Brother who had stood trial on no less than six occasions but failed to halt a further trial. However, it might be noted that the trials sought to be prohibited by the accused in *J(S)T* were trials that were pending in the Circuit Court in Limerick, whereas the earlier allegations had related to his time teaching in a school in Dublin.

30. In circumstances where there is very considerable overlap between the issues raised in the two sets of judicial review proceedings, and where they were heard together before the High Court and before this Court, but where some specific points are raised in relation to individual complainants, it is necessary to consider in more detail the factors which the appellant says would deprive him of a fair trial. It should be noted that the appellant takes as his starting point the fact that there was an investigation in 1987, and that at that stage, the appellant's attitude was one of cooperation which involved making a general statement of admission.

Delay Issue

31. The appellant submits that the High Court judge, having accepted that delay was a feature (as she was obliged to do), then had to consider and examine the responsibility for the delay, as well as the impact of the delay, in light of the appellant's contention that it reflected on the fairness of the proceedings, and that the difficulties to which the delay gave rise meant that there was a real risk of unfair trials. It is pointed out that the alleged offences occurred

between 26 and 41 years prior to the returns for trial. It is said that there was a combination of factors which contributed to the delay, including: (i) delay on the part of complainants in making formal complaints, (ii) periods of inaction on the part of the Gardaí, and (iii) delays in properly investigating the complaints that were the subject of investigation in 1987. It is said that to the extent that there was an investigation in 1987, the appellant cooperated with that investigation and made certain admissions of at least a general nature. Given the cooperative nature of the appellant's response, it is submitted that that was the time for a comprehensive investigation which should have involved addressing the question of whether there were other potential complainants beyond those who had come forward.

32. The appellant further complains that specific prejudice arises in circumstances where A and B (the complainant brothers) engaged in unjustifiable and deliberate delay, in that they delayed making a formal complaint in 2013 despite the implications of doing so being specifically brought to their attention by Gardaí. Furthermore, it is said that they were undoubtedly in a position to make a complaint from 2002 – and indeed, probably earlier – but did not do so.

33. In the case of C, it is said that there was culpable delay on the part of both the prosecution and the complainant as follows: (i) the prosecution and the Gardaí were culpable for not taking action on foot of the 1985 complaint in a situation where the complainant was not accompanied by an adult when he first attended the Garda station, and (ii) the complainant was also blameworthy in not pressing his complaint, particularly after reaching the age of majority, and after he had married, when he had discussed his alleged experiences with his wife. The appellant says that there was no justification for the Gardaí acting as they did, nor was there any justification for the complainant not renewing his complaint and pursuing it in a timely manner.

34. C only emerged as a potential victim and witness in 2016. It is true that he visited the Garda station in 1985 on the day after his Intermediate Certificate ended. There may be room for differences of opinion as to whether the Gardaí acted wisely in asking C to return in the company of a responsible adult.

35. So far as D, E and F are concerned, they were not actors in the 1987 investigation. At the time, two of them were still minors. D was contacted by Gardaí in November 2013 but made no complaint at that stage. He explained that he decided not to pursue making a formal complainant while the appellant, in his view, still had a “hold”; this refers to the fact that the appellant was his accountant and had physical possession of his business accounts. In my view, this is an issue which is capable of being pursued at trial.

36. The first person E says he made a disclosure to was JC who had waived his anonymity following the first trial. E, who had been following the trial, sent him a supportive Facebook message, and disclosed that he had also been abused.

37. In the case of F, while he had made disclosures to a then girlfriend and to his sister, his first contact with Gardaí was by way of a telephone call from New York. It does not appear that he followed up on the telephone call when he returned to Ireland. However, it appears that he also followed reports of the first trial in the media, and then established contact with RTÉ’s southeast correspondent. F also made reference to an occasion when, as a juvenile, he became involved in an incident where money was taken from a local garage, and subsequently found himself in “the barracks” in around 1979/80.

