THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 576
[Record No. 2019/552 JR.]

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

F.M.

RESPONDENT

JUDGMENT of Mr. Justice Mark Heslin delivered on the day of 2nd July, 2021

Introduction

1. The background to this case concerns four charges of indecent assault. The assaults are alleged to have occurred between 1st April, 1968 and 31st December, 1970. A prosecution was brought against the respondent, the complainant being **a family member, who was aged between seven and nine at the time of the alleged incidents. The respondent's trial was listed for hearing on 27th March, 2019. On that date, counsel for the prosecution sought an adjournment due to the unavailability of a prosecution witness. That application was declined. The judge decided to proceed with the respondent's trial. The learned judge swore in a jury and adjourned the trial to the following day. On the morning of 28th March, 2019, counsel for the prosecution informed the court that the complainant was unavailable due to ill health and a medical report by the complainant's general practitioner, dated 27th March, 2019 was handed into the judge. This report referred, *inter alia*, to the applicant being under extreme stress and to a number of physical symptoms and the GP's view included the following: *"I don't think that she is currently in a fit state to testify."* This was the first time the prosecution sought an adjournment based on the complainant's unavailability. Counsel for the respondent made it clear that any adjournment was strenuously opposed. The applicant in the present proceedings asserts that counsel for the respondent then made an application to have the case against the respondent dismissed for reasons of unfairness, in accordance with the Supreme Court's decision in *People (DPP) v. PO'C* [2006] 3 IR 238. The applicant contends that the submission made by the respondent on 28th March, 2019 was to the effect that the historical nature of the charges meant that a fair trial could not be held and that the trial should be prohibited and that a "*PO'C application*" was made. The applicant asserts that the court entertained that application, notwithstanding the fact that no evidence had been heard and that *PO'C* applications are not available at the pre-trial stage. The respondent asserts that no *PO'C* application was in fact made and that no *PO'C* application was engaged with by the learned Circuit Court judge. A transcript of 27th and 28th Mach, 2019 is available. It is not in dispute that counsel for the respondent made specific reference to the *PO'C* decision and quoted certain passages from that case, *verbatim*, on the morning of 28th March, 2019. In his ruling, the learned judge stated, *inter alia: "I accept in general terms, the type application is probably one that is made as the evidence unfolds, but it is apparently common case that nine people who have a relevance to this prosecution are now dead. The passage of time has certainly affected the position. But that's not giving a conclusion on the PO'C ground, it's just stating the obvious, that it's a case that had to get on and had to get on quickly."* The trial judge

declined to adjourn the matter and, in circumstances where the prosecution was not in a position to offer any evidence, the learned judge directed the jury to acquit the respondent. The applicant seeks, *inter alia*, to quash the order of the Circuit Court judge made on 28th March 2019 directing the jury to acquit the respondent.

The Order granting Leave

2. By order made on 29th July, 2019, this Court (Meenan J.) granted the applicant leave to seek judicial review in respect of the reliefs set out in para. D on the grounds set out at para. E of the applicant's statement of grounds dated 29th July, 2019. The relevant relief sought by the applicant is described in the 29th July, 2019 order and reflected in para. D of the statement of grounds, as follows:-

> "*(i) An order certiorari quashing the order of a Circuit Court judge sitting at Bray Circuit Court on the 28th March, 2019 directing the jury to acquit the respondent herein of four charges of indecent assault on dates between 1st April, 1968 and 31st December, 1970;*
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> *(ii) An order remitting the aforementioned charges of indecent assault to the Circuit Court so that they may proceed in accordance with law;*
>
> *(iii) An extension of time for the bringing of this application, if necessary, and*
>
> *(iv) Such further or other relief as may be appropriate."*

DPP v. PO'C [2006] 3 IR 238

3. Of particular significance in the present case is whether what has been described as a "*PO'C* application" was made on behalf of the respondent on 28th March, 2019. Given the relevance of the principles deriving from that decision, it is appropriate to look in some detail at the Supreme Court's judgment in *PO'C* which was delivered on 27th July, 2006 by Denham J. (as she then was). In that case, the accused, who was a primary school teacher, was charged with a number of sexual offences against young girls, alleged to have taken place between 1979 and 1981. On 25th January, 2000, the trial began before McGuinness J. and a jury in the Central Criminal Court, no complaint or application being made in relation to delay. The following day, it transpired that two members of the jury knew some of the witnesses in the case and the jury was discharged, with the case recommencing before Finnegan J. and a new jury on 24th May, 2000. After the jury was sworn in, counsel for the accused made an application to the trial judge "*to stay the indictment in this trial*". The basis for the application was that the offences in the indictment were alleged to have occurred between 1979 and 1981 and that, by reason of excessive delay, it would not be possible for the accused to get a fair trial. The trial judge refused the application, stating as follows:-

> *"On consideration of the authorities to which I have been referred, I take the view that I have no jurisdiction to proceed as requested. However, it may be of comfort to the accused to understand that delay is a matter which may be relevant in the course of this hearing. It is undoubtedly a matter to which counsel for the accused will refer and if appropriate, it is a matter with which I will deal in any charge which*

I give to the jury. Again, if in the course of a trial it appears that a serious prejudice is caused to the accused it may be grounds upon which I should direct the jury as to the verdict which they should give. So delay is a matter which I will bear in mind throughout the trial but it is not a matter for which I should have concern at this stage."

4. This ruling by the trial judge was affirmed by the Court of Criminal Appeal in a judgment delivered on 27th January, 2003. That court held that the trial judge had no jurisdiction to entertain such an application to quash the indictment. Relying on *The State (O'Connell) v. Fawsitt* [1986] IR 362 and *BF v. DPP* [2001] 1 IR 656, the Court of Criminal Appeal held that the correct way to proceed in such cases was by way of prohibition where the court was an inferior court and by way of injunction against the DPP where the prosecution was in the Central Criminal Court. The matter came before the Supreme Court in circumstances where the Court of Criminal Appeal certified that its decision dismissing PO'C's appeal against his convictions involved a point of law of exceptional public importance, the certified point of law being:-

"Does a trial judge in the Central Criminal Court have jurisdiction under the Constitution or at common law to hear an application to stay or quash an indictment on grounds of delay?"

5. The Supreme Court's decision in *PO'C* emphasises that a trial court does not have the right to determine issues involving delay at the commencement of a trial. The following passages from the Supreme Court's judgment appear to be particularly relevant:-

"*The issue of delay requires considerable fact finding by a court and thus a separate procedure, such as judicial review, is far more appropriate than a motion at the commencement of a trial*." (p.7, para. 6)

"*While it is well established under the Constitution and under common law in Ireland that the courts have an inherent jurisdiction to protect fair trial and due process, this does not apply to the issue of a preliminary application in a trial on the issue of delay*." (p. 8, para. 6)

***"There is no doubt that the trial court has a general and inherent power to protect its process from abuse and that this power includes a power to safeguard an accused person from oppression or prejudice. However, this applies during the course of the trial and does not establish a right to a separate, discrete, preliminary process at the commencement of a trial to inquire into issues of delay*." (p. 9, para. 6)**

6. Given the significance of the principles to the case before this Court, it is also appropriate to quote, *verbatim*, the final section of the Supreme Court's decision in *PO'C*, as follows:-

"7. … The special jurisprudence which has been established relating to the issue of delay in prosecuting cases of sexual abuse in children has addressed the matter of

the appropriate remedy. Thus G v. DPP [1994]1 IR 374 was an appeal to this Court from a refusal of the High Court to grant liberty to institute proceedings by way of judicial review seeking an injunction or prohibition preventing the trial of the applicant on twenty seven charges contained in a book of evidence. The charges referred to a series of offences of indecency against young girls and of carnal knowledge of girls under the age of fifteen years. The earliest date was a charge on a date unknown between the 1st January, 1967, and the 31st January, 1967, and the latest of the charges appeared to be on a date unknown between June, 1981 and the 31st December, 1981. The charges involved seven young girls. Judicial review was sought on the basis, inter alia, *of the length of time which had elapsed from the date of the alleged offences and the date of any trial. Finlay C.J. pointed out that an applicant must satisfy a court in a prima facie manner that the only effective remedy, on the facts established by the applicant, which an applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure. Finlay C.J. held, at p. 379:*

> *"(e) With regard to the appropriateness of judicial review as a remedy in this case, the judgment of this Court in The State (O'Connell) v. Fawsitt [1986] IR 362 at p. 379, quite clearly endorsed the principle that if a person's trial had been excessively delayed so as to prejudice his chance of obtaining a fair trial that the appropriate remedy was a judicial review, even though the court of trial has, of course, jurisdiction to prevent the trial."*

This is the general principle of law, if a trial is delayed the appropriate remedy in which to raise that issue is by way of judicial review. However, whether an application for judicial review is made or not, the trial court retains at all times its inherent and constitutional duty to ensure that there is due process and a fair trial. Thus, in the course of the trial matters may arise, evidence may be given, which renders a trial unfair, or the process unfair. In these circumstances the trial judge retains the jurisdiction of preventing the trial from proceeding. This jurisdiction is exercised in the course of a trial but does not enable, or relate to, a preliminary hearing at the commencement of a trial on the issue of delay.

It has been expressly stated in State (O'Connell) v. Fawsitt [1986] IR 362 that a person charged with a criminal offence is entitled as part of his right to be tried in due course of law, to a trial with reasonable expedition. Where a trial of a person charged with an indictable offence has been excessively delayed so as to prejudice his chance of obtaining a fair trial, the appropriate remedy by which his constitutional rights may be defended and protected is by an order of prohibition or injunction. Such a person should not be put to the risk of being arraigned and pleading before a jury.

In G v. DPP, which referred to State (O'Connell) v. Fawsitt, Finlay C.J. stated that the appropriate remedy was an application for leave to apply for judicial review.

The further phrase by Finlay C.J., as to the jurisdiction to prevent the trial, was an expression of the law stating that simply because the appropriate remedy existed this did not exclude the fundamental jurisdiction of the trial court to protect its due process and to prevent a trial proceeding. Such reference related to the body of the trial and not to a pre-trial application. Similarly in MK v. His Hon. Judge Groarke (Unreported, Supreme Court, 25th June, 2002) reference is made to the judge made law relating to orders of prohibition and injunction, i.e. judicial review. This, of course, does not preclude the jurisdiction of the trial court in the course of the trial from addressing matters relating to delay which arise on the evidence. It is not inconceivable that evidence may be given during the course of the trial which would require the trial judge to exercise his jurisdiction to prevent the trial proceeding. When a judicial review has been heard and determined it does not exclude the continuing duty of a trial judge to ensure fair procedures and due process, including issues arising because of any delay. However, this jurisdiction is exercised in the course of the trial, on the evidence given in the trial, and not as a separate motion on specific evidence at the commencement of a trial.

8. I would dismiss the appeal. The Central Criminal Court does not have jurisdiction to hear an application at the commencement of a trial, or preliminary to a trial, to stay or quash an indictment on the grounds of delay. It is established law that the correct procedure is to apply to the High Court for leave to apply for judicial review."

7. It is clear from the *PO'C* decision that the issue of delay requires considerable fact-finding by a court and cannot be dealt with at the start of a trial. It will be recalled that in the *PO'C* case, a jury had been sworn in, yet the Supreme Court was very clear that an application to dismiss on delay grounds was not possible by way of a preliminary application. In the case before this Court, a jury was sworn in on 27th March, prior to the application which was made on 28th March, 2019, giving rise to the order of that date which is challenged in the present proceedings. It is clear from the decision in *PO'C* that someone who seeks to argue that there is a serious risk of an unfair trial or that by reason of delay and alleged prejudice arising from delay, that a fair trial is no longer possible, must engage with the evidence and demonstrate the alleged unfairness. Doing so involves the court assessing the potential relevance to the trial of, for example, such witnesses as are said to be no longer available due to delay. Such an assessment cannot happen by way of a preliminary hearing at the commencement of a trial on the issue of delay. As per the Supreme Court's guidance in the *PO'C* decision, the appropriate remedy is to seek leave to apply for judicial review. Apart from the foregoing, a trial judge enjoys a jurisdiction, during the course of the trial, to address matters relating to delay which arise on the evidence. In certain circumstances, that could conceivably involve a trial judge exercising his or her jurisdiction to prevent a trial from proceeding. Such a jurisdiction is, however, exercisable in the course of the trial, having regard to the evidence given in the trial.

8. As recently as 19th December, 2019, the Supreme Court examined the principles derived from the decision in *PO'C*. In the *CCE* case, the appellant had been accused of serious sexual offences against his niece, going back to 1971/1972. After some period of time, charges were brought by the DPP. A key third party witness had died before being interviewed or giving evidence. During the course of the trial, the appellant had made an application to have the trial halted on the basis that the lapse of time and the death of the third 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. The matter came before the Supreme Court which held that the appeal should be dismissed. 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 facts of the case before it, with the majority considering that delay and absence of the third 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 trial 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.

9. The Supreme Court, in *CCE*, also examined Superior Court decisions which post-date *PO'C,* in particular, judgments 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. That assessment, however, was to be made by a trial judge, having regard to the evidence actually tendered in the case running before her or him. 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."

10. Later, at para. 5.4, 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 IR 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".*
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> *5.5 The courts had previously indicated that, should it not be possible to form a judgment in advance as to whether a trial would be fair or unfair, it was for the trial judge to ensure as best he or she could that the trial was fair (per Geoghegan J. in P.L. v. Buttimer [2004] 4 IR 494 at p. 520). In The People (Director of Public Prosecutions) v. P. O'C. [2006] IESC 54, [2006] 3 IR 238, this Court held that the trial court did not have the jurisdiction to entertain a preliminary motion to quash the indictment on the grounds of delay. It was affirmed that the "appropriate procedure" by which to address the issue of delay was that of judicial review proceedings. However, importantly, Denham J. affirmed the inherent jurisdiction of the trial court to protect its process, address matters relating to delay which arise on the evidence and make such orders as are necessary during the course of the trial."*

11. The Chief Justice then cited a passage from *PO'C* which I have quoted earlier in this decision, including: *"This jurisdiction is exercised in the course of a trial but does not enable, or relate to, a preliminary hearing at the commencement of a trial on the issue of delay".* Later still, at para. 5.7, Clarke C.J. commented on the respective roles of judicial review and a trial court's jurisdiction with respect to ensuring a fair trial, but it is important to note that there was no question of the trial judge's jurisdiction being exercisable by way of a preliminary application at the commencement of a trial, as opposed to an assessment of evidence given during a hearing as the prosecution's case developed. The Chief Justice put 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."

12. It is clear from the foregoing, that an assessment of the effect of delay such as unavailable witnesses or missing evidence, in the context of an assertion by an accused that a fair trial is no longer possible, is an assessment which cannot be made by way of a preliminary application to a trial judge.

Statement by the Supreme Court in D.P.P. v. C.CE.

13. 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 by a trial judge in respect of an application to halt a trial on the grounds of delay and alleged unfairness arising from same. A reading of the various judgments of the Supreme Court in *CCE* and the Supreme Court's helpful *Statement* demonstrates that the approach outlined is entirely consistent with the principles derived from the *PO'C* case. 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. Thus, for present purposes, it is appropriate to quote the first portion of the statement as follows:-

> **"Statement**
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> *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.*
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> *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:-*
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> *"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.*
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> *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.*
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> *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."

14. Having regard to the Supreme Court's decision in *PO'C* and the guidance given by the Supreme Court in *CCE*, it is clear that a preliminary application on the issue of delay cannot be brought. It should also be noted that, when O'Donnell J. states at para. 46(i) that the jurisdiction to determine whether it is just to permit a trial of an accused on historic allegations to proceed "*is one normally best conducted at the trial*", the learned judge was not suggesting that it was open to a trial judge to permit such an application by way of a preliminary hearing immediately after a jury had been sworn in but before evidence had been given. Rather, a reading of his judgment makes it clear that such an application could only be dealt with by a trial judge in light of evidence which had been given during a trial which proceeded. The learned judge's comments in relation to the assessment being one best carried out at the trial was made in the context of contrasting that situation with an assessment based on affidavit evidence in the context of judicial review, O'Donnell J. stating the following at para. 44 of his judgment:-

"The logic underlying this recent approach of the courts is that the assessment of the overall fairness of the proceedings is best carried out at the trial, rather than in advance on the basis of affidavit evidence professionally drafted and speculation as to what might transpire at a trial. The courts came to require that applicants at least directly engage with the case, rather than seek to raise hypothetical issues. Moreover, the place that any lost evidence, whether real or oral, might play in a case was best assessed in the context of the case itself, and the manner in which it proceeded."

The Pleadings in this case

15. Having looked at certain key legal principles of relevance to the case before this court, I now turn to the pleadings. I have carefully considered the contents of all pleadings in this case comprising the applicant's statement of grounds dated 29th July, 2019; the affidavit of Mr. Rory Benville, State Solicitor for County Wicklow, sworn 29th July, 2019 and exhibits "RB1" to "RB5" thereto; the respondent's statement of opposition dated 11th November, 2019; the verifying affidavit sworn by Aonghus McCarthy, solicitor for the respondent, on 6th December, 2019; the replying affidavit sworn by Mr. Benville on 24th June, 2020 and exhibit "A" thereto; as well as the affidavit sworn on 8th September, 2020

by the respondent. As a result of a careful analysis of the foregoing, there is a significant degree of consensus on certain relevant facts leading up to the making of the order on 28th March, 2019 which is challenged in the present proceedings. I will presently set out those facts.

