THE SUPREME COURT

Record Number: 2018/25
Clarke C.J.
O'Donnell J.
MacMenamin J.
Charleton J.
O'Malley J.

BETWEEN/

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

PROSECUTOR/RESPONDENT

AND

C. Ce.

DEFENDANT/APPELLANT

Judgment of Mr. Justice Clarke, Chief Justice, delivered the 19th December, 2019

1. Introduction

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.

1.2 This case raises such issues. The defendant/appellant ("Mr. C.") was found guilty on counts of rape and indecent assault by a jury at the Central Criminal Court on 12 May 2016. The allegations against Mr. C. related to events said to have occurred between 1 August 1971 and 30 April 1972 and thus the offences alleged were said to have taken place approximately 44 years prior to his trial.

1.3 One of the developments in the case law in recent times has been a suggestion that the question of whether it is possible to provide a fair trial, in such cases involving a lengthy lapse of time, should be left to the trial judge rather than, as tended to be the case during the earlier stage of the development of the jurisprudence, be decided in proceedings which sought to prohibit the conduct of the criminal trial before it commenced. It will be necessary to refer briefly to that development in due course but the underlying reason behind it was a view that a trial judge would normally be in a much better position to

assess the real extent to which it might be said that prejudice had been caused to the defence by the lapse of time in question.

1.4 The trial judge in Mr. C.'s case refused an application, made on behalf of Mr. C. at the conclusion of the prosecution case, to the effect that the trial should proceed no further because of what was said to be unfairness caused by the absence of two potential witnesses, with emphasis placed on the absence of one witness in particular, M.Cy. The principal reason for the trial judge's refusal of the application stemmed from her characterisation of the missing evidence as being no more than a "lost opportunity".

1.5 Following his conviction, Mr. C. appealed to the Court of Appeal on a number of grounds, one of which related to the trial judge's refusal to hold that the trial had been rendered unfair on grounds of delay. The appeal was dismissed on all grounds. Insofar as the issue of delay was concerned, the Court of Appeal took the view that the suggestion that M.Cy. would have been of significant assistance to the defence involved a number of major assumptions which the Court considered were unjustified. It is as against that decision of the Court of Appeal that Mr. C. now appeals to this court. It is appropriate to turn first to the grant of leave to appeal.

2. Leave to Appeal

2.1 In a determination of this Court dated 16 January 2019 (*Director of Public Prosecutions v. C Ce* [2019] IESCDET 3), Mr. C. was granted leave to appeal that part of the judgment of the Court of Appeal which determined that his trial had not been rendered unfair by reason of the lapse of time since the offences in question. In doing so, the Court held that Mr. C. had raised an issue of general public importance for determination, namely:-

> *"[T]he extent of the burden on an accused person, tried on historic allegations, who argues that his trial is unfair because the lapse of time has resulted in the death of a witness who might have been of assistance to him."*

2.2 As has already been noted, there were a range of issues raised both at the trial of Mr. C. and on his appeal to the Court of Appeal. However, the only issue which now remains before the Court is that identified in that determination of this Court granting leave to appeal. It follows that it is only necessary to consider the rulings of the trial judge and of the Court of Appeal insofar as they relate to that issue.

3. The Trial

3.1 The complainant, whom I will refer to as A.U., made allegations against Mr. C., A.U.'s uncle, in relation to events which were said to have taken place on dates unknown between August 1971 and April 1972, when A.U. and her family stayed with Mr. C. in Clare. It was A.U.'s account that she had been indecently assaulted by Mr. C. on an occasion when he had taken her hunting. She also gave evidence of a second incident, where she alleged that she had been raped by Mr. C. during the same holiday. In this regard, she referred to the background to the rape, involving a row between Mr. C., Mr. C.'s partner at the time, M.Cy., and his son, C.C., in the course of which the latter was said to have produced a shotgun. She further stated that later that evening, M.Cy. had led A.U. from her bed to the bedroom where Mr. C. was, undressed her, and placed her

naked in the bed alongside Mr. C. After M.Cy. left the room, Mr. C. was alleged to have raped A.U.

3.2 The allegations against Mr. C. were made to the Gardaí by A.U. in April 2004. In December 2004, Mr. C. was arrested, detained and interviewed. The direction to prosecute Mr. C. on these charges was issued by the D.P.P. in February 2006. In 2005, Mr. C. had left the jurisdiction, living in several different countries until his arrest and extradition from the United Kingdom in July 2013. It transpired that M.Cy., and also B.C., A.U.'s mother, had both passed away in 2008.

3.3 At the close of the prosecution case, defence counsel made an application to the trial judge that the trial proceed no further by reason of what was said to be the prejudice to the accused arising from the lapse of time since the date of the alleged offences and the absence of M.Cy. and, to a lesser extent, B.C. On that basis, it was said that there was a real risk of an unfair trial. Counsel for Mr. C. submitted that M.Cy. was a person of "central importance" in the allegation, as a witness to the events which were alleged to have occurred, particularly given that, when the allegation of rape was first put to Mr. C. in 2004, he stated that M.Cy. would be able to verify his denial.

3.4 Counsel for the defence stated that it was "beyond debate" that, if M.Cy. was going to give evidence that A.U.'s evidence consisted of lies, this would have undoubtedly undermined the prosecution to a significant extent and affected A.U.'s credibility. The demonstration of the impossibility of the rape allegation would also, it was said, have had a significant collateral impact on A.U.'s credibility in relation to the other charge, being that of indecent assault.

3.5 There was also what was said to be the "reasonable possibility" that M.Cy. would have contradicted the evidence of C.C., the son of the accused, thus damaging his credibility not only in relation to his evidence placing A.U. and her siblings in the house at the same time as Mr. C., but also in relation to the evidence adduced by the prosecution from C.C. in relation to a form of verbal admission allegedly made by Mr. C. many years later.

3.6 Defence counsel also stated that, while the impact of B.C.'s evidence not being available was not as great as that in the case of M.Cy., it was a factor to which the court ought to have regard, as she might have been in a position to have given evidence as to whether Mr. C. was living in the house at the time she stayed there with her family or as to her recollection of the incident involving the firearm on the night of the alleged rape.

3.7 Counsel for the prosecution opposed the application to halt the trial, stating that the evidence of M.Cy. could not have rendered the entire account of A.U. an impossibility, that it was speculation to say that the absence of M.Cy. meant that Mr. C. had lost the real possibility of an obviously useful line of defence, and that it was more properly characterised as a lost opportunity for the defence.

3.8 Prosecuting counsel further suggested that Mr. C. had contributed to the delay and any potential prejudice suffered by moving away from Clare. Both parties agreed that it was

a matter of debate as to whether or not a trial could have taken place at which M.Cy. could have given evidence, in the period between the issuance of the direction to prosecute by the D.P.P. in February 2006 and her death in April 2008.

