THE HIGH COURT

[2023] IEHC 502

[Record No. 2022/683JR]

BETWEEN:-

SO'C

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered on the 16th August 2023.

Introduction.

1. In this application, the applicant seeks to prohibit his prosecution before the Dublin Circuit Criminal Court on 151 counts of indecent assault, that he is alleged to have perpetrated against nine different complainants, between 1 September 1974 and 31 December 1983, while the complainants were students in a primary school in Dublin, where the applicant taught. The applicant's trial is due to commence on 22 January 2024.

2. In summary, the applicant seeks to prohibit his trial on two grounds: first, he submits that the cumulative effect of wholly exceptional circumstances due to the delay that arose in the case, render it unfair or unjust to try him for any of the offences in Bill No. DUDP 99/2022.

3. Secondly, it is submitted that the respondent unfairly and unlawfully used the *nolle prosequi* procedure, on 12 May 2021, to halt the applicant's initial trial in relation to the allegations made by three of the complainants, so as to bring fresh proceedings, whereby those allegations would be included with the allegations made by six other complainants. It was submitted that in these circumstances, the procedure was used so as to gain an unfair advantage for the prosecution as against the applicant.

4. For reasons that will be outlined later in the judgment, the respondent resists the order of prohibition that is sought by the applicant in his proceedings herein.

Background.

5. The applicant is a retired teacher. He is currently 71 years of age. At present, he is serving a sentence of imprisonment as a consequence of convictions for other sexual offending. On 19 December 2014, he was sentenced by the Central Criminal Court to a total of nine years imprisonment for rape and sexual assault offences. At Dublin Circuit

Criminal Court, on 1 July 2015, he was convicted and sentenced to a total of three years imprisonment for separate indecent and sexual assault offences; that sentence to run consecutively to the sentence imposed by the Central Criminal Court. The applicant was sentenced to seventeen months imprisonment for sexual assault at Galway Circuit Criminal Court on 21 July 2021; that sentence to be served consecutively to the sentence imposed at the Dublin Circuit Criminal Court.

6. In these proceedings, the applicant seeks to prohibit his trial on 151 charges outlined in the indictment on bill 99/2022, that relate to three different tranches of charges, each involving three complainants. The first tranche of charges in the indictment, concerns allegations by DG, BB and SD, following a request by DG in 2019, that the first respondent review the decision taken in 2001, not to prosecute the applicant in respect of a complaint that DG had made in 1999.

7. The first respondent reviewed that complaint, together with the complaint made by SD in 2012 and the complaint made by BB in 2013. In light of all of the circumstances, as they were then known, including the factual similarities in those complaints, with the particulars of the charges in respect of which the applicant had been convicted before the Central Criminal Court, together with similarities with other complaints, that had been made against him; on 13 August 2020 the respondent decided that a prosecution was warranted. She directed that the relevant charges should be preferred against the applicant in relation to the allegations made by these three complainants.

8. The second tranche of charges in the impugned indictment, concerns 89 charges that arise from complaints made by DC, KM and DH. DC made his statement of complaint to the Gardaí on 9 March 2015; KM made his complaint on 22 November 2017; and DH made his complaint on 8 August 2016. The applicant was interviewed in 2017/2018. The respondent received the Garda file in respect of all three complainants on 11 December 2018. She directed a prosecution in all three cases on 27 February 2019. The applicant was duly charged and returned for trial on bill 103/2020. Thereafter, the matter was before the courts.

9. On 12 May 2021, the respondent entered a *nolle prosequi* on the express basis, which had been communicated in advance to the applicant's solicitors, that it was intended to prosecute the applicant for the offences alleged by DC, KM and DH, in a new indictment, and to do so in conjunction with other offences, including those alleged by DG, BB and SD,

the subject of the August 2020 Direction. The applicant, having been informed about the purpose of the application, made his objections known to the court at that time.

10. The third tranche of charges, concern SB, BP and TC. SB made his statement of complaint to the Gardaí on 27 February 2020; BP made statements on 8th and 19th October 2020; and TC made his statement on 9 December 2020. The Garda file was submitted to the respondent on 15 April 2021. The relevant charges were directed on 9 August 2021. The director decided that these and other pending charges should all be contained in one book of evidence.

Submissions on behalf of the Applicant.