The verifying affidavit and matters not relevant to the decision of this court

16. It is also fair to say that, in opposing the relief sought, the respondent has raised a range of matters which do not appear to be relevant to the decision which this Court must make. The case before this court does not constitute an appeal, much less a merits-based analysis of issues which were before the Circuit Court. This Court is concerned with the lawfulness, or otherwise, of the decision made on 28th March, 2019. I make the foregoing comments in circumstances where, in the affidavit verifying the statement of opposition, sworn by Mr. Aonghus McCarthy, solicitor for the respondent, a wide range of averments were made, including to the following effect:-

- that the allegations against the respondent relate to unknown dates almost half a century ago;
- that the allegations are based on the word of the complainant alone and are fully denied by the respondent who voluntary attended for interview with An Garda Síochána;
- that **the complainant's brother who was familiar with the locus and broadly familiar with certain interactions between the complainant and respondent has no real recollection of the facts;
- that the second (and final) witness of fact is the complaint's sister who is a person the complainant is said to have told, decades after the fact, that she had been sexually assaulted;
- that, over time, persons present in the relevant locus where the allegations are said to have occurred have passed away;
- that the few who remain are unlikely to be able to recall detail reliably;
- that, around the time of the alleged crimes, the respondent was employed full-time during the summer in a shop on O'Connell Street, Dublin;
- that his employer is now deceased and that the respondent claims that his employment, in or about the time of the allegations, would have prevented him from visiting the family home in Wicklow and being present at the time of the allegations;
- that **the owner of the relevant land in Wicklow, would have been able to provide valuable defence evidence regarding the layout of the land and woodland and alleged presence of temporary structures, but is now deceased as are his brother and wife who were local;

- that the respondent's parents are deceased and would have been in a position to give relevant evidence regarding specific clothing;
- that investigating Garda, Fergal O'Connor, is deceased and would have been expected to have given evidence of arrest and caution and whether or not he ever warned any witnesses not to speak to each other;
- that disclosure requests commencing on 6th December, 2016 were not fully dealt with;
- that the absence of Garda notes on the investigation file may have undermined the prosecution's case and assisted the defence;
- that the complainant delayed in making her complaints;
- that on an unknown date in 1986, it is claimed that the complainant told **her sister certain details allegedly pertaining to allegations against the respondent,
- that it is claimed that the complainant, in or about 1990, told **her brother certain details of her allegations;
- that it was not until 10th December, 2014 that the complainant first made a report to An Garda Síochána and made a statement of complaint on 20th January, 2015;
- that there was prosecutorial delay, including the fact that it was not until 25th March, 2015 that the matter was referred to Investigating Officer O'Connor;
- that Garda O'Connor delayed further and, having taken statements from only two persons, being the sister and brother of the complainant on 18th May and 3rd June, 2015, Garda O'Connor did not speak to the respondent until 22nd August, 2015;
- that the respondent steadfastly denied and denies the allegations put to him;
- that it was not until 21st January, 2016 that the investigation obtained a map of the locus relevant to the allegations;
- that a warrant issued on 14th September, 2016 and the respondent was arrested and charged on 21st September, 2016 and first appeared before Bray Circuit Court on 6th December, 2016;
- that the matter was next listed on 14th March, 2017 and set down that day for trial on 4th July, 2017 but did not proceed to hearing on that date because it was not reached due a heavy trial list;
- that the matter was listed for trial on 5th December, 2017 but did not proceed because it was not reached due to a heavy list where other cases were given priority;

- that the matter was further listed for trial on 10th April, 2018 but did not proceed to hearing on that date because, once again, it was not reached due to a heavy list and other matters being given priority;

- that the matter was again listed for trial on 10th July, 2018 but was not reached due to a heavy list;

- that counsel for the respondent expressed concern on 10th July, 2018 that this was a historic claim of sexual assault and the respondent was most anxious to have the matter dealt with without further delay;

- that the matter was listed on 2nd October, 2018 and was given some degree of priority and was specifically listed as a "back-up trial" but did not proceed and was put back to 4th December, 2018;

- that on each occasion the respondent travelled from Leitrim and attended court and was under significant apprehension and anxiety at the prospect of being put on trial on serious offences of a sexual nature occurring some 50 years ago;

- that the case did not proceed on 4th December, 2018 because of a bereavement in the family of the complainant's sister who was, at the time, considered by the applicant to be an essential witness;

- that the bereavement had occurred in January, 2018 and involved the sudden death of the adult son of the complainant's sister, as a result of which, the Defence consented to an adjournment on compassionate grounds;

- that the case was listed for 24th January, 2019 but did not proceed on that date because Garda O'Connor had died and a new Garda had assumed carriage of the case;

- that the death of Garda O'Connor and the taking over of the case by a new Garda had revealed certain shortcomings in how disclosure requests made on the respondent's behalf had been dealt with;

- that the matter was listed for 27th March, 2019 and that it appears to the deponent that the complainant was requested by the Gardaí or State Solicitor to obtain a note from her doctor on 27th March, 2019;

- that, at its height, the medical note indicated that her doctor "did not think" that she was currently in a fit state to testify;

- that no indication was given in the doctor's note as to when the complainant might be expected to be in a fit state to testify;

- that the respondent took the view that the absence of the complainant's sister was no longer a basis which invited the sympathy of the Defence or was a proper justification for adjourning the trial;

- that there was a failure by the prosecution to produce counselling/medical notes;

- that if the complainant was suffering from ill health, the first time this was made known was on the eighth occasion the matter was in court;

- that in circumstances where the complainant's counsel indicated her willingness to "pursue the case" and ask for an opportunity to do so "at a future date", no indication was given of when that would be;

- that the respondent was, at that time, 68 years old with no ascertainable end in sight to the considerable distress, anxiety, inconvenience and expense he was subjected to whilst facing the repeated adjournment of his trial;

- that whilst it may be true that, of the 9 witnesses no longer available to the respondent in his defence, none are or were eye witnesses, it is equally true of the two civilian witnesses on the book of evidence;

- that the application to adjourn on 27th March, 2019 was made on the erroneous presumption that the adjournment would be granted if simply asked for and on the assumption that no proper regard to the right of the accused to the expeditious trial of historical offence allegations would be given by the trial judge;

- that the respondent is a man of advanced years who is deeply distressed by the news that his acquittal is now being questioned in the High Court and that he may face a "retrial";

- that the finality the respondent justly believed the justice system had provided to him by his acquittal has turned out not to be the end he believed and expected it to be;

- that this is a case where no compelling evidence of guilt exists at all;

- that at its height, the case is one of mere bald allegation faced with an equally bald denial; and

- that evidence that was proposed to be led in this case did not provide any proof that there was any independent witness to any abuse or offending or incidents of sexual assault, all of which have been and continue to be steadfastly denied by the respondent.

17. In my view, many of these various issues canvassed on behalf of the respondent, and summarised above, are not at all relevant to the core question which it is for this Court to determine. It is clear that particular difficulties arise where there is a significant lapse of

time between when offences are alleged to have occurred and the making of a formal complaint. Doubtless, this involves anxiety and stress for anyone accused, just as the process is likely to be stressful for an alleged victim. It is not the function of this Court, in the present application, to conduct an examination into merits. Nor is it for this Court to analyse the potential role played by delay in respect of the underlying prosecution. Equally, this Court's function is not to examine assertions of prejudice in respect of missing witnesses, documents or alleged prosecutorial delay. Rather, where a remedy of *certiorari* is sought, the focus of this Court is on whether or not a decision taken was made within jurisdiction.

The respondent's affidavit – issues not before this court

18. The foregoing comments apply equally to a range of issues raised in the respondent's affidavit which was sworn on 8th September, 2020 in which, *inter alia*, averments are made in respect of the following:-

- that the respondent has always maintained his innocence in relation to the allegations which date back to April, 1968 when the respondent was still a teenager;
- that the respondent is now 70 years of age and has never been convicted of a criminal offence or ever been in trouble;
- that the respondent has found the experience of being accused and brought before the courts deeply distressing for himself and his family;
- that the respondent was first told by Garda O'Connor about the allegations on 22nd August, 2015;
- that on the same day the respondent voluntarily went to the Garda station and answered every question he was asked;
- that it was over two years later, on 21st September, 2016, that he was charged;
- that he heard nothing about the matter in the interim and had assumed that it was at an end;
- that on each occasion he took the train to attend court from his home in Leitrim, he was in emotional turmoil and that the single thought running through his head was "when will this nightmare end";
- that each time he attended court, it was made clear to him by legal advisors that it was up to the judge to decide whether the trial would start;
- that he was always informed that "it may or may not get on" and "if it does not go ahead it will be put back and given another trial date";
- that after repeatedly being told that disclosure was still awaited or was not complete, it was felt by the defence that the matter should proceed in the "absence

of disclosure" because, having regard to the relevant requests, this would present a problem for the prosecution;

- that the respondent remains at a loss to understand why all relevant materials were not disclosed by the prosecution prior to seeking a trial date;
- that it is surely grossly unfair to subject a citizen to prosecution before all relevant facts have been ascertained that would allow an impartial and objective decision to be made;
- that it cannot be validly claimed that it was only after a complete review of the file after the death of Garda O'Connor that it became apparent that there was material that ought to be disclosed;
- that the respondent's lawyers made a full disclosure request for all such material and that, by 26th March, 2019, full disclosure of relevant material was still outstanding;
- that if trial judges are to repeatedly postpone trials because the prosecution has not taken sufficient steps to fulfil its disclosure obligations, a "Kafkaesque type situation" would be permitted whereby an accused can be permanently put on trial;
- that the complainant alleges that the respondent assaulted her whilst her brother was present in specific locations and, due to the lengthy passage of time and the delay in this case, the respondent is deprived of any opportunity to test her version of events by reason of the fact that her brother cannot now remember;
- that the respondent is certain he never constructed any hut or timber structures in which it is alleged he did these things to the complainant while her brother was present;
- that **the landowners were very familiar with their farmland and forestry and knew every inch of the immediate locality and that, due to their deaths and delay in notifying the respondent of these allegations, he is without their evidence as to the non-existence of any makeshift timber huts on their lands;
- that on 14th September, 2015, Garda O'Connor visited the locations shown to him by the complainant and a map was prepared but with little or no detail now available concerning this visit and what occurred and no notes;
- that Garda O'Connor's official Garda notebook cannot now be located;
- that in respect of maps, no legend was ever produced and, as Garda O'Connor is now deceased, it is not possible for the respondent to ascertain why specific locations were identified and who it was named them and pointed them out;

- that no statement from the complainant exists that makes reference to any site visit(s) with any Garda or the pointing out to any Garda of any specific location;
- that the respondent is now deprived of any opportunity to test the complainant on what she told Gardaí when the maps were being compiled;
- that it is not true the respondent has not enquired about who could give evidence of what happened;
- that the respondent was told that the Gardaí would contact "any person" who might be able to assist;
- that the respondent could not canvas witnesses who were presumably part of the investigation;
- that no explanation has been given as to why there was a thirteen-month delay between the first contact from Garda O'Connor in August, 2015 and the respondent being charged in September, 2016;
- that, from 1967 onwards, the respondent was working weekends and had a half day off on Wednesday and that the respondent's job sometimes prevented him from going to **Wicklow;
- that the respondent recalls the Gardaí asking him questions about allegations that he assaulted the complainant while giving her a piggyback;
- that the respondent was not asked any questions about leggings and that the respondent did not say he remembered leggings or accepted that the complainant wore leggings;
- that people present at the time could have contradicted this detail if they had been asked at the time when they could have been expected to remember it;
- that the complainant waited until both of her parents were deceased before making her complaints;
- that the respondent travelled to court on 26th and 27th March 2019 expecting that he could be placed in charge of a jury and tried on these serious allegations;
- that each and every time the respondent came to court, it was the same feeling of anxiety and deeply felt frustration that the trial might get adjourned yet again;
- that it is now over fifty-two years since the incidents complained of are alleged to have occurred and that the complainant waited forty-five years before approaching the Gardaí;

- that the complainant made allegations to her psychologist in or around July 1993 but refused to provide the full name of the alleged perpetrator or to permit her to report the allegations to the Gardaí;

- that the complainant also told her psychologist that the same man had sexually touched some her other cousins but refused to name them;

- that up to this date, the complainant has refused to disclose to the prosecution or the Gardaí or to the respondent the names of the cousins she claims the respondent sexually assaulted;

- that no cousins of hers or anybody else has ever made any complaint against the respondent apart from the complainant;

- that the complainant has admitted to having deliberately waited until after both of her parents and both of the respondent's parents had died before making a complaint against the respondent;

- that an essential defence witness, **the landowner, has also passed away before the respondent knew of the allegations;

- that as a consequence of this deliberate delay, there are no living independent witnesses available to the respondent, which denies him any opportunity to challenge any island of fact surrounding the allegations made by the complainant;

- that the complainant has a long history of psychological intervention and that up to the date of swearing of his affidavit, the respondent has only been provided with the 2-page report of the complainant's psychologist dated 3/11/2015;

- that it is clear from the contents of that report that the complainant was in contact with a named social worker prior to 22nd July 1993 who referred her to the psychologist;

- that it is also clear that a named GP referred the complainant for psychological services on 28th July, 1993;

- that the psychologist states that she referred the complainant to a named senior clinical psychologist on 1st November, 1996 and that the complainant briefly attended a therapeutic group;

- that the respondent is at a loss to understand how or why the prosecutor has failed to disclose all relevant material contained in the records of those persons referred to in the psychologist's letter of November, 2015;

- that there can be no reasonable or acceptable excuse for such shortcomings and that disclosure of this material has not been provided in advance of the respondent's trial in March, 2019;

- that the respondent was so exasperated having endured the terror of facing trial so often that he wanted his case to proceed;

- that the absence of the disclosure was to be used in an application to the trial judge after the trial commenced to have the trial stopped on grounds of manifest unfairness;

- that at no time was it ever accepted by the respondent or by the respondent's legal advisors that the delay and absence of disclosure of this material was in any way fair and acceptable;

- that the respondent is an accused who has already suffered significant prejudice to his defence by reason of the passage of over half a century since the alleged offences are said to have occurred and complainant and prosecutorial delay since he was informed of the allegations;

- that it is now over five years since the respondent was first told about these allegations and that it has been present like a dark storm cloud over the respondent and his family ever since that time;

- that the respondent has done nothing to frustrate or delay the process and has fully cooperated at every turn;

- that all of the delays and the failure to progress matters have been the responsibility of the complainant or the prosecution or both; and

- that if the case was to come back before the criminal courts for trial in circumstances where so much prejudice has been caused to the respondent's ability to defend himself, the respondent would be caused to needlessly suffer further hardship and distress while he goes through the process again, even though the requirement for a fair trial is likely to result in his inevitable acquittal by direction a second time.

19. Averments to the foregoing effect, made by the respondent in his affidavit sworn in opposition to the relief sought do not appear to me to be relevant to the question which this Court must determine. This is to take nothing away from the proposition that prosecutions in respect of historic matters are undoubtedly stressful and present particular challenges, including the fundamentally important challenge of ensuring fairness, both to the accused and the complainant, in the context of the proper administration of justice. It is important, however, to keep in mind that this is not a merits-based hearing by this court and it seems to me that much of what is canvassed in the respondent's affidavit, as in his solicitor's, relates to the merits of the underlying case against the respondent in respect of allegations strenuously denied and issues relating to prejudice alleged to arise out of delay including alleged prosecutorial delay. These are not issues for this court to determine.

20. I now turn to facts which are not in dispute but which provide the backdrop to the making of the order challenged in the present proceedings. The events of 28th March, 2019 are of fundamental importance. Helpfully, a transcript of what occurred both on 27th and 28th March, 2019 comprise part of the exhibits being "RB3" and "RB5" exhibited by Mr. Benville in his affidavit sworn on 29th July, 2019. Where appropriate, I will quote relevant passages from the transcripts, verbatim. For the sake of clarity and convenience, I propose to examine the evidence in chronological order.