3.9 The trial judge, refusing the application, held that she was not persuaded that the absence of M.Cy. posed a risk of an unfair trial such that the two charges should be withdrawn from the jury. She stated:-

> *"I agree that [M.Cy.]'s evidence is a lost opportunity. This is a consequence of delay or stale cases, because this is what can happen in delayed or stale cases. We cannot speculate about what her evidence might have been, would it have been favourable to the prosecution or to the defence? And neither indeed can the jury speculate in relation to that…"*

3.10 She further ruled that the absence of the evidence of M.Cy. was not akin to the absence of objectively reliable evidence, such as records, which could demonstrate the improbability of A.U.'s allegations. The trial judge further stated that she would give the full "Haugh warning" to the jury in relation to the difficulties which arise by reason of delay and the absence of evidence.

4. The Court of Appeal

4.1 Mr. C. appealed against his conviction. The appeal was dismissed by the Court of Appeal (Birmingham, Hogan and Mahon JJ.) on 8 December 2017. The reasons for that decision were provided in the judgment of Birmingham J. delivered on the same date (*The People (at the suit of the Director of Public Prosecutions) v. C. Ce* [2017] IECA 326). Mr. C.'s appeal was dismissed on a number of grounds but it is sufficient for the purposes of this appeal to set out the conclusions of the Court of Appeal on the issue of the application to halt the trial by reason of delay.

4.2 In relation to the absence of the evidence of B.C., A.U.'s mother, from the trial, the Court of Appeal concluded that her absence could not possibly have provided a basis for stopping the trial. The only evidence which she could have been expected to have been able to give would have been in relation to the issue of whether Mr. C. and A.U. and her family all stayed at the same time in the house where the rape offence is alleged to have occurred. The Court held that it was "speculative in the extreme" to suggest that she would have given evidence that was contradictory to the evidence of A.U. and that of A.U.'s brother, C.U. The Court declined to attach a great deal of significance to either party's arguments as to Mr. C.'s own contribution to the delay in leaving the jurisdiction.

4.3 Turning to M.Cy., the Court of Appeal considered the role that she was likely to play at trial in order to assess the significance of her absence. The Court considered that this question should be viewed holistically, by reference to the evidence actually before the trial judge.

4.4 It was noted that, had contact been made with M.Cy., she would have had to have been interviewed under caution, as A.U.'s account would have suggested that M.Cy. was

complicit in the offence. Furthermore, had M.Cy. been called as a witness by the defence, the trial judge would have had to warn her that she need not answer questions if by doing so she might incriminate herself. If she gave evidence in support of Mr. C., Birmingham P. pointed out that she would have been cross examined on the basis that it would be suggested that she was denying that the incident occurred because she was an accomplice to the offence.

4.5 The Court of Appeal then concluded that to take the view that M.Cy. would likely have been of significant assistance to the defence involves "a number of major assumptions which appear unjustified having regard to the totality of the evidence". The Court then reviewed the evidence adduced by the prosecution which it considered was corroborative of A.U.'s allegations and concluded, at para. 33 of the judgment:-

> *"It cannot therefore be said that this was simply a case of an uncorroborated allegation of rape and indecent assault which is said to have taken place some 45 years earlier. There was other independent testimony which, if accepted, was strongly indicative of guilt. While there was no doubt but that the death of [M.Cy.] in 2008 represented, in the words of the trial judge, a missed opportunity for the defence, nevertheless, when viewed in the light of the totality of the evidence, it cannot be said that her absence was so gravely prejudicial in the circumstances such as would necessarily have warranted halting the trial."*

5. The Case Law

5.1 The jurisprudence on the issue of a lapse of time between when offences are alleged to have occurred and the making of a formal complaint has evolved significantly since the courts were first faced with a series of cases alleging historic sexual abuse in the 1990s.

5.2 Where an application was made to prohibit the trial of a person on the grounds of a lapse of time, the initial approach of the courts was to conduct an inquiry into whether the applicant was ultimately responsible for the complainant's delay, examining issues such as the dominion which the accused exercised over the complainant and the relationship and the age difference between the parties, (see, for example, *B. v. D.P.P.* [1997] 3 I.R. 140). If it was found that the applicant was responsible for the delay, he could not rely on the lapse of time unless it presented a real risk that the applicant would not obtain a fair trial. Thereafter, the constitutional principle that a trial would be prohibited if there was a real or serious risk of an unfair trial, as set out in *D. v. D.P.P.* [1994] 2 I.R. 465, was applied.

5.3 This two-stage inquiry was generally conducted during judicial review proceedings brought by the accused in advance of the trial, in which an application was made for either an order of prohibition of the prosecution of the applicant or for an injunction restraining the D.P.P. from proceeding further with the prosecution.

5.4 The judgment of this Court in *S.H. v. D.P.P.* [2006] IESC 55, [2006] 3 I.R. 575 signalled a significant development in the jurisprudence, however, as judicial notice was taken of the circumstances of and reasons for delay in making complaints by victims of child sexual

abuse and it was held that there was no longer a necessity to inquire into the reasons for a delay in making a complaint. In a recalibration of the test to be applied in cases involving a lapse in time prior to the making of a complaint, Murray C.J. stated at p. 622 of the reported judgment that the issue which arose for determination by the court is "whether the delay has resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial".

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 I.R. 494 at p. 520). In *The People (Director of Public Prosecutions) v. P. O'C*. [2006] IESC 54, [2006] 3 I.R. 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. She held at p. 247 of the reported judgment:-

> *"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 time 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."*

5.6 A shift in thinking has ensued in relation to the correct stage of proceedings at which an application to halt a trial on the grounds of delay should be made, as noted in *P.B. v. D.P.P.* [2013] IEHC 401. There, O'Malley J. stated that where the court must determine whether prejudice has arisen as a result of a lapse of time and, if so, whether it is such as to give rise to a real or serious risk of an unfair trial, each case falls to be considered on its own facts and in the light of the power of the trial judge to ensure a fair trial by means of appropriate rulings and directions. This includes the jurisdiction to withdraw the case from the jury where the trial judge considers that such is the only way to prevent injustice to the accused. She continued at para. 59:-

> *"The point of the decision in S.H and the authorities that followed is that the difficulties caused to a defendant in cases of old allegations (and I do accept that there can be very real difficulties) are best dealt with in the court of trial. Trial judges are now accustomed to dealing with such cases and using such powers as are necessary to prevent injustice to accused persons. It is perfectly clear that a trial judge is not restricted to simply giving warnings to the jury but may, where necessary in*

exceptional cases, withdraw the case from the jury on the basis that the difficulties for the defence are such that it is not just to proceed. Such a decision, in the normal course of events, will often be better taken in the light of the evidence as actually given rather than as speculated about in judicial review proceedings."

