THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 266

Record Number: 2019/91

Edwards J.
Whelan J.
Kennedy J.

BETWEEN/

H. S.

RESPONDENT

- AND –

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

JUDGMENT of the Court delivered on the 22nd day of October 2019 by Ms. Justice Máire Whelan

Introduction

1. This is an appeal by the Director of Public Prosecutions from the High Court judgment of 1st March, 2019 and subsequent orders extending time for the bringing by the respondent of an application by way of judicial review and granting an order of prohibition of the trial on indictment of the respondent on seventeen charges of alleged historic child sex abuse of his two younger sisters.

2. The respondent sought an order of prohibition to restrain further prosecution of the criminal proceedings on the basis that there was a real risk that the trial would be unfair. He raised arguments of delay, actual and presumptive prejudice, the unavailability of possible witnesses due to death or absence of recollection and general unfairness arising from the lapse of time contending that some individuals who might have been of assistance to him as witnesses are now deceased or otherwise have no clear recollection of events.

Background

3. The respondent was born in 1960. The book of evidence was served on him on the 1st June, 2017 and the case was sent forward for trial on that date with the trial date fixed for the 25th July, 2018. The first complainant is his sister M. born circa 1966. There are five charges of indecent assault and one charge of rape between the years 1974 and 1978 in relation to her. The abuse is alleged to have commenced when she was eight years old.

4. There are a further eleven counts (ten of indecent assault and one of rape) in respect of the second complainant, his sister R., relating to the years 1977 – 1985. R. was born circa 1970. The abuse is alleged to have commenced when she was seven years old. All of the offences are alleged to have taken place in the family home (which changed on a number of occasions during the relevant years) where the sisters resided with the parents of the parties both of whom are alive.

5. The home environment was volatile and unstable, characterised by the alcoholism, violence and brutality of the father. The father and mother were routinely absent from the home by reason of work leaving the younger children, including the complainants, to fend for themselves. There were but two incidents in which a specific date is identified in the statement of charges. Both pertain to the complaints of the respondent's sister R. The first is alleged to have occurred on Christmas Eve, 1977 and the second during a visit by the respondent in 1985 to the family home to inform his family of his engagement. It is alleged that during that visit their parents were at work and he raped R. in her bedroom.

Judgment of the High Court

Procedural issue - Extension of time

6. In his judgment delivered 1st March, 2019 the High Court judge noted that the Director of Public Prosecutions had raised objection that the judicial review proceedings had been instituted outside the three-month time limit specified in O. 84 r. 21 of the Rules of the Superior Court and no good or sufficient reason had been identified for the delay and that the High Court should refuse any extension of time.

7. The High Court judge observes at para. 25 that the complainants' mother had provided a supplemental witness statement to the gardaí on the 7th December, 2017. This was not disclosed to the defence until the 4th April, 2018. The late disclosure of this statement was relied on by the respondent as sufficient reason to warrant an extension of time. He considered that the supplemental witness statement of the mother: -

> "…does address a number of potentially significant matters as follows. In some instances, this involves an elaboration on matters addressed in the mother's first witness statement of 4 November 2015."

The judgment noted that the statement set out in detail the mother's recollection of an incident alleged to have occurred in the family home on Christmas Day, 1978, (the Christmas Day, 1978 incident) over twelve months after one of the alleged incidents of abuse on R. which she dates to Christmas Eve, 1977. R. had recalled a shotgun being discharged in the family home by a third party on Christmas Day, 1978. The mother in her supplemental statement does not recall a gun being fired. An uncle reputed to have been present during the Christmas Day, 1978 incident is now deceased. Another witness is stated to be too unwell to give evidence. The Christmas Day, 1978 incident is referred to in the mother's first statement but her supplemental witness statement gave more particulars.

8. The High Court judge also notes that the said statement: -

> "…sets out in more detail the circumstances in which the second complainant was taken to a medical doctor in about the time of some of the alleged indecent assaults. The medical doctor is now deceased."

9. The judgment notes that the mother provides a description of the layout of one of the houses in which the indecent assaults are said to have occurred and whether the

bedrooms had functioning locks. The statement of the mother also provided further details of an alleged admission by the respondent to his mother of his "touching" or "petting" his sister R. The respondent is recorded as having stated to his mother when confronted that this conduct was "harmless" and did not go as far as sexual assault.

10. On the issue of the calculation of time for instituting judicial review proceedings, at para. 31 the High Court judge noted: -

> "It is not clear from the case law, however, as to the date from which time is to be calculated for the purposes of an application to restrain a criminal prosecution. In particular, there is some debate as to whether the time limit should be calculated
>
> (i) from the date of the return for trial, or
> (ii) from the later date of the formal service of an indictment."

He observed that the Supreme Court judgment in *CC v. Ireland* [2006] 4 I.R. 1 had indicated that the time limit runs from the date of the indictment. He noted that: -

> "The correctness of the approach adopted in *CC v. Ireland* has, however, since been queried by the judgment of the High Court (Kearns P.) in *Coton v. The Director of Public Prosecutions* [2015] I.E.H.C. 302."

Paras. 37-38 of the judgment notes: -

> "The judgment of the Supreme Court in *CC v. Ireland* [2006] 4 I.R. 1 is binding on this court, and, accordingly, I cannot accept the DPP's submission that time begins to run from the date of the return for trial.
>
> In any event, even if this court were in a position to adopt the alternative approach suggested by the High Court (Kearns P.) in *Coton v. The Director of Public Prosecutions* [2015] I.E.H.C. 302, I am satisfied that the late disclosure of the supplemental statement of the complainants' mother on 4 April, 2018 was a sufficiently significant event so as to reset the clock for the purposes of judicial review proceedings."

11. The High Court judgment continues at paras. 39-41: -

> "There was some debate at the hearing before me as to whether the supplemental witness statement contained material which was sufficiently relevant to the issues in the judicial review proceedings as to affect the running of the time-limit. It was also suggested that the supplemental witness statement merely elaborated upon material in the first statement."
>
> "I must admit that I have a concern as to whether this is the correct approach to take in the context of judicial review proceedings in respect of a pending criminal prosecution. The applicant is entitled to the presumption of innocence. This applies not just to the pending criminal trial, but also to these judicial review proceedings. (See comments of Hardiman J. in *J. O'C. v. Director of Public Prosecutions* [2000] 3

I.R. [478] at 517 *et seq*.). It does not seem to me to be consistent with the presumption of innocence to expect the applicant and/or his solicitor to explain on affidavit why it is that the belatedly disclosed material is relevant. To require an accused person to do so may well have the undesirable consequence of requiring him to disclose aspects of his proposed defence of the criminal proceedings."

> "… I am satisfied that—on an objective reading—the supplemental witness statement does disclose material which is relevant to and supportive of the application for judicial review."

