No Redaction Needed

APPROVED

THE COURT OF APPEAL

JUDICIAL REVIEW

Court of Appeal Record No. 2022/134

High Court Record No. 2019/229JR

Birmingham P.
Woulfe J.
McCarthy J.

Between

W.C.

Respondent/Applicant

-and-

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

Appellant/Respondent

JUDGMENT of Mr. Justice Woulfe delivered on the 12th day of July, 2023

Introduction

1. This is an appeal by the Director of Public Prosecutions ("the respondent") against an order of the High Court in judicial review proceedings staying the prosecution of certain charges against W.C. ("the applicant") in the Dublin Circuit Court, unless the complainant disclosed certain specified information and material within four months of the High Court judgment dated the 7th April, 2022.
2. The charges the subject of this prosecution are eight charges of indecent assault contrary to common law as provided for by s.6 of the Criminal Law Amendment Act 1935, and ten charges of indecent assault contrary to common law as provided for by s.10 of the Criminal Law (Rape) Act 1981. These charges relate to a period of time between the 1st February, 1975 and the 1st June, 1984, *i.e.* a period of time ranging from just over 48 years ago to just under 39 years ago. At the time the complainant was aged between 4 and 14, and the applicant was aged between 20 and 29.
3. The applicant denies each and every allegation made against him and maintains that he is innocent of all the offences charged.

The Factual Background

4. The complainant was born on the 19th May, 1970, and lived with her parents and siblings in north Dublin. In or about June, 2016 she complained to the Gardaí that the applicant, a first cousin, had sexually abused her when she was a child. It appears that a statement of complaint by the complainant commenced on the 23rd June, 2016, and was completed on the 1st August, 2016. On the 5th January, 2017, the applicant attended a Garda station voluntarily to take part in a cautioned interview, during which he denied all the allegations.

5. The applicant was arrested on the 30th March, 2017, and came before the District Court, when he was charged with offences of indecent assault as set out above. Following service of the book of evidence in the District Court on the 4th May, 2017, the applicant was sent forward to the Dublin Circuit Criminal Court for trial and he appeared on several dates thereafter.

6. The complainant's allegations of her sexual abuse by the applicant are set out in her statement contained in the book in evidence. She says in her statement that the first incident of sexual abuse happened in 1975 when herself and her siblings were being minded by the applicant in her family's mobile home or caravan, while her mother was in hospital following the birth of her younger brother. She sets out in her statement further episodes of sexual abuse which she says occurred when the applicant was sleeping in the same bedroom as her in the subsequent family home, after the applicant had moved in following the death of the complainant's mother in April, 1978.

7. The complainant also sets out further episodes of sexual abuse which she says occurred in 1983 – 1984, when the applicant brought her in his car to his flat in a nearby town. The complainant described the flat and drew a sketch of the layout, which was exhibited in the book of evidence.

8. The complainant in her statement refers to the calling of a family meeting at the family home in more recent years, which was attended by the respondent. She says that the applicant was confronted by her and said "I may have fondled you but I didn't do what you are saying". She also refers to subsequently meeting the applicant at the funeral home when his mother died. She described shaking hands with her cousins, but trying to withdraw from doing so with the applicant. She says that the applicant put her in a bear type hug and whispered in her ear as he lifted her slightly off the ground "I'm sorry".

She says that nobody else would have heard him whisper this to her, and that she knew he was apologising for what he had done to her years earlier.

9. The book of evidence also contained statements of evidence from other proposed witnesses for the prosecution. In her statement the complainant's elder sister says that she knows that the complainant feared the applicant when she was small. She recalls that, not long after their mother died, the applicant used to come to their family home looking to take the complainant out for a spin in his car. She remembers that when he would call, the complainant would say that she did not want to go but she never said why and always ended up having to go. She also recalled an occasion in more recent years, when their granddad passed away and the applicant offered herself and the complainant a lift, but the complainant refused point blank to go in the applicant's car. She says that she could not understand why the complainant refused, and the complainant broke down and told her that the applicant had abused her as a child, which she took to mean had sexually abused her.

10. In his statement the complainant's younger brother remembers the applicant taking the complainant and himself for an outing in his car. He recalls that the complainant was upset and fretting the whole time while they were travelling. He says that they went to a small cottage some distance away, and the applicant brought them in, and he remembers that the applicant brought the complainant into a small room and locked the door, leaving him outside this room. The next thing he remembers is hearing the complainant screaming and crying, and himself kicking the door trying to get to the complainant to see what was going on. He recalls the applicant coming out of the room very angrily, and lifting him up and putting him out the window onto the roadway.