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. See, for example, *McFarlane v. D.P.P.* [2006] IESC 11, [2007] 1 I.R. 134, at pp. 144-145.

5.10 The threshold to be met on such an application has been stated in differing terms across the jurisprudence. In *S.B. v. D.P.P.* [2006] IESC 67 ("S.B."), the absence of potential witnesses to whom allegations of indecent assault were said to be made was in issue. If these witnesses had denied that complaints were made, the credibility of the complainant would have suffered significantly and thus the applicant was held by Hardiman J. to have "lost the real possibility of an obviously useful line of defence" and was granted injunctive relief.

5.11 MacMenamin J. set out the "two fundamental tests" as to specific prejudice arising from the unavailability of evidence in *M.U. v. D.P.P.* [2010] IEHC 156 in the following terms, at para. 32:-

> *"(i) whether the applicant has engaged with the facts and demonstrated the materiality of unavailable evidence; and (ii) whether the evidence can be obtained elsewhere, or can be dealt with by warnings from the trial judge?"*

5.12 In that case, MacMenamin J. assessed the potential prejudice arising from the absence of a number of witnesses on the facts of the case, holding that the evidence of a garda to whom the applicant had made a complaint in writing many years previous to the effect that his father had been sexually abusing his sisters, who were the complainants, "clearly would have the effect of buttressing his credibility" and that this would have been of significant benefit to the applicant in defending the charges faced. The absence of this witness was held by MacMenamin J. to constitute specific prejudice sufficient to warrant a grant of prohibition.

5.13 In assessing whether the absence of certain witnesses gave rise to irremediable prejudice in *K.D. v. D.P.P.* [2011] IEHC 384, Dunne J. considered whether their presence was "demonstrated to be essential in order to assist the applicant's defence in respect of the charges" and whether other witnesses were available who could provide evidence in relation to the same matters.

5.14 In *Ó'C v. D.P.P.* [2014] IEHC 65, O'Malley J. held that, where what was alleged was the absence of evidence, an applicant must point to a "real possibility that the witnesses or evidence would have been of assistance to the defence" and dismissed the principle that it was sufficient to point to a theoretical possibility that the evidence of an unavailable witness might contradict the complainant's account or that of other witnesses. At para. 67, she continued:-

> *'The question is, I consider, whether there is a real possibility that the missing material would reveal a material inconsistency which would be of benefit to the applicant. In my view, there is nothing in the evidence to suggest that this is a realistic possibility as might be the case if, for example, it was shown that [the complainant] had given materially inconsistent accounts in other instances.'*

5.15 This approach of O'Malley J. was recently followed by the Court of Appeal in *R.B. v. D.P.P.*, cited above, where Baker J. stated that to raise a real possibility that the missing evidence would assist in the defence, an applicant for prohibition "must engage in a real way with that potential evidence and identify how and why it might assist in defending the charge".

5.16 However, it is necessary to consider the proper approach to be adopted by a trial judge who is asked to consider halting a trial on the grounds that it has been demonstrated to be unfair. It is important to emphasise that much of the language used in the case law which concerned prohibition of trials necessarily referred to the risk that a trial which might happen in the future would be unfair. However, where the application is made to the trial judge, much of the trial will have already taken place.

5.17 Given that the purpose behind the more recent jurisprudence, which suggests that trial judges are better placed to make decisions of this type, stems from the fact that the trial judge will have heard evidence, it follows that it is unlikely that it would be appropriate to entertain an application to halt a trial on the grounds of prejudice caused by delay without having heard all, or at least most, of the prosecution case. In those circumstances, the trial judge will have had the opportunity to understand in detail the prosecution case as it has actually turned out to be at trial, rather than as it might theoretically have been anticipated to be at the stage of a pre-trial application to prohibit. In passing, it might also be mentioned that there could be circumstances where an application to halt a trial might be made after some or all of the defence evidence had been given as well, but a decision as to the point in time at which it might be considered appropriate to entertain an application to halt the trial is a matter which the trial judge is uniquely placed to determine.

5.18 In any event, the first matters which a trial judge will need to assess are the components of the prosecution case. Clearly, that case must contain sufficient evidence which would permit a jury properly instructed to convict the accused, for, if that is not the case, the accused will be entitled to a direction from the trial judge to the jury to acquit and no question of halting the trial on delay related grounds would arise. The trial judge will need to consider the key elements of the evidence which have the potential to allow the prosecution case to go to the jury in the first place.

5.19 Next, the trial judge will have to consider the evidence which is said to be missing by reason of lapse of time. It is inevitable that this task will involve some level of speculation, for it is the very fact that the evidence is not available which gives rise to the potential prejudice in the first place. However, it is clear that what is required is a legitimate basis on which it can be said to be reasonable to infer that particular evidence, potentially favourable to the accused, might have been given had the trial taken place at an earlier stage. There will, obviously, be cases where there may be quite compelling evidence as to what the missing testimony might have been. For example, a potential witness who has died may have made a formal statement to An Garda Síochána or might even have given evidence under oath in other proceedings about facts relevant to the

trial. On the other hand, questions relating to whether there might truly have been material evidence which is now missing and, indeed, the content of such evidence if it existed, may amount to little more than speculation. It follows that the first assessment which the trial judge must make, on the basis of whatever evidence is available (either as tendered before the jury at the trial or in a hearing conducted in the absence of the jury), must be to determine the likelihood that there truly was evidence which is missing and which would have been potentially material to the trial. The second assessment, which must be made in conjunction with an assessment of the prosecution case, is as to the true materiality of the evidence likely to be missing.

5.20 At one end of the scale, it is possible to envisage a case where there is very cogent reason to believe that evidence, which would be central to the jury's consideration, has become unavailable by virtue of lapse of time. At the other end of the scale, the suggestion that there is missing evidence may amount to little more than speculation. In between these extremes there will undoubtedly be cases which may require a difficult balancing of competing factors. The confidence with which it can be said that there truly is missing evidence and the extent to which it may be reasonable to assume that, in the light of the prosecution case as it has developed at trial, the missing evidence might be expected to potentially have had a real impact on the result of the case, are matters which a trial judge will be required to assess.

5.21 For example, if the prosecution case is very strong, then the evidence said to be missing would need to be such that there was a real possibility that it could influence the decision of the jury notwithstanding the strength of the prosecution's case.

