THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 564
[Record No. 2020/297 JR]

BETWEEN

J.J.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Mark Heslin delivered on the 3rd day of AUGUST, 2021.

Introduction

1. This case comes before the court in circumstances where the applicant, who is now 80 years of age, seeks to prohibit a criminal trial in respect of 358 allegations of indecent assault, spanning a period of time commencing on 01 May, 1967 and ending on 14 August, 1984. There are four individual complainants whom I will refer to as PM, JM, MJ and AJ. All four complainants are nephews of the applicant. I will presently look closely at the pleadings in this case but, for present purposes, it is sufficient to say that the applicant claims that there has been inordinate and inexcusable delay in the commencement of criminal proceedings against him and he asserts that the delay in the proceedings has given rise to the accumulation of prejudicial circumstances leading to a real danger of an unfair trial taking place. He asserts, *inter alia*, that as a result of delay certain witnesses and documents are no longer available to him and, coupled with his ill-health, there are wholly exceptional circumstances creating a real and present danger of an unfair trial taking place if the criminal proceedings are allowed to continue. This is said to justify the making of an order of prohibition and/or injunction to restrain the respondent from advancing the prosecution any further.

Certain relevant facts

2. The applicant is a retired plasterer and he resides alone on what was previously the family landholding. He has no previous convictions and the only allegations faced by him constitute the allegations contained in the relevant Bill returned to the relevant Circuit Court Criminal sessions.

3. The allegations made by PM (who was born in 1957) span a timeframe commencing 01 May, 1967 and ending 25 May, 1973. These comprise charges 1-119, inclusive. The assaults are alleged to have occurred in the applicant's family home where he resided with his parents. The alleged assaults took the form of inappropriate touching of the anal area advancing to forced anal intercourse and a single incident of oral sex. These alleged assaults are alleged to have occurred in circumstances where PM, who was then resident in the United Kingdom, would travel to Ireland for holidays totalling, PM suggests in his statement, 10 weeks (including 6 weeks during the summer months, 2 weeks at Christmas and 2 weeks at Easter. All alleged assaults are alleged to have occurred in the applicant's bed in his bedroom. PM describes the bedroom as containing one double bed, a wardrobe and a dresser with drawers and he drew a sketch of same. The applicant asserts that he left home in 1959 and resided and worked in the UK until 1972, whereupon he returned to Ireland to take up employment in Dublin, where he worked

until 1978 before returning to the family home. The applicant was 26 years of age in 1967 and asserts that he was living and working in London, returning occasionally to the family home. PM acknowledges that the applicant was working away during that year, in Dublin and London mostly. PM states that the applicant was at home to do the hay and the turf and at Christmas.

4. The allegations made by JM (born 1960) relate to the period commencing 01 May, 1973 and ending on 31 August, 1976. The alleged assaults took place in the applicant's family home, namely, the home he shared with his parents, and in the applicant's car. It is alleged that the assaults took place in the applicant's bed and took the form of touching and masturbation of a mutual nature and escalated to anal penetration. The allegations relating to JM comprise charges 120-341, inclusive. JM is a brother of PM. JM resided, with his family in Great Britain until 1975, before moving to Northern Ireland. JM travelled to and spent summers in the applicant's parents' home. JM suggests that, when he was around eleven or twelve years of age, the applicant had returned from Dublin and was working as a plasterer. JM suggests that the applicant drove 'Mazda' cars and that he was abused by the applicant from the age of eleven or twelve up to the age of sixteen when he was in the relevant family home during the summer months. JM says the abuse occurred once a week every week for the 7 weeks he was there in the summer. JM suggested that the applicant undertook to leave all the property that he would inherit to him. JM suggests that the anal penetration took place once or twice per week from 1971/72 to 1976/77 during the relevant 7-week period. JM suggests that the applicant would allow him to drive the applicant's car and would, while he was driving, touch him inappropriately and ultimately get the car to pull over, get him into the passenger seat and make him masturbate the applicant. JM identifies one of these locations as a layby known locally (by a particular title which I will refer to as the 'SA' carpark). JM has no recollection of being in the relevant locations other than during the summertime but believes he must have been there at Christmas also, because of his involvement with the 'Wren Boys'. JM refers to there being an old house where he was never abused and a new house where he was. JM states that in the new house he would sleep in the visitor's room but when people came, he would sleep in the applicant's bedroom, in his bed, which he describes as uncle J's room. JM recollects there being a small double bed and describes the mattress and blankets. JM suggests that there was pornography under the applicant's pillow and under the mattress and that the applicant would show this to him as a precursor to being abused and anally penetrated. JM said there were no showers or water.

5. The allegations made by MJ (born 1969) relate to charges 343-358, inclusive. The relevant time period in respect of the alleged assaults commences on 01 August, 1977 and concludes on 14 August, 1984. The allegations take the form of inappropriate touching of the complaint's genitals and forced oral penetration. MJ resided with his family in the United Kingdom during the period of the allegations. He recalls going for holidays from 1977 onwards, always for the first 2 weeks in August, when he and his family would stay with his grandparents, being the applicant's parents. MJ suggests that the abuse continued up to 1984 when he was approximately fifteen and that, at this

stage, the applicant lived at home with his parents, being MJ's grandparents. MJ suggests that he would always stay in the applicant's double bed. MJ suggests that there were pornographic magazines on the applicant's bed, three or four of same and that the applicant would show him those magazines. MJ suggests that the applicant would take him for spins and that he would sit on the applicant's lap and that there was a single occasion where the applicant allegedly forced MJ to perform oral sex on him. MJ also alleges that the applicant sought oral sexual gratification from calves which the applicant would look after during the summertime.

6. The allegation made by AJ (born 1967) relates to charge 342. He alleges that on a Saturday night, between 01 August and 14 August, 1980, the applicant climbed into bed with him and was rubbing the applicant's erect penis off him and pushing it into his buttock area. AJ is a brother of MJ and resided, at the relevant time, in the United Kingdom. AJ suggests that he specifically remembers a holiday in 1980, having travelled to Ireland with two named individuals (I will identify as FN and VN). AJ suggests that he would normally stay in his parents' room but on this trip, he stayed in the applicant's bedroom in a single bed, suggesting that there was another bed in the room too. AJ suggests that there were pornographic magazines hidden within a wardrobe and that he looked at them during this time but that the applicant did not show them to him.

7. AJ suggests that he later confronted the applicant at a family funeral which took place in the mid-1990's. It is suggested that this took place in what the applicant believes to be the house of a named family (identified as MD) and that the applicant was asked to leave.

8. The applicant asserts that there was a confrontation in or about 2008/2009 in circumstances where persons including PM and a KM (who is not a complainant in respect of the charges proffered against the applicant) sought to record a conversation with the applicant to suggest that the applicant acknowledged sexual impropriety. The applicant denies acknowledging this.

9. It is not in dispute that the foregoing constitute relevant facts by way of a backdrop to the present application, as is clear from the affidavit sworn by the applicant, on 24th April, 2020 in the context of grounding his application for judicial review. That affidavit includes *inter alia*, a section entitled "*Investigation*" wherein, at paras. 20-31, the applicant makes averments in relation to what occurred between August 2016, when MJ made a recorded DVD of a complaint against the applicant, and 04 February 2020 when the applicant was served with a copy of the relevant Book of Evidence. The same period is addressed in an affidavit sworn on 20 November 2020 by Sergeant Brian Murphy in the context of verifying the respondent's statement of opposition. A synthesis of the various averments, none of which are in dispute, produces the following facts by way of a chronology of relevant matters concerning the investigation.

2016

10. On 26 July, 2016 MJ attended at a police station in the UK and made a video-recorded statement of a complaint against the applicant. This material was forwarded to Sergeant Brian Murphy of An Garda Síochána.

11. On 23 August, 2016, the applicant received the relevant DVD and a transcript of MJ's statement. The complaint was assessed and communications were opened between An Garda Síochána, the police in the United Kingdom and with MJ in order to attempt to arrange a time for gardaí to take a written statement of complaint from MJ.

12. In September 2016, Sergeant Murphy contacted the Garda Domestic Violence and Sexual Assault Unit in Harcourt Square, Dublin, to seek assistance in terms of the correct protocols for interviewing complainants and witnesses resident in another jurisdiction.

13. On 02 October, 2016, Sergeant Murphy made contact with the relevant UK police, via email to Detective Constable ('DC') Julian McGill, in an attempt to arrange a date to take a written statement of complaint from MJ.

14. On 04 November, 2016, Sergeant Murphy received an email from DC Sacha Harvey, Protection of Vulnerable Persons Unit in the UK, informing him that MJ was unavailable to make a complaint until after 14 November, 2016.

15. On 11 November, 2016, Sergeant Murphy received an email from Police Constable ('PC') Sarah Young, Protection of Vulnerable Persons Unit, relating to a possible second complainant, of a similar nature, from AJ, the brother of the initial complainant.

16. On 29 November, 2016, a further complainant, PM, made a statement in a particular garda station.

17. On 30 November, 2016, Sergeant Murphy spoke to MJ and tentative arrangements were made to meet with MJ in early 2017.

18. Over December 2016, Sergeant Murphy had a number of contacts with police officers in the UK in terms of making arrangements to obtain witness statements from the second complainant, AJ.

19. On 29 December, 2016, PM's statement of complaint arrived at the relevant garda station and was received by Sergeant Murphy.

2017

20. On 07 January, 2017, Sergeant Murphy spoke with MJ in relation to attending the United Kingdom to take a formal written statement – follow-up phone calls to formalise arrangements were made on 11 January and on 18 January, 2017.

21. On 11 January, 2017, Sergeant Murphy also spoke with AJ who wished to make a formal complaint regarding being the victim of sexual abuse at the hands of the applicant when he was twelve/thirteen years old while on holidays at the relevant location.

22. On 18 January, 2017, Sergeant Murphy confirmed, via phone call with AJ, that he would be at the relevant location in the UK on 28th or 29th January, 2018 to take formal statements. On the 18 January, 2017, Sergeant Murphy made an application to Sergeant Cook of the relevant police station in the United Kingdom, to use the relevant UK police station for the purposes of taking statements.

23. On 26 January, 2017, Sergeant Murphy made contact with a witness (identified as BM). On the same date, Sergeant Murphy made contact with KM, another witness (and a brother of PM and JM) and arranged to take a statement from KM in March 2017.

24. On 28 January, 2017, written statements of complaints were taken from MJ and AJ in the United Kingdom. This was done by Sergeant Murphy and by Detective Garda Flannery. A witness statement was also taken from AJ on the same date.

25. On 09 February, 2017 an application was made to a "BD" counselling service regarding MJ and AJ.

26. On February 2017, efforts were also made to take a statement from SM and BM and permission was sought to access the "Facebook" evidence on official garda computers.

March 2017

27. As per uncontested averments made by Sergeant Murphy, the following steps were taken in the investigation during March of 2017:-

- 1/3/2017 – conference and jobs book updated. One witness that AJ disclosed to was not available to assist the investigation;
- 2/3/2017 – witness statement taken from SM at a particular garda station;
- 9/3/2017 – witness statement taken from BM at an identified location;
- 10/3/2017 – access to Facebook on garda computers granted by Garda Headquarters;
- 11/3/2017 – statement from witness KM, brother of two complainants. Disclosure made to him in 2002 of a recorded conversation with applicant on microcassette. Handed over this recording to investigating garda at station;
- 18/3/2017 – statement of EM arrives from a particular garda station;
- 18/3/2017 – report requested from LF, Counsellor;
- 19/3/2017 – request for assistance from Superintendent Telecommunications, Garda Headquarters;
- 29/3/2017 – microcassette brought to Detective Garda Noon, Telecommunications, Garda HQ, by Sergeant Murphy to see if the dialogue could be made clearer.

April 2017

28. In light of the uncontested averments made by Sergeant Murphy, the following steps were taken in April 2017:-

- 6/4/2017 – Initial complaint from JM made to Sergeant McGill in a particular garda station;

- 7/4/2017 – reports from LF and JC (of BD Counselling Service) arrive;
- 10/4/2017 – Sergeant Murphy collected original microcassette and copy of attempted noise background clearing recording of microcassette, from Garda HQ, Phoenix Park, Dublin;
- 13/4/2017 – Sergeant Murphy transcribed microcassette dialogue in as far as possible;
- 20/4/2017 – statement of JM arrived at relevant garda station. This is the fourth complainant in the investigation;
- 21/4/2017 – request sent to UK police regarding accessing the postcard handed over by MJ to UK police but unfortunately the postcard had been destroyed;
- 23/4/2017 – statement made by Detective Sergeant Mark Daly;
- 27/4/2017 – case conference held at a named garda station. Updated records of investigation. Enquiries into two witnesses mentioned in statements but transpired both now deceased;
- 27/4/2017 – requested identified Facebook pages from KM and MJ (an identified Facebook page was a Facebook messenger chat page where extended family were organising a reunion when these allegations arose);
- 30/4/2017 – request sent to Sgt. i/c scenes of crime, at a particular Division, to photograph one possible, external crime scene;
- 30/4/2017 – request to the "BD" Counselling Service, for a copy of the notes they took during counselling sessions with AJ and MJ.

May 2017

29. Having regard to the uncontested averments made by Sergeant Murphy, the following steps were taken in May 2017:-

- 9/5/2017 – further statement of complaint taken from JM by Sergeant Murphy at a particular garda station;
- 9/5/2017 – photographs taken of SA carpark by Garda Gibbons from the relevant Divisional scenes of crime;
- 10/5/2017 – update and review at incident room of relevant garda station.

June 2017

30. In light of uncontested averments by Sergeant Murphy, the following steps were taken in June 2017:

- 17/6/2017 – Garda Statements from scenes of crime to investigating member;

- Over June 2017, a number of witnesses were also contacted who did not want to involve themselves in the investigation.

July 2017

31. In light of uncontested averments by Sergeant Murphy and averments made by the applicants, the following steps were taken in July 2017:-

    - 7/7/2017 – initial contact was made with the applicant, where Sergeant Murphy called to his home, cautioned him and informed the applicant about the allegations that had been made concerning him. Sergeant Murphy noted applicant's response in his notebook. Sergeant Murphy phoned a solicitor for the applicant, at his request. Sergeant Murphy requested that the applicant attend for a voluntary interview which the applicant subsequently did;

    - 10/7/2017 – the applicant attended a particular garda station voluntarily for interview;

    - 11/7/2017 – the applicant was arrested at his home on 11 July, 2017, when he indicated that he was no longer willing to voluntarily present for the purposes of interview. The applicant was detained and interviewed at a particular garda station. Fingerprints and photographs were taken;

    - 14/7/2017 – statement made by Inspector Butler;

    - 26/7/2017 – contact was made with the applicant who stated that he was willing to come voluntarily for interview in the future;

    - 31/7/2017 – the applicant provided a voluntary cautioned interview at a particular garda station. The applicant avers that, during the currency of his interview, he vehemently denied all allegations of sexual impropriety with all the complaints and injured parties and that, furthermore, the applicant indicated that at no stage was he ever in a bed on his own with his nephews as alleged in the complaints.

August and September 2017

32. Having regard to the uncontested averments made by Sergeant Murphy, the following steps were taken in August and September 2017:-

    - 2/8/2017 – interview from 3 interviews sent for typing. Review of information and file;

    - 10/8/2017 – update complainants on progress of investigation;

    - 18/8/2017 – statement made by Detective Garda John Flannery;

    - 28/8/2017 – statement made by Sergeant John Boyle;

    - 12/9/2017 – statement made by Gda. Adrian McGlynn.

