

IRELAND / JUDGMENT

D. -v- DPP [2008] IESC 47 (23 July 2008)

[2008] IESC 47

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[2008] IESC 47 Supreme Court Record Number: 279 & 280/05 High Court Record Number : 2002 184 JR Date of Delivery: 23 July 2008 Court: Supreme Court Composition of Court: Fennelly J., Macken J., Finnegan J. Judgment by: Finnegan J. Status of Judgment: Approved
Judgments by Result Concurring Finnegan J. Appeal dismissed - affirm High Court Order Fennelly J., Macken J. Outcome: Dismiss Notes on Memo: Dismiss appeal. Allow part Cross-Appeal. THE SUPREME COURT JUDICIAL REVIEW Record Nos. 279 & 280/05 Fennelly J. Macken J. Finnegan J. BETWEEN: D. D. APPLICANT/APELLANT and THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT/RESPONDENT Judgment of Mr Justice Finnegan delivered on the 23rd day of July 2008 The appellant was charged with 34 counts as follows:- 18 counts of indecent assault contrary to section 62 of the Offences against the Person Act 1861 11 counts of sexual assault contrary to the Criminal Law (Amendment) Act 1990 5 counts of assault contrary to section 47 of the Offences against the Person Act 1861. The offences were alleged to have been committed against ten separate complainants. By order of the High Court dated the 10th June 2005 the respondent was restrained from taking any further steps in or further proceeding with the prosecution of the appellant in respect of eleven offences in respect of six complainants and an order restraining the respondent from taking any further steps in or further proceeding with the prosecution of the appellant was refused in respect of the remaining 23 offences alleged to have been committed against four complainants. The appellant appeals the said order insofar as prohibition was refused and the respondent cross appeals insofar as prohibition was granted. At the commencement of the hearing of this appeal the respondent gave an undertaking that a number of counts would not now be prosecuted. As a result of the undertaking this court is concerned with eleven counts involving six complainants as follows:- On the appeal Count 9 that the appellant did on a date unknown between 1-3-1975 and 31-7-1995 indecently assault one K. S. a male contrary to section 62 of the Offences against the Person Act 1861 Count 10 that the appellant did on a date unknown between 1-3-1975 and 31-7-1975 other than on occasion

the subject matter of count 9 indecently assault one K. S. a male contrary to section 62 of the Offences against the Person Act 1861. Count 12 that the appellant did on a date unknown between 23rd August 1975 and 22nd August 1976 indecently assault one J. C. a male contrary to section 62 of the Offences against the Person Act 1861. Count 13 that the appellant did on a date unknown between 1-3-1975 and 31-7-1975 other than on occasion the subject matter of count 12 indecently assault one J. C. a male contrary to section 62 of the Offences against the Person Act 1861. Count 16 that the appellant did on a date unknown between 1-1-1978 and 31-12-1979 other than on occasion the subject matter of count 15 indecently assault one P. H. a male contrary to section 17 of the Offences against the Person Act 1861. Count 17 that the appellant did on a date unknown between 1st September 1977 and 31st December 1979 unlawfully assault one P. H. thereby occasioning him actual bodily harm contrary to section 47 Offences Against the Person Act 1861. On the Cross Appeal Count 3 that the appellant did on a date unknown between 1-3-1971 and 30-11-1976 indecently assault one J. D. a male contrary to section 62 of the Offences against the Person Act 1861. Count 4 that the appellant did on a date unknown between 1-3-1971 and 30-11-1976 other than on occasion the subject matter of count 3 indecently assault one J. D. a male contrary to section 62 of the Offences against the Person Act 1861. Count 5 that the appellant did on a date unknown between 1-1-1973 and 31-12-1979 indecently assault one G. T. a male contrary to section 62 of the Offences against the Person Act 1861. Count 18 that the appellant did on a date unknown between 1-1-1978 and 31-12-1984 indecently assault one J. B. a male contrary to section 62 of the Offences against the Person Act 1861. Count 19 that the appellant did on a date unknown between 1-1-1978 and 31-12-1984 other than occasion the subject matter of count 18, indecently assault one J. B. a male contrary to section 62 of the Offences against the Person Act 1861. The Appeal and the Cross Appeal The same issues arise on both the appeal and the cross appeal namely:-