12. The judgment continues at para. 42: -

> "The supplemental witness statement at the very least strengthened the case for judicial review—and perhaps even presented grounds for the first time—by allowing the applicant to point to specific issues in respect of which the unavailable witnesses might have given evidence. Separately, a further letter of 23 April 2018 from the Chief Prosecution Solicitor also disclosed further details of the police investigation, and, in particular, the fact that two relatives (another uncle of the complainants, and the mother-in-law of one of the complainants) had indicated that they had no recollection of these matters and did not wish to make statements."

13. The judgment concluded at para. 47 of the judgment that: -

> "The applicant was entitled to await receipt of the response to the request for further disclosure. This was received in April 2018, and the *ex parte* application for leave to apply for judicial review was made within three months of that date."

14. Lest he be incorrect in his finding that the application was brought within time the High Court judge proceeded to consider whether it would have been appropriate to grant an extension of time. He considered O. 84 r. 21(3) and (4) as amended and the relevant jurisprudence concluding at para. 53: -

> "I am satisfied that both limbs of the test under Order 84, rule 21(3) have been met. If and insofar as there was any delay in instituting these proceedings, same is justified by the delay on the part of the DPP in disclosing the supplemental witness statement of the complainant's mother."

The substantive issue

15. With regard to the substantive ground for seeking prohibition – whether there was a risk of an unfair trial – the court noted that the alleged offences were said to have occurred some thirty to forty years previously;

> "The principal specific prejudice alleged by the applicant is the loss of potential witnesses, as follows":

> (i) The respondent maintains that he was not resident in the family home in the years 1974 – 1978 and that he had lived with his grandparents and latterly with his grand-aunt. All these individuals are now deceased and "…

the delay will make it more difficult for the applicant to establish an important line of defence, namely that he was not in residence during the time the alleged sexual abuse was being carried out."

(ii) Regarding the death of the respondent's wife the judge theorised; "The wife might have been in a position to provide exculpatory evidence. For example, she might have been able to confirm that he did not regularly visit the family home during the relevant period."

(iii) In regard to the allegation that R. had been raped on the occasion when the respondent attended the family home in 1985 to announce his engagement the court noted; "It is not clear from the witness statement as to who is said to have been in the house on this occasion, and, in particular, it is not clear whether it is said that the applicant's fiancé[e] was present." He then postulated that; "But for the lapse of time, it might have been expected that the other people in the house that day would have been available to give evidence as to their recollection of events." The High Court judge considered that same "might have been relevant to the jury's assessment of the credibility of the complainant to consider whether the events as alleged could have occurred without having come to the attention of the other people in the house… as a consequence of the delay, it appears as if there are now no witnesses available to give evidence."

(iv) "The two key participants in the event on Christmas Day 1978… are now deceased. The second complainant and her mother have provided very different accounts of this incident, and, in particular, as to whether it involved the discharge of a shotgun…The fact that the two principal witnesses are now deceased or unavailable through illness is a potential cause of prejudice."

(v) "The medical doctor who had examined the second complainant in or about the time of the alleged sexual abuse is also now deceased… this is something which the defence legal team may have wished to pursue at trial."

(vi) "Two other relatives… have indicated they had no recollection of these matters and did not wish to make statements."

16. The High Court judge concluded at paras. 58-61 that: -

"…the very significant lapse of time since the alleged offences occurred in this case has created a real risk of an unfair trial…

Such potential witnesses as have survived are elderly, and a number of same have indicated to An Garda Síochána that they have no clear recollection of events.

> … a trial of this type will ultimately reduce itself to a form of swearing match between the applicant and the two complainants...
>
> I do not think that the risk of an unfair trial can be avoided by the trial judge giving specific warnings to the jury in relation to matters such as the danger of convicting on the basis of uncorroborated evidence, or of convicting in cases of significant delay. …The lack of specificity in relation to the dates of most of the alleged offences makes it almost impossible for the applicant to challenge the evidence by way of cross-examination or to rely on an alibi defence. In respect of the two offences in respect of which a date is identifiable, the consequence of the delay is that potential witnesses are now deceased, and those who have survived have no clear recollection of the events."

The court ordered that the DPP be prohibited from further prosecuting the respondent in respect of the 17 charges in question.

Grounds of Appeal

17. The Director appealed. The notice of appeal identifies eight separate grounds where the High Court judge is alleged to have erred: -

(1) In refusing to hold that the time for judicial review begins to run in a criminal case from the date of the return for trial in circumstances where this principle was established conclusively in *Coton v. The DPP* [2015] I.E.H.C. 302.

(2) In holding that the disclosure of the mother's supplemental statement was a sufficiently significant event to reset the clock for the running of time for the purposes of seeking judicial review.

(3) In holding that there was no onus on the respondent and/or his solicitor to explain why the "belatedly disclosed material" is relevant in relation to the extension of time.

(4) In holding that there was a real risk of an unfair trial because of the unavailability of each of:

(a) The doctor;
(b) The grandparents;
(c) The grand-aunt; and
(d) The wife of the respondent,

in circumstances where there is no indication that any of these witnesses could have given evidence that would be of assistance to the respondent at trial.

(5) In holding that the unavailability of the complainant's uncle and the latter's friend led to a "potential cause of prejudice" in circumstances where they had been present at a peripheral incident in the family home one year after an alleged incident of abuse but where there was no indication that they had any information in relation to the alleged abuse.

(6) In failing to take adequate account of the fact that the mother and father of the respondent (who were resident at the family home where the alleged abuse took place) are available to give evidence.

(7) In failing to give any weight to the authority of *Ó'C v. The DPP and Others* [2014] I.E.H.C. 65 which decision was approved by the Supreme Court in J*.(S).T. v. President of the Circuit Court and Another* [2015] I.E.S.C. 25 and more recently by the Court of Appeal in R.B. v DPP [2019] I.E.C.A 48.

(8) In failing to leave the issue of prejudice to the trial judge who is best placed to make such an assessment having regard to the evidence tendered at trial and further erred in holding that the prejudice was "obvious".

18. The respondent opposes the appeal.

Submissions on behalf of the appellant

19. In regard to the High Court's finding that there existed a real risk of an unfair trial because of the unavailability of a number of individuals whose absence through death or other indisposition was considered a potential cause of prejudice, the DPP argued that this finding is based on pure speculation as to what evidence could have been given by them. Only some of the alleged acts of sex abuse are said to have occurred when the respondent was residing in the family home.

20. It was contended that the judgment at para. 57(i) amounts to pure speculation as to what evidence, if any, could have been given by the grandparents or grand-aunt were they alive.

21. With regard to the non-availability of the respondent's former wife who died circa 2012 it was contended that all of the alleged abuse is claimed to have occurred prior to the marriage. It was argued that the judge erred in relying on a dissenting judgment of Hardiman J. at para. 57(ii) in *J O'C v. DPP* [2000] 3 I.R. 478 to support his conclusions.

