Appendix FF

Order 58, rule 15

No. 1

SUPREME COURT

Application for Leave and Notice of Appeal (redacted)

For Office use

Supreme Court record number of this appeal	
Subject matter for indexing	

Leave is sought to appeal from			
X	The Court of Appeal		The High Court

[Title and record number as per the High Court proceedings]

The Director of Public Prosecutions		V	JG
High Court Record Nr	Bill No. CC0105/12	Court of Appeal Record Nr	249/15
Date of filing 16/8/18			
Name(s) of Applicant(s)/Appellant(s)		The Director of Public Prosecutions	
Solicitors for Applicant(s)/Appellant(s)		The Chief Prosecution Solicitor	
Name of Respondent(s)	John Gannon		
Respondent's solicitors	Bambury and Company Solicitors, IPI Centre, Breaffy Road, Castlebar		
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?			
	Yes	X	No
If yes, give [Supreme Court] record number(s)			

Are you applying for an extension of time to apply for leave to appeal?		Yes	X	No
If Yes, please explain why				

1. Decision that it is sought to appeal

Name(s) of Judge(s)	Mahon, Edwards, Hedigan JJ
Date of order/ Judgment	8th June 2018; perfected 31st July 2018

2. Applicant/Appellant Details

Where there are two or more applicants/appellants by or on whose behalf this notice is being filed please provide relevant details for each of the applicants/appellants

Appellant's full name	N/A

Original status

	Plaintiff
	Applicant
X	Prosecutor
	Petitioner

	Defendant
	Respondent
	Notice Party

Solicitor			
Name of firm	The Chief Prosecution Solicitor		
Email	cca.mailbox@dppireland.ie and jane.mckevitt@dppireland.ie		
Address	The Chief Prosecution Solicitor, Office of the Director of Public Prosecutions, Infirmary Road,	Telephone no.	01 8588500 02 8588535
		Document Exchange no.	DX 34
Postcode	Dublin 7	Ref. 2011/8635/CCA01	

How would you prefer us to communicate with you?

	Document Exchange	X	E-mail
	Post		Other (please specify)

Counsel			
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Counsel			
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If the Applicant / Appellant is not legally represented please complete the following

Current postal address	N/A
e-mail address	
Telephone no.	

How would you prefer us to communicate with you?

	Document Exchange	X	E-mail
	Post		Other (please specify)

3. Respondent Details

Where there are two or more respondents affected by this application for leave to appeal, please provide relevant details, where known, for each of those respondents

Respondent's full name	N/A

Original status

	Plaintiff		Defendant	Is this party being served with this Notice of Application for leave?
	Applicant		Respondent	
	Prosecutor		Notice Party	

		Petitioner	X	Accused	Yes		No	

Solicitor	Niamh Bambury		
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		Ref.	[GAN001/0002] [CCA]
Postcode	F23 VI25		

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

X	Document Exchange		E-mail
	Post		Other (please specify)

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		Document Exchange no.	33023 Castlebar
Postcode			

If the Respondent is not legally represented please complete the following

Current postal address	N/A
e-mail address	
Telephone no.	

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

	Document Exchange		E-mail
	Post		Other (please specify)

4. Information about the decision that it is sought to appeal

The Applicant seeks to appeal the decision of the Court of Appeal (Criminal) quashing the convictions of the accused JG and refusing a retrial. The Court of Appeal held that evidence of previous similar offending should have been excluded on the combined basis that it was not sufficiently similar and that the accused had admitted and pleaded guilty to those offences.

On the 8th day of July 2015, following a five-day trial presided over by Mr. Justice Hunt in the Central Criminal Court, the accused was convicted by unanimous jury verdicts of:

- One count of indecent assault contrary to common law;
- 8 counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990;
- One count of anal rape;
- Four counts of oral rape;

alleged to have taken place between 1990 to 1994 when the complainant, PH, was 4 - 8 years old.