1. Complainant delay.
2. Prosecutorial delay.
3. Prejudice.
4. Lack of specificity as to time. The appellant submits that on the proper application of the law relevant to each of these issues the further prosecution of the remaining counts against him should be restrained. The respondent on the like basis submits that the remaining counts which he wishes to prosecute should not be restrained. Preliminary Issues. In the High Court the appellant relied on four affidavits sworn by his solicitor. He did not himself swear an affidavit. In many instances the averments by the deponent clearly constitute hearsay being in effect a recitation of instructions given to him by the appellant. Order 40, Rule 4 of the Rules of the Superior Courts provides as follows:- "4. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions, on which statements as to his belief, with the grounds thereof may be admitted." Accordingly on an application for judicial

review affidavits should be confined to such facts as the deponent is able of his own knowledge to prove. The respondent objected to the admission of hearsay on the appeal. However the affidavits were received in the High Court and this was not the subject matter of a ground in the notice of cross appeal and on this basis the court declined to hear argument on this issue. The respondent also sought on the appeal to argue that the delay on the part of the appellant in making the application for leave disentitled him to relief: again this ground was not raised in the notice of cross appeal and the court declined to hear argument in relation to the same. Complainant Delay The judgment and order of the High Court predates the decision of this court in *S. H. v Director of Public Prosecutions*

[2006] 3 IR 575 . Counsel for the appellant quite properly conceded that the appeal on the ground of complainant delay could not succeed. Nonetheless complainant delay, it is submitted, is not irrelevant and it was proposed to rely on the delay in what was termed “the omnibus argument” and with which I will deal hereafter. The appellant was born in March 1930 and is now 78 years of age. He has been a member of the Order of Christian Brothers since 1946. At the dates upon which it is alleged he committed the offences with which he is charged he was the director of an industrial school: each of the complainants at the time of the alleged offences was a resident at the industrial school. The date of the offences alleged against each of the six complainants with which the appeal is concerned and the order of the High Court made in respect of each such complainant can be set out in tabular form:

Complainant	Date of the Order of the alleged offences	High Court
K. S.	Between 1st March 1975 and 31st July 1975 (2 counts)	Prohibition refused
J. C.	Between 23rd August 1975 and 22nd August 1976 (2 counts)	Prohibition refused
P. H.	Between 1st January 1978 and 31st December 1979 (2 counts)	Prohibition refused
J. D.	Between 1st March 1971 and 30th November 1976 (2 counts)	Prohibition granted
G. T.	Between 1st January 1973 and 31st December 1979 (1 count)	Prohibition granted
J. B.	Between 1st January 1978 and 31st December 1984 (2 counts)	Prohibition granted

Towards the end of 1994 the appellant became aware that serious allegations were being made against him. The first complaint made, that of K. S., was made on the 2nd November 1994. The latest complaint was made in mid-1997. The appellant was charged with the offences alleged to have been committed against G. C. on the 3rd February 1999: he was charged in relation to the other complainants on the 31st October 1997. Prosecutorial Delay On the appeal this ground was restricted to a complaint that the appellant’s trial was adjourned from time to time over a period of one year and nine months on the application of the respondent to enable three applications for judicial review relating to Christian Brothers in the same industrial school to be concluded. Both in the High Court and this court the respondent objected that there was no complaint of prosecutorial delay disclosed in the grounding affidavits and this is indeed correct. However as the learned trial judge did consider submissions in relation to prosecutorial delay this court determined that it should do likewise. At the time of the investigation of the complaints leading to the charges against the appellant there was a wide ranging investigation into alleged physical and sexual abuse at the industrial school. I am satisfied that in these circumstances it was reasonable

to seek to adjourn the appellant's trial pending resolution of judicial review applications taken by other Christian Brothers against whom complaints were made. The appellant has not satisfied me that the period of one year and nine months delay upon which he relies amounts to culpable prosecutorial delay. I would dismiss the appeal on this ground. Actual Prejudice On behalf of the appellant it was submitted that his defence has been prejudiced by reason of the delay in the institution of the criminal proceedings as follows:-