11. On behalf of the applicant, Mr. Rahn SC, submitted that there were two independent grounds on which the applicant's trial on bill 99/2022 should be prohibited. First, it is submitted that there had been very considerable delay in bringing this matter to trial. While the applicant did not allege that he had suffered any specific prejudice as a result of this delay, such as loss of relevant witnesses or relevant documentary or other evidence, it was the applicant's case that he came within the second limb of the test set down in *SH v. DPP* [2006] 3 IR 575; which provided that there could be circumstances in an individual case, which cumulatively, amounted to wholly exceptional circumstances, which taken together, meant that the accused could not obtain a fair hearing at the trial.

12. It was submitted that the cumulative exceptional circumstances in the present case, included the following: the total delay between the date of the alleged events and the date of the trial, being 40/49 years; the fact that there had been culpable prosecutorial delay in relation to the following matters: submission of files to the respondent; the giving of directions to prosecute by the respondent and the review by the respondent of the decision not to prosecute the applicant; the fact that the applicant had stood trial for similar offences in 2014, 2015 and 2021 and was serving cumulative prison sentences of 14 years and 5 months; the fact that the applicant was now 71 years old and was in poor physical health; and the fact that the allegations made by four of the complainants, could have been prosecuted as part of earlier trials in 2014 or 2015.

13. It was submitted that in *PT v. DPP* [2007] 1 IR 701, the court had ordered prohibition on the basis of the following factors: the allegations related to events between 37 and 42 years previously; the applicant in that case was 87 years of age; and the applicant was in bad health. In that case the judge had stated: *"It is the cumulative effect*

of all the factors which bring this case within the category of an exception requiring a balancing exercise to be conducted by the court".

14. It was submitted that in *MS v. DPP* [2021] IECA 193, it had been recognised that the issue was whether the cumulative factors in the case were of such an exceptional nature, as to render it unfair to put the appellant on trial. Counsel further submitted that in a number of cases, it had been recognised that where there had been a delay in the making of the initial complaint by a complainant to the Gardaí, there was a greater onus on both the Gardaí and the DPP, to act with expedition. It was submitted that in this case there had been significant delay in the making of the initial complaints and there had been culpable prosecutorial delay thereafter.

15. It was submitted that in this case the applicant was of advanced years and was in poor health, as evidenced by the medical documentation exhibited to the affidavit sworn by the applicant's solicitor.

16. It was submitted that some of the allegations in the present proceedings, could have been tried as part of the earlier prosecutions, thereby vindicating the applicant's right to an expeditious trial of historic allegations. In this regard counsel referred to the dicta of Birmingham P. in *DPP v. BK,* where he stated: *"There has to be an end point…a stage would be reached where a proposed further trial on the back of multiple trials would be oppressive and unacceptable".* It was submitted that these dicta applied with equal force in this case.

17. It was submitted that having regard to the length of time that had elapsed since the date of the alleged events; the age and health of the accused; the prosecutorial delay on the part of the prosecuting authorities; coupled with the fact that the applicant had faced a number of previous trials; all of these factors taken cumulatively, warranted an order for prohibition being made in favour of the applicant in relation to the charges in bill 99/2022.

18. In the alternative, it was submitted that the entry of the *nolle prosequi* on 12 May 2021, had been a procedural step taken by the respondent in a way that was unfair to the applicant. It was submitted that it was well settled at law, that a *nolle prosequi* could not be used by the prosecution to gain an advantage, or to deprive an accused of an advantage that he/she had already obtained in the extant proceedings: see *O'Callaghan v.*

O hUadhaigh [1977] IR 42; *O'Callaghan v. DPP* [2011] 3 IR 356; and *Furlong v. DPP* [2016] 1 IR 320.

19. It was submitted that by entering a *nolle prosequi* in relation to bill 103/2020, the applicant had been seriously disadvantaged in two ways: first, it meant that instead of facing allegations by three complainants, he would have to face a greater number of allegations by nine separate complainants. It was submitted that this would render a defence of fabrication on the part of the complainants, all the harder to mount at the trial. Secondly, by having to face a larger number of allegations brought by the larger number of complainants, the applicant would be in a more adverse position, having regard to the decision handed down by the Supreme Court on 18 February 2021 in *People (DPP) v. Limen* [2021] 2 IR 546, where it was held that where an accused was charged with multiple offences of the same nature against several individuals, some probative value could be found in the inherent unlikelihood that several people had made the same or similar false accusations. The accusations did not need to be identical or "strikingly similar", but had to be of the same nature. However, similarity might add to the probative value, and the greater the similarity was, the greater the probative value. It was submitted that by having to face all the allegations from all the complainants on a single indictment, the prosecution had obtained for itself a significant advantage at the proposed trial.