38. When viewed in the round, it seems that the appellant’s real complaint is that Gardaí had cause for significant concern as of 1987, when the parent of a boy said to have been abused made contact with Gardaí but declined to follow up on the initial contact. In reality, it is possible that Gardaí had cause for concern even earlier than that as a result of the initiation of contact by C, or as early as 1979/80 if F is correct about his experience in the Garda

station. All of this may well be highly relevant to the Commission of Investigation that has been established, but a question remains as to how relevant it is in the context of the forthcoming trials which the appellant seeks to halt. At its height, there seems to be a suggestion that if Gardaí had been more committed in 1987, it is possible that the extent of the appellant's offending would have emerged at that time, and that each of the complainants would have been identified at that stage. However, it seems to me that that is speculative in the extreme. A number of complainants – A, B and D – did not provide statements in the course of the 2013 investigation. Their decisions in this regard can be probed further in any future trial.

Contact between the Complainants

39. It is also said that the trial judge fell into error in failing to have sufficient regard to the extent of contact between the complainants. More particularly, it is said that the judge failed to have regard to the fact that it was clear that there had been contact between a number of complainants and JC, a central figure in the first trial. It was also clear that there had been contact between the complainants in the pending trial. This was itemised in the case of contact between D and A. D had been approached by Gardaí at the time of the initial prosecution but had not provided a statement of complaint. In the case of E, JC emerges as a figure of significance again. In the case of F, there were a number of failures. There was the failure to follow up on the phone call by way of complaint, but significance is also attached to the fact that, according to the complainant, when he came to Garda attention as a juvenile in 1979 or 1980, he and co-suspects were questioned by Gardaí in relation to the appellant.

40. It must be recognised that in very many cases where there are multiple complainants, whether that be in a family context, school, social group or otherwise, it may be contended that the issue of cross-contamination arises. The reality is that if there is concern about possible untoward activity, it is only to be expected that there will be contact between those

who find themselves in a similar situation. Generally speaking, one would think that the question of whether any contact undermines the value of the evidence that a particular individual is offering is something that is well capable of being probed at trial. In this case, to his credit, the appellant admitted from an early stage that he had engaged in multiple acts of abuse directed towards multiple complainants. If it appeared to be the case that the initial investigation was not so comprehensive and effective that every possible complainant had come forward, then I would not be at all surprised or disturbed by the fact that the initial prosecution would give rise to contact between individuals with an interest in what was emerging, as well as contact between that group and individuals who had acquired a public profile arising from the first investigation. It seems to be an issue that is well capable of being probed at trial.

Commission of Investigation

41. By virtue of the delay, it is contended that the appellant has been significantly disadvantaged as a result of complainants waiting to emerge until after the first prosecution and first set of convictions. He is now a convicted and sentenced person. Details of his offending, prosecution, conviction and sentence have been widely published, and he has been the subject of comment in the Houses of the Oireachtas. He has been referred to in the Terms of Reference of a government-established Commission of Investigation. He contends that prejudice has now been caused as a result of the existence of the ongoing Commission of Investigation.

42. The effect of this, it is submitted, is that the appellant is now gravely disadvantaged in terms of any forthcoming trials. These disadvantages would not have been present had the charges now preferred been preferred at the time of the first trial, and his situation would have been further improved had there been timely complaints and a timely investigation. It is said that the appellant now faces a real and serious risk of an unfair trial.

43. In my view, the fact that a Commission of Investigation has been established does not give rise to particular concern. The terms of reference specifically refer to the fact that the Commission is to have due regard to any criminal prosecution currently in train or pending. The Commission is currently under the chairmanship of Mr. Justice Michael White, previously the senior judge in the Central Criminal Court, the first chairmanship having been under His Honour Judge Barry Hickson, retired judge of the Circuit Court. I am absolutely confident that the Commission is being conducted, and will continue to be conducted, in a manner that does not impact on the appellant's rights (including his right to a fair trial) or on the complainants' rights.

Unavailability of Central Figures and Witnesses

44. The appellant further submits that a fair trial is not possible in circumstances where figures that were central to the 1987 investigation are no longer available because they have died or are in ill-health, and that the High Court judge failed to engage with the impact of the absent witnesses.

