THE SUPREME COURT

[Appeal No: 22/2013 &

24/2013]

Denham C.J.
Hardiman J.
O'Donnell J.
Clarke J.
Charleton J.

Between/

Mark Nash

Applicant/Appellant

and

The Director of Public Prosecutions

Respondent

JUDGMENT of Mr. Justice Clarke delivered on the 29th day of January 2015

1. Introduction

1.1 Cases which come to trial a long time after the events with which the proceedings are concerned can raise many problems. The courts have, over recent years, had to deal with many such issues both in the context of civil claims and criminal charges. A very significant body of case law has grown up and, at least in some respects, it would be fair to say that the jurisprudence has evolved.

1.2 There are some types of cases which have featured quite frequently in the case law both in the civil and criminal contexts. However, that case law also throws up, from time to time, unusual circumstances. It could hardly be denied that this case can be characterised as unusual to a high degree. The facts of the case are set out fully in other judgments and I do not propose to repeat them save to note some of the principal features which, in my view, are of particular importance to the way in which this case should be resolved.

1.3 The applicant/appellant ("Mr. Nash") currently stands charged with what became the very high profile murders of two women living in sheltered accommodation called Orchard View at Grangegorman Psychiatric Hospital in Dublin. The circumstances of those murders were more than sufficient to bring them to the forefront of public attention. However, it was what happened subsequently which placed these cases into the "quite extraordinary" category. In circumstances set out in detail by Hardiman J. and Charleton J., both Mr. Nash and a Dean Lyons (since deceased) confessed to the murders and subsequently each purported to retract their respective confessions. Nothing in either confession suggested that there was any possibility that both Mr. Nash and Mr. Lyons acted in any way together so that both confessions were, necessarily, contradictory. In circumstances elaborated on by Charleton J. in his judgment, it would appear that the prosecuting authorities, having initially charged Mr. Lyons but having then dropped those charges, felt that, as things then stood, it would have been impossible to sustain a conviction against either Mr. Nash or Mr. Lyons given the doubts that would have been raised in each of their cases by the confession of the other. Mr. Lyons subsequently died but forensic evidence later emerged which, the prosecution contends, now leads to there being a sufficient case to bring Mr. Nash to trial. Mr. Nash sought to prohibit his trial principally on the grounds of prejudice arising from the lapse of time between the murders and his likely trial date (if same was not prohibited) in the early part of this year. The High Court (Moriarty J.) refused the relief (*Nash v. D.P.P.* [2012] IEHC 359). Mr. Nash appealed to this Court. When the appeal came on for hearing before this Court there was an urgency in the Court giving its decision having regard to the fact that Mr. Nash's trial, if it were to go ahead, had been fixed for hearing in early course. In those circumstances the Court indicated that it would give a decision in a short number of days but that it was likely that it would give the reasons for its decision at a later stage. That is, in fact, what transpired. The Court indicated that it would dismiss the appeal, thus allowing Mr. Nash's trial to go ahead, and would give reasons later. The purpose of this judgment is to set out the reasons why I supported the Court's determination to dismiss the appeal. For completeness it should be noted that, in addition to the delay issue, a question concerning whether Mr. Nash's trial has been irreparably prejudiced by inappropriate pre-trial publicity was also raised before the High Court, dismissed by that court and was the subject of an appeal to this Court.

1.4 One of the difficulties which courts frequently encounter, not least where there is a large volume of case law in an area, is in attempting to apply that case law consistently most especially when the case under consideration has, as here, many extraordinary and unusual features. In such circumstances it may often be useful to attempt to take a step back and identify the fundamental principles which lie behind the case law for such a process can often be a valuable tool in seeking to apply the jurisprudence in unusual cases. As some of the case law is concerned with blameworthy delay, but other aspects concerned simply with the consequences of a significant lapse in time between events and a trial concerning those events, I propose to refer to the jurisprudence governing all of these areas as the lapse of time jurisprudence, to which I now turn.

