

UNAPPROVED



NO REDACTION NEEDED

THE COURT OF APPEAL

[160/20]

Neutral Citation No: [2021] IECA 324

The President

Edwards J.

Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

PATRICK HARTE

APPELLANT

JUDGMENT of the Court delivered on the 25th day of November 2021 by Birmingham

P.

1. The appellant, a retired 79-year old primary school teacher, stood trial in the Dublin Circuit Court charged with twelve counts of indecent assault relating to seven different complainants. On 16th March 2020, the jury returned majority verdicts by 10:2 on eleven counts that were on the indictment. Subsequently, on 10th July 2020, he was sentenced to an effective sentence of three years imprisonment, structured as follows: two years imprisonment on the first count; one year of imprisonment on the second count (to be served consecutive to the sentence imposed on the first count); and a further one year sentence on each of the remaining counts to run concurrently.

2. The appellant has now appealed against both his conviction and sentence, however this judgment deals with the conviction aspect only. The appeal against sentence has been deferred to await delivery of this judgment.

3. The following four grounds of appeal appear in the notice of appeal:

- (i) That the trial judge erred in law and in fact in permitting the joint trial of the accused on thirteen counts relevant to seven complainants and ought to have severed the indictment on such application having been made.
- (ii) That the trial judge ought to have granted a direction of “not guilty” on all counts on account of the exceptional delay herein and the prejudice accruing thereby, for the reasons stated in argument. Without prejudice to the above the learned trial judge also erred in relying on the prosecution argument which rested on the High Court judgment of McDermott J. in a judicial review maintained by the appellant herein as opposed to the facts ascertainable from the evidence adduced by the prosecution in the case before His Honour Judge Nolan.
- (iii) That the trial judge erred in not discharging the jury on the application of counsel when prejudicial material was elicited by counsel for the prosecution in circumstances where caution was demonstrably required.
- (iv) The Court erred in law and in fact in failing to deal adequately or at all with the significant issues and logistical problems resulting from the very recently issued government advice regarding Covid-19 (including the decision to close schools on the first day of the jury’s deliberations) and in failing to make reasonable inquiries of the jury when requested to do so by counsel for the defence.

4. This fourth ground relating to Covid-19 was not the subject of oral argument. In fact, the written submissions on this topic are rather terse and are confined to setting out the following exchange that took place between counsel for the prosecution and the trial judge on 12th March:

“[PROSECUTION COUNSEL]: My junior informs me that there has been an announcement, a public announcement that schools will be closing from this evening and I mentioned --

JUDGE: No, the jury -- if they've done harm to each other at this stage, they've done harm to each other and this trial is continuing.

[PROSECUTION COUNSEL]: Oh yes, Judge, no, I just wondered if they might want to leave early, if maybe we come back at quarter to two, but I'm in the Court's hands, thank you, Judge.

JUDGE: No, we'll continue on, I think I want to --

[PROSECUTION COUNSEL]: Thank you, Judge.

JUDGE: -- for everybody's sake, I think this case should be finished, thank you.”

The comment is confined to a statement that the timing of this trial is significant, as is the 10:2 majority verdict, in light of the unfolding pandemic.

5. It should be noted that while the grounds of appeal suggest that the issue was raised by the defence, the transcript indicates that it was senior counsel for the prosecution who mentioned the development in relation to the announcement as to school closures. Either way, this Court has no doubt that there is no reason to conclude that the trial was rendered unfair or the verdicts unsafe by reason of the timing of the trial or by reason of the occasion on which the verdict was delivered. Insofar as this remains an issue in the case, this Court rejects this ground of appeal.

Background Events

6. The first complainant in the case is “A”. He alleged that when he was approximately nine years of age, he was taught in third class (class 3C) by the appellant. A’s evidence was that the appellant sat the complainant on his lap and stroked his penis over and over again. He alleged that this happened once or twice a week throughout his time in third class.

7. Counts four and five concerned alleged indecent assaults upon “B” at a time when he was about eight or nine years of age. These allegations also related to class 3C. The complainant testified that when he complained of a pain in his stomach, the appellant brought him up to his desk, rubbed his stomach, and then placed his hand on the complainant’s genital area and rubbed him there for a few minutes. B also alleged that there was another occasion when the appellant had put his hand inside the back of the complainant’s trousers and felt his buttocks.