22. It was contended that it was entirely speculative for the High Court to assert that the respondent's former wife could ever have given exculpatory evidence.

23. Regarding the Christmas Day, 1978 incident it was argued that same was entirely peripheral and did not form part of the narrative in relation to any alleged incident of sexual abuse.

24. Regarding the non-availability of the deceased family doctor it was contended that it is not part of the prosecution's case that the doctor was ever informed by R., or anybody, about the sex abuse allegations or had ever physically examined R. in relation to such allegations.

25. In relation to two other individuals who are alive but indisposed who when approached by the gardaí had no recollection of matters, it was contended that it had never been alleged that either was an eyewitness or could have provided any relevant evidence.

The appellant's arguments regarding the role of the trial judge in ensuring a fair trial

26. It was contended on behalf of the appellant that the decision of O'Malley J. in the High Court in *Ó'C. v. The DPP and Others* [2014] I.E.H.C. 65 – which has subsequently been cited with approval by both the Supreme Court and the Court of Appeal – represents the current state of the law and ought to have been followed by the High Court judge. It was further argued that the said decision is authority for the proposition that a claim of prejudice arising from the unavailability of a witness is a matter which may be raised with the trial judge who is best placed to determine the issue. The appellant argued that it is pure speculation as to what evidence any of the missing witnesses in this case could have given on behalf of the respondent at trial. The two most relevant witnesses – other than the complainants – are still alive namely, the parties' father and mother.

Exceptional circumstances

27. It was further contended by the DPP that the High Court judge had not given sufficient weight to the role of the trial judge and the established jurisprudence of the Court of Appeal and the Supreme Court that, absent any truly exceptional circumstances, the issue of prejudice is a matter best left to the trial judge. It was argued that since the decision in *S.H. v. DPP* [2006] 3 I.R. 575 a far more stringent test for prohibition lies and that the remedy is now only granted exceptionally. Reliance was placed on *Nash v. DPP* [2015] I.E.S.C. 32 and the decisions of Clarke J. (as he then was) and Charleton J. which had emphasised that the higher courts will only intervene to grant prohibition in exceptional circumstances. It was contended that the High Court judge had erred in his application of the authorities and the legal principles to the facts of this case.

Arguments regarding extension of time and procedural grounds of appeal

28. It was contended that the High Court judge had erred in determining that there was no onus on the respondent to explain why the "belatedly disclosed material" warranted the granting of an extension of time to seek judicial review. Further, that he erred in refusing to hold that the time for seeking judicial review begins to run in a criminal case from the date of the return for trial. It was pointed out that an indictment is almost invariably served at the commencement of a trial. The determination of the High Court that the time for seeking judicial review runs from the service of the indictment would permit an applicant to institute judicial review proceedings on the eve of trial and would cause very significant disruption to the orderly conduct and management of criminal trials in the Circuit and Central Criminal Courts it was contended.

29. It was contended that the respondent had failed to meet the requirements of O.84 r.21(3) of the Rules of the Superior Courts, 1986 as amended by the Rules of Superior Courts (Judicial Review) 2011 (S.I. No. 691 of 2011) which provides that the court shall only extend the three month period within which an application for judicial review is to be brought if it is satisfied that there are good and sufficient reasons for doing so and the circumstances were outside the control of, or could not reasonably been anticipated by the applicant who seeks the extension of time.

30. Insofar as the High Court judge had relied on the supplemental statement of the complainants' mother – disclosed on the 4th April, 2018 – as constituting a sufficiently

significant event to reset the clock for the purposes of instituting judicial review proceedings, it was contended that the judge had erred. It was material, the appellant contended, that the respondent had not engaged with the facts or indicated why it was contended that the new statement had changed matters to such a degree that prohibition was at that point considered to be a necessary relief.

Arguments on behalf of the respondent

31. It was acknowledged that there was no dispute between the parties as to the legal principles applicable on an application seeking prohibition and same are well established. Each case must be determined upon its own facts. It was contended that the decision of the High Court was based on the application of well-established legal principles to the facts before it. With regard to the unavailable witnesses the following arguments were advanced:

    (a) There was no dispute between the parties as to where the onus of proof lies and that the respondent was obliged to engage with the facts and demonstrate that prejudice accruing to him is not merely theoretical.

    (b) There was "a real possibility" that the individuals in question would have been of assistance to the defence.

    (c) It was contended that the appellant had erred regarding the standard of proof applicable in an application for prohibition – such an applicant cannot be expected to show either as an established certainty or even a probability that a witness would have been of assistance to the defence. Rather, it must be sufficient to establish the relevance of a lost witness as a real possibility and the respondent had discharged such a burden in this case.

32. It was argued that whilst it is preferable if a prohibition applicant could advance positive evidence outlining specifically what a particular witness would have said if available, a degree of leniency must be afforded where a complainant's delay (however understandable) has deprived the applicant of the opportunity of ascertaining precisely what evidence could have been given by a potential witness prior to their death or the erosion or diminution of their memory. Hence, it was contended that a degree of speculation with regard to lost evidence is unavoidable and must as a matter of principle be permissible. The dissenting judgment of Hardiman J. in *J. O'C. v. DPP* [2000] 3 I.R. 478 was cited as authority for the proposition.

33. It was contended that the respondent's former wife was the most significant potential witness. By reason of her death the respondent did not have the opportunity to ascertain her recollection of relevant events before the complainants brought their allegations to the gardaí. It would be irrational in such circumstances to expect the respondent to establish precisely what she would or would not have said. By reason of her death, it was argued, the loss of such evidence was irremediable and deprived the respondent of a vital opportunity to challenge his sister R.'s narrative of the sole occasion when she claims she was raped by him. The incident was one of just two out of the seventeen charges which is

linked to a particular event or date. As such, it was contended that the 1985 engagement announcement was one of the few "islands of fact" on which the prosecution case was built and one of the few concrete assertions which the respondent could challenge with any particularity.

34. It was contended that the death of his grandparents deprived the respondent of the ability to prove when he was resident with them. He argued that they were best placed to give evidence of the frequency of his visits to the family home at the material times.

35. He contended that the death of the family doctor deprived him of the opportunity of challenging the evidence of R. and their mother that a doctor diagnosed her childhood ailments as being "psychosomatic". Such a diagnosis appears nowhere in the hospital chart and records disclosed to the respondent, he argued.

36. In regard to the death of the maternal uncle J. and the indisposition of the latter's friend B., two individuals alleged to have been present when a shotgun was allegedly discharged on Christmas Day, 1978, it was disputed that their evidence would be confined to peripheral matters only as the Director of Public Prosecutions contended. It was argued that such evidence could be of assistance to the respondent to challenge the credibility and coherence of the complainant R., her narrative and to interrogate the timeline advanced. It was argued that the non-availability of these witnesses is a significant blow.

Witnesses in lieu

37. The respondent contended that the availability of the parties' father and mother cannot be deployed as mitigation for the prejudice accruing to the respondent from the loss of other witnesses, given that their recollection of events is patchy at best and in some respects fully eroded.