1. The appellant's recollection of events is no longer clear and had the complaints been made earlier he might have been able to collate or call evidence to refute the allegations made against him.
2. Several potential witnesses are now deceased. Had complaints been made immediately after the alleged incidents these witnesses might have been available to corroborate the appellant's account of the events.
3. The night watchman R. D. died on the 16th March 1996. K. S. alleges that following a complaint from R. D. he was sent to the appellant for punishment and an alleged offence took place. P. H. alleges that he was abused at night by the appellant and that he then went out of the room and broke a window in the corridor. P. D. might have remembered making a complaint about K. S. Further it is reasonable that the broken window would have been recorded in P. D.'s records: his records were burned or lost in 1995.
4. E. M. was the tailor attached to the industrial school until shortly before his death in the early 1980s. K. S. alleges that an offence was committed one Saturday when he was taken by the appellant to the tailor's room. As it was a Saturday the tailor was not there. J. D. alleges that the appellant used to fondle him in the tailor's room while measuring him for clothes three or four times a year. E. M. could have given evidence as to whether or not the brothers had access to the tailor's room.
5. A. G. who worked in the kitchens died in the late 1970s. Evidence which she might have been in a position to give is relevant to an offence against K. S. which is not now being prosecuted.
6. Several parts of the old buildings of the industrial school have been demolished. P. H. alleges that an offence was committed against him by the appellant in Rope Hall which has since been demolished. J. B. alleges that the appellant committed an offence against him in the sweet shop which has since been demolished. The relevant test is whether the delay or events happening during the period of delay has caused irreparable prejudice to his ability to defend himself so that there is a real and serious risk of an unfair trial. In *McFarlane v Director of Public Prosecutions*

[2006] IESC 11 at p.11 Hardiman J. said:- "In order to demonstrate that risk there is obviously a need for an applicant to engage in a specific way with the evidence actually available so as to make the risk apparent. A failure to do this was the basis of the failure of the applicant in *Scully* [2005] . This is not a burdensome onus of proof: what is in question, after all is

the demonstration of a real risk, as opposed to an established certainty, or even probability of an unfair trial. The applicant has not so much failed to meet the requisite standard of proof as failed to address the issue in any meaningful way. To say this is not to criticise the applicant's advisors: it may be that the point has been put as far as it can be." In relation to the evidence which each of the missing witnesses R. D., E. M. and A. G. might have been in a position to give the appellant has not gone as far as he can go. The nature of the offences in issue here is that they occur in private and in secret. Any evidence which the deceased witnesses could have given would at best have been peripheral. In *B. J. v Director of Public Prosecutions*, unreported, Supreme Court, 1st May 2007, Denham J. said:- "A person engaging in illicit sex with a young person will do it in private. Thus at the core of such cases are issues as to credibility of a complainant and an accused. The court is alert to the difficulties of old cases, where prosecutions occur after many years. However the issues relating to those dangers are best met by the rulings and directions of a trial judge who has the opportunity to see and hear the evidence and who will guard against an unfair trial." The applicant has not engaged with the circumstances of the case in that he has not indicated whether any of the evidence which the three deceased witnesses would give is available from some other source. In a case such as the present where the community of the Christian Brothers was presumably numerous and the residents of the industrial school ever more numerous, the appellant ought at least to have recounted his efforts to obtain such evidence as he might wish to adduce from other sources. With regard to the buildings which have been demolished the applicant submits that it is no longer possible to ascertain whether the layout of these buildings would have permitted of the types of abuse alleged. The applicant himself can describe the layout of the buildings. No evidence is before the court as to attempts to obtain other witnesses who could give that evidence. Again the applicant has failed to engage with the evidence actually available to make any risk apparent. I would dismiss the appeal on this ground.