5.22 Ultimately, the trial judge must determine whether the trial meets the standard of a fair trial. It is important to emphasise that a fair trial does not necessarily have to be a perfect trial. Almost all trials may potentially run without some possibly relevant evidence being available. The question of whether a trial is fair does, as the Court of Appeal considered, require an overall approach. If a theoretical possibility that some tangentially material piece of evidence is not available were to render a trial unfair, it would be difficult to envisage many cases in which there could ever be a fair trial. Something more substantial is required in order that a trial can be considered to be unfair. In cases which turn on a contention that there is evidence which has become unavailable by lapse of time, it is necessary to look at the case in the round, to have regard to the likelihood of evidence favourable to the defence being genuinely lost by reason of the lapse of time and also to have regard to the role which that evidence might reasonably have been expected to play at the trial, in the light of the prosecution case as it actually appeared at the trial.

5.23 But, having identified the way in which a trial judge should approach the question of whether a trial is fair, it is also necessary to identify the standard to be applied by the trial judge to the assessment which is to be carried out.

5.24 It is important to recall the test set out in *S.B. v. D.P.P.*, cited above, where Hardiman J. considered that a real or serious risk of an unfair trial arose in circumstances where the accused had "lost the real possibility of an obviously useful line of defence".

5.25 That case was decided in the context of an application to prohibit a trial rather than an application to a trial judge to prevent a trial continuing. However, the principle remains true in either case. As already noted, a trial judge will know in detail the prosecution case as already made. As also noted, there will inevitably be some degree of speculation as to what evidence might have been capable of being given were it not for the fact that the evidence concerned was missing. However, subject to that difficulty, the trial judge will also be in a position to assess the extent to which that evidence might meet the *S.B.* test on a much more objective and less speculative basis than might have been the case in a pre-trial application to prohibit. It follows that it is for the trial judge to consider, on the basis of the prosecution case as actually made and having considered the extent to which it can properly be said that there is evidence missing which would be truly material to defending the prosecution case as made, whether that missing evidence might be assessed as providing a real possibility of an obviously useful line of defence so as to determine whether it is just to permit the trial to continue to a conclusion or whether the trial must be halted on the basis that it can no longer be considered to be fair.

5.26 It must also be recalled that the precise issue which was expressly referred to in the grant of leave to appeal in this case is the question of the burden which lies on the accused in such circumstances. As in certain other situations which arise in the course of criminal trials, there may be at least two ways in which an accused may identify evidence which can form the basis of an argument that a particular course of action should be adopted by the trial judge. It is obviously for the accused to raise the question as to whether the continuation of a trial is appropriate on the basis of a contention that the trial is unfair by reason of lapse of time leading to the unavailability of material evidence. When raised, it is open to the accused to make the case in favour of the trial not continuing by reference to evidence which is already before the Court as part of the prosecution case. It may be that in some situations there will be sufficient evidence available from the prosecution case to enable the accused to advance such an argument. In that context, it is, of course, the case that the first element to be considered by the trial judge is the prosecution case which has actually been made at trial. It is also possible that, in some cases, there will be sufficient evidence already tendered as part of the prosecution case to enable the accused to make such argument as may be open in relation to the evidence which would have been likely to have been given had it not been missing. However, there may be circumstances where it will be necessary for the accused, in the absence of the jury, to lead additional evidence to enable the trial judge to reach an assessment as to the missing evidence. The prosecution may also decide to lead evidence in the absence of the jury which is directed to the same assessment.

5.27 Whether relying solely on evidence led by the prosecution or on that evidence together with additional evidence, it is for the accused to persuade the trial judge that, having regard to the prosecution case and such evidence as there may be as to the likely content

of any missing evidence, it has been established that the accused has, by virtue of lapse of time and in the light of that missing evidence, lost the real possibility of an obviously useful line of defence.

5.28 The obligation is on the trial judge to make a separate and distinct determination in that regard and it is clear that the trial judge must do so conscientiously in the light of all of the evidence and argument presented at the trial. The ultimate assessment of the trial judge must be as to whether the trial is fair rather than to reach any assessment which implies either the guilt or innocence of the accused.

5.29 I would add one point, even though it is not relevant in the particular circumstances of this case. No trial is perfect. There will always be the possibility that other material evidence could have been gathered. In addition, evidence which was gathered may not be available at the trial for a range of reasons. Witnesses may not be capable of being required to give evidence or physical evidence may be lost or damaged. If it were to be the case that the absence of any evidence which might have been present in a theoretically perfect trial could lead to a trial being considered unfair, then it would follow that very few trials could be conducted. As analysed earlier, the extent to which prejudice to the defence has been demonstrated to have had a potentially material effect on the trial is a matter which requires to be assessed by the trial judge in the light of the range of factors which I have sought to identify.

5.30 However, it should also be noted that there can be cases where prejudice to the defence arises either from culpable delay on the part of investigating or prosecuting authorities or, indeed, although rarely, from wrongful acts on the part of such authorities. An overall assessment as to whether it can be said that a trial is fair can, in an appropriate case, take into account such culpable actions. An accused is entitled legitimately to complain that a trial is unfair by reference to a lesser degree of prejudice if that prejudice has been caused or significantly contributed to by the culpable actions of investigating or prosecuting authorities. The analysis of the prejudice actually caused should not differ from that outlined earlier. However, in reaching an overall assessment as to whether the trial is fair, the trial judge can properly have regard to such culpable failures, for it is particularly unfair that an accused suffers prejudice due to such culpable activity. It follows that a lesser degree of prejudice may suffice to render a trial unfair where the prejudice concerned flows from culpable acts or omissions.

5.31 All that being said, it follows that if, having regard to the factors identified, the trial judge is satisfied that the trial is unfair by reason of the absence of the missing evidence, then it should be halted. It is necessary to consider the manner in which both the trial judge and the Court of Appeal dealt with this issue. That first requires a consideration of the evidence.

6. The Evidence

6.1 It must, of course, be recorded that the principal evidence tendered on behalf of the prosecution was that of A.U. Obviously that evidence was such that, were it to be believed by the jury, it was capable, in principle, of establishing the guilt of Mr. C. beyond

reasonable doubt. But such will almost always be the case in circumstances where delay issues arise. If the delay has deprived the prosecution of sufficient evidence to establish the case beyond reasonable doubt, then there will be no trial in the first place (or a direction will be granted) and therefore no question of the trial being halted on lapse of time related grounds will arise. The appropriate analysis must focus on the totality of the evidence that either was tendered or, arguably, might have been available were it not missing, so as to reach an overall determination as to whether a fair trial remains possible.

6.2 In the course of the trial, A.U.'s brother, C.U., gave evidence of visiting Clare and staying in Mr. C.'s house with his mother, and his siblings, one of whom was A.U. In evidence, he described an altercation between Mr. C. and Mr. C.'s son, C.C., during the course of which a shotgun was said to have been produced by C.C. The details he offered of this incident, which the prosecution say formed the background to the rape, diverged in certain respects from the description of the incident provided by A.U., and he recalled that the row took place in the bedroom of Mr. C., while both C.C. and A.U. were inside the room.

