AN CHÚIRT UACHTARACH
THE SUPREME COURT

[S:AP:IE:2018:000025]

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.C.

DEFENDANT/APPELLANT

Judgment of O'Donnell J. delivered the 19th day of December, 2019.

Introduction

1. The incremental development of the law is not simply linear. Cases emerge with different facts which place principles previously announced in a different light, perhaps requiring reconsideration, qualification, and even, on occasion, a change of course. General principles announced by appellate courts are applied in a myriad of different situations by trial courts, and by repetition can become reduced to rules of thumb which over time may themselves require further clarification, adjustment or qualification. The development of the law in any field is a process of adjustment and correction.

2. The emergence of the phenomenon of allegations of child sexual abuse occurring many years prior to the making of the complaint has been a significant feature of life in many countries in the late 20th century, and has posed particular problems for the law, both civil and criminal. At the risk of some oversimplification, it came to be recognised that the sexual abuse of children was a serious problem which, by its nature, tended to remain hidden. It was further recognised that one of the consequences of the sexual abuse of a child at a young age is that the victim would frequently be unable to make a complaint and to pursue it for many years afterwards. This was particularly so at a time when the phenomenon of sexual abuse of children was not generally recognised in society.

3. The lapse of time, however, between an allegation of abuse, a complaint, and any trial (whether civil or criminal) poses obvious problems for the fairness of the process towards the defendant, and, therefore, the fairness of the process generally. Normally, it is understood that trials, particularly those which depend on the oral evidence and recollection of witnesses, should proceed within a reasonably short period from the events described. It is generally accepted that there comes a point when any dispute about

events goes beyond the reach of fair litigation, and becomes, if anything, a matter for historical debate and opinion, rather than adjudication with all the legal consequences that may follow. At that point, any trial would not be the administration of justice. There are a number of matters which are relevant to the decision as to whether that point has been reached, which may include any culpability on the part of the prosecution in the lapse of time, the length of the lapse of time itself, the death or unavailability of witnesses, the loss of real evidence, records or recordings, or any other events that real life can throw up. Even then, while there may be an agreement that there is, in principle, a point at which an allegation, even of serious criminal conduct, is beyond the reach of fair litigation, different courts and different judges may reasonably differ as to whether that point has been reached in any particular case. To that extent, the assessment is always dependent on the facts of a particular case, and the manner in which those facts are evaluated.

4. As set out in the judgment of the Chief Justice, the approach of the courts to criminal prosecutions in respect of child sexual abuse that is alleged to have occurred at a considerable distance in time from the trial has gone through a number of distinct developments. Initially, the Superior Courts heard judicial review applications seeking to prohibit such trials on grounds of lapse of time and/or culpable delay. Cases of that kind developed to involve sometimes lengthy hearings on oral evidence as to the cause of the delay in making a complaint, and, in particular, whether it could be said that the delay or lapse of time could be explained as a consequence of the abuse alleged to have been suffered. Apart from the inherent difficulty of applying such a test in the context of the criminal process, the fundamental component of which is that the accused is presumed innocent, such hearings could be an additional ordeal for the victim, and also necessarily created the prospect of very substantial delays in the trial process.

5. A significant development occurred in *S.H. v. Director of Public Prosecutions* [2006] IESC 55, [2006] 3 I.R. 575 ("*S.H.*"), when Murray C.J. stated that the courts had now acquired considerable judicial knowledge of the phenomenon of abuse, and its consequences for criminal complaints. He said at p. 620 of the report:-

"45 As I stated in P*.O'C. v. Director of Public Prosecutions* [2000] 3 I.R. 87 at p. 105:-

> 'Expert evidence in a succession of cases which have come before this court and the High Court has demonstrated that young or very young victims of sexual abuse are often very reluctant or find it impossible to come forward and disclose the abuse to others or in particular to complain to gardaí until many years later (if at all). In fact this has been so clearly demonstrated in a succession of cases that the court would probably be entitled to take judicial notice of the fact that this is an inherent element in the nature of such offences.'