In 1995, the complainant's sisters FH (a lifelong cerebral palsy sufferer) and AH reported regular sexual abuse (from approximately aged 6 and 5 respectively) also carried out by the accused between 1990 and 1994. The accused pleaded guilty to the offences alleged in respect of both girls and was sentenced to four years imprisonment. The complainant, PH, did not make a complaint at this time.

In July 2010, approximately fifteen years later and following a failed suicide attempt, the complainant, PH, (then aged 24) reported the sexual abuse perpetrated on him during the same period in which his sisters had been abused. The accused was initially tried in November 2013 in relation to the allegations of the complainant, PH. During the course of this trial the Director of Public Prosecutions sought to call the evidence of the complainant's sisters, FH and AH, on the basis that it amounted to system evidence. The defence challenged the admissibility of this evidence.

The similarities relied upon by the Director were that the three victims were siblings, they were of a similar age, all pre-pubescent, and the abuse was carried out in identical circumstances namely, that they would all stay with the accused, their neighbour, from time to time and would all sleep in the same room. During the night, the accused would lie in bed beside one or other of them, read bedtime stories to them and take the opportunity to touch them, in particular, all three alleged that the accused put his finger into their anus. Each complainant was told not to tell anyone. In the case of this complainant, he alleged more serious offences including anal rape, but his sisters' evidence was confined to the same touching and digital penetration which characterised the initial abuse of this complainant.

The first trial Judge, Mr. Justice Patrick McCarthy, exercised his discretion to admit the evidence of the complainant's sisters on the basis that it amounted to probative and admissible system evidence.

The accused and his legal representatives agreed to have the evidence of the complainant's sisters FH and AH read to the jury pursuant to s21 of the Criminal Justice Act 1984 rather than have the witnesses called to give evidence *viva voce*. The accused and his legal representatives did not object to admission of evidence of the fact that the accused had pleaded guilty to the offences against FH and AH. Counsel for the accused closed the case to the jury on the basis that the accused was guilty of the abuse committed against FH and AH and had pleaded guilty but was not guilty of the abuse alleged by PH and had therefore

pleaded not guilty. That jury could not reach agreement.

The accused was re-tried in July 2015. The accused was represented by a different Senior Counsel. During the course of this trial the Director of Public Prosecutions again applied to call the evidence of the complainant's sisters FH and AH on the basis that it amounted to system evidence. The defence again challenged the admissibility of this evidence. The same similarities were outlined to the Judge.

The trial Judge, Mr. Justice Tony Hunt, exercised his discretion to admit the evidence the of the complainant's sisters on the basis that it amounted to probative and admissible system evidence.

As in the previous trial, the evidence of the complainant's sisters FH and AH was read to the jury pursuant to s21 of the Criminal Justice Act 1984 rather than have the witnesses called to give evidence viva voce. As in the previous trial the jury was told that accused had pleaded guilty to the offences against FH and AH. The accused was unanimously convicted by the jury.

On the 9th of October 2015 the accused was sentenced to 13 years imprisonment with the final 5 years of the sentence suspended for a period of 5 years.

At the appeal the grounds of appeal included the separate arguments that the trial Court had erred in admitting the evidence of FH and AH *and* in admitting the evidence that the accused had pleaded guilty to abusing them. The oral argument addressed dissimilarities between the various accounts.

On the 23rd of February 2018, the Court of Appeal, in quashing the convictions, held:

"in the particular circumstances of this case, evidence of the abuse by the appellant of the complainant’s sisters and his conviction for those offences ought not to have been admitted because of their overwhelming prejudicial effect before the appellant."

In paragraph 17 of its judgment, the Court of Appeal set out its conclusion that the fact that his sisters reported in 1995 meant that the complainant could have revealed the offending then, but did not.

In paragraph 24 of its judgment, the Court of Appeal set out its conclusion that abusers tend to prefer one gender over another.