2. The Lapse of Time Jurisprudence

2.1 Much of the jurisprudence in respect of lapse of time both in relation to criminal trials and civil proceedings focuses on the risk to a fair trial. I do not at all disagree with the proposition that fundamental constitutional concepts of fairness in the legal process are, quite properly, at the heart of this jurisprudence. At least since *State (Healy) v. Donoghue* [1976] I.R. 325, it has been recognised that the guarantee provided by the Constitution of a criminal trial in due course of law brings with it an obligation that the trial is conducted not only in accordance with the technical requirements of the criminal law for the time being in force but also in accordance with fundamental principles of fairness. It also seems to me that like considerations apply in respect of civil proceedings even though the precise requirements which the Constitution may demand may not necessarily be the same in the context of such cases. Indeed, even within the criminal category itself, it is clear that the practical requirements of constitutional fairness may differ from one case to the next. *State (Healy) v. Donoghue* was specifically concerned with the entitlement of an impecunious accused to have legal aid provided by the State. However, that case made it clear that the entitlement only arose in criminal proceedings where the potential consequences for the accused were sufficiently serious. Thus, the constitutional requirement of fairness requires legal

aid in serious criminal cases but not in relation to minor ones.

2.2 It is, therefore, important, when attempting to address the fundamental underlying principles, to make clear that the way in which those principles may impact in practise may differ significantly from case to case. There will undoubtedly be differences in the practical impact on civil cases, on the one hand, and criminal proceedings, on the other. There will also, potentially, be differences in impact between one type of case within either category and another. But it does not seem to me that the acknowledgement of that undoubted fact should necessarily distract from the important task of seeking to identify the fundamental underlying principles. As noted earlier, resort to those principles can often be of particular assistance in attempting to resolve unusual or difficult cases.

2.3 In that context it is important to identify the fundamental rights and obligations with which any court must be concerned. On one side of the equation there is the undoubted constitutional importance of ensuring that asserted legal rights and obligations are definitively determined after a full examination of all relevant and admissible evidence and the application of proper legal principles to the facts which emerge from that analysis. There is a high constitutional value in proceedings, whether criminal or civil, being determined after a trial on the merits. In the criminal context, Denham J., in *B. v. DPP* [1997] 3 I.R. 140, spoke of the community's right to have offences prosecuted. As she pointed out that right is not absolute. However, in my view, a significant countervailing constitutional right is required to justify proceedings from being terminated before they have progressed to a decision following a trial on the merits. The general principle encompasses the entitlement of society as a whole to ensure that those against whom there is sufficient evidence to warrant the bringing of a criminal charge are tried and a proper verdict determined in accordance with the evidence and the law. It is also important to emphasise, as Hardiman J. noted in *Whelan v. Lawn* [2014] IESC 75, that there has been an increasing recognition, in the context of the criminal process, of the rights of victims. The entitlement of a victim of crime to at least have the evidence which suggests that a particular accused may be guilty analysed at a trial and a proper verdict delivered should not be underestimated.

2.4 In passing it should, however, in that context, also be noted that the criminal process itself envisages that there may be cases where the evidence is insufficient to allow a trial on the merits to proceed to a verdict of the jury (or a judge or judges where a trial without a jury is permitted). First, an accused is entitled to apply under s.4E of the Criminal Procedure Act, 1967 (as inserted by s.9 of the Criminal Justice Act, 1999) for what has sometimes been called a "summary dismissal" (see for example *Cruise v. Judge Frank O'Donnell* [2008] 3 I.R. 230 and *D.P.P. v. Jagutis* [2013] IECCA 4). This procedure replaced the former preliminary inquiry before the District Court. Under s.4E(4) the court must dismiss the case if "there is not a sufficient case to put the accused on trial". Likewise, an accused can apply during the trial (most typically at the close of the prosecution case) for a direction based on a submission that a jury properly directed could not convict. The D.P.P. must be entitled to consider whether a prosecution could survive such applications in deciding whether to prosecute.