October 2017

33. In light of uncontested averments made by Sergeant Murphy, the following steps were taken in October 2017:-

- 9/10/2017 – permission was granted by the applicant to photograph the internal and external areas of his house;
- 14/10/2017 – request for previous convictions of complainants to Interpol;
- 18/10/2017 – initial contact with AM, wife of KM, to see if she wished to make a statement;
- 27/10/2017 – arranged to take statement from AM;
- 19/10/2017 – contact with KM to arrange taking of witness statements;
- 26/10/2017 – Sergeant Murphy travelled to a particular county to take witness statement from KM, wife of PM.

November and December 2017

34. Having regard to uncontested averments by Sergeant Murphy, the following steps were taken in November and December 2017.

- 5/11/2017 – statement taken from AM;
- 7/11/2017 – report from TUSLA received;
- 18/12/2017 – conference on case with Superintendent Gately at a particular garda station.

2018

35. In light of uncontested averments made by Sergeant Murphy, in January 2018, the typed statements that were taken were proof-read as against the original handwritten notes and the following steps were also taken during 2018.

36. In February 2018, the information obtained in the investigation up to that point was assessed and collated.

37. In March 2018, the incidents of alleged sexual were entered on the PULSE system.

38. On 23 April, 2018, a case conference was held in a particular garda station. On 26 April, 2018, further contact was made with AM.

39. On 03 May, 2018, AM completed her statement at a particular garda station. On 05 May, 2018, a statement was made by Sergeant Pat Lavelle of a particular garda station. On 17 May, 2018, a further case conference was held in respect of this case at a particular garda station.

40. In June and July, 2018, administrative work relating to the preparation of the Book of Evidence was undertaken. Furthermore, discussions were ongoing in terms of potential charges against the applicant.

41. At the beginning of August 2018, Sergeant Murphy transcribed MJ's DVD of interview with UK police. On 08 August, 2018, a request was made to Garda Fergal Noons to prepare a statement. On 20 August, 2018, the completed investigation file was forwarded to the District Officer, at a particular garda station.

42. On 13 December, 2018, Garda Analysis in Galway began compiling a family tree in an effort to make it easier to understand the links between the applicant and his alleged victims. On 14 December, 2018, the file was returned by the District Officer with recommendations and amendments.

43. Between 14 December and 31 December, 2018, changes to the layout of the file were attended to, as recommended by the District Officer.

2019

44. In light of uncontested averments by Sergeant Murphy, on 13 January, 2019, the completed investigation file was forwarded to the DPP. On 27 January, 2019, victim assessments were completed.

45. On 23 September, 2019, initial direction was given by the DPP. Clarifications were sought in respect of certain elements of the directions.

46. On 04 October, 2019, the original statements of PM (taken on 27 November, 2016), EM (taken on 16 March, 2017) and JM (taken on 06 April, 2019) arrived at a particular garda station, having been taken originally in another station.

47. On 07 October, 2019, Sergeant Murphy received updated directions from the DPP.

48. Between 08 October, 2019 and 12 November, 2019, the 358 charges, the subject of the prosecution, were broken down and printed.

49. On 13 November, 2019, the applicant was charged, at a particular garda station with 358 alleged offences.

50. On 14 November, 2019, the applicant was brought to the District Court where Sergeant Murphy gave evidence of arrest, charge and caution in respect of the charges which are the subject of the prosecution.

2020

51. On 04 February, 2020 the applicant was served with a copy of the Book of Evidence.

52. Having appeared in the District Court on 14 November, 2019, the applicant was ultimately sent forward for trial in a particular Circuit Court on 05 April, 2020.

The present proceedings

53. The applicant's statement of grounds is dated 23 April, 2020 and the initial verifying affidavit was sworn by the applicant's solicitor, Thomas J. Walsh, and filed on 23 April, 2020. Application for leave to seek judicial review was initially made *ex parte* and by order dated 27 April, 2020 the court (McDonald J) directed that the leave application be brought on notice to the State.

54. On 12 May, 2020 the court (Quinn J) granted leave to the applicant to seek judicial review in respect of the reliefs set forth at para. "D" of the applicant's Statement, on the grounds set forth at para. "E" therein. An order was also made pursuant to s.45 of the Courts (Supplemental Provisions) Act, 1961 and/or s.27 of the Civil Law (Miscellaneous Provisions Act) 2008 or otherwise directing the redaction of the pleadings herein and prohibiting the publication of, or broadcast of any, matter relating to the proceedings which would or could identify any non-professional persons referred to.

The relief sought by the applicant

55. As para D of the statement of grounds makes clear, the applicant seeks the following reliefs:-

"*(i) An order of prohibition, or in the alternative an injunction, by way of Judicial Review prohibiting the Respondent, his servants or agents, from further prosecuting the criminal proceedings entitled 'the People (at the suit of the DPP) v. JJ Bill No….12/2020', currently pending before…Circuit Criminal Court and comprising of three hundred and fifty-eight charges.*

(ii) An order of prohibition by way judicial review staying the trial of the applicant as an abusive of process.

(iii) A Declaration that the delay in the criminal proceedings the subject matter of the application for relieve herein and in prosecution them has prejudiced the Applicant generally and specifically in securing a fair trial.

(iv) A Declaration that wholly exceptional circumstances exist in the circumstances of this case which would render it unfair and unjust to put the applicant on trial.

(v) A Declaration that the delay in the criminal proceedings, the subject matter of the application for relief herein, constitutes, and were a trial so to proceed would be:-

(a) An unfair procedure within the meaning of Art. 40.3 of the Constitution;

(b) a trial otherwise than in due course of law as required by Art. 38 of the Constitution;

(c) an unlawful infringement of the applicant's liberty;

(d) a breach of Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

(vi) An interlocutory order staying the criminal proceedings the subject matter of the application for relief herein.

(vii) Such further or other orders as this Honourable Court might deem fit.

(viii) An order providing for costs."

The grounds upon which the relief is claimed

56. At para. E of his statement of grounds, the applicant refers to his age; to the number of charges of indecent assault spanning the period from 01 May 1967 to 14 August 1984; and he refers to the four complainants all being his nephews. He refers to the charges which are currently pending before the relevant Circuit Criminal Court on the relevant Bill number. He also refers to the dates when the complaints were made by each of the complainants. The applicant states that the period between the date of the first allegation and his prospective arraignment amounts to over 53 years. In addition to the foregoing, the applicant pleads the following grounds:-

- The prosecution by the respondent, in commencing the criminal proceedings, constitutes a breach of the applicant's rights to be tried in due course of law pursuant to Art. 38.1 of the Constitution; to be tried with reasonable expedition; to fair procedures and to fairness and justice.

- The delay in commencing the criminal prosecution constitutes inordinate and inexcusable delay and has prejudiced the applicant.

- The prosecution is contrary to Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

- The trial of the applicant at such a remote time from the date of the alleged offences amounts to an abuse of process and gives rise to a real and serious risk of an unfair trial.

- Exceptional and specific circumstances exist which would render it unfair to put the applicant on trial and/or which gives rise to a real and serious risk of an unfair trial resulting. Those circumstances are as follows:

  (a) As it stands, the charges relate to allegations stated to have occurred between 53 to 36 years prior to the statement of grounds;
  (b) the allegations relate to 4 complainants, now in their 50's and 60's, none of who seek to corroborate one another or were witnesses to other alleged abuse;
  (c) witnesses who would have been available to the applicant to give direct evidence of matters arising from the details of the allegations area now deceased, to include alibi evidence to contradict potential background evidence;
  (d) documentary evidence which would have been available to the applicant is unavailable owing to the passage of time.

- By reason of all the facts alluded to in the affidavit of the applicant, he cannot secure a fair trial and/there is a real risk of an unfair trial occurring at this remove in time.

- Such further or other grounds as the Court may permit.

The Book of Evidence

57. The first exhibit to the applicant's affidavit is the Book of Evidence which was served on him on 04 February, 2020. It runs to 217 pages and it comprises the following: -

(1) statement of charges (pp. 3-71);

(2) list of witnesses (pp 72-73);

(3) list of exhibits (p.74);

(4) statement of PM (pp. 75-79);

(5) statement of KM (pp. 80-82);

(6) statement of KM (pp. 83-86);

(7) statement of BM (pp. 87-89);

(8) statement of AM (pp. 90-91);

(9) statement of SM (pp. 92-94);

(10) statement of EM (pp. 95-96);

(11) statement of JM (pp. 97-101);

(12) statement of MJ (pp. 102-104);

(13) statement of WJ (pp. 142-143);

(14) statement of AJ (pp. 144-146);

(15) statement of Sgt. Brian Murphy (pp. 147-153);

(16) statement of Garda Keane (p. 154);

(17) statement of Garda Russell Gibbons (pp. 155-156);

(18) statement of Garda Fergal Noons (p. 157);

(19) statement of Garda Adrian McGlynn (pp. 158-160);

(20) exhibit 1 – sketch of the house drawn by PM (p. 161);

(21) exhibit 4 – sketch of the house in C drawn by MJ (p.162);

(22) exhibit 5 – memo of interview no. 1 with JJ taken on 10/07/2017 at a named garda station, having been cautioned by Sergeant Murphy (pp. 163-178);

(23) exhibit 6 – memo of interview no. 2 with JJ taken on 11/07/2017 at a named garda station, having been cautioned by Sergeant Murphy (pp. 179-187);

(24) memo of interview no. 3 with JJ by Sergeant Murphy dated 11 July, 2017 (p. 188-190, 16:42; and 16:48 hours pp.188-193);

(25) exhibit 8 – memo of interview no. 4 with JJ by D/Garda John Flannery, Sergeant Murphy also present, 31/07/2017 (pp. 194-208);

(26) exhibit 9 – photographs of house (pp. 209-212);

(27) exhibit 10 – photograph of SA carpark (pp. 213-216);

(28) statutory declaration as to service (p. 217).

58. On 08 May, 2020 the applicant swore a supplemental affidavit and it is appropriate to quote *verbatim* the averments made by the applicant from paras. 3 to 6 inclusive:-

3. I say that Sergeant Murphy commenced an investigation in relation to these allegations and his statement is contained in the Book of Evidence, found as statement number 12, starting on page 147. He recites therein that when he called to my home on the 7th July, 2017 and he sets out in his statement that he informed me of the allegations made by my four nephews and that he cautioned me in what I understand to be the ordinary way. He further states that the purpose of the visit was to inform me about the allegations made against me and to arrange a suitable time for a voluntary interview with my consent. He notes and suggests that I stated in his conversation that I had consensual sex with my nephew KM, before K got married and that I may have fondled my nephew PE in the bed but that is all. He records thereafter I blamed my brother P for interfering with me as a child and that he understood this to mean interfering in the sexual context. He further noted that I stated that that is why P's two sons, MJ and AJ, had made allegations against me. He further states that he noted this in his notebook.

4. I say that KM has made no allegation of wrongdoing against me and I further say that PM, one of my nephews and one of the complainants against me is also known as PE. I say that the above matters were subsequently addressed in interview when I attended for a voluntary cautioned interview on the 10th July, 2017.

5. The contents of that interview are to be found in the Book of Evidence commencing at page 163, and the specific suggestion is dealt with on page 173 wherein I acknowledge that when Sergeant Murphy called to my house he cautioned me in what I understand to be the ordinary way. The specifics as set out above were put to me and I replied "I said I may have in my sleep. I don't know what I have done

when I was sleeping". "Question – do you do things in your sleep that you are not aware of?" "I don't know I am asleep". That is the extent to which these matters were further canvassed with me in the interview. I wish to take the opportunity to again confirm as I did throughout my interviews that I never sexually interfered with any of the four complainants as alleged by them at any stage.

6. I intend entering pleas of not guilty to all the allegations made against me, and I further say that while my health continues to deteriorate I have not had an opportunity, despite the best efforts of my solicitor, to attend before appropriate professionals to be comprehensively and completely assessed."

59. Later in this judgment I will look at the evidence concerning the applicant's health in circumstances where his age and ill health, in conjunction with a number of other issues are said to render it necessary, in the context of alleged inordinate and inexcusable delay which is said to have prejudiced the applicant, that this Court prohibit his further prosecution. At this juncture, however, and having regard to the averments made by the applicant in his supplemental affidavit, it is appropriate to note the fact that p.149 of the Book of Evidence (being the third page of Sergeant Murphy's statement of evidence) includes *inter alia*, the following:-

> *"On the 7/7/2017, I called to the home of JJ (the Accused). I informed him of the allegations his 4 nephews had made against him and I cautioned him 'you are not obliged to say anything unless you wish to so, but anything you do say will be taken down in writing and may be given in evidence'. The purpose of this visit was to inform Mr. J about the allegations made against him and possibly arrange a suitable time for a voluntary interview, with his consent. JJ stated in this conversation that he had consensual sex with his nephew KM, before K got married, and that he may have fondled his nephew, PE in the bed but that's all. He blamed his brother P for interfering with him as a child. I understood this as meant as interfering as a sexual nature. He stated that was why P's two sons, MJ and AJ had made such allegations against him. I noted this in my official notebook and arranged for JJ to get access to a solicitor then…".*

60. It is no function of this Court to determine any issue in dispute in the underlying prosecution and nothing I say in this judgment should be interpreted as any such determination. It is, however, appropriate to state that, as a matter of fact, p.149 of the Book of Evidence makes reference to something in the nature of an admission. This is not to determine anything, including whether any admission, if it be so, would be admissible. It does seem to me, however, to be part of the fabric against which the present application is brought, just as is the case with regard to the contents of p.173 of the Book of Evidence to which the applicant makes specific reference in para. 5 of his supplemental affidavit sworn on 08 May, 2020. Page 173, which comprises part of a cautioned interview with the applicant conducted by Sergeant Murphy on 10 July 2017, contains *inter alia*, the following exchange: -

"Q. – Do you recall the first thing I said when I went into your house was a caution 'you are not obliged to say anything unless you wish to do so, but anything you do say will be taken down in writing and may be given in evidence'.

A. – Yes you did.

Q. – In that conversation you said you'd consensual sex with KM before he was married and you may have fondled PE in the bed but that's all.

A. – I said I may have in my sleep. I didn't what know what I'd done when I was sleeping.

Q. – Do you do things in your sleep that you're not aware of?

A. – I don't know I'm asleep."

61. I would emphasise again that this Court is not purporting to determine any issue which arises in respect of the prosecution itself, but it seems fair to say that the response *"I may have in my sleep"* given to a question regarding fondling a complainant in the bed, may be something in the nature of an admission. At this juncture it is also appropriate to note that for someone to state that they may have fondled a complainant in their sleep is inconsistent with an assertion that they never shared a bed with such a complainant. Again, this is to determine nothing in respect of the underlying proceedings, but the fact that the aforementioned comprises part of the Book of Evidence constitutes part of the factual matrix against which this application is brought, indeed, comprises matters which the applicant draws this court's particular attention to, in the manner he has averred.

62. Before leaving the applicant's supplemental affidavit, a number of further comments appear to me to be relevant. At para. 5, the applicant highlights *inter alia* his reply given to Sergeant Murphy in the following terms: *"I said I may have in my sleep. I didn't know what I'd done when I was sleeping"* (per p. 173 of the Book of Evidence). As well as appearing to be inconsistent with the proposition that the applicant never shared a bed with the complainant, PM, it is also inconsistent with the proposition that the applicant never slept in the family home when there were visitors, i.e. when any of the complainants were present. I would emphasise once more that to note the foregoing is merely to look at a feature of the case, which the applicant himself has highlighted from the Book of Evidence. Nothing in this judgment takes away from the fundamentally important presumption of innocence which the applicant enjoys but two points arise in this respect. Firstly, this is not a criminal trial in which the presumption of innocence is of course paramount. Rather it is an application on the civil side seeking to halt a criminal prosecution. Secondly, it seems to me that this court is required to engage, to a sufficient degree, with the evidence before it, including as regards certain issues which would appear to arise in the present case, in the context of the applicant's contention that a fair trial is impossible and a determination of that issue. This court does so very conscious, not only of the applicant's presumption of innocence, but, in the context of the application which the applicant brings to this court, it is uncontroversial to say that the

applicant may be innocent of the charges proffered against him or he may be guilty. Assertions are made by the applicant that he never sexually assaulted any of the complainants at any stage but it is no function of this court to determine innocence or guilt.

