

APPROVED
NO REDACTION NEEDED



THE COURT OF APPEAL

Record No. 270/2023

Neutral Citation Number [2024] IECA 38

Edwards J.
McCarthy J.
Kennedy J.

Between/

S.O’C.

Appellant

V

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

JUDGMENT of Mr. Justice Edwards delivered on the 23rd of January 2024.

Introduction

1. The present appeal has been brought by Mr. S.O’C. (i.e., “the appellant”) against the refusal by the High Court (Barr J.) of certain reliefs sought by way of judicial review, most significantly an Order prohibiting the Director of Public Prosecutions (i.e., “the respondent”, or “the Director”) from further prosecuting the appellant on 151 counts of indecent assault on Bill No. DUDP 99/2022. The said counts allege that the appellant perpetrated indecent

assaults against nine different complainants at various points in time between the 1st of September 1974 and the 31st of December 1983. The appellant had sought to prohibit his trial on this indictment on two grounds: (1) that the cumulative effect of wholly exceptional circumstances which were said to obtain in his case rendered it unfair or unjust to try him for any of the offences alleged in Bill No. DUDP 99/2022; and (2) that the Director had unfairly and unlawfully used the *nolle prosequi* procedure on the 12th of May 2021 to halt the appellant'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 the six other complainants, and specifically that this use of the *nolle prosequi* procedure, which was detrimental to the appellant's position, had enured to the benefit of the Director and had conferred an unfair advantage on the prosecution.

2. By Notice of Appeal (bearing Court of Appeal stamp dated the 20th of October 2023) the appellant advanced a number of grounds in support of his appeal. These grounds will be described in greater detail later in this judgment. For the purposes of this introductory section, it suffices to summarise them as follows:

1. That the High Court judge erred in law and fact in refusing to prohibit the respondent from further prosecuting the appellant on Bill No. DUDP 99/2022.
2. That the High Court judge erred in refusing to prohibit the further prosecution of the appellant on said indictment on the basis that it would be unfair or unjust to try him based on the cumulative effect of wholly exceptional circumstances. (This alleged error is particularised in greater detail later in this judgment.)
3. That the High Court judge erred in refusing to prohibit the further prosecution of the appellant on the said indictment on the basis that the current prosecution of the offences relating to certain three complainants is the result of an

unlawful deployment of the *nolle prosequi* procedure. (Again, this alleged error is particularised in greater detail later in this judgment.)

4. That the High Court judge erred in all the circumstances in refusing the reliefs sought by the appellant.
5. That the High Court judge erred in making an Order for costs against the appellant. This ground relates in particular to the operation of the Legal Aid (Custody Issues) Scheme (of which the appellant had availed), and to a departure by the High Court judge from his previous approach to costs in similar circumstances in *A.H. v. DPP* [2021] IEHC 308.

Factual Background

3. The factual background to the present appeal has been set out at length in the High Court judgment (see judgment of Barr J. dated the 16th of August 2023, bearing neutral citation [2023] IEHC 502). For the purposes of the present judgment, it suffices to provide the following precis of relevant facts.

4. The appellant is currently aged 71 years and is serving a sentence of imprisonment in respect of previous convictions for other sexual offending. He is a retired teacher, and it is in the course of his employment as a teacher at a primary school that the appellant encountered the various nine complainants, former pupils at that school, whom he is alleged, on Bill No. DUDP 99/2022, to have indecently assaulted on various dates between the 1st of September 1974 and the 31st of December 1983.

5. As the High Court judge described in his judgment, the 151 charges outlined in the indictment on Bill No. DUDP 99/2022 relate to three different “*tranches*”, each involving three complainants. The names of each of the nine total complainants have been redacted, and in the interests of consistency the letters assigned to each respective complainant by the High Court judge have been retained for the purposes of the present judgment.

6. The tranches, as identified by the High Court judge, are described as follows:

The First Tranche:

7. The first tranche comprises count nos. 90 to 102, inclusive, which relate to indecent assaults alleged to have been perpetrated by the appellant on the following complainants:

- (i) DG (count nos. 90 and 91), who made a statement to An Garda Síochána on the 8th of May 1999 regarding offences which he alleged to have occurred between the 1st of September 1974 and the 30th of June 1975. The appellant was interviewed by gardaí regarding DG's complaint in or about the year 2000. The date on which a file in respect of DG's complaint was initially submitted to the Director was the 6th of November 2000. A decision not to prosecute was made by the Director on the 18th of January 2001. For reasons which will be described shortly, this decision was revisited. The Garda file in respect of DG was later submitted to the Director again on the 13th of August 2018, and shortly thereafter, in 2019, there was a request for a review of the original decision not to prosecute, the outcome of this review being a direction to prosecute which was given on 12th of May 2021;
- (ii) BB (count nos. 92 and 93), who made a statement to An Garda Síochána on the 6th of August 2013 regarding offences which he alleged to have occurred between the 1st of September 1979 and the 30th of June 1981. The appellant was interviewed by gardaí in respect of BB's complaint on the 23rd of October 2013. The date on which a file in respect of BB's complaint was submitted to the Director was the 3rd of February 2014. A decision not to prosecute was made by the Director on the 27th of May 2014. A review of this decision was requested in 2019 and this resulted a direction to prosecute which was given on 12th of May 2021;

(iii) SD (count nos. 94 to 102, inclusive), who made a statement to An Garda Síochána on the 27th of December 2012 regarding offences which are alleged to have occurred between the 1st of November 1980 and the 1st of March 1981. The appellant was first interviewed by gardaí in respect of this complaint in or about 1994 - 1996. The date on which a file in respect of SD's complaint was submitted to the Director was the 3rd of February 2014. A decision not to prosecute was made by the Director on the 27th of May 2014. A review of this decision was requested in 2019 and this resulted a direction to prosecute which was given on 12th of May 2021;

8. As will be apparent from the chronology just set out, the position in summary is that Director had originally declined on the 18th of January 2001 to prosecute the appellant in respect of DG's complaint. However, following a request by DG in 2019, and in the light of complaints which were subsequently made by BB and SD, respectively, which complaints bore factual similarities to that made by DG, and to other complaints made against the appellant, the Director agreed to review her previous decision not to prosecute. Ultimately, the Director reversed her previous decision, and directed that relevant charges in relation to the allegations made by DG, BB, and SD, respectively, be preferred against the appellant, which direction was made on the 12th of May 2021.

The Second Tranche

9. The second tranche comprises count nos. 1 to 89, inclusive, which counts relate to indecent assaults alleged to have been perpetrated by the appellant on the following complainants:

(i) DC (count nos. 1 to 43, inclusive), who made a statement to An Garda Síochána on the 9th of March 2015 regarding offences which are alleged to have occurred between the 1st of January 1980 and the 31st of December 1982.

The appellant was interviewed by gardaí in respect of DC's complaint on the 27th of September 2017. The date on which a file in respect of DC's complaint was submitted to the Director was the 10th of December 2018. A direction to prosecute was given on the 27th of February 2019;

- (ii) KM (count nos. 44 to 88, inclusive), who made a statement to An Garda Síochána on the 22nd of November 2017 regarding offences which are alleged to have occurred between the 1st of September 1979 and the 31st of December 1982. The appellant was interviewed by gardaí in respect of KM's complaint on the 24th of May 2018. The date on which a file in respect of KM's complaint was submitted to the Director was the 10th of December 2018. A direction to prosecute was given on the 27th of February 2019;
- (iii) DH (count no. 89), who made a statement to An Garda Síochána on the 8th of August 2016 regarding an offence which he alleged had occurred between the 1st of January 1981 and the 31st of December 1983. The appellant was interviewed by gardaí in respect of DH's complaint on the 27th of September 2017. The date on which a file in respect of DH's complaint was submitted to the Director was the 10th of December 2018. A direction to prosecute was given on the 27th of February 2019.