6th December, 2016–26th March, 2019

21. The evidence before the court reveals that the following can be said in relation to dates when this case was in court between 6th December, 2016 and 26th March, 2019. The respondent first appeared before Bray Circuit Court on 6th December, 2016. Disclosure was sought on that date and the matter was adjourned. On 14th March, 2017, a solicitor appeared on behalf of the respondent and the case was listed for 4th July, 2017. Both sides accept that the case did not proceed because it was not reached in the list and that it was adjourned to 5th December, 2017. It was not reached on that date and it was adjourned to 10th April, 2018, 10th July, 2018 and 2nd October, 2018 when the case was listed as a "back-up trial". Again, it was not reached and the case was adjourned to 4th December, 2018. From the applicant's perspective, the complainant's sister was an essential witness. Unfortunately, she suffered a tragic bereavement when her son died in **an accident abroad in **, 2018. It appears that she was too distressed to attend court in December 2018 and, on compassionate grounds, the respondent consented to an adjournment. The first effective hearing date for the case was 4th December, 2018. Later in this judgment, I will examine closely the transcript of 28th March, 2019 but, for present purposes, it is appropriate to note that on p. 12 of the transcript of 28th March, 2019, the trial judge stated: *"…insofar as it is concerned with hearing dates, the first effective hearing date was December 2018 and that adjournment of that was with the consent of the accused man and in circumstances where this Court I certainly would have granted an adjournment without any difficulty for a short period."* Thus, in December 2018, the matter was put back to 24th January, 2019 but did not proceed on that date. In their statement of opposition, the respondent pleads that the case did not proceed to hearing on that date because Garda Fergal O'Connor had died and a new Garda had assumed carriage of the case and it is not in dispute that the matter was adjourned to 27th March, 2019.

22. A list for the relevant sessions, as published on 25th February, 2019, shows the case listed as number 4 of 4 cases. In para. 6 of his 29th July, 2019 affidavit, Mr. Benville avers that the case against the respondent was listed third behind two other cases in which the same senior counsel was defending. It is not in dispute that the case listed first (*DPP v. **Z*) was specially fixed and arrangements had been made for the complainant to travel from abroad. It is not in dispute that the second trial in the list (*DPP v. **B*) was a custody case with a 2008 bill number. Mr. Benville avers that it was intended to have the respondent's trial as a "back-up". This certainly appears from the evidence to have been the position. That is not to say that a presiding judge cannot decide to take matters in a different order, nor is it to say that there was any guarantee that the case would not be

called on. It is, however, uncontroversial to say that, having regard to where this particular case appeared on the list, it was uncertain whether the case would "get on" with the distinct possibility, if not likelihood that it would not. Mr. Benville has also exhibited a list for the Bray sittings of Wicklow Circuit Court on 27th March, 2019 showing *DPP v. **Z* as the first case, with the case against the respondent listed as number two. Mr. Benville has averred that the case of *DPP v. **B*, which had been the second trial in the list, was not ready to proceed on 27th March and that it was intended to start it on 28th March and he exhibits a Bray Circuit Court list for 28th March, 2019 showing DPP v. **B as case no. 1 and DPP v. **[this respondent] as case no. 2. It is not in dispute, however, that on the morning of 27th March, 2019, the presiding judge called on the case against the respondent. Exhibit "RB3" to Mr. Benville's 29th July, 2019 affidavit comprises a transcript of 27th March, 2019 and it is to an examination of same that I now turn.

Transcript – 27th March, 2019

23. As is clear from the transcript, the Registrar called DPP v. **[*this respondent*] which had originally been case no. 4 in the list. Counsel for the prosecution, Mr. Kelly, began by stating that the matter "…*was put in as a back-up trial*…" and he proceeded to make an application for an adjournment, which application counsel for the respondent objected to. The basis of the application was that "…*one of our vital witnesses has emotional problems in relation to the death of a young son of hers*…". This was a reference to the death of the son of the complainant's sister. Mr. Kelly also referred to a disclosure issue concerning counselling notes and stated that he was "…*asking if the trial date could be adjourned back to July*". The immediate response of the presiding judge was to indicate that he was not disposed to granting any adjournments and to state that the application proceeded, with submissions made by counsel for the respondent, including in relation to the adjournment of the case on 4th December 2018 due to the death of the witness' son. Counsel for the respondent submitted to the court that no indication was given as to when this witness was going to be available to give evidence. The death of the Investigating Garda was also referred to in submissions. In response to a request by Mr. Kelly, the presiding judge allowed some time for him to confer with his instructing solicitor, Mr. Benville, following which Mr. Kelly outlined, *inter alia,* the procedural history, including adjournments, and referred to the death of Garda O'Connor. Reference was made, *inter alia*, to the consent on the part of the defence to an adjournment previously granted due to what was described as the ongoing psychological problems experienced by the mother of the young man who died. Reference was also made to Mr. Benville being informed on 8th March 2019 that notes which were being sought were with the HSE solicitor, but had not yet been obtained. It was said that those notes should be reasonably readily available and they could be made available to the defence. Mr. Kelly, in his submission also referred again to "…*operating very much . **[this respondent]'s case was a back-up trial…*". The case of *DPP v. **B* was, on 27th March, put back to the following day, 28th March, 2019

24. It is clear from his ruling that the presiding judge took the view that it was not a good ground, in the context of the adjournment sought, to say, as the learned circuit judge put it, that "*…a witness just is emotionally unable to give evidence*". Counsel for the

respondent made clear his objection to an adjournment submitting, *inter alia*: *"my application is to swear in a jury and let him call his witness, if it's ready, and come back with **DPP v B, but if they can't get themselves organised between this and then, well, then he's left with no option but to enter a nolle. It's the fairest thing to do, I would have thought."* Counsel for the respondent also made clear that he was not making an application for an adjournment on the basis that disclosure was incomplete, also making the submission, regarding disclosure, that *"If I still don't have it on the day of the trial starts, well, it will be a matter for the trial judge to determine whether or not it's fair that the trial proceed at all absent the notes"* and going to submit to the judge *"And that's where your jurisdiction comes into play to make sure that there's fairness between both sides".*

25. The judge decided that he would swear a jury in for the case against the respondent and do likewise in relation to a jury for the *DPP v. **B.* Mr. Kelly, for the prosecution, submitted to the court that, in circumstances where the complainant lives in County Leitrim, it would be somewhat unrealistic to expect him to start the trial that day. In response, the judge made it clear that he was not expecting the prosecution to start on 27th March, saying instead *"I'm expecting you to start it tomorrow… So, you'll start it tomorrow, and minus your witness if the witness can't attend*". The respondent was then arraigned and pleaded not guilty. A jury was sworn and the respondent was given in charge to the jury for trial. The learned judge made clear that the hearing would proceed the following day, 28th March 2019. Exhibit, "RB5" comprises a transcript of 28th March, 2019 and it is appropriate to examine same in some detail to see what occurred.

Transcript – 28th March, 2019

26. On the morning of 28th March, 2019, the Registrar called the case against the respondent which was, at that point, described as case no. 2. Mr. Kelly for the prosecution then made an application for an adjournment. He informed the court, *inter alia,* that the complainant was contacted yesterday and she expressed her inability to come to court. Reference was made both to short notice and to her medical issues and Mr. Kelly handed into court a medical report by the complainant's general practitioner, Dr. J**, dated 27th March. At this juncture, it is appropriate to quote the material part of that medical report, *verbatim* and in full, the report having been exhibited by Mr. Benville as "RB4" to his 29th July, 2019 affidavit:-

> *"To whom it may concern,*
>
> ***[The complainant] is a patient of mine for several years and has a number of medical issues. She tells me that she is due in court today. At the moment she is under extreme stress and also has a flare-up of a variety of physical symptoms such as fibromyalgia, irritable bowel syndrome and painful bladder syndrome etc. I don't think that she is currently in a fit state to testify. When it does come to that point, it would be very helpful if she could be given as much notice as possible so that she can prepare herself properly and ensure that she has someone with her to support her. Your understanding is appreciated.*

Yours sincerely,

*Dr. J**"*

27. In his submission on 28th March, Mr. Kelly for the prosecution made it clear, *inter alia,* that the complainant was: "…*not prepared to forego the complaints and would wish for an opportunity to do so at a future date. My application is that the jury might be discharged, and the case adjourned on the basis of the short notice that she ultimately got and in respect of her medical condition*." Mr. Kelly also made a submission based on the complainant's rights with reference to what was described as the "Victims of Crime Act" to the effect that the complainant was "…*entitled to have her rights as a complainant respected*". Counsel for the respondent submitted that: "*that medical report simply says the doctor doesn't think she's currently in a fit state to testify. This case, as the court knows, was first returned for trial on the 9th November 2016."*

28. Before proceeding further, it is appropriate to make some short observations, having regard to the facts. It is entirely true to say that the respondent first appeared before Bray Circuit Court on 6th December, 2016 when disclosure was sought. There was, however, no reality in a trial taking place at that stage and the first effective trial date was not until December, 2018, less than four months before the events of 28th April 2019. In Dr. J**'s report, he confirms both the fact that the complainant *"is under extreme stress*" and goes on to say that the complainant "*also has a flare-up of a variety of physical symptoms"* and he offers a medical opinion, namely, "*I don't think that she is currently in a fit state to testify*". It is a matter of fact that there was no other medical opinion before the court on 28th March, 2019. Nor was there any evidence proffered to suggest that Dr. J** was not appropriately qualified to express the view he gave, or that his medical opinion was other than given *bona fide*. No argument was made that the medical report was not admissible or that it could or should be disregarded because its author, ***Dr J was not there to prove its contents formally.

29. The presiding judge then made it clear to the respondent's counsel that the court was aware of the details in respect of the relevant dates because the respondent's counsel had gone into that on the previous day. It is important to set out, verbatim, the submission which was then made on behalf of the respondent. This begins at the top of p. 4 of the transcript in respect of 28th March 2019, as follows:-

> *"MR. KAVANAGH: All of those dates are set out and the Court has them. We are opposing strenuously any adjournment. We want the case to open and for the prosecution to present its case. At this stage, Judge, if it's not prepared to do so, I am going to make an application to you under the principles set out in the People (DPP) v.* PO'C *of 2006, where a general principle of law was set out by, I think, Ms. Justice Denham at the time: "If a trial is delayed, the appropriate remedy in which to raise the issue is by way of judicial review…" we know that. "However, whether an application for judicial review is made or not, the trial court retains at all times its inherent and constitutional duty to ensure that there is due process and a fair trial. Thus, in the course of the trial, matters may arise, evidence may be given,*

which renders the trial unfair or the process unfair. In these circumstances, the trial judge retains the jurisdiction of preventing the trial from proceeding"."

30. It is appropriate to note that, by "*this stage*", counsel for the prosecution had already made it clear, *inter alia*, that the complainant was not in a position to give evidence and her doctor's view had already been given. The unavailability of the complainant, and the reason said to explain same, were facts known to all relevant parties at this stage. Another fact is that a second witness, the complainant's sister, was unavailable. This had been the subject of the adjournment application the previous day. In other words, before making a submission to the court, counsel for the respondent was aware that, due to the non-availability of the prosecution's witnesses, in particular, the complainant, the prosecution would not be in a position to present its case that day. It is against this factual background or matrix of fact, that the respondent's counsel stated, *inter alia*, that "*At this stage… I am going to make an application to you under the principles set out in the People (DPP) v. PO'C of 2006*". The respondent's counsel then went on to quote, *verbatim*, from Ms. Justice Denham's judgment in *PO'C*.

31. Having regard to the foregoing, I am satisfied that a *PO'C* application was, as a matter of fact, made on behalf of the respondent on the morning of 28th March, 2019. Fairly considered, the contents of the transcript demonstrate that this was a *PO'C* application both in form and in substance. Further extracts from the transcript reinforce that view and I will refer to them presently. By referring to the *PO'C* decision and by quoting a specific passage from that decision which emphasises a trial judge's jurisdiction to prevent a trial from proceeding, counsel for the respondent was plainly drawing the court's attention to that jurisdiction and urging the court to exercise it. Counsel for the respondent did not, however, open to the learned Circuit Court judge the sentence which appears in the *PO'C* judgment immediately after the passage which he had quoted, namely: "*This jurisdiction is exercised in the course of a trial but does not enable, or relate to, a preliminary hearing at the commencement of a trial on the issue of delay.*"

32. A reading of the entire transcript of 28th March, 2019 demonstrates that counsel for the respondent did, as a matter of fact, make what can fairly be described as a preliminary application at the start of a trial on the issue of delay. It was not the case that the respondent's counsel merely opposed the application for an adjournment on the basis that the 27th March, 2019 medical report was insufficient, or on the basis that the relevant history of the case meant that no further delay should be permitted. Rather, the respondent's counsel clearly made submissions to the effect that a fair trial was no longer possible due to the delay which had occurred and the consequences of that delay. For example, half-way down p. 4 of the transcript, the following submission on behalf of the respondent appears:-

> *"There are a total of nine people, potential witnesses, who are now dead, sadly passed away. The first one is Detective Fergal O'Connor, who is the investigating Guard in the case. The second one would be **the landowner, who could have given evidence with relation to the logs and the hazel woods…"*

At the bottom of p. 4 of the transcript, one can see that counsel for the respondent submitted that **the landowner is dead and that he owned the relevant farm or shared it with his brother, and **his wife, who are also deceased. As is clear from the top of p. 5 of the transcript, counsel for the respondent submitted, *inter alia*, that the parents of the complainant are deceased and could have, perhaps, been asked questions about the type of clothing and whether there were any rips in the clothing allegedly worn by the complainant. It is perfectly clear that a submission was being made to the effect that, as a result of delay, important witnesses were now deceased and that the respondent has been prejudiced as a result. This is a submission which speaks to the question of fairness of a trial. The submission which was made on 28th March, 2019 continued as follows:-

> "**The complainant's brother, in his statement, says that due to the passage of time he has no specific memory of anything back in happening back then when he was a child. That is another example of how the passage of time seriously prejudices the accused man, in that he simply says "I don't remember anything". And I am presuming in the course of his interviews, he has been asked or in a general way the scenario was being put to him as to what his sister was saying. His reply is, "I don't remember anything", and that is a significant issue. The accused's parents themselves have passed away since and also a shop owner where he had worked, where he says from 1966 onwards he was working part time and wouldn't have necessary been there at the weekends and things like that. So there's at least nine potential witnesses who are now deceased. The brother, due to the passage of time, can't recall anything specific, he being somebody who has allegedly been present."

33. The foregoing is a submission which speaks directly to the principles set out in the *PO'C* decision. It is a submission to the effect that delay has caused serious prejudice such that the respondent can no longer receive a fair trial, regardless of when the trial takes place. At the bottom of p. 5 of the transcript, the submission by the respondent's counsel continued, with reference made to two cousins who the complainant says may have been victims. For the respondent, it was submitted to the learned judge that these cousins have never been identified and "…*we don't know whether they're dead or alive or where they might be*". Reference was also made*, inter alia*, to counselling and medical records which, it is said, have been sought since 2016. At the top of p. 6 of the transcript records, *inter alia,* the submission continuing as follows: "*As a consequence of Fergal O'Connor's, the investigating Garda's death, there will be any evidence of any warning being given to the witnesses not to speak to each other, as he's deceased."*

34. Once again, this submission was to the effect that delay has resulted in important witnesses no longer being available, resulting in a trial being unfair. This was, as a matter of fact, a preliminary application at the commencement of a trial on the issue of delay and I am satisfied that, as a matter of fact, it was an application which the presiding judge engaged with. This is clear when one looks at the transcript of 28th March, 2019 which, half-way down the page, includes, *inter alia*, the following exchange between the respondent's counsel and the Court:-

"MR. KAVANAGH:…So here we are nearly half a century after the alleged events occurred.

JUDGE: More than half a century.

MR. KAVANAGH: More than half a century. Where nine

JUDGE: In some charges.