63. The averment made at para. 6 of the applicant's 08 May, 2020 affidavit that: "*I intend entering pleas of not guilty to all the allegations made against me…"* seems somewhat incongruous, given that the applicant asserts that a fair trial is impossible and must be halted. It does, however, underline, that the applicant vociferously objects to the allegations, asserts his innocence, and intends to defend his prosecution if it is not halted.

64. From paras. 32 to 47, inclusive, of his 24 April, 2020 affidavit the applicant avers that, owing to the passage of time, he has suffered prejudice under a range of headings for issues which, cumulatively, require his prosecution to be halted in light of what he asserts to be a real and substantial risk that the applicant cannot receive a fair trial. These various issues can be summarised as follows:

- The applicant's age and ill health;
- Inordinate and inexcusable delay in the commencement of the criminal proceedings;
- The death of the applicant's parents and their unavailability as witnesses;
- The death of F.N. and V.N. and their unavailability as witnesses;
- The unavailability of employment records and the death of E.S. in that regard;
- The absence of "islands of fact" and inconsistencies in the allegations.

Certain relevant principles

65. At this juncture it is appropriate to refer to certain principles which emerge from a number of relevant authorities to which the court's attention was drawn. There would not appear to be any disagreement between the parties as to the existence of the following principles which apply, including to cases said to involve 'complainant delay', in the context of alleged unfairness:-

a. whether the applicant has engaged with the facts and demonstrated the materiality of unavailable evidence and whether the evidence can be obtained elsewhere or can be dealt with by warnings from the trial judge (*M.U. v. DPP* [2010] IEHC 156);

b. if certain witnesses are absent, does that absence give rise to irredeemable prejudice on the basis that their presence was "*demonstrated to be essential in order to assist the applicant's defence in respect of the charges"* and whether other witnesses were available who could provide evidence in relation to the same matters *(K.D. v. DPP* [2011] IEHC 384);

c. an applicant must be able to point to a "*real possibility that the witnesses or evidence would have been of assistance to the defence*" as opposed to a theoretical possibility that the evidence of an unavailable witness might contradict the complainant's account or that of other witnesses (*O'C v. DPP* [2014] IEHC 65);

d. whether the evidence which is no longer available is "*no more than a missed opportunity*" or whether the applicant has *"lost the real possibility of an obviously useful line of defence (S.B. v. DPP* [2006] IESC 67) and that 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";*

e. in order to raise the real possibility that the missing evidence would assist in the defence, an applicant for prohibition "*must engage in a real way with that potential evidence and identify how and why it might assist in defending the charge" (R.B. v. DPP* [2019] IECA 48).

It seems to me appropriate to examine the evidence before this court against the backdrop of those principles and I now propose to do so. For the sake of clarity, I intend to look at what the applicant has canvassed by way of the various factors which he says, collectively, mean that his prosecution should be halted and then turn to an examination of the submissions made by both sides and to focus on certain key authorities in that regard. It is not in dispute that applications of this type are fact specific and for this reason I have looked closely in this judgment at the relevant facts. I now turn to the first of the issues canvassed by the applicant in his 'omnibus' application to see what facts emerge from an analysis of the evidence before this court.

Age and ill health

66. In his 24 April, 2020 affidavit, the applicant makes the following averment at para. 45:

> *"I say that I am a man of advanced years, being 78 years of age at this juncture, and have suffered and continue to suffer from a number of medical ailments to include prostate cancer and in general cognitive degeneration. I say that I am under the care and guidance of Dr. Crowley … and I beg to refer to a copy of the said medical report dated 21st April, 2020 setting out my various medical conditions and the state of advancement of those and the degeneration of my cognitive abilities creates a real risk in terms of my ability to fully instruct my legal representatives and thus mount a full defence."*

67. The report of Dr. Crowley indicated *inter alia* that the applicant "…*is suffering from memory loss and a recent MoCa (Montreal Cognitive Assessment) screening test for cognitive decline was much reduced at a score of 19 out of 30. A MoCa score of 26 or over is considered to be normal. A score of 19 can indicate a significant degree of cognitive impairment amounting to mild dementia. The MMSE (mini mental health test) score is also reduced at 25 out of 30 which can indicate mild cognitive impairment."*

68. At para. 4 of the affidavit sworn by Mr. Walsh, solicitor for the applicant, on 22 April, 2020, he avers that he had a discussion with the applicant's general practitioner, Dr. Crowley, and that on the latter's advice, Mr. Walsh wrote to Dr. Frank Kelly, consultant psychiatrist, seeking an opinion in relation to the defendant's medical condition. He goes on to refer to correspondence with Dr. Kelly, in order to arrange for an assessment of and a report concerning the applicant. In a supplemental affidavit sworn by the applicant on 04 September, 2020, he avers that he was interviewed by Dr. Francis Kelly, consultant forensic psychiatrist, on 30 June, 2020 and he exhibits a copy of Dr. Kelly's report which is dated 10 July, 2020.

Report by Dr. Frank Kelly, consultant forensic psychiatrist, dated 10 July 2020

69. Dr. Kelly is a consultant forensic psychiatrist at the Central Mental Hospital, Dundrum, and visiting psychiatrist to Castlerea Prison, Roscommon and the Midlands Prison, Portlaoise. This is confirmed in s. 1 of Dr. Kelly's report, wherein he details his qualifications and confirms his understanding that his primary duty is to the court both in preparing the report and in giving evidence. In s. 2, Dr. Kelly states the following:

"2. Consent:

2.1 I was satisfied that Mr. J. understood that he was being interviewed for the purposes of preparing a psychiatric report. He understood that anything he discussed with me would be used in the construction of this report and I explained that, should this report be used in Court, it could no longer be regarded as clinically confidential document.

2.2 He gave me, in my opinion, valid consent to this effect."

70. The report proceeds to set out information by way of introduction (s. 3); family history (s. 4); personal history (s. 5); drug and alcohol history (of which there was none) (s. 6); past medical history (s. 7); past psychiatric history (s. 8); current medications, (with reference made to a statin, an antibiotic for a urinary tract infection and an injection, once every six months being a steroid for treatment of prostate cancer) (s. 9); past forensic history (of which there was none) (s. 10); and, at s. 11, Dr. Kelly details *"Mr. J.'s account of alleged index offences".*

The applicant's account of the offences as recorded by Dr. Kelly

71. It is appropriate to quote *verbatim* paras. 11.1 and 11.2 from Dr. Kelly's report as exhibited by the applicant:

"11. Mr. J's account of alleged index offences:

11.1 Mr. J. reiterated that his sexual orientation was homosexual and he only had interest in sexual attraction to male adults. He told me he has never had sexual interest in children and has never engaged in any form of sexual contact with children at any stage.

11.2 He told me he was aware that four of his nephews had made accusations against him concerning him sexually abusing them including rape, he told me on 358 occasions between the late 1960s and the early 1980s. He told me these claims are false in their entirety and include allegations of abuse when they were all children and at times when he was living abroad e.g. in the U.K. or in Dublin. When I pressed him on the substance of the allegations he told me that he remembers on one occasion he 'woke up one morning with my arms around P. (when he was 13-14 years old)'. He denies that this was in any way sexual encounter or that he had sexually assaulted him in any way. He told me he believes these nephews have made these accusations because they are now interested in inheriting his land. He told me that he thinks they may be angry that he has excluded them from his will which he first drew up he says approximately 10 to 15 years ago when the main beneficiary was another person who he did not identify to me but told me was someone who would be free of paying death duties. He told me he has 8½ hectares and property which amount in value to approximately $400,000. He told me he amended his first will five to six years ago, and this time included his god son Mr. S.D. who then became the main beneficiary. He told me he most recently made a further revision of his will approximately six weeks prior to my meeting with him. With regards to his nephews, he told me he has excluded them because of the allegations they have made against him and that they are all abroad and he is fearful they would not look after the land following his death. He told me that following his arrest on these current charges that they posted various items on Facebook including 'J.J. remanded in €100 bail…'. And that they also claimed that 'Uncle J. promised to leave me land' referring to one of his nephews' claims that he had made this promise to him in the 1970s when he had no land to leave. He believes the M. brothers 'got together' with the J. brothers to 'concoct' the false allegations of sexual abuse in order to divest him of his estate."

72. I am entitled to hold that Dr. Kelly accurately reported the applicant's account. No issue is taken with the admissibility of or contents of Dr. Kelly's report for the purposes of the application which is before this court. Indeed, it was the applicant who exhibited this report. It will be recalled that Dr, Kelly explicitly records at the start of his report concerning the applicant that: *"He understood that anything he discussed with me would be used in the construction of this report"*. Thus, part of the context in which the present application is brought is the applicant reporting to Dr Kelly that: "*he remembers on one occasion he 'woke up one morning with my arms around P. (when he was 13-14 years old)'*."

Concocted / collusion / cahoots

73. Quite apart from the foregoing, it seems clear from what Dr. Kelly has reported that an issues which the applicant canvasses in opposition to the charges is that (a) all allegations are false; (b) all four complainants have concocted the allegations; and that (c) the reason is because the complainants are angry at having been excluded from the applicant's will. At this juncture, it seems appropriate to observe that the foregoing line of

defence does not appear to be one which has been or can be in any way adversely affected by the delay or prejudice of which the applicant complains.

74. It is also appropriate to observe that what the applicant reported to Dr. Kelly on 30 June, 2020 about false allegations having been concocted by the complainants is reflected in the contents of exhibit B contained in the Book of Evidence, being the memorandum of cautioned interview no. 4 which took place three years earlier on 31 July 2017, when the applicant was interviewed by D/Garda Flannery, Sergeant Murphy also being present. Page 199 of the Book of Evidence records inter alia the following:

"A – Those allegations are absolutely false.

Q – They are very specific.

A – They are specific but it is something to do with collusion with the [McGs].

75. Page 205 of the Book of Evidence records inter alia the applicant stating that he never said to one of the claimants that he would leave property to him and in asserting that accusations were false, the applicant is recorded as *inter alia* giving the following answer:

"A. Never, those allegations are all quite similar they are all in cahoots".

The applicant's cognitive state

76. At s. 12 of his report, Dr. Kelly sets out his findings in respect of a mental state examination of the applicant which was conducted on 31/06/2020. It is appropriate to quote that section verbatim, as follows:

"Mental state examination on 30/06/2020:

12.1 Mr. J. presented as casually and cleanly dressed and was cooperative and entirely appropriate in his speech and behaviour. I could detect no symptoms of major mental illness such as severe depression, schizophrenia or bipolar affective disorder. He was able to give me what appeared to be an open and honest account of his background. He for instance did not demur from discussing his sexuality or the casual nature of his sexual encounters with men in Dublin and London.

12.2 With regards to his cognitive state he appeared to remember accurately a great deal of detail about his family, his background, the details of his medical conditions, his current medication and the allegations made against him by four nephews in some significant detail. He was alert and fully orientated in time, place and person.

12.3 Additionally, I conducted the Montreal Cognitive Assessment (MOCA). This is a brief cognitive assessment scale that assesses orientation, memory, attention, language, abstraction and other high cerebral functions such as executive cognitive functioning (judgment in planning). Out of a maximum score of 30 he scored 27 and of the three points he dropped these related to his difficulty in recalling only two of five words I had given to him three minutes earlier. He was however able to remember two of these with little prompting. This score essentially indicates that there is no gross cognitive impairment. It would be highly unlikely therefore that he would be suffering from a dementing illness of any degree."

77. At s. 13, under the heading "*collateral information",* Dr. Kelly confirms that he read the report of Dr. Crowley, the applicant's GP, which confirms the applicant's diagnosis of prostate cancer and his current treatment with radiotherapy and six-monthly injections of steroids. Reference is made to other conditions, including angina diagnosed fifteen years ago; various bowel conditions; a current urinary tract infection; and a fracture of the applicant's lumbar vertebrae resulting from a fall in 2019. Paragraph 13.1 also states that the only comment relating to the applicant's past mental health was the statement "*acute psychosocial stress, has felt suicidal in the past".*

78. With regard to the foregoing, there is no evidence that any of the physical conditions referred to by Dr. Kelly (or by Dr. Crowley) would prevent him from giving evidence at a future trial. Nor is there any evidence that full participation by the applicant in a future trial would exacerbate any medical condition. It is not suggested that, having regard to any medical condition affecting the applicant, that participating in a trial would or could be injurious to his health. Nor is there any evidence that the applicant is currently suffering from any suicidal ideation. On the contrary, at s. 8.2, Dr. Kelly states: "*He told me he took an antidepressants (sic) for only one week and has otherwise not seen a psychiatrist or other mental health professionals, nor has he had any admissions (psychiatric) or any deliberate self-harm attempts."* In circumstances where, as part of an omnibus application, the applicant contends that his age and ill health will materially affect his ability to defend the allegations against him, it is appropriate to quote *verbatim* and in full the final section of Dr. Kelly's report as follows:

"***14. Conclusions and recommendations****:*

14.1 I could find no evidence that Mr. J. has any mental illness as defined by the Mental Health Act, 2001 or a mental disorder as defined by the Criminal Law (Insanity) Act, 2006 currently.

14.2 From his own account he has been distressed by the allegations made by the four nephews but this has not led to symptoms consistent with any significant depressive illness. He does not currently appear depressed and his GP only records that he has suffered from "psychosocial stress". This is not a mental illness or mental disorder as defined by the Acts referred to above even if they can at times be distressing. He gives an internally consistent account of an acquisitive motivation by his nephews for making these allegations."

79. It is appropriate to pause at this juncture to note that, based on statements made by the applicant to An Garda Síochána, under caution, as recorded in the Book of Evidence as well as similar statements made separately by the applicant to Dr. Kelly, forensic psychiatrist, a material element of the intended defence is that the allegations have been concocted by his four nephews, who are colluding, their motivation being acquisitive, specifically, in order to divest the applicant of his estate. It is difficult to see how such a defence, which certainly appears to be a material part of the intended defence, is in any way adversely affected by the passage of time or any alleged prejudice. Dr. Kelly's report continues and concludes in the following terms:

"14.3 With regards to the alleged offences I have not been asked to comment on these and have not had access to the Book of Evidence and so make no opinion as to the credibility of his account or any criminal responsibility. I make however the observation that he denies these allegations and believes they are motivated by his nephews' disappointment and anger at not being included in his will as they had expected to be. I note however that the allegations were first made in 2001, which I have estimated to be at least four years prior to him drafting his first will.

14.4 With regards to the central opinion sought from myself, namely medical grounds for seeking a prohibition of the current prosecution by way of an application to the High Court, it would be outside of my professional expertise to comment on his physical health conditions excepting the potential impact of his various medications on his mental health and the general impact of his numerous conditions in his mood. The six monthly injection of Decapeptyl, a steroid used in the treatment of prostate cancer, is reported to be associated frequently with reduction of libido and commonly with loss of libido, depression and mood change. Infrequently or rarely it is associated with insomnia, irritability, confusional state, decreased activity or euphoric mood. I gained the impression that Mr. J's libido had been greatly diminished or absent for many years and he indicated to me that the last time he was sexually active was in his early 30s, up to four decades ago. I could not evince from Mr. J. any other symptoms that could be associated with this medication. I will comment on his cognitive state below.