6.3 C.C., the son of Mr. C., then gave evidence on behalf of the prosecution. He described his aunt and her family, including A.U., coming to Ireland for a holiday and staying with Mr. C. at his house in Clare. He went on to describe intervening in a violent row between Mr. C. and M.Cy., in the course of which C.C. produced a shotgun, again in somewhat different terms to the accounts of A.U. and of C.U. He further stated that A.U.'s family were present in the house on that night.

6.4 C.C. also gave evidence in relation to an occasion when he confronted Mr. C. in relation to the allegations of A.U., of which he had become aware after having spoken to her. In response, his father was said not to have denied the allegations and to have agreed to seek psychiatric help in relation to the matter. It will be necessary to return to this evidence in due course.

6.5 Mr. C. did not give evidence in his own defence. However, the trial court heard an account of an interview conducted with him in December 2004, in the course of which he denied any wrongdoing. He also denied that there had ever been a time when he and A.U. and her family had all been staying at the house in question in Clare. During that interview, he also stated that M.Cy. "can verify" that she did not undress A.U. and place her in the bed beside Mr. C. as alleged. He also denied that any conversation had taken place between himself and his son, C.C., in which he admitted to abusing A.U.

6.6 The trial judge also heard evidence in the absence of the jury from a retired garda who had previously investigated the allegations of A.U., as to attempts to locate Mr. C. following his departure from the jurisdiction and the failed attempts to trace M.Cy.'s whereabouts, beyond establishing that she had moved to the United Kingdom some years earlier.

6.7 C.C. also gave evidence, in the absence of the jury, of a meeting he had with M.Cy. and two of his aunts, including B.C., which took place in Holyhead at an unknown time. In the

course of that meeting, C.C. said that he outlined a disclosure made to him by his sister concerning sexual abuse inflicted by Mr. C. His evidence was that he was advised not to visit A.U. because it was "all lies". C.C. had not yet met with A.U. at the point at which he relayed the allegations of his siblings to his aunts and to M.Cy. This meeting, counsel for Mr. C. argued, indicates that the evidence of the deceased women, and in particular M.Cy., which was not available to the Court, would likely have been favourable to the defence. Counsel for the D.P.P. argued that C.C., on the basis of his evidence, was not aware of the allegations of A.U. at the time of his meeting with the three women in Holyhead and therefore that the "all lies" remark must refer exclusively to other allegations made against Mr. C. by his daughters. Counsel for Mr. C. disagreed with this interpretation of the evidence, arguing that the exhortation not to meet with A.U. which was given by the women suggests either that the women had pre-existing knowledge of A.U.'s allegations or else that such allegations were discussed at the meeting in circumstances where C.C. indicated that he intended to visit A.U. to find out more about what was alleged. It will also be necessary to return to this aspect of the evidence in due course.

6.8 Against that backdrop, it is necessary to turn to an analysis of the fairness of the trial having regard to the lapse of time involved and, in particular, the absence of M.Cy. It is first appropriate to consider how this question was addressed both by the trial judge and by the Court of Appeal.

7. The Decisions in the Courts below

7.1 As mentioned, in the course of making the application to halt the trial, counsel for the defence suggested that C.C.'s evidence regarding his meeting with his aunts and with M.Cy. demonstrated that M.Cy. had some knowledge of A.U.'s allegations and that M.Cy.'s state of mind was such that whatever A.U. was going to say could not be believed. Therefore, it was submitted, this was indicative of the testimony she would have provided had she been in a position to give evidence at the trial. In determining the application, the trial judge first stated that she did not agree with this interpretation of C.C.'s evidence as put forward by defence counsel and appeared to consider that the conversation between C.C. and the women specifically was in reference to the allegations against Mr. C. which were made by C.C.'s sisters.

7.2 Dismissing the application, the trial judge then stated the following:-

> *"I agree that [M.Cy.]'s evidence is a lost opportunity. This is a consequence of delay or stale cases, because this is what can happen in delayed or stale cases. We cannot speculate about what her evidence might have been, would it have been favourable to the prosecution or to the defence? And neither indeed can the jury speculate in relation to that. Whatever her evidence, I agree with the submission made by [prosecuting counsel] that it doesn't come close to the loss of a record which would show the improbability of the accused in the committing of the offence or the improbability, or similar to the improbability of a story that a nurse administering an injection when she had no authority to do so.*

I intended to give the full Haugh warning to the jury. I would intend to refer to [M.Cy.]'s absence specifically and also to the absence of [B.C.]… And by doing so, I don't accept [defence counsel]'s submission that I'm abdicating my duty under the Constitution by giving a jury a warning in relation to delay by a form of words. And I'm not persuaded that the absence of [M.Cy.] poses a risk of an unfair trial, such that the two charges should be withdrawn from the jury and accordingly I'll refuse the application."

7.3 In the judgment of the Court of Appeal, the Court correctly indicated that it wished to focus on the question of "whether Mr. C.'s trial was a fair one or whether allowing the trial proceed to a verdict was unfair". The Court first sought to assess the impact of the absence of A.U.'s mother, B.C., from the trial and considered the evidence which she could have been expected to provide in relation to the question of whether A.U.'s family and Mr. C. both stayed at the same time in the house, where the rape offence was alleged to have occurred. The Court held that it was "speculative in the extreme" to suggest that she would have given evidence that was contradictory to the evidence of A.U. and that of C.U.

7.4 Turning to consider the impact of the absence of the evidence of M.Cy. on the trial, the Court acknowledged that, on A.U.'s account, M.Cy. was an eye witness to the offence of rape and was a "very significant figure in the narrative". The Court considered that its particular focus of attention should be placed on the position of M.Cy. and the role which she would have played at trial, while taking account of all the evidence before the trial judge and the way in which the trial proceeded. At paras. 27 and 28, the Court outlined its concerns regarding both the availability of M.Cy.'s evidence and the credibility thereof, should she have given evidence at the trial:-

"27. It would seem inevitable that, had contact been made with [M.Cy.], she would have had to have been interviewed under caution. What she would have said, if anything, we cannot of course now know, but it seems unlikely that she would have been a prosecution witness. There remains the possibility that she would have been called as a witness by the defence. Based on the attitude that she and the aunts were expressing at Holyhead, there must be doubts as to whether she would have been a willing participant in a trial. She had married, changed her name and was making a new life for herself. The trial judge would have had to warn her that she need not answer questions if by doing so she might incriminate herself. If, having been so advised, she gave evidence in support of the appellant, it would seem inevitable that she would have been cross examined on the basis that she was denying the bedroom incident because she was a participant in it, a facilitator, in effect, an accomplice. Viewed in that light, the defence is seeking to halt the trial because of the unavailability of someone who was, on [A.U.]'s account, an accomplice in this incident.

