

**SUPREME COURT****Respondent's Notice**

Supreme Court record number	127/2018
-----------------------------	----------

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

The Director of Public Prosecution	V	J.G.
------------------------------------	---	------

Date of filing	30 <sup>th</sup> August 2018
Name of respondent	J.G.
Respondent's solicitors	Bambury & Company Solicitors.
Name of appellant	The Director of Public Prosecution
Appellant's solicitors	The Chief Prosecution Solicitor

**1. Respondent Details**

Where there are two or more respondents by or on whose behalf this notice is being filed please also provide relevant details for those respondent(s)

Respondent's full name	J.G.
------------------------	------

The respondent was served with the application for leave to appeal and notice of appeal on date 17 <sup>th</sup> August 2018

The respondent intends :

 to oppose the application for an extension of time to apply for leave to appeal

 not to oppose the application for an extension of time to apply for leave to appeal

 to oppose the application for leave to appeal

 not to oppose the application for leave to appeal

 to ask the Supreme Court to dismiss the appeal

 to ask the Supreme Court to affirm the decision of the Court of Appeal or the High Court on grounds other than those set out in the decision of the Court of Appeal or the High Court

 Other (please specify)

If the details of the respondent's representation are correct and complete on the notice of appeal, tick the following box and leave the remainder of this section blank; otherwise complete the remainder of this section if the details are not included in, or are different from those included in, the notice of appeal.

Details of respondent's representation are correct and complete on notice of appeal:	<input checked="" type="checkbox"/>
--	-------------------------------------



### 3. Information about the decision that it is sought to appeal

1. This appeal relates to the quashing by the Court of Appeal of the Respondent's conviction for a series of alleged historical sexual abuse offences covering the period from the 22<sup>nd</sup> September, 1990 to the 31<sup>st</sup> July, 1994 at various locations in in the County of Mayo where the Respondent is alleged to have sexually assaulted and both orally and anally raped the Complainant, who was born in 1986.
2. No complaint or report was made by the alleged victim to the Gardaí or any other competent authority until the 7<sup>th</sup> July, 2010, some 16 years after the alleged abuse is claimed to have stopped. The Complainant asserted that he was in fear of the Respondent herein and that this was why he failed to make his complaints at an earlier date, even when given the opportunity to do so by the Gardaí investigating the abuse of his sisters in 1994 and subsequently during a discussion with his Primary School principal in 1997 – contrary to what is claimed in section 5(6) of the Appellant's submissions to this Honourable Court.
3. The Respondent had previously pleaded guilty to the sexual assault of A.H and F. H, who were older sisters of the Complainant herein. These offences occurred during the period January 1992 to June 1994 in the case of one of the parties and over June and July 1994 in the second case. The complaints in relation to these two parties were made in July, 1994 and the Respondent was quickly arrested and made full confession as to his wrongdoing. He cooperated fully with investigating Gardaí and was arraigned, pleaded guilty and was sentenced in January, 1995. He had no previous convictions for any offence either prior to or subsequent to the within matters and has no convictions other than in respect of the 2 H sisters. He has also suffered from considerable poor health for the past decade or so and his health continues to deteriorate.
4. It was alleged by the Complainant in this matter that the Respondent abused him prior to abusing his sisters but all such abuse stopped once the sisters made their complaints in July, 1994. The Complainant also alleged that he was sexually assaulted during this period by a D.G, cousin of the Respondent herein. However, D.G is now deceased and no timely complaint was made by the Complainant in relation to D.G and this complaint was only made when the complaints against the Respondent herein were raised in July, 2010. The Complainant was approximately 24 years of age when he first raised the complaints the subject matter of the within proceedings.
5. The matter initially came on for hearing before the Central Criminal Court in November, 2013. The jury in that instance were unable to reach a verdict and were eventually discharged and a fresh trial date was ordered and the matter further came before the Court in July, 2014 but was not reached and did not get on on that occasion. The matter eventually came on for hearing on the 2<sup>nd</sup> July, 2015 where the Respondent was arraigned and pleaded not guilty in relation to each of the fourteen counts and the jury was empanelled. The matter was heard over 5 days on the 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> of July, 2015.
6. During the course of the trial, the Appellant sought to admit evidence in respect of the sexual abuse of the Complainant's sisters. The Appellant now contends that it sought to admit the 2 sisters' statements *simpliciter* solely on the basis of supporting and demonstrating a "system" under the principle of similar fact evidence and that evidence of the admission, the guilty plea, conviction and sentence of the Respondent herein in respect of the allegations of the two

Complainant's sisters were not sought to be introduced by it. However, the Appellant, during the course of the trial process, served additional evidence by way of Notice of Additional Evidence dated 17th October 2010 containing:

- (i) the evidence of the Complainant's sisters by way of their Statements of Complaint to An Garda Siochana;
- (ii) the Garda Memo's of Interview with the Appellant wherein he made his admissions; and
- (iii) the Order of the Circuit Criminal Court in that matter recording the plea of guilty, conviction and sentence of the Appellant for the offences in respect of the two sisters.