11. In her statement the complainant's stepmother describes calling family members to a meeting at the family home in or about 2001. She remembers asking the applicant if he

had abused the complainant, and she says he replied "well I did fondle her". She then told the applicant to leave their family home and never to come back.

12. In his statement the complainant's elder brother recalls one day when they were young, and seeing his sister, the complainant, sitting in the front passenger seat of the applicant's car, which was parked in the driveway of their family home. He remembers that the complainant shouted over to him "John, John, no, no,", but he did not realise what was going on or that anything was wrong.

13. The book of evidence also contained a memo of the voluntary interview which the applicant took part in with the Gardaí. The memo records the applicant denying that the complainant was ever in his flat in the nearby town, but stating that she was outside his "house" in the summer of 1983. It also records him recollecting a family meeting when the complainant said that he sexually assaulted her. He stated that he was cornered by them, but he denied saying anything at the meeting.

14. Having examined the book of evidence, and the nature of the complaints made by the complainant, the applicant's solicitor wrote to the applicant by letter dated the 7th June, 2017, seeking certain specific items of disclosure. In particular, the letter sought the following:

(i) Copies of all unredacted statements taken during the course of this investigation, including unredacted versions of all statements in the book of evidence;

(ii) In relation to the complainant, any other complaints made by her to An Garda Siochana or to any other person concerning any allegations of sexual/physical abuse;

(iii) The complainant's medical records from 1978 onwards; and

(iv) All notes, records or reports of any counselling of any nature received by the complainant.

15. By letter dated the 21st February, 2018, the respondent made disclosure of certain items, including the unredacted version of the statement of the complainant in the book of evidence. In the unredacted version the complainant alleged that, in the past, she had been subjected to a number of other sexual assaults which can be summarised as follows:

(i) She alleged that two young boys had attempted to sexually assault her in a laneway near her home on some occasion before her mother died in April, 1978;

(ii) She alleged that she had been raped while she was living in England, probably in or about 1997;

(iii) She alleged that an uncle of her's, T.F., had sexually assaulted her;

(iv) She alleged that another unnamed uncle had sexually assaulted her;

(v) She alleged that a neighbour had sexually assaulted her; and

(vi) She alleged that two family members had sexually assaulted her.

16. As regards the allegation of sexual abuse by an uncle, T.F., it should be noted that T.F. was prosecuted in the Dublin Circuit Court on twenty sexual offence counts in respect of five complainants. He was prosecuted on three counts of indecent assault in respect of the complainant herein. He received a sentence of five years imprisonment overall on a plea of guilty, with some counts being taken into consideration.

17. Following receipt of the unredacted statement of the complainant, the applicant's solicitor sent a further letter seeking disclosure to the applicant dated the 29th May, 2018. This letter sought immediate disclosure of all outstanding material previously requested that had not as yet been disclosed. It went on to note the other allegations of sexual/physical abuse made by the complainant in her redacted statement, and requested disclosure of all material regarding the investigation and prosecution of all of these other allegations, and in particular:

(i) The names and addresses of the two young persons who she alleges attempted to sexually assault her in a laneway near her home on some occasion before the complainant's mother died;

(ii) All material and full information in relation to an allegation made by the complainant that she was raped while residing in England;

(iii) Details of including all material, documents, notes, statements in relation to the investigation of and prosecution of allegations of sexual abuse made by the complainant against another unnamed uncle as referred to in her unredacted statement.

(iv) Details of including all material, documents, notes, statements in relation to the investigation of and prosecution of allegations of sexual abuse made by the complainant against a neighbour as contained in her unredacted statement; and

(v) Details of including all material, documents, notes, statements in relation to the investigation of and prosecution of allegations of sexual abuse made by the complainant against two family members as contained in her unredacted statement.

18. Further correspondence ensued between the parties in relation to the outstanding disclosure, and the matter was listed for mention in the Circuit Criminal Court on a number of occasions in relation to that issue, in advance of the trial date which had been set for the 6th November, 2018.

19. The respondent made further disclosure by letter dated the 26th October, 2018, including disclosure of some of the complainant's medical records and three further statements made by the complainant. In her statement dated the 17th September, 2018, the complainant stated that in relation to the reference she made in her original statement to

the other people who abused her, she wanted to reiterate that she did not want to name any of these people or disclose any information about what happened.

20. When the matter was listed for trial on the 6th November, 2018, the matter could not proceed as one witness listed in the book of evidence was not available, and this witness was required by the applicant. The matter was adjourned to fix a new trial date, but no new date was fixed before these judicial review proceedings were commenced in May, 2019.