14.5 The GP in his letter to me indicated that when he conducted the MOCA (Montreal Cognitive Assessment), he scored Mr. J. 20/30 which he felt 'could indicate a significant degree of cognitive impairment'. He however also conducted an alternative cognitive screening assessment the Mini Mental State Examination (MMSE) which he states he scored 30/30 (i.e. normal). My own testing of Mr. J. using the MOCA showed a score of 27/30 which can be regarded also as normal and not evidence for any cognitive decline. I have inferred that the GP's MOCA cognitive assessment may have provided the main motivation for seeking an assessment by myself.

14.6 Given my findings that Mr. J. does not suffer with any major mental illness nor any cognitive decline, it is my opinion that from a psychiatric or neuropsychiatric perspective he does not have medical grounds to satisfy conditions for prohibition from prosecution. It may well be that the court takes a different view on the medical grounds related to his other physical health conditions and would have to seek appropriate medical expert opinion in this regard. "

80. It will be recalled that it was the applicant's GP who advised the applicant's solicitor to seek Dr. Kelly's opinion. Plainly, this is in circumstances where, on the question of mental capacity, Dr. Kelly is the expert. The views of that expert are clearly set out and definitive. There is no suggestion, for example, that Dr. Kelly is wrong in any of his views

or that they should be ignored in favour of the earlier views expressed by the applicant's GP who, himself, advised that Dr. Kelly's opinion should be sought.

81. I have referred in this judgment to the entire of the professional medical evidence, Dr. Kelly's views being the most recent. In my view this court is entitled to hold that, as a matter of fact, the applicant is not suffering from any cognitive decline. Nor is there any evidence from which this court could conclude that any physical ailment affecting the applicant will materially affect his ability to defend the allegations against him.

Inordinate and inexcusable delay

82. Among the complaints made by the applicant is with regard to the significant delay between when the assaults are alleged to have occurred and when the complaints were made to An Garda Síochána. At para. 47 of the applicant's affidavit sworn on 24 April, 2020 he avers as follows:

> *"I say that there was a significant delay between the matters as alleged presenting within the family unit as amongst the alleged complainants and the matters being brought to the attention of the gardaí. K.M. in his Statement (p. 83 of the Book) confirms that he attended at my house some time maybe 11 or 12 years prior to 2017 in the company of his brother P.M. wherein he confirms that the matter was discussed within the family unit between himself and his brother P. in August of 2002. It was further the case that within a relatively short period of time P.M. and K.M. presented in my family home, in or around the summer of 2002, and sought to record a conversation between myself and themselves which subsequently misrepresents what had actually taken place. It is also the case that the matter was discussed within the J. family to include M.J. and S.M., when attending a concert … the matter previously presented within the family at a family funeral in the mid-1990s according to the statement of A.J. (p. 144 of the Book). I say that these matters, had they presented to the gardaí in 2002 or in the mid-1990s would allow me far fairer opportunity to address the allegations. The delay in bringing the matter forward is inexcusable and unjustifiable in the circumstances".*

83. This is not the only delay the applicant complains of. He makes specific complaint about what he characterises as further delay on the part of the authorities between the time the allegations were made up to the point at which the applicant was charged. Paragraph 47 of the applicant's 24 April, 2020 affidavit contains that complaint which is made in the following terms:

> *"I say that the gardaí subsequently were presented with these allegations within a period starting in March of 2017 and concluding in my interviews in July of 2017. Thereafter, Garda Sergeant Murphy received further statements, as set out in paragraphs 23, 24 and 25, and it was not until November 2019 that I was formally charged. Again, I say there was a further delay from the Statements being taken, and me being interviewed, and the ultimate charge has further compromised my capacity to either quickly and fully defend this case and thus has created a real risk of an unfair trial."*

84. Earlier in this judgment I set out, in chronological order, facts which are not in dispute and which detail the steps taken with regard to the relevant investigation. Dealing first with the period from March 2017 until November 2019 which is characterised by the applicant as delay which has compromised his capacity to defend the case resulting in a real risk of an unfair trial, I am satisfied that this court could not fairly characterise the foregoing period as one involving inordinate delay. Given what occurred during that period in connection with the investigation, it seems to me unfair to characterise this period as being one of "*delay*" on the part of the relevant investigating authorities. Time undoubtedly passed but during this passage of time a great deal of necessary work was done, in the manner detailed earlier in this judgment. Even if I am wrong in the view that there was not inordinate delay, I am entirely satisfied that the delay was excusable. I take this view, in circumstances where, plainly, a great deal of necessary steps were taken during that period involving many different individuals and two different police forces in two jurisdictions and there is no evidence whatsoever of any intentional delay on the part of the relevant authorities. In addition, the court has before it the uncontested averment made by Sergeant Murphy at para. 47 of his affidavit sworn on 20 November, 2020 as follows:

> *"It is respectfully submitted that this was a complicated investigation involving multiple complainants in different jurisdictions. It is clear from the timeline set out above that the matter was progressed as expeditiously as possible in all the circumstances. It is denied that there was any delay, once the matter was brought to the attention of the gardaí, that would warrant a prohibition on the trial of the applicant proceeding,"*

85. Obviously the question of whether the prosecution should be prohibited is a matter for this court but there is no doubt about the fact that this was a complicated investigation involving multiple complainants in two different jurisdictions. There is no doubt about the numerous steps taken and when they were taken and this is clear from the facts which I have set out earlier in this judgment in chronological order. There is a positive assertion that "*the matter was progressed as expeditiously as possible in all the circumstances*" and, carefully considering all relevant evidence, I accept that to be so. There is also a positive denial that there was any delay once the matter was brought to the attention of An Garda Síochána and, for the same reasons, I accept that this is so as a matter of fact.

86. It is also fair to say that, despite his averments at para. 47, the applicant has not identified how the alleged delay from March 2017 to November 2019 has compromised his capacity to obtain a fair trial. Furthermore, it is appropriate to observe that none of the issues which, according to the applicant, have caused him prejudice (e.g. the death of his parents and other witnesses and the unavailability of employment records) are said to have arisen between March 2017 and November 2019. Thus, in circumstances where I am satisfied that, as a matter of fact, there has been no culpable prosecutorial delay and there has been no inordinate or inexcusable delay from the point at which An Garda Síochána were presented with the relevant allegations as of March 2017, and in circumstances where, even if I am entirely wrong in the foregoing, there is no evidence

that the foregoing specific "*delay*" caused identifiable prejudice, it is very difficult to see how this alleged issue adds any weight to the claim the applicant makes.

87. The first period of delay complained of by the applicant is the period commencing with the alleged allegations and ending with the presentation of those allegations to An Garda Síochána. It will be recalled that the alleged assaults for which the applicant has been charged go back to 01 May 1967 (in respect of the first complainant, PM); 01 May 1973 (in respect of the second complainant, JM); 01 August 1977 (in respect of the third complainant, MJ) and the single charge concerning the fourth complainant relates to the 1st to 14th August 1980. In para. 47 the applicant is critical of the relevant matters presenting within the family and being raised in the manner he alleges, in the mid-1990s and in August 2002, without any of the complainants, at that stage, making formal complaints to An Garda Síochána. He characterises the complainants' delay in making formal complaints to An Garda Síochána as being "*inexcusable and unjustifiable in the circumstances*".

88. As regards the foregoing it seems appropriate to quote as follows from the Supreme Court's 31 July 2006 judgment in *S.H. v. DPP* [2006] IESC 55. In that decision the Supreme Court conducted a careful review in respect of the jurisprudence which had developed over the previous decade in respect of cases where there had been an accusation of child sexual abuse and a significant delay between the alleged actions, the complaint, and the prosecution. The court specifically took the opportunity to consider what it described as *"the developing jurisprudence on the issue of delay in cases relating to the sexual abuse of children".* Murray C.J. put matters as follows:

> *"Over the last decade the courts have had extensive experience of cases where complaints are made of alleged sexual abuse which is stated to have taken place many, many years ago. It is an unfortunate truth that such cases are routinely part of the list in criminal courts today.*
>
> *At issue in each case is the constitutional right to a fair trial. The Court has found that in reality the core inquiry is not so much the reason for a delay in making a complaint by a complainant but rather whether the accused will receive a fair trial or whether there is a real or serious risk of an unfair trial. In practice this has invariably been the essential and ultimate question for the Court. In other words, it is the consequences of delay rather than delay itself which has concerned the Court.*
>
> *The Court approaches such cases with knowledge incrementally assimilated over the last decade in some of which different views were expressed as to how these issues should be approached. In such cases when information was presented concerning the reasons for the delay it was invariably a preliminary point to the ultimate and critical issue as to whether the accused could obtain a fair trial. In all events, having regard to the Court's knowledge and insight into these cases it considers that there is no longer a necessity to inquire into the reason for a delay in*

making a complaint. In all the circumstances now prevailing such a preliminary issue is no longer necessary."

89. In light of the foregoing it seems to me that this court cannot hold that delay on the part of the complainants in making formal complaints was "*unjustifiable*". It also seems to me that, regardless of the matters presenting within the family in mid-1990s and in August 2002, the reasons for a delay on the part of the complainants in making formal complaints to the authorities are not relevant. In other words, it seems to me that, for the purposes of the present application, the applicant's complaints that matters were raised in the mid-1990s and in 2002, but no formal complaints were made to the authorities until 2016/17, does not add any extra weight to the applicant's claim. Rather, the central issue, regardless of the reason for delay, is whether the applicant will receive a fair trial or whether there is a real or serious risk of an unfair trail. The applicant asserts that there is such a risk but it seems to me that the fact of delay, and the reasons for same, up to the point at which formal complaints were made to An Garda Síochána, do not, of themselves, weigh in favour of halting the prosecution or add additional weight to the applicant's argument for that result. Rather, it is the consequences of such delay, insofar as they render a fair trial impossible or create a real risk of same, which this court must consider. There has undoubtedly been delay in the sense of the passage of many, many years since the alleged assaults in question, but such delay does not *ipso facto* result in prejudice rendering a fair trial impossible.

90. Having already looked at the evidence in respect of the applicant's ill health which was said to prejudice his ability to defend the allegations against him (but which does not) I now turn to look at the next issues claimed by the applicant to cause prejudice, namely, the death of his parents and other witnesses.

The death of the applicant's parents

91. The applicant's father died in 1986 and the applicant's mother died in 1994. The applicant asserts that if his parents were alive and available as witnesses, they would have aided him in defence of the charges in a material way. The applicant describes this in para. 33 of his affidavit sworn 24 April, 2020 in the following terms:-

"[33]. Had my parents been alive, they would have been able to confirm my personal circumstances to include my history of employment and when I returned to home. They would also have been able to confirm the sleeping arrangements of PM, JM, MJ and AJ. They would also confirm that contrary to the suggestion from AJ suggesting that there was a single and a double bed in my room, that there was only ever one double bed and my room was a box room.

[34]. My mother would have frequently been in and out of my bedroom in terms of dressing the bed and changing the bed clothes. She would also have attended to my clothes such as washing them and returning them to my wardrobe. She would be in a position to confirm that at no stage was there pornography either under the pillow, under the mattress or in the wardrobe. I acknowledged that I did have a pornographic magazine, but I only ever had one magazine and that was kept in the

glove compartment of my car and never placed inside the house at all. I say that at no stage did I ever show it to any of the complainants."

92. It is asserted that the loss of the testimony of the applicant's parents has created an evidential deficit and has prejudiced his ability to properly defend the allegations made against him. It is not in dispute that the applicant's father died in 1986 and it will be recalled that the final allegation of offending was on 14 August, 1984 (being an allegation relating to the third complainant, MJ, born 1969). Given that the applicant's father died within a period of two years from the date of the last allegation of offending, in circumstances where the relevant claimant was not an adult when the applicant's father passed away, it is difficult to see how prejudice arising from the non-availability of the applicant's father as a witness flows from delay. Insofar as the allegations presented within the family at a funeral in the mid 1990's, it seems fair to say that, even if formal complaints to An Garda Síochána had been made at that stage (as the applicant contends they should have been) the applicant's father was already deceased. As regards the applicant's mother, para. 4.1 of Dr. Kelly's report, as exhibited by the applicant, states the following under the heading "*Family History*": -

"4.2 He told me his father died at 87 years old and was a retired farmer, and his mother died at 91 years old and had Alzheimer's, and he claims that he looked after her for the last ten years of her life. He told me he had four brothers, one of whom died, the others are alive and well and he has four sisters."

93. It is uncontroversial to say that Alzheimer's is a degenerative disease affecting the cognitive function or mental state of those unfortunate enough to suffer from it. The evidence proffered by the applicant in the form of Dr. Kelly's report indicates that the applicant cared for his mother - who had Alzheimer's disease and who died in 1994 - for the last ten years of her life *i.e*. from 1984. Having regard to his evidence, it seems fair to infer that the cognitive functioning or mental state of the applicant's mother was diminishing during the ten-year period when the applicant cared for her, the final allegation of offending behaviour being in the very year (1984) when the applicant began looking after his mother. That being so, it is difficult to see how the prejudice resulting from the non-availability of the applicant's mother as a witness is caused by delay.

94. Insofar as issues were raised within the family, specifically at a family funeral in the mid-1990's, this is precisely when the applicant's mother passed away. In other words, even if formal complaints had been made to An Garda Síochána in the mid 1990's (as the applicant says they should have been) and a criminal prosecution had immediately ensued *(i.e*. 25 years ago), neither the applicant's father or mother would have been available as witnesses at that stage. This is not for a moment to hold that the non-availability of the applicant's parents, as witnesses, may not result in prejudice. It is to take the view, however, that such prejudice does not result from delay.

95. In the manner averred by the applicant, his parents' evidence would have assisted in respect of three issues. Firstly, that there was only one double bed in his room; secondly, that there was no pornography in his room; and thirdly, when he was present at home.

Of the four complainants, only AJ references a single bed. All three other complainants state that the bed was a double bed. With regard to the question of pornography, it seems uncontroversial to say that the most the applicant's parents could say in evidence was that they never saw pornography in the applicant's room. Given the nature of such material it seems equally uncontroversial to suggest that that does not prove none was present. In addition, PM (charges 1-119) does not refer to pornographic magazines. As regards when the applicant was present at home, it seems unlikely that either witness would have been in a position to state, definitely, when the applicant was and was not at home in respect of each of the alleged assaults and to provide specific and definitive evidence on this issue covering a period spanning from 01 May 1967, to 14 August 1984. It also seems to me to be fair to say that the applicant cannot say definitively what evidence his father or mother would have given, had they been available.

96. It also seems appropriate to point out that none of the four complainants suggest that anything untoward was known to the applicant's parents. There is no suggestion that any untoward behaviour was witnessed.

97. In an ideal world each and every witness any party wished to call would be available but this is not the world we inhabit, nor is it the world in which trials proceed. The non-availability of the applicant's parents does not arise out of any culpability on the part of the prosecution. Furthermore, it is difficult to see how the applicant's parents could be regarded as crucial or fundamentally important witnesses whose testimony, if available, had the potential to be exculpatory in respect of all charges. It will be recalled that, although the majority of alleged assaults are said to have occurred within the home the applicant shared with his parents, this is not exclusively so. It will be recalled that charges relating to JM include alleged assaults said to have been carried out in the applicant's car at a range of locations, one of which is identified as a lay-by known locally as the SA carpark.

98. I would emphasise again that to say the foregoing is not to hold that the absence of the applicant's parents, as witnesses, is irrelevant or that some prejudice may not arise as a result. It is to hold that their unavailability does not arise from any prosecutorial culpability and that, even if a prosecution had occurred as much as a quarter of a century ago, neither of the applicant's parents would have been available. I now turn to what the applicant asserts in relation to the non-availability of other witnesses, specifically F.N. and V.N.