2.5 Likewise, in the civil context, persons who claim disputed rights or obligations or who allege wrongdoing in respect of which the law allows redress are, in principle, entitled to have their day in court. That means that there is a strong constitutional value in a court ultimately determining the rights and wrongs of the competing positions of the parties on the basis of a proper analysis of all relevant and admissible evidence and the application of the law to the facts thereby emerging.

2.6 All of those factors suggest that there is a significant constitutional weight to be placed on the side of credible cases, whether criminal or civil, going to trial and being determined on the merits in accordance with the law and the evidence. However, there may be competing considerations. It seems to me that, at least of the level of broad and high principle, there are three such considerations.

2.7 First, it must be acknowledged that persons who may be the subject of adverse findings as a result of a court process (criminal convictions or adverse orders in civil claims) have a general constitutional entitlement (similar to the rights established under the European Convention on Human Rights) to have those rights, obligations or liabilities (including criminal liabilities) determined in a timely fashion (see further, *I.I. v. J.J.* [2012] IEHC 327). That is an entitlement which is, in my view, independent of the entitlement to a fair trial.

2.8 For example, in the criminal delay context, this Court and the High Court have frequently cited the jurisprudence of the United States Supreme Court including, in particular, *Barker v. Wingo* [1972] 407 U.S. 514 (see for example *D.P.P. v. Byrne* [1994] 2 I.R. 236). It is clear from that jurisprudence that a significant aspect of the rights which must be taken into account involves a consideration that a criminal charge should not be left hanging over the head of an accused for an excessive period. This encompasses the second criteria noted in *Barker v. Wingo* being the anxiety and concern of the accused caused by a significant delay in a criminal case coming to trial. It can also, in some cases, include the first criteria where the accused is imprisoned pending trial. Those criteria are separate from the third which focuses on the risk to a fair trial. Precisely how the right to expedition may apply in practise may, of course, raise many difficult questions of implementation. It is also true that there may well, at least in many cases, be a significant interaction between lapse of time *per se* and prejudice to a fair trial for it is the universal experience that the more time which elapses, the greater the risk there will be to the possibility of there being a fair trial. Nonetheless, I am satisfied that there is a constitutional value involved in this area of jurisprudence which requires weight to be placed on the entitlement of parties not to have potential litigation hanging over them for a period which, in all the circumstances, amounts to a significant breach of their rights. Importantly, it must also be acknowledged that the remedy for a breach of the right to an early or expeditious trial will not necessarily be that the trial must be prohibited.

2.9 Similar principles have been identified, as a stand-alone element of the jurisprudence, in the civil context. In *Toal v. Duignan* (No. 2) [1991] I.L.R.M. 140, Finlay C.J. stated that the Court has an inherent jurisdiction in the interests of justice to dismiss a claim where the length of time which has elapsed between the events out of which it arises and the time when it comes on for hearing is, in all the circumstances, so great that it would be unjust to call on the defendant to defend himself against the claim made. It seems clear that this inherent jurisdiction to dismiss a claim exists even in the absence of culpable delay on the part of a plaintiff. (See for example *Manning v. Benson and Hedges Limited* [2004] 3 I.R. 556 at 567).

2.10 It follows that, in both the criminal and the civil jurisprudence, there is a strand which recognises that there is a constitutional entitlement to a timely trial of proceedings and that, in extreme cases, it may be that a particularly serious breach of that entitlement will, of itself, override the constitutional imperative that there should be a trial on the merits and, thus, require that the case not progress to trial. It should, however, be emphasised that the fact of a breach of the constitutional right to a timely trial does not, in and of itself, necessarily mean that there should be no trial on the merits. There will be many cases where the breach will not be sufficiently serious to warrant interfering with the presumption in favour of a trial on the merits. There may also well be many cases where some form of remedy, other than preventing a trial on the merits, will be sufficient.

2.11 I now turn to the second consideration. In many (probably most) cases the key consideration which will require to be balanced against the undoubted desirability of there being a trial on the merits is the risk that that very trial will, by virtue of lapse of time, in

itself, be unfair. But what, in that context, is meant by an unfair trial?