Relevance of existing jurisprudence

38. The respondent argued that since no two cases are the same and the application of the established principles to one set of circumstances cannot simply be transposed to another, the existing case law is not particularly helpful. He sought to rely on the majority decision of this court in *B.S. v. DPP* [2017] I.E.C.A. 342 which was determined on its particular facts to be within the "wholly exceptional circumstances" category such that the grant of prohibition was warranted.

39. It was posited that "wholly exceptional circumstances" are present in the instant case, with inherent prejudice arising from the cumulative impact of the evidence and assistance lost to the respondent, particularly in light of factors including; that the allegations are vague in nature, made without any supporting forensic or documentary evidence and range back up to forty-five years – a time when the respondent was a minor and had not reached full maturity. It is the combination of circumstances which renders this an exceptional case warranting the grant of prohibition, the respondent contended. It was argued that if the case goes to trial the jury would be left with a swearing match which would put the respondent in an invidious position.

Role of the trial judge

40. Reliance was placed by the respondent on the decision in *I.I. v. J.J.* [2012] I.E.H.C. 327 regarding the role of the trial judge. The respondent agreed with the appellant's outline submissions on the evolution of the Superior Courts' jurisprudence concerning the central role of the trial judge in ensuring the fairness of a criminal trial and that prohibition is now generally granted in advance of trial only where the applicant has established manifest, unavoidable prejudice such as to give rise to a real risk of an unfair trial. It was contended that such exceptionality has been established in this case.

Extension of time

41. It was argued on behalf of the respondent that where the complainants had waited for up to forty years before bringing their allegations to the gardaí who, in turn, had waited seven months before interviewing him and a further eleven months had elapsed before charges were brought, the respondent had initially concentrated on seeking essential disclosure from the appellant and had waited a few short months until some of the requested disclosures had been received before issuing prohibition proceedings. He contended that this, on the facts, was reasonable. Reliance was placed on the affidavit of his solicitor sworn on the 8th June, 2018 which explained why prohibition proceedings had issued when they did.

Discussion

42. Over the past two decades there have been significant developments in judicial thinking in this jurisdiction regarding the manner in which the courts treat applications for the prohibition of a trial concerning allegations of historic child sexual abuse. The complex dynamics and impediments inherent in the prosecution of historic child sexual abuse cases led to an evolution in approach to achieve the correct striking of a fair balance between the competing interests taking on board the often secretive, manipulative and coercive features that may characterise the sexual abuse of children as well as the specific factors in any given case that may come into play in delaying disclosure to the authorities. The courts have endeavoured to strike a balance between the societal rights that such matters be amenable to trial on the one hand and the fundamental right of an accused person to due process and a fair trial. In the decision of *G. v. DPP* [1994] 1 I.R. 374 at p. 381 Denham J. (as she then was) opined: -

> "Insofar as there are new developments and knowledge in our society on issues related to the charges laid in this case then these matters must be dealt with in a fair and just way by the courts."

The case in question concerned charges of sexual offences involving seven children alleged to have occurred over a period of approximately fourteen years.

43. In her later decision in *P.C. v. DPP* [1999] 2 I.R. 25 at p. 62 Denham J. referred to the fact that courts by then were achieving a greater understanding of the nature of such offences stating: -

> "As knowledge grows of the nature and effects of child sexual abuse and as medical, psychiatric and psychological evidence is expanded and presented to the

courts other factors may become apparent. Also, each case depends on its own circumstances."

44. Historic child sex abuse trials over the past two decades have shown that such offences may occur routinely in circumstances where no third-party accounts are forthcoming and where no "island of fact" is available as was observed by MacMenamin J. in *J.S. v. DPP* [2013] I.E.C.C.A. 41. The absence of an independent "island of fact" *per se* is not generally considered a sound basis for seeking prohibition of a trial involving allegations of historical child sexual abuse. Recent decisions from this court including the decision delivered by Edwards J. in *DPP v M.D.* [2018] I.E.C.A. 277 confirm that position.

45. While it is recognised that it is frequently important to the defence in a case such as the present one to be in a position to test a complainant's evidence in relation to allegations with reference to available islands of fact, there is, however, nothing in the evidence in the present case to support the respondent's contention that the alleged shotgun incident of Christmas Day, 1978, could ever represent an "island of fact" against which any specific allegation of sexual assault could be effectively fact-checked. The allegation of abuse closest in time to the said date is claimed to have occurred over one year previously.

46. As the High Court judge correctly noted in his judgment the key decision of the Supreme Court which identifies the operative principles governing an application for prohibition of a trial such as the present is *S.H. v. DPP* [2006] 3 I.R. 575 which concerned indecent assault allegations by four complainants dating from the 1960's. The children were aged between seven and ten at the date of the alleged incidents. Chief Justice Murray in his judgment made clear that: -

> "…there is no necessity to hold an inquiry into, or to establish the reasons for, delay in making a complaint. The issue for a court is whether the delay has resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial. The court does not exclude wholly exceptional circumstances where it would be unfair or unjust to put an accused on trial".

47. In *S.H. v. DPP*, of note is the observation of Murray C. J. at p. 618: -

> "The court's experience… has found that there is a range of circumstances extending beyond dominion or psychological consequences flowing directly from the abuse which militate or inhibit victims from bringing complaints of sexual abuse to the notice of other persons, in particular those outside their family and even more particularly the gardaí with a view to a possible trial."

Accordingly, an inquiry as to the reasons for any delay in making a complaint need no longer be made.

48. Murray C.J. emphasised at p. 620, that in an application such as the present: -

> "The test is whether there is a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay. The test is to be applied in light of the circumstances of the case…
>
> The inquiry which should be made is whether the degree of prejudice is such as to give rise to a real or serious risk of an unfair trial. The factors of prejudice, if any, will depend on the circumstances of the case."

He observed at p. 621: -

> "There is no doubt that difficulties arise in defending a case many years after an event. However, the courts may not legislate, the courts may not take a policy decision that after a stated number of years an offence may not be prosecuted. Also, as the legislature has not …established a statute of limitations that…may be viewed as a policy of the representatives of the People. Thus, each case falls to be considered on its own circumstances."

49. The High Court judgment noted that the appellant relied on the decision of the Supreme Court in *Nash v. DPP* [2015] I.E.S.C. 32 which the respondent sought to distinguish. That judgment had clarified further the position of the Supreme Court on the correct approach to be adopted when considering an application for prohibition of a criminal trial in a historic child sex abuse case, Charleton J. stating at para. 23: -

> "The trial judge now has the primary role in decisions of this kind and judicial review is rarely appropriate. An application to the trial judge is an alternative to judicial review."