21. In the meantime, the applicant's solicitor wrote again to the respondent regarding disclosure by letter dated the 11th December, 2018. He again sought disclosure of information in relation to the other allegations within the complainant's unredacted statement. In addition, he stated that it now appeared from the medical/psychological records disclosed that the complainant had made a number of other complaints of sexual abuse against a number of other persons, including her sister. Counsel had advised that the applicant could not get a fair trial and a trial in due course of law if the names of the other persons and details of what the complainant alleges against them were not disclosed.

22. Further correspondence ensued, and the complainant's position was ultimately confirmed in a letter from the respondent dated the 29th April, 2019, as follows:

"We can now confirm that the complainant...does not wish to name or give any further details in relation to a number of persons whom she has alleged sexually assaulted her in the past."

These Judicial Review Proceedings

23. The grounds set out in the applicant's statement grounding his application for judicial review dated the 20th May, 2019, can be summarised as follows. The complainant's

refusal to disclose the names of the persons she alleges that sexually abused her in the past and details of the alleged abuse violate the applicant's right to trial to in due course of law, prejudices his chance of obtaining a fair trial, prejudices him in the preparation and presentation of his defence, and deprives him the opportunity of collecting, collating and adducing collateral and rebuttal evidence at his trial. Further, the delay in the commencement of these criminal proceedings violates the applicant's right to a trial with reasonable expedition, and to a trial in due process of law. The effect of the delay prejudices the applicant's chance of obtaining a fair trial, and prejudices him in the preparation and presentation of his defence.

24. On 20th May, 2019, the applicant applied to the High Court for leave to apply for judicial review. This was granted by Noonan J., who ordered that the applicant do have leave to apply, *inter alia*, for:

(i) An order prohibiting the further prosecution of the applicant on foot of the charges set out at para. 2 above;

(ii) An injunction restraining the respondent from taking any further steps in the criminal proceedings then before the Dublin Circuit Criminal Court;

(iii) An interim and/or interlocutory injunction and/or stay preventing the further prosecution of the said charges until further order of this Honourable Court and/or the determination of this action.

25. A statement of opposition was filed by the respondent on the 9th March, 2020. The grounds of opposition can be summarised as follows. The respondent contends that the complainant may be cross-examined in respect of the previous incidents of sexual abuse alleged by her during any trial of the charges against the applicant, with a view to testing the credibility of her allegations against the applicant. There is therefore no risk of unfairness in the trial process arising from the fact that the complainant has not named

the alleged perpetrators, and does not wish to make a statement of complaint in respect of other events, in circumstances where these matters may be pursued in cross-examination by the applicant's legal advisers. The applicant has failed to demonstrate a real and unavoidable risk of unfairness arising from the fact that his solicitor has been deprived of an opportunity to seek out and interview individuals, against whom no formal complaint has been made and no charges have been preferred, with a view to establishing the credibility of the complainant's allegations of indecent assault occurring when she was a child.

26. As regards the delay ground, the respondent denies that there has been any inordinate delay that would threaten the applicant's right to a fair trial. The applicant does not identify in what way he maintains he was specifically prejudiced by any alleged delay. The delay issue and any possible unfairness arising for the applicant are more appropriately matters for the trial judge to determine.

27. In his submissions to the Court below the applicant relied principally upon the decision of this Court in *Vattekaden v. DPP* [2016] IECA 205 ("*Vattekaden*"), and it is therefore necessary to consider this authority in some detail. In that case the complainant alleged in August, 2011 that in the course of receiving a massage from the applicant, Mr. Vattekaden, he indecently touched her vagina. A few days later she made a complaint to An Garda Siochána who investigated the complaint. The applicant was subsequently charged with a single count of sexual assault, contrary to s.2 of the Criminal Law (Rape) (Amendment) Act 1990 (as amended by s.37 of the Sex Offenders Act 2001).

28. As with the current case, issues arose around disclosure that may have assisted the accused in his defence. The complainant in statements to the Gardaí had alleged two prior incidents of sexual assault when she was a child. The first was alleged to have occurred in 1993 when she was 11 years of age, when a man who was a member of her

extended family was said to have rubbed her genital area and tried to pull down her pyjama bottoms and underwear while she was asleep. The complainant said that she did not tell anybody at the time.

29. The second instance alleged was that in 1999, when she was 16, she was raped in the stairwell of a particular building by a young male whom she knew, having consumed a large amount of vodka and some cannabis. She said that she had reported this incident to the Rape Crisis Centre within a week of it allegedly occurring.

30. In a supplementary statement in November 2013, the complainant said that she did not tell the investigating Gardaí about these incidents previously because she did not feel they were relevant to the case. Neither of the two prior alleged incidents had been the subject of any complaint to the Gardaí. When questioned further by the Gardaí about these matters, the complainant indicated that she did not wish to identify the men concerned nor did she wish to make any formal complaint in that regard.