Lack of Specificity as to Time A feature common to the three complainants in respect of whose complaints prohibition was granted is a lack of specificity in relation to the dates at which the offences are alleged to have been committed. In the case of J. D. two counts are alleged to have been committed between the 1st March 1971 and the 30th November 1976, in the case of G. T. one offence between the 1st January 1973 and the 31st December 1979 and in the case of J. B. two offences between the 1st January 1978 and the 31st December 1984. The periods span five years and eight months, seven years and seven years respectively. In respect of the three complainants in respect of whom prohibition was refused the period in respect of K. S. is five months, in respect of J. C. twelve months and in respect of P. H. in respect of the charge of indecent assault, two years and in respect of the charge of assault contrary to section 47 of the Offences Against the Person Act 1861 three years. The Criminal Justice (Administration) Act 1924, section 4 provides as follows:-

- (1) Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.
- (4) After the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary: provided that where any rule of law or any statute limits the particulars of an offence which are required to be given in an indictment, nothing in this rule shall require any more particulars to be given than those so required.
- (5) The forms set out in the appendix to these rules or forms conforming thereto as nearly as may be shall be used in cases to which they are applicable, and in other cases forms to the like effect or conforming thereto as nearly as may be shall be used, the statement of the offence and the particulars of offence being varied according to the circumstances in each case. The rules appended to the Act give forms of indictment for offences. In each case the particulars of offence provide for the furnishing of the date on which the offence was committed. However it may not be possible to specify a date and it is permissible to specify two dates between which the offence was committed. An offence of embezzlement over a protracted period is an example of where a specific date cannot be assigned to the offence and it is appropriate in the particulars to state that the offence was committed between two dates. In *Director of Public Prosecutions v F.*, unreported, Supreme Court, 24th February 1994 on a Case Stated the Supreme Court considered inter alia the following question:- “Whether the circumstances in which the counts relate to an offence on a date or dates unknown in a particular year is such as to deprive the accused of a fair trial in due course of law.” The accused was charged with nine counts of indecent assault each stated to have been committed between the 1st January in a particular year and the 1st January in the year following. The question was considered in conjunction with a further question relating to delay between the date of complaint and the preferment of charges and the judgment does not appear to have addressed this specific question. However in dealing with a question on duplicity the court considered that the manner in which the charges were framed had a large element of unreality. One complainant claimed that the offences occurred roughly every day or every second day and the other that the offences occurred twice a week. In these circumstances the court thought it preferable that the indictment should conform with the allegations which had been made and an approach to realism could be achieved by increasing the number of counts so that each count referred to a period of one month rather than a year. These observations refer to the particular circumstances of that case. In *O’R v Director of Public Prosecutions*

[1997] 2 IR 273 the applicant was charged with ninety offences involving unlawful carnal knowledge, indecent assault and sexual assault on ten complainants between the 1st January 1976 and the 31st December 1992. Charges 1 to 68 and 81 to 90 inclusive were alleged to have been committed between the years 1976 and 1984 and the remaining

charges to have been committed between 1991 and 1992. In respect of the complainant C. B. there were twelve charges alleged to have been committed between 1st January 1976 and 31st December 1978 and sixteen between the 1st January 1976 and the 31st December 1979. In the case of the complainant D. M. there were twenty four charges alleged to have been committed between the 1st January 1978 and 31st December 1983. The applicant contended that he was prejudiced by reason of the lack of specificity in regard to the dates of the offences charged against him and relied upon the judgment of the Supreme Court in *D. P. P. v F*. The learned trial judge dealt with this issue as follows:- “Finally, I must express my views on the complaint which was made concerning lack of specificity in the charges. I have already quoted from the judgment of Egan J. in *Director of Public Prosecutions v F*. In my view, the way in which the charges here have been formulated accords precisely with what the Supreme Court indicated ought to be done in that case. I found no basis upon which an order of prohibition could be issued under this heading of complaint.” From the judgment I divine that in the case of each of the complainants there were a number of separate charges in respect of each calendar year, 1st January 1976 to 31st December 1978 and in the case of the complainant D. M. four charges in respect of each calendar year between the 1st January 1978 and 31st December 1983 and in that the circumstances differed from the present case. In *J. O’C v the Director of Public Prosecutions*