10. Following the Director's direction to prosecute in relation to all three cases on the 27th of February 2019, and the appellant having been duly charged, he was then returned for trial on Bill No. 103/2020. However, on the 12th of May 2021, a *nolle prosequi* was entered in respect of the counts on the bill on the express basis that the Director intended to prosecute the appellant for the offences alleged on Bill No. 103/2020 in a new indictment, which indictment would also contain counts alleging indecent assaults involving other complainants. Notice of the intended application to enter a *nolle prosequi* on that basis was

communicated to the appellant's solicitors in advance, and, having been informed about the purpose of the application, the appellant, through his counsel, made his objections known to the court at the time.

The Third Tranche:

11. This comprises count nos. 103 to 151, inclusive, which counts relate to indecent assaults alleged to have been perpetrated by the appellant on the following complainants:

- (i) SB (count nos. 103 to 109, inclusive), who made a statement to An Garda Síochána on the 27th of February 2020 regarding offences which are alleged to have occurred between the 1st of October 1977 and the 30th of June 1978. The appellant was interviewed by gardaí in respect of SB's complaint on the 6th of November 2020. The date on which the file in respect of SB's complaint was submitted to the Director was the 15th of April 2021, and a direction to prosecute was given on the 9th of August 2021;
- (ii) BP (count nos. 110 to 124, inclusive), who made a statement to An Garda Síochána on the 8th and 19th of October 2020, respectively, regarding offences which are alleged to have occurred between the 1st of September 1977 and the 30th of June 1978. The appellant was interviewed by gardaí in respect of BP's complaints on the 6th of November 2020. The date on which the file in respect of BP's complaint was submitted to the Director was the 15th of April 2021, and a direction to prosecute was given on the 9th of August 2021;
- (iii) TC (count nos. 125 to 151, inclusive), who made a statement to An Garda Síochána on the 9th of December 2020 regarding offences which are alleged to have occurred between the 1st of October 1977 and the 7th of February 1982. The appellant was interviewed by gardaí in respect of TC's complaint on the 11th of March 2021. The date on which the file in respect of TC's complaint

was submitted to the Director was the 15th of April 2021, and a direction to prosecute was given on the 9th of August 2021.

12. Following the Director's direction to prosecute on the 9th of August 2021 it was decided by the Director that these, and the other pending charges, should all be contained in one Book of Evidence. Accordingly, the charges comprising all three tranches became the subject matter of Bill No. DUDP 99/2022.

Submissions to the High Court

Submissions on behalf of the appellant

13. The appellant's concerns regarding his pending trial on Bill No. DUDP 99/2022 were expressed in submissions made on his behalf to the High Court. In short, two principal grounds were advanced in the court below. The first was that there had been very considerable delay in bringing this matter to trial. It should be noted that the appellant did not allege in the court below, or in this Court, that he had suffered any specific prejudice as a result of the delay, such as loss of relevant witnesses or relevant documentary or other evidence; rather, the appellant's argument was that the present case fell within the second limb of the test laid down by the Supreme Court in *S.H. v. DPP* [2006] 3 I.R. 575, which authority provides that there could be circumstances in an individual case which cumulatively amount to wholly exceptional circumstances whereby, and in consequence of which, it would be unfair and unjust to put the accused on trial.

14. The wholly exceptional circumstances in the case, the cumulative effect of which counsel for the appellant argued would render it unfair or unjust to put the appellant on trial, were particularised in the court below as follows:

- (i) That the allegations relate to events between 40 and 49 years ago;
- (ii) That there has been culpable prosecutorial delay in relation to the following:
the submission of files by gardaí to the Director; the giving of directions to

prosecute the appellant; and the review by the Director of an earlier decision not to prosecute the appellant;

- (iii) That the appellant had been subject to three previous trials in 2014, 2015, and 2021, respectively, for offences arising in the same or similar context, and arising out of which he was convicted and is now currently serving custodial sentences totalling a cumulative period of 14 years and 5 months;
- (iv) That the appellant was aged 71 years;
- (v) That the appellant was in poor physical health, said to be evidenced by certain medical documentation exhibited to the affidavit sworn by the appellant's solicitor, and;
- (vi) That the allegations made by four of the complainants in Bill No. DUDP 99/2022 could have been prosecuted as part of earlier trials in 2014 or 2015.

15. In support of his application the appellant placed particular reliance upon the following authorities : *P.T. v. DPP* [2008] 1 I.R. 701, *M.S. v. DPP* [2021] IECA 193, and *DPP v. B.K.* [2022] IECA 119. It was submitted that taking all of the factors outlined above on a cumulative basis, an Order for prohibition in favour of the appellant in relation to the charges on Bill No. DUDP 99/2022 was warranted.

16. The second ground on which the appellant advanced his application in the court below was that the entry of the *nolle prosequi* on the 12th of May 2021 was a procedural step made in a way which was unfair to the appellant. It was submitted that it was well settled at law that such a procedural step 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. In support of this submission the court below was referred to *O'Callaghan v. Ó hUadhaigh* [1977] I.R. 42, *O'Callaghan v. DPP* [2011] 3 I.R. 356, and *Furlong v DPP* [2016] 1 I.R. 320.

17. The disadvantage at which the appellant claims he was put by the entry of a *nolle prosequi* on the 12th of May 2021 was said to manifest in the following ways. In the first place, it was said that the effect of this procedural step by the prosecution was to give rise to a situation whereby rather than facing the allegations of three complainants at trial, he would now have to face those of nine. This would frustrate the ease with which the appellant would be able to mount a defence of fabrication on the part of the complainants. Second, it was said that by having to face a greater number of allegations brought by the greater number of complainants, the appellant would be in a more adverse position. Reference in this regard was made to *People (DPP) v. Limen* [2021] 2 I.R. 546 wherein the Supreme Court 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 allegations. As the High Court judgment records, the appellant’s analysis of *Limen* continued:

“The accusations did not have 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 the complainants on a single indictment, the prosecution had obtained for itself a significant advantage at the proposed trial”.

18. The appellant further complained that the prosecution, by entering the *nolle prosequi* in the terms and circumstances that it did, had “*sidestepped*” the effect of s. 4N of the Criminal Procedure Act 1967, as inserted by s. 9 of the Criminal Justice Act 1999. This provision provides:

“Where the accused has been sent forward for trial in accordance with this Part, the indictment against the accused may, with the consent of the accused and notwithstanding any other enactment, include counts that—

(a) charge an offence justiciable within the State, other than the offence for which the accused was sent forward, and

(b) are not founded on the documents served on the accused section 4B or 4C, and section 25 (3) of the Courts (Supplemental Provisions) Act, 1961, shall be construed accordingly.”

It was submitted to the High Court that by entering a *nolle prosequi* in this case, the Director had sidestepped the requirements of the above section, in particular the requirement to obtain the consent of the applicant to the enlargement of the indictment.

19. It was argued that having regard to these factors and the case law on this issue, that the court below should find that the Director had misused her powers to enter a *nolle prosequi*; and on that basis that the fresh prosecution brought in the form of Bill No. 99/2022 should be prohibited.