20. It was also submitted that in entering the *nolle prosequi*, the prosecution had also sidestepped the effect of the provisions of s.4 of the Criminal Procedure Act 1967, as amended, and the decision in *MS v. DPP* [2015] IECA 309, which held that charges that did not arise from the evidence grounding earlier charges, could not be added to the indictment, unless the accused consented to such addition; such additional charges would have to be the subject of a separate prosecution. It was submitted that by entering the *nolle prosequi* in this case, the prosecution had sidestepped the requirements of the section and the requirement to obtain the consent of the applicant to the enlargement of the indictment.

21. It was submitted that having regard to these factors and having regard to the case law on this issue, the court should find that the respondent had misused her powers to enter a *nolle prosequi* and on that basis, the fresh prosecution brought as a result of the entry of the *nolle prosequi*, should be prohibited.

Submissions on behalf of the Respondent.

22. On behalf of the respondent, Ms. McDonagh SC submitted that it was not appropriate for the court to grant an order of prohibition in respect of the trial at this stage. Counsel submitted that it was noteworthy that, while there had been considerable delay since the date of the alleged events giving rise to the complaints made to the Gardaí, the applicant did not allege any specific prejudice as a result of that delay.

23. It was submitted that the legal authorities made it clear, that in general, it was preferable that if an issue of prejudice, or a risk of an unfair trial, should arise as a result of delay, such matters should be left to the decision of the trial judge, who had power to issue all necessary warnings and directions to the jury and in appropriate cases, could even withdraw the case from the jury altogether. Thus, it was submitted that even if the applicant was unsuccessful in his application herein, that did not prevent his legal team from making whatever applications may be appropriate in this regard, at the trial. It was submitted that it was preferable to leave these matters to the discretion of the trial judge, to deal with appropriately in light of the evidence that would be led at the trial.

24. Insofar as the applicant contended that the various factors that he had referred to, when taken cumulatively, had given rise to sufficient prejudice to make it likely that he would be unable to receive a fair trial; it was submitted that the factors that he had referred to did not in fact give rise to any concerns that he may not receive a fair trial in January 2024.

25. It was submitted that when one looked at a number of cases that had considered similar factors, the accused in those cases had had to deal with allegations that were of considerably greater antiquity; some of the accused were considerably older than the applicant; and some of them had demonstrated far greater ill-health. In this regard counsel referred to the decisions in *PB v. DPP* [2013] IEHC 401 and the decision of O'Malley J. in *MS v. DPP* [2015] IEHC 84, which was upheld by the Court of Appeal at [2015] IECA 309; while the Court of Appeal ultimately prohibited the trial of *MS* six years later at [2021] IECA 193, the applicant was then 88 years of age and was in poor physical and mental health and had difficulty giving instructions to his solicitors. Counsel pointed out that fairly cogent medical evidence had been led in that regard.

26. Counsel also referred to the decision in *BK v. DPP* [2022] IECA 119, which it was submitted was broadly similar to the within proceedings. In that case, the court had

refused to grant prohibition of the trial and had held that any issues that may arise due to delay or the absence of evidence, or the applicant's medical condition, could be adequately addressed by the trial judge. Counsel submitted that in the present case, none of the factors taken individually would warrant a finding that the applicant was unable to obtain a fair trial; nor did their cumulative effect warrant such a conclusion.

27. In relation to the submission based on the entry of the *nolle prosequi*, it was submitted that it was perfectly appropriate for the respondent to direct that all the extant charges should be tried together in a single indictment. To that end the *nolle prosequi* had been entered well in advance of the hearing of the action and the intention of the respondent to bring fresh charges, which included those that had been on bill 103/2020, along with the further allegations by the remaining six complainants, was a legitimate use of the *nolle prosequi* procedure by the respondent.

28. Counsel submitted that the entry of the *nolle prosequi* by the respondent in May 2021, had not deprived the applicant of any forensic advantage that he had obtained in the course of the trial, by way of a ruling of the trial judge, or otherwise. It was submitted that while the applicant may perceive his position as being more difficult under the fresh proceedings on foot of bill 99/2022, that did not mean that the entry of the *nolle prosequi* in respect of the earlier proceedings had been unlawful or inappropriate.