MR. KAVANAGH: Yes. Where nine people are no longer available to us, where we don't have the medical records, we don't have the counselling notes, we don't have essential information with relation to the investigation because the Garda Investigator is dead and we're expected to be able to run a fair trial in those circumstances. So I'd simply ask the Court to bear in mind the words of the Supreme Court in PO'C*, that it has an inherent jurisdiction, it's a constitutional duty to ensure a fair trial and a fair process. And to grant an adjournment would in itself be an unfairness at this stage. And it is my intention that if he opens his case, to renew this application under* PO'C *and say that the procedure is just completely unfair. There has to be a time reached where these cases cannot be prosecuted fairly. This is the first time I have come across a case where there are so many elements of it pointing and indicating to potential manifest unfairness It's simply completely unacceptable. This man has had this hanging over him for three years. He's made a voluntary statement, attending at the Garda station voluntarily, where without a solicitor or anything else, he simply denies all of this, said it never happened, don't know where this is coming from. And in those circumstances, it's inevitably going to be a case where it's a she says he did it, he says he didn't do it. And it's the other aspects of this case that sometimes are to become so important in trying to persuade a jury that there's a reasonable doubt on the veracity of her evidence, and where it wouldn't reach the required standard for a conviction in a civil case. We are severely hampered, severely handicapped in the running of such a case, and it falls on this Court to exercise its constitutional duty to make sure that the procedure is fair. And I think when one steps back and looks at it in the broad brush, it's clear that we can't have a fair trial at this juncture."*

35. The foregoing is, without doubt, an application which was made by the respondent's counsel, based on the principles outlined in *PO'C.* It is an application made at the commencement of the trial to the effect that delay has made a fair trial impossible. It was also said that, for the court to grant an adjournment would, in itself, be an unfairness, but it is clear that, regardless of and quite apart from the question of any adjournment, a *PO'C* application was being made. Indeed, counsel for the respondent was explicit about the fact that, if the prosecution did open its case, the respondent would *"renew this application under PO'C*". To renew an application is to make it *again*. There is no doubt about what counsel for the respondent said to the court and, in my view, it is beyond doubt that a *PO'C* application was being made at the time and that the court was informed that, in the event of the prosecution opening its case, the *PO'C* application would be made again (but, in the manner examined in this judgment, all relevant parties

were aware that there was no reality in the prosecution opening its case that day). What is also perfectly clear from a reading of the transcript is that, as of the morning of 28th March 2019, and relying on the principles outlined in *PO'C*, counsel for the respondent told the court that the presiding judge retained the jurisdiction to prevent a trial from proceeding and told the court in the starkest of terms that "*…it's clear that we can't have a fair trial at this juncture".*

36. As a matter of principle, if it is truly the case that, due to the passage of time and unavailability of witnesses/evidence, a fair trial is no longer possible, it is uncontroversial to say that an adjournment is irrelevant in that, whether granted or not, an adjournment, be it for a short or a long period cannot "cure" unfairness which has already arisen and which has rendered a fair trial impossible. It is very clear from a reading of the transcript in respect of 28th March 2019 that precisely the foregoing principle was deployed on behalf of the respondent in the *PO'C* application which was made to the learned Circuit Court judge. It is very clear that the court was informed on 28th March 2019 that, irrespective of the question of an adjournment, i.e. regardless of whether an adjournment was granted or not, there were much more fundamental difficulties which had already been caused by the passage of time and which already rendered the trial unfair. Indeed, counsel for the respondent sketched out a possible scenario in the event that an adjournment was granted, emphasising that it did not address what he described as the *"principal difficulty",* which the respondent's counsel explained in the following terms (as can be seen halfway down p. 7 of the transcript):-

> *"…if the case is to be adjourned, it could possibly be later this year before it ever gets heard, and only if these two witnesses recover sufficiently to be able to give evidence. But that doesn't get us over the principal difficulty, which is that at least nine persons are deceased and the principal person involved in the case, which is the brother of the complainant, who she says was in the location, in the huts where this was supposed to have happened, has absolutely no recollection of anything occurring, due to the passage of time. The evidence, I think, of **the complainants brother was only to go so far as to say that she made some complaint after this complainant had a row with her mother, some 20 years ago where she said, "oh, by the way, I have been touched by somebody", or words to that effect. It's most unsatisfactory. It presents a very serious and grave risk of a miscarriage of justice. And it's my respectful submission that given everything that it's in this case, and I say it surpasses anything I've seen before by way of difficulties, that the appropriate course is to call on the prosecution to open its case, and if there is no evidence to present to them to acquit an acquittal of the accused. It's the only way to remedy it."*

37. It is plain from the foregoing that counsel for the respondent made it clear to the court that an adjournment was essentially irrelevant because, whether granted or not, it would not address what was said to be the principal difficulty, namely the death of nine witnesses who were said to be relevant and the effect on the memory of the

complainant's brother due to the passage of time, thus rendering a trial unfair according to the submission made on behalf of the respondent.

38. Counsel made it clear in his submission on the day in question that, regardless of any adjournment, the respondent's principal difficulty was prejudice said to have already arisen due to the passage of time. It was put in the clearest terms to the court that the difficulties created by the passage of time had resulted in "*…a very serious and grave risk of a miscarriage of justice*". The gravamen of the submission on behalf of the respondent was that, even if the court were to grant an adjournment, it could not possibly cure the difficulties and prejudice caused for the respondent as a result of the delay or passage of time. In other words, an adjournment was entirely irrelevant, but should still be refused because, according to the respondent's counsel, a fair trial was impossible at that point and would continue to be impossible even if a court were to adjourn the matter to a point when the complainant and her sister could both give evidence.

39. In my view, the foregoing was undoubtedly a *PO'C* application, based squarely on the principles in that decision, and an application which was made to the presiding judge on the basis of a submission that he exercised jurisdiction to prevent unfair trial from proceeding. The court was also given to understand (the relevant sentence from the *PO'C* decision not having been opened to the court) that it had jurisdiction which it was entitled to exercise at that point in time (i.e. without evidence having been heard) in order to prevent an unfair trial proceeding.

40. On foot of the *PO'C* application, the court was urged to take a very specific course of action. It was said to the court that the "*appropriate course*" and the only way to *"remedy"* what was described as the very serious and grave risk of a miscarriage of justice was *"…to call on the prosecution to open its case, and if there is no evidence to present to then direct an acquittal of the accused*". It will be recalled that the relevant context or factual matrix against which the respondent's counsel invited the court to take this course of action included the undisputed fact that the complainant and her sister were both unavailable. This was known to all relevant parties by the time counsel for the respondent made what was, I am entirely satisfied, a *PO'C* application.

41. It will also be recalled that, as characterised by the respondent's counsel, this was "*inevitably going to be a case where it's a she says he did it, he says he didn't do it".* Thus, the complainant was a critical witness but one who was unavailable and in respect of whom the complainant's GP did not think that she was "*currently in a fit state to testify*". Therefore, counsel for the respondent was urging the court to call on the prosecution to open its case, knowing that this would certainly *not* happen and the court was being urged to direct an acquittal of the accused in that scenario, but very explicitly based on principles derived from the Supreme Court's decision in *PO'C*. This, it was submitted on behalf of the respondent, was the only way to remedy the fundamental difficulty, namely, the prejudice occasioned by delay, resulting the serious risk of an unfair trial.

42. What the presiding judge was *not* told, however, when a *PO'C* application was made on behalf of the Respondent, was the *limit* on the Court's jurisdiction in that regard, specifically, that the jurisdiction is exercised in the course of a trial and does not enable or relate to a preliminary hearing at the commencement of a trial on the question of delay. At this juncture, it is also appropriate to point out that the course of action urged on the presiding judge in the *PO'C* application made on behalf of the respondent as basis to remedy the alleged impossibility of a fair trial and the grave risk of a miscarriage of justice, is *precisely* the course of action the Court took, resulting in the 28th March, 2019 order which is challenged in the present proceedings. There was only one Order made on 28th March 2019 and that is the one the applicant seeks to impugn.

43. It is also clear from the transcript that, prior to making any ruling, the presiding judge enquired as to the parameters of the court's jurisdiction with regard to a *PO'C* application. It is appropriate to set out, *verbatim*, the exchange which took place between the respondent's counsel and the presiding judge, which begins at the bottom of p. 7 of the transcript, and which took place *after* the respondent's counsel had urged the court to take a very specific course of action on the basis that it was the only way to remedy what was characterised as the very serious and grave risk of miscarriage of justice. Having done this, the respondent's counsel continued in the following terms:-

> *"MR. KAVANAGH: The reason this burden has been placed on Circuit Court judges is of course to obviate the necessity for orders of prohibition and things like that and taking up time and expenses in the High Court. It shouldn't be necessary. We simply are here to meet our trial, meet the case. We should have been provided with lots of material. It should have been prosecuted long before now.*
>
> *JUDGE: That's where I think you're right, Mr. Kavanagh. I do recall reading a judgment where I think there was an application for prohibition and the answer whether it was arbiter [obiter] or ratio, I am not sure, was that these things should be raised with the trial judge. Now, admittedly I'm not while I am the trial judge, I suppose the jury have the accused in their charge. This is in some ways as the case unfolds, you would then stand up and say, "Well, look this is unfair and it shouldn't proceed under the* PO'C *authority". But does* PO'C *apply at the stage of applying for an adjournment as well?"*

44. It is clear from the foregoing that counsel for the respondent submitted to the presiding judge that the Court had the jurisdiction to prevent a trial from proceeding and that the burden of entrusting this jurisdiction to Circuit Court judges was to obviate the necessity for judicial review proceedings in the High Court. In response, the presiding judge referred to the Circuit Court's jurisdiction, but asked whether the principles outlined in *PO'C* could be exercised at *that* point in time. The following was the response provided by the respondent's counsel and the subsequent exchange:-

> *"MR. KAVANAGH: Well, we're gone beyond that, we're in charge of the jury.*
>
> *JUDGE: We're in charge, yes.*

MR. KAVANAGH: The trial has started. They're just not in a position to call any evidence.

JUDGE: Yes, yes, yes.

MR. KAVANAGH: And that's a far different scenario for mentioning in the course of calling over of a list the accused man in a criminal case is unwell, and we're looking for an adjournment and here's the medical report, and of course circumstances then might dictate and adjournment.

JUDGE: Well, this wasn't mentioned yesterday at all.

MR. KAVANAGH: It wasn't mentioned yesterday at all. So we're here, we're in charge, we're ready to start our trial. If he has no evidence to call, he has a decision to make at that stage and it falls on the court. And even if he is to start, as I say, I will be making renewing this application in any event. Even if she was here.

JUDGE: No, I understand that. But you understand I'd have to hear all of the merits of the various

MR. KAVANAGH: Of course, yes. But even if she was here, I would be making a similar application. But I say it's not an appropriate case for an adjournment. First of all it's an adjournment into the ether, so to speak, because we don't know when she's going to be fit, if ever, to give trial. She might be anxious to testify, but we don't want to live another year of our lives with this hanging over us."

45. Nowhere in that exchange was the presiding judge's attention drawn to the fact that the jurisdiction to ensure due process and a fair trial is exercised in the course of a trial but does not enable or relate to a preliminary hearing at the commencement of a trial on the issue of delay. I am entirely satisfied that, as a matter of fact, such a preliminary application was brought on behalf of the respondent. The question raised by the presiding judge, as to the parameters of the court's jurisdiction, was dealt with by the submissions on behalf of the respondent that "…*we're gone beyond that, we're in charge of the jury"* and "*The trial has started. They're just not in a position to call any evidence*". In my view, the submission that "The trial has started" does not engage with the fact that no evidence had been given and the presiding judge had, therefore, not had any opportunity to test the proposition that a fair trial was no longer possible or to explore in any meaningful way the prejudice said to result from the fact that, due to the passage of time, nine witnesses were no longer available. The extent to which the evidence of those deceased witnesses might or might not be crucial was not explored nor was any assessment made of the extent to which it might or might not be possible to compensate for the missing evidence if it was crucial, the foregoing being, of course, an assessment made in the context of a trial which has commenced.

46. It is also clear from the final submission in the extract from the transcript set out above that, not only did counsel for the respondent make a *PO'C* application in circumstances

where the complainant was not present and the respondent was aware of the fact that the prosecution was not in a position to call any evidence, it was emphasised to the presiding judge that, even if the complainant had been present, a similar application would have been made. If the complainant was present, it is self-evident that the reason to seek an adjournment based on her absence would fall away. Yet, Counsel for the respondent made it very clear to the court that, even in that scenario, namely "…*even if she was here, I would be making a similar application*". This underlines that the application which was in fact made to the court on 28th March 2019 was both in form and in substance a *PO'C* application, namely an application that a trial should be halted on the basis that a fair trial was impossible due to the passage of time. The evidence before this court undoubtedly demonstrates that the application which was made on 28th March 2019 was, in fact, a *PO'C* application and that - as the respondent's counsel stressed on the day in question - had the complainant been present, the "*similar application*" to which the respondent's counsel referred would have been a *PO'C* application i.e. the same application as was, in fact, made on 28th March 2019.

47. As is clear from the transcript, the presiding judge then turned to the contents of Dr. J**'s report and, referring to the complainant's medical conditions described in the said report, the presiding judge offered the view that "*…there's no reason why the person can't be here*". That view is not at all inconsistent with the contents of Dr. J**'s 27th March, 2019 report, in that the doctor does not express the view that the complainant was unfit to travel (the Doctor saying that he thought she was currently unfit to *testify*, no reference to *travel* appearing in the report). The presiding judge went onto express the view that "*It can be said to them that they can take a break if they need to"*. With due respect to the learned judge, the latter view expressed by the presiding judge does not, it seems to me, engage directly with what was the only view from a medical practitioner before the court, namely, Dr. J**'s view, for the reasons given, that "*I don't think that she is currently in a fit state to testify"*.

48. It is clear from p. 9 of the transcript that counsel for the prosecution submitted, *inter alia,* that: "…*these PO'C points don't really apply. Those points, in my submission, are points to be made at a conclusion of a trial in which evidence has been led. Obviously, I am not in a position to call such evidence*." The foregoing submission by counsel for the applicant reflects what Ms. Justice Denham expressed in the sentence from her judgment in *PO'C* which was not opened to the learned Circuit Court judge on 28th March 2019 (namely: "*This jurisdiction is exercised in the course of a trial but does not enable, or relate to, a preliminary hearing at the commencement of a trial on the issue of delay*"). The submission by counsel for the prosecution also underlines the fact that, prior to the Court making any ruling or Order on 28th March, it was aware that there was no reality in the prosecution case opening, in the event that an adjournment was declined.

49. It is very clear that the presiding judge regarded himself as under an obligation to ensure a fair trial and a fair process at all material times, not merely as things emerged on the basis of evidence given. As can be seen from the bottom of p. 9 of the transcript, the

presiding judge stated: *"So if these things emerge on the basis of the evidence, a PO'C application may be made. But I am under an obligation to ensure a fair trial*."

50. An exchange then ensued between the presiding judge and counsel for the respondent in relation to, *inter alia*, the previous adjournment which resulted from the death of the of the witness's children and the understanding, which counsel for the prosecution regarded as a shared understanding between the parties, that the respondent's trial would not be reached, with further mention made of the medical records or counselling notes and the disclosure issue. For the sake of clarity and completeness, it is appropriate to quote, *verbatim*, from the bottom of p. 11 to the top of p. 14 of the transcript, in which the presiding judge gave his ruling, following which the order challenged in the present proceedings was made.

The context in which the Circuit Court was invited to make a decision on 28/3/2019

51. Before setting out the ruling which the presiding judge delivered on 28 March 2019, it is appropriate to look at what was the then factual position immediately prior to the ruling. Having regard to the transcript, the following can be said to be the factual background and context in which the learned Circuit Court judge was invited to make a decision: -

    1. Counsel for the prosecution had applied for an adjournment relying, in particular, on a medical report from the complainant's GP in which the doctor confirmed that the complainant was under extreme stress and also had a flare up of a variety of physical symptoms and the doctor stated that he did not think *"that she is currently in a fit state to testify";*

    2. This was the only medical report before the court. There was no issue taken with its admissibility. There was no other view, written or verbal, proffered by any other Doctor (e.g. taking issue with the view expressed by Dr. J**);

    3. Neither counsel for the respondent, nor the learned judge enquired as to when the complainant would be fit to testify according to her doctor and that question was neither asked nor answered;

    4. The respondent's counsel made a *PO'C* application submitting *inter alia* that there were at least nine potential witnesses who had passed away and that, due to the passage of time, the complainant's brother no longer had any recollection of anything occurring and counsel made a detailed submission in relation to the alleged consequence of the absence of their evidence and, relying explicitly on the words of the Supreme Court in *PO'C*, it was submitted that it was not possible to have a fair trial.

    5. The respondent's counsel also submitted that, even if the case were to be adjourned, it would not "*get us over*" or remedy "*…the principal difficulty which is that at least nine persons are deceased and the principal person involved in the case, which is the brother of the complainant, who she says was in the location, in*

the huts where this was supposed to have happened, has absolutely no recollection of anything occurring, due to the passage of time".

6. It was made clear to the court that an adjournment was, in effect, beside the point and entirely irrelevant, due to the underlying and fundamental difficulties which, according to the submission on behalf of the respondent, prevented the respondent from having a fair trial, at any stage, and the respondent's counsel described this as presenting "*…a very serious and grave risk of a miscarriage of justice".*

7. In the course of making a *PO'C* application, counsel for the respondent suggested a very specific approach be adopted by the court, namely, "*…that the appropriate course is to call on the prosecution to open its case, and if there is no evidence to present then to direct an acquittal of the accused. It's the only way to remedy it".*

8. That submission was made knowing that the prosecution could not present evidence if the case was called on that day. Thus, it was not a question of "*if there is no evidence"*. The respondent's counsel knew, as did the court, that the prosecution could and would present no evidence, if called on to open its case that day. This is clear from explicit statements both by counsel for the prosecution and counsel for the respondent (i.e. "*MR. KAVANAGH: The trial has started. They're just not in a position to call any evidence*". (Transcript p. 8); "*MR. KELLY: And if we just confine ourselves to that, then these PO'C points don't really apply. Those points, in my submission, are points to be made at a conclusion of a trial in which evidence has been led. Obviously, I'm not in a position to call such evidence*". (Transcript, p. 9)

9. This was not a situation whereby there was a discreet application for an adjournment, dealt with as such, with the parties unaware of what might happen in the event an adjournment was declined. On the contrary, the factual position - as known by counsel for the prosecution and counsel for the respondent and by the presiding judge - was that if the court declined to grant an adjournment, it would inevitably bring a halt to the prosecution's case in circumstances where, as a matter of fact, the prosecution was unable to present evidence that day (due to the complainant being unavailable and, according to her Doctor, unfit to testify at that point in time);

10. This was, of course, precisely what counsel for the respondent urged on the court as being "*the only way to remedy it*". The "*it*" was plainly not inconvenience or alleged prejudice which might flow from an adjournment regardless of how short or long such an adjournment might be. On the contrary, counsel for the respondent made it clear that the *"it"* was the prejudice which had already been caused to the respondent by reason of nine people having died and the complainant's brother (described as "*the principal person involved in the case*") having no recollection of anything occurring, due to the passage of time. The "*it*" was the impossibility, according to the respondent's counsel, of a fair trial;

11. The foregoing was the factual position when the presiding judge was invited to make a ruling on 28 March 2019. Thus, what was at issue was, in substance, whether the prosecution's case should be halted or not.