50. It is clear from the *Nash* decision that it is desirable, save in the most exceptional circumstances, that an application to prohibit or restrain a trial in such cases must be made to the relevant trial judge rather than by way of judicial review proceedings. Charleton J. further observed at para. 23: -

> "An application to stop a trial before the trial judge may best be decided upon a consideration of all of the evidence and how the alleged defect, be it delay or missing evidence or unavailable witnesses, impacts on the overall case. Whether the real risk of an unfair trial that cannot otherwise be avoided then exists is, in such cases of an argument that justice has been diminished, often best seen in the context of such live evidence as has been presented and not through the contest on affidavit that characterises these cases on judicial review seeking prohibition in the High Court or on appeal."

51. The decision of Charleton J. in *Nash* reiterates the said judge's earlier decision in *K. v. His Honour Judge Carroll Moran and Others* [2010] I.E.H.C. 23 where at para. 9 he distilled the applicable principles of law into nine key propositions: -

"(1) The High Court should be slow to interfere with a decision by the Director of Public Prosecutions that a prosecution should be brought. The proper forum for the adjudication of guilt in serious criminal cases is, under the Constitution, a trial by judge and jury; *D.C. v. DPP* [2005] 4 I.R. 281 at p. 284.

(2) It is to be presumed that an accused person facing a criminal trial will receive a trial in due course of law, one that is fair and abides by constitutional procedures. The trial judge is the primary party to uphold the relevant rights which are: the entitlement of the accused to a fair trial; the right of the community to have serious crime prosecuted; and the right of the victims of crime to have recourse to the forum of criminal trial where there is reasonable evidence and the trial can be fairly conducted; *P. C. v. DPP* [1999] 2 I.R. 25 at p. 77 and *The People (DPP) v J.T.* (1988) 3 Frewen 141.

(3) The onus of proof is therefore on the accused, when taking judicial review as an applicant to stop a criminal trial. That onus is discharged only where it is proved that there is a real risk of an unfair trial occurring. In this context, an unfair trial means one where any potential unfairness cannot be avoided by appropriate rulings and directions on the part of the trial Judge. The unfairness of the trial must therefore be unavoidable; *Z. v. DPP* [1994] 2 I.R. 476 at p. 506 - 507.

(4) In adjudicating on whether a real risk occurs that is unavoidable that an unfair trial will take place, the High Court on judicial review should bear in mind …. that a trial Judge will warn a jury that because of the elapse of time between the alleged occurrence of the facts giving rise to the charges, and the trial, that the accused will be handicapped by reason of the lack of precision in the presentation of the case, and the disappearance of evidence such as diaries, or potentially helpful witnesses, or by the normal failure of memory. This form of warning is now standard in all old sexual violence cases and a model form of the warning, not necessarily to be repeated in that form by all trial Judges, as articulated by Haugh J. is to be found in the decision of the Court of Criminal Appeal in *The People (DPP) v. E.C.* [2006] IECCA 69.

(5) The burden of a proof on an applicant in these cases is not discharged by merely making a general allegation of prejudice by reason of the years that have elapsed between the alleged events and the commencement of the criminal process. Rather, there is a burden on such an applicant to fully and actively engage with the facts of the particular case in order to demonstrate in a specific way how the risk of an unfair trial arises; *C.K. v. DPP* [2007] IESC 5 and *McFarlane v. DPP* [2007] 1 I.R. 134 at p. 144.

(6) Whereas previously the Supreme Court had focused upon an issue as to whether the victim could not reasonably have been expected to make a complaint of sexual violence against the accused because of the dominion which he had exercised over her, the test now is whether the delay has resulted in prejudice to an accused so as to give rise to a real risk of an unfair trial; *H. v. DPP* [2006] 3 I.R. 575 at p. 622.

(7) Additionally, there can be circumstances, which are wholly exceptional, where it would be unfair or unjust to put an accused on trial. Relevant factors include a lengthy elapse of time, old age, the sudden emergence of extreme stress in consequence of the charges, and which are beyond that associated with the normal stress that a person will feel when facing a criminal charge and, lastly, severe ill health; *P. T. v. DPP* [2007] IESC 39.

(8) Previous cases, insofar as they are referred on the basis [of] facts that are advocated to be similar, are of limited value. The test as to whether a real risk of an unfair trial has been made out by an applicant, or that an applicant has established the wholly exceptional circumstances that had rendered unfair or unjust to put him on trial, are to be adjudicated in the light of all of the circumstances of the case; *H. v. DPP* [2006] 3 I.R. 575 at p. 621.

(9) …it can be the case sometimes that circumstances such as extreme age or very poor health will be contributory factors to an applicant succeeding in making out that a real risk of an unavoidably fair trial is established."

Missing witnesses

52. As the High Court judge noted in his judgment at para. 7, O'Malley J. in *P.B. v. DPP* [2013] I.E.H.C. 401 – in a passage cited with approval in the judgment of this court in *M.S. v. Director of Public Prosecutions* [2015] I.E.C.A. 309 – emphasised that the point of the decision in *S.H.* and the authorities that followed is that difficulties caused to a defendant in the case of old allegations are best dealt with in the court of trial. The judgment of this court in *M.S. v. Director of Public Prosecutions* considered that unless the delays in question have caused irremediable prejudice in terms of either missing witnesses or evidence: -

> "Experience has shown that, special circumstances aside, the court of trial is generally better placed than the judicial review judge to make an assessment of this matter, particularly having regard to the run of the evidence and the evidence actually tendered."

53. O'Malley J. in *Ó'C v. The DPP and Others* [2014] I.E.H.C. 65 noted at para. 65: -

> "… when an applicant seeks to establish that the absence of a specific witness or piece of evidence has caused prejudice, he or she must be in a position to point to, at least, a real possibility that the witness or evidence would have been of assistance to the defence. In other words, I do not believe that it is sufficient to point to a theoretical possibility that an unavailable witness might have had something to say that would contradict the complainant's account and that of other witnesses."

The judge continued at para. 66: -

> "In this case, it is theoretically possible that C. gave an account to Dr. O'Carroll which was wholly at variance with that given to others and consistent with the

innocence of the applicant, or which, at least, was materially inconsistent with her other accounts. On the basis of the evidence, however, that is not a real possibility."

The judgment continues at paras. 67-68: -

> "The question is, I consider, whether there is a real possibility that the missing material would reveal a material inconsistency which would be of benefit to the applicant. In my view, there is nothing in the evidence to suggest that this is a realistic possibility as might be the case if, for example, it was shown that she had given materially inconsistent accounts in other instances. I do not consider that the presumption of innocence requires the court to assume, in the absence of any supporting evidence, that it did happen in relation to Dr. O'Carroll.
>
> This is not to suggest that the applicant bears an onus of proving his innocence it is simply that the establishment of a 'real risk' must involve establishing a 'real possibility' that evidence did exist, which could have been helpful, but is no longer available."