29. It was submitted that it would be inappropriate for the court to grant prohibition in view of the fact that, if the applicant had a realistic submission to the effect that he could not get a fair trial, due to the multiplicity of counts on the indictment, he had the right to apply to the trial judge to severe the indictment. It was submitted that in these circumstances, his right to a fair trial, was protected.

30. It was submitted that in all the circumstances of this case, the court should refuse the reliefs sought by the applicant in his notice of motion.

Conclusions.

31. There is considerable jurisprudence concerning the issues of delay and prejudice that can arise in the context of the trial of historic sex abuse allegations. A summary of the relevant principles which should be applied where an application is brought to prohibit a criminal trial on grounds of delay and prejudice, was set out by Charleton J. (then sitting as a judge of the High Court), in *K v. Moran & DPP* [2010] IEHC 23 at para. 9. That statement of the relevant principles was adopted and endorsed by O'Malley J. (then sitting

as a judge of the High Court), in *PB v. DPP* [2013] IEHC 401. It is not necessary to set out this general statement of principles in this judgment; save to note that the court has had regard to these principles in reaching its judgment herein.

32. In the seminal decision of the Supreme Court in *SH v. DPP* [2006] 3 IR 575, it was established that when looking at cases of delay in historic sex abuse cases, it was no longer appropriate to look at the reasons why the complainant did not make their complaints at an earlier time. The sole focus of the court's attention should be on whether, in all the circumstances, the accused has been prejudiced by the delay, such that he or she can no longer receive a fair trial. Delivering the judgment of the court, Murray C.J. stated as follows at para. 47:

> "*Therefore, I am satisfied that it is no longer necessary to establish such reasons for the delay. The issue for the court is whether the delay has resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial. The court would thus restate the test as:-*
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> *The test is whether there is a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay. The test is to be applied in light of the circumstances of the case.*"

33. In dicta that have been adopted and applied in a number of subsequent cases, Murray C.J. stated his conclusion as follows at para. 54:

> "*In this case the developing jurisprudence as to delay in bringing a prosecution for offences of child sexual abuse was considered by the court. I am satisfied that in general there is no necessity to hold an inquiry into, or to establish the reasons for, delay in making a complaint. The issue for a court is whether the delay has resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial. The court does not exclude wholly exceptional circumstances where it would be unfair or unjust to put an accused on trial*."

34. Under the test in *SH*, an accused can seek to prohibit the trial on either of two grounds: that he has suffered specific prejudice due to the delay in prosecuting him; or that due to the cumulative effect of wholly exceptional circumstances that arise in the case, it would be unfair to expect the accused to stand trial, as there would be a significant

risk that he would have an unfair trial. The applicant moves this application for relief under the second limb of the test in *SH*.

35. The second limb of the test in *SH* was considered in *PT v. DPP* [2007] 1 IR 701. The applicant, who was 87 years of age, was returned for trial on charges of indecent assault. A period of between 34 and 39 years had elapsed between the dates of the alleged offences and the return for trial. When the matter came on for hearing before the Supreme Court, the applicant submitted that the case was exceptional, in that it would be unfair to put him on trial given his age and the fact that the charges related to events alleged to have occurred between 37 and 42 years previously. In addition, there was medical evidence adduced to the effect that the stress associated with a criminal trial, could have a major adverse effect on the applicant's health.

36. Delivering the judgment of the court, Denham J. (as she then was) stated that in *DC v. DPP* [2005] 4 IR 281, it had been noted that an application for prohibition of a trial may only succeed in exceptional circumstances. Where the DPP had taken a decision to prosecute, the courts must be slow to intervene. However, bearing in mind the duty of the courts to protect the Constitutional rights of all persons; in exceptional circumstances, the court would intervene and prohibit a trial. However, she also noted that in general such a step was not necessary, as the trial judge maintained at all times the duty to ensure due process and a fair trial. The basic assumption to apply in relation to all pending trials, was that they would be conducted fairly, under the direction of the presiding judge.