12. In other words, all parties were aware that to decline to adjourn the case was, in effect, to terminate the prosecution's case by means of an inevitable direction to the jury (the foregoing being exactly what counsel for the respondent urged on the court as the only way to remedy the very serious and grave risk of a miscarriage of justice, were the prosecution's case against the respondent not to be halted);

13. Although, in *form*, the first application made to the presiding judge on the morning of 28 March 2019 was an adjournment application by the applicant's counsel, this was immediately followed by a *PO'C* application on behalf of the respondent and, in *substance*, it was a *PO'C* application which the court was invited to decide;

14. Both a refusal of an adjournment and a direction to acquit were urged on the court on the basis of a *PO'C* application and, in light of the facts which pertained, to decide one was to decide the other.

The 28th March 2019 Ruling and Order

52. The following is a *verbatim* setting out of the ruling given and order made by the presiding judge on 28 March 2019, beginning from the bottom of p. 11 of the transcript: -

> *JUDGE: All right. Thanks. Well, this an application, the trial now having commenced, to adjourn. There was an application before the jury was put, sorry, the accused was put into the charge of the jury yesterday to adjourn this trial. That application was based on the unavailability of a witness, and that application was refused. At the stage of that application for an adjournment, i.e. before the accused was put into the charge of the jury, no mention was made of any inability on the part of the complainant to attend to give evidence. The situation now is that there is consequently a fresh ground of adjournment, and I just want to very briefly say in relation to the background detail – Mr. Kavanagh has outlined that and I'm not going to repeat it, but at no stage it is common case was anybody told, whether it was the investigating guard, whether it was the DPP's solicitor or anybody, was told that she would not going to be in a position to give evidence. Whatever chance this application had for success, it would have had it yesterday, not today.*
>
> *In addition, this is based on a medical report, which indicates difficulties that the lady may have in relation to symptoms of anxiety and so forth, but the reality is that I would need some degree of convincing further than the letter of Dr. J** to convince me that she's not in a position to attend to give evidence. After all, this is her complaint. She has brought a complaint as a result of the complaint of events which occurred more than 50 years ago in relation to some charges and not far shy of it in relation to other charges, she makes a complaint of wrongdoing against **the accused. She has to come and deal with it. This case has been in the list since 2016. I accept that it, insofar as it is concerned with hearing dates, the first*

*effective hearing date was December 2018 and that adjournment of that was with the consent of the accused man and in circumstances where this Court, I would have granted an adjournment without any difficulty for a short period. And that's what happened, the case was adjourned to the 29th of January 2019 with a view to it getting on, remembering at all times that this is a case involving allegations of events a considerable period ago, a lifetime ago in some respects. It was listed for hearing on the 29th of January 2019. By that stage, the investigating guard, God rest him, was dead and now a new guard had come into it, and this guard had indicated to the State that there might be counselling notes which ought to be discoverable. No criticism can be made of that guard whatsoever, but you can see now that this is a case where many, many years after the events and after the case has been listed for hearing and was supposed to get on in December '18, there is now for the first time some mention of documentation which should have been disclosed. There is a rigmarole about how it has to be disclosed and how long; but in cases of this type where you're dealing with events that have occurred a long, long time ago, there's an absolute onus to get the case on quickly and to get the case on as efficiently as possible. So on the 29th January 2019, the State, if I can use that in its emanations, if I can use that phrase, was offside and an accused person was now going to be met with a further delay while these notes where being obtained. The case was put back to yesterday. It was, I accept, intended that the case would back up another trial, and I've no difficulty with that proposition; but equally everybody knows that just because a trial is listed no. 1 in the list doesn't mean that it's going on. There's various reasons why things don't go on. The case, in fact, in the list was one in which the complainant hadn't turned up on a previous occasion. So it would have been realistic to expect that **the accused's could have got on. And unfortunately, the position is that, for whatever reason, this wasn't dealt with, and Mr. Kavanagh on behalf of the accused and on his instructions, made a legitimate point that he wanted the case to go ahead. I agreed with him and the case was due to start today, the accused being in the charge of the jury. A fresh ground of adjournment is really not appreciated at this stage. This should have been the ground of adjournment if at all yesterday and in the interests of justice, I've got to take into account fair process, fair procedures; how would anybody in this court feel, and I shouldn't ask rhetorical questions, but I'll just say I think it is unfair that a person who is dealing with allegations of events that are supposed to have occurred a half a century ago is constantly put back to have these investigations put in front of, sorry, investigations concluded and the matter put in front of a jury. There has to be a fair process for both sides.*

I accept in general terms, the PO'C *type application is probably one that is made as the evidence unfolds, but it is apparently common case that nine people who have a relevance to this prosecution are now dead. The passage of time has certainly affected the position. But that's not giving a conclusion on the P O'C ground, it's just stating the obvious, that it's a case that had to get on and had to get on quickly. Rights of an accused are also present as well as rights of a complainant, and the accused carries with him a constitutional right and a constitutional*

presumption of innocence. He is entitled to have this case tested and it hasn't been tested. So I'm not going to accede to any application for an adjournment. The matter proceeds.

MR. KELLY: May it please the court, judge.

MR. KAVANAGH: May it please the court.

JUDGE: So I call in the jury now.

IN PRESENCE OF JURY

JUDGE: There we go. Now, Mr. Kelly.

MR. KELLY: Judge, somewhat unfortunately, I'm not in a position to offer any evidence in this case, for reasons that the jury need not be concerned with, and I have no evidence to offer at this time.

JUDGE: All right.

MR. KAVANAGH: In the circumstances, judge, I'd ask that you direct an acquittal, and that the foreman of the jury record the same on the issue paper.

JUDGE: Yes, that's Mr. Foreman, that's exactly correct. The State are not offering any evidence, so consequently, I'm going to direct you, and I'll get the form now, direct you to find him not guilty, because there's no evidence offered. Yes, Mr. Foreman, would you just write "not guilty by the direction of the judge". And you sign it and date and that's it, and that will conclude your jury service. That's it. And that will conclude your jury service. That's it. There are charges, so in fact it should be in respect of each and every count. So I don't know how many counts there are, I don't have the indictment in front of me, but –

MR. KELLY: There are four counts.

JUDGE: Four counts. So what you do is in respect of each count, in other words, each specific charge you write, "not guilty by direction of the judge", "not guilty by direction of the judge", on four occasions. Sorry for the just to be formally correct. You need to date it today's date, whatever date that is.

FOREMAN: The 28th. So by the direction of the judge.

JUDGE: Yes. Just write "not guilty by direction of the judge". See it's not your decision in a sense, because no evidence has been given, but that's the way we do it. And I'm not dismissing it on a point of law or anything like that, it's just that because there's no evidence proffered, there's nothing to think about basically. That's perfect thank you. And it just falls to me to say thank you for your jury service, and I will absolve you from further jury duty for a period of five years from today's date. I know you have agreed to serve in a difficult case on a jury and I

know you've had to come back a couple of days, so thank you for your service and that's it really. Good luck for the rest of the day".

53. It is clear from his ruling that the learned Circuit Court judge formed a different view than the view expressed by the complainant's doctor, as to her fitness to testify. The basis for that view is not clear, but what is perfectly clear is that the Court's view of the medical report was most certainly *not* the only issue which gave rise to the refusal of the adjournment.

54. On the contrary, in addition to the medical report and the issue of the complainant's fitness, the learned judge explicitly referenced other factors in his ruling, including: " *…the complaint of events which occurred more than 50 years ago in relation to some charges and not far shy of it in relation to other charges*"; *"…that this is a case involving allegations of events a considerable period ago, a lifetime ago in some respects*"; "*…in cases of this type where you're dealing with events that have occurred a long, long time ago, there's an absolute onus to get the case on quickly and to get the case on as efficiently as possible"; "…nine people who have a relevance to this prosecution are now dead."* and "*The passage of time has certainly affected the position".*

55. In short, the reason for the Court's decision not to grant an adjournment was not confined to the Court taking a different view as to the complainant's fitness to testify and relied on other factors which the Court plainly took into account, and explicitly referred to in the learned judge's ruling. These included the age of the complaints themselves; delay in prosecuting the complaints; the death of nine witnesses; and the effect on the case of the passage of time. It is clear that those factors upon which the learned judge relied, reflected the *PO'C* application which had just been made to him, to the effect that a fair trial was no longer possible.

Discussion and decision

56. I want to express my gratitude to counsel for both parties and to their instructing solicitors for the detailed written legal submissions which were provided to the court. These were supplemented by skilled oral submissions during the hearing over the course of two days (the second of which was 03 June 2021, a considerable gap arising in circumstances where the case was called on, on the basis that it would take one day but a second day was required). I have considered, very carefully, all written and oral submissions before coming to the decision which detailed in this judgment. It is fair to say that the submissions made on behalf of the applicant primarily rely on the principles derived from the Supreme Court's decisions in the *PO'C* and *CCE* cases, to which I have referred, whereas Counsel for the respondent submits, repeatedly and strenuously, that no *PO'C* application was ever made. During the course of this judgment, I will refer in some detail to the various submissions made on behalf of the respondent, in light of the evidence before this court. It is also submitted, on behalf of the applicant, that the view taken by the presiding judge in respect of Dr. J**'s medical report was unreasonable/irrational within the meaning of the relevant jurisprudence. Particular reliance was placed by the Applicant on the Supreme Court's decision delivered by Clarke

J. (as he then was) in *Rawson v. The Minister for Defence* [2012] IESC 26. Para. 6 of that decision begins as follows: -

"6. The Law

6.1 It is trite law to say that judicial review is concerned with the lawfulness of decision making in the public field. Where a decision is made by a public person or body which has the force of law and which affects the rights and obligations of an individual then it hardly needs to be said that the courts have jurisdiction to consider whether the decision concerned is lawful. If it were not so, then it is hard to see how such a situation would be consistent with the rule of law. For if decisions materially affecting the rights and obligations of individuals could be made in an unlawful fashion the rule of law would not be upheld.

6.2 While the circumstances in which a decision made by a public person or body may be found to be unlawful are varied, it is possible to give a non-exhaustive account of the principal bases by reference to which such a finding might be made. First, the decision must be within the power of the person or body concerned. Second, the process leading to the decision must comply both with fair procedures and with whatever procedural rules may be laid down by law for the making of the decision concerned. Third, the decision maker must address the correct question or questions which need to be answered in order to exercise the relevant power and in so doing must have regard to any necessary factors properly taken into account and must also exclude any considerations not permitted. Fourth, in answering the proper questions raised and in assessing all matters properly taken into account the decision maker must come to a rational decision in the sense in which that term is used in the jurisprudence".

57. There is no dispute between the parties in respect of the foregoing principles and these principles are undoubtedly of relevance to the issue which is for this Court to decide.

58. In light of the evidence I am entirely satisfied that in form and in substance a *PO'C* application was made to the court on 28th March 2019, to the effect that a fair trial was not possible and that any trial presented a very serious and grave risk of a miscarriage of justice. The reasons why I take that view are clear from my analysis of the evidence, in particular my analysis of what occurred on 28th March 2019 with reference to the transcript discussed earlier in this judgment.

59. During submissions made to the court, prior to the ruling delivered by the presiding judge on 28th March 2019, counsel for the respondent, in the context of making a *PO'C* application, urged the court to take a very specific course of action, namely, to refuse an adjournment and if the prosecution did not present evidence, to direct an acquittal.

60. The factual context in which the foregoing was urged on the court is that the prosecution was not in a position to open its case and offer any evidence. There was no doubt about this fact. During submissions, counsel for the prosecution stated explicitly *"Obviously, **I'm***

not in a position to call such evidence" (p. 9 of transcript). This was a statement made by the applicant's counsel in response to the *PO'C* application, wherein the applicant's counsel also stated that "*these PO'C points don't really apply. Those points, in my submission, are points to be made at a conclusion of a trial in which evidence has been led."* (p. 9, lines 13 – 15). Counsel for the prosecution also stated explicitly that "*The trial has started.* ***They're just not in a position to call any evidence***" (Transcript p. 8) and said this in the course of his application to the effect that delay rendered a fair trial impossible.

61. In other words, the prosecution, the defence and the presiding judge were all aware, prior to any decision by the Court in respect of what was a *PO'C* application, that a refusal of the prosecution's request to adjourn the case would inevitably mean the dismissal of the case, in light of the relevant facts. This is precisely the course of action which counsel for the respondent urged on the court and it was urged squarely on the basis of *PO'C* principles. This is precisely what the court did in response to the *PO'C* application.

62. It is clear from the transcript, including from the ruling given by the presiding judge, that the Circuit Court entertained and engaged with what was a preliminary application, to the effect that delay rendered a fair trial impossible. A passage from the *PO'C* judgement was opened to the court but at no stage, however, was the following sentence in the Supreme Court's decision in *PO'C* opened to the learned Circuit Court judge: "*This jurisdiction is exercised in the course of a trial but does not enable, or relate to, a preliminary hearing at the commencement of a trial on the issue of delay*".

63. At no stage during the submission to the learned judge on behalf of the respondent was the Court informed that the relevant jurisdiction could only be exercised during the course of a trial as the prosecution case actually developed and evidence was actually given. Rather, the court was caused to believe that it had the relevant jurisdiction by reason of the trial having "started".

64. As can be seen from the very first sentence in the Court's ruling on 28th March 2019, some emphasis was placed by the court on "*…the trial now having* ***commenced****…"* (bottom of p. 11 of the transcript), reflecting the submission made by counsel for the respondent that "*The trial has* ***started****. They're just not in a position to call any evidence"* (p. 8 of the transcript, line 9) which submission was made on the respondent's behalf, in response to a query by the presiding judge as to whether a *PO'C* application could be made at that stage.

65. It is equally clear from the court's ruling that it understood that a *PO'C* application could properly be made at that point, without the court having heard any evidence, even if *PO'C* applications were more usually made as evidence unfolds.

66. It is also clear that the *PO'C* application with which the court plainly engaged, played a material part in the decision which the presiding judge came to. The unavailability of nine witnesses and the alleged prejudice to the respondent caused by the passage of time were issues which the respondent's counsel emphasised in a *PO'C* application. It is a

matter of fact that, in his ruling, the presiding judge stated *inter alia* that: "*…nine people who have a relevance to this prosecution are now dead. The passage of time has certainly affected the position".*

67. The death of nine witnesses speaks to the proposition that a fair trial is not possible. It is very difficult to see how the death of nine witnesses is a relevant consideration insofar as an adjournment is concerned. If the position is that nine witnesses have died, that will remain the position, regardless of whether an adjournment is or is not granted. Indeed, the evidence demonstrates that the foregoing is precisely the stance taken on behalf of the respondent, namely that an adjournment, whether granted or not, was *irrelevant* to the much more fundamental problem of a fair trial not being possible, due to the passage of time, and what had occurred ,i.e. during submissions on behalf of the respondent, the court was essentially told that an adjournment, whether granted or not, was irrelevant because it would not "*…get us over the principal difficulty, which is that at least nine persons are deceased . . . and the complainant's brother has absolutely no recollection of anything occurring, due to the passage of time".*

68. It is plain from the court's ruling that the unavailability of nine people and the passage of time were both issues which were to the fore and which underpinned the court's decision. Both issues, as canvassed in the *PO'C* application made on behalf of the respondent, relate to whether a fair trial is possible. The statement by the presiding judge "*But that's not giving a conclusion on the PO'C ground, it's just stating the obvious, that it's a case that had to get on and had to get on quickly*" does not undermine the fact that the passage of time and the unavailability of nine people constituted issues which were central to the court's decision (both being issues canvassed in the *PO'C* application and both of which speak to the possibility or not of a fair trial) which decision inevitably gave rise to the order challenged in the present proceedings, having regard to the factual matrix in which the *PO'C* application and the Court's decision in response to same, were made.

69. The evidence before this court establishes that, during a preliminary application to a trial judge before any evidence had been given and knowing that if a presiding judge could be persuaded to decline an adjournment, no evidence would or could be given by the prosecution, counsel for the respondent asserted *inter alia* that, because of the passage of time and because nine witnesses had died, it was no longer possible to have a *fair* trial, irrespective of any adjournment. It was asserted on behalf of the respondent that an adjournment was, in essence, irrelevant because it would not remedy the principal difficulty of the non – availability of nine witnesses and the prejudice to the respondent asserted by reason of the passage of time.

70. The presiding judge was told that the only way to remedy what was described as a very serious and grave risk of a miscarriage of justice was to take a very specific course of action, i.e. to decline an adjournment and then to direct an acquittal "*if*" no evidence was given by the prosecution, the factual position - as all relevant parties knew – being that such evidence could not and would not be proffered. The presiding judge took precisely

the course of action urged on the court on behalf of the respondent, leading inexorably to the order challenged in the present proceedings.