7. Thus, it is quite clear from the Notice of Additional Evidence, as well as the transcript of the *voir dire* in the trial of this matter in July 2015, that both the learned Trial Judge and Counsel for the DPP and the Defence all accepted and understood that the DPP/Appellant intended and wished to admit evidence not simply of the statements of the 2 sisters *simpliciter*, but also evidence of the admissions, guilty plea, convictions and sentence of the Respondent herein for the offences in relation to the two sisters.
8. The Defence argued that the evidence sought to be admitted was more "misconduct" than "similar fact" evidence and that there were a large number of dis-similarities in the circumstances of the sisters versus the Complainant such as to take the evidence outside the realm of "similar fact" and that, in any event, the prejudicial effect of admitting such evidence far outweighed any probative value which same might have. It was also highlighted that the offending alleged by the Complainant pre-dated the offending committed by the Respondent against the Complainant's 2 sisters by approximately 1 ½ years and that this counted strongly against the system/similar fact evidence argument.
9. The Learned Trial Judge acceded to the Appellant's application and permitted the evidence of the 2 sisters in the form of their statements as well as evidence of the admissions, guilty plea, convictions and sentence of the Respondent herein for the offences in relation to the two sisters to go to the jury.
10. Following on from this trial, the jury unanimously convicted the Respondent on the 8<sup>th</sup> July, 2015 and the matter was adjourned for sentencing to the 27<sup>th</sup> July, 2015. The Respondent was taken into custody on that occasion and remanded for finalisation of sentence to the 9<sup>th</sup> October, 2015, wherein he was sentenced to a term of thirteen years imprisonment, with the final five years suspended for a period of 5 years. The Respondent was only released from custody upon the judgment of the Court of Appeal quashing his conviction being delivered on 23<sup>rd</sup> day of February 2018. This saw the Respondent being incarcerated for a period of approximately 31 months which, allowing for and applying the principle of a one-quarter remission, meant that the Respondent has already served an effective sentence of over 41 months (or almost 3½ years) in respect of this matter.

#### 4. Respondent's reasons for opposing leave to appeal

##### **PRELIMINARY OBJECTION:**

The Respondent contends and submits to this Honourable Court that:-

1. The right of the Appellant to appeal the decision of the Court of Appeal is regulated by law and provided for by section 23 of the Criminal Procedure Act 2010 [as amended].
2. The jurisdiction of the Supreme Court to consider any such appeal has also been regulated by the Oireachtas in pursuance of Article 34.5.3 by section 23 Criminal Procedure Act, 2010 as amended by section 71 of the Court of Appeal Act, 2014.
3. The right of the Appellant to appeal and/or to apply to the Supreme Court is regulated by section 23 of the Criminal Procedure Act, 2010 [as amended by the Court of Appeal Act, 2014] which consists of the prescription by the Oireachtas of the full extent of the basis of an appeal to the Supreme Court.
4. No valid appeal and/or application has been made to this Honourable Court in respect of the decision of the Court of Appeal herein.
5. In such circumstances, the Respondent respectfully submits that this Honourable Court should dismiss the application of the Appellant *in limine* or alternatively and in the circumstances the Respondent requests this Honourable Court to determine this matter as a preliminary issue prior to the hearing of the application herein.

##### **Without prejudice to anything hereinbefore contained:**

*It is respectfully submitted that leave to appeal to this Honourable Court is not necessary, desirable or required in the instant matter on the basis that:-*

- \* the decision in respect of which leave to appeal is sought does not involve a matter of general public importance
  - \* it is not, in the interests of justice, necessary that there be an appeal to the Supreme Court
1. The Appellant now seeks that this Honourable Court would revisit and reconsider the judgment of the Court below as regards the issue of the admissibility of the previous wrongdoing by the Respondent in respect of the two sisters of the Complainant herein on the purported basis that the judgment was based on a factually flawed premise and that the judgment of the Court of Appeal in this matter is incorrect in law and sets a dangerous and wrong precedent for similar cases going forward. Further, the Appellant also seeks that this Honourable Court would direct a retrial on this matter.
  2. A central plank of the argument on behalf of the Appellant in this matter is that the Court below's decision was based on a factually flawed premise, namely that it was at the Respondent's behest that the Trial Court introduced evidence of the Respondent's admissions and convictions in respect of the sexual abuse of the Complainants sisters herein. The Appellant further contends that Counsel for the Appellant sought to admit the statements *simpliciter* solely on the basis of supporting and demonstrating a "system" under the principle of similar fact evidence. The admission of the confession/plea/conviction aspect rather than the simple inclusion of the complaints in respect of the two sisters is what the Appellant contends was solely sought during the trial and the alleged conflation of the two issues are what gives rise to the within appeal.
  3. However, it is respectfully submitted that the inclusion in the Book of Evidence of the