54. In *J.(S)T. v. The President of the Circuit Court and the DPP* [2015] I.E.S.C. 25 Denham C.J. in considering an issue of missing records observed as follows at para. 27: -

> "In all the circumstances, the missing records are not a basis upon which to prohibit the trial. In a recent case of *Ó'C. v. D.P.P* [2014], O'Malley J. rejected the argument that missing records from a health centre and the death of a doctor, to whom the complainant had spoken to about alleged sexual abuse, were matters which should persuade the Court to grant prohibition. Each case has to be considered on its own facts. The alleged absence of documents in this case does not appear to be such upon which to prohibit a trial. That said, it is an issue which may be opened to the trial judge, who will be best placed to determine the matter."

55. A succinct exposition on the current jurisprudence of the Supreme Court and this court on the general desirability of the issue of prejudice being dealt with at the trial rather than speculatively by way of an application for prohibition is to be found in the judgment of Coffey J. in *R.B. v. DPP* [2018] I.E.H.C. 326. He stated at para. 15: -

> "It seems to me that the effect of the modern jurisprudence relating to allegations of undue delay in historic sexual abuse cases is to postpone the issue of prejudice to the trial itself so that it can be assessed by the trial judge having regard to the granular detail of the actual evidence that is to go to the jury with the result that prohibition should only be granted in advance of a trial where the prejudice complained of is manifest, unavoidable and of such significance as to give rise to a real or serious risk of an unfair trial."

His decision was upheld on appeal in this court in a judgment delivered by Baker J. reported at *R.B. v. DPP* [2019] I.E.C.A. 48. I am satisfied that the excerpt represents a correct statement of the current state of the jurisprudence.

56. It is incumbent on an applicant who seeks to prohibit a criminal trial to demonstrate that the prejudice contended for is manifestly unavoidable and of such significance as to demonstrably give rise to a real or serious risk of an unfair trial.

57. The question for determination is whether the High Court judge correctly applied the relevant legal principles cited in his judgment to the facts of the case.

Functions of trial judge

58. The parties to this appeal are in agreement that the central figure in delivering a fair trial is the trial judge and as is submitted on behalf of the respondent; "The case-law has evolved to the extent that prohibition is now generally granted in advance of a trial only where the appellant has established manifest, unavoidable prejudice of such significance as to give rise to a real risk of an unfair trial."

59. As was observed by O'Malley J. in P. v. The Judges of Dublin Circuit Court and the DPP and the Attorney General [2019] I.E.S.C. 26: -

> "The prosecution of sexual offences alleged to have been committed many years, or even decades, ago has thrown up many challenges for the criminal justice system."

60. The granting of orders prohibiting criminal trial in the case of historic child sex abuse cases usurps the principle that the appropriate constitutional forum for the adjudication of guilt in serious criminal cases is a trial by judge and jury. The principles in that regard set forth by Charleton J. as a judge of the High Court in *K. v. His Honour Judge Carroll Moran and Others* [2010] I.E.H.C. 23 have been followed continuously thereafter and upheld both by the Supreme Court and by this court.

Distinguishability of the decision of this court in B.S. v. DPP [2017]

61. The respondent sought to rely on the decision of this court in *B.S. v. DPP* [2017] I.E.C.A. 342 where the majority determined that an order prohibiting the trial was warranted. Several key factors distinguish that decision from the instant case: -

(1) The applicant had been returned for trial on one count only which it was alleged had occurred on an unspecified date between the 1st January, 1970 and the 21st May, 1970 when the applicant was sixteen years of age. By contrast in the instant case the respondent has been returned for trial on seventeen counts of sexual assault, two of which concern rape.

(2) The period of offending in this case is of substantially greater duration – over a decade ranging from 1974 to 1985.

(3) The respondent, whilst he was a minor during the commission of seven of the alleged offences, was also a person of full age when it is alleged other of the offences, including rape, took place.

(4) The instant case involves more than one complainant.

(5) In *B.S.* the court found that the appellant had engaged with the evidence and his belief that the three deceased witnesses could have been of assistance to him went well beyond mere assertion. The deceased witnesses were shown to be potentially helpful to the defence. An essential element in this case which distinguishes it from many of the authorities sought to be relied upon on behalf of the respondent is that both the father and mother of the parties are still alive and available to give evidence and be subjected to cross-examination. There were differences in recollection between the mother and the complainant R., differences that can be fully exploited at trial by cross-examination if considered appropriate.

Conclusions

Witnesses

62. The respondent based his claim for prohibition of a criminal trial primarily on the lost witnesses he asserted are unavailable to him at trial. I am satisfied that the dicta of O'Malley J. in *Ó'C v. DPP* constitutes a correct exposition of the standard applicable where it is contended that the unavailability of a witness through death or incapacity or otherwise warrants prohibition by reason of a real possibility that the ensuing trial will be unfair.

i. The former wife

63. There is real doubt as to whether the respondent's estranged wife, who died in either 2011 or 2012, was even present in the family home in 1985 on the occasion when the respondent visited to inform his family of his engagement and when, it is alleged, the last act of sexual assault by the respondent on his sister R. occurred. There is no allegation that he sexually abused either complainant following the marriage. The averments and exhibits supporting the application for prohibition refrain from asserting unequivocally that she was present at all in the house on the occasion in question in 1985.

64. The respondent deposed in an affidavit verifying his statement grounding the application for leave on the 25th May, 2018 at 15(ii): -

> "The applicant lived with his ex-wife [A.M.] during some of the period of the alleged offences against [R.]. She would have been in a position to provide evidence relevant to his defence. Her death in 2012 has deprived him of another significant witness. This materially affects his ability to test the case against him and to challenge the credibility of the complainants' and/or other witnesses."

65. Beyond mere assertion there is a significant failure to engage fully and actively with the facts to demonstrate specifically and with reasonable particularity what that evidence might be or how the absence of his estranged wife and her non-availability as a witness gives rise to any risk of an unfair trial. Neither would there appear to be any statement before the court asserting that the ex-wife was ever present in the complainants' family home at or about the time of any of the other sixteen alleged incidents of abuse the subject matter of the other indictments. The overall impression to be inferred is that she was not present in the family home on the said occasion in 1985.

66. The bare assertions concerning his deceased estranged wife that "she would have been in a position to provide evidence relevant to his defence" and the unsupported contention in the statement of grounds that; "Had they sought out a statement from the applicant's ex-wife when they first became aware of the allegations, at which time she was still alive, they would have preserved significant evidence which had a potential bearing on the issue of guilt or innocence" are entirely vague, devoid of any particularity and are mere theoretical possibilities which fail to engage with the facts. They offer no particularity as to what the "significant evidence" might be and fail to demonstrate, as the law requires, how specifically her evidence might have assisted the respondent.