28. There is no doubt that at first sight the argument on behalf of the defence for stopping the trial is a powerful one. On A.U.'s account, [M.Cy.] was an eye witness to relevant matters and, in truth, much more than a bystander. If she gave evidence denying witnessing anything of the sort described and was convincing in that regard, that would be a very considerable assistance to the defence. However, if one considers what role she was likely to play at trial the significance of her absence is much less."

7.5 The Court held, at para. 31, that "[t]o take the view that she would likely have been of significant assistance to the defence involves a number of major assumptions which appear unjustified having regard to the totality of the evidence".

7.6 The Court then proceeded to examine the other evidence which it considered was corroborative of A.U.'s account, namely the evidence of C.C. and C.U., to the effect that A.U. and her family had stayed in the same location as Mr. C., which, if accepted, demonstrated that there was an opportunity during which the alleged offences may have taken place, and the evidence of C.C. of his confrontation with Mr. C. regarding the allegations of A.U., which Mr. C. was said not to have denied. In light of this, it continued, at para. 33:-

"33. It cannot therefore be said that this was simply a case of an uncorroborated allegation of rape and indecent assault which is said to have taken place some 45 years earlier. There was other independent testimony which, if accepted, was strongly indicative of guilt. While there was no doubt but that the death of [M.Cy.] in 2008 represented, in the words of the trial judge, a missed opportunity for the defence, nevertheless, when viewed in the light of the totality of the evidence, it cannot be said that her absence was so gravely prejudicial in the circumstances such as would necessarily have warranted halting the trial."

7.7 On that basis, the Court found that the conclusion of the trial judge that the trial was fair and ought not to be stopped was an understandable one and refused to interfere therewith.

8. Discussion

8.1 It is appropriate to start with an analysis of the basis on which both the trial court and the Court of Appeal reached their respective conclusions to the effect that the trial remained fair notwithstanding the potentially missing evidence and, in particular, the evidence which might have been given by M.Cy.

8.2 I have already set out the relevant passage from the ruling of the trial judge. The trial judge agreed that, in the case of M.Cy., the absence of her evidence was a "lost opportunity". It follows that the real question which the trial judge should have addressed, in the light of the test set out in *S.B.*, was whether that lost opportunity involved "the real possibility of an obviously useful line of defence". However, the trial judge concluded that the potential evidence which M.Cy. might have given did not "come close to the loss of a record which would show the improbability of the accused in

committing the offence". It seems to me that, in so concluding, the trial judge applied an incorrect test. The question is not whether the relevant missing evidence might have shown the improbability of the accused committing the offence in question (although obviously if it did so demonstrate, then it would be hard to conclude that the trial was fair). The test is, as has been emphasised, whether the missing evidence would have been likely to have provided a real possibility of an obviously useful line of defence. That line of defence might or might not have succeeded. But the problem is that the very fact that the evidence was missing means that we will never know what view a jury might have taken had the evidence been present. It is for the trial judge to assess, in the light of the prosecution case and such evidence as there may be as to the content of the missing evidence, whether the *S.B.* test is satisfied. On the basis of the ruling of the trial judge, it seems to me that an incorrect standard was applied.

8.3 It would appear that the Court of Appeal took a slightly different route. That court speculated on the likely run of the trial had M.Cy. given evidence. The Court of Appeal did accept that, on first sight, the argument put forward on behalf of the accused was a "powerful" one given that, on A.U.'s account, M.Cy. was an eye witness to one of the offences and, as the Court of Appeal put it, "much more than a bystander". The Court of Appeal accepted that, had M.Cy. given evidence contrary to A.U.'s account and had she proved credible, "that would be a very considerable assistance to the defence".

8.4 However, the reason why the Court of Appeal did not consider that those circumstances led to the trial being considered unfair was because of an analysis of the difficulties that the Court considered would have been encountered in respect of M.Cy.'s evidence. It is true that, on A.U.'s account, M.Cy. would have appeared to have been in the nature of an accomplice. That might well have led to procedural consequences, such as a warning, had she given evidence, and it would also have provided an undoubtedly useful line of cross-examination for the prosecution who might well have been able to suggest to her that, having regard to the role which A.U. ascribed to her, her evidence was self-serving.

8.5 It does not seem to me to be clear, therefore, that the Court of Appeal properly applied the *S.B.* test. That court clearly did conclude that, if M.Cy. had given evidence which contradicted A.U.'s account, this would have been of considerable assistance to the defence. As such the evidence clearly was, in the view of the Court of Appeal, an obviously useful line of defence. It might perhaps be said that the Court also concluded that the potentially missing evidence of M.Cy. did not truly provide a "real possibility" of that line of defence being available, for the reasons identified in its judgment. However, it seems to me that the process whereby the Court of Appeal came to that view involved trespassing on an assessment of how credible the evidence of the missing witness might have been. While there may be some circumstances in which such an exercise may be appropriate, such as where there are objective reasons to seriously doubt the relevant evidence such as contradictory statements by the witness concerned, it seems to me that the Court of Appeal trespassed into an area which should more properly be one for the jury, that being an assessment of the general credibility of a potential witness whose evidence is missing.

8.6 In the light of that analysis, I consider that neither the trial court nor the Court of Appeal truly adopted the proper approach to an assessment of the evidence in this case and it follows that it is for this Court to consider whether, on the evidence and argument presented, and applying the correct test, there was an obligation on the trial judge to have halted the trial on the grounds of unfairness.

8.7 As noted earlier, it is necessary first to look at what additional or corroborative evidence was presented beyond that of A.U. It is then necessary to analyse the potential evidence which might have been available had the two women in question, and in particular M.Cy., been capable of being called as witnesses.

8.8 It is true that there was corroborative evidence adduced, not least the account given by the son of Mr. C., which might be taken to amount to an implicit confession. Much of the other evidence tendered by the prosecution beyond that of A.U. centred on what might be described as background evidence to events surrounding the occasion on which the rape is alleged to have occurred. It can, I think, fairly be said that it potentially provides some corroboration for the general account of those background circumstances given by A.U. It is, however, true, as noted earlier, that some of the accounts were not entirely consistent one with the other. It is for that reason that it seems to me to be appropriate to characterise the evidence of an implicit confession as being the most significant additional evidence tendered by the prosecution.