31. The applicant's legal team sought details of the names and contact details of the two men involved so that they could be interviewed. Further disclosure was also sought in respect of any other counselling notes that might exist, including from the Rape Crisis Centre. The Director's office replied on the 15th January 2014, stating that the Gardaí were not pursuing efforts to identify the persons allegedly involved in the prior incidents. The letter also stated that the Director had been advised by An Garda Siochana that, as the complainant was making no formal complaint about these prior incidents, the Gardaí had no grounds to institute a criminal investigation.

32. The applicant's solicitor responded to this correspondence on the 27th February, 2014 stating that in the circumstances that the applicant could not get a fair trial and called upon the Director to abandon the prosecution. On the 27th May, 2014, the Director

confirmed that the prosecution would be proceeding. An application for leave to apply for judicial review was then made in the High Court and was duly granted.

33. The High Court refused the application for judicial review. Noonan J. saw no unfairness by reason of the non-disclosure of the identity of the persons who had allegedly abused the complainant on two occasions in the past which was not capable of being addressed either in the cross-examination of the complainant or, as the case might be, by way of appropriate rulings and directions from the trial judge. In his judgment he stated as follows:

"It is clear therefore that for the applicant to succeed in this case, he must establish that the refusal of the complainant to identify those who abused her as a child is an exceptional circumstance that gives rise to a real risk of an unfair trial. In dealing with this, the applicant says that if the names were made available to him, his solicitors would be able to interview the individuals concerned and this in turn might result in information coming to light which could potentially undermine the complainant's credibility. Underlying this assertion is the assumption that the individuals in question would agree to be interviewed at all by the applicant's solicitors in the first instance. Having regard to the fact that the complainant never made any formal complaint to the Gardaí about these instances which occurred many years ago, it must be open to considerable doubt as to whether consent would be forthcoming to such interviews. Even if it were, one must assume that the interviewees are likely to deny any involvement in the matters in issue. If they admitted involvement, that could clearly not benefit the applicant. Assuming however a denial, it is not immediately obvious to what extent that will facilitate cross-examination of the complainant as to credit any more than, for example, suggesting that if the allegations were true, the applicant would be

likely to have reported them to the Gardaí, a suggestion the applicant is perfectly free to make as matters stand.

The applicant submits that were it to transpire from interviewing these individuals that, say for the sake of argument, one or other or both were in a position to prove conclusively that they could not have abused the complainant, this would be powerful evidence to put before a jury. It seems to me however that this is moving the case into the realms of total speculation and into the area of remote, theoretical or fanciful possibility of the kind that the Supreme Court expressly found in both *Dunne* and *Savage* could not give rise to a right to prohibition. Further, in my view the applicant has not sought to engage with the facts of the prosecution case as they arise here. There is considerable evidence in the case beyond a mere or bare assertion by the complainant of an assault having taking place. I have alluded to this already. Nor is this a case in which there has been a failure to make disclosure by the prosecution. This is not alleged and, accordingly, the line of authority on failures to make disclosure is of limited relevance. There is a clear public right in pursuing a prosecution and I am not entitled to ignore the potentially significant evidence in this case beyond that of the complainant alone.

Conclusion

Accordingly, I am satisfied that the applicant has not discharged the onus of establishing that there is a real risk of an unfair trial or less still that there is anything particularly exceptional about the facts of this case that would warrant the intervention of this court. It seems to me that the applicant has ample material available to him with which to conduct a meaningful cross-examination which is unlikely to be inhibited to any significant degree by the non-availability of the names of the alleged perpetrators of the

abuse. Even if that could be said to give rise to any unfairness, I can see no reason why that could not be adequately dealt with in an appropriate fashion by the trial judge."

34. The Court of Appeal allowed the appeal brought by the applicant. In his judgment for the Court, Hogan J. described the issue presented on appeal as follows:

> "Where an accused is charged with sexual assault and the evidence discloses that the complainant previously made similar allegations against unnamed third parties in the past but has never made a formal complaint to the Gardaí in respect of those matters, is he entitled to be informed of the identity of the alleged perpetrators of these offences in advance of trial and, in default, is he entitled to have the trial prohibited?"

35. He then referred to the judgment of the High Court, and in particular Noonan J's view that there was "considerable evidence" in the case beyond simply an assertion by the complainant that she was indecently assaulted, and stated that he could not entirely share that view. The three items of evidence to which Noonan J. alluded were described by him as follows:

> ".... she telephoned the applicant to advise him that she was going to report the matter to the Gardaí and he offered her money not to do so. When asked about this, the applicant appears to have confirmed the complainant's version of events. Further, the applicant appears to have admitted that when he sat beside the [complainant] outside the Centra shop, he was crying. It is also alleged by the prosecution that the applicant furnished no satisfactory explanation for the apparent attempt to conceal the complainant's telephone number from his wife by saving it under 'Jason'."