aforesaid statement of the two Complainant's sisters as well as the statements and interviews of the investigating Gardaí and the Order of the Court in respect of the matter pertaining to the two sisters makes it quite clear that the Appellant was seeking to admit and was intending to rely upon, not only the basic fabric of the complaints of the two sisters in that matter but also the fact that the Respondent herein admitted his wrongdoing in that case, entered a plea of guilty in respect of the charges arising therefrom, was convicted of the offences complained of by the two sisters and was sentenced accordingly.

4. It is respectfully contended that there are neither exceptional circumstances nor strong reasons for this Honourable Court to review the judgment of the Court below. The Respondent disputes the Appellant's contention that the Court of Appeal assessed and gave judgment in this matter while proceeding on a false, flawed or incorrect premise – the judgment of the Court below makes clear that it had the full factual matrix available and properly known to it and the judgment reflects this fact.
5. While it is fully accepted that this Honourable Court enjoys the power and discretion to review the decision of the Court of Appeal and to grant leave to appeal and to direct a retrial if it deems same appropriate, it is respectfully submitted that such would not be an appropriate or proper Order to make in the instant matter and the Respondent contends that the particular history and factual matrix of the index case renders an Appeal and possible retrial undesirable in the circumstances and that accordingly the Court should decline to exercise this right to grant leave to appeal in this matter. In particular, The Respondent refutes the submission of the Appellant that the judgment of the Court below, if left undisturbed, would set a dangerous precedent. This is simply not the case as the peculiar and particular factual background to this matter was a significant influence and determining factor in the Court of Appeal reaching the decision that it did. Indeed, the Court was at pains to state that its judgment in this matter was unique to the particular facts of the case before it and were not of general or universal applicability. This clear enunciation by the Court below limits the “applicability” of the within judgment to the case itself and results in same being distinguishable in all other cases. This factor obviates many of the concerns and neutralizes the main grounds upon which the Appellant seeks leave to appeal in this matter.
6. The decision of the Court below turned on the particular facts of the index case. Thus, the uniqueness and restrictive nature of the judgment of the Court of Appeal in this matter effectively eliminates the possibility that the within decision might be cited as a precedent for any situation or circumstances which does not fall four-square within the factual matrix of the within matter – a scenario that is highly improbable to repeat itself. This further serves to render much, if not all, of the “public importance” arguments in this matter as moot.
7. Thus, while it may be preferable that superior court judgments be consistent *inter se*, it is simply not required that they be identical or follow a particular template, as the factual matrix of any particular case will determine its outcome when viewed through the relevant and appropriate jurisprudential lens. Thus, the correct application by the Court of Appeal of the appropriate law to the particular factual circumstances of the index matter is what has resulted in the within judgment being given and same does not in any way offend the principles of stare decisis or a trial judge's discretion, nor does same set a dangerous, or indeed any, precedent in the wider scheme of the admissibility of similar fact/system/misconduct evidence jurisprudence. The within case turned on its particular facts.
8. Furthermore, it is respectfully submitted to this Honourable Court that it is not, in the

interests of justice, necessary that there be an appeal in this matter on the basis of the history of same as briefly set out hereinbefore, to wit, the very difficult history of this case, the significant delay on the part of the Complainant in making the within complaints, the longevity of the case in terms of the Garda investigation and Court process and procedure, the period of time which has elapsed since the offences are alleged to have occurred, the difficult personal circumstances, including very poor health, of the Respondent, the very substantial period of time which the Respondent has already served in custody in respect of this matter and the vintage of the allegations all dictate that the balance of justice in this matter falls against granting leave to appeal and it is respectfully requested that this Honourable Court not accede to any such application in this matter.