2.12 The starting point has to be to acknowledge that there will very rarely be a perfect trial where all evidence which either side might theoretically wish to have available is before the Court. As has often been pointed out, even where a case comes on for trial with commendable expedition, evidence may just no longer be available because of the untimely death of witnesses or, indeed, their unavailability. Documentary or forensic evidence may not have been preserved or even gathered in the first place in circumstances which may be wholly understandable and where no blame may attach to anyone. The person charged with a criminal offence arising out of public disorder on a street may find that there were CCTV cameras which either were not working on the night in question or did not point in the right direction to catch the important parts of the relevant incident. A witness to a car crash which is the subject of a civil claim may not have left their name with anyone who remained at the scene of the accident and may just not be capable of being found. Literally hundreds of other examples could be given. So the starting point has to be to acknowledge that very few trials will be close to perfect in the sense of the judge having available all materials which either side might, in an ideal world, have wished to have been in a position to present. But such lack of perfection does not mean that the trial will be unfair for to require such perfection as a necessary ingredient of a fair trial would automatically lead to the vast majority of cases being incapable of being tried and, thus, to the whole scale denial of the rights and obligations of those parties who had an interest in a proper trial and a proper determination of whatever rights, obligations or liabilities the evidence and the law required. In that context it is apposite to note the telling comment of Henchy J., in *O'Domhnaill v. Merrick* [1984] I.R. 151, to the effect that justice delayed does not always mean justice denied but can often mean justice diminished. Henchy J. went on to say that, in some cases, delay can "put justice to the hazard to such an extent that it would be an abrogation of basic fairness to allow the case to proceed to trial".

2.13 What then leads to a trial, whether criminal or civil, being regarded as constitutionally unfair given that trials will almost inevitably fall somewhat short of perfection? When does justice become so diminished or "put to the hazard" to lead to a degree of unfairness sufficient to hold that justice is denied and thus to warrant departing from the imperative of a trial on the merits? In my view, a proper analysis of the jurisprudence in both the criminal and civil contexts leads to the conclusion that there are two ways in which such unfairness may be established. First, the lapse of time may be so great and the divergence from any semblance of a real trial on the merits so substantial, that it can be appropriate to come to the view that the conduct of a trial would be nothing more than that in name. Obviously the extent to which such a situation can properly be said to exist may be very dependent on the type of case under consideration. Some types of case, of their nature, will, no matter how perfect the trial may be, involve the Court in only having available limited materials to assess the facts. Also certain types of materials are likely to be less cogent or effective as evidence over time. For example, while the context in which a contract was drawn up will always be of some relevance to the proper interpretation of its terms, legal rights and obligations which are more or less completely determined by a document are likely to be just as capable of being properly assessed even after a lengthy period of time. However, even in cases where all of the witnesses who might have been available, had there been a very early trial, are still in a position to give evidence, lapse of time can make it a lot more difficult for a court to carry out any proper assessment of where the truth may lie particularly where the facts are contested. At a certain point the absence of evidence which might otherwise have been available coupled with the effect of lapse of time on the ability of the Court to assess other evidence, may lead to a stage being reached where, in the words used in some of the civil jurisprudence and most recently reiterated by Hardiman J. in *Whelan v. Lawn*, the case has gone beyond the reach of fair litigation.

2.14 In such cases, whether criminal or civil, the finding of the Court is simply that, not necessarily through anyone's fault, time and events have passed to such an extent that the establishment of facts, determined by an analysis of evidence which can properly be tested, which process is at the heart of a court system, is just no longer possible. In such circumstances it will not be possible to have a fair trial.

2.15 There are, however, other cases where the consequence of lapse of time and events is not so severe so that it is possible to say that a meaningful trial could not be conducted at all. As noted earlier, few trials will be perfect. But the effect of lapse of time may well, again to a greater or lesser degree depending on the type of case involved, mean that the extent to which any trial might fall short of perfection has increased. To adopt the phrase of Henchy J. in *O'Domhnaill*, lapse of time will diminish but not deny justice. Should that, necessarily and of itself, lead to a conclusion that any trial would be unfair? I do not think so. However, where it is possible for the Court to identify that a party was culpable in respect of the lapse of time (i.e. that a party was guilty of delay) then a different analysis seems to me to arise.