45. A senior cleric who is an uncle of the appellant, as well as a prominent figure in public life who is a first cousin of the appellant, are dead, while another potential witness, PW, who is said to have been at the centre of matters that were canvassed with Gardaí at the time and would have a knowledge of how they were dealt with, now has Alzheimer's disease, and is not available as a witness.

46. It is said that the appellant had accepted his wrongdoing, at least in general terms, during the 1987 investigation, and then attended a psychiatrist who provided information about his treatment and progress to the Gardaí. This psychiatrist is now deceased, as is the appellant's general practitioner with whom, the appellant says, he engaged extensively.

47. The appellant attaches significance to the fact that a particular Garda who was assigned a role in the earlier investigation, Garda Seán Barry, is now deceased. The appellant

says that Garda Barry had been tasked with monitoring his activities, and so would have been in a position to offer support to the appellant's contention that misconduct did not occur post-1987. The High Court judge felt that the statement upon which the appellant was placing reliance did not support the contention that Garda Barry was engaged in monitoring the appellant, but rather, that he carried out liaison role to see that the appellant was receiving appropriate care and counselling.

48. The appellant also contends that he is prejudiced because of the death of his parents. It is said that the prosecution case is advanced on the basis of frequent offending within the family home and that would have required the absence from the home of both of his parents, but they are not now available to question the suggestion of such frequent absences. At this stage, I pause to note that in cases such as this, an applicant for judicial review will often point to an individual – be it a parent, spouse or sibling – and say that the offending alleged could not have occurred without the activity being noted. In this case, though, the point would appear to have much less substance. It is indisputably the case that the appellant did abuse multiple victims at a time when his parents were alive. It seems to me there is a degree of unreality in the contention that the appellant's parents did not notice and were not in a position to prevent the abuse which was admitted, but would have noticed the abuse that is disputed in the present case.

49. Turning then to the issue in relation to the late Garda Barry, it must be said that I do not find the arguments advanced by the appellant in this regard particularly convincing. Garda Barry, who undoubtedly had some involvement in or around 1987, died in November 2002. There is nothing to suggest that he had any contact with any of the complainants, or that he would have anything specific to offer in relation to them. The suggestion that he was conducting such a level of monitoring that offending would not have been possible is unconvincing. On the appellant's own account, he engaged in sexual activity with

complainants A and B but suggests that it was at a time when they were adults and it was consensual. However, it was only in 1993 that homosexual acts were decriminalised.

50. In relation to the late first cousin and uncle of the appellant (the aforementioned figure in public life and senior cleric) they died in 2009 and 2017 respectively and it is hard to imagine how they would ever have had admissible evidence to offer. There is no suggestion that either man knew anything of the six complainants in the pending trials. I can't see how they could ever have been permitted to offer opinion evidence that the appellant was reformed as of 1987, nor could they have been permitted to give evidence of any conversation that they might have had with the appellant if it was being suggested that he offered comfort or reassurance to them.

51. In relation to the medical witnesses, Dr. Kelleher (the consultant psychiatrist) and Dr. Hogan (the appellant's GP) died in November 2008 and February 2013 respectively. It is not at all clear how either of these doctors, even if alive today, would be in a position to give admissible evidence that the appellant either did not, could not or would not have sexually abused a child in the manner alleged. Thus, if the suggestion is that these complainants could or should have formed part of the 2013 investigation and the earlier trial, both doctors were deceased by the time of the trial date (17th November 2015). In addition, one cannot lose sight of the fact that the great bulk of the charges relate to a period before 1987:

- The charges involving A relate to the period September 1983 to May 1989;
- The charge concerning C involves a single allegation relating to the summer of 1985;
- The charges involving D relate to the period February 1980 to June 1988;
- The charges involving E relate to the period September 1984 to August 1986; and
- The charges involving F relate to the period December 1978 to December 1981.