71. The evidence demonstrates that the court's 28th March 2019 order is one which flowed from the *PO'C* application which was made to the court on 28th March 2019 and, in my view, involved a breach of the principles outlined in the *PO'C* decision and reiterated most recently by the Supreme Court in the *CCE* decision.

72. The case before this court is *not* about the principle that a presiding judge is entitled to manage the business of the court. Nor is it about the principle that a presiding judge has a wide discretion to grant, or refuse, an adjournment. A consideration of the evidence before this Court demonstrates, however, that a preliminary application was made with the aim of halting any trial of the respondent. That application was made before any evidence was tendered in the case. The precise course of action urged on the court by counsel for the respondent was followed by the presiding judge. It resulted in the trial being halted prior to any evidence being tendered and before the court had any opportunity to conduct an analysis of for example, the potential relevance to the trial of missing witness evidence in the context of such prosecution evidence as was actually tendered as the trial developed and the extent to which any evidence no longer available could be compensated for. Thus, the court never had an opportunity to consider whether there was a line of defence which had been undermined by the absence of one or more witnesses or whether missing evidence could be compensated for by other witnesses or such evidence as was available.

73. During the course of his ruling on 28th March, the presiding judge referred to the medical report of 27 March 2019 from the complainant's doctor but stated *inter alia* that "*I would need some degree of convincing further than the letter from Dr. J** to convince me that she's not in any position to attend to give evidence"*. There is nothing on the face of the said medical report which makes it explicit that it would be impossible for the complainant to travel to court to be present. The doctor did, however, express a view, as a medical practitioner that "*I don't think that she is currently in a fit state to testify*". No issue was taken with Dr. J's** *bona fides* or qualifications. Nor was any issue taken with the fact that Dr. J** was not present in court, either on 27th or on 28th March 2019, to formally prove the contents of the medical report and no objection was taken to the report on the basis of the "hearsay rule". It is also a fact that there was no contrary medical evidence before the court. In the absence of any contrary medical evidence, it is difficult to understand the basis for the view taken by the presiding judge to the effect that the complainant was fit to testify. To put it another way, it is not possible to identify a basis for the view formed by the learned Circuit Court judge that the applicant was fit to testify when the only medical evidence, in the form of Dr J's report, was to the effect that she was *not*.

74. It is perfectly clear from the transcript that Counsel for the Respondent is not correct in his submission that the only thing that occurred on 28 March 2019 is that an adjournment was applied for by the Applicant, resisted by the Respondent and that the learned Circuit

Court judge considered a range of things, all of which were relevant to the question of whether or not to grant an adjournment and then refused the adjournment, after which the prosecution "*chose"* not to call any evidence, and as a result of that choice, an acquittal was directed.

75. Quite apart from the view taken by the learned judge in respect of the medical report, a *PO'C* application was undoubtedly made and was considered by the court, and was material to the court's decision on 28 March 2019, leading inexorably to the order challenged, being, in fact, the only order made on that date. Furthermore, given the facts as they pertained on 28 March 2019, the prosecution did not make a *choice* not to open its case. The prosecution's crucial witness, the complainant, was unavailable having been certified as unfit to testify in a medical report of the previous day. All parties knew that this was the position and they knew it prior to the adjournment application being dealt with. It is not unfair to say that, against that factual backdrop, the refusal of the adjournment prevented the prosecution from opening its case, such a refusal having been made, the evidence establishes, on foot of a submission that a fair trial could never take place (i.e. the essence of the Respondent's submission being that a fair trial was impossible *then*, or at any time in the *future*, the damage having already been done). In this regard the applicant has drawn this Court's attention, *inter alia*, to the decision in *DPP v. Kelly* [1997] 1 IR 405, the head note of which records what was held (by Laffoy J.) including: "*2. That in a criminal trial on indictment a trial judge has no jurisdiction to direct a jury to find an accused person not guilty where the prosecution has not been allowed to open its case or to adduce any evidence."*

76. Even if I am entirely wrong to take the view that the effect of the court declining to adjourn the case, resulted for practical purposes in the prosecution not being allowed to adduce, or being prevented from adducing any evidence, and even if this court ignores entirely the decision in *DPP v. Kelly*, I am still entirely satisfied that the *PO'C* application was made and that it was material to the learned judge's decision to decline an adjournment. That *PO'C* application was not one the Circuit Court had the jurisdiction to entertain or decide, at that point, being an application made at the start of the trial before any evidence was given, not an application made in the course of a trial and earlier in this judgment I cited at some length from *PO'C* and from the *CCE* decisions which establish the relevant principles.

77. It is understandable that, when explaining matters to the foreman of the jury (someone who was not present in court when the *PO'C* application was made) the presiding judge stated: *"And I'm not dismissing it on a point of law or anything like that, it's just because there's no evidence proffered, there's nothing to think about basically".* The evidence before this Court in the form of the 28 March 2019 transcript demonstrates, however, that, knowing the prosecution could not and would not open its case, the presiding judge was urged, in a *PO'C* application, to decline an adjournment and to direct an acquittal *"if"* the prosecution did not open its case. It was urged on the court that this was the only way to remedy what was said to be the very serious and grave risk of a miscarriage of justice, in the context of a submission that a fair trial was not possible, regardless of

when a trial took place (i.e. the submission made to the learned Circuit Court judge being that a trail would be unfair then, i.e. On 28 March 2019, and it would remain unfair in the future if an adjournment was granted). What was urged on the Circuit Court is precisely what that Court did, and plainly did so to try and ensure fairness.

78. On the facts which pertained at the time, to decline an adjournment, on 28 March 2019, was, in reality, to direct the jury to acquit the respondent. It is clear from the facts that this was one and the same decision, in that to refuse an adjournment led inexorably to an acquittal, something the court was aware of in advance of declining to adjourn, given the fact that the prosecution could proffer no evidence at that point.

79. It is plain that the presiding judge's decision to decline an adjournment which led inevitably to the halting of the prosecution's case deprived the presiding judge of the opportunity to exercise a trial judge's jurisdiction, consistent with *PO'C* principles, to ensure due process and a fair trial, which jurisdiction is exercisable during the course of the trial.

80. There is no dispute about the principle that a trial judge has the jurisdiction to prevent unfairness, including by stopping a trial, if unfairness has become manifest as a trial develops. The exercise of such a jurisdiction involves the trial judge examining evidence tendered and being satisfied that prejudice within the meaning of the jurisprudence has been established. Such an approach strikes the appropriate balance between the rights of an accused, the rights of victims, and the public interest in the prosecution of crimes.

81. Among the many submissions made with sophistication and skill on behalf of the respondent, the first was to urge this Court not to consider the application before it on the basis that the respondent claims that the application for leave was brought one month and one day too late, having regard to O. 84, r. 21 (1) of the Rules of the Superior Courts. It has to be said, however, that, nowhere in the respondent's statement of opposition, dated 11 November 2019, is it pleaded that this Court cannot or should not consider the application before it by reason of any delay on the part of the Applicant in seeking leave. Delay is not pleaded in opposition to the Applicant's case. On the contrary, the statement of opposition and the lengthy affidavits sworn by the respondent and his solicitor, by way of verifying the contents of the statement of opposition and opposing the applicant's claim, engage fully with the application for judicial review, without any assertion that the court is or should be prevented for considering the application by reason of any delay in bringing the present case.

82. Leave was granted on 29 July 2019, as is clear from the contents of the order made by this Court on that date. Among the terms in the said order granting leave, and reflected in the Applicant's 1st August 2019 Motion, is the relief at (iii) namely "*An extension of time for the bringing of this application, if necessary*". The respondent was served with the aforesaid order and motion. Despite this, the respondent did not plead delay on the part of the applicant. Nor is the issue canvassed at all in the detailed 20 – page written legal submissions furnished on behalf of the respondent.

83. The very first time delay is raised was after the Applicant's counsel concluded her opening oral submissions on day-1 of the trial and counsel for the respondent made oral submissions in reply. On behalf of the respondent, this court is urged to, of its own motion: *"end the matter in a couple of paragraphs"* i.e. to deliver a very short judgment refusing to entertain the Applicant's case at all by virtue of what the respondent's counsel submitted was delay of one month and one day in seeking leave to bring Judicial Review proceedings.

84. In making this submission, Counsel for the Respondent drew this Court's attention to the Supreme Court's 19 June 2002 decision in *Shannon v. McCartan* [2002] 2 IR 377. In that case, the Supreme Court dismissed an appeal against a decision of the High Court (Kearns J., as he then was) in which the applicant was refused *certiorari* in respect of a decision by the Circuit court which had been made three and a half years earlier. Keane C.J. stated (at p. 383):

> *"I would leave for another occasion the question as to whether, in such circumstances, having regard to the requirements of O. 84, r. 21(1) and the repeated insistence of this court that applications for judicial review must be made in an expeditious manner, the question as to whether, even where delay is not expressly raised by the opposing party, the court should, of its own motion, raise the matter."*

Counsel for the respondent also relied on the 1st October 1990 decision of Mr Justice Barr in DPP v. McDonnell, wherein the learned judge stated, *inter alia* that *"…a person who wishes to apply for relief by way of judicial review has a primary obligation to do so as soon as possible and in any event within a prescribed period (unless an extension thereof is granted by the court)."* The Supreme Court's decision in *Shannon,* which involved delay in applying for Judicial Review of over three years, is certainly not authority for the proposition that this Court is obliged, of its own motion, to refuse to engage with the substance of the dispute as pleaded and, instead, to focus exclusively on the one issue of delay which is not pleaded. As to the decision in *DPP v. McDonnell,* there can be no dispute in relation to the principles outlined therein, but that is not the end of the analysis in light of the particular facts in the present case.

85. The penultimate paragraph of the 23rd March 1996 decision of Mr. Justice Barron in *DPP v. McMenamin* states as follows:

> *"It has been submitted on behalf of the Notice Party that the application for Judicial Review is out of time in that it has not been brought within the period of six months form the date of the Order. This is correct. However, it is submitted on behalf of the Applicant that as the Notice of Opposition does not raise this issue, it cannot now be raised, since the Applicant has been deprived of the opportunity to indicate grounds upon which the Court should exercise its discretion to extend the time for seeking Judicial Review. Since it was not so raised, such evidence is not before the Court. In the circumstances the objection must be refused."*

86. Notwithstanding the fact that the relevant time limit in the present case is 3, rather than 6 months and despite any changes in respect of the provisions of Order 84 in its current form, it is entirely true to say that, in the present case, the Respondent did not raise the issue of delay in his Statement of Opposition. Nor did he do so in any affidavit sworn by or on his behalf. Furthermore, delay is not referred to at all in the Respondent's written submissions. That being so, it seems to me that the Applicant, who plainly had sought *"an extension of time for the bringing of this application, if necessary"*, in the Order and Motion which were served on the Respondent, was entitled to take the view that delay as regards seeking leave to bring Judicial Review proceedings was not an issue taken by the Respondent. If one looks at the pleaded case, it is not put in issue and, thus, is not an issue for this Court to determine.

87. It also seems to me that the effect of the Respondent not pleading delay was to deprive the Applicant of the opportunity to indicate grounds upon which this Court should exercise what is an undoubted discretion to extend time for seeking Judicial Review (something that, from the outset, the Applicant flagged as relief it was seeking, to the extent necessary). Not having been met with any plea of delay, it was not necessary.

88. Furthermore, the decision of the Supreme Court in *AP v DPP* [2011] 1 IR 729 seems to me to be authority for the principle that the parameters of a case are set out in the pleadings and, as I say, delay is simply not pleaded by the respondent. As to the parameters of the case before this court, it is very clear that the Respondent has engaged fully with the substance of the Applicant's case. This is clear from the 9-page Statement of Opposition, and the contents of 3 affidavits, running to 20 pages between them, sworn in opposition to the Applicant's claim.

89. As well as not pleading delay in the Statement of Opposition, the Respondent has not put forward any evidence of prejudice allegedly suffered by reason of the delay of one month and one day referred to in the oral submissions made by his Counsel in the context of encouraging this court to dispose of the matter "in a couple of paragraphs" i.e. to refuse to entertain the Applicant's case at all.

90. In short, the Respondent having pleaded its opposition to the Applicant's case and having engaged fully with the substance of same asks this Court to refrain from doing what it did, i.e. it submits that this Court should *not* to engage with the case before it but, instead, dismiss the case summarily, of the Court's own motion, in view of the delay in seeking leave.

91. In light of the foregoing, I am satisfied that it is appropriate to decide the case before me, leave to seek judicial review having been granted on 29 July 2019, and no plea being made in the statement of opposition that any delay in seeking leave deprives the applicant of the entitlement to seek judicial review. Even if this court has the discretion to decide, of its own motion, not to entertain an application for judicial review, (i.e. due to delay in seeking leave, even where no such plea is made in opposition to the claim in question) I am satisfied that it would be to create a patent injustice and would be an

impermissible exercise of such a jurisdiction if this Court were to do so in the present case, in light of the particular facts.

92. A principal submission made on behalf of the respondent is that, as a matter of fact, no *PO'C* application was made on 28 March 2019 and, thus, no decision was made by the court in response to or touching on any *PO'C* application. As well as this point being stressed in written submissions, Counsel for the Respondent stated, more than once, in oral submissions: "*I want to make it absolutely clear that no PO'C type application was made*". Counsel for the Respondent later submitted that "*There is a manifest mis-understanding as to what actually happened*", going on to submit that the Applicant's case "*…is based on a mistaken belief that a POC application was made when it was not".* Having looked closely at the evidence before this Court, I am satisfied that the foregoing submissions are wholly undermined by the facts. I am entirely satisfied that, as a matter of fact, a *PO'C* application was made on behalf of the respondent and was made with skill and force. The evidence demonstrates that not only was a *PO'C* application made, it played a material and fundamentally important part in the court declining to adjourn, thus inevitably resulting in an acquittal, being the very course of action urged on the court in the *PO'C* application which was made on behalf of the respondent.

93. During the course of oral submissions, Counsel for the Respondent submitted that, in the context of a Judge considering whether or not to grant an adjournment, *"a myriad of things fall to be considered*" and he went on to submit that these things include the same considerations which arise in a *PO'C* application, emphasising in this submission that no *PO'C* application was, in fact, made. Later, Counsel for the Respondent submitted that "The transcript speaks for itself", going on to stress once more that "*no PO'C application was made*" and characterising what took place as "*simply an opposition to an adjournment*". The Respondent's Counsel went on to submit that the adjournment was opposed on a range of grounds "*some of which would have been similar to a PO'C application, had it been made, which it was not".*

94. It is fair to say that the gravamen of these submissions was for it to be argued on behalf of the Respondent that the considerations arising in a *PO'C* application are the self-same considerations which a judge can or must take into account on the question of whether to grant an adjournment or not. Similarly, it is argued that, not having been made, no *PO'C* application was ever considered or ever formed part of the learned Circuit Court Judge's decision-making on 28 March 2019. Rather, it is submitted that, to the extent that the learned judge took account of *PO'C* principles, he did so exclusively in the context of, and confined to, a consideration of whether or not to adjourn the case and, it was submitted, none of the myriad considerations which the Judge properly took account of, including *PO'C* considerations, were impermissible for him to consider given that, it was argued, all he was doing was considering whether to adjourn a case, or not, and all the Respondent was doing, it was argued, was opposing an adjournment. Thus, it is argued, *PO'C* principles were deployed on 28 March 2019 but only in the context of opposing an adjournment and never *qua PO'C* application itself.

95. Regardless of the skill and subtlety with which it is made, this is a submission which I feel obliged to reject, in light of the evidence before this Court. What in fact happened on 28 March is that the presiding judge was told that it was clear that the respondent could not have a fair trial. The judge was also told that if the case was adjourned, it could possibly be later that year but, even then, it would not "*get us over the principal difficulty, which is that at least nine persons are deceased . . .*" and the complainant's brother whom the respondent's counsel described as "*the principal person involved in the case",* the court was told, *"has absolutely no recollection of anything occurring, due to the passage of time"*. In very clear terms, it was put to the court that a fair trial was not possible, and counsel for the respondent described the situation as presenting "*a very serious and grave risk of a miscarriage of justice*". The foregoing was to make a *PO'C* application. It may have been in response to an application for an adjournment but it was a *PO'C* application nonetheless. The issues raised by counsel for the respondent were to the effect that a fair trial was impossible. Counsel for the respondent was also explicit that these difficulties existed and would continue to exist *irrespective* of any adjournment. In other words, counsel for the respondent was very clear that these were difficulties which had already arisen and would subsist, regardless of the consideration of any adjournment and regardless of the outcome of the adjournment application.