Submissions on behalf of the Director

20. The Director opposed the appellant’s application on the following bases. In the first place and in the round, it was said that it was not appropriate for the court below to grant the Order for prohibition sought by the appellant in respect of his forthcoming trial on Bill No. DUDP 99/2022. It was said that it was noteworthy that notwithstanding complaint being made of considerable delay, the appellant did not allege any specific prejudice to him arising out of that delay.

21. It was further argued that it was clear from legal authorities that generally it is preferable that if an issue of prejudice, or a risk of an unfair trial, should arise as a result of delay, the matter should be dealt with by the trial judge, who has the power to issue all necessary warnings and directions to the jury in appropriate cases, and is best placed to address such concerns. It was submitted accordingly that even should the appellant fail in his application to the High Court (which, in the event, he did) then his legal team would not be

prevented from making whatever applications that might seem to them to be appropriate in this regard at the appellant's trial, and the trial judge would have the ability to deal with the defence's concerns appropriately in the light of evidence led, or to be led, at the trial.

22. It was refuted that the factors outlined by the appellant, as purportedly and cumulatively giving rise to wholly exceptional circumstances such as to meet the threshold of the second limb in *S.H.*, had given rise to sufficient prejudice such as to make it likely that he would be unable to receive a fair trial. Conversely, it was said that those such factors did not, in fact, give rise to any such concern. Reference was made to a number of authorities, in particular *P.B. v. DPP* [2013] IEHC 401 and *M.S. v. DPP* [2015] IEHC 84, and it was submitted that in cases where similar factors had been considered, they had been considered in circumstances distinguishable from the present case: the accused in those cases had to deal with allegations that were of considerably greater antiquity; the accused was considerably older than the appellant, and; the accused had demonstrated, with reference to cogent medical evidence, far greater ill-health. Reliance was also placed on *B.K.*, referred to previously, which case was said to have been broadly similar to the within case. It was noted that the Court of Appeal (Birmingham P.) had held in that case, in refusing to make an Order of prohibition, that any issues that might arise due to delay or the absence of evidence, or the applicant's medical condition, could be adequately addressed by the trial judge. It was said in the court below that none of the factors outlined, when taken either on an individual or a cumulative basis, would warrant a finding that the appellant was unable to obtain a fair trial.

23. In reply to the appellant's complaint regarding the use of the *nolle prosequi* procedure, the Director submitted the following. In the first place, it was said that the use of the said procedure, for the purpose of directing that all the extant charges should be tried together in a single indictment, was perfectly appropriate, and represented a legitimate use of that procedure. It was further said that this procedural step was taken well in advance of the

hearing of the action. It was refuted that the entry of the *nolle prosequi* by the Director in May 2021 had deprived the appellant 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 argued that while the appellant might perceive his position as being more difficult in the light of Bill No. 99/2022, this did not mean that the entry of the *nolle prosequi* by the respondent in respect of the earlier proceedings had been unlawful or inappropriate.

24. Finally, it was submitted that an Order for prohibition would be inappropriate in view of the fact that the appellant retained a right to apply to the trial judge to sever the indictment, if he had a realistic submission to the effect that he could not get a fair trial due to the multiplicity of counts contained therein.

Judgment of the High Court

25. In the first place, Barr J. acknowledged that principles of general application in the present case were to be found in Charleton J.'s judgment in *K. v. Moran & DPP* [2010] IEHC 23 (at para. 9 thereof), which were adopted and endorsed by O'Malley J. in the High Court in *P.B. v. DPP* [2013] IEHC 401. He then reviewed the Supreme Court's decision in *S.H. v. DPP* [2006] 3 I.R. 575 and noted that arising from this seminal case the focus of the court in deciding on the application seeking prohibition on grounds of delay and prejudice is not on the reasons for why the complainant(s) did not make his/her/their complaints at an earlier remove in time, but rather the court's focus should solely be on whether, in all the circumstances, the accused has been prejudiced by the delay, such that he/she can no longer obtain a fair trial.

26. The High Court judge then isolated the following passages from Murray C.J.'s judgment in *S.H.* which he regarded as being indicative of the test to be applied:

“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:-

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.

[...]

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 exclude wholly exceptional circumstances where it would be unfair or unjust to put an accused on trial”.*

27. The High Court judge noted that under the foregoing, prohibition could be sought on either of two grounds: (i) that he has suffered specific prejudice due to the delay in prosecuting him, or; (ii) 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 significant risk that he would have an unfair trial.

28. As it was on the second of the aforementioned limbs in *S.H.* that the appellant relied in his application to the court below, the High Court judge’s analysis centred on this. In this context, the High Court judge considered *P.T. v. DPP* [2008] 1 I.R. 701, *D.C. v. DPP* [2005] 4 I.R. 281, *M.S. v. DPP* [2021] IECA 193, and *DPP v. B.K.* [2022] IECA 119; and the High Court judge distilled from these authorities *inter alia* certain principles which he regarded as applicable to the immediate case:

- (i) That it was not for the court below in considering an application seeking prohibition to merely pick out an element and conclude that arising from it there is a possibility of an unfair trial. The test requires the applicant to raise an arguable case that there is a serious risk of an unfair trial (*D.C.*, per Denham J., paras. 28 - 29).
- (ii) 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 applicant on trial (*M.S.*, per Kennedy J., para. 57).
- (iii) 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 (*B.K.*, per Birmingham P., para. 57).

29. The High Court judge was not satisfied that the circumstances taken cumulatively were wholly exceptional circumstances such that the appellant could not obtain a fair trial at his forthcoming trial. The court below was not persuaded by the suggestion that the appellant’s age meant that he would be incapable of properly defending himself at the trial or giving instructions to his legal team in respect of same. The High Court judge noted in this context that modern medical advances mean that the age of 71 years is not regarded as giving rise to reduced physical or mental capacity; he further noted in this context that members of the public and civil service have the right to work to the age of 70 years. He concluded that the age of 71 years *per se* cannot be seen as being of such an age that a person cannot adequately defend themselves.

30. The High Court judge did acknowledge, however, that physical and mental health may be a factor. In this context, it is important to note that paras. 42 to 45 of the affidavit sworn by the appellant's solicitor, a Mr. Donough Molloy, on the 27th of July 2022 deposed to certain health issues of the appellant:

“42. I am instructed that the applicant was diagnosed with coronary artery disease in 2003. He had multiple stents in situ prior to his imprisonment. Further stents were put in place in November 2019. In or about May or June 2020, he had a triple bypass and aortic valve replacement. He has ongoing issues with arrhythmia.

43. I am instructed that the applicant was diagnosed with type 2 diabetes in 2018. In March 2018, he was diagnosed as having background diabetic retinopathy.

44. In addition, I am instructed that the applicant has ongoing gastric issues, chronic lower back pain, and osteophytosis of L3/4 and L4/5.

45. I beg to refer to medical documentation supplied by the applicant which touches on some of the above medical issues upon which, marked with the letters “DM10”, I have signed my name prior to the swearing hereof”.

31. The documentation in question, exhibited as DM10, comprised the following items which are now summarised:

- (i) A letter dated the 14th of March 2018 from a Dr David Keegan, Clinical Director at Diabetic RetinaScreen, informing the appellant that, following his attendance at an eye screening appointment, that the results of same showed that he had background diabetic retinopathy, which condition involves minor

changes to his retina arising from diabetes. The letter goes on to state “[i]t can sometimes improve without treatment. It is important to control your blood glucose and blood pressure in order to prevent these changes from progressing”, and later states “[l]ooking after your diabetes can reduce the risk of your retinopathy getting worse, or slow the rate at which it progresses”. There was no further document exhibited updating this aspect. It should also be stated that this is the only document exhibited as medical documentation which refers (albeit indirectly) to the appellant’s diabetes diagnosis.