67. There is no sound basis identified for the contention that she would have been in a position to give any relevant evidence which was potentially helpful to the respondent. What she might or might not have said, were she in a position to give evidence, is in the realms of pure speculation. For instance, as matters stand, it might be expected that she could say that she was not present at all in the house on the occasion in question. Her untimely death in 2012 or thereabouts precludes the possibility of taking the matter beyond conjecture at this stage. The assessment by the High Court judge that had the ex-wife been in the house and had she been available to give evidence "it might have been relevant to the jury's assessment of the credibility of the complainant to consider whether the events as alleged could have occurred without coming to the attention of the other people in the house" is in the realm of theory and conjecture, and is not a sound basis for making an order prohibiting the trial proceeding. The dissenting judgment of Hardiman J. in J*. O'C. v. Director of Public Prosecutions* [2000] 3 I.R. 478 relied upon is of limited relevance given firstly, that it was a dissenting judgment and given that over the ensuing twenty years since it was delivered the criteria governing the making of an order of prohibition in respect of a criminal trial in historic child sexual abuse cases have substantially evolved as outlined above such that aspects of the said dissenting judgment have now been substantially superseded.

ii. The grandparents

68. It is contended by the respondent that he moved out of the family home and went to live with his maternal grandparents on a farm a distance away from the family home. He argued that they are relevant witnesses as they would be best placed to give evidence of the frequency of his visits to the family home during the period of time he resided with them. However, that is not so. Logically, all they could testify to at best would be that he had or had not on a given date not indicated that he was going to visit his original family home. Such evidence would not be probative of any issue arising such as would render them potentially helpful witness for the respondent. By contrast, his parents are still alive and they were at all material times normally resident in the family home. His mother is a witness in the book of evidence and his father can be called if required to give direct evidence of the frequency or otherwise of visits to the family home.

iii. The grand-aunt

69. It was contended that the respondent had resided with his grand-aunt in England for a time. However that does not appear to be in dispute. The complainants appear to accept that he resided in England for some months and then returned to Ireland, and thereafter

joined the army. No stateable basis has been identified for a contention that he is prejudiced by her non-availability to confirm what is not in contention between the parties.

iv. Death of uncle J. and non-availability of J.'s friend B. pertaining to events on Christmas Day 1978.

70. I am not satisfied that there was probative evidence before the High Court sufficient to warrant a determination that the absence of both the said witnesses amounted to a "potential cause of prejudice". The incident in question in respect of which the complainant R. recalls that a loaded shotgun was accidentally discharged in the family home on Christmas Day, 1978 was not an occasion when any act of abuse, the subject matter of any of the charges, is alleged to have taken place. Indeed, it is distant in time from the most proximate count by approximately one year. Furthermore, insofar as it constitutes one of the "islands of fact" in the case and affords an opportunity to stress test the credibility of R. this can be done readily by cross-examination in light of the contents of the book of evidence, and in particular the statement of the parties' mother where she disagrees with R.'s recollections and denies that any shot was fired in the family home on Christmas Day, 1978 in the manner that R. contends. There was no nexus between this incident and any of the alleged incidents of sex abuse. I am satisfied that on balance it constitutes a wholly peripheral issue. Therefore, no line of questioning at the trial in regard to the credibility or reliability of R. as a witness and a re-counter of fact is diminished or in any way trenched upon by the non-availability of the uncle J. and his friend B. through death or indisposition respectively. I am further satisfied that the evidence that might have been given had they been available to testify would not go to the truth or falsity of any of the offences set forth in the statement of charges, there being no suggestion that they were ever present or had any nexus with any of the alleged incidents at all.

v. The family doctor

71. The family doctor is now deceased. However, it was not suggested that at any time the said doctor was informed about the alleged abuse or that he ever physically examined the complainant R. in relation to an allegation of sexual abuse; and at most it is contended that he treated her in connection with a urinary or kidney tract infection or infections. If, as the respondent contends, the records as exist make no reference to a psychosomatic condition that any suggestion on the part of R. or the parties' mother that her childhood ailments had a psychosomatic dimension can be fully argued at trial and can be the subject of cross-examination and formal legal submission. The doctor was never in a position to give any evidence as to whether R. was or was not abused by the respondent.

vi. Lack of recollection of mother-in-law of R. and maternal uncle

The indisposition and lack of recollection of these parties is wholly irrelevant to any issue in this trial. There is no suggestion that they were present or aware of any alleged incident set out in the statement of charges. Neither is it contended that they were eyewitnesses or ever in a position to tender relevant evidence which might have assisted the respondent in relation to any complaint of abuse.

Demonstration of a real risk of an unfair trial

72. I am not satisfied that the respondent engaged in a specific way with the evidence actually available to the degree that the jurisprudence now requires of an applicant who seeks to prohibit a criminal trial taking place, and to remove discretion with regard to its conduct from the trial judge merely on the basis of affidavit evidence. Whilst reliance was sought to be placed on the dicta of Hardiman J. in *McFarlane v. DPP* [2007] 1 I.R. 134 it will be recalled that the said judge on behalf of the majority in the Supreme Court stated at para. 24: -

> "In order to demonstrate that risk [of an unfair trial] 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. … 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."

73. I am satisfied that the High Court erred in granting an order prohibiting the trial and in reaching a conclusion that the significant lapse of time since the alleged offences occurred in the case gave rise to a real risk of an unfair trial. The High Court judge in determining that the deaths or non-availability of the various individuals referred to in the judgment – and above – had the effect of denying the respondent an opportunity to advance lines of defence including;

i. his residence;

ii. the circumstances of his visits to the family home – especially at times such as Christmas Eve and the announcement of his engagement; and

iii. the credibility of the complainants' recollections,

failed to apply the established jurisprudence to the facts of this case and disregarded the fact that at most the respondent's assertions of prejudice amounted to theoretical possibilities that the unavailable witnesses might have something to say that could possibly contradict the accounts of the complainants. None resided in or even asserted to be present at the family home on the dates when sexual abuse or rape was alleged to have occurred. There is no indication that any had knowledge of the alleged offences or complaints regarding same. None was demonstrated with supporting evidence to be a potentially helpful witness to the respondent.

74. I am satisfied in the instant case that the respondent's contentions fall far short of demonstrating actual identifiable prejudice of a kind which could not be cured by directions of a trial judge at the hearing. In concluding to the contrary at paras. 60 - 61 of the judgment the High Court judge was in error and failed to apply the by now well established legal authorities to the facts of this case.

75. Hence, at para. 63 of his judgment the High Court judge erred in failing to distinguish the facts of the instant case from those which obtained in *B.S. v. DPP* which latter decision derives from its own exceptional facts and cannot be said to be of any general application.

The decision in *B.S. v. The DPP* turned on its own unusual facts, particularly a single incident alleged to have occurred forty-seven years' prior at a time when he was a minor. There was no witness available who could address the issues. Potentially helpful witnesses were all deceased. By contrast, in the instant case there are two complainants. There are seventeen separate charges ranging over many years. When the unavailable witnesses are more closely scrutinised it is clear that at best the evidence they might be in a position to give would be entirely peripheral to the central issue as to whether the allegations of sexual abuse comprised in the seventeen counts did or did not take place.