2.16 A party (the accused in a criminal trial or a defendant in civil proceedings for example) may not always be able to have the perfect trial. For the reasons already analysed some cases may be so far removed from that theoretical standard of perfection that it can fairly be said that there can not really be anything that is a trial in any proper sense of that term at all. In such circumstances the trial would necessarily be unfair.

2.17 However, there may be other cases where a trial is still possible but where, due to the fault of one side (the prosecuting authorities in a criminal case or, typically, a plaintiff in civil proceedings), there has been a significant increase in the extent to which the trial falls short of perfection from the perspective of the other side. In such cases, therefore, justice is diminished through fault. In those circumstances the party on the receiving end (the accused or the defendant) can, in my view, properly suggest that the constitutional unfairness with which they are faced is not so much that they cannot have a fair trial at all but rather that it is unfair that they should have a significantly impaired or diminished trial where that impairment is as a result of culpable delay on the part of their opponent. It might well, of course, have been the case that, due to happenstance, a less perfect trial might be all that could have been achieved notwithstanding the absence of any culpable delay on the part of the relevant opponent. In those circumstances, it might be said that there is no constitutional unfairness. A trial which is still fundamentally fair could be conducted. Insofar as it might fall short of perfection no-one will be to blame. However, where there is culpable delay it may become unfair to subject a defendant or accused to a significantly less than perfect trial where the degree of impairment has been materially contributed to by culpable delay on the other side. Such cases will, necessarily, involve a balance in which the undoubted desirability of rights, obligations and liabilities being properly determined at a full trial, on the basis of a consideration of all relevant and admissible evidence and the application of the law to the facts thus established, must be given significant weight.

2.18 There is a third lapse of time issue which I should mention but which does not arise in this case. In order that there be adherence to the obligation of the State to afford all litigants, criminal or civil, a timely trial, the courts have significant power to impose adverse consequences in respect of serious procedural failure including cases where such failure leads to delay. There can be cases where the termination of proceedings may be a proportionate response to such failure, although, of course, such a cause of action will normally be justified only in cases of very significant failure and frequently, although not necessarily, where such failure leads to prejudice.

2.19 Thus, it seems to me, in summary, the fundamental principles can be expressed in the following way:-

(a) There is a significant constitutional imperative in favour of all issues of rights, liabilities or obligation, whether criminal or civil, being determined on the merits as a result of a trial at which all admissible and relevant evidence is analysed and the law properly applied to the facts which thereby emerge;

(b) In order that such a trial on the merits not proceed it is necessary that there be a sufficiently weighty countervailing factor involving important constitutional rights which, in the circumstances of the case, outweigh the constitutional imperative for a trial on the merits;

(c) In the context of lapse of time the countervailing factor may, if sufficiently weighty in the circumstances of the case, be one of:-

i. culpable delay which is such that it would, having regard to the period of time over which the proceedings or potential proceedings have been left hanging over the relevant party, be a sufficient breach of constitutional fairness so as to make it proportionate to prevent the proceedings from going ahead;

ii. a lapse of time which, irrespective of whether blame can be attached to any person, has rendered it impossible that a true trial on the merits can be conducted and has, therefore, placed whatever controversy might have been the subject of the trial beyond the reach of fair litigation or;

iii. culpable delay where a trial on the merits is, nonetheless, still possible but where, in the context of the issues in the case and the evidence which could or might be or have been available, the trial which could ultimately be conducted is, by reason of lapse of time caused by culpable delay, significantly further from the ideal of a perfect trial than would have been the case had no such culpable delay occurred. Where, therefore, justice is diminished through fault. A clear balancing exercise arises in such cases. It will only be appropriate to prevent a final decision on the merits where it is proportionate so to do as a response to any culpable delay established.