52. Thus, at this stage, it would not appear that any evidence from the doctors would ever have been of critical importance. I have already referred to the fact that I do not regard the fact that the appellant's father and mother are unavailable as particularly significant; they died in May 2000 and April 2012, respectively.

53. In relation to Brother C, the school principal, he died in July 2007. It appears the appellant's interest in him is promoted by the fact that D has indicated that the school principal spoke to him in or around 1987 and questioned him about the appellant's activities. Again, it is hard to see how the school principal, if alive today and available to give evidence, could have anything relevant or admissible to offer at trial.

Pre-trial Publicity

54. The final issue raised relates to pre-trial publicity. It must be said immediately that there has been very considerable publicity, both in terms of the reporting of the original trial and sentence, and the public controversy about the adequacy and appropriateness of the Garda response. There has been significant media coverage, both locally in Waterford, and nationally. A very unusual aspect of the case is that the coverage was, to a significant extent, contributed to by the appellant. This has included interacting with and giving interviews to RTÉ's southeastern correspondent, phone conversations and meetings with journalists from The Sunday World, and giving interviews to journalists for The Waterford News and The Star.

55. The appellant has contended that such has been the level of publicity that it would not be possible for him to have a fair trial in Waterford or even in Dublin. In my view, the appellant overstates the significance of the coverage in Dublin. It is the nature of things that people tend to pay more attention to news stories that have a personal or local element. Stories of a sports coach abusing in a provincial city are big news indeed, locally, but they are likely to be much less impactful in Dublin. It will be open to the appellant, if the trial

proceeds, to seek a transfer of the cases to Dublin. If such an application is made, it will be for the trial judge to decide on it and I would not wish to pre-empt this decision in any way, but clearly, it would, by any standards, be a substantial application.

The Recent Judgment of this Court in *MS*

56. The *MS* litigation culminated in a 2021 judgment of this Court (*MS v. DPP* [2021] IECA 193) wherein Kennedy J. ordered prohibition of a prosecution of the applicant. The prosecution was prohibited based on a finding of wholly exceptional circumstances, rendering a further trial unfair in the circumstances. This finding was based on consideration of the cumulative factors at play with regards to the prosecution, including (i) a finding of total delay of between 29 and 53 years, (ii) the advanced age and poor physical and mental health of the applicant, and (iii) the fact that he had stood trial for historical sexual abuse crimes on three earlier occasions. Moreover, an oversight with regards to communication between the prosecution and the applicant in relation to the relevant charges, and the fact that the applicant was therefore unable to face the charges under the instant prosecution and an earlier prosecution together, contributed to the finding of wholly exceptional circumstances rendering a further trial unfair.

57. I have asked myself whether the factors identified by Kennedy J. and the other members of the Court in *MS* are to be found in the present case to a level and degree that would require or justify a similar conclusion. In the course of the judgment, I have sought to set out the factual background that has brought us to the present situation. I do not believe that what has emerged would justify or prohibit a trial, rather, I think what has emerged has established that there are issues that can be addressed (and are best addressed) in the courtroom in the context of a criminal trial. I would, however, add that I do recognise that

there has to be an end point and that a stage would be reached where a proposed further trial on the back of multiple trials would be oppressive and unacceptable.

Conclusion

58. In summary, I have not been persuaded that it would be appropriate to halt the forthcoming trials, either generally or in respect of individual complainants. On the contrary, it seems to me that the issues canvassed on this application are matters that can appropriately be dealt with by the trial judge. Having heard the evidence in the trial, he or she would be in a much better position to assess the extent of the significance of the missing evidence and/or missing witnesses, and to determine whether the appellant has received a fair trial. In the event that the appellant is convicted in respect of any of the complainants, it will then be for the Circuit Court judge to pass sentence. Again, I would not wish to pre-empt in any way what he or she might do, but no doubt the judge would, in deciding on a sentence, have regard to the fact that the previous sentence imposed was a very significant one and that the offending in respect of which he or she was being called on to sentence had taken place many years before the sentencing hearing on 19th February 2016.

59. In summary, I am of the view that the appeal should be dismissed.