37. Denham J. went on to note that a prosecution was not an exercise in vengeance. While the court should give careful regard to the position of victims, it must protect the integrity of the justice system as a whole. In finding that in the circumstances of that case, it was an exception as envisaged in the *SH* case, and accordingly in holding that the trial should be prohibited, she stated as follows at paras. 28 and 29:

> "*28. In considering an application for prohibition a review court should not merely pick out an element and conclude that arising from it there is a possibility of an unfair trial. That is not the test. The test is, as stated in Z. v. Director of Public Prosecutions [1994] 2 I.R. 476, that of a serious risk of an unfair trial. The applicant here is applying on the basis of a hypothesis which might or might not happen. The alleged facts of the two events are dissimilar in circumstances and time. Whether any further basis for such an application pursuant to s. 3(1)(5) of*

the Act of 1981 can be established is within the realm of the trial judge, in the context of the evidence adduced at trial, the cross-examination and the defence raised on behalf of the applicant. The applicant in this case has not raised an arguable case that there is a serious risk of an unfair trial.

29. The refusal of leave to apply for judicial review to the applicant will return the case to a position in which it is assumed that the trial judge will ensure a fair trial. An arguable case has not been established that there is a serious risk that the applicant will not receive a fair trial."

38. In *MS v. DPP* [2021] IECA 193, Kennedy J., delivering the judgment of the court, noted that the inherent jurisdiction vested in a trial judge to give the necessary directions or warnings to a jury, and in exceptional cases, to withdraw a case from a jury; did not exclude the possibility of a court on an application for judicial review, concluding that cumulative factors existed of such a wholly exceptional kind, as would mean that it would be unjust to put the appellant on trial. She stated that looking at the factors in that case, she did not believe that any of the factors identified, taken alone, would bring the case into the kind of exceptional category envisaged in the *SH* case, so as to render a trial unjust or unfair. She went on to state as follows at para. 57:

"…It is quite clear that old cases may be prosecuted, it is also clear and my firm view that age is no restriction, nor is ill-health, either mental or physical. But it is not only a question of the individual factors, it is also the cumulative impact of the various factors present. I do not find that any single period of delay would in and of itself require the trial to be prohibited, but when I look at the entire period, together with the other factors, I am driven to the inexorable conclusion that this is one of those rare cases, where the cumulative factors are such so as to bring this matter into the wholly exceptional category where it would be unjust to put the appellant on trial."

39. In *DPP v. BK*, [2022] IECA 119, the accused was facing a total of 270 charges involving six complainants in respect of offences that were alleged to have occurred in the period December 1978 to March 1993. Notwithstanding that the accused maintained that he had received extensive publicity arising out of his previous conviction for related sex offences and the death of witnesses, whom he regarded as being highly relevant; together with the death of certain medical witnesses, who had examined him in relation to the

period after 1987; the court did not regard these factors cumulatively as meaning that he could not obtain a fair trial and accordingly they refused to prohibit the trial proceeding. Delivering the judgment of the court, Birmingham P. stated as follows:

> *"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."*

40. Turning to the present application, in deciding the first line of argument put forward by the applicant, the court must apply the principles as set out in the case law cited above. Each case however, will turn on its own facts. Having regard to the circumstances in this case, the court is not persuaded that the circumstances taken cumulatively are wholly exceptional circumstances that mean that the accused cannot receive a fair trial at his forthcoming trial in January 2024.

41. A number of factors were put forward by the applicant as constituting circumstances which, when taken cumulatively, would mean that he could not get a fair trial. First of these was his age, being 71 years at present. The court is not persuaded that this, of itself, would mean that he would be incapable of properly defending himself, or giving instructions to his legal team to act on his behalf at the forthcoming trial. With modern medical advances, the age of 71 years is not regarded as meaning that a person has lost a significant part of their physical or mental capacity. In this regard, the court notes that under current provisions, members of the civil and public service, have the right to work to the age of 70 years. Thus, the age 71 years, *per se*, cannot be seen as being of such an age that a person cannot adequately defend themselves.

42. Of course a person's age on its own, is not determinative of their physical or mental capacity. Much will depend on their mental and physical health at the relevant time. In the affidavit sworn by the applicant's solicitor on 27 July 2022, he set out at paras. 42 *et seq*, the instructions that he had received in relation to the applicant's health. He exhibited documentation, which he maintained revealed the applicant as having a poor state of health at the present time.