8. The next complainant, “C”, was the subject of count six on the indictment. His evidence concerned an alleged indecent assault which occurred in September 1970, when he was ten years of age and a pupil in class 5C. He alleged that the appellant put his hand down his trousers and fondled his genital area.

9. Counts seven and eight related to “D” who alleged that on two or three occasions between 1st September 1970 and 30th June 1971, when the appellant was beating him in front of class 5C, he put his hand on his genitals outside his trousers.

10. Count nine related to an indecent assault involving “E”, which was alleged to have occurred between 1st September 1968 and 30th June 1969 when the complainant was nine years of age. E stated that he was brought to the appellant’s desk at the front of the class as a consequence of matters such as not paying attention or passing notes to other pupils. He alleged that the appellant put his hand on his buttocks, touched his genitals, and spanked him.

11. Count ten related to an alleged indecent assault on “F” while he was a pupil in class 3C, aged between eight and nine years. He claimed that he was put on the appellant’s knee, and while the other children would have their heads down, the appellant put his hand down the back of his trousers and played with his genitals.

12. Count eleven related to an alleged indecent assault on “G” when he was a pupil in class 3C. His evidence recounted being called to the top of the class, and being introduced to the class and praised by the appellant whilst he had his hands down the complainant’s trousers and was fondling his penis and testicles.

The Severance Application

13. On 2nd March 2020, at the outset of proceedings, senior counsel for the defence addressed the trial judge and explained that the case had been sent over from Judge O’Connor, and that it was a case in which there were some “outstanding matters...not of enormous importance”. He said that the issue surrounding the question of severance was still to be decided, and that counsel for the prosecution was happy to deal with that “speedily”. He said that on the assumption, and that it was only an assumption, that the ruling was adverse to him, the accused would then have to be arraigned and put in charge on the remaining eleven or twelve counts as he had been initially arraigned on only one count. Counsel went on to explain that his client had medical issues and that long court days would not be appropriate in the circumstances.

14. Addressing the question of severance, counsel for the prosecution then provided a summary of the expected evidence, and the trial judge enquired: “[o]n what basis do you say they should be tried together, all of them?” Counsel indicated that there was “evidence of system”. She said that the probative effect of trying them together outweighed any prejudicial

impact, and pointed out “the unlikelihood of a number of seven complainants making up roughly similar allegations”. At that stage, the trial judge again interjected and said:

“JUDGE: So you're saying that basically these seven complaints are un-colluding defendants -- complainants.

[PROSECUTION COUNSEL]: And that will be -- yes, Judge. And there's --

JUDGE: And therefore that has probative effect. You're saying principally there are seven un-colluding defendants -- complainants making roughly similar allegations and therefore a jury should be allowed to consider that and it is probative evidence.”

15. At that stage, counsel for the prosecution indicated that she had a booklet of authorities. The trial judge explained that he felt he knew the law on this issue and that he would hear what counsel for the defence had to say. Counsel on behalf the defence then proceeded to make the following submission:

“Obviously I recognise that the state may be able to say that there are some similarities and obviously the case is quite evolving. But, at the heart of it, Judge, is the following matter[.] Firstly, the Court does have a discretion. It would certainly be acknowledged it may be that the prosecution persuade you that there is some probative force, but, as against that, the Court also has to measure the question of the prejudice that flows from that, and I'm talking about prejudice which isn't just, as it were, probative and the Court understands that. But the next thing is this, is that this is a case which is -- in which most of the allegations are from 68/69 and then there's some from 69/70. So it's a 50-year-old case. And, of course the [c]ourts, the High Court, the Court of Appeal and the Supreme Court have been very astute in the last number of years to say that the appropriate form for the disposal of all of these matters is the [c]ourt of trial and the trial judge. So, I would say this. If this was a case in which the matter was being litigated without a remove of years, then perhaps there would be a lot of force in my friend's argument. But if it is a matter that is so old as

this then I would submit that the Court should have a very -- should look severely on such an application when this issue is going to be litigated in front of a jury at a remove of 50 years, possibly a little more than 50 years, possibly a tiny bit less than 50 years. And, in those circumstances, I'd submit that the balance should favour me, because the [c]ourts from *SH* onwards have said the duty of the trial judge is, and the Court knows all of this, to vindicate the accused's fair-trial rights, and I'd submit that after a lapse of time such as this, the Court ought to lean against the prosecution for this. That's what I say on that.