[2000] 3 I. R. 478 the applicant was charged with sixteen counts of indecent assault over a period of time between the 20th October 1974 and 19th October 1978, the complainant being a girl then aged between ten and thirteen years of age. The complainant’s statement was to the effect that the applicant started to molest her when she was nine to ten years of age and that this continued until she was fourteen or fifteen years of age. In total she was sexually assaulted between 1974 and 1979 or 1980 some forty or fifty times. Again while it is not clear from the judgment I think it likely that the applicant was charged with a number of offences in each of the years from 20th October 1974 to 19th October 1978. Keane C. J. dealt with specificity in the following terms:- “While it was said during the course of argument that the allegations were not of a specific nature, I find it difficult to understand the basis for the suggestion. I have set out in full at an earlier part of this judgment the statement of C. O’S contained in the book of documents. It is undoubtedly the case that she does not specify the dates and times at which the alleged abuse occurred. Even if this complaint had been brought within a period where the complaint as to the delay would have been so insecurely based as to be almost unarguable – say within a period of three or four years from the date of the alleged abuse – it would have been surprising if she had been able to specify the dates and times in that manner. In a case of this nature, where the complaint is of a repeated pattern of sexual abuse stretching over a relatively lengthy period, such lack of detail is almost inevitable and it does not appear to me that the statement in this case is any more defective in this respect than the statements in other cases in which this court has been satisfied that the inference of the necessary degree of prejudice could not be drawn.” Hardiman J. in that case dealt with lack of specificity as follows. The applicant’s case was that he was prejudiced by lack of

specificity in the context of a very long lapse of time which has taken place since the alleged commission of the offences: he is unable to correlate his movements and other matters sufficiently to give his solicitors specific instructions with which he might hope to conduct the defence. The respondent's case is that the book of evidence contains the evidence against the applicant "with as much specificity as is available given the nature of the offences charged": the lack of precision complained of was not such as to make it impossible for the applicant to defend himself. However basing his judgment on other grounds he did not further deal with lack of specificity. A ground of appeal in *Director of Public Prosecutions v Christopher O'Connor*, Court of Criminal Appeal, 29th July 2002, was that the dates set out in the indictment were too vague and unspecific. Fennelly J. dealt with this argument as follows:- "The third complaint is the vagueness and lack of specificity of the dates of the charges. It is undoubtedly the fact that each count was laid as having taken place between 1st January and 31st December in each year. Two were laid for each year. S. was almost entirely unable to assign dates to the alleged offences. It was also true, that in the absence of specific dates it was not possible for the accused to investigate contemporary events and look for possibly exculpatory evidence including any possible alibi. On the other hand, it is of the essence of the type of sexual abuse allegation that has confronted the courts in recent times that the complainant is unable to assign a specific date or time. On occasion the courts have been persuaded that, having regard to the lapse of time and the vagueness of the evidence, it is not possible to have a fair trial. In this case the complainant, in addition to the non-specific allegations gave evidence of six specific instances which she endeavoured to date by reference to specific events. The fairness of the lack of specificity had to be considered in the context of the specific case. If there was one allegation of a specific incident on one, but unspecified date very many years ago, it might well be unfair depending on the other circumstances of the case to ask the accused person to face a charge in terms that he could not reasonably be asked to meet it. In this case, however, S. says that the applicant committed the offence of rape against her with great frequency, often as many as six or seven times per week. The defence is that none of the alleged incidents ever happened. In these circumstances the defence is not prejudiced in the sense of being unable to seek out contemporaneous facts to support denial. It is notorious that sexual offences are almost always committed in private. Direct independent evidence is rarely available. In the present case, the jury had the unenviable task of deciding whether to accept that the prosecution had established beyond reasonable doubt that the evidence of S. was true. In the context of the case, the jury also had to be satisfied that the prosecution had discharged the burden of showing that the evidence of the applicant could not reasonably be true. This is what they did. This was their province and their function under our system of criminal law. The court also rejects this ground of complaint." The like issue was raised in the number of cases determined in the High Court including *McA. v. Director of Public Prosecutions*, unreported, the High Court, 15th January 2004, *T. G. v The Director of Public Prosecutions*, unreported, the High Court, 10th December 2004, *N. v. Director of Public Prosecutions*, unreported the High Court, 15th June 2005. In each case the dates between which the offences were