8.9 It is, therefore, appropriate to look at the actual evidence of C.C. in somewhat greater detail. The evidence of C.C. suggested that he first told Mr. C. about an account of abuse which A.U. had made to him. On being asked for the reaction of Mr. C., C.C. said the following:-

"Well, I was very surprised because I – he didn't deny that any – anything, and more or less said it was her own fault."

8.10 C.C. also confirmed that the account he had given had been to the effect that A.U. had said that Mr. C. "had been sexually abusive towards her". The evidence went on to suggest that C.C. had indicated to Mr. C. that he should stay clear of children and "maybe… get some help…". C.C. testified that Mr. C. had agreed to this. C.C. went on to indicate that, at a later stage, Mr. C. indicated to him that he had a letter of appointment for a psychologist or the like. In cross-examination, counsel for Mr. C. put it to the witness that there had been no such conversation. However, counsel did not pursue this line of questioning beyond that bare suggestion. No approach was adopted which put forward a basis on which it was suggested that C.C. was either being untruthful or mistaken in his recollection.

8.11 It is clear, therefore, that there was no formal confession made under caution. However, there can be little doubt but that there was admissible evidence from which the jury was entitled to infer that Mr. C. had made an admission of sexual abuse of A.U.

8.12 In that context, it is appropriate to refer to the judgment of Hardiman J. in S.A. v D.P.P. [2007] IESC 43, where the following is stated:-

> *"…Admissions, depending on their context, may vary greatly in their significance on an application like this. An unrecorded and disputed allegation may be of little or no significance unless its terms or context make it very compelling. A disputed allegation of admissions to Gardaí will normally be verified by recording: an omission to record will call for explanation. However, in the present case the admissions do not appear to have been denied or glossed in any way so that it seems reasonable to take them at face value.*
>
> *…*
>
> *To look at these admissions from another point of view, it would in my opinion be extraordinary to prohibit a trial in circumstances where the defendant admits a significant amount of behaviour of a criminal nature."*

8.13 While Hardiman J. was dealing with a case in which it was sought to prohibit a trial, there can be little doubt but that similar considerations must be relevant in assessing the prosecution's case for the purposes of identifying the materiality of the evidence said to be missing. The fact that the accused had admitted to the relevant criminality (to the extent to which there may be evidence of same) must clearly be a significant factor in assessing whether there is a fair trial. It is also clear that the comments of Hardiman J. concerning the limitation on prohibition of trials would not apply in a case where the relevant admissions were hotly disputed and/or not independently verified. It seems to me that this case falls somewhere in the middle of the range. The admissions are not independently verified. While it is true that they were formally disputed at the trial (in the sense that counsel put it to the witness that the relevant conversation never took place), no contrary evidence was given at any stage and no positive basis for challenging the evidence was suggested. While the evidence did not go so far as to suggest that Mr. C. positively admitted the allegations, it does seem to me that the evidence given by C.C. was undoubtedly capable of being accepted by the jury as evidence which, in substance, amounted to an admission. In summary, therefore, so far as this aspect of the prosecution case is concerned, it seems to me to be appropriate to characterise the situation as one in which there was unverified evidence which amounted to an admission, which admission was formally contested but was not the subject of any contrary evidence.

8.14 In this context, I should emphasise that it by no means follows that informal admissions may not provide strong evidence of guilt in an appropriate case. On one view, it may be more likely that the perpetrator of a crime may make a candid admission outside the context of a formal police interview. However, what is at issue here is an assessment of the strength of the prosecution case in order to assess how realistically it might be said that the potentially missing evidence might have offered an obviously useful line of defence. The difference, in that context, between an admission made under caution and an informal admission is that there may, in the latter case, be much greater scope for the existence of a dispute about whether the admission was actually made in the first place.

It is for that reason that an informal admission may potentially play a lesser role in the overall assessment of whether it is fair to continue with a trial in the light of missing evidence. However, that point is undoubtedly materially weakened in the circumstances of this case by reason of the purely formal manner in which the alleged making of the relevant admission was contested.

8.15 Having looked at the prosecution case, it is next necessary to turn to the question of what is said to be missing evidence. This case is unusual in the context of historical sex abuse proceedings in that, on the account of A.U., there was actually a witness who could give quite direct evidence concerning the events surrounding one of the two alleged incidents. On one view, as argued on behalf of Mr. C., the absence of M.Cy. from the trial meant that a key potential witness was not available. It is necessary to assess the importance of M.Cy.'s potential evidence on at least two bases. First, there is the question of the evidence which was called in the absence of the jury from which it might be possible to infer what M.Cy.'s evidence could have been. Second, there are the connected questions of whether there was any real likelihood that M.Cy. would have given evidence had the trial taken place while she was alive and of the credibility of her evidence had it been favourable to the defence.

8.16 As noted earlier, there will always be some element of speculation as to the content of any evidence which is said to be missing, precisely because it is missing. In some cases, there may be very strong evidence as to what the missing witness might have been able to say. For example, a formal statement may have been taken from that witness at some stage or the witness may have given an account in writing in some form. This case cannot be put at that level. However, there was, in my view, evidence from which it can be inferred that M.Cy. would not have accepted the account given by A.U.

8.17 It is true that her description that it was "all lies" is somewhat bald and there may, indeed, as already noted, be some legitimate debate about precisely what allegation was under discussion at the time in question. In that context, regard should be had to the view of the trial judge that the discussion in question did not involve the allegations of abuse against A.U. at all. However, it is also fair to say that there is realistic evidence from which it might be inferred that M.Cy. would have been in a position to give evidence favourable to Mr. C. This case is most certainly not of the type where a debate about the evidence which could have been given by the missing witness is entirely speculative. M.Cy. was, after all, an eye witness on A.U.'s own account.

8.18 However, it is also necessary to consider whether M.Cy. would have been likely to have given evidence and the extent to which her credibility might well have been successfully challenged had she given evidence favourable to the defence. As the Court of Appeal correctly noted, the account given by A.U. was such that, if true, M.Cy. would have been an accomplice. That would undoubtedly have given rise to some difficulties for the defence and might, indeed, have led either to M.Cy. not having been willing to give evidence or, even if willing, a decision being taken by the defence not to call her. Furthermore, there can be little doubt but that, if M.Cy. gave evidence which contradicted

A.U.'s account, it would have been suggested to her that her evidence was self-serving on the basis of distancing herself from being complicit in one of the offences.

8.19 Therefore, while there was evidence from which the account which M.Cy. might have been prepared to give could be inferred, that evidence is not as strong as it might be in some other cases. There would have to be some question over whether M.Cy. would ultimately have given evidence had she been alive and there can be little doubt but that, if she had given evidence favourable to Mr. C., then the prosecution would have sought to damage her credibility.