Also mindful that if one marries therefore the delay aspect to the balancing test, which the Court has to undertake, in my respectful submission, the Court should lean against the prosecution in that and lean to the extent of severing.”

The trial judge ruled on the matter as follows:

“It's questionable whether the higher [c]ourts have been astute in leaving all of these matters to the lower [c]ourts, but they have. The higher [c]ourts have indicated that these type[s] of offences can be tried at the remove of 50 years. Obviously it has been a much-litigated topic, but eventually, for their own very good reasons, the higher [c]ourts, including the Supreme Court, have indicated that they can be tried. Now, the next question is obviously should I sever the indictment to deal with each individual complainant in separate trials. Now, obviously [counsel for the prosecution] has indicated that there's considerable probative -- there could be considerable probative weight in having all seven complainants giving evidence of a similar type, where it could be proved there was no collusion between them. Obviously that's a matter any jury can take into account and, in the right circumstances, could be seen to be compelling evidence. [Counsel for the defence] argues that this would be a double injustice to his client, facing a very delayed trial and also facing this type of evidence.

But it seems to me that in this type of case trying all of these cases individually I think would wreak greater injustice. That basically the juries would be facing each individual trial without knowledge of what occurred or comprehensive knowledge of what occurred. And, therefore, it seems to me that I should order all trials to be heard together on the basis that the evidence of seven un-colluding complainants could be seen by a jury to be highly probative. And obviously this totally outweighs any prejudicial effect on [the accused's] obvious right to a fair trial.”

16. In the course of written and oral submissions, the appellant has been critical of the extent of consideration given to the issue of severance by the trial judge. The complaint is made that the issue was dealt with in a very truncated fashion, and did not receive the in-depth consideration that an issue of such substance deserved. The appellant complains that what is remarkable about the exchange quoted is that it was the trial judge who suggested to the prosecution that the seven complainants were un-colluding, which appeared to be the basis for his ultimate decision to permit joint trials.

17. However, an examination of the exchange from the transcript shows that it is not the case that the trial judge was suggesting, or finding, that the complainants were un-colluding. In fact, what he was doing was indicating that it was the prosecution case that the complainants had not colluded. It is true that the debate on the issue of severance was a brief one, but one cannot ignore the reality that issues about severance or joint trials arise with great frequency, and it is to be expected at this stage that those who are regularly involved in criminal trials, whether as judge or advocates, will have a familiarity with the legal principles at issue and with the relevant case law.

18. Indeed, it must be said that this was a case where the argument in favour of a joint trial was a particularly strong one. Each of the complainants had been taught by the appellant in the same school. The incidents that they were expected to describe had occurred in one of

two classes (class 3C or class 5C), and there was a striking similarity between the accounts that each the complainants were expected to give.

19. In the decision delivered in the case of *DPP v. K(B)* [2000] 2 IR 199, Barron J. summarised the principles that emerged from a review of the authorities in the area of system evidence. The first such principle he identified was that the rules of evidence should not be allowed to offend common sense, and the second principle identified was that “where the probative value of the evidence outweighs its prejudicial effect, it may be admitted”.

20. In this case, there were strong arguments in favour of saying that if separate trials were ordered, such a ruling would offend against common sense. There were also strong arguments in favour of saying that the probative value of the evidence outweighed its prejudicial effect. This was so because of the similarity of the manner in which the offences were committed, and also because of the unlikelihood that the same person would find himself falsely accused by seven different individuals. In that regard, it is of some significance how the seven complainants emerged. It is our understanding that complainant A contacted the Gardaí. In response to the complaint, Gardaí commenced an investigation and sought to identify witnesses. This involved accessing the school roll book, as well as the individual roll books for the classes where the abuse was alleged by A to have occurred. Gardaí proceeded to contact pupils from that class, a number of whom made allegations when contacted.