The judgment, at paragraph 28, concludes that this complainant’s evidence was strong and persuasive. The Court concludes at the end of the same paragraph: *Arguably, this serves to reduce the probative value of the admission into evidence of the account of the earlier prosecution of the appellant.*

The Director of Public Prosecutions, before applying to retry the accused, was invited by Mr. Justice Mahon to make further submissions on the issue of severance in circumstances where the Director contended that she had not sought that evidence of the accused's plea and conviction be admitted but rather it was the evidence of the two sisters that was sought to be admitted. It had been specifically stated in the second trial that the evidence of the pleas or convictions was not necessary for the prosecution case. Further, the Director argued in the application for a retrial, the significant issue of whether or not convictions generally could be admissible in such circumstances had not been sufficiently addressed. The Appellant / Accused argued that the introduction of convictions and pleas were specifically named as grounds of appeal, that the decision on these issues was clear from the judgment and that there was no reason to revisit the Court’s decision in substance for the purpose of the retrial application.

On the 8th day of June 2018, the Court of Appeal refused the application made on behalf of the Director of Public Prosecutions for a re-trial and refused to revisit the substantial issue of

the introduction of evidence of pleas and convictions regarding the system evidence. In the course of its written judgement the Court clarified the issue of system evidence holding that:

"8. The reason for this court's decision to allow the appellant's appeal in relation to his second trial on these offences concerned the introduction into evidence in the course of trial of the fact and detail of the appellant's admitted sexual abuse of the complainant's sisters in the early to mid 1990s. A re-trial of the appellant absent that evidence would, while not necessarily fatally undermining the prosecution case, would nevertheless significantly weaken it. This fact, while it does not in any way exclude the possibility of a fair re-trial of the appellant, is nonetheless a material factor for consideration." The Court refused to Order a re-trial.

It is therefore clear that the Court of Appeal has determined that both trial judges erred in law in exercising their discretion to admit the evidence of FH and AH due not only to an analysis of that evidence but also due to the fact that the jury was told that the accused had pleaded guilty to abusing them. In its last ruling in relation to the question of a retrial, the Court of Appeal did not envisage a trial in which the evidence of the two sisters could be given without evidence that there had been pleas of guilty.

5. Reasons why the Supreme Court should grant leave to appeal

1. This application is made under Article 34.5.3 of the Constitution. It is a matter of general public importance that there be clarity in the law and that the rules of evidence do not offend common sense. In this judgment, there are three different issues which create dangerous precedents in an important area of law; the fair trial of historic sexual offences committed against numerous, child victims. It is imperative that there be clarity as to what is admissible and what is too prejudicial to be admitted; what is relevant and what is irrelevant; what is "normal" in such cases and what is an unfounded assumption. The first issue in this case concerns the doctrine of *stare decisis* as it applies to system evidence with related points about the relevance of certain evidence, the second issue concerns the evidential status of guilty pleas in any criminal case, the last concerns an apparent contradiction of all recent authority relating to the phenomenon of delay, otherwise so well-established that judicial notice is usually taken of this feature in similar cases. Any one of the three issues would render the case an appropriate one for this Honourable Court to consider the matter afresh, the three together make this an important case not only in terms of the justice of the case itself, but its status as a precedent in future cases involving child victims of sexual abuse.
2. All decisions of the superior courts, and in particular the Court of Appeal and the Supreme Court, should be consistent *inter se*. The judgment of the Court of Appeal in the present case is inconsistent with the Court's established jurisprudence in relation to system evidence. The judgment now represents a poor precedent in this area of law, in three separate respects. The first is the primacy of the Trial Judge's discretion in such cases. The decision of the Trial Judge was one within his discretion and there were numerous grounds to support his decision, as is clear not only from the facts of the case set out herein, but from the fact that he was the second Trial Judge to make that same decision. The judgment refers to no other authority to justify the Court's decision and no factor in the case justifies the decision. The Court appears to have been persuaded by two factors, set out in its judgment as conclusions and both dealt with below, neither of which follows from its premise. The law provides that

evidence of other offences alleged against the same accused is admissible if it is sufficiently similar as to rebut the defences of accident or innocent association and because it is inherently unlikely that several persons will make up exactly the same, or very similar, allegations against the same innocent man. To use the language of the authorities in this area, it offends common sense not to admit such evidence generally. Here, the Court excluded such evidence because the man accused had pleaded guilty to the earlier allegations. It is submitted that if the evidence is excluded because it does not comprise allegations but proven offences, accepted as true by the accused, this further offends common sense. It is contrary to public policy and the proper administration of justice for such inconsistent authorities to co-exist and for such a precedent to dictate future cases in this important, complex and frequently arising area of criminal law;