The unavailability of F.N. and V.N. as witnesses

99. Two gentlemen, F.N. and V.N., are referred to by the applicant at para. 18 of his affidavit sworn on 24 April 2020, insofar as the fourth complainant, A.J. remembers a holiday in 1990 "*having travelled to Ireland with F.N. and V.N.".* It is fair to say that the applicant has not given any indication as to how either of these gentlemen would have potentially assisted his case. It is also fair to say that neither could be regarded as crucial in terms of, for example, providing exculpatory evidence in response to the allegations made by the four claimants. Their evidence clearly appears to be confined, according to the

applicant's averment at para. 18, to accompanying a claimant to Ireland in 1980, according A.J.

100. It also seems appropriate to note that, as of 1980, the alleged offending behaviour was ongoing and the last offence with which the applicant has been charged relates to 14 August 1984, being four years after F.N. and V.N. feature. Thus, it seems to me that there is no question of their unavailability arising either from culpability on the part of the prosecution or being in any way related to delay. On the evidence before this court, the applicant has not established how the death of F.N. and V.N. has caused prejudice to him.

101. Furthermore, what evidence F.N. and/or V.N. might have given, had they been available, seems to me to involve an exercise in pure speculation.

The applicant's employment history and Mr. E.S.

102. The applicant worked in the United Kingdom from 1959 to 1972 and reference is made in his affidavit of 24 April 2020 to Reading (from 1959 to 1961) and London (from 1961 to 1972). With regard to his employment history he avers inter alia that "There is no record maintained in relation to my employer or location of employment" (para. 36) and that he "worked on a temporary casual basis for different employers" (para. 37). Although living in the United Kingdom during the aforesaid period, the applicant confirms, at para. 38, that he would, on occasion, return to Ireland for a brief period in April to do turf and in the summer period, June and July, to assist in harvesting hay. He goes on to aver that, had his parents still been alive or had the allegations come forward sooner, his parents would have been in a position to assist in terms of confirming the particulars of his movement, when he was present at home and the circumstances of his residence at home and, earlier in this judgment, I looked up the issue of the non-availability of the applicant's parents. At para. 39, however, the applicant makes a specific averment in relation to employment records and a deceased employer in the following terms:

> *"39. I say that from 1972 to 1978 I returned to Ireland on a full-time basis and resided in Dublin. I stayed again in lodgings or boarding houses; however, my employment was regular, and I made my stamp contributions and my tax payments were regular. I say that my employers are now both deceased, one having passed away in the 1970s, but more importantly my other employer during this period Mr. E.S. only died in 2017 and would have been in a position to confirm the prevalent nature of my employment, and the period of time in which I was present for work and the periods when I would have returned to my parents in … to assist with the turf and the harvesting of the hay."*

103. It is clear from the foregoing that the applicant asserts that employment records covering the period 1972-1978 would have assisted him. No averments are made in relation to what efforts, if any, were made to investigate whether any such records exist. None of the interviews conducted by An Garda Síochána with the applicant record the applicant mentioning the fact that employment records might be available for any of the dates when the alleged offences are said to have occurred. Page 203 of the Book of Evidence

comprises part of the cautioned interview conducted on 31 July, 2017 and it records i*nter alia* the following questions and answers:

"Q – J. do you remember the years you worked in Dublin

A – 1972 to 1978 I think; I came home the night the Pope John Paul I died. I recall this as my father got a stroke this night and I came home."

104. Despite being asked, specifically, about the years when he worked in Dublin, the applicant did not make any reference to employment records or refer to E.S. Although not purporting to determine anything which touches on the underlying prosecution, what emerges from the evidence before this court in the present application is the fact that the applicant did not, in 2017, inform An Garda Síochána of the potential availability of employment records, or of evidence from Mr. E.S. concerning the applicant's employment with respect to the period 1972 to 1978. It also must be said that the period 1972 to 1978 is a sub-set of the period of time during which the alleged assaults are said to have occurred (that period being 01 May 1967, to 14 August 1984).

105. It is uncontroversial to say that no employer has the statutory obligation to retain records for decades. The first piece of legislation requiring employers to keep records of their employees' working hours was introduced by way of the Organisation of Working Time Act, 1997, which requires records to be kept for a three-year period. Thus, it seems fair to say that even had the applicant mentioned to An Garda Síochána the potential availability of employment records at the very first opportunity (in early 2017) it seems unlikely in the extreme that physical or written employment records, relating to a period over 40 years earlier would have been available. Similarly, even if E.S. had not passed away in 2017, the prospect of him being able to furnish written employment records or, in the alternative, recalling with precision the applicant's employment record as regards the relevant period appears to be extremely remote. It also seems fair to say that, what the testimony of E.S. would have been, appears to be an exercise in speculation.

106. Earlier I set out, in chronological order, the facts with regard to the investigation and these facts represent a synthesis of the various averments made by the applicant and by Sergeant Murphy. The relevant chronology commenced on 26th July, 2016 with the first of the complainants, N.J. attending a police station in the United Kingdom to make a video-recorded statement of complaint against the applicant. According to the applicant, E.S. died in 2017. There is no question of prosecutorial delay, culpable or otherwise, as between July 2016 and the death of E.S., even if the court is to assume that he passed away at the very end of December 2017 (and the applicant has not indicated precisely when, in 2017, he died). That being so, to the extent that the applicant is prejudiced as a result of the non-availability of E.S., and I do not believe that he has established this, it is undoubtedly the case that such prejudice does not flow from any culpability on the part of the prosecution.

Absence of islands of fact and presence of inconsistencies

107. As part of what is an omnibus application, the applicant asserts that there is both an absence of essential details as well as the presence of inconsistencies in the allegations. The applicant avers as follows from paras. 40 – 42 of his 24 April, 2020 affidavit:

> *"40. I say that there is no particularity to the detail suggested by the complainants. There is no island of fact which is capable of being identified save and except for a suggestion that I had interfered with one of the complainants, N.J., at a location identified as the S.A. I say the charge sheets that account for charges 120 through to 171 particularise or specify that I indecently assaulted JM from the 1st May, 1972 to the 31st August, 1976 at a place unknown within the State, I can only presume that this is meant to accord with the allegation of indecent assault occurring in my motor vehicle, to include at that location identified as the S.A. This is specifically referred to at p. 99 of the Book of Evidence.*
>
> *41. I say that the above quite simply cannot be true in circumstances where that plaque about the S.A. is erected is identified as a lay-by and which plaque was not erected until the late 1980s. J.N. states that this was a regular place for me to pull in and sexually abuse him.*
>
> *42. There is a reference also to G's shop or pub and frequent trips to same. The proprietor has changed hands on a number of occasions, but it has always remained within the G family. The capacity to take a statement from or corroborate or seek supportive evidence that would contradict the statement of the injured parties in this regard has been lost by virtue of the manner and time of the complaints.*
>
> *43. There was a water supply in the new house from its construction in 1966 and a shower was only installed in 1994 within two years after my mother's death in 1996."*

108. With regard to the foregoing, it does not appear to be all in doubt that the relevant lay-by is currently known as S.A. The applicant avers that the relevant plaque to that effect was erected in the late 1980s. This predates by many years the formal complaints made to An Garda Síochána. Thus, it seems uncontroversial to say that the location was known as the S.A. carpark or lay-by at the time the relevant complaints were made. Furthermore, the location identified as the S.A. carpark or lay-by is relevant in respect of a sub-set only of the charges relating to one out of four complainants. It also seems to me that the foregoing is the type of issue which would typically give rise to cross-examination in the context of a trial where evidence is tested, but it is difficult to see how the foregoing constitutes prejudice insofar as the applicant's ability to defend the prosecution against him is concerned.

A witness from a shop

109. As regards the applicant's contention that someone from G's shop might have been able to corroborate his version of events or provide supportive evidence, this seems to me to be speculation of the most extreme kind, given the paucity of detail other than the

reference to the existence of a shop/pub and a reference to frequent trips to same, as well as a number of changes of ownership. The evidence before the court on the foregoing issues does not seem to me to constitute evidence of a useful line of defence having been lost and similar comments seem to me to apply with regard to the question of water supply. As regards the question of water supply, this, too, seems to me to be an issue for examination and cross examination, with a jury being in a position to assess the evidence and a trial judge in the position to ensure fairness.

110. Nowhere in the applicant's affidavit does he identify any potential witness from G's shop, nor does he aver to any steps taken to locate any such witness. The averment to the effect that he has lost the opportunity to seek supportive evidence in opposition to the prosecution is, it is fair to say a "bald" assertion. As to what evidence might or might not have been given by an unnamed witness or witnesses from the shop in question, this seems to me to be an exercise involving pure speculation.

Islands of fact / inconsistencies

111. Counsel for the respondent draws the court's attention to certain authorities which, at this juncture, are appropriate to refer to insofar as islands of fact and inconsistencies are concerned. With regard to unidentifiable islands of fact, Ms. Justice Whelan stated, in *H.S. v. DPP* [2019] IECA 266 that:

> *"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."*

112. With regard to inconsistencies, Mr. Justice Edwards emphasised in *M. v. DPP* [2015] IECA 65 that it has long been accepted that determining factual issues are quintessentially a matter for a jury. When setting out the court's analysis and decision, Edwards J. stated the following:

> *"47. At the outset the Court wishes to address a misconception that it occasionally encounters, that the second limb of Lord Lane's celebrated statements of principle in R v Galbraith represents authority for the proposition that a case must be withdrawn from the jury if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies. This Court wishes to emphasise that it is not authority for that proposition.*
>
> *48. On the contrary, the emphasis in Galbraith is on the primacy of the jury in the criminal trial process as the sole arbiter of issues of fact. What Lord Lane was in fact saying in Galbraith was that even if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies, it is for*

the jury to assess that evidence and make of it what they will, unless the state of the evidence is so infirm that no jury, properly directed, could convict upon it. Accordingly, what Galbraith is in fact concerned with is fairness.

49. Moreover, implicit in the Galbraith principles enunciated by Lord Lane, is that withdrawal of a case from a jury should be an exceptional measure, to which resort should only be had for the purpose of avoiding a manifest risk of wrongful conviction."

113. It is worth observing that the applicant in the present case seeks to bring about a situation where no jury could ever assess any evidence. For the purposes of the application which is before this court, I am giving due weight to what the applicant asserts insofar as the absence of islands of fact and the presence of inconsistencies. I have no hesitation in saying, however, that, of themselves, they do not provide a basis for relief and, fairly considered, they do not appear to me to be exceptional circumstances or even unusual issues, arising, as they do, in the context of a prosecution of this nature.

114. Before referring to submissions made by the parties and turning to look at other authorities of particular relevance (including the *CCe* decision), it is appropriate to note that it is on the basis of the facts which I have examined that the applicant asserts that his capacity to defend the case fairly and adequately has been compromised and he makes the following concluding averments in his affidavit of 24 April, 2020:

"48. I say that the delay in this case is inordinate and inexcusable. I say that I am prejudice (sic) in terms of the unavailability of the above identified witnesses and documentation owing to the passage of time. I say that there is a fundamental unfairness in proceeding to trial so long after the date of these allegations and there is a real and substantial risk that I cannot receive a fair trial."

115. I have examined in this judgment, thus far, the evidence which was put before the court as a basis for asserting, with reference to the cumulative effect of a range of factors, that the applicant's prosecution must be halted. Having carefully considered the evidence with respect to all these factors, I do not believe that the applicant has demonstrated that he has lost the real possibility of an obvious useful line of defence. What the witness evidence 'lost' to the case was, or might have been, seems to me to be a matter of speculation and it does not seem to me that the applicant has established that the presence of any (now - unavailable) witness was essential to his defence. To the extent that documentary evidence has been lost, the applicant has not, in my view, demonstrated how such evidence plays a vital role in his defence. Carefully considering everything which the applicant has put before this court does not allow me to hold that he has established manifest or serious or unavoidable prejudice, giving rise to a real risk that a fair trial is not possible. I want to stress, however, that - although these comments seem to me to be fair to make - this Court should not be invited to make definitive rulings on the existence of, extent of, and effect on a trial of, prejudice alleged by the applicant unless the applicant has demonstrated, with reference to the specific facts of his case,

that it comes within the exception to the rule identified in *DPP v. CCe* [2019] IESC 94 (a case I will look at in some detail presently).

Submissions

116. I would like to acknowledge the assistance provided to the court by counsel for the applicant, Mr. Bowman, and counsel for the respondent, Mr. McKenna. Both filed detailed written submissions which were supplemented during the hearing by oral submissions made with clarity and skill. I have carefully considered all submissions made, as well as all authorities which counsel helpfully directed the court's attention to. Counsel for the applicant made clear that his client does not assert that any one specific issue of those canvassed is, of itself, sufficient to warrant the relief sought. He emphasises, however, that, taken together, the cumulative factors create wholly exceptional circumstances representing a real and present danger of an unfair trial taking place if the proceedings are not halted by this court.

117. Regardless of the undoubted skill with which submissions are made on behalf of the applicant, it is important to emphasise that the decision of this court hinges on the evidence before it. I have examined that evidence and the facts which emerge from that examination have been set out earlier in this decision which looked at each and every one of the issues canvassed by the applicant in support of the relief claimed, namely, (1) his age and ill health; (2) delay said to be inordinate and inexcusable; (3) the death of the applicant's parents and their unavailability as witnesses; (4) the death of F.N. and V.N. and their unavailability; (5) the unavailability of employment records for the period 1972-1978 and the death of one of his employers, E.S.; (6) the unavailability of a witness from G's shop; and (7) the absence of islands of fact as well as inconsistencies.

118. For the reasons set out earlier in this judgment, the first of these entirely falls away. Notwithstanding the applicant's age, the evidence from the expert consultant forensic psychiatrist retained by the applicant is that he does not suffer from "*any cognitive decline*". It is also appropriate to say that there is no unresolved tension between the earlier views expressed by the applicant's General Practitioner who administered a particular test of cognitive function. Nor is there any 'rationality' point which might be made, in circumstances where the reasons for the experts' view are set out with clarity. The later analysis and report by Dr. Kelly explains cogently and comprehensively why he has formed a view which differs from the earlier one expressed by Dr. Crowley. Furthermore, by advising the applicant's solicitor that Dr. Kelly's opinion should be sought, Dr. Crowley was making plain that Dr. Kelly was the expert. The court now has the experts' views (views which were not available when leave to seek judicial review was applied for and granted).

119. Taking all the foregoing into account, this court is entitled to hold that, as a matter of fact, the applicant is not suffering from any cognitive decline. Furthermore, there is no evidence that any of his physical ailments prevent him from defending his prosecution. For these reasons, the first of the issues canvassed on behalf of the applicant and a material element of the omnibus application is entirely without substance and falls away.

120. As to the remaining issues, this is undoubtedly an "*old*" case in the sense that the alleged offending goes back several decades. Thus, there has undoubtedly been delay up to the point at which formal complaints were made to the relevant authorities. Counsel for the applicant submits that the complainants were grown adults when matters were raised within the family and he emphasises that the complainants chose not to make formal complaints at that juncture. He makes clear, on behalf of the applicant, that no concession is made that there is *not* culpability on the part of the complainants in relation to when they decided to contact the authorities. His submission is to the effect that the alleged issues were known and discussed amongst the complainants "for whatever reason and for whatever purpose" long before formal complaints were made to An Garda Síochána. He stresses that these were "*adult males in their fifties and sixties who chose to come forward when they chose to come forward, to the applicant's detriment*". In my view, however, the focus of this court must be on the consequences of the foregoing delay, not on the reasons for it, the Supreme Court's decision in *S.H. v. DPP* [2006] IESC 55 being relevant in that regard. I am also satisfied that, as a matter of fact, there has been no prosecutorial delay and certainly no culpable delay whatsoever on the part of the respondent.