21. The argument advanced by counsel for the appellant that the trial judge should have balanced the books and acceded to the application for severance in light of the fact that this was a trial taking place at a considerable remove from the events in question is, we believe, without substance. A trial, if it is to be permitted to take place, has to be a trial that is fair for all involved. We are firmly of the view that the justice of the case was met by permitting a joint trial, and so, we have no hesitation in dismissing this ground of appeal.

The Delay Issue

22. On day six of the trial, counsel on behalf of the appellant asked the trial judge to direct a “not guilty” verdict by reason of the delay that had occurred. The argument was advanced that this was essentially “a swearing match”, conducted at a remove of fifty years from the events in issue. The point was made that the only departure from the classic swearing match was that there were multiple complainants and the prosecution was contending that there was evidence of system. In reply, counsel on behalf of the prosecution referred to the fact that the accused had previously canvassed the issue of delay in judicial review proceedings before the Superior Courts.

23. The appellant criticises the trial judge for indicating that he had to have some regard to the decisions made in the higher courts. The trial judge observed that he had heard the witnesses at the trial and that it would be fair to say that it was a “typical type of historical sexual abuse case”. He referred to the fact that there were missing witnesses, but posed the question whether that inhibited and curtailed significantly the accused’s ability to get a fair trial. The trial judge then indicated that he was in agreement with McDermott J., who dealt with the judicial review proceedings in the High Court, that there were still plenty of witnesses available in relation to these matters. Gardaí had approached class members, and the names and addresses of the former pupils were given to the defence, and it was for the defence to take their own course if they wanted to call such witnesses or not.

24. In our view, the arguments for halting the trial were not strong ones. Unlike some historic cases where offences occurred in a domestic setting and where the argument is made that the unavailability of a particular witness is highly significant because such a witness, if available, would have had much to contribute, the alleged activity in this case took place in public, in a crowded classroom. It is noteworthy that none of the complainants claimed to

have witnessed other complainants being abused. If untoward activity occurred, then it was obviously surreptitious. Therefore, the fact that others who taught in the school, the school principal and Department of Education inspectors, may have died, or for other reasons be unavailable, appears of little significance. What is unusual about this case in terms of historical sexual abuse is the fact that large numbers of witnesses were available. Each of the individual acts of abuse alleged is said to have occurred in a classroom when there would have been upwards of fifty pupils present. Not all of these were available, but many potentially were and could have been approached by the defence and called as witnesses. It might be that their evidence would not have gone any further than to say that they never witnessed anything untoward, but even that could potentially have been significant. It was open to the defence to approach potential witnesses with a view to challenging a picture of life in the classroom as presented by the complainants.

25. Overall, we are quite satisfied that this was not a case where there were strong grounds for arguing that the trial should be halted. On the contrary, it seems to us that the trial judge's decision to permit the case to be considered by the jury was entirely understandable, and in our view, was a very proper decision. We reject this ground of appeal.

The Application for a Discharge

26. The background to this issue is as follows. On day seven of the trial, the appellant gave evidence in his own defence, and in the usual way, was cross-examined by counsel for the prosecution. Counsel probed him about the fact that he had not availed of the first opportunity to enter teacher training college. The question of teacher training college arose after counsel had brought the witness through his primary and secondary education. It must be said that the relevance of the cross-examination then or now is not quite apparent. At one point, the trial judge intervened to ask, “[w]ill the relevance become apparent...in time?”, to

which counsel replied, "...maybe I should move on", drawing the riposte from the judge, "I think we should move on".

27. Counsel for the prosecution then asked the witness about sitting the Leaving Certificate and what he did after that, to which the witness responded that he had applied for teacher training, aged eighteen, and was accepted into St. Patrick's, but did not take it up. Counsel established that while the witness was initially accepted for entry into teacher training college in 1960, he did not actually attend until 1965. When asked why that was, the witness explained that during this period, he did substitute teaching and also worked in England for a period. Counsel then asked the direct question, "[c]an I ask you why you didn't take up the call to training to St. Pat's, you applied for it and you got it?" This exchange then followed:

"A. Well -- well, you see at the time there was an issue about the church because the Bishop in Sligo, he had to give a reference and he got it from the Parish priest to give to the college, to give to St Pat's.