43. The court does not regard the documentation exhibited as demonstrating that the applicant's health is poor. The letter exhibited from Dr. David Keegan, Clinical Director of the Diabetic Retina Screen Clinic, dated 14 March 2018, merely stated that examination had revealed that the applicant had background diabetic retinopathy, secondary to his type 2 diabetes. Examination had revealed that there were minor changes to the retina. The letter noted that the changes were caused by diabetes, but did not need treatment and did not affect the applicant's eyesight. He was informed that the condition could sometimes improve without treatment. He was advised that it was important to control his blood glucose level and blood pressure, in order to prevent the changes in the retina from progressing. He was advised that it was important that he should attend his next screening appointment. There was no further documentation updating this aspect.

44. The applicant also exhibited a colonoscopy report from a procedure on 10 February 2020, which revealed minor diverticulosis of the left colon. No other gross mucosal lesion was seen. He was advised to be reviewed in the out-patient's clinic in six weeks. He was to restart his Plavix medication. The applicant also exhibited a letter dated 14 January 2020, sent from a member of the general surgical clinic to Dr. Pearson, Consultant Cardiologist, asking him whether he would advise that the applicant should stop taking the Plavix medication and if he needed to replace it with something else, before a procedure was to be carried out. Other than that letter to the consultant cardiologist, there was no medical evidence to support the assertion made by the applicant's solicitor, that the applicant had been diagnosed with coronary artery disease in 2003; that he had multiple stents *in situ* prior to his imprisonment; that further stents had been put in place in November 2019; or that in May or June 2020, he had had a triple heart by-pass and aortic valve replacement; nor that he had any ongoing issues with arrythmia. There was no medical evidence concerning these issues; nor as to their appeal on the applicant's current state of health.

45. Nor was there any medical evidence to back up the instruction given to the applicant's solicitor, that the applicant had gastric issues, chronic lower back pain and osteophytosis of L3/4 and L4/5. In particular, there was no assertion in the affidavit sworn by Mr. Molloy, nor any documentation, to suggest that the applicant was suffering from any cognitive impairment, or memory loss, either due to his age, or for any other reason.

In the absence of any cogent medical evidence, the court cannot hold that the applicant is in poor health.

46. Insofar as the applicant had submitted that it would be unfair to expect him to face a further trial, given that he had already faced a number of trials in which he had been convicted and received substantial prison sentences; it is an unavoidable fact that where the accused held a position which gave him access to a large number of children over a protracted period of years, which the applicant had in his position as a primary school teacher, it is inevitable that there may be numerous complaints made over a protracted period of time, which may give rise to multiple trials. The court has to have regard to the fact that alleged victims, who come forward and make complaints, have a right to have these matters investigated and if thought appropriate by the DPP, have them proceed to a trial in the ordinary way.

47. The applicant also complained of prosecutorial delay; while it is certainly true that in a number of cases there was both an initial delay on the part of the complainants in coming forward and while there was some delay in relation to the early complaints, in having an interview with the applicant; the effect of that delay was not material, given that it was only subsequently on a review of the files, that the DPP directed that there be a prosecution in relation to the earlier set of complaints that had been made against the applicant. The court is not persuaded that the other periods of delay identified by the applicant in his written submissions, are sufficient to warrant prosecutorial delay, which either on their own, or cumulatively, would warrant prohibition of the trial; particularly, in the absence of any assertion of the applicant having suffered specific prejudice.

48. Looking at the matter in the round, taking into account the overall lapse of time since the date of the events alleged to constitute the criminal offences and the likely date of the trial in January 2024; coupled with such evidence as has been forthcoming in relation to the applicant's age and state of health, combined with the fact that he has faced previous trials for similar offences; the court is not persuaded that these circumstances cumulatively give rise to a situation where it can be said that the applicant is at risk of receiving an unfair trial in January 2024.

49. If the applicant, or his legal team, are of the view that an application can be made in light of the evidence that is led at the trial, that the applicant's right to a fair trial has been impaired, the appropriate application can be made to the trial judge at that stage. As

noted in a number of decisions, the trial judge is the person who is best placed to deal with the matter, either by giving the appropriate warnings or directions to the jury, or in extreme cases, by withdrawing the case from the jury.

50. Turning to the second ground on which it is submitted that the court should prohibit the forthcoming trial, the applicant has submitted that the respondent has used the *nolle prosequi* procedure to obtain an unfair advantage in the fresh criminal proceedings that are extant against him. In particular, it was submitted that the prosecution has benefitted unfairly from this procedure in two ways: (a) the accused must now face nine complainants in the one trial, instead of three complainants, as was the position under bill 103/2020, thereby weakening any defence that might arise that the accounts given by the complainants are fabricated accounts; and (b) the DPP can benefit from the decision of the Supreme Court in the *Limen* case in relation to the admissibility of similar fact evidence and by virtue of the fact that there will be nine complainants, rather than three complainants, making similar complaints at the trial.