- (ii) A colonoscopy report compiled by the endoscopy unit at a HSE hospital which diagnosed the appellant with minor diverticulosis of the left colon, i.e., the formation of abnormal pouches in the bowel wall. The date of the procedure was the 10th of February 2020. The accompanying referral letter dated the 14th of January 2020, predating the colonoscopy report, detailed that the appellant had been complaining of *inter alia* abdominal pain. It also referred to a previous diagnosis of gastritis in June 2019. The recipient of the letter, a Dr Pearson, was asked to advise on whether the appellant should stop taking Plavix (an antiplatelet drug). Reference was also made to the appellant having been seen previously by Dr Pearson, at a remove in time unknown both to the court below and to this Court based on the material furnished at first instance and on appeal, in relation to “*Cardiac problems*”. It was also referred to in this context that the appellant has a stent.

32. Referring to the affidavit sworn by the appellant’s solicitor on the 27th of July 2022 and the above accompanying exhibited documents purporting to reveal the appellant’s state of health, the High Court judge stated that the court below did not regard said documentation

as demonstrating that the appellant was in a poor state of health. Having reviewed the medical documentation just described, the High Court judge was not satisfied as to the cogency of the medical evidence advanced to support Mr. Molloy's assertions that the appellant was a man with a particular poor bill of health. The High Court judge was critical of *inter alia* the absence of medical evidence to support the appellant's solicitor's assertions that the appellant had been diagnosed with coronary artery disease in 2003; that the appellant had multiple stents *in situ* prior to his imprisonment, and that further stents had been put in place in November 2019; or that in May or June 2020 the appellant had undergone a triple heart bypass and aortic valve replacement procedures; nor that he had any ongoing issues with arrhythmia. The High Court judge continued:

“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”.

33. Turning to the appellant's submission 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 been convicted and received prison sentences, the High Court judge expressed some reservations:

“46. [...] 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”.

34. Further, the High Court judge was not satisfied that the prosecutorial delay complained of by the appellant was material. The High Court judge remarked that it was only subsequently on a review of her files that the respondent made directions to prosecute the appellant in relation to the earlier set of complaints that had been made (i.e., those comprising the so-called “*first tranche*”). As the High Court judge would explicate, the absence of any assertion by the appellant of any specific prejudice arising from the alleged prosecutorial delay was both conspicuous and significant in this context:

“49. [...] The court is not persuaded that the other periods of delay identified by the appellant 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”.

35. The High Court judge was ultimately not convinced that submissions made in respect of the first ground of the appellant’s application warranted the making of an Order for prohibition. The judge’s conclusions in this regard were twofold. In the first place, he remarked that the High Court was not persuaded that the circumstances identified by the appellant cumulatively gave rise to a situation where it could be said that the appellant was at risk of receiving an unfair trial in January 2024. This conclusion was reached by the court below having looked at the matter in the round, and by taking into account the following factors: the overall lapse of time since the date of the events the subject matter of Bill No. DUDP 99/2022 and the likely date of the trial in January 2024; coupled with such evidence as

was adduced in respect of the appellant's age and state of health, and; combined with his previous trial and conviction history in respect of similar offences.

36. The second basis on which the High Court judge dismissed this particular ground of the appellant's application fundamentally related to what remedy or relief could be sought at the trial of the appellant. He noted that if in the light of the evidence that is led at trial, the appellant, or his legal team, form the view that the appellant's right to a fair trial has been impaired, then the appropriate application can be made on the appellant's behalf to the trial judge at that stage. The High judge remarked that it is the trial judge who is best placed to deal with such concerns, either by giving the appropriate warnings or directions to the jury or, in an extreme case, by withdrawing the case from the jury.

37. The High Court judge's attention then turned to the appellant's second ground, relating to the prosecutions use of the *nolle prosequi* procedure. Referring to *inter alia*, *State (O'Callaghan) v. Ó hUadhaigh* [1977] I.R. 42, *O'Callaghan v. DPP* [2011] 3 I.R. 356, and *Furlong v. DPP* [2016] 1 I.R. 320, the High Court judge noted that the jurisprudence 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 a manner which is unfair, so as to deprive an accused of a particular advantage that he or she has already obtained. The High Court judge also acknowledged the provisions of s. 4N of the Criminal Procedure Act 1967, as amended, on which the appellant placed reliance in submissions made on his behalf to the court below.

38. Having reviewed the relevant authorities and statutory provisions, and having considered the submissions made by both parties, the High Court judge concluded that he was not satisfied that the Director had used the *nolle prosequi* procedure in a way that was unfair and that warranted the prohibition of the appellant's forthcoming trial.

39. Distinguishing the appellant's present case with the facts of the authorities to which the court below was referred, the High Court judge noted that in each of those earlier cases the accused 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 at which it was halted, and that these said advantages were effectively set at nought by the entry of a *nolle prosequi*, or by the withdrawal of the case from the jury. In the present case, it was regarded as noteworthy that no such advantage had accrued to the appellant because his trial on Bill No. 103/2020 had yet to commence.

40. The High Court judge did not regard the requirement on the part of the Director to seek the consent of the appellant prior to adding new charges to the indictment to constitute an "*advantage*" accruing to the appellant; rather, he termed it a "*procedural state of affairs*" which was brought about by the provisions of s. 4N of the Criminal Procedure Act 1967, as amended. Further, the High Court judge expressly noted that chronologically it would not have been possible, even with the consent of the appellant, for the Director to have included the charges comprising the "*third tranche*" in an earlier indictment on which the appellant was tried in 2021, seeing as the complaints giving rise to such charges post-dated that particular indictment (103/2020).

41. In the circumstances, the High Court judge regarded as "*reasonable*" the entry by the Director of a *nolle prosequi* and to thereafter proceed with all charges under Bill No. DUDP 99/2022. He did not find anything underhand or unfair in the taking by the Director of that procedural step; and insofar as the appellant complained of "*piecemeal prosecutions*", arising out of broadly similar complaints, the High Court judge remarked that it was in the appellant's interest to dispose of all charges in the one trial. Further, while the court below acknowledged the "*more onerous*" position in which the appellant now finds himself, having to face nine complainants in the context of one trial, the High Court judge was not persuaded

that this greater difficulty was sufficient to warrant the relief sought. Additionally, and in the absence of any evidence purporting to show that efforts were not made by the Director to include some of the charges under Bill No. DUDP 99/2022 in earlier indictments, the High Court judge was not persuaded by the appellant's arguments in that regard.

42. Finally, the High Court judge remarked that if the appellant wished to make the case that the number of complainants and/or charges would or does in some way deprive him of his right to a fair trial, it remained open to the appellant to apply to the trial judge to sever the indictment. The High Court judge was therefore of the view that the appellant's right to a fair trial was preserved.

43. The High Court judge accordingly refused the reliefs sought. By Order perfected the 12th of October 2023, the court below further awarded costs to the respondent.