46 The court's judicial knowledge of these issues has been further expanded in the period since that particular case. Consequently there is judicial knowledge of this

aspect of offending. Reasons for such delay are well established, they are no longer "new factors".

47 Therefore, I am satisfied that it is no longer necessary to establish such reasons for the delay. The issue for 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. The court would thus restate the test as:-

> The test is whether there is a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay. The test is to be applied in light of the circumstances of the case."

6. As identified in the judgment of the Chief Justice at para. 1.3, it has become accepted as broadly preferable that, other than in very clear-cut cases which will not be affected by the development of the evidence at the trial, this issue:-

> "should be left to the trial judge rather than, as tended to be 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 positon 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".

7. This development can itself be traced to the decision in *The People (Director of Public Prosecutions) v. P.O'C.* [2006] IESC 54, [2006] 3 I.R. 238 ("*P.O'C.*"), and the judgment of Denham J. (as she then was), where she said, at pp. 247 to 248:-

> "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."

8. It is not necessary to consider in detail the steps by which it was considered inappropriate to permit these matters to be dealt with by preliminary application at the trial, as occurs in some other comparable jurisdictions. See *Connelly v. DPP* [1964] A.C. 1254, 1354, 1355 and the jurisprudence that followed. See e.g. A.L.T. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (2nd edn, O.U.P., 2008), pp. 40-51, 71-90; D. Corker & D. Young, *Abuse of Process and Fairness in Criminal Proceedings* (Butterworths, 2000), pp. 1-36. The fact that Irish law arrived at a roughly similar point by a different route is, perhaps, an example of the sometimes haphazard manner in which the law develops in response to particular cases and arguments.

9. In Ireland, it is established that the jurisdiction to quash an indictment did not extend to a contention that the prosecution would constitute an abuse of process, by reason of delay

or on some other basis. In *P.O'C*, it was reasoned that the appropriate procedure for bringing such a challenge was by way of pre-trial judicial review application. In cases pending in Central Criminal Court, this meant an application for an injunction restraining the DPP from prosecuting the case, since that court was not subject to judicial review. The underlying reasoning appears to have been that the trial court was not the appropriate forum for the investigation of factual claims relating to delay which might involve claims of culpable delay and prejudice. The preferable route was therefore a judicial review application, coupled with the possibility of an application during the trial (most often at the close of the evidence), as confirmed in *P.O'C.* itself.

10. This position is not necessarily particularly logical or consistent. Facts relating to delay and prejudice can be addressed in the trial court in the course of the *P.O'C.* application, and, strictly speaking, the DPP commits no legal wrong in prosecuting a case the court later considers to be beyond the reach of a fair trial, but this is one more example of the truth of the observation that the lifeblood of the law is not necessarily remorseless logic. The position reached in this jurisdiction where clear cut cases may be brought by way of anticipatory judicial review, and other cases addressed at trial in the light of the evidence adduced, is reasonably practical and fair.

11. The position now has been reached, however, where it is generally accepted that in most cases it is preferable that delay be addressed by a so-called "*P.O'C.* application" made at the close of the prosecution case, or by the evidence generally, if the accused adduces any evidence. The reasons for preferring that the matter be ventilated in the course of the trial have been set out in some detail in the judgment of the Chief Justice, and now appear settled. One example may, however, suffice. In a helpful passage in her judgment in the High Court case of *P.B. v. Director of Public Prosecutions* [2013] IEHC 401, (Unreported, High Court, O'Malley J., 6 September 2013), O'Malley J. said, 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."

12. It will be necessary to consider in a little more detail later in this judgment the underlying reasons for the approach which now holds sway, but at this point it is sufficient to note that this was the jurisdiction invoked in this case. The trial judge was requested at the close of the prosecution case to withdraw the case from the jury, on the basis that it was one of those exceptional cases where, notwithstanding the fact that there had been

evidence adduced upon which a jury properly directed could convict the accused, the difficulties for the defence were such that it was not just to proceed.