76. Contrary to the conclusions of the High Court judge, the respondent failed to establish manifest, unavoidable prejudice of such significance and gravity as to give rise to a real risk of an unfair trial which could not be avoided by appropriate rulings and directions by the trial judge who would have the opportunity to consider the granular detail of the actual evidence. The fact that the current state of affairs may be likely to give rise to a swearing match at trial, as the High Court judge considered, makes it no different from most other trials and cannot be said to put the respondent in an invidious position. Adversarial trials represent the process in this jurisdiction whereby facts are to be determined in accordance with the evidence.

The constitutional norm provides that trial by judge and jury is the appropriate form for determination of guilt or innocence in serious criminal matters

77. Allowing the matter to go to trial accords with the constitutional order which provides that the determination of guilt in serious criminal matters is in a trial by judge and jury. In light of the failure of the respondent to adduce cogent evidence in support of his application to meet the threshold for intervention, a refusal of the application for prohibition was warranted.

78. A refusal to make an order of prohibition could not be said to amount to an abdication of a difficult decision as the High Court judge erroneously suggested at para. 62 of the judgment. It is the judge at trial who is primarily charged with upholding all relevant rights of the parties concerned and it is inappropriate to usurp that process save in the exceptional case where there is cogent evidence demonstrating the real risk of an unfair trial and where such prejudice cannot be avoided.

79. Our laws acknowledge the many stakeholders in the administration of the criminal justice system. The right to a fair trial is fundamental but some consideration of other interests is also warranted. A criminal trial is also recognised, from a public interest perspective, as a mechanism to vindicate the legal, constitutional, EU and ECHR rights of an alleged victim of crime, the strengthening of such rights has been a feature of recent legal developments, including the introduction of Directive 2012/29/EU of the European Parliament and of the Council of 25th October, 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (Victims Directive). Such rights include the positive rights arising from the State's "obligation to conduct an effective prosecution" (*Söderman v Sweden* (Application No. 5786/08) European Court of Human Rights, 12th November, 2013, para.

88) as was observed by the Humphreys J. in *Nulty v D.P.P.* [2015] I.E.H.C. 758 at para. 33.

80. In reaching his conclusion, the High Court judge erred in failing to accord sufficient weight to the constitutional norm which provides the appropriate form for the determination of guilt or innocence in serious criminal cases as being a trial by judge and jury.

81. In light of the aforesaid, to allow a criminal trial to be de-railed unnecessarily by granting an order of prohibition, as I am satisfied arose in the instant case, when the basis for such an application is insufficient or vague and where the respondent has failed to demonstrate in a specific manner – as the law requires – how exactly each of the unavailable witnesses would have obviated the risk of prejudice or an unfair trial ran counter to the legal authorities and was erroneous.

82. All such issues can be dealt with within the trial.

The trial judge is best placed to make an assessment

83. The High Court judge erred in failing to have due regard to the fact that in a trial concerning sexual assault the burden of proof rests on the prosecution and the oral testimony of the relevant witnesses and complainants will be comprehensively stress tested in cross-examination. The trial judge has a far greater opportunity to consider the testimony of the witnesses and to make directions or orders as he sees fit. This offers a far superior process to an exercise carried out in the context of judicial review, relying merely on written statements, frequently averments and affidavits sworn inevitably by parties, with no direct knowledge of the matters or incidents alleged.

84. The prosecution has available to it a full panoply of remedies, applications, submissions, arguments and requisitions to exercise as considered appropriate depending on how the run of the evidence goes. The trial judge is in a position to make such rulings as are appropriate and grant directions to protect the fairness of the trial and ensure its integrity and that it is conducted fairly. The trial judge's position is unique as the central party charged with upholding the relevant rights, and in particular the entitlement of the accused person to a fair trial which he or she can balance with regard to the rights and interests of the other stakeholders, including the public interest that serious crime be prosecuted and the entitlement of complainants who assert that they are victims of crime to have recourse to the courts where there is reasonable evidence and the trial can be fairly conducted as was stated by Charleton J. in *K. v. His Honour Judge Carroll Moran and Others* [2010] I.E.H.C. 23.

85. The High Court judge failed to give adequate weight to the presumption of innocence which governs the trial and imposes the burden of proof beyond all reasonable doubt upon the prosecution. There are extensive inbuilt protections in the criminal trial process which are available to aid the respondent and his legal team, and which may result in an appropriate case in some or all of the counts not going to the jury and the requirement in law that the jury be satisfied beyond all reasonable doubt as to give before convicting on any one or more count.

86. I am satisfied that on balance, whilst the desire of said judge to achieve justice is understandable and he expressed the noble concern that he "cannot simply abdicate the difficult decision to the trial judge", in fact, the approach adopted had the undoubted unintended consequence of usurping the established standard, resulting in the halting of a trial in circumstances where the respondent had failed to establish manifest, unavoidable prejudice of such significance as to give rise to a real risk of an unfair trial in all the circumstances of the case.

Time Limit

87. The High Court judge erred in his approach at para. 40 of the judgment where he stated: -

> "It does not seem to me to be consistent with the presumption of innocence to expect the applicant and/or his solicitor to explain on affidavit why it is that the belatedly disclosed material is relevant. To require an accused person to do so may well have the undesirable consequence of requiring him to disclose aspects of his proposed defence of the criminal proceedings."

88. It is incumbent on the applicant who seeks prohibition of a trial to engage with the evidence and the facts to demonstrate with clarity why prohibition of his trial should lie or why time should be extended for the making of such an application and this respondent did neither.

89. Contrary to the High Court judge's conclusions the supplemental statement of the complainants' mother was not demonstrated by the respondent to be a sufficiently significant event as warranted resetting the clock for the purposes of seeking judicial review. In several respects the later statement merely amplified her earlier statement. There was insufficient evidence put before the court by the respondent to warrant it being treated as pivotal to the judge's granting of an order of prohibition. It was incumbent on the respondent to engage with the facts and demonstrate why the statement *per se* constituted good and sufficient reason for the extension of time such that the legal test under O. 84 r. 21 is met.

90. There is a dispute between the parties as to whether the decision in *Coton v DPP* [2015] I.E.H.C. 302 is correct or whether it conflicts with the earlier Supreme Court decision in in *C.C. v. Ireland* [2006] 4 I.R. 1, which appears to have indicated that the time limit for seeking judicial review runs from the date of the indictment rather than the date of the return for trial. However, since the substantive basis on which prohibition was granted has been dealt with above it is not necessary to determine whether the two decisions can be harmoniously construed. It is noteworthy that in *Coton* Kearns P. pointed out that considerable changes had been effected to O. 84 and that there was considerably less tolerance of delay than had been the case 10 years before.

91. For the foregoing reasons, I would allow the appeal and set aside the orders of the High Court.