2.20 It is important to emphasise that those underlying principles apply equally in the context of criminal and civil proceedings. They inform the jurisprudence which has developed as a means of giving practical implementation to those principles but do so, because of the obvious difference in the nature of the relevant proceedings, in a different way in the civil and the criminal context.

2.21 Before leaving the general principles applicable there are two further points which I would wish to make. First, there has been a growing tendency for the courts, when asked to prohibit or otherwise prevent a trial from going ahead (by means of prohibition in the criminal context or by stay or dismissal for inordinate and inexcusable delay in the civil context) to consider whether it might be more appropriate to leave the final decision to the trial judge. Where it is clear that no true trial on the merits is capable of being conducted then such a course of action may well not be appropriate. Likewise, there may be circumstances where delay *per se* leads to it becoming constitutionally unfair to allow a trial to proceed in circumstances where nothing which would be likely to emerge at the trial would alter the proper assessment of where the balance of justice lies in the case in question. However, in many cases, and most particularly those cases where it is suggested that the fundamental constitutional unfairness stems from an accused or defendant being required to be subjected to a trial which has been rendered significantly more distant from the ideal of a perfect trial by reason of culpable delay, it may well be that an assessment of the extent of any such difficulties will much more easily be made by a trial judge. Such a judge will be able to assess, in the light of the evidence which is actually tendered and in the light of having a much better ability to assess the kind of evidence which might have been tendered were it not for the delay (and the relevance and importance of such evidence in practice), whether the extent of departure from the ideal of perfect trial is sufficiently significant to warrant interfering with the constitutional imperative that proceedings should be tried on their merits. Likewise, a trial judge will almost invariably be in a better position to determine whether the ability to assess the credibility or cogency of evidence has been impaired by lapse of time.

2.22 In those circumstances, I am of the view that it is preferable, except in clear cases, that the issue be left to the trial judge whether in civil or criminal proceedings. That position should only be departed from where, in advance of trial, the result of the outcome of any analysis of the competing interests is sufficiently clear to warrant the case not even going to trial. It must again be emphasised that, even where the case goes to trial, it remains one of the most important duties of the trial judge to assess, if the issue is raised, whether any of the lapse of time issues which emerge render it appropriate to reach a determination other than on the merits in all the circumstances of the case.

2.23 Finally, it is important to touch on what has become known in the recent jurisprudence of the courts as the lost evidence cases. I do this not least because that jurisprudence is referred to by Charleton J. in his judgment.

2.24 First, it seems to me to be necessary to note that there is a distinction between the strand of jurisprudence involving lapse of time cases, on the one hand, and lost evidence cases, on the other, although the consequences of lapse of time and lost evidence may often be the same. Prejudice arising from lapse of time may be asserted to take the form of evidence no longer available.

2.25 Therefore, the lost evidence jurisprudence fits into the broad principles which I have sought to identify as applicable in respect of lapse of time. Where, owing to culpability on the part of the prosecuting authorities, an accused is faced with a trial which is, because of the loss of evidence, much further from the ideal of a perfect trial than should otherwise be the case, it may ultimately be in breach of constitutional principles of fairness to allow a trial on the merits to proceed. However, as in all other aspects of these areas of jurisprudence, significant weight needs to be placed on the important constitutional imperative that there should be a trial on the merits. Likewise, save in a clear case, it will be preferable to leave the ultimate question to the trial judge who will be in a much better position to be able to tell the real or likely effect which the lost evidence might have had on the trial.

2.26 In the light of those general principles I now turn to the facts of this case.

3 Application to this Case

3.1 I was not convinced that it is proper to characterise this case as being essentially a lost evidence case. It is, fundamentally, a lapse of time case even though, as pointed out earlier, there may be similarities between the two.