121. In my view, the remaining issues canvassed on behalf of the applicant in his omnibus application need to be seen in light of the foregoing. That is not to rule out the possibility that prejudice has arisen or may not arise, but in the manner examined earlier in this judgment, it is very difficult to see how any prejudice flows from any culpable delay. Even if I was entirely wrong in the foregoing views as to delay, it is fair to say that no alleged prejudice appears to be extreme in character in the sense that it obviously gives rise to an issue striking at the fairness of a future trial. Could it really be said that the passing, in 1986 and 1994, respectively, of the applicant's father and mother obviously creates exceptional prejudice or amounts to exceptional circumstances, particularly having regard to the factual position which I have examined earlier in this judgment? To my mind, the answer is in the negative. There may well be prejudice, but it does not seem to me to be of an extreme or exceptional kind or, for that matter, to flow from delay, still less to flow from culpable delay and there is no question of any such prejudice flowing from culpable prosecutorial delay.

122. Similar comments apply, in my view, with regard to the other issues canvassed, i.e. insofar as prejudice may flow from them, it does not seem to me to be of an extreme or extraordinary kind. That leaves this court in the position where an omnibus application was brought, a material element of which has fallen away entirely, and, in respect of the remaining elements, such prejudice as arises or may arise is not of an exceptional or extreme kind. In truth, there are no exceptional circumstances, individually or collectively, aside from the fact that none of the alleged prejudice seems to me to flow from any culpable delay.

123. In submissions on behalf of the applicant, particular reliance is made on a trinity of decisions i.e. the Supreme Court's decision (Denham J.) in *P.T. v. DPP* [2007] IESC 39; this court's decision (Charlton J.) in *K (E) v. Moran J. and DPP* [2010] IEHC 23; and the

decision of Mr. Justice White in *T.C. v. DPP* [2017] IEHC 839. Counsel for the applicant identifies what he submits to be parallels between the facts in the present case and certain facts which underpinned those three decisions delivered on 31 July 2007, 05 February 2010 and 24 November 2017, respectively. Mr. Bowman, very fairly and very appropriately, acknowledges that his client faces a high bar and takes no issue with the proposition that recent jurisprudence suggests a move away from the court being asked in an application for judicial review to halt proceedings, in favour of allowing trial judges to determine whether there is a risk of an unfair trial occurring. He emphasises, however, that the remedy of prohibition remains available and he stresses that the omnibus principle still applies and, in his submission, the present case is one of such exceptionality that the relevant prosecution must be halted given what he submits to be the real and present danger of an unfair trial, arising from the accumulation of wholly exceptional circumstances.

124. For the respondent, Mr. McKenna emphasises the exceptional nature of prohibition as a remedy in the context of an ongoing criminal prosecution and, in essence, he submits that the issues raised by the applicant are matters for the trial court, considerable emphasis being laid in the recent decision of the Supreme Court in *DPP v. CCe* [2019] IESC 94. The respondent does not dispute the existence of a residual jurisdiction allowing prohibition where there is a serious risk of an unfair trial, but he submits that this is not a case where that jurisdiction can or should be exercised. Among the submissions made on behalf of the respondent is that the three decisions upon which the applicant places most reliance were inherently bound up with the particular health factors pertaining to the applicants in those cases. Whilst not accepting that there has, in fact, been an unfairness or prejudice to the applicant, the submission is made that it is very difficult to understand how a trial judge could not deal with the applicant's complaints, in the context of the careful management of an evolving trial particularly in circumstances where, as CCe makes clear, a trial judge retains the power to withdraw a case from a jury if the interests of justice require it, i.e. if a fair trial is not possible.

125. Counsel for the respondent emphasised that cases of this type are decided on a fact-specific basis and no issue with this principle was taken on behalf of the applicant (see *X(JC) v. D.P.P* [2020 IECA 4 and also *D.P.P. v. A.T.* [2020] IECA 6) The respondent's counsel submitted that the applicant had not advanced a strong case in respect of any prosecutorial delay, nor had the applicant advanced a strong case as regards diminished capacity and that, grouping a variety of issues together, none of which are strong on their own, does not assist the applicant in clearing the very high bar required in order for this court to grant the relief sought. Rather, submits the respondent, 'lumping together' the issues highlights how weak the omnibus application in the present case is.

126. Counsel for the respondent also submitted that caution should be exercised as regards "*cherry picking*" certain similar facts which may have arisen in previous cases, given the obligation on this court to the deal with the specific facts arising in the application before it. He also highlighted the public interest in the prosecution of offences, including alleged offences of an historic nature, emphasising, in particular, the number of complainants in

the present case; the number of charges proffered; the nature of the charges; and the interests of the alleged victims, as well as the public generally in not having a prosecution halted before the tendering of any evidence before judge and jury.

127. Counsel for the respondent submitted that the material before this court discloses that, quite apart from any issue in respect of which the applicant claims prejudice, the applicant has identified a line of defence, unaffected by any alleged prejudice, which he intends to canvass, namely that (a) all allegations are false and were "*made up*" by the complainants; (b) the complainants have ben colluding and are "*in cahoots*"; (c) and the reason is their designs on his estate.

128. Counsel for the respondent submits that, what any of the unavailable witnesses might have said is a matter of speculation. Counsel for the respondent submits that the applicant is asserting that he was not present when the alleged assaults were allegedly committed and the reason he proffers in support of that proposition that his employer and his parents would say the same thing, is because the applicant says it is true. Counsel for the respondent also highlights that not all of the offences are said to have occurred in the home; none of the offences are said to have been witnessed; and many of the offences fall outside of the period in respect of which the applicant complains as to the potential existence of employment records for the 1972-1978 period. Counsel for the respondent also submits that it is not at all clear, or explained, how F.N. and V.N. could have assisted the court, had they been available. Counsel for the respondent asks rhetorically: "*What would they have disputed?*"

129. Counsel for the respondent also refers to what was described as a quasi-admission made by the applicant under caution and he emphasises that it is also a statement wholly at odds with the applicant's claim that he always slept alone and never shared a bed with a complainant. For the respondent, it is submitted that this court can dispose of the application on the basis that all matters raised are properly for the trial court but that, even if the court engages in the type of analysis conducted in *P.T. v. DPP; K (E) v. Moran J. and DPP* and in *T.C. v. DPP*, the applicant has not met the threshold for an order of prohibition or for any relief.

The Supreme Court's decision in D.P.P. v. C.Ce. [2019] IESC 94

130. It is appropriate to note at the outset that the decision by the Supreme Court in DPP v. *CCe* post-dates, by over a decade, that court's decision in P.T. v. DPP. Given the very clear guidance provided by the Supreme Court very recently in *CCe,* it is appropriate to quote at some length from same. The backdrop to *CCe* concerned a ruling of a trial judge in circumstances where an application was for the case to be withdrawn in light of a missing witness. In *CCe*, the appellant had been accused of serious sexual offences against his niece, going back to 1971/1972. After a period of time, charges were brought by the DPP. A key 3rd-party witness died before being interviewed or giving evidence. During the course of the trial, the appellant made an application to have the trial halted. This was on the basis that the lapse of time and the death of the 3rd- party witness would render the trial unfair. The trial judge refused the application and the Court of Appeal dismissed the subsequent appeal against that decision. It is in these circumstances, the

matter came before the Supreme Court, which held that the appeal should be dismissed. Nothing turns on the difference in the facts as between that case and those presenting before this court. I say this because the Supreme Court in a variety of decisions very explicitly laid down principles which are of direct applicability insofar as the present application is concerned.

131. In their judgments, four members of the Supreme Court considered that the trial judge was required to assess whether a defendant had been deprived of a realistic ground of defence by the lapse of time. The Chief Justice set out the elements that were relevant to such an assessment, which were also discussed in the other judgments. The Supreme Court divided on the application of that assessment-process to the particular facts of the case before it, with the majority considering that delay and absence of the 3rd- party witness did not render the trial unfair. It is, however, entirely clear from the various judgments that the proper approach which must be taken by a trail judge where an accused seeks to halt a trial on the basis of alleged unfairness said to arise from delay between the alleged offence and the trial requires, inter alia, an engagement with the evidence given at the trial. It is clear that the relevant assessment as to fairness involves engagement with the prosecution case as it has actually developed at a trial. The Supreme Court in *CCe* examined a number of superior court decisions which suggested that a trial court, rather than a judge in judicial review proceedings, will often be in a better position to make an assessment as to whether an accused has suffered irreparable prejudice giving rise to a real risk of an unfair trial. The opening paragraph of the Chief Justice's decision in *CCe* is as follows:-

> *"1.1 The proper approach to long delayed criminal prosecutions has been the subject of much judicial debate in recent years. That debate stems, at least in part, from the emergence of significant allegations of sexual and other abuse in both institutional and domestic settings. Very frequently, those making such allegations have come forward at a significant remove in time from the events alleged to have occurred. While, at least in many cases, there are entirely understandable reasons explaining why allegations may not have been made at a time much closer to the alleged events, nonetheless the prosecution of serious criminal offences long after the event poses problems for the courts. On the one hand, there is the significant imperative in seeking to ensure that cases of serious alleged wrongdoing are considered on their merits. However, it is also necessary to protect the requirements of due process and a fair trial. But the question of finding the proper balance between these competing demands and putting in place appropriate procedures to enable courts to determine where that balance lies in the circumstances of any particular case have been much discussed as the case law has developed over recent years."*

Para. 5.4 of the Chief Justice's decision is directly relevant to the criticisms levelled by the Applicant at the complainants, for not making formal complaints sooner, and emphasises that prejudice arising from delay, not the reason for delay, is the key issue. Clarke C.J. stated as follows: -

"5.4 The judgment of this Court in S.H. v. D.P.P. [2006] IESC 55, [2006] 3 I.R. 575 signalled a significant development in the jurisprudence, however, as judicial notice was taken of the circumstances of and reasons for delay in making complaints by victims of child sexual abuse and it was held that there was no longer a necessity to inquire into the reasons for a delay in making a complaint. In a recalibration of the test to be applied in cases involving a lapse in time prior to the making of a complaint, Murray C.J. stated at p. 622 of the reported judgment that the issue which arose for determination by the 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".

At para. 5.7, Clarke C.J. commented specifically on the respective roles of judicial review and a trial court's jurisdiction with regard to ensuring a fair trial, putting matters as follows:-

"5.7 Recent decisions of the Court of Appeal have affirmed the views expressed by O'Malley J. in P.B. v. D.P.P. to the effect that the trial court will often be in a better position than the judge in judicial review proceedings to make an assessment of whether the accused has suffered irremediable prejudice giving rise to a real risk of an unfair trial, having regard to the run of the case and the evidence which is actually tendered; see M.S. v. D.P.P. [2015] IECA 309, at para. 49, and R.B. v. D.P.P. [2019] IECA 48 at paras. 9-16. The issue was similarly addressed by this Court in Nash v. D.P.P. [2015] IESC 32 in the context of judicial review proceedings in which an order of prohibition was sought on the grounds of lapse of time and where culpable delay on the part of prosecuting authorities was alleged by the applicant. At para. 2.21 of my judgment, I recognised the "growing tendency" on the part of the courts to consider, in the context of an ex ante application to prohibit a trial from going ahead, whether it might be more appropriate to leave the final decision to the trial judge and also set out the basis on which I considered that this course of action may be preferable.

5.8 Charleton J., at para. 23 of his judgment in the same case, was in agreement, stating:-

"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. As Clarke J states in his judgment on this appeal, if the case is one that there has been a diminishment in the availability of a trial that would be otherwise complete in every respect due to the factors complained of, then this judgment would concur that since the appropriate balance may best be seen by the trial judge in the context of a complete analysis of the facts of the case, it is preferable that an application to halt the trial be made to that forum. Where however, as Clarke J states, the case is one of a clear denial of justice resultant upon the factors found to be culpably wanting, prohibition by the High Court should be granted. 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."

5.9 As evidenced by the facts of the present proceedings, a consequence of delay is often that certain key witnesses are unavailable for trial or are deceased. In order to establish that a real or serious risk of an unfair trial exists as a result of the absence of a witness, it was always considered that there was a burden on the applicant to fully engage with the facts of the particular case in order to demonstrate in a specific way how the risk arose."

132. The following statement from the judgement delivered by O'Donnell J. in *CCe* is also apposite:

"18. Few trials, however, are perfect reproductions of all the evidence that could possibly exist. The absence of a witness or a piece of evidence does not render such trials unfair. A trial judge has therefore a vantage point which allows him or her to consider whether what has occurred crosses the line between a just and an unjust process. In shorthand terms, this involves considering whether the evidence which is no longer available is "no more than a missed opportunity", as the trial judge and the Court of Appeal considered, or by contrast whether the applicant has 'lost the real possibility of an obviously useful line of defence', as considered by the majority in this court, adopting in this regard the language of Hardiman J. in S.B. v. Director of Public Prosecutions [2006] IESC 67, (Unreported, Supreme Court, 21 December 2006) (' S.B.'), at para. 56. These judicially adopted phrases seek to identify either side of the dividing line: it is inevitable that many cases will proceed to trial without all the evidence that was potentially available at the time of the alleged offence, but that in itself does not prevent a trial occurring. There is a point, however, at which the deficiencies are of such significance and reality in the context of the particular case that it can be said that it is no longer just to proceed.

19 It follows that there is a particular and distinct onus upon trial judges to address this issue separately and conscientiously. This jurisdiction, which is in addition to the power of the jury to consider the impact of lapse of time, is an important protection for fair trial rights in circumstances which can be challenging. The exercise of that jurisdiction can, and must, be reviewed on appeal. That is a further important aspect of maintaining a fair trial."

Statement by the Supreme Court in D.P.P. v. *C.Ce*.

133. On the same day as delivering judgment in the *CCe* case, the Supreme Court took the somewhat unusual step of issuing a "Statement" which details the appropriate approach to be taken in respect of an application to halt a trial on the grounds of delay and alleged unfairness arising from same. The first portion of the Supreme Court's Statement

addresses the relevant principles, whereas the latter portion deals with the proper application of those principles to the particular circumstances of the case before it. For present purposes, it is appropriate to quote the first portion of the Statement, as follows:-

> "**Statement**
>
> *The Supreme Court has given judgment today in this appeal, which concerned the proper approach which should be taken by a trial judge in a case where an accused applies to have a trial halted on the grounds of alleged unfairness arising out of a significant lapse of time between the alleged offence and the trial.*
>
> *Four of the judges have delivered judgments in which they agreed that the proper approach at the level of principle requires an assessment by the trial judge as to whether a trial is fair and just in light of the lapse of time complained of and whether the accused had thereby been deprived of a realistic opportunity of an obviously useful line of defence. In the judgment delivered by the Chief Justice, with whom MacMenamin J. agreed, the elements of that assessment were set out from paras. 9.2 to 9.5:-*
>
> > *"9.2 In that regard, the trial judge must (a) first consider the prosecution case as it has actually developed at the trial. Thereafter, the trial judge must (b) consider whatever evidence is available as to the testimony which might or could have been given but which is said to be no longer available. That exercise will generally involve two principal considerations; first, the court must (c) consider the available evidence about what might have been said by the missing witness or what might have been contained in missing physical evidence, such as documents or objects. The trial judge will be required to have regard to the degree of confidence with which it can be predicted that the particular evidence would have been available, while recognising that the very fact that the evidence is not available means that that exercise must necessarily be speculative at least to some extent.*
> >
> > *9.3 If the trial judge is satisfied that it has been established that there was a real prospect that the evidence concerned could have been tendered, next, he or she will be required to (d) assess the materiality of any such evidence. The materiality of that evidence will need to be considered in the light of the prosecution case as it evolved at the trial.*
> >
> > *9.4 In the light of all of those factors, the court must finally (e) reach an assessment as to whether the trial is fair. The assessment of whether the trial is fair involves a conscientious determination by the trial judge whether, on the basis of all of the materials before the court, it can be said that the test identified by Hardiman J. in S.B. has been met, being that the absence of the missing evidence has deprived the accused of a realistic opportunity of an obviously useful line of defence.*

9.5 Although not relevant on the facts of this case, it should also be noted that culpable prosecutorial failure or wrongdoing can be taken into account in assessing the degree of prejudice which renders a trial unfair. As noted earlier, no trial is perfect. However, the degree of departure from a theoretically perfect trial which will render the proceedings unfair can be less where it can be said that culpable action on the part of investigating or prosecuting authorities have contributed to the prejudice. A lesser departure from what might be considered to be a theoretically perfect trial will render the proceedings unfair if that departure is caused or significantly contributed to by culpable action on the part of investigating or prosecuting authorities. A greater degree of departure from the theoretically perfect trial will need to be demonstrated in cases where there is no such culpable activity."