36. Hogan J. analysed these three other items of evidence in some detail and concluded as follows:

"Viewed as a whole, therefore, it would be hard to say that the other evidence (as to alleged payment, crying etc) was anything other than equivocal. In these circumstances, it is clear that the prosecution turns on the respective credibility of the complainant and the applicant. This is an essential and decisive consideration from which the rest of this judgment proceeds. It is unnecessary to examine what the situation might have been had there been other evidence relevant to the guilt of the accused."

37. Hogan J. noted how the right to cross-examine a witness in a criminal trial is at the heart of the constitutional guarantee in Article 38.1 of the Constitution to a trial in due course of law. He cited the judgments of Hardiman J. in cases such as *Maguire v Ardagh* [2002] 1 I.R. 385, 705-707 and *O'Callaghan v Mahon* [2006] 2 I.R. 32 as laying emphasis on the fact that cross-examination by reference to prior conduct and prior inconsistent statements is often the only means of undermining the credibility of an otherwise plausible witness.

38. Hogan J. cited the statement in McGrath, *Evidence* (2nd. Ed.) at 144 that "effective cross-examination depends on the availability of materials to challenge a witness's account and credibility", and noted how other Supreme Court decisions have explored other ancillary dimensions of the right to cross-examine, often in contexts where complainants in sexual cases have refused to make disclosure or otherwise cooperate with inquiries made by the legal team for the defence. He referred to *J.F. v. Director of Public Prosecutions* [2005] 2 I.R. 174, where the complainant had declined to allow himself to be interviewed by the psychologist nominated by the accused, and the Supreme Court ruled that the complainant's approach effectively negated the accused's right to cross-examination.

39. Hogan J. also referred to the Supreme Court decision in *P.G. v. Director of Public Prosecutions* [2007] 3 I.R. 39 ("P.G."), where an issue arose as to whether the applicant was entitled to have access to notes taken when the complainant attended a counsellor/therapist. Fennelly J. drew attention to the fact that it is the fundamental obligation of a trial judge to ensure that a trial is fair. He agreed with the respondent's submission that matters of disclosure are within the province of the trial judge. They are not matters for judicial review except to the extent that an accused person can show that, having taken all reasonable steps to obtain disclosure, necessary material is being withheld from him to such an extent as to give rise to a real risk of an unfair trial.

40. Hogan J. felt that there could be no question but that the accused had taken all reasonable steps to obtain disclosure, so the first of the above three conditions articulated by Fennelly J. had been satisfied. He next examined whether the second and third conditions had been satisfied. In doing so he acknowledged that the question of whether the complainant had previously made allegations of a sexual nature is essentially collateral to the question at issue in the case at hand, namely, whether the applicant indecently touched the complainant. The general rule was that (subject to certain exceptions) the cross-examiner was bound by the witness's answer to the collateral question, and that rebuttal evidence to contradict such an answer was not in general admissible. There was, however, considerable evidence to suggest that the collateral questions rule had been relaxed in sexual cases where the only issue is either consent or fabrication, precisely because in such cases issues of credibility are critical. Hogan J. felt that it was, moreover, in practice often the case that it was only through cross-examination as to credit in relation to previous statements that the credibility of the witness could be effectively impeached.

41. In *R. v. Funderburk* [1990] 1 W.L.R. 587, the accused was convicted of sexual intercourse with a thirteen-year-old girl. The prosecution's case was that the complainant had no prior sexual experience. The defence case was that the complainant had had prior sexual experience with other men, the details of which she had deployed to make allegations in the present case. The trial judge refused to allow the accused to put these questions in cross-examination.

42. The English Court of Appeal held that the trial judge had been wrong to disallow these questions. Henry J. first acknowledged the difficulties with the traditional collateral questions rule, especially in sexual cases where credibility is at the heart of the case. He stated that a practical distinction must be drawn between questions going to an issue before the court and questions merely going either to the credibility of the witness or to facts that are merely collateral. He later added as follows (at 598):

> "If a fact is not collateral then clearly you can (adduce) evidence to contradict it, but the so-called test is silent on how you decide whether that fact is collateral. The utility of the test may lie in the fact that the answer is an instinctive one based on the prosecutor's and the court's sense of fair play rather than any philosophic or analytic process."