51. The case law establishes that where the prosecution has a particular procedural advantage, such as the ability to enter a *nolle prosequi* and proceed afresh thereafter, that procedure cannot be used in an unfair manner, so as to deprive an accused of a particular advantage that he or she has already obtained.

52. In *State (O'Callaghan) v. O hUadhaigh* [1977] IR 42, the applicant had obtained an advantage at his trial, when the presiding judge had ruled that only certain charges could be proceeded with, thereby excluding a number of charges from the indictment; whereupon, the prosecution entered a *nolle prosequi*, with a view to proceeding afresh on all the charges; it was held that such use of the *nolle prosequi* procedure was inappropriate and unfair. Finlay P. stated as follows at p.54:

> "*It seems to me that so to interpret the provisions of s. 12 of the Act of 1924 as to create such an extraordinary inbalance between the rights and powers of the prosecution and those of the accused respectively, and to give the Director such a relative independence from the decision of the court in any trial, would be to concur in a proposition of law which signally failed to import fairness and fair procedure.*
>
> *Whilst my decision, as I have already emphasised, must rest upon the facts of this particular case, it is confirmed by a consideration of the extent of the contention*

made on behalf of the respondent. If the Director, having entered a nolle prosequi*, is entitled to institute an entirely fresh prosecution in respect of the same alleged offence without restriction from any court then, if it appeared likely that a contention of the prosecution would fail, there would appear to be nothing to prevent the Director from entering a* nolle prosequi *and availing himself of the opportunity in a fresh prosecution, on additional or different evidence, to succeed where he had been about to fail: that situation might arise in a discretionary matter involving a decision of mixed fact and law which falls to be determined by the trial judge rather than by the jury—such as the admissibility of a statement alleged to have been made by the accused. Viewed in this light, the basic unfairness of such a contention appears to me to become clear. Therefore, I am satisfied that on the facts of this particular case the Director of Public Prosecutions has not got a right to institute a fresh prosecution against the accused in respect of the matters which were the subject matter of the three charge sheets, and in respect of which the accused was returned by the learned District Justice for trial to the Circuit Court. I make absolute the conditional order of prohibition.*"

53. A similar conclusion was reached in *O'Callaghan v. DPP* [2011] 3 IR 356, where the trial judge presiding at the first trial had found that the applicant was unfit to plead. Thereupon, the prosecution entered a *nolle prosequi*, with a view to prosecuting the matter afresh. It was held that the Director had had the opportunity at the previous trial to call medical evidence to seek a determination that the applicant was no longer unfit to be tried. However, it was noted that the procedure which had been followed, placed the applicant at a significant disadvantage in the second prosecution: he was deprived of the benefit of the existing determination; consequently, he had to proceed anew to call his evidence and to have the matter determined. The court held that that was a significant unfairness. The court allowed the appeal and granted an injunction prohibiting the further prosecution of the applicant on the new charges.

54. In *Furlong v. DPP* [2016] 1 IR 320, a *nolle prosequi* had not been entered, but an analogous application had been made, whereby the prosecution applied to have the jury discharged on the basis that evidence as to cause of death could no longer be relied upon. That had arisen in somewhat unusual circumstances, when the Deputy State Pathologist had given evidence in relation to the cause of death of the deceased. Subsequent to the

giving of that evidence, the State Pathologist wrote to the DPP indicating that there had been a breach of standard procedures within the office of the State Pathologist, whereunder the findings of a pathologist on a post mortem, would be peer reviewed by the other pathologists in her office, prior to being presented in court. For some unknown reason, that had not happened in relation to the evidence given by the Deputy State Pathologist. It was in those circumstances, that the prosecution had made its application to withdraw the case from the jury. The Director then proposed to retry the applicant on the basis of pathology evidence that would be properly peer reviewed by other doctors within the Office of the State Pathologist.