This step-by-step approach was expressly agreed with by O'Malley J. at para. 8 of her judgment. In that paragraph, she also agreed with the principles set out in the judgment of O'Donnell J. regarding the correct approach to be taken by a trial judge in this context, and stated that she did not see any real disagreement between the members of the Court as to how the trial judge determining such an application should proceed. These principles were set out at para. 46 of O'Donnell J.'s judgment as follows:-

"(i) The jurisdiction to determine whether it is just to permit a trial of an accused person on historic allegations to proceed, is one normally best conducted at the trial;

(ii) The decision the trial judge should make is whether he or she is satisfied that it is just to permit the trial to proceed;

(iii) The obligation on the trial judge is to make a separate and distinct determination in this regard, and the trial judge must do so conscientiously, in the light of everything that has occurred at the trial;

(iv) The test to be applied does not involve any assessment of the guilt or innocence of the accused, which is a matter for the jury, but rather the fairness and justice of the process by which it is sought to determine that matter;

(v) While an appellate court must recognise that a trial court has particular advantages in the making of this assessment, the decision of a trial court is subject to appeal, and trial judges should therefore set out clearly the considerations leading to the conclusion that it is or is not just to permit the trial to proceed."

O'Donnell J. similarly agreed that there was consensus in the Court as to how the trial judge should approach an application such as this, and stated that the differences between the members of the Court in this case involved the application

of general principles to the particular facts of this case. O'Donnell J. further expressly agreed with paras 9.2 to 9.4 of the judgment of the Chief Justice. At para. 15 of his judgment, Charleton J. concurred with the principles which were set out by O'Donnell J., and reiterated in the judgment of O'Malley J.

It follows that the proper approach to be adopted by a trial judge in all cases involving such applications is as set out in those judgments."

134. It is fair to say that the Supreme Court's decision in *CCe* makes it clear that judicial review is "*rarely appropriate*" and that, at the level of principle, what is required by way of a judicial response to an assertion that a fair trial is not possible or that there is a serious risk of an unfair trial, is by way of an assessment by the trial judge, responding to the prosecution case as it has actually developed.

135. The applicant in the present proceedings contends that his is one of the rare cases where this court should depart from the general principle that a trial judge is best placed to determine whether it is just to permit the applicant's prosecution. At this juncture, let me say that for the reasons set out in this judgment, I am satisfied it is not. A careful assessment of the evidence before this court convinces me that this is not one of those rare cases where the court should depart from what might be called the "*default position"* and where, instead of permitting a trial judge to administer justice in response to evidence actually given, this court should take upon itself the task of determining in advance and, thus, in an evidential vacuum, the fundamentally important question of fairness. I say that because, given all due weight to the facts which emerge from an analysis of the evidence laid before this court, I am entirely satisfied that they are not wholly exceptional circumstances made out by the applicant where it would be unfair or unjust to permit his trial even to commence. To say the foregoing is not to rule out the existence of prejudice, but it is to say that, insofar as prejudice has been made out or may arise in the context of an actual trial as it develops, it is certainly not of the type or degree which would justify this court in depriving a trial court of the entitlement, in the interests of justice, to conduct the assessment of the type laid out by the Supreme Court in *CCe*. I take this view conscious that, at any stage during the trial and in response to evidence proffered and issues as they arise in the trial court, it is open to the applicant to make what is commonly known as a "*POC application"* (see *DPP v. P. O'C* [2006] 3 IR 238). The Supreme Court's decision in *PO'C* emphasised that under the Constitution and at common law, the courts have an inherent jurisdiction to protect fair trial and due process, which includes a power to safeguard an accused person from oppression or prejudice. The court recognised that, during the course of a trial, matters may arise and evidence may be given which render a trial unfair or which render the process unfair and in such circumstances the trial judge retains a jurisdiction to prevent the trial from proceeding further. It seems uncontroversial to say and entirely consistent with the principles which emerge from *P O'C* and from *CCe* that the issue of delay and of determining whether prejudice has arisen from that delay and the extent of any such prejudice requires considerable fact-finding by a court and, plainly, this is better done by a trial court. I have examined the evidence closely in relation to the present application

and I am unable to hold that what emerges is the existence of exceptional circumstances which would justify a departure from the position articulated in *CCe*. In my view, this is sufficient to dispose of the present application. In short, having regard to the evidence in this case, it is undoubtedly one which, *per* the principles detailed in *CCe*, the appropriate forum for alleged prejudice to be raised is at a trial as it develops and it is inappropriate for this court hearing a Judicial Review application to make the determination, in advance and in a vacuum.

136. Things might be otherwise if, for example, Dr. Kelly's view was that the applicant was suffering from severe cognitive impairment and if, instead of receiving treatment for physical illnesses, the applicant was terminally ill with an untreatable disease and a limited life expectancy. Were that the factual position, the case might well be in the rare category. To say the foregoing is not to purport to lay down principles of wider application. It is not to say what this court should, or should not, regard as rare or exceptional cases. The facts in each specific case must be engaged with, making it unhelpful in my view to try and produce at a level of principle a list of what would or would not constitute exceptional circumstances or exceptional cases. It is simply to contrast the factual situation in the present case with a hypothetical scenario which might have required this court to depart from the 'default position' as articulated in *CCe.*

137. In other words, in that purely hypothetical scenario of serious impairment to mental capacity and/or untreatable terminal illness, it might well have been more appropriate for this court to take the view that it was appropriate to assess matters, than for the question of prejudice to be dealt with at the trial. That is not to predict the outcome of such an assessment. It is merely to say that such an extraordinary factor or circumstance, if present, might bring a case within the exceptional category outlined in *CCe*, namely, an exception to the general rule or 'default position' (that a trial court is better placed to assess the effect, in terms of alleged prejudice, arising from delay in cases of this nature). No such extraordinary circumstance is present here and I have no hesitation in saying that the facts which emerge from an examination of the evidence in the present case convince me that when O'Donnell J. stated that "*the jurisdiction to determine whether it is just to permit a trial of an accused person on historic allegations to proceed, is one* ***normally*** *best conducted at the trial"* (emphasis added), the present case falls into the foregoing category i.e. the norm, not the exception. Thus, this court must leave it to the forum where the relevant assessment is best conduced, i.e. the court of trial.

138. For these reasons, I am satisfied that the applicant is not entitled to the relief claimed. Lest I be entirely wrong in the foregoing view, I now propose to look closely at what is submitted on behalf of the applicant with reference to several authorities on which he places particular reliance.

P.T. v. DPP [2007] IESC 39

139. The case concerned an appeal by the DPP against a decision by the High Court. In the Supreme Court's decision Denham J. (as she then was) the court considered whether the applicant fell within the terms of the "*wholly exceptional circumstances where it would be unfair or unjust to put an accused on trial"* (per S.H. v. DPP [2006] IESC 55). Given the

reliance placed upon it by the applicant, it is appropriate to quote as follows from para. 15 of the Supreme Court's decision in *P.T.:*

> *"This is a test based on 'wholly exceptional circumstances', which are essentially fact based and thus previous cases are of limited value as precedents. It is necessary when analysing this aspect of the test to consider the particular facts of a case, and to determine whether it would be unfair or unjust to put that specific accused on trial in all the circumstances of the case.*
>
> *In this case relevant factors include:-*
>
> *(1) It is an old case, i.e. the allegations related to events between 37 and 42 years ago;*
>
> *(2) Consequently, it has the features of an old case;*
>
> *(3) There was an interval of time between the Church authorities being told of the allegations, the formal complaint, the charging of the applicant, and the return for trial;*
>
> *(4) The applicant is in his old age; he will be 87 years old in the autumn;*
>
> *(5) The charges have had a detrimental effect on the life of the applicant, because of the nature of the charges.*
>
> *(6) The health of the applicant.*
>
> *As to the health of the applicant, Dr John Kenny, consultant cardiologist, deposed, inter alia, of the applicant:-*
>
> > *'5. At present he is quite short of breath on pretty minimal exertion and has great difficulty in moving around. When I last saw him on 21/12/06 he had heart failure but his heart failure is well controlled on his medication. He also suffers quite a bit from stress and given the unstable nature of his cardiac condition I feel that the stress associated with a criminal trial could have a major effect on his health and possibly precipitate heart failure or acute myocardial infarction.'"*

140. The court went on to make clear that, in conducting the relevant balancing exercise, it identified three factors; firstly, that it was an old case; secondly, that the applicant was in his 87th year; and thirdly his ill health. As opposed to those factors was the public interest in the prosecution proceeding. The court made clear that no single factor rendered the case an exception, but it stated very clearly that it was a cumulative effect of the foregoing three factors which brought the case within the category of an exception requiring a balancing exercise to be conducted by the court.

141. I have no hesitation in saying that, in the present case, the applicant does not even get as far as a balancing exercise. I say this because the cumulative effect of all the factors he has relied on does not bring his case within the category of an exception. Yes, his is an old case and has the features of an old case. As the Supreme Court made clear, however, at para. 17 of the decision in *P.T*. "*this is not unusual in such a prosecution".* Thus, it is clear that it was the other two of the three factors in P.T. which were unusual, and which merited greater weight.

142. The evidence regarding the health of the applicant as referred to in the *P.T*. decision is fundamentally and materially different to the evidence proffered by the applicant in the present case. In P.T., there was clear evidence that to proceed with a criminal trial could possibly precipitate heart failure or a heart attack. Nothing of the sort arises in the present case. There is not even a suggestion that a criminal trial would adversely affect the applicant's health. This court recognises that a criminal trial will, under normal circumstances, be stressful, but the factual position in *P.T*. as opposed to in the application before this court is utterly different insofar as the applicant's health is concerned. The third factor in *P.T*. was that the applicant was in his 87th year. The applicant in the present case has just turned 80. In my view, that is a material difference. When one is of advanced years, a six-year period, one way or the other, is plainly material, given the average life expectancies. Even if I am entirely wrong in that view, it is uncontroversial to say that the factor which was plainly of major significance in *P.T*. (the ill health of an accused and the detrimental effect of a trial on same) is entirely absent in the case before this court. Nor is there a factor of equivalent weight - absent from *P.T*. but present in the case before this court - which could reasonably be said to 'make up the difference', thereby rendering the present case one involving wholly exceptional circumstances where it would be unfair or unjust to put the applicant on trial.

143. At para. 20 of the Supreme Court's judgment in P.T. the observation was made that: "*20. It demeans a system of justice if its process is one of vengeance, or has such a perception*". There is no question of the foregoing, in actuality or in perception, having regard to the facts which in the present case which I have examined in some detail earlier in this decision.

144. At this juncture it is appropriate to highlight very clearly the dangers associated with 'zoning - in' on a particular fact which arose in a previous decision, lest too much be made of the similarity or the distinction. An example, as regards *P.T*., is that the relevant applicant faced 28 charges of indecent assault. By contrast, the applicant in the present case faces 358 such charges. At a surface level, one might be tempted to say that in the latter case there is a far stronger public interest in the prosecution of what is, on any analysis, a far greater number of alleged offences. This is not a view I share, and I say that for two reasons. Firstly, there is an obvious public interest in the prosecution of all offences, in particular, alleged offences against children of an historic nature, and this is so regardless of the number of those offences, taking on board too that sample offences may be prosecuted in a given case. Secondly, and more importantly, each application of the present type is fact specific. In other words, justice must react to the very specific

facts of this particular case and must do so in every case, each of which will have a range of facts. To divorce one fact from the many others in a different case which, collectively, required a fact-specific analysis, seems to me to be of limited use unless those were facts identified as having played a material part in the court's decision, e.g. being identified as factors rendering the case an exception, or could fairly be inferred to be so.

K (E) v. Moore J. & DPP [2010] IEHC 23

145. This case concerned an application to prohibit the applicant's criminal trial for charges of sexual abuse, on the grounds of delay. It is clear from the decision of the court that, wholly unlike the position in the present case, the applicant in question suffered from a learning disability. Furthermore, it seems clear from the judgment (Charlton J.) that the applicant, by reason of his mental disability, appeared to have a relationship with his mother of a particular nature and that she was more likely to have been involved with his care and supervision than would otherwise be the case. Psychiatric evidence was given with the views of a Dr. Bahmjee (as per para. 7 of the court's judgment) being as follows: "Mr. K. is a person of low intelligence in the mild to moderate learning disability range. Although he is able to answer questions in a simple manner Mr. K. will not be fit to plead and he will not be able to instruct counsel or understand court procedure." A second clinician, Dr. O'Connell, was of the view that Mr. K. did not have the capacity to participate willingly in interview, and Dr. O'Connell's views (as per para. 8 of the court's judgment) were as follows: "In my opinion, Mr. K. presents with features consistent with a learning disability ..... In examining his fitness to be tried Mr. K. stated that he was innocent of the charges and that he wanted to plead not guilty. I was satisfied that he understood the nature of the accusations against him. However, I was concerned at his inability to weigh the consequences of entering a plea. Nevertheless, in the light of his evident desire to plead his innocence I am constrained from offering an opinion on the matter of his fitness to be tried. I am therefore reserving my opinion subject to a trial of the facts."

146. The position which emerges from the evidence in the application before this court could hardly be more different. There is no question whatsoever of the applicant in the present case suffering from a mental disability or, for that matter, having had a relationship with either parent which involved a level of care and supervision outside the norm. The court in *K. (E)* gave its conclusion in the following terms:

> *"12. The applicant, who is accused of 10 counts of sexual violence over 40 years ago, is a 63-year-old retired general labourer. He suffers from epilepsy and is illiterate. In addition to that he has significant cognitive impairment. His answers to the Gardaí, and his interview with Dr. O'Connell, suggest to me that his manner of dealing with events in his life history is to recall them in simple terms, where he remembers at all, and to eschew descriptive narrative."*

147. The facts in *K (E)* are materially different to those in the present case. In particular, the applicant in the present case does not have a "*significant cognitive impairment*". The expert's report - which the applicant's solicitor and counsel very properly drew to the court's attention - confirms precisely the opposite. Yet, it is plain that this feature, which

is entirely absent in the present application, played a significant role in the court's decision in *K (E)* to prohibit the prosecution. Among other things, Mr. Justice Charleton stated that "*the material before me suggests that that evidence would be terse, truncated to a general denial and possibly emotional.* (para. 13). Nothing of the foregoing sort rises in the present application. The final paragraph of the court's decision in *K (E)* was in the following terms:

> *"14. Should this trial proceed and a conviction occur, it would be open to a reasonable person to doubt the soundness of the conviction whereby a simple man with limited recall could have defended himself against allegations arising out of family visits almost half a century beforehand where one of the closest participants, namely his mother, is now dead. I would therefore regard this applicant as one of the very few applicants who fall within the category of succeeding in showing that there is a real risk of an unfair trial due to delay."*

148. In the application before this court, the applicant is not a 'simple man' and there is no evidence whatsoever that his recall is limited. Nor, as I say, is there any evidence that the applicant's mother had the particular type of relationship which the mother of K (E) had with him, due to the latter's mental disability. Neither could it be said, on the evidence before this court, that there is a basis for the court, at this stage, taking the view that a reasonable person could doubt the soundness of a future conviction. None of the foregoing arises.