43. Applying that test the Court concluded that questions as to (alleged) previous loss of virginity on the part of the complainant should have been allowed because, as Henry J. put it (at 598):

> "Otherwise, there would be the danger that the jury would make their decision as to credit on an account of the original incident in which the most emotive, memorable and potentially persuasive fact was, to the knowledge of all in the case save the jury, potentially false."

44. Hogan J. held that it would be inappropriate for the Court to determine at that juncture whether, in all the circumstances, any such evidence as to previous complaints would be permitted in that case. This would ultimately be a matter for the trial judge to determine in the event that a trial were to go ahead. None of this meant, however, that the failure on the part of the complainant to disclose the identity of the persons against whom the previous complaints were directed did not have implications for the applicant's right of effective cross-examination. Without this information in advance the applicant could not hope to have any effective opportunity of contradicting the complainant's account of these earlier alleged incidents from 1993 and 1999 or which might otherwise impeach her credibility as a witness, even if the admissibility of such evidence concerning third parties would ultimately be a matter for the trial judge.

45. Hogan J. accepted that it was true that, as Fennelly J. indicated in *P.G.*, disclosure issues of this kind are normally best left to the court of trial. He concluded that the present case was, nevertheless, an exceptional case where, applying the *P.G.* test, advance disclosure was necessary. If the present case were to proceed to trial without such disclosure in advance, then the applicant would necessarily be disadvantaged, even if disclosure were later to come in the course of the trial process. If that occurred, then the defence would be entitled to an adjournment to enable appropriate inquiries to be made. In that event, it is quite likely that the original trial would have to be aborted and a fresh trial directed. Hogan J. found it hard to see what advantage would accrue to any party in those circumstances when the answer (one way or the other) could be obtained in advance, thus obviating these unnecessary complications. If, on the other hand, the complainant were to refuse to reveal the identity of the persons who were the subject matter of the earlier 1993 and 1999 complaints, Hogan J. found it difficult to see how,

judged by the comments of Fennelly J. in *P.G.* to which he had just referred, the trial judge would have any option but to bring the trial to an end.

46. Accordingly, Hogan J. found himself obliged to conclude that, in the circumstances of the case before him, the applicant's constitutional rights to a trial in due course of law could not be adequately or satisfactorily protected by leaving the matter to the trial judge. He could not agree with the views of Noonan J. that in the particular circumstances of the case this matter could best be left to the court of trial. He stressed again that this was a case which turned almost entirely on the credibility of the complainant and the applicant.

47. As regards the appropriate form of relief, Hogan J. did not think it appropriate at that stage to grant a final order of prohibition. In his view the complainant should first be given the fair opportunity of considering her position in the light of his judgment. Accordingly, he granted an order staying the prosecution of the sexual offence charge against the applicant unless the complainant disclosed the identity of the person or persons who allegedly (i) sexually assaulted her in 1993 and (ii) raped her in 1999. In the event that such information was disclosed to the applicant's solicitor within three months of the date of the judgment, then in those circumstances the stay would be lifted and the prosecution could proceed. In the event, however, that this information was not so disclosed, then the stay on the prosecution would become permanent.

The High Court Judgment

48. In his judgment delivered on the 11th April, 2022, Meenan J. held that the applicant was entitled to an order staying the prosecution of the charges against him unless the complainant disclosed, within four months of his judgment, the requested information and material as set out in para. 14 above.

49. In reaching his decision Meenan J. stated that the question posed by Hogan J. for resolution in *Vattekaden*, and quoted at para. 34 above, was effectively the same question which he had to answer in the present case. He noted that in this case the applicant had again sought certain information for the purposes of cross-examining the complainant with a view to testing her credibility.

50. Meenan J. quoted several passages from the judgment of Hogan J. in *Vattekaden* regarding the crucial importance of the right to cross-examine by a person facing charges, and regarding the issue of previous complaints in the context of the collateral questions rule, as quoted and discussed by me above. He noted the respondent's submission that disclosure of the complainant's references to earlier sexual assaults (including rape) are best left to the trial judge, but he did not think that this dealt with the issue. He cited the statement of Hogan J. in *Vattedaken* that it was difficult to see how the trial judge would have any option but to bring the trial to an end, if the complainant were to refuse to reveal the identity of the persons who are the subject matter of the earlier complaint.

51. It seemed, therefore, to Meenan J. that the issue of disclosure had to be dealt within these judicial review proceedings. He was satisfied that the applicant was entitled to the disclosure of the information which he sought, in advance of the trial. As per Hogan J. in *Vattekaden* he again did not think it appropriate to grant a final order prohibiting the trial, but instead granted an order staying the prosecution as described above.