Notice of Appeal

44. As alluded to in the introduction to this judgment, the appellant advanced certain grounds of appeal in his Notice of Appeal. These grounds are now described in full:

- “1. *The learned High Court judge erred in law and fact in refusing to prohibit the respondent from further prosecuting the appellant on bill number DUDP 99/2022.*

2. *In particular, the learned High Court judge erred in refusing to prohibit the further prosecution of the appellant on bill number DUDP 99/2022 on the basis that it would be unfair or unjust to try him based on the cumulative effect of wholly exceptional circumstances. Without prejudice to the generality of the foregoing, the learned High Court judge erred in:*
 - (a) *Applying the incorrect legal test in determining whether prohibition should be granted.*

- (b) *Finding that there was no prosecutorial delay, despite the evidence pointing to periods of apparent delay which the respondent failed to adequately explain or justify.*
 - (c) *Failing to have any regard, or any sufficient regard, to the obligation on the investigating and prosecuting authorities to proceed expeditiously and to ensure no further unnecessary delays in bringing prosecutions of already delayed complaints to trial.*
 - (d) *Failing to engage sufficiently or at all with the argument advanced by the appellant regarding the oppressive impact of multiple sequential trials.*
 - (e) *Concluding that there was insufficient evidence to establish that the applicant was in poor health.*
 - (f) *Failing to find that the cumulative effect of the wholly exceptional circumstances in this case renders it unfair or unjust to try the appellant on bill number DUDP 99/2022.*
3. *Further or in the alternative, the learned High Court judge erred in refusing to prohibit the further prosecution of the appellant on bill number DUDP 99/2022 on the basis that the current prosecution of the offences relating to the complainants [DC], [KM] and [DH] is the result of an unlawful deployment of the nolle prosequi procedure. Without prejudice to the generality of the foregoing, the learned High Court judge erred in:*
- (a) *Failing to have any regard, or any adequate regard, to the procedural protection afforded by s. 4N of the Criminal Procedure Act 1967,*

which requires the consent of an accused person if unrelated allegations are to be added to an indictment.

- (b) *Holding that in order to establish an unlawful deployment of the nolle prosequi procedure, it must be shown that the accused has been deprived of an advantage obtained in the course of the trial.*
 - (c) *Failing to find that the use by the respondent of the nolle prosequi procedure to obtain a procedural advantage in adding further charges relating to further complainants to a prosecution and / or bypass the procedural protections afforded by s. 4N of the Criminal Procedure Act 1967 and / or the rules relating to the joinder of indictments amounts to an unlawful deployment of the nolle prosequi procedure.*
 - (d) *Finding that it was reasonable for the respondent to enter a nolle prosequi on bill number DUDP 103/2020 so that the allegations comprised in that bill number could form part of a new return for trial encompassing additional complainants.*
 - (e) *Failing to take into account of the impact of the entry of the nolle prosequi on the appellant's right to an expeditious trial in respect of those allegations which were already delayed and historic in nature.*
 - (f) *Failing to hold that the entry by the respondent of a nolle prosequi on bill number DUDP 103/2020 was an unlawful deployment of the nolle prosequi procedure.*
4. *The learned High Court judge erred in all of the circumstances in refusing the reliefs sought by the appellant.*

5. *The learned High Court judge erred in making an order for costs against the appellant. Without prejudice to the generality of the foregoing, the learned High Court judge erred in:*
- (a) *Failing to have any regard, or any adequate regard, to the fact that the appellant had availed of the Legal Aid (Custody Issues) Scheme and that the respondent would therefore not have been liable to pay the appellant's costs if he had succeeded in the litigation.*
 - (b) *Failing to have any regard, or any adequate regard, to the chilling effect of making an order for costs against a person who is availing of the Legal Aid (Custody Issues) Scheme to pose a statable challenge to the lawfulness of the prosecution against him or her.*
 - (c) *Departing from and distinguishing, without adequate justification, his earlier judgment in A.H. v. DPP [2021] IEHC 308, in which it was held that it was inappropriate to make an order for costs in similar circumstances.*
 - (d) *Failing to have any regard, or any adequate regard, to the limited financial means of the appellant?*

Parties' Submissions to the Court of Appeal

45. Both sides filed extensive written submissions which the Court is grateful to have.

These were supplemented by oral submissions at the appeal hearing.

46. In the context of the claim that the trial should be prohibited because of the cumulative effect of wholly exceptional circumstances counsel for the appellant referred us to the following quotation from the judgement of Murray C.J. in *S.H v DPP* [2006] 3 I.R. 575 at para 54:

“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”.

47. Counsel for the appellant acknowledged that the jurisprudence indicates that a trial judge has inherent jurisdiction to address issues caused by delay and prejudice to an accused person. However, he pointed to *M.S. (No. 2) v. DPP* [2021] IECA 193 in which this court held that the existence of this inherent jurisdiction does not exclude the possibility of a court in judicial review proceedings concluding that cumulative factors exist of such a wholly exceptional kind as would mean that it would be unjust to put the appellant on trial.

48. It was submitted that the trial judge’s approach in the present case, which had focused on whether the appellant faced the risk of an unfair trial by reason of delay, elided the distinction between the first and second limbs of *S.H.*, and incorrectly treated the case as being an application for prohibition under the first limb.

49. This court was referred to a number of cases by the appellant in which the courts have held that prohibition is warranted on the second limb of *S.H.* These included *P.T. v. DPP* [2008] 1 I.R. 701 and *M.S. (No. 2) v. DPP* (previously cited). For completeness, it should be stated that an earlier application by *M.S.* (the judgment in which bears the neutral citation [2015] IEHC 54) had been unsuccessful. Further, it is convenient this point to identify some further cases to which we were referred by counsel for the respondent in which applicants claiming that prohibition was warranted either on the second limb of *S.H.*, or on broadly analogous grounds in cases that predated that judgment, had been unsuccessful. In particular we were referred to the respective judgments of Charleton J. in *K. v. His Honour Judge Carroll Moran* [2010] IEHC 23, of O’Malley J. in *P.B. v. DPP* [2013] IEHC 401, and of Birmingham P. in *B.K. v. DPP* [2022] IECA 119.

50. It was accepted by counsel for the appellant that individually (with the exception of his *nolle prosequi* point) none of the matters on which he was placing reliance would justify an Order of prohibition. It was emphasised that it was the cumulative effect of the matters or factors to which he was pointing that would render it unfair and unjust to try his client at this stage. The factors being relied upon were:

- the overall length of the cumulative or aggregate delays in this case;
- the fact that some of those delays represented (in the contention of the appellant) culpable prosecutorial delay which meant, it was submitted, there had been a failure to vindicate his client's right to an expeditious trial;
- the absence of any explanation for such culpable prosecutorial delay as had occurred;
- the fact that his client had already undergone several trials for offences of a similar kind and had received, and was serving sentences, amounting to a total of 14 years and 5 months;
- the fact that he could have been prosecuted for a number of the offences at an earlier stage, but was not so prosecuted;
- the fact that the prosecution had (in his contention) unfairly availed of the *nolle prosequi* procedure, resulting in the prosecution gaining an advantage and his client suffering a detriment;
- his client's advanced age;
- his client's ill-health.

51. Counsel for the respondent, replying on behalf of her client in respect of the complaint based on the alleged existence of factors of a wholly exceptional kind which it was said would, cumulatively, render it unfair and unjust to put the appellant on trial, disputed that some of the matters identified could legitimately be relied upon at all in the

circumstances of the case, and that they in fact represented factors of a wholly exceptional kind.