Q. And what was the issue?

A. Pardon?

Q. What was the issue about your getting a reference?

A. Well, the thing about -- well, I didn't want to get a reference from the Parish priest.

Q. Why not?

A. Because I didn't, we didn't think it was necessary, it should not be necessary.

Q. When you say "We", who is "We"?

A. My family.

Q. So you got a call to training, at the time it was prized; isn't that right, to get a call to training was a hard thing to get?

A. Yes.

Q. And it meant you would have a job after two years?

A. Well, there was no tradition of teaching in my family.

Q. No, I know that, well apart, leaving aside that, are you telling the jury you gave up that position that call to training, where you said you would have had a grant to do it because you didn't want to get a reference?

A. I don't know did I have a grant, but that's my understanding, I never drew it down.

Q. Who -- but why, why did you not want to get the reference, could you get a reference, would he have given you one?

A. I'm sure he would.

Q. And so you're telling the jury that for five years, you didn't take up this --?"

At this point, the judge intervened to indicate that they would give the witness a long break and take the lunchtime break.

28. After the jury left the courtroom, counsel for the defence observed that he really did not know where the cross-examination was going. The trial judge responded by saying that he usually gave counsel plenty of time and scope. He explained that he had already asked counsel for the prosecution how this was relevant, and that he presumed it was going to become relevant or she would not be pursuing it. The trial judge added that if it was not relevant, he wished that she would stop.

29. At that stage, counsel for the prosecution began to say "Judge, I wonder", at which point, the trial judge intervened to say, "[n]o, no, I don't want to know from you. But I'm very interested in...historically what happened, but I cannot see that it's relevant". At that stage, there was a change of subject and counsel for the prosecution informed the Court of the

announcement that had been made regarding the closure of schools, to which there has already been reference.

30. Following the lunch break, the issue about the line of cross-examination being pursued was raised again by counsel for the defence in the absence of the jury. In that regard, counsel said:

“As it developed, it simply wasn't clear to me what was at issue, was it a minor point of credit, was it some collateral issue, but it certainly did not appear to be an issue that had ever been canvassed in the papers or in the disclosure given to us. Then it finally made landfall when after constant prodding the prosecutor states the point that [the accused] was disinclined to seek a letter of reference or unwilling to get a letter of reference from the parish priest of an area in which he was presumably known. He was either unwilling or unable to get it.”

31. Counsel then distracted himself into addressing the issue in terms of the dropping of the shield. One of the complainants in the case had a large number of recorded criminal convictions and was cross-examined in relation to his criminal record. However, we feel that counsel misjudged the situation by believing that there was any issue about the dropping of the shield. Counsel for the defence said that his colleague had persisted in laying in front of the jury “a highly damaging allegation” that before he eventually got his papers, his client did not have the confidence or the certificate of reference from his local parish priest. By innuendo, counsel explained, this “caused more damage than anything by the front door could have done”. Counsel indicated that he could not say how his client felt, but that the two daughters of his client (who were present in court) shared the opinion of counsel and solicitor that this was “the most damaging thing” that had been done in the case by the prosecution, “far more damaging than any allegation made by any complainant” who had been in the witness box.

32. Responding to the application, counsel for the prosecution explained that prior to the trial, the prosecution was not aware of any matter to do with references. She had been exploring in cross-examination why, for many years, the accused had not started his teacher training. Counsel said that this was perhaps a “tedious [and] clumsy cross-examination[,] perhaps with a view to...enquiring as to whether he actually ever wanted to be a teacher”. She conceded that it appeared to be a line of cross-examination that was irrelevant, and stated that it was unfortunate that it had come out that the accused and his family did not want him to get a reference, but the jury could have no doubt that the accused was somebody with the highest references: he secured a position teaching at the school, and ultimately went on to become the principal. Counsel then referred to some of the authorities on when a jury should and should not be discharged.