8.20 It must, however, be kept in mind that the overall approach is to determine whether the criteria identified by Hardiman J. in *S.B.* have been met. The missing witness, in the shape of M.Cy., would undoubtedly have been able to give evidence highly material to the case, precisely because she was said by A.U. to have been present. There is at least a realistic basis for suggesting that her evidence could and would have been tendered and would have been favourable to the accused. The fact that her credibility might, in such circumstances, have been challenged does not take away from an assessment of the fairness of the trial or of an assessment as to whether her evidence might have provided an obviously useful line of defence. It is no part of that assessment to attempt to reach a conclusion as to whether she would have been telling the truth had she given evidence favourable to the accused. Other than general questions arising out of a potential suggestion that her evidence might have been self-serving, there was no particular basis (such as contrary statements made in the past) which would allow an objective assessment to be made that her evidence was unlikely to be regarded by a jury as credible, such that her evidence could not truly be said to have potentially provided a realistic basis for suggesting an obviously useful line of defence.

8.21 There was a real possibility that the evidence of M.Cy. could have made a material difference at the trial. That possibility is not based on speculation or the mere chance that some identified witness might have happened to have been in a position to give some evidence relevant to the trial. M.Cy. was a central figure precisely because it was A.U. herself who placed M.Cy. as having such a role.

8.22 In my view, the various factors which were required to be taken into account in determining whether there could be a fair trial were, in the particular circumstances of this case, such that no one factor could be said to be decisive.

8.23 The evidence of an admission by Mr. C. must be taken into account in favour of the proposition that the trial was ultimately fair, although the weight to be attached to that factor may not be quite as great as might apply in other cases, having regard to the fact that there was no independent verification of the admission and that there were at least some questions about the credibility of the evidence of C.C. (whose account was the only evidence of any admission by Mr. C.). On the one hand, this is not a case which can be described as one where it is very clear that the defendant, in the words of Hardiman J., admitted "a significant amount of behaviour of a criminal nature". On the other hand, the admissions were not challenged other than in a formal way.

8.24 Likewise, the evidence concerning the testimony that might have been given by M.Cy. in the event that she would have been available to give evidence at the trial is itself limited. It is important to emphasise that, most unusually, M.Cy. was a person at the centre of the account of one of the two incidents of criminality alleged. M.Cy. was not, therefore, a peripheral or potential witness. On the other hand, the limited evidence concerning the account which she might have been prepared to give undoubtedly lessened the weight to be attached to the fact that her evidence was no longer available. This is not a case where an entirely independent witness with no axe to grind either way had given a clear indication as to the testimony which they would be prepared to give, such that their evidence, had it been available, would undoubtedly have been of significant assistance to the defence.

8.25 Thus, both sides of the equation have their positive and negative sides. But it must be recalled that the jury was being asked to consider events which, at the date of the trial, had occurred more than 40 years previously. The general problems which occur in such cases have been often described. However, in addition, here there can be little doubt that, had M.Cy. been available to give evidence, there is at least a realistic possibility that she might have been in a position to give evidence which would have been highly favourable to the defence and there is also a real possibility that such evidence would have survived any attack on its credibility to a sufficient extent to cause the jury to at least have a reasonable doubt as to the guilt of Mr. C. She would, highly unusually, have potentially been in a position to give direct evidence of the events surrounding an allegation of historic sexual abuse, although neither the complainant nor the accused.

8.26 In those circumstances, I find it impossible not to conclude that the defence in this case were deprived of a realistic possibility of an obviously useful line of defence. Whether that defence might or might not have persuaded the jury to acquit is not the question. The issue is as to whether there was a realistic basis that it might have made a difference. While, for the reasons already analysed, that question is far from clear cut, it seems to me that, having regard to the S.B. test, the balance must lie on the side of a conclusion that the trial judge should have concluded that it was unfair to continue with the trial in all the circumstances of this case.

9. Conclusions

9.1 For the reasons analysed earlier in this judgment, I am satisfied that the proper approach of a trial judge, on being asked to halt a trial on the grounds of prejudice caused by significant lapse of time, must be to assess whether the trial is fair.

9.2 In that regard, the trial judge must (a) first consider the prosecution case as it has actually developed at the trial. Thereafter, the trial judge must (b) consider whatever evidence is available as to the testimony which might or could have been given but which is said to be no longer available. That exercise will generally involve two principal considerations. First, the court must (c) consider the available evidence about what might have been said by the missing witness or what might have been contained in missing physical evidence, such as documents or objects. The trial judge will be required to have regard to the degree of confidence with which it can be predicted that the

particular evidence would have been available, while recognising that the very fact that the evidence is not available means that that exercise must necessarily be speculative at least to some extent.

9.3 If the trial judge is satisfied that it has been established that there was a real prospect that the evidence concerned could have been tendered, next, he or she will be required to (d) assess the materiality of any such evidence. The materiality of that evidence will need to be considered in the light of the prosecution case as it evolved at the trial.

9.4 In the light of all of those factors, the court must finally (e) reach an assessment as to whether the trial is fair. The assessment of whether the trial is fair involves a conscientious determination by the trial judge whether, on the basis of all of the materials before the court, it can be said that the test identified by Hardiman J. in S.B. has been met, being that the absence of the missing evidence has deprived the accused of a realistic opportunity of an obviously useful line of defence.

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

9.6 For the reasons set out earlier in this judgment, and applying the overall approach identified, I am satisfied that, on balance, the trial in this case was unfair and should have been halted by the trial judge. The factors on all sides are less than clear cut and the balance is a narrow one. However, the fact that M.Cy., who was placed by A.U. at the centre of her account and who was, necessarily, therefore, a potentially important witness, was missing, is a factor of particular importance. That is so notwithstanding the fact that there were at least some questions over the evidence which M.Cy. might have given, over whether she would have been a willing witness and as to her credibility if she gave evidence favourable to the accused. However, those factors, while relevant and of some importance, do not fully take away from the fact that she remained a potentially central witness to events which were said to have occurred 40 years before the trial.

9.7 I remain of that view while taking into account and giving all due weight to the evidence tendered by the prosecution from C.C. concerning an admission said to have been made by Mr. C. For the reasons analysed earlier, it seems to me that the evidence concerned was such that a jury was entitled to consider it to be evidence of an admission. While formally challenged, no contrary evidence was given by the defence. However, it is also true that the admission was not made in recorded or otherwise verified circumstances.

Thus, the weight to be attached to that admission is not of the same level as would attach to, for example, an admission made under caution in a recorded interview session in a police station. The evidence of that admission is, notwithstanding this, entitled to all due weight but it does not seem to me to be sufficient, in the unusual circumstances of this case, to override the problems caused by the absence of such a central figure as M.Cy.

9.8 In those circumstances, I am satisfied that the appeal should be allowed and the conviction of Mr. C. quashed.