52. In particular, the following factors were were contested by counsel for the respondent: that there had been culpable prosecutorial delay; that there had been a failure to vindicate the appellant's right to an expeditious trial; that the Director had acted unfairly in entering a *nolle prosequi* on Bill No. 103/2020; that there had been unjustified piecemeal prosecutions; that there was anything exceptional about the appellant's age at 71 years, and; that there was anything exceptional about the appellant's state of health. It was said that the evidence simply did not support these contentions and the Court was invited to consider the evidence relied upon in detail. In counsel for the respondent's contention, the High Court judge had properly analysed the evidence and he had made appropriate findings. The respondent's position was that the High Court judge's decision had been correct with respect to the complaint based on the second limb of the decision in *S.H.*

53. In respect of the appellant's second core complaint, namely that there had been a fundamental unfairness in the circumstances in which the *nolle prosequi* was entered on Bill No. 103/2020 sufficient to justify the making of an Order of prohibition, counsel for the appellant reiterated the points that he had made in the court below, namely: that what was done by the Director was a device to get around s. 4N of the Criminal Procedure Act 1967; that his client was disadvantaged by having to defend the trial involving many more complainants; that it would be more difficult in the circumstances for him to mount a defence of fabrication on the part of (some, or all, of) the complainants, and; that, by virtue of the decision in *Limen* (previously cited) the prosecution would now, it was anticipated, contend that probative value could be found in the adherent unlikelihood that several people had made the same or similar false allegations. All of this meant, in counsel for the applicant's

contention, that the prosecution had obtained an unfair advantage and that his client was correspondingly disadvantaged.

54. Responding to this, counsel for the respondent submitted that there had been nothing unfair or underhanded what was done. The Director had made plain from the outset that in doing so she was proposing that the appellant should be recharged and prosecuted on the new bill of indictment for the offences on Bill No. 103/2020 together with other offences. The *nolle prosequi* had not been entered in the context of a trial that was underway. While it was accepted that the position of the appellant might be somewhat more difficult, this was not as a result of any misuse of powers by the Director. What the Director had done was not an abuse of process; rather she had availed of a legitimate procedural step that was open to her. The appellant retained his right to apply to the trial judge for a severance of the indictment in the event that there was a perceived unfairness in having to defend complaints from many complainants.

The Court's Analysis and Decision

The complaint based on the second limb of DPP v. S.H.

55. I have carefully considered all of the caselaw to which the Court was referred. It is somewhat trite to suggest that each case depends very much on its own facts, but there is much truth in it. While all of the jurisprudence has been helpful, I have found the Supreme Court's decision in *P.T. v. DPP* (previously cited) to be of particular assistance.

56. I accept that quite apart from the right of every accused to an expeditious trial, there were particular circumstances which also behoved the prosecuting authorities to act expeditiously in these cases once the complaints were received. These circumstances included: the fact that these are quite old cases; the fact that the appellant himself has attained age when most people are retired, and; the fact that the appellant has already undergone a number of trials for similar offences of which he has been convicted, and in respect of which

he is serving sentences. It is necessary, therefore, to examine the circumstances in which prosecutorial decisions were taken, and acted upon, in these cases.

57. In the case of the oldest tranche of cases, being those involving DG, BB, and SD, I find nothing to suggest to the Court that there were excessive or inappropriate delays in any of these cases between the receipt of the complaint, the interviewing of the appellant, and the submission of an initial file to the Director. It was following a request by DG for a review of the decision taken in 2001 not to prosecute the appellant in respect of DG's complaint, that the Director came to revisit the three cases involving the complaints of DG, BB, and SD, and decided, in the light of all of the circumstances that were then known, that prosecutions were in fact warranted, and directed the preferment of relevant charges. By this stage, charges had already been directed concerning DC, KM, and DH.

58. It was pleaded in the respondent's Notice of Opposition, and verified by the affidavit of Ms. Riognach Corbett on behalf of the Director, that having regard to the underlying unity or nexus between the charges that had already been directed concerning DC, KM, and DH, and the charges that had been the subject of the appellants conviction before the Central Criminal Court at an earlier stage on Bill No. 85/2011, and other complaints that had been made, the Director considered that the allegations made by DG in 1999, for which no prosecution had previously been directed, bore similarities with the foregoing and with the allegations made by BB and SD, respectively, for which no prosecution had been directed either. It was in those circumstances, and notwithstanding the passage of time, that the respondent on the 13th of August 2020 directed that the appellant should be prosecuted for two counts of sexual assault against DG. It was then necessary to consider the position in respect of BB and SD, and on the 12th of May 2021 the respondent directed prosecutions in respect of DG, BB, and SD's respective complaints.

59. It is clear to the Court that there was a complex background to the matters. The Director was required to conduct a balancing exercise between the right of the public to have crimes prosecuted and the appellant's right to expeditious decisions with respect to complaints made against him and to not be subjected to a trial which would be unfair and unjust. These are complex cases, and it is appropriate that the Director should be afforded a reasonable time within which to make a decision striking the appropriate and required balance in such cases. I do not consider the time taken by the Director to have been unreasonable. Insofar as there was some delay, I am satisfied that it is explained. I do not consider that there is evidence of undue prosecutorial delay in those matters.

60. The appellant is currently serving sentences for offences of which he was convicted following a trial on Central Criminal Court (Bill No. 85/2011) and Dublin Circuit Criminal Court (Bill No. 1199/2011). The trial on Bill No. 85/2011 took place between the 12th and 28th of November 2014. The trial on Bill No. 1199/2011 took place between the 30th of April and 12th of June 2015. It was suggested that DG, BB, and SD had each respectively made statements prior to the dates of both of these trials (although the respondent had, at that stage, directed no prosecution), and that had the prosecution acted with reasonable expedition, and had taken reasonable steps, a situation could have been brought about where all matters were tried together at the same point in time.

61. I do not consider that it is reasonable to criticise the Director for not having tried DG, BB, and SD concurrently with the matters in Bill Nos. 85/2011 and 1199/2011 in circumstances where a request for a review of the decision not to prosecute in the case of DG was only made during 2019, resulting in a decision to prosecute after all in that case being made in August 2020. The Director then required to consider whether in the light of that decision, and new information, decisions to prosecute after all might also be appropriate in the cases of BB and SD, and decisions to prosecute after all were made in those cases on the

12th of May 2021, with a direction being given on that date that it would be appropriate to try the appellant for the offences against the three complainants DG, BB, and SD together. The time taken to reach these decisions was not unreasonable in the circumstances in my determination.

62. The point is also made by the appellant in submissions that DC had made a statement prior to the date of the appellant's trial on Dublin Circuit Court (Bill No. 1199/2011). It was again suggested that had the prosecution acted with reasonable expedition, and had taken reasonable steps, a situation could have been brought about where the appellant could have been tried for the alleged offence against DC with the matters the subject matter of that bill of indictment. I am satisfied that there is an air of unreality to this. The statement of complaint made by DC was made just seven weeks before the opening of the trial on Bill No. 1199/2011. By the opening of the said trial, the investigation was still at a very early stage, and the appellant had not yet been interviewed, much less had any file been sent to the Director for consideration.

63. Insofar as the prosecutions of the appellant for offences based on the complaints of SB, BP, and TC are concerned, there is absolutely no basis for suggesting that there was undue delay on the part of the prosecuting authorities either in the investigation of those complaints or in the taking of relevant prosecutorial decisions.