55. The court noted that in *State (O'Callaghan) v. O hUadhaigh*, it had been held that the court should not permit the prosecution's power to enter a *nolle prosequi* to be exercised in a fashion which would give the prosecution a signal advantage over the defence. Hogan J, delivering the judgment of the court, stated as follows at paras. 35 and 37:

> "***35.*** *This, however, is precisely the situation which occurred here, since it would be unfair to allow the prosecution to have a fresh trial when the first trial was aborted at the request of the prosecution, precisely because of an inability on the part of the prosecution to rely on vital evidence which had been given by a major prosecution witness when such a facility would not be available to a defendant if he encountered similar problems.*
>
> *[…]*
>
> ***[37]*** *Applying that test in the present case, we find ourselves obliged to acknowledge that any retrial would be unfair or oppressive because of these circumstances and the particular stage of the trial at which the jury came to be discharged. To permit the prosecution to obtain an advantage of this kind from the collapsed trial by allowing it, as Kearns P. graphically put it in his judgment in the High Court, to re-make entirely a vital aspect of its case would be inherently unfair and entirely at odds with the principles articulated in The State (O'Callaghan) v. O hUadhaigh [1977] I.R. 42.*"

56. The applicant also submits that the respondent has served the *nolle prosequi* in this case to enable the prosecution to circumvent the provisions of s.4N of the Criminal Procedure Act 1967, as amended, which provides that additional charges can only be

added to the indictment, where same flow from the evidence which grounded the original charges in the indictment: see *MS v. DPP* [2015] IECA 309. In addition, it is submitted that the position of the applicant has been rendered considerably worse from a forensic point of view by virtue of the entry of the *nolle prosequi*, in that he is now facing considerably more charges, on the basis of complaints made by nine complainants, rather than a lesser number of charges, on the basis of complaints from three complainants, as had been the case under bill 103/2020.

57. I am not satisfied that the respondent has used the *nolle prosequi* procedure in a way that is unfair and should be prohibited. In the cases referred to by the applicant, the accused in each case had obtained either a favourable ruling from the trial judge, or had secured a forensic advantage in the course of the evidence given at the trial, prior to the time that it was halted; which advantages were set at nought by the entry of a *nolle prosequi*, or by withdrawing the case from the jury. No such advantage has accrued to the applicant in the present case, because his trial on foot of bill 103/2020, had not commenced.

58. While it is correct that the DPP could not have added new charges to the indictment, which did not arise out of the evidence grounding the original charges without the consent of the applicant, that was not an advantage that had been obtained in the course of the trial. It was a procedural state of affairs, brought about by the provisions of s.4 of the 1967 Act, as amended. Given the dates on which the statements of complaint were made to the Gardaí in respect of the last trance of charges, it would not have been possible for them to have been included in bill 103/2020, even if the applicant had consented to an enlargement of it. It was reasonable for the respondent to have entered a *nolle prosequi* and thereafter, to have proceeded with all charges on bill 99/2022.

59. The court is satisfied that there was nothing underhand or unfair in the respondent electing to enter a *nolle prosequi* in respect of the charges in bill 103/2020 and electing to proceed with all charges in the one set of proceedings in bill 99/2022. Insofar as the applicant complains of "piecemeal" prosecutions, arising out of broadly similar complaints, it is in his interest to dispose of all charges in the one trial.

60. The court accepts that on one view, it could be argued that his position is more onerous in the trial that is extant, in that he has to face nine complainants, rather than

three complainants; however, that is not sufficient to warrant an order prohibiting the trial proceeding at this stage.

61. While the applicant complains that some of the charges that are in the current extant bill, could have been included at the time of his previous trials in 2015 and 2021, there is no evidence that that was not done, as a means of securing any unfair advantage to the prosecution as against the applicant. Accordingly, the court does not regard that as being a sufficient ground to prohibit his trial on foot of bill 99/2022.

62. If the applicant wishes to make the case that he cannot get a fair trial due to the number of complainants, or the multiplicity of charges on the indictment, he can apply to the trial judge to sever the indictment. In that way his right to a fair hearing has been protected.

63. For the reasons set out herein, the court refuses the reliefs sought at para. 1 of the applicant's notice of motion dated 17 January 2023.

64. The court will rule on the remaining ancillary reliefs sought in the applicant's notice of motion, when making its final order herein.

65. As this judgment is being delivered electronically, the parties will have four weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

66. The court continues its earlier order, that there should not be publication of any material that would tend to identify the applicant, or any of the complainants.

67. The matter will be listed at 10.30 hours on 12 October 2023 for the purpose of making final orders.