96. As I noted when examining the relevant passage from the transcript, counsel for the respondent laid out a hypothetical scenario whereby an adjournment was granted, making it clear that even if an adjournment was granted and the complainant and her sister were available later that year, it would not get over the "*principal difficulty*", namely the death – which had already occurred - of nine witnesses and the impairment of a witness's memory due to the passage of time. Thus, it was made very clear to the court that fundamentally *different* considerations were at the heart of the respondent's submission than those involving whether an adjournment was, or was not, appropriate. At this juncture it is appropriate to note that, on 28 March 2019, there was no focus on the question of when the complainant might be available to give evidence. This question does not appear to have either been asked or answered. The foregoing is in circumstances where the transcript discloses that what was truly at stake and in issue, on 28 March 2019, was halting the prosecution entirely, in precisely the manner which counsel for the respondent urged on the court, by reason of the submission made on *PO'C* grounds that a fair trial was impossible, regardless of when it might take place.

97. At the heart of the respondent's submission to the court on 28th March was that a fair trial was no longer possible and there was a serious and grave risk of a miscarriage of justice were a trial to proceed at all, *regardless* of whether an adjournment was or was not granted. The transcript makes clear that the court was told, on behalf of the respondent, that there were fundamental issues of prejudice and unfairness which had already arisen and the only way to remedy matters was to take the course of action urged on the court by the respondent's counsel. That was, in reality, to submit to the learned Circuit Court Judge that a trial, said to be fundamentally unfair, should never be allowed to proceed. That was, in reality, to seek to halt the trial notwithstanding the submission made to this Court by counsel for the respondent that "*we were never looking to halt the*

trial". A consideration of the transcript allows me to hold that halting the trial is precisely what was sought on behalf of the respondent and a course of action which would bring about that outcome was laid out for the learned circuit court judge in the clearest of terms against the factual backdrop which pertained at the time and it was this very course of action the learned judge followed, plainly influenced, to a material extent, by the submission that a fair trial was no longer possible and doubtless motivated exclusively by the desire to ensure fairness.

98. The factual backdrop or context in which the *PO'C* application was made and the court came to its decision was that the applicant's counsel, the respondent's counsel and the presiding judge all knew that if an adjournment was declined, the prosecution could not and would not open its case. Counsel for the prosecution confirmed that explicitly, as did counsel for the applicant and both confirmed this in submissions which were made *prior* to the court's ruling. The reason why the case could not be opened by the prosecution is that the complainant was, according to her doctor unfit to testify.

99. Grounded on a *PO'C* application to the effect that a fair trial was not possible, the presiding judge was urged to decline an adjournment and was urged to direct an acquittal of the accused if there was no evidence presented, knowing that there would not be evidence presented. That course of action, which was said to be "*the only way to remedy it"*, was explicitly based on the proposition that there was "*a very serious and grave risk of a miscarriage of justice*" and that a fair trial was no longer possible due to the passage of time and the non – availability of at least nine persons who were by then deceased.

100. The foregoing can fairly be, indeed can *only* be, described as *PO'C* considerations. They were not considerations as to whether an adjournment should be granted, or not. On the contrary, it was explicitly put to the court that, such was the damage which had *already* been done by the passage of time, an adjournment was irrelevant as it would not cure the "*principal difficulty*". In light of the factual situation which pertained as of 28 March 2019, to decline an adjournment was to terminate or halt the prosecution case. That is precisely what the court was urged to do, squarely based on *PO'C* principles, and that is what the court did in response to the *PO'C* application.

101. Counsel for the respondent also described the present proceedings as a "*collateral attack"* on an order made by the Circuit Court and submitted that the present proceedings constituted an attack on the principle of "*double jeopardy*" as well as an attack on the principle that a presiding judge is entitled to make decisions, including whether to grant adjournments, in the context of the proper management of a busy court list. I am satisfied, however, that the foregoing principles are not offended by the application before this Court. It seems to me that, in taking the precise course of action urged upon it by counsel for the respondent in a *PO'C* application, the Circuit Court inadvertently breached the principles laid down in *PO'C* and *CCE* and acted without jurisdiction.

102. In making a submission with reference to the "*double jeopardy*" rule, counsel for the respondent relied, *inter alia,* on *DPP v. JC* [2017] 1 IR 417, a 15 April 2015 decision by the Supreme Court in which the following was stated, from para. 31: -

> *"The principle of double jeopardy whereby a person cannot be prosecuted twice for the same offence, particularly following an acquittal, stretches back beyond the common law and is one which is at the heart of every system of justice based on the rule of law, and also expressed as the principle of non bis idem . . .*
>
> *[33] Palles C.B. in his judgment in G.S.W. Railway Company v. Gooding [1908] 2 IR 429 approved the description which Coleridge LCJ gave to the rule against double jeopardy (in The Queen v. Duncan [1881] 7 QPD 198) which was as follows:*
>
> > *'The practice of the courts has been settled for centuries and is that in all cases of a criminal kind where a prisoner or defendant is in danger of imprisonment no new trial will be granted if the prisoner or defendant, having stood in that danger, has been acquitted'".*

103. The evidence before this Court demonstrates that there was no trial in any meaningful sense and the respondent, never, in fact, stood in danger of imprisonment. Having regard to the facts which emerge from an analysis of the transcript in relation to what occurred on 28th March 2019, the respondent was never "in peril" when the presiding judge called in the jury after declining to adjourn the case. This is because, when the presiding judge called in the jury, it was a matter of fact that the prosecution was not in a position to open its case and proffer any evidence and an acquittal by direction was an inevitability. The fact that the prosecution was not in a position to call any evidence was known to the presiding judge in advance of the jury being called in, because this had been stated explicitly, both by the applicant's counsel and by the respondent's counsel, prior the court being asked to make any decision. The learned judge also had a copy of the medical report from the complainant's Doctor who was of the view that she was not fit to testify. Leaving aside the fact that the basis upon which the learned judge took the view that the complainant was fit to testify (when the only medical view as to the contrary) is unclear, it is perfectly clear that prior to the jury being called in, the learned judge knew that the prosecution case would not and could not be opened, given the absence of the complainant.

104. In my view, there is no breach of the double jeopardy or *autrefois acquit* principles. For the reasons set out in this judgment, I am satisfied that the order challenged in the present proceedings was one made in excess of, or without, jurisdiction. The circumstances in which the jury was directed to find the respondent not guilty arose as a result of a *PO'C* application which played a material and central role in the court declining to adjourn and which led, inevitably, to the only order made on 28 March 2019, being the order challenged in the case before this Court. As previously stated, the respondent was never "in peril" when the presiding judge called in the jury after declining to adjourn the case (a decision based to a material extent on issues raised in the *PO'C* application which spoke to the impossibility of having a fair trial including, as the presiding judge stated in his ruling "*. . . nine people who have a relevance to this prosecution are now dead. The passage of time has certainly affected the position").*

105. The granting of the relief sought by the applicant in the present case would not be to create a new trial in any meaningful sense. Rather, it would be to quash an order made, inadvertently outside of jurisdiction, and made in response to an impermissible *PO'C* application at the commencement of a trial, the effect of which being that no trial ever took place.

106. The Supreme Court's decision (Murray J.) in *DPP v. JC* also makes clear that there are exceptions to the double jeopardy rule and these are addressed from para. 44 onwards, wherein the Supreme Court make it clear that: - "*Such exceptions are, of course, different from a retrial arising from some fundamental flaw vitiating a first trial (such as an issue going to the jurisdiction of a court), so that the first trial cannot be considered to have been a trial at all".* In my view, what occurred on 28 March 2019 cannot be considered to have been a first trial or a trial at all, despite the submissions made with skill to this court and, indeed, to the presiding judge on 28 March 2019 by the respondent's counsel.

107. Counsel for the respondent also characterised the present judicial review proceedings as another example of delay compounding what was alleged to be prosecutorial delay. The existence, or not, of prosecutorial delay does not, it seems to me, constitute a proper matter for this Court to consider even though it is referred to in the statement of opposition and in the affidavits sworn by the respondent and his solicitor. Alleged prosecutorial delay, and delay generally, also feature quite heavily in the written legal submissions on behalf of the respondent but in my view are not determinative of any issue in the present case.

108. In the respondent's written legal submissions, it is said, *inter alia,* that "*it took the complainant 47 years to complain to the Gardai (in 2015)*", whereas in the respondent's affidavits, sworn on 08 September 2020, it is averred *inter alia* that "*the complainant has admitted to having deliberately waited until after both of her parents and both of my parents had died before making a complaint against me".* Complaints were also made, both in the written legal submissions and on affidavit, to the effect that there was unacceptable delay between the complaint and the bringing of the matter to trial, with further criticisms made in relation to the various listings of the case, the thrust of the assertions being that delay has prejudiced the respondent. I am satisfied that the foregoing are not issues of relevance to the decision which this Court has to make.

109. The question before this court concerns whether the Order challenged was made within jurisdiction or not, particularly in light of the guidance by the Supreme Court in the *PO'C* and *CCE* decisions. That said, the criticisms made by and on behalf of the respondent in relation to the period of time which elapsed between the alleged offences and the complaint made, mean that it is appropriate to refer to para. 5.4 of the Supreme Court's decision in *CCE*, wherein Clarke C.J. referred to the Supreme Court's judgment in *S.H. v. DPP* [2006] IESC 55 which signalled a significant development in the relevant jurisprudence: ". . . *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".

110. On behalf of the respondent it was also submitted that, although the further down a list a case appears, the less likely it is that the case will proceed, all parties still need to be ready to go on and it is said that, in the present case, counsel for the prosecution wrongly assumed that he would get an adjournment for the asking. There can be no doubt about the fact that parties to proceedings which are listed for hearing need to be prepared. That said, it is hardly uncontroversial to say that the further down a list a case appears, the less likely it is to "get on" and the evidence before this court is that this case was initially listed 4 out of 4 and, when called on, it was the second, not the first, case in the list. It seems clear that the fact the case was called on came as something of a surprise to the prosecution and one could have some sympathy for them, given the particular circumstances. Saying the foregoing is to criticise no one, nor are the circumstances in which this case was called determinative of any issue before this Court. What occurred on 28 March 2019 was characterised by counsel for the respondent as having been no more than an application for an adjournment which was brought by the prosecution and which was refused by the presiding judge, after a proper consideration of all relevant matters. I cannot agree. The foregoing submission ignores the active part played by the respondent, through his counsel, on the morning of 28 March 2019 in seeking a particular outcome which would lead inexorably to the halting of the trial. It ignores, in particular, what was plainly, as a matter of fact, a *PO'C* application to the effect that, irrespective of the question of any adjournment, there was a more fundamental problem, namely the impossibility of a *fair* trial and the very serious and grave risk of a miscarriage of justice, unless the court did what counsel for the respondent urged it to do, namely decline an adjournment with the inevitable consequence that the court direct an acquittal, given the fact, known to all relevant parties, that the prosecution was not in a position to open its case.

111. Referring to the court's decision to decline an adjournment on 27 March 2019, counsel for the respondent referred to what he described as "*a flurry in the prosecution camp*" and he submits that the complainant "*runs off to the doctor and gets a medical report*". Although I am entirely satisfied that no disrespect whatsoever was intended towards the complainant by means of the foregoing description, I am also satisfied that there is no evidence before this Court, nor was there any before the Circuit Court, that the views expressed by the complainant's GP are other than a *bona fide* opinion expressed by an appropriately qualified medical practitioner.

112. I am satisfied that it was an impermissible *PO'C* application which gave rise to the Order challenged in the present proceedings. At the heart of the case is, of course, the contention made, repeatedly, and with force and skill on the part of the Respondent's counsel, to the effect that no *PO'C* application was ever made. For the reasons set out in this judgment, I am entirely satisfied that the facts which emerge from an analysis of the evidence establish clearly that a *PO'C* application was made, was engaged with and gave

rise, in light of the facts as they pertained on 28 March 2019, to the Order which the Applicant challenges.

113. The medical report spoke, of course, to the complainant's ability to testify at a particular point in time and was, as such, relevant to an adjournment application. The evidence demonstrates, however, that the respondent's counsel did not merely oppose an application for an adjournment, much less confine such opposition to a consideration of the contents of the medical report and any adverse consequences, in terms of weeks or months of delay, for the respondent. Rather, counsel for the respondent made a very comprehensive and skilful *PO'C* application, a material part of which was to suggest that the question of an adjournment was, in effect, beside the point and wholly *irrelevant,* because there was, he urged on the Circuit Court, a more fundamental problem and one which would not go away whether that Court decided to adjourn the case or not.

114. This "*principal difficulty*" was the alleged prejudice to the respondent which had already been caused by the passage of time, rendering it impossible to have a fair trial and creating the spectre of "*a very serious and grave risk of a miscarriage of justice*". To address the foregoing, the court was invited to, and did, proceed exactly as counsel for the respondent suggested and I am entirely satisfied on the evidence that the court did so, relying to a material extent on the submission that this was the only way to remedy the alleged unfairness (the court's attention not having been drawn, in the *PO'C* application, to the limits on a trial judge's jurisdiction to ensure due process and a fair trial, having regard to the principles outlined in *PO'C* and in *CCE,* in particular, the relevant sentence from the judgment of Denham J (as she then was) not having been opened to the learned Circuit Court judge).

115. The *PO'C* and *CCE* cases made clear that the relevant jurisdiction is exercised by the trial judge in the course of a trial as it progresses. It is clear that the presiding judge did have certain concerns, indeed asked, explicitly "*does PO'C apply at the stage of applying for an adjournment as well*?", the response from the Respondent's Counsel being ". . . *we're gone beyond that, we're in charge of the jury . . . The trial has started. They're just not in a position to call any evidence".* If, in a technical sense, the trial had "*started",* what was, in fact, a *PO'C* application was not being made during the *course* of the trail, against the backdrop of evidence given, but at the very outset, in a manner which is impermissible.

116. It is clear that a trial judge's jurisdiction to ensure due process and a fair trial is not engaged merely because it could be said, in a formal sense, that a trial had started, where no evidence whatsoever had been proffered. Yet, the presiding judge clearly placed some store on the fact that the respondent had been placed in the charge of the jury and that the trial had "*started*". The respondent's counsel stated very clearly: "*The trial has started"* (transcript p.8) and did so in the context of submitting that there was no bar to the learned Circuit Court judge determining what was in reality a *PO'C* application made prior to any evidence in the case being tendered. Moreover, the learned Circuit Court Judge referred in his ruling to "*…the trial now having commenced…*" (transcript p.11), plainly understanding that there was no bar of the foregoing sort. I am satisfied,

however, in light of the principles in *PO'C* and *CCE*, that the presiding judge did *not* have jurisdiction to consider what undoubtedly was, in substance as well as in form, a preliminary hearing at the commencement of the trial on the issue of delay.

117. In the respondent's written submissions, it is stated *inter alia* that "*the Respondent does not accept that there was any 'key' witness in the case except the complainant herself".* This submission can be contrasted with what was said to the presiding judge on 28 March 2019 when, having referred to an adjournment which could possibly see the case get on later that year if the complainant and her sister recovered sufficiently to be able to give evidence, counsel for the respondent went on to specifically state: *"But that doesn't get us over the principal difficulty, which is that at least nine persons are deceased and* ***the principal person involved in the case which is the brother of the complainant,*** *who she says was in the location, in the huts where this was supposed to have happened, has absolutely no recollection of anything occurring, due to the passage of time*" (my emphasis).

118. In the manner explained earlier in this decision, the foregoing submission was to the effect that, regardless of any adjournment, a fair trial could not be held, but it is plain that in deploying that argument, it was certainly asserted that, quite apart from the complainant and, indeed, her sister, there was another key (or "*principal*") witness, namely the complainant's brother. That submission to the Circuit Court is impossible to square with the submission to this Court but, I hasten to add, nothing turns on this for the purposes of the issue which this Court has to determine.

119. Just as was said in submissions to the presiding Circuit Court judge on 28 March 2019, the respondent's written legal submissions emphasise that there are nine deceased witnesses who could have given evidence at the trial and a criticism is made to the effect that the respondent's rights were prejudiced by reason of a trial not occurring before these witnesses had died. The respondent's written legal submissions include the following:

> *"There is not a single note or piece of correspondence or statement in this application showing that any care or concern or even interest was shown by the applicant in securing the constitutional right of the respondent to an expeditious trial before these witnesses had died".*

The respondent's written legal submissions then comment on the potential relevance of the deceased persons and what, it is said, they could have confirmed. To my mind, these are all issues which, to be properly addressed, require compliance with the principles in the *PO'C* and *CCE* decisions. In other words, the proper place for those issues is to be raised is during the course of a trial, as evidence is given, with the trial judge having the opportunity to take the approach so carefully outlined by the Supreme Court in *CCE.*

120. In the manner I have attempted to explain in this judgment, it seems to me that the presiding judge was denied the opportunity to engage in the necessary assessment which is detailed so clearly in the *CCE* decision and in the accompanying "Statement" issued by

the Supreme Court on 19 December 2019. It seems to me that the presiding judge was deprived of that opportunity because the limits on the trial court's jurisdiction, flowing from the *PO'C* and *CCE* decisions, were not outlined to him with sufficient clarity.