64. Returning to the prosecutions of the appellant for offences based on the complaints of DC, KM, and DH, which at the time were listed for trial on the 22nd of June 2021, I accept that the effect of the entry of the *nolle prosequi* on the 12th of May 2021 was that an imminent trial date was lost and, that by virtue of new charges not being preferred until the 21st of September 2021, being amongst those which is now sought to prosecute in the context of Bill No. DUDP 99/2022, the appellant has still not been tried in respect of those matters. This does represent some additional delay insofar as progressing prosecutions in respect of

those complaints are concerned, but an explanation has been provided in respect of why that arises, and I do not regard it as unjustified or as representing undue delay on the part of the prosecuting authorities.

65. Apart from all of that, I do accept however that there is some unexplained ostensible delay in the investigation of the case of DC, with three years and eight months elapsing between the taking of a statement from DC by gardaí and the submission of a file to the Director of Public Prosecutions. That having been said, for reasons which I will set forth momentarily (in paragraph 66 *et seq.*), I do not believe that such prosecutorial delay as may have occurred in relation to this tranche of cases, which was by no means gross delay, supports the contention by the appellant that there was a breach of his right to an expeditious trial.

66. I think it is important to recognise that the Director of Public Prosecutions has a range of legitimate discretion in terms of directing what alleged offences are appropriate to be tried together. She has a margin of appreciation in that regard. I am satisfied that cogent explanations have been put forward for the prosecutorial decisions she has taken in this case. While the appellant may not agree with her decisions, I do not consider that he has demonstrated that she acted outside her legitimate range of discretion.

67. Insofar as it is contended by the appellant that there was a failure to vindicate his right to an expeditious trial in respect of at least some of the offences now the subject matter of Bill No. 99/2022, I do not consider that there has been sufficient engagement by the appellant with the facts of the case and with the law. His assertion that there was a failure to vindicate his right to an expeditious trial rests firmly on his contention that he has demonstrated blameworthy prosecutorial delay of significance. I do not consider that to be the case, but even if another view were open on the evidence, it is not the delay but the effects of the delay which are crucial. Where such delay is relied upon in support of a contention that there has

been a breach of the right to an expeditious trial, the law mandates the Court to conduct a balancing exercise between the impacted interests of the applicant and the public interest in the prosecution and conviction of those guilty of criminal offences. A party who is not contending specific prejudice to his ability to defend himself at trial on account of the delay of which he complains, must put something additional into the balance before the Court would be justified in intervening on the basis of a breach of his right to an expeditious trial, and I believe that this appellant has not pointed to any additional factor of relevance.

68. In *P.M. v. Malone* [2002] 2 I.R. 560, Keane C.J. held at pp. 572-573:

“[...] Where there has been significant and culpable delay to which he has not contributed in any way, the result may be either actual prejudice (the loss of otherwise available evidence) or presumptive prejudice (the difficulties necessarily inherent in giving evidence after a lengthy period) which may affect his ability to defend himself and, hence, fatally compromise the fairness of the trial. That, however, may not be the only consequence for the accused of significant and culpable delay to which he has not contributed.

The first major consequence may be the loss of his liberty while the trial is pending. That does not arise in this case and, where it does arise, is capable of remedy through the machinery of bail and habeas corpus. The second major consequence is the anxiety and concern of the accused resulting from a significant delay in his being brought to trial.

*There are thus three interests of defendants which the right to a speedy trial is intended to protect, the third being the possibility that the defence will be impaired. These were identified by Powell J in his opinion in the United States Supreme Court decision of *Barker v Wingo* (1972) 407 US 514 in a passage which was approved of in this court in *Director of Public Prosecutions v Byrne* [1994] 2 IR 236, having*

previously been endorsed by the Judicial Committee of the Privy Council in Bell v DPP [1985] AC 937 and by Murphy J in The State (O'Connell) v Fawsitt [1986] IR 362.

In this case, the greater part of the delay of which the applicant complains occurred before he was charged with any offence. Undoubtedly, there is a distinction between the anxiety and concern of an accused person after he has been charged and before he has been charged. If the accused's right to a reasonably expeditious trial is violated by culpable delay which is so significant as, objectively considered, to cause him anxiety and concern, it would follow that that would be a ground for prohibiting his further trial where the delay occurred after he had been charged”.

69. In the later case of *P.M. v. DPP* [2006] 3 I.R. 172, Kearns J., having referenced the above passages, stated at p. 185:

“33 I believe that the balancing exercise referred to by Keane CJ in PM v Malone [2002] 2 IR 560 is the appropriate mechanism to be adopted by a court in determining whether blameworthy prosecutorial delay should result in an order of prohibition. It means that an applicant for such relief must put something more into the balance where prosecutorial delay arises to outweigh the public interest in having serious charges proceed to trial. In most cases, pre-trial incarceration will not be an element as an applicant will probably have obtained bail pending his trial. Secondly, while he may assert increased levels of stress and anxiety arising from prosecutorial delay, any balancing exercise will have to take into account the length of such blameworthy delay, because if it is a short delay rather than one of years, the mere fact that some blameworthy delay took place should not of itself justify the prohibition of a trial”.

70. In the present case, the appellant, in circumstances where he is in prison serving sentences for other matters, cannot point to deprivation of his liberty as being a consequence of the delay he relies upon. Further, he has not pointed to, or sought to make a case, that he is been subjected to meaningful additional stress and anxiety on account of such delay. Neither does he rely on any specific prejudice in terms of his ability to defend the cases against him. Accordingly, I am not satisfied that the appellant has demonstrated that there has been a breach of his right to an expeditious trial to any appreciable extent.

71. I find no error in how the trial judge approached the medical evidence offered in support of the appellant's contention that he is in poor health. The evidence put forward was, for the most part, mere assertion, and was unsupported by medical reports or affidavit evidence from a medical witness. It lacked the necessary reliability and cogency to enable a court to act upon it. I am satisfied that the trial judge was completely justified in regarding such medical evidence as was adduced as being insufficient to allow him to act upon it.

72. I also find no error in how the trial judge approached the issue of the appellant's age. The point was rightly made that at 71 years of age he is not exceptionally old. Many people in this country are working to the age of 70 years.

73. In summary therefore, I do not consider that the appellant has demonstrated culpable prosecutorial delay of such significance that it impinged meaningfully upon his right to an expeditious trial, or that he has established that he could reasonably have been expected to have been tried for the offences the subject matter of this litigation at an earlier stage, or that he has established that he is exceptionally old, or that he is in significant ill-health. While it is true that the appellant has been tried and convicted for other matters and is serving a lengthy sentence that is not a basis, *per se*, and absent other significant factors, for prohibiting his further trial. Moreover, although I will deal with this issue specifically in the next section of this judgment, I can state at this stage that I have also concluded that the appellant has not

demonstrated that there was any unfairness in the entry by the Director of the *nolle prosequi* on Bill No. 103/2020. All that being the case, I am satisfied that the appellant has not demonstrated that the High Court judge was in error in his findings of fact or in matters of law. I am satisfied that he was correct to find that the appellant had failed to demonstrate that cumulative factors exist of such a wholly exceptional kind as would mean that it would be unjust and unfair to put him on trial.

The complaint based upon the issuance of the nolle prosequi

74. Turning then to the complaint based upon the issuance of the *nolle prosequi*, I think it is an important point in assessing the fairness of what was done, and whether the prosecution have derived a prosecutorial advantage from what they have done, that the *nolle prosequi* was not entered in the course of an ongoing trial. It was entered in advance of any trial on Bill No. 103/2020 commencing. It was not, therefore, a case of the defence losing the benefit of a ruling in their favour which they had obtained at trial.