Grounds of Appeal and Submissions on Appeal

52. The respondent filed a notice of appeal dated the 3rd June, 2022. The two essential grounds of appeal are that the learned trial judge erred in holding that he was bound by the decision of this Court in *Vattekaden* in the circumstances of this case, and

alternatively that the decision in *Vattekaden* is incorrect and should not now be followed by this Court.

53. As regards the first ground, the respondent submits that *Vattekaden* can be distinguished, having regard to the view expressed by Hogan J. in *Vattekaden* (at para. 21) that the other evidence relevant to the guilt of the accused "was anything other than equivocal". She argues that the factual matrix in this case is different in significant ways. In this case there are corroborated admissions by the applicant. There is also material in the applicant's interview which may be described as lies; he denied that the complainant was in his flat, and yet she was able to draw a sketch of it, and her brother recalls being there with them. Furthermore, there is evidence of a complaint to the complainant's sister which is potentially admissible. None of these features are present in *Vattekaden.*

54. As regards the second ground, it is submitted that *Vattekaden* was decided in error and while an appellate court would normally be reluctant to depart from its own previous decision (as per *Mogul of Ireland v. Tipperary (NR) County Council* [1976] I.R. 260), it is free to do so in cases of error.

55. The respondent submits that the decision in *Vattekaden* does not give sufficient recognition for the primacy of the trial judge, who will have the benefit of seeing the evidence unfold live and can assess the impact of the missing evidence in the context of the evidence as a whole. As this case demonstrates, each case falls to be considered in its own factual context. The applicant must show that in the context of the case as it will unfold at trial, there is a real risk of an unfair trial that cannot be ameliorated by appropriate directions on the part of the trial judge. The respondent submits that this has not been demonstrated to be so in this case.

56. The applicant submits that the respondent has failed to distinguish the facts of this case from *Vattekaden*, and failed to demonstrate that the decision in *Vattekaden* is erroneous. On the contrary, it is submitted that the *Vattekaden* precedent is good law and allowed the learned trial judge to reach a fair decision that ensured a trial in due course of law, while also taking cognisance of the rights of the complainant.

57. As regards departing from *Vattekaden*, the applicant relies upon the Supreme Court decision in *D.H. v. Groarke* [2002] 3 I.R. 522, where Keane C.J. referred to the "high threshold" which must be reached before a court departs from one of its own previous decisions. He stated that it would no doubt be possible for the Court to take a different view than that arrived at by the Court in an earlier case, but it most certainly could not be said that the earlier decision was "clearly wrong" or that that there were "compelling reasons" for treating it as one of those exceptional cases in which the Court would depart from the generally applicable principle of *stare decisis*. The applicant submits that the respondent has failed to reach the necessary high threshold to justify this Court departing from *Vattekaden*.

Discussion

58. The first issue arising, in my opinion, is whether the decision in *Vattekaden* creates a bright line rule requiring disclosure of the type of information requested by the applicant in advance of any trial, which rule is on the face of it applicable in the present case, or whether the decision in *Vattekaden* can be distinguished.

59. I am satisfied that *Vattekaden* can be distinguished, for the following reasons. Firstly, it is important to recall the caveats or qualifications which Hogan J. himself expressly attached to his own decision in *Vattekaden*. He described the case as "an exceptional case" where advance disclosure was necessary, *i.e.* as being an exception to the

principle that disclosure issues are normally best left to the trial judge who has the fundamental obligation to ensure that a trial is fair.

60. Hogan J. stressed that *Vattekaden* was a case which he felt turned almost entirely on the credibility of the complainant and the applicant, in the absence of other evidence (other than what he viewed as equivocal evidence) relevant to the guilt of the accused, and stated that it was unnecessary to examine what the situation might have been had there been such other evidence. In stating his conclusions (at para. 50), Hogan J. did so while twice referring to the particular circumstances of the case before him.

61. Secondly, in my opinion there are important points of distinction between the factual matrix in *Vattekaden* and that in the present case. The alleged offence in *Vattekaden* arose out of a once-off incident which occurred in the context of a massage, where perhaps there was a greater potential for misunderstanding or confusion, whereas in this case what is alleged is a pattern of abusive behaviour over a period of almost ten years.

62. In the present case, unlike what Hogan J. felt was the situation in *Vattekaden*, there is considerable evidence beyond simply an assertion by the complainant that she was indecently assaulted, which evidence is set out earlier in this judgment. This includes evidence of an alleged admission by the applicant, which is disputed by him, but there is also other evidence from the complainant's sister which a jury could potentially treat as corroboration. There is also the denial by the applicant during the voluntary interview that the complainant was ever in his flat, yet the complainant was able to draw a sketch of the flat layout, and her brother recalls the applicant bringing them to a property where some incident of an untoward kind occurred. All of this material is capable of being considered by a jury.