121. In submissions, counsel for the respondent characterised what occurred on 28 March 2019 as no more than a situation where the respondent was anxious to have the trial proceed. That is to ignore, however, the fact that, in making what was in form and in substance a *PO'C* application, counsel for the respondent made it clear to the presiding judge that "*It's clear that we can't have a fair trial at this juncture*" and that, even if the case were to be adjourned, "*that doesn't get us over the principal difficulty*", namely the nine persons were deceased and that the "*principal person*" being the complainant's brother "*has absolutely no recollection of anything occurring, due to the passage of time "* and that the situation *"presents a very serious and grave risk of a miscarriage of justice".* To the extent that it was urged on the court that the case must be allowed to proceed, that was urged on the court in the context of a very specific set of facts, namely the fact, plainly stated by counsel for the prosecution, that he was not in a position to call evidence and that, according to the respondent's counsel, a fair trial could not proceed, ever. In reality, far from seeking that the trail proceed, the respondent was seeking to have the trial halted.

122. The evidence undoubtedly demonstrates that the respondent's counsel made it clear to the court that a fair trial could *never* take place and the court was urged to refuse an adjournment in a very specific factual context, i.e. there was an anxiety on the respondent's part to have a trial proceed (a trial which, according to his counsel could not be fair and a trial which presented a very serious and graver risk of a miscarriage of justice) *only* in circumstances where it was known that no evidence could be presented by the prosecution and, therefore, as explicitly urged by counsel for the respondent, the case should be halted by means of direction to acquit, in the absence of any prosecution evidence and the court was urged to refuse an adjournment in that specific context only.

123. It is also submitted on behalf of the respondent that the trial judge did not rely on *PO'C.* For the reasons explained in this decision, I am entirely satisfied that the evidence demonstrates otherwise. It was submitted on behalf of the respondent that "*The court, based on common sense and on common case, refused the applications to adjourn and directed the acquittal as no evidence had been tendered*". That ignores the fact of the *PO'C* application with which the court engaged and it ignores that the court's decision was undoubtedly influenced by, and to a material extent based on, the submission that nine people of relevance to the prosecution were by that stage dead and that the passage of time had certainly affected the position, both of which speak to the question of whether a *fair* trial is possible, regardless of when such a trial might take place and irrespective of the grant, or not, of an adjournment.

124. Among the submissions made on behalf of the respondent is that "*All judges have a duty to ensure constitutional fairness of procedures and they have the power to take such action as they deem appropriate to remedy a particular situation in light of the evidence*

adduced or submissions made". As a general proposition, there is no difficulty with the foregoing. Nor could issue be taken with the dicta cited by the respondent's counsel from *The State (Healy) v. Donoghue* [1976] IR 325; *The People v. Lynch* [1982] IR 64*; Ellis v. O'Dea* [1989] IR 530, or *Whelan v. Kirby* [2005] 2 IR 30. These statements of principle do not, however, address the fundamental issue in the present case, namely that a *PO'C* application was made at a preliminary hearing and resulted in the order challenged in the present proceedings, without the presiding judge's attention having been drawn to what was a crucial statement of principle by the Supreme Court in *PO'C*, namely *"This jurisdiction is exercised in the course of a trial but does not enable, or relate to, a preliminary hearing at the commencement of a trial on the issue of delay".*

125. The respondent also relies on the Supreme Court's decision in *DPP (Coleman) v. McNeill* [1999] 1 IR 91 wherein it was stated (p. 96): *"[T]here is a solemn responsibility on anyone having anything to do with prosecuting cases to make sure that they are brought to court with all due expedition".* Once again, no issue can be taken with the foregoing proposition, but it does not seem to me to be relevant to what this Court has to decide. The same comments apply insofar as the respondent relies on the High Court's decision in *DPP. v. Arthurs* [2000] 2 ILRM 363 where (at 376) it was stated that: -

> *". . . a necessary corollary of that right [to a speedy or expeditious trial] is that there rests upon the State a duty to ensure that all reasonable steps are taken to ensure such a speedy trial is provided. This must necessarily mean conducting the investigation and prosecuting in a manner which, insofar as it is reasonably practicable, eliminates unnecessary delay, and must additionally mean that such resources as are necessary for the orderly and expeditious processing of criminal cases through the courts are provided".*

126. The proper place, it seems to me, for a submission to the effect that there has been prosecutorial delay, was outlined in para. 9.5 of the Chief Justice's decision in the *CCE* case. It is not necessary to repeat that paragraph which appears earlier in this judgment. Suffice to say that the statement of principle from *DPP v. Arthurs* upon which the respondent relies does not constitute a basis for refusing the relief sought by the applicant.

127. In submissions, counsel for the respondent also relies on a range of statements of principle as to the appropriate scope of judicial review, reference being made, *inter alia,* to dicta from *The State (Daly) v. Ruane* [1988] ILRM 117; *Killeen v. DPP* [1997] 3 IR 218; *O'Neill v. Judge McCartan* [2007] IEHC 83 and *Costigan v. Brady* [2004] IEHC 17, wherein Quirke J. stated (at p. 8): -

> *"It is not the function of this court in an application for a judicial review of the order of Judge Brady to consider or revisit the merits of the application made to him.*
>
> *It is the function of this court to consider whether the order made by judge Brady was lawful or was, as contended on behalf of Ms. Costigan, made without*

jurisdiction, or in excess of jurisdiction or in breach of principles of natural and constitutional justice".

128. There is no dispute in respect of the foregoing principle. Applying same to the facts in the present case leads me to the conclusion that an impermissible *PO'C* application was made on the issue of delay, at the commencement of a trial, with which the Circuit Court engaged and, in circumstances where the proper limits of the court's jurisdiction to ensure a fair trial were not drawn to the attention of the court with sufficient clarity, the presiding judge took the precise course of action urged upon the court by counsel for the respondent during the *PO'C* application, as a consequence of which the court made the order challenged in these proceedings and did so without jurisdiction or in excess of jurisdiction,.

129. On behalf of the respondent it is asserted that "*It cannot be gainsaid but that the Trial Judge had the requisite jurisdiction and the constitutional duty to defend and vindicate the respondent's rights and that trial Judge's lawful actions in that regard cannot be amenable to judicial review"*. The foregoing submission ignores the parameters of what is an inherent and constitutional duty to ensure a fair trial and due process, which jurisdiction is exercised in the *course* of a trial but does not enable or relate to a preliminary hearing on the issue of delay at the *commencement* of a trial, such as undoubtedly occurred in the present case on 28 March 2019, leading inexorably to the order of that date which the applicant challenges.

130. Counsel for the respondent also relies on the principle of *ex-turpi causa non oritur actio* and submits that the present proceedings involve a positive reliance by the applicant on the fact of its own prosecutorial delay in the context of an attempt to impugn the presiding judge's decision not to adjourn the case on 28th March 2019. For the respondent, it is also submitted that the applicant has failed and refused to engage in explaining prosecutorial delay. In my view, the foregoing submissions provide no basis to oppose the relief sought. Such prosecutorial delay as is alleged, is, in my view, wholly irrelevant to the issue before this Court which is, in essence, concerned with jurisdiction, specifically, the extent of a trial judge's jurisdiction to ensure a fair trial, having regard to the principles derived from *PO'C* and *CCE*. Nor do I accept the submission on behalf of the respondent that it was somehow inappropriate to challenge the order made by the Circuit Court on 28th March 2019 as opposed to applying for judicial review of the presiding judge's decision to decline to adjourn the case. In the manner explained in this judgment, the decision to adjourn, in light of the facts, led inevitably to the order to acquit, both being the steps which counsel for the respondent urged the court to take when making a *PO'C* application, and both being precisely what the Circuit Court did in response to the *PO'C* application made. It is also the case that there was one and only one order made on 28 March 2019, being the order the applicant challenges in these proceedings.

131. The submission on behalf of the Respondent to the effect that, on 28 March 2019, the applicant could or should have entered a *nolle prosequi* is not determinative of any issue which this court is required to decide.

132. Reliance on the judgement of Mr Justice White in *TC v. DPP* [2017] IEHC 839 cannot avail the respondent. In that case the applicant, who was a gentleman of 80 years of age terminally ill with bowel and lung cancer, obtained an order of prohibition in respect of the prosecution of offences going back to between 1964 and 1982, in what in light of what White J. Described as the "*very exceptional circumstances*" in that particular case.

133. There is no dispute in relation to the principles referred to by White J, at para. 19 of his judgment, in TC, in which he quoted, *inter alia*, from the Court of Appeal's decision *in MS v. DPP & Ors* [2015] IECA 309, wherein Hogan J stated|:

> *"30. Historically, there were certain concerns that a trial judge was prescribed from withdrawing a case from the jury on grounds of either general or specific prejudice to an accused where the allegations were of considerable antiquity, on the basis that it was more appropriate to seek to prohibit the trial.*
>
> *31. There is now much greater emphasis on the role and onus on the trial judge to ensure that if this type of prejudice arises, he or she can withdraw the case from the jury and that that decision is better taken in light of evidence tendered at the trial rather than as speculated on in judicial proceedings."*

134. The foregoing passage underlines the proper limits on the jurisdiction of a trial judge, insofar as halting a case is concerned. This can be contrasted with the situation in the present case whereby a *PO'C* application was made by counsel for the respondent, at the very commencement of a trial, prior to any evidence being tendered, knowing that no evidence would be tendered if the case was not adjourned, and opposing an adjournment on the basis that, regardless of when a trial took place, and irrespective of any adjournment, a trial could never be fair and that any trial would involve a grave risk of a miscarriage of justice. The court was told in the clearest of terms that a fair trial was already impossible and this would continue to be the position even "*…if the case is to be adjourned*" and the case "*could possibly be later this year*", as the respondent's counsel stated.

135. It can also be observed that the TC decision involved and application by an accused for an order of prohibition. The respondent has never brought an application for an order of prohibition. Among the submissions made on behalf of the respondent was for his counsel to state "*I've no doubt that if we need to we can and will go to the High Court and get an order of prohibition and this renders the present application somewhat moot*" or words to that effect. Nothing this court decides constitutes any impediment to the respondent seeking such relief as he regards himself entitled to, but I am entirely satisfied that the belief on the part of the respondent that he is entitled to, and can obtain for the asking, an order of prohibition, does not render moot the present proceedings brought by the Applicant's proceedings.

136. Among the submissions made on behalf of the Respondent was to urge on this Court that the Respondent has suffered prejudice arising from the delay in relation to the underlying prosecution which "*only gets worse*" as a consequence of the present proceedings brought

by the Applicant and this Court is invited to dismiss the Applicant's claim on these grounds. This submission seems to me to invite the Court to decide that there has, in fact, been prejudice to the Respondent in relation to the underlying prosecution and that, by reason of this alleged prejudice, compounded, it is submitted, by prejudice occasioned by these judicial review proceedings, a fair trial of the Respondent is not possible and should be prevented (the method for ensuring this being to dismiss the Applicant's claim). It is not permissible for this Court to do what is urged on it. This Court cannot be invited to determine, and is in no position to determine, whether the Respondent has suffered any prejudice or has suffered such prejudice as to render a fair trial impossible.

137. If, as Counsel for the Respondent submits, the Respondent cannot receive a fair trial, the remedies available to him include the making of a *PO'C* application during the *course* of the trial, as evidence emerges, and in accordance with the guidance given in the *CCE* decision, or to seek an order of prohibition, having regard to the principles which emerge from the authorities to which I have referred, including *CCE,* and taking account of the principle that, generally speaking, a trial judge will be in a better position than a judge in judicial review proceedings to assess whether an accused has suffered irreparable prejudice giving rise to a real risk of an unfair trial, with such an assessment taking place against the backdrop of evidence which is actually tendered during a case as it develops.

138. In oral submissions, Counsel for the Respondent repeatedly urged this Court, on more than one occasion, to simply dismiss the Applicant's case "in a couple of paragraphs", i.e. on the basis of delay on the Applicant's part in seeking leave and, earlier in this judgment I explained why justice requires me to engage with and to decide the pleaded case, as opposed to ignoring the issues as pleaded and, instead, dismissing the matter out of hand on the Court's own motion. Counsel for the Respondent went on to submit that if this Court goes on to consider the merits of the present claim, it should be refused and for the reasons set out in this judgment, I take a different view. The Respondent's Counsel continued by submitting that, even if this Court held for the Applicant, the question of remitting the matter to the Circuit Court *"is a serious matter and given the delays which occurred in the prosecution of the underlying proceedings and the delay in the bringing of these Judicial Review proceedings"* this Court should refuse to remit the matter. At a first principles level, it is plainly appropriate that the matter be remitted to the Circuit Court for hearing in the absence of a finding that a fair trial is impossible. This Court's function was never to interrogate the proposition, advanced by the Respondent on 28 March 2019 and, it is fair to say, canvassed again in these proceedings, that a fair trial is no longer possible. The question before this court related exclusively to jurisdiction, yet the essence of this submission made on behalf of the Respondent is to invite this Court to hold that there have, in fact, been delays which have prejudiced the Respondent such as to render his trial unfair and, on this basis, to try and persuade this Court not to remit the matter. In my view, it is clearly appropriate that the matter be remitted

This court's decision summarised

139. Counsel for the respondent undoubtedly made a *PO'C* application to the presiding judge on 28 March 2019 and did so with obvious skill and commitment to his client's case.

140. The attention of the presiding judge was not, however, drawn to the following statement by Denham J. (as she then was) in the *PO'C* case, with regard to a trial judge's jurisdiction (in particular, the limits in respect of same) to ensure due process and a fair trial: "*This jurisdiction is exercised in the course of a trial but does not enable, or relate to, a preliminary hearing at the commencement of a trial on the issue of delay".*

141. In the present case a preliminary application was undoubtedly made which related to the issue of delay and of alleged prejudice to the respondent which was said to render a fair trial impossible.

142. The evidence demonstrates that, to a material extent, the presiding judge entertained and engaged with a *PO'C* application and that his decision to decline an adjournment which led, inevitably, to the order which is challenged in the present proceedings, was based, to a material and significant extent on issues raised in the *PO'C* application.

143. The result was a halting of the prosecution case against the respondent in breach, it seems to me, of the principles in the *PO'C* and *CCE* decisions.

144. In circumstances where the presiding judge's attention was not drawn to the limits of his jurisdiction to ensure a fair process and fair trial, the presiding judge was, in reality, deprived of the opportunity (e.g. after an adjournment), to consider the prosecution case as it actually developed.

145. Equally, the presiding judge was deprived of an opportunity, at that juncture, to consider whatever evidence was available as to the testimony which might or could have been given, but which was said to be no longer available.

146. Similarly, the presiding judge was deprived of the opportunity to consider the available evidence about what might have been said by each of the missing witnesses.

147. The learned Circuit Court judge was also deprived of the opportunity to assess the materiality of such evidence as was alleged to be missing, all the foregoing being matters to be considered in light of the prosecution case as it actually evolved during a trial.

148. Thus, the presiding judge was deprived of an opportunity to reach an assessment as to whether the trial was, or was not fair, such a determination being one to be made on the basis of all materials before the court.

149. The presiding judge was also deprived of any opportunity to take into account, to the extent relevant, any alleged culpable prosecutorial delay as was asserted on behalf of the respondent in the context of a trial judge's consideration of fairness.

150. In short, it seems to me that the evidence demonstrates that the presiding judge was deprived of the opportunity to apply, properly, the principles outlined by the Chief Justice in the *CCE* decision.

151. As a consequence, I am satisfied that the order which is challenged in the present proceedings is one in respect of which *certiorari* is appropriate.

152. In opposing the reliefs sought in the present proceedings, both the respondent and his solicitor have sworn affidavits which contain numerous averments to the effect that a fair trial is not possible. The case before this Court is not a hearing as to substantive merits, but the foregoing highlights the importance of the principles derived from *PO'C* and detailed in *CCE*.

153. Plainly, there can be significant difficulties in bringing old cases to trial. In addition, the process is likely to be very stressful for both an accused and a complainant. The authorities make clear, however, that a trial judge has no jurisdiction to halt a trial on the basis of a *preliminary* application grounded on an assertion that, due to the passage of time and missing witnesses, an unfair trial is no longer possible or that a trial would present "*a very serious and grave risk of a miscarriage of justice",* as counsel for the respondent submitted to the presiding judge on 28 March 2019.

154. The evidence demonstrates that the order challenged in the present proceedings resulted from what was an impermissible preliminary application in breach of the *PO'C* and *CCE* principles.

155. It is plain from the learned judge's ruling in the Circuit Court that it was one which flowed from the fundamentally important principle of ensuring due process and a fair trial and the learned judge's commitment to that principle. Unfortunately, however, the attention of the presiding judge was not drawn with sufficient clarity to the limits placed upon that jurisdiction in the context of a preliminary hearing at the commencement of a trial on the issue of delay.

Form of Order

156. For the reasons set out in this judgment, the applicant is entitled to the relief sought, in particular at (i) and (ii) of the 29 July 2019 order granting the applicant leave to seek judicial review, reflecting the relief at (i) and (ii) of para. D of the applicant's statement of grounds of the same date.

157. 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."*

158. Having regard to the foregoing, the parties should correspond with each other forthwith, regarding the appropriate order to be made, including as to costs, with a view to reaching agreement. In default of such agreement, short written submissions should be filed in the Central Office within a further 14 days.