3.2 First it should be said that this case did not seem to me to fit into that category of case where it can be said that there can be no reality to there being a true trial on the merits as a result of the lapse of time between the events the subject of the charge and the likely trial date. The central plank of the prosecution case will, doubtless, be forensic evidence connected with the blood samples found on Mr. Nash's clothing which were, ultimately and in the circumstances set out in some detail in the judgment of Charleton J., analysed in a way which suggests that they are blood from the two victims. This court is not presently aware as to the way in which

the defence will seek to address that evidence. Will it be suggested that there is some flaw in the forensic evidence? Will some explanation be put forward as to how the blood might have been on Mr. Nash's clothing in innocent circumstances? The precise approach which the defence adopts to that forensic evidence is a matter of which the trial judge will be aware and this Court is not. That alone places the trial judge in a much better position to assess the overall issues which arise from lapse of time in this case. It also not at all clear at this stage that any questions which the defence might wish to raise in respect of that forensic evidence will be more difficult to raise now than would have been the case had there been a much earlier trial. Thus, one of the central issues in the case, being the extent to which the relevant forensic evidence may be considered probative, seems likely to be capable of being fully explored at the trial. It follows that this could not, by any manner of means, be said to be a trial which is beyond the reach of fair litigation.

3.3 The central complaint which is made on behalf of Mr. Nash concerns what are said to be the significant additional difficulties which he would now face in being able to, as it were, question the cogency of the case against him by reference to the confession previously made by Mr. Lyons. Such a defence is sometimes referred to as an "empty chair" defence whereby the focus, or at least a focus, of the defence case is to suggest the possibility that another individual is the true culprit and thus argue that the case against the accused has not been established beyond reasonable doubt. There is no doubt but that it is open to Mr. Nash to seek, within the rules of procedure and the law of evidence, to raise an empty chair defence, in this case directed at Mr. Lyons, or indeed, any other potential perpetrator. But there must be considerable uncertainty at this stage as to the extent to which, in practise, it might be said that he is impaired in so doing.

3.4 That Mr. Lyons initially confessed to the same murders cannot be doubted. That those facts can form a legitimate part of the defence seems clear. It will, at least initially, be a matter for the trial judge to rule on the admissibility of any particular items of evidence which the defence may seek to introduce as part of an "empty chair" defence. All that can be said at this stage is that neither counsel for Mr. Nash nor prosecuting counsel were, quite understandably, prepared at the hearing before this Court to suggest any definitive answer to some of the evidential issues which might well arise in that context at the trial. For that reason again, the trial judge will be in a much better position to form a judgment as to whether, and if so to what extent, Mr. Nash has truly been impaired by lapse of time in running any empty chair defence which he might wish. Like considerations apply in relation to any defence which might be based on the position of another individual who appeared to have been a so called "person of interest" in the context of the inquiries made by An Garda Síochána in this case.

3.5 Insofar as it may be possible for Mr. Nash to seek to argue that, by reason of lapse of time, he will now have an impaired opportunity to present his defence, the extent of any such impairment - the extent to which justice may be diminished - is far from clear and is highly likely to be much clearer to the trial judge. But, of course, in the light of the general principles which I have sought to analyse earlier in this judgment, a case where a trial might involve some diminishment (but not denial) of justice should only be prohibited if the reason for such diminution is culpable delay and where prohibiting the trial is a proportionate response to the relevant culpable delay considered in the light of the extent of the impairment in question.

3.6 There was, in my view, a real question of whether there is, truly, any real culpability on the part of the prosecuting authorities at all. It is important to emphasise that prosecuting authorities should only properly bring criminal proceedings where there is a prospect of success. As noted earlier, there are procedures available to the defence to halt the trial process where there is insufficient evidence to arguably support a sustainable conviction. But even beyond that, prosecuting authorities are, like all other agencies, subject to the limitation of finite resources. Decisions have to be made as to how those resources are best to be deployed. Allocating resources in the prosecution of one case may mean that there are less resources available in another area. Leaving aside altogether, therefore, cases where it would be wrong to prosecute because of insufficient evidence, a wide margin of appreciation must be left to prosecuting authorities as to how to allocate their resources with particular reference to concentrating on cases where there is the greatest likelihood of securing a conviction. The criminal process is not, ultimately, about conducting inquiries. It is about determining guilt or innocence of criminal offences and, in the case of guilt, imposing an appropriate penalty.