149. Let me say that I accept entirely the submission made with skill and force by counsel for the applicant to the effect that there continues to exist a special category of cases where the cumulative weight of factors might justify the court in granting an order of prohibition. The present case is not, however, one of the few or rare cases which fall within that special category. This is because the factors and circumstances pertaining to the present case do not bring it outside the norm. Nor has the applicant demonstrated that there is a real risk of an unfair trial. In my view, it would be to create a patent injustice, having regard to the public interest in the prosecution of offences, for this court to prohibit the applicant's trial from even commencing. To do so, even if this court were to ignore the entirety of guidance given in *CCe,* would undoubtedly require truly exceptional circumstances which, cumulatively, would have to be of obvious weight tipping the scales in favour of the exceptional remedy of prohibition. There is nothing like such weight which emerges from the facts in the present case. Giving everything the applicant has put forward due weight, the scales tip decidedly in favour of the public interest in the prosecution of offences and against granting relief which would prevent his trial from commencing.

T.C. v. DPP [2017] IEHC 839

150. In a judgment delivered on 24 November, 2017, Mr. Justice White decided on an application by the applicant to prohibit his prosecution in respect of offences of indecent assault alleged to have occurred between 1964 and 1984. The foregoing, submits counsel for the applicant, is similar to the position in the present case. The applicant in *T.C.* was a bachelor living on a farm in the northeast who was then aged 80, his mother having died

in 1994. Again, counsel for the applicant refers to parallels regarding the facts in the present case. Another similarity is that, in 2003, a family meeting took place where the issue of sexual abuse was discussed and the family agreed to, and did, confront the applicant. The members of the family who subsequently made complaints in 2014 were mature adults in 2003. Again, counsel for the applicant emphasises that the foregoing has echoes of the position in the present case. At para. 19 of his judgment, White J. noted *"…the developing jurisprudence of the Superior Courts indicating that these matters are more appropriately dealt with at the trial rather than by prohibition."*

151. Counsel for the applicant submits that, notwithstanding the foregoing jurisprudence, there remains extant, the omnibus jurisdiction invoked by Denham J. (as she then was) in *P.T*. This is a submission I accept, but it is also appropriate to note that what Mr. Justice White referred to as "*the developing jurisprudence"* has, on any analysis, developed even further in that there is even greater clarity as to the appropriate approach to be taken in an application such as this, per CCe. The appropriate approach or the 'default position' is that such matters as the applicant has raised should be dealt with by a trial judge who is tasked with and empowered to ensure fairness insofar as a trial is concerned and who retains at all material times the jurisdiction to halt an ongoing trial if constitutional justice requires it. As I have explained earlier, it is only a rare and truly exceptional case where the guidance given by the Supreme Court in CCe should be departed from and this is not such a case. This fortifies me in the view I expressed earlier. Nevertheless, and lest I be wrong, I will continue with the analysis of *T.C.*, accepting as I do the existence of the omnibus jurisdiction (though satisfied that the facts which emerge from an analysis of the evidence in this case do not get the applicant 'off the blocks' in terms of invoking that jurisdiction and, for this reason, the present analysis is unnecessary).

152. It is appropriate to quote the final passages of White J.'s decision:

> *"23. This Court would generally be very reluctant to prohibit a trial on such serious charges where there is an overwhelming public interest that this trial should take place. However, the court does accept that the omnibus principle which the Court does not generally favour, still applies. There are exceptional circumstances where a court should intervene to prohibit a criminal trial.*
>
> *24. Very exceptional circumstances arise in this case. The Applicant is 80 years of age. He is terminally ill with bowel and lung cancer. His medical professionals have advised that intervention is not warranted except with palliative care. They cannot predict the date of his death but have given a reasoned opinion that it is best measured in a short number of years and possibly less. In addition, the Applicant has other general health problems which would not ultimately prevent his trial but he has poor hearing and possible memory loss. The antiquity of some of the alleged offences is also exceptional, and while delay on its own would not prevent the trial, a significant portion of the delay could have been avoided if complaints had been made by the H family after their meeting in 2003 when the behaviour of the Applicant was discussed. While the public interest would strongly dictate that the*

prosecution should continue it is the view of the court that in all the circumstances, due to the exceptional circumstances of this case the court should prohibit any further proceedings in the trial of the Applicant."

153. Counsel for the applicant also points out that there were 9 complainants in the *T.C*. case, whereas there are fewer, *i.e*. 4 complainants in the present application. The gravamen of his submission is to argue that, in *T.C.*, the larger number of complainants represented an even stronger argument in respect of the public interest in the prosecution of *T.C.* continuing, yet the court halted the prosecution. The foregoing is canvassed in support of this court doing likewise. Despite the skill with which it is made, that appears to me to be a specious argument and nothing at all turns, in my view, on the specific number of complainants in each case (both of which involved multiple complainants).

154. It is also submitted on behalf of the applicant that the terminal illness of the applicant in *T.C*. was not a determining factor and it is submitted that if it had been determinative, Mr. Justice White would have made that clear. Regardless of the subtlety of that submission, it is beyond doubt, in my view, that the applicant's state of health was a material factor and played a material role in what was a successful omnibus application, in the manner explained by White J.

155. If one were to remove from the court's decision in *T.C.*, the fact that the applicant was terminally ill with bowel and lung cancer; and the fact that his medical advisors had advised that intervention was not warranted except with palliative care; and the fact that their opinion was that his life expectancy was measured in a short number of years and possibly less; as well as the fact that the applicant had poor hearing and possible memory loss, what remains? What remains is an elderly individual facing historic allegations, a portion of which delay could have been avoided if the complaints had been made by the relevant family in 2003 – in short a delayed prosecution of this nature. I have no hesitation whatsoever in saying that the foregoing does not constitute very exceptional circumstances. Indeed, Mr. Justice White was explicitly of the same view stating *inter alia* that "…*delay on its own would not prevent the trial…".*

156. Thankfully, the applicant in the case before this court is receiving medical treatment. His medical professionals have not advised that only palliative care is appropriate. Nor is there evidence that, as a result of his illness, the applicant's life is measured in a short number of years and possibly less. Furthermore, and unlike the position in *T.C.* the applicant does not have poor hearing and there is no question of the applicant having memory loss, possible or otherwise. The issue of cognitive impairment was definitely ruled out by Dr. Kelly.

Conclusion

157. It was appropriate for this court to examine the evidence before it. That was done and the result was that no exceptional factor emerged, nor was it the case that, taken together, a number of, on their own unexceptional, factors cumulatively constituted the exceptional, or placed this case in the category outside the norm, as identified by the Supreme Court in *CCe*.

158. Thus, having regard to the guidance given by the Supreme Court in *CCe,* this court was required, in my view, to refuse the relief sought by the applicant (leaving the applicant in the position whereby the issues canvassed in the present application could be ventilated before the trial court which would be in a far better position to make an assessment, in the context of an actual trial as it developed, as to whether or not the applicant had suffered prejudice, incapable of being remedied, so as to give rise to the real risk of an unfair trial).

159. Lest I was wrong in that view, I engaged with the omnibus application in the context of authorities upon which the applicant placed particular reliance. Either route produces, in my view, the self-same result i.e. the refusal of the relief sought. For the reasons explained in this judgment I am satisfied that this is an application which must be dismissed.

160. The would-be comparators relied on by the applicant do not, in my view, offer any support for the relief sought when one looks at the particular facts and circumstances of the case before this court. Applying, however, the very principles which were applied in the three authorities on which the applicant places particular reliance, I am entirely satisfied that very exceptional circumstances do not arise in the present application which would justify the grant of the relief sought.

161. Having given due weight to all the facts which emerge from the evidence proffered by or on behalf of the applicant, I am satisfied that the factors canvassed by him do not, cumulatively, bring this case within the category of exceptional case where a balancing exercise ought to be conducted. In my view, the facts in the present case mean that matters do not even get as far as they did in *P.T.* In para. 17 of the Supreme Court's decision in *P.T.,* Denham J (as she then was stated that: *"In issue is the exception referred to in H. v. The Director of Public Prosecutions: whether it would be unfair or unjust to put the applicant on trial. Thus, the relevant factors require to be identified and then a balancing exercise undertaken by the court*". In the present case (wholly unlike in *P.T.*) there was not a single unusual or exceptional factor among the various factors canvassed by the applicant. Thus, on the facts of the present case, matters did not even get to the stage of conducting a balancing exercise in my view. That said, I proceeded to conduct that exercise lest I be wrong not to.

162. Conducting, as I say, the very balancing exercise referred to in *P.T.* (lest I be wrong that the principles which were outlined in *CCe* are determinative of the case, and lest I also be wrong that the cumulative effect of the factors identified by the applicant is more than the sum of each part and places the applicant in a situation where, per *P.T*. he can require this court to conduct the balancing exercise referred to at para. 17 of that judgment) certainly does not, in my view, favour the halting of his criminal prosecution.

163. It is also necessary to make clear that, in my view, the result of such a balancing exercise does not involve fine margins. The result is overwhelmingly in favour of permitting the prosecution to proceed. The factors identified by the applicant certainly do not outweigh

the public interest in the prosecution of offences (and I take this view ignoring, entirely, the possible existence in this case of anything in the nature of an admission of any sort).

164. The applicant alleged in the case before this court, inordinate and inexcusable delay both pre and post formal complaints being made to the authorities. I am entirely satisfied that he has not proved prosecutorial delay, culpable or otherwise. Denham J. (as she then was) made clear in *P.T.* that even where (as in this case) prosecutorial delay had not been proved, the Court could halt a prosecution of this nature where the prejudice to the accused gave rise to a real or serious risk of an unfair trial. That jurisdiction which exists to respond to wholly exceptional circumstances of which there are none in the present case.

165. The 'common thread' between the *P.T; K(E)* and *T.C.* decisions is that a significant factor which plainly comprised a material element of the wholly exceptional circumstances in each case, was something specific to the applicant, personally; concerned his health, be that mental and/or physical; and, thus, was incapable of being ameliorated by a trial judge. To illustrate the point, it is impossible to see what a trial judge could have done by way of ameliorating measures in a criminal trial if the criminal trial itself could precipitate heart failure or a heart attack (as in *P.T*). Similarly, it is impossible to see what a trial judge could do to ameliorate the fact of a learning disability *(K(E))* or the fact of terminal and incurable illness in an elderly person *(T.C.).*

166. The common thread was not missing witnesses or missing documentation (something hardly unlikely in cases of this type which involve the prosecution of crimes alleged to have been committed against children many years earlier). The common thread was specific health issues adversely affected the applicant in each of the three cases, the fact and/or effect of which, for the purposes of ensuring a fair trial, was incapable of amelioration. Nothing of the sort arises in the present case.

167. As the Supreme Court explained in *CCe*, trial judges are experienced in ensuring that imperfect trials, as a great many must be in an imperfect world, are, nevertheless, fair. On the facts presented to this court, there is. Wholly unlike the situation in *P.T.; K(E)* and *T.C.* there is nothing out of the ordinary or significant which is specific to the applicant and which, taken together with other factors (even if none of those are extraordinary in the context of prosecutions of this type) moves the case into the category of the wholly exceptional.

168. It is also appropriate to note what Ms. Justice Murphy stated in *N.S. v. DPP* [2019] IEHC 671 wherein, at para. 47, the learned judge stated:

> *"47. The SH decision made it clear that unless and until the legislature decides to impose a statute of limitations on sexual offences, delay per se is not a bar to prosecution. In the intervening years our jurisprudence has evolved to the point that it is now settled law that where prejudice is asserted to have occurred by reason of delay, the forum in which that assertion is to be tested is the court of trial. The court of trial has all the tools necessary to test the significance of disputed or lost or missing*

evidence. It can conduct a voir dire *where there is a challenge to the admissibility of evidence on the basis of asserted prejudice. It is charged with the protection of an accused's fair trial rights. It can and must withdraw a case from the jury where it is established that an accused's fair trial rights have been impaired by delay. That said, the jurisprudence does leave open the possibility that in an exceptional case prohibition might still be available pre-trial. What amounts to an exceptional case has not been defined, but is likely to be a case in which an accused is manifestly unable to defend himself by reason of the passage of time. An accused who is suffering from alzhei0mers or dementia might fall into the category of 'exceptional' even though generally speaking the question of capacity is reserved to the court of trial."*

The proposition that it is now 'settled law' that the forum in which to raise assertions of the type canvassed by the applicant in the present case, is the court of trial, is hardly controversial, given the explicit guidance provided by the Supreme Court in *CCe*. Thus, once this court, having reviewed the evidence before it, was in a position to take the view that this was *not* an exceptional case, it seems to me that no further engagement with the application was necessary, other than to dismiss it, thereby ensuring that the forum best placed to deal with the issues could do so, insofar as the applicant wished to canvass such and any other issues said by him to undermine the fairness of his prosecution.

169. For the reasons explained in this decision I am satisfied that, taken together, the matters which are said by the applicant to prejudice his right to a fair trial fall very well short of the wholly exceptional circumstances required to successfully obtain prohibition. It also seems to me that, although the omnibus jurisdiction remains something which in rare and exceptional cases can be invoked, it seems to me that in light of the guidance given in *CCe*, a party seeking to halt a trial who relies on an omnibus application in this regard must do more than proffer a range of factors each of which, on their own, is not unusual, rare or exceptional. It seems to me that if the position is that not a single feature of an omnibus application can reasonably be said to be exceptional, then the appropriate approach for this court to take, once such a view emerges from the evidence proffered in the omnibus application, is to decline relief and, (as *per* the *CCe* principles) to leave it to the forum far better placed to deal with questions of alleged prejudice and fairness in respect of a trial i.e. the trial court. In short, it seems to me that the effect of *CCe* insofar as the omnibus jurisdiction is concerned is to require that there must be at least something genuinely exceptional canvassed in it, in order for the court to engage with it at all. In the wake of the clear guidance given in *CCe,* I take the view that the grouping-together of a collection of individually unexceptional factors cannot, in my view, be sufficient to engage the court's jurisdiction by way of an omnibus application contending that a trial should be halted. Such applications should not be brought. That is not to deny justice or to refuse an avenue to justice. Rather, it is to point, as the Supreme Court did most clearly, to the appropriate forum where the fundamentally important issue of fairness in respect of a criminal prosecution is to be dealt with.

170. It also seems appropriate to make reference to the Court of Appeal's decision in *X. v. DPP* [2020] IECA 4 wherein, in a "post-script" furnished by the court in the wake of the Supreme Court's decision in *CCe,* the Court of Appeal stated as follows:

> *"40. Following on from* People (DPP) v. C.C., *those who wish to challenge their prosecution on the grounds of delay may be well advised to think twice before proceeding to judicial review."*

171. I would respectfully echo the foregoing sentiment and, for the reasons set out in this judgment, I must refuse the relief sought by the applicant.

172. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: *"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."*

173. Having regard to the foregoing, the parties should correspond with each other, forthwith, regarding the appropriate form of order including as to costs which should be made. In default of agreement between the parties on that issue, short written submissions should be filed in the Central Office within 14 days.