33. The judge ruled in these terms:

“Obviously, I was listening to the cross-examination of [prosecution counsel] in relation to [the accused]. I must say my only feeling in relation to the cross-examination was annoyance. I didn't see the relevance of the cross-examination, but nonetheless I didn't see it to be greatly prejudicial either. It seems to me whether somebody obtained a certificate or a reference from a parish priest back in the sixties has little or no relevance to a jury hearing a case in 2020. Obviously if a case was heard probably in 1960, 1970, 1980, the failure of a priest to give any reference may have some import or some impact, but nowadays I think it would have gone completely over the head of most of the jury members.

Now, I wasn't thinking in those terms until I was addressed in relation to the matter by [defence counsel]. I've thought about his principled submission, that the answer to the question that for some particular reason they didn't want to apply for this reference or didn't get it is a prejudicial matter, so prejudicial that no direction or no submission to

the jury can cure it. I don't accept that. I think -- I was listening to the matter and I must say I was more annoyed because I am usually impatient with what I consider irrelevant cross-examination than anything. So I don't see any necessity to discharge the jury. I don't think this defendant has been prejudiced by it. I think the jury were somewhat mystified by what has happening as I was, but nonetheless I cannot see the prejudice and I certainly cannot see the prejudice which would mandate this Court discharging the jury. Because unless I perceived that basically the process was so prejudiced and polluted by the cross-examination that a jury must be discharged, I don't see that at all. I am going to refuse [defence counsel's] application.

But I should warn that basically cross-examination is for a particular reason and I do agree with the suggestion made by [defence counsel] that the issues raised in this case provide a rich source of cross-examination starting off in 1968 or '69. So let's move on to '68 or '69, I will not tell any barrister how to do their job.”

34. The written submissions on this topic conclude as follows:

“In holding as aforesaid, the trial judge implicitly acknowledged that this unnecessary exchange may have had an impact on some of the jury members. That, of itself is prejudicial to the Appellant and is demonstrably so in the case of the 10:2 verdict in the case. In such circumstances, the trial judge did not adequately address the issue or properly rule on the matter. The Appellant contends that the questioning was an apparent endeavour to link him by association with the Christian Brothers and that it demonstrated a sectarian animus and delineation. The prejudice engendered could not be airbrushed and a discharge was appropriate in all of the circumstances.”

35. It must be said that this Court finds the reference to an apparent endeavour to link the then accused by association with the Christian Brothers demonstrating a sectarian *animus* and delineation quite extraordinary. We do note that the sentence begins with “the appellant

contends”, but even allowing for that, we do not believe there was a proper place for it in the submissions.

36. The trial judge indicated that his reaction to the cross-examination was one of “annoyance”, viewing it as irrelevant. Reading the transcript, our sense is one of bemusement, if anything, as it was not at all clear where the cross-examination was going, and what, if any, its relevance was. In response to questions from members of this Court, counsel for the prosecution indicated that what she was seeking to do – she accepted, in a clumsy manner – was to explore whether the appellant wanted to be a teacher and whether he was “cut out” for teaching.

37. Whatever was intended, it seems to us, and we believe we share the view of the trial judge in this regard, that the cross-examination was irrelevant. However, we also share the view of the trial judge that the cross-examination did not and could not have caused any prejudice to the appellant. We see as fanciful in the extreme any suggestion that a Dublin jury, in 2020, would think the worst of, or be prejudiced against, someone because he and his family were reluctant to seek a reference from a parish priest. We note that when the witness was asked whether he could get a reference or whether he would have been given one, he responded that he was sure he would. If there had been any attempt to convey a message that the appellant was someone from whom a reference would be withheld, asking the question whether a reference could have been obtained, which drew the entirely predictable response, would have made absolutely no sense whatsoever. Having read the transcript of the evidence, both direct and in cross-examination of the appellant, we are firmly of the view that the questions asked about his decision not to take up the place that was available to him in St. Patrick’s could not have impacted on the trial. We are quite satisfied that the judge’s ruling on the application for a discharge was a correct one, and we dismiss this ground of appeal.

38. In conclusion, we have not been persuaded to uphold any of the grounds of appeal, and so, the appeal must be dismissed.