#### **5. Respondent's reasons for opposing appeal if leave to appeal is granted**

The Respondent repeats his preliminary objection as set out at section 4 herein. He further contends and submits to this Honourable Court as follows:-

1. The Court of Appeal were correct, both in law and in fact, in overruling the decision of the Learned Trial Judge in respect of the exercise of his discretion to both deem and to admit the evidence pertaining to the Complainant's sisters as being or as capable of being similar fact/system evidence.
2. The Court of Appeal were correct, both in law and in fact and were entitled to consider the entirety of the case, including the Complainant's evidence, in determining whether the evidence pertaining to the Complainant's sisters ought to be admitted and were furthermore entitled to give whatever weight and consideration they deemed appropriate to the facts and evidence when considering the question of admissibility.
3. The Court of Appeal were correct, both in law and in fact and were entitled to consider and to take judicial notice of their own experiences of such cases and the evidence and principles which they derived from their considerable experience of such cases and to utilise same in their consideration of and deliberations in this index matter, including the manner, preferences and modus operandi of abusers in such cases.
4. The Court of Appeal were correct, both in law and in fact and were entitled to consider whether the evidence pertaining to the Complainant's sisters, including the Respondent's previous convictions in that regard, ought to be admitted and were within their rights to determine that same should not have been admitted. Further and/or in the alternative, the Court properly and adequately considered all such issues pertaining to the decision of the Learned Trial Judge to admit such evidence, his rationale for so determining, and that he erred in so determining and the Court of Appeal further had all such information as to the arguments and issues arising in that regard opened to it and considered by it and no such conflation of issues as alleged arose in this matter. The Court of Appeal was fully and properly informed, aware and advised when it made its determination herein.
5. The Court of Appeal were correct, both in law and in fact and were entitled to consider and to take judicial notice of their own experiences of such cases and the evidence and principles which they derived from their considerable experience of such cases and to utilise same in their consideration of and deliberations in this index matter, including any issues as regards the failure of Complainants to make their allegations in a timely and/or appropriate manner in such cases and the possible reasons for such failures or omissions.
6. The Court of Appeal were correct, both in law and in fact, in determining not to direct a re-trial in the instant matter, having regard to all the various factors and issues at play.

Name of counsel or solicitor who settled the grounds of opposition (if the respondent is legally represented), or name of respondent in person:

DIARMAID MCGUINNESS S.C.

BRENDAN MCDONAGH B.L.

## 6. Additional grounds on which decision should be affirmed

The Respondent repeats his preliminary objection as set out at section 4 herein. He further contends and submits to this Honourable Court as follows:-

*Set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court:*

1. The particular and unusual factual matrix of the index matter entirely justifies the Court's decision to overrule the Learned Trial Judge in respect of the admission of the purported similar fact/system evidence.
2. The dis-similarities in respect of the alleged offending behaviour towards the Complainant and the accepted misbehaviour towards the 2 sisters, including *inter alia* the differences in methodology, timing, gender, location and time-period, takes the purported system evidence outside the parameters of that category.
3. In the particular and peculiar circumstances of the instant case, the delay on the part of the Complainant in reporting the within matter goes to credibility on his part and creates issues of prejudice and hardship for the Respondent/Accused.
4. The directing of a re-trial in this matter would be to impose a particular hardship on the Respondent/Accused in circumstances where he has been living under the cloud of the within allegations since same were initially raised by the Complainant in or around the 7<sup>th</sup> July 2010 (over 8 years ago and over 16 years after the alleged abuse was claimed to have stopped). The Respondent has already paid a very high price and suffered a very serious and significant detriment as set out hereinbefore since this matter initially was raised some 8 years ago. He should not have to endure any further difficulties in this regard.
5. The directing of a re-trial in this matter would also be to impose an additional particular hardship on the Respondent/Accused in circumstances where his health is in serious decline and his well-being is such that his medical fitness to be tried is uncertain.
6. The particular and peculiar circumstances of the instant case and judgment are such that no precedent will be set by the decision of the Court of Appeal and no issue of public policy or question of public importance arises in the circumstances.

**Are you asking the Supreme Court to:**

depart from (or distinguish) one of its own decisions?

Yes

No

If Yes, please give details below:

make a reference to the Court of Justice of the European Union?

Yes

No

If Yes, please give details below:

Will you request a priority hearing?

Yes

No

If Yes, please give reasons below:

Signed:

\_\_\_\_\_  
Niamh Bambury  
(Solicitor for) the respondent  
Bambury & Company Solicitors  
IPI Centre, Breaffy Road,  
Castlebar, Co. Mayo.

**Please submit your completed form to:**

The Office of the Registrar to the Supreme Court  
The Four Courts  
Inns Quay  
Dublin

This notice is to be lodged and served on the appellant and each other respondent within 14 days after service of the notice of appeal.