63. I am therefore of the view that *Vattekaden* can be distinguished, and that it is not necessary to reach a decision on the respondent's alternative submission that it should now be departed from by this Court.

64. In circumstances where the decision of *Vattekaden* is not directly applicable, I would not favour extending the approach adopted in that case to the particular circumstances of the present case.

65. The principles applicable to applications to prohibit a criminal trial were helpfully summarised by Charleton J. in *K. v. Moran* [2010] IEHC 23, where he stated, *inter alia*, as follows (at para. 9):

"(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 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 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 506-507.

...

(8) Previous cases, insofar as they refer to 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 have rendered it unfair or unjust to put him on trial, are to be adjudicated in the light of all the circumstances of the case: *H. v. DPP* [2006] 3 I.R. 575 at 621."

66. Fennelly J. in *P.G.* spoke about the primacy of the trial judge in ensuring that a trial is fair, in the context of an absence of disclosure. He stated as follows (at 55):

"This Court...can, however, draw attention to the fact that it is the fundamental obligation of a trial judge to ensure that a trial is fair. There is no reason whatever to assume that the trial judge...will not address the issues raised and rule upon them appropriately.

...

If the matter is not resolved..., it will be a matter for the trial judge to deal with it. Presumably the complainant can be asked about it in his evidence. The trial judge must be and is in law bound to arrange the progress of the trial so as to render justice and to guarantee fair procedures to all parties, especially the accused. I agree with the submission of the respondent that matters of disclosure are within the province of the trial judge. They are not matters for judicial review except to the extent that an accused person can show that, having taken all reasonable steps to obtain disclosure, necessary material is being withheld from him to such an extent as to give rise to a real risk of an unfair trial."

67. Applying those principles to the circumstances of the present case, I am not satisfied that the applicant has discharged the onus of proving that necessary material has been withheld from him to such an extent as would give rise to a real risk of an unfair trial. At the trial the applicant's legal team may seek to ask the complainant for details of the information previously sought in advance of the trial. If so, and if the complainant continues to refuse to reveal that information (as has been indicated by the respondent will happen), then in my opinion (as per Fennelly J. in *P.G.*) there is no reason whatever to assume that the trial judge will not address the issues arising and rule upon them appropriately, against the backdrop of his or her fundamental obligation to ensure that a trial is fair.

68. I might observe that before making any ruling the trial judge may have to consider, on the one hand, whether the applicant would necessarily be disadvantaged, and the extent of any such potential disadvantage, by any such refusal by the complainant to disclose the information sought. The trial judge may also have to consider, on the other hand, other possible countervailing factors such as any possible privacy rights of the complainant, and the possible use of which the applicant might make of the information sought, having regard to possible issues around the admissibility of evidence such as the collateral questions rule and questioning as to a complainant's previous sexual history. All of these possible considerations would arise in the context of the actual evidence at the trial.

69. At para. 45 above, I refer to certain observations made by Hogan J. in *Vattekaden* regarding the disclosure issue arising at trial. Hogan J. was of the view that, if at a trial in that case, the complainant were to refuse to reveal the identity of the persons who were the subject matter of the earlier complaints, he found it difficult to see how the trial judge would have any option other than to bring the trial to an end. With respect,

I am of the opinion that this view as expressed by Hogan J. probably goes somewhat too far, and I do not think a trial judge should feel constrained by these observations in considering all of the relevant factors which may arise if called upon to make an appropriate ruling, including the factors set out by me above, in the context of the actual evidence at trial.

70. As regards delay, the applicant acknowledged that our current jurisprudence in this jurisdiction generally favours the issue of delay being dealt with at trial by the trial judge. However, it was submitted that this does not preclude situations where wholly exceptional circumstances arise that would allow a trial to be prohibited, and the applicant relied upon the decision of this Court in *M.S. v. DPP* [2021] IECA 193 ("*M.S.*"). The applicant submitted that the failure of the complainant to disclose relevant material compounded with the delay in this case gives rise to wholly exceptional circumstances that should lead this Court to prohibit the further prosecution of the applicant.

71. In *M.S.,* Kennedy J. emphasised that the test of wholly exceptional circumstances is very much fact specific. Having regard to my conclusions on the disclosure issue as set out above, I am not persuaded that the applicant has established any single exceptional circumstance or any accumulation of factors which would bring this matter into the wholly exceptional category, whereby it would be unfair to put the applicant on trial.

Conclusion

72. Accordingly, I would allow the appeal, set aside the order of the learned trial judge and dismiss the application for judicial review.