alleged to have been committed were of a much shorter span than in the present case and the court refused to prohibit the trial from proceeding. In *J. N. v Director of Public Prosecutions*, unreported, the High Court, 21st March 2003 the applicant was charged with two counts of indecent assault between the 28th January 1964 and the 28th January 1966. The complainant isolated the offences to the summer of each of the years. One of the offences was alleged to have occurred on the occasion of an outing to a beach. The other offence was alleged to have been committed a few months after the complainant made his Confirmation. While lack of specificity was raised in the proceedings the issue was not dealt with in the judgment. However in the four High Court decisions which I mention prohibition was not granted. Where specificity was raised by an applicant and offences were alleged to have been committed between two dates one year or two years apart lack of specificity has not resulted in the trial being prohibited. This consistent approach is appropriate in this case: I would dismiss the appeal on this ground in relation to counts 9, 10, 12, 13, 16 and 17. In the present case the time span in relation to complainant J. D. there are two counts alleged to have been committed between the 1st March 1971 and the 30th November 1976, in the case of the complainant G. T. one count is alleged to have been committed between the 1st January 1973 and the 31st December 1979 and in the case of complainant E. B. two counts are alleged to have been committed between the 1st January 1978 and the 31st December 1984. In relation to J. D. his statement is that while he was a resident in the Industrial School from the age of eleven he left at the age of sixteen. When he was fourteen or fifteen years old the applicant came to the industrial school. The last alleged offence was committed against him three weeks before he left. It is clear accordingly that the period in question here spans just two years at most. In the absence of some exceptional circumstance this period is not such as to require a trial to be prohibited. In his statement G. T. complains of a single incident within a time span of seven years. The incident took place on an occasion when he was sick in bed. I am satisfied that the time span in this instance of a single complaint is such that it was open to the trial judge to conclude that it would be unsafe for a trial to proceed. Accordingly it was appropriate that he should grant the Order of Prohibition sought and I would dismiss the cross appeal in relation to this count. In relation to J. B., in his statement he recounts two incidents in the period 1st January 1978 to 31st December 1984. The first incident occurred when he was twelve years of age. He was born on the 15th December 1966 and the date in relation to this incident is sufficiently specific. The second incident occurred later. At the end of 1978 J. B. ran away from the Industrial School for the third time but was returned within a matter of hours. That day he alleges that he was abused by the applicant. Having regard to the statement it is possible to isolate this event to a period around the end of 1978. Accordingly there is not such a lack of specificity in relation to these complaints as would entitle the applicant to have his trial in relation to the same prohibited. I would allow the cross appeal in relation to counts 3, 4, 18 and 19 and dismiss the same in relation to count 5. The Omnibus Argument In *J. M. v The Director of Public Prosecutions*, unreported, the Supreme Court, 28th July 2004 the applicant sought to have his trial prohibited on grounds of complainant delay,

prosecutorial delay and prejudice. McCracken J. held on the facts of the case that the complainant delay was explicable, that the prosecutorial delay was not blameworthy although extensive and that while of itself the delay would not lead to the prohibition of a trial it is a factor to be taken into account in the overall assessment of the fairness of a trial proceeding. In relation to prejudice no specific prejudice had been disclosed. He held that while the overall delay taken by itself was not sufficient to require the trial to be prohibited that delay should be taken into account with other circumstances which he listed:-

1. Inconsistencies in the statements of P. B.
2. The initial statement of P. B. was made after he had talked to J. B. and after J. B. had made statements: both statements referred to the applicant by the wrong name.
3. P. B. did not identify the applicant other than by name, that being the wrong name, the error only being corrected some four years later.
4. Disclosure of the alleged offences to another Brother was not mentioned in any of P. B.'s statements.
5. The identification of the applicant by his proper name came only after P. B. was informed by the investigating Garda that that was the correct name.
6. Nineteen of twenty one charges against the applicant were not proceeded with presumably because the complainant in respect of the same was considered unreliable. P. B. made his original complaint after talking to this apparently unreliable complainant.
7. There was a complete lack of records as to who were pupils in the school at the relevant time. Prohibition was granted. In this case taking the overall delay into account together with the prejudice alleged I am satisfied that on the omnibus argument it would not be unfair to allow the applicant's trial to proceed.

Conclusion

Having regard to the foregoing I would dismiss the appeal in relation to the complaints of K. S., J. C. and P. H. I would allow the cross appeal in relation to the complaints of J. D. and J. B. and dismiss the same in relation to the complaint of G. T. The effect of this is that the trial of the applicant should proceed in relation to counts 3, 4, 9, 10, 12, 13, 16, 17, 18 and 19. D . D .v. DPP

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