3. The judgment, at paragraph 28, concludes that this complainant's evidence was strong and persuasive. The Court concludes at the end of the same paragraph: *Arguably, this serves to reduce the probative value of the admission into evidence of the account of the earlier prosecution of the appellant.* This, it is submitted, is not correct. The test as to the admissibility of system evidence does not include any assessment of the strength of the complainant's evidence without the support of the system evidence. The system evidence grounding this prosecution was admissible because it was highly probative. As the accused has accepted that it is true, it was even more probative. The strength of the evidence of a complainant cannot affect the admissibility of otherwise relevant and probative evidence. It is important that the test in relation to system evidence be clear and that there is no misleading authority which imports into that test a new factor i.e. the strength of the evidence of the primary complainant. Would this, for example, require that the trial court hear such evidence before ruling on the admissibility of the system evidence? Such a result, it is submitted, would be the effect of this comment in the case, if not corrected by this Honorable Court.

4. The judgment, in dealing with system evidence, also rests in part on a conclusion that is without evidential foundation and that was reached without argument devoted to its premises namely, that abusers of children prefer one gender to another; This conclusion contradicts a decision delivered by the same Court (in *DPP v. D.McG.*) to the effect that the gender of the victim is not an important factor, and that it was important to note that both were children. In cases which involve pre-pubescent children, as many such cases do, there is no foundation for the statement that one or other gender is usually the victim of any given abuser or, in any event, it is submitted, that there is not sufficient foundation for the conclusion such as justifies elevating this observation to the status of a precedent in such cases.

5. Insufficient argument in the Court of Appeal was addressed to the important question as to whether a plea of guilty to previous sexual offending renders that evidence too prejudicial to admit it in a subsequent case. As a matter of logic, the judgment contains an unsatisfactory conclusion, suggesting (as it does) that if pleas of guilty are entered in such cases, this renders the relevant evidence too prejudicial to introduce it in a subsequent case. The conclusion directly contradicts the conclusion in J.C. (No. 1). Here, the Court of Appeal held that a trial in which evidence of six complainants had been heard was a fair one and that the similarities in the evidence were such as to properly allow the evidence of one to support the others. The Court held that an admission by the accused in relation to one complainant was relevant in relation to all and provided *strong support for the correctness of the judge's ruling.* It is also unsatisfactory for a judgment on such a fundamental point of law to be pronounced without any, or any sufficient consideration of the only point distinguishing it from J.C. (No. 1), that is, whether evidence grounding a criminal conviction is capable of

being admitted as evidence of system and, if so, the basis on which it may be admitted. It seems clear that evidence of admissions is not sufficient to render the system evidence inadmissible but that admissions, on the contrary, render the evidence more probative. As a matter of logic, this must apply also to evidence of convictions for offences involving system or similar fact evidence.

6. The judgment rests in part on a conclusion that contradicts established jurisprudence in relation to the delay by children in disclosing sexual offending against them. The Court of Appeal held that the fact that his sisters reported in 1995 meant that the complainant could have revealed the offending at that point, but did not. This is contrary to jurisprudence on delay, including numerous High and Supreme Court decisions, in relation to the disclosure of childhood sexual abuse in cases which concern the prohibition of trials on the grounds of delay. There was no evidence as to the ability of this complainant to reveal the abuse on him at the time his sisters made their complaints. It is also clear that the offending alleged in his case was far more serious. It is well established, in the case law dealing with prohibition, that children often do not report abuse for many years, even in circumstances where they are adults or where an abuser has been identified by others. If this conclusion remains uncorrected, it may form the basis of arguments to withdraw cases against known abusers on the grounds that if aware of other complaints, the complainant could have disclosed sooner.