75. It is also important to observe that the Director's actions were conducted in a fully transparent fashion. The Director had made plain from the outset that she intended to include the charges the subject matter of the *nolle prosequi* in a new indictment which would contain other charges.

76. I am not greatly impressed by the appellant's contention that he is significantly prejudiced by virtue of having to defend a case involving nine complainants. Two points require to be made in that respect. The first is that the appellant retains the right to apply to the trial judge for severance of the indictment if he believes that he can make a compelling case that he will not be entitled to a fair trial by virtue of having so many complaints joined in the same indictment. The trial judge would be best placed to make an assessment of what would and would not represent a significant unfairness to the appellant in all the circumstances of the case and could be depended upon to make appropriate rulings. The

second point that requires to be made is that, notwithstanding clarifications provided in the recent *Limen* jurisprudence, even if the prosecution had proceeded to try the appellant for the offences involving the complaints made by DC, KM, and DH separately on Bill No. 103/2020, it would nonetheless still have been open to the prosecution to seek to call DG, BB, SD, SB, BP, and TC, or any of them, as witnesses for the prosecution in that case, notwithstanding that complaints involving those persons were not the subject matter of any charge on that indictment.

77. I do not consider that there was anything improper done, much less anything approaching an abuse of the process, by the Director for the Prosecutions in entering the *nolle prosequi* that she did. She was under no obligation to seek the consent of the appellant so as to allow her to avail of s. 4N of the Criminal Procedure Act 1967. While that was an option open to her, it was not one that she was compelled to avail of. In circumstances where she was concerned with taking a considered overview of a great many cases involving this appellant, and where she was conducting several reviews of earlier decisions not to prosecute for offences involving some complainants, she was entitled to adopt the approach she did. I do not accept, therefore, that what was done was done so that the prosecution could gain an unfair advantage. I do not believe that the prosecution gained any unfair advantage or that the appellant has been in any way unfairly disadvantaged.

78. For these reasons, I am not prepared to uphold the appellant's second substantive complaint. I find no error on the part of the High Court judge in how he dealt with it.

The appeal against the award of costs by the court below

79. Counsel for the respondent has correctly made the point that the mere fact that a person has sought, and indeed may be entitled to, a recommendation under the Legal Aid (Custody Issues) Scheme does not automatically mean that an Order for costs may not be made against them. However, and in that regard, I note the approach taken in *A.H. v DPP*

[2021] IEHC 308 wherein the High Court held that it was appropriate in the circumstances of that case that the successful State respondents should bear their own costs.

80. The justification for the rule, now reflected in statute, that, in general, costs should follow the event (subject to a discretion to depart from the general rule where the justice of the case requires it) is equity. The idea that the successful party to proceedings should not have to pay the costs of those proceedings, and that instead they should be borne by the unsuccessful party, has an obvious equitable basis. However, persons entitled to the benefit of a recommendation under the Legal Aid (Custody Issues) Scheme are, by definition, of modest means; and it would offend notions of equal access to justice if they were to be deterred from pursuing stateable, and potentially justified, litigation, out of concerns with being saddled with a bill of costs beyond their ability to pay in the event of being unsuccessful, particularly in circumstances where the respondent is the State, or a State body or entity, with no corresponding financial concerns. While it is appropriate to seek to deter unmeritorious and unjustified litigation by insisting that those who can afford it bear the financial consequences of their actions, it will not always be appropriate to do so in the case of those who cannot afford it, particularly where an asserted claim to vindication of the right to liberty, or the vindication of some other fundamental right or rights is at issue. If the chilling effect of a potential award of costs against a litigant of little or modest means was so strong as to dissuade them from reasonably seeking to access the courts, it could lead to injustice. It is for that reason that it is uncommon, albeit not unheard of, for costs to be awarded against unsuccessful judicial review applicants who are entitled to the benefit of the Legal Aid (Custody Issues) Scheme.

81. Section 169(1) of the Legal Services Regulation Act 2015 provides that a party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the

particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including the matters listed in s. 169(1)(a) to (g). The fact that a wholly unsuccessful applicant has sought, and is *prima facie* entitled to, a recommendation under the Legal Aid (Custody Issues) Scheme will never be determinative, in and of itself, of whether that applicant should or should not have an Order for costs made against them. However, I am of the clear view that it is a factor to be taken into account.

82. I have considered the agreed note of the trial judge's *ex tempore* ruling on costs. The ruling does not articulate a specific reason for awarding costs against the appellant, beyond noting that he is in custody on a different basis from the applicant in *A.H. v. DPP*, and the trial judge's belief that the case was more analogous to that determined by this court in *M.N. v. DPP* [2022] IECA 251. All of that may be true, but the appellant's case was not predicated on an attempt by him to seek any kind of immediate vindication of his right to liberty. There was no attempt to gainsay that, that by virtue of his existing convictions and extant sentences, success in his judicial review application would not result in his release from prison. Rather, his claim was based on a contention that prohibition was required to vindicate his fair trial rights in respect of a pending prosecution, including his entitlement to have been tried with due expedition. The trial judge's ruling does not engage with whether, notwithstanding that the appellant was ultimately unsuccessful, it had been reasonable and defensible for the appellant to have brought the action. The claim was certainly stateable, and in my assessment it was not in any sense frivolous or vexatious or abusive of the process. The reasons provided in respect of the ruling on costs do not suggest that the interests of justice were served by awarding costs against the appellant.

83. In those circumstances, I consider that the High Court judge erred in failing to engage with sufficient rigour with what the justice of the case required, in circumstances where the application for the respondents to be awarded their costs was opposed on grounds, *inter alia*,

that the bringing of the action had been reasonable and defensible, and that to award costs against this appellant, who was of modest means and *prima facie* entitled to a recommendation under the Legal Aid (Custody Issues) Scheme, would be contrary to usual practice, unjust in the circumstances of the case, and potentially could have a chilling effect on others in an analogous position to the applicant and deter them from seeking access to justice.

84. While I do not believe that the Court is in a position in this case to lay down comprehensive principles applicable to applications for costs by wholly successful respondents against applicants who have the benefit of the Legal Aid (Custody Issues) Scheme, I consider that in the present case the High Court judge was not justified in making an Order for costs against the appellant in circumstances. While the respondent was wholly successful, the case brought by the appellant was stateable, albeit ultimately unsuccessful. Important points of principle were raised. The High Court judge does not appear to have adequately considered the nature and circumstances of the judicial review case, and the appellant's conduct of those proceedings, in deciding to award costs against the appellant in circumstances where he was entitled to the benefit of a recommendation under the Legal Aid (Custody Issues) Scheme. This was not vexatious litigation, nor was it a case in which manifestly untenable points had been raised; it was reasonable for the appellant to bring the litigation that he brought.

85. I would therefore allow the appeal insofar as it relates to the costs Order that was made.

Conclusion

86. All of the appellant's grounds of appeal must therefore be dismissed, save for the ground of appeal relating to the costs of the proceedings in the High Court. The appeal is

allowed, therefore, on the sole ground relating to the costs of the proceedings in the High Court.

87. I would invite submissions in relation to what, if any, alternative Order would be appropriate with respect to costs in the High Court, and also as to what would be the appropriate Order as regards the costs of this appeal.

McCarthy J.

I concur with the judgment of Mr. Justice Edwards.

Kennedy J.

I have also had the opportunity of reading the judgment before Mr. Justice Edwards delivered the judgment, and I agree with the analysis, the content, and the conclusions.