3.7 Without the forensic DNA evidence now available, it is difficult to disagree with the case made on behalf of the prosecuting authorities that it was reasonable not to prosecute Mr. Nash. It may well be that, prior to that evidence becoming available, different members of An Garda Síochána who had some involvement in the case had different views as to whether it was more likely that Mr. Nash, on the one hand, or Mr. Lyons, on the other, or, indeed, any other person, might be guilty. But those differences of opinion are beside the point. The forensic evidence, at least so far as providing a sufficient case to justify seeking to bring the matter to trial, was a game changer.

3.8 It is true that it would appear that the enhanced techniques which were ultimately deployed to provide the evidence, which is now sought to be relied on at Mr. Nash's trial, were available for some period prior to their actual use in this case. Whether, and if so to what extent, the prosecuting authorities were culpable in not seeking to use those techniques at an earlier stage and whether, importantly, their use at a somewhat earlier stage (thus leading to a somewhat earlier trial) might have made any great difference to the likely evidence which could have been led, is a matter which, in my view, is far from clear on the evidence currently available. It will be a matter on which the trial judge will be in a much better position to form a proper judgment.

3.9 As indicated earlier, a trial should only be prohibited in a clear case. In other cases the assessment of whether there is a sufficient level of unfairness to prevent the trial from ultimately coming to a conclusion on the merits is a matter for the trial judge. Insofar as there may be cases where it is appropriate to prevent a trial reaching a conclusion on the merits because of an impairment in the ability of the defence to make its case, a judgment must be reached as to whether, in the light of the imperative which favours a trial on the merits, the degree of culpability on the part of the prosecuting authorities and the extent of any diminishment in the ability of the accused to present a defence has led to a point being reached where it is constitutionally unfair to allow the trial to reach a conclusion on the merits. In this case I was satisfied that it was by no means clear that there had been any significant culpable delay on the part of the prosecuting authorities, although I would leave a final judgment on that issue to the trial judge. Likewise, I was satisfied that it was by no means clear as to the extent to which Mr. Nash would truly be impaired in the presentation of his defence by reason of any additional lapse of time which could be attributable to such culpable delay as might be established. I would, again, leave an assessment of such impairment or diminishment to the trial judge. This was, therefore, far from the sort of clear case where the courts should intervene to prohibit a trial in advance.

4. Conclusions

4.1 For those reasons, I was satisfied that the conclusion reached by the Court, being to uphold the decision of the High Court and dismiss the appeal, is correct. Any unconstitutional unfairness which might arise in this case stems from that category identified earlier in this judgment where it might be said to be unfair to require an accused to be tried on the merits in circumstances where, due to culpable delay on the part of the prosecuting authorities, the trial will be much more distant from the ideal of a perfect trial than might have otherwise been the case in the absence of such culpable delay.

4.2 In order for it to be constitutionally required that the imperative, which favours all issues of justiciable controversy being determined by a trial on the merits, should be departed from, it is necessary that the real extent of any such additional departure from the ideal of a perfect trial be sufficiently significant and the culpability of the prosecuting authorities so serious that their combined effect is sufficient to disturb the important constitutional value in the guilt or innocence of persons accused of crime being determined by a full trial on the merits.

4.3 A trial should only be prohibited from going ahead where it is clear that such balance lies against a full trial on the merits being permitted. I was not satisfied that it was at all clear that such is the case here. It will remain, of course, a matter for the trial judge to form a judgment (which judgment the trial judge will be in a much better position to exercise) whether that balance tips against allowing a final determination of Mr. Nash's guilt or innocence to be determined by a decision on the merits. In particular the trial judge will be in a much better position than this Court to assess the state of the evidence in that regard not least because there are many issues of admissibility which may have a significant impact on the extent to which Mr. Nash may be able to place before the Court any defence which he wishes (concerning the involvement of Mr. Lyons).

4.4 Finally, I am in full agreement with the judgment of Charleton J. insofar as it relates to the pre-trial publicity issue and I have nothing to add on that point.