6. Ground(s) of appeal which will be relied on if leave to appeal is granted

1. The Court of Appeal erred in law in overruling the Learned Trial Judge in respect of the lawful and proper exercise of his discretion to admit the system evidence of the complainant's sisters.
2. The Court of Appeal erred in law in concluding that the robustness of the complainant’s evidence had any relevance to the question of whether or not the evidence of prior offending should be admitted.
3. The Court of Appeal erred in law in concluding, in the absence of any evidence to that effect, that abusers tend to prefer one gender of pre-pubescent child over another;
4. The Court of Appeal erred in law in ruling that evidence of the prior convictions of the accused for sexually abusing the complainant's sisters ought not to have been admitted; further, or in the alternative, the Court erred in basing its decision on a conflation of two types of evidence, system evidence and evidence of convictions / admissions, without hearing sufficient argument on the issue of whether or not the evidence of the admissions and convictions was more probative than prejudicial.
5. The Court of Appeal erred in law in concluding, in the absence of any psychological evidence in relation to the complainant, that the fact that the complainant's sisters had reported their abuse in 1995 meant that the complainant could have, but did not, reveal the offending at that point;
6. The Court of Appeal erred in law in refusing a re-trial.

Name of solicitor or (if counsel retained) counsel or applicant/appellant in person:

Mary Rose Gearty, S.C.

Lorcan Staines, B.L.

7. Other relevant information

Neutral citation of the judgment appealed against *e.g.* Court of Appeal [2015] IECA 1 or High Court [2009] IEHC 608

[2018] IECA 43 [2018] IECA 168

References to Law Report in which any relevant judgment is reported
DPP v. B.K. [2000] 2 I.R. 199
DPP v. B. [1997] 3 I.R. 140
DPP v. O.S. (Unreported, Court of Criminal Appeal, 28th July, 2004)
Martin McCurdy v. DPP [2012] IECCA 76
C.C. v. DPP (No. 2) [2012] IECCA 86
DPP v. J.C. (No. 1) [2015] IECA 343
DPP v. D. McG. ICCA [2017] 98
P.O'C –v- DPP [2000] 3 I.R. 87
H. v DPP [2006] IESC 55

8. Order(s) sought

Set out the precise form of order(s) that will be sought from the Supreme Court if leave is granted and the appeal is successful:

Set aside judgement of the Court of Appeal. The Applicant seeks a retrial in the particular circumstances of the case.

What order are you seeking if successful?

Order being appealed:	set aside	X	vary/substitute		
Original order:	set aside	X	restore		vary/substitute

If a declaration of unconstitutionality is being sought please identify the specific provision(s) of the Act of the Oireachtas which it is claimed is/are repugnant to the Constitution
N/A
If a declaration of incompatibility with the European Convention on Human Rights is being sought please identify the specific statutory provision(s) or rule(s) of law which it is claimed is/are incompatible with the Convention
N/A

Are you asking the Supreme Court to:				
depart from (or distinguish) one of its own decisions?		Yes	X	No

If Yes, please give details below:				
make a reference to the Court of Justice of the European Union?		Yes	X	No
If Yes, please give details below:				

Will you request a priority hearing?	X	Yes		No
If Yes, please give reasons below:				
This is a criminal case relating to offences alleged to have taken place 24-28 years ago. The outcome of the appeal has significant implications for the complainant (who enjoys the rights and protections of the Victims directive). The outcome will also have a significant impact on the accused.				

Signed:_____

Helena Kiely
Chief Prosecution Solicitor
Solicitor for the applicant/appellant

Please submit your completed form to:

The Office of the Registrar of the Supreme Court

The Four Courts

Inns Quay

Dublin

together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal.

This notice is to be served within seven days after it has been lodged on all parties directly affected by the application for leave to appeal or appeal.