13. I fully agree that the developments in *P.O'C.* and *S.H.*, as traced in the judgment of the High Court quoted above, mean that in other and clear-cut cases where the deficiency is of a kind which will not be affected by the manner in which the trial proceeds or by the evidence adduced, the trial is the appropriate location for any decision as to whether the lapse of time and impact on the case is such that the case is beyond the reach of fair adjudication – or, in the words of O'Malley J., that it is not just for the trial to proceed.

14. I also fully agree that this has the important corollary that trial judges must exercise that jurisdiction fully and conscientiously, and be prepared to withdraw cases based on their own consideration of the impact of a lapse of time on the case. It should be emphasised, moreover, that the test is not whether a trial judge would himself or herself consider that a guilty verdict was or could be appropriate (that is, that as a matter of fact the defendant was or might be guilty of the offence), but rather the distinct question of whether any question of guilt, if arrived at, could be considered to have been achieved by a process which would be considered just. The trial judge is not asked to second-guess or anticipate the decision of the jury, but rather whether the process meets the standard required to permit a jury to deliver its verdict.

15. Not only is this a distinct function of the judge, it is one to which a judge is particularly suited. It might be thought that most questions of the extent and significance of the evidence can safely be left to a jury, who must be satisfied beyond any reasonable doubt before they can convict an accused. Generally speaking, deficiencies in the evidence – lapses, inconsistencies, gaps, and absences – will tend to make it more difficult to reach that standard. Furthermore, a jury in delay or in lapse of time cases will be given a detailed warning about the impact of delay upon their adjudications, which is now deservedly known as a "Haugh warning" in reference to the charge given to the jury by Haugh J. at the trial in *The People (Director of Public Prosecutions) v. R.B.* and approved by the Court of Criminal Appeal in that case: see *The People (Director of Public Prosecutions) v. R.B.* (Unreported, Court of Criminal Appeal, 12 February 2003).

16. These are, themselves, substantial guarantees of the fairness of the process. Nevertheless, a trial judge has critical information and experience in this regard that a jury lacks. The assessment of the impact of lapse of time and the unavailability of evidence necessarily involves an assessment not just of the evidence actually adduced, which the jury can be expected to appreciate and assess, but rather a consideration of the absence of evidence. A jury has no comparator against which to gauge the trial which they are hearing. A trial judge, by contrast, will normally have heard many cases and may have participated in such trials as a practising lawyer, and therefore may be expected to have the capacity to attempt to assess the impact on the trial in reality of what is now unavailable. A trial judge may be expected to understand that in a trial in which all available evidence is adduced and tested, there may be a number of side-issues which may be explored with greater or lesser effect, which may give rise to unexpected

twists and turns, and which may be of benefit to the accused, if not in providing evidence that is positively exculpatory, at least raising doubts about the case. This investigation is part of the trial process.

17. Even, therefore, if the core components of a case remain – the complainant's allegation and the defendant's denial, whether contained in evidence, a statement made, or simply by maintaining that the case has not been established – a trial which is limited to such matters may be rendered unjust because it has been shorn of all the surrounding detail which might be expected in a trial held soon after the event, the investigation and testing of which is a normal part of the fair trial process.

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

19. It follows that there is a particular and distinct onus upon trial judges to address this issue separately and conscientiously. This jurisdiction, which is in addition to the power of the jury to consider the impact of lapse of time, is an important protection for fair trial rights in circumstances which can be challenging. The exercise of that jurisdiction can, and must, be reviewed on appeal. That is a further important aspect of maintaining a fair trial. However, it is in the nature of such a determination, which is to some extent dependent upon an appreciation of the manner in which the case has progressed, the demeanour of witnesses and parties, and the manner and cogency with which evidence is given, that a significant margin of appreciation must necessarily be afforded to the decision of the judge presiding at the trial. For this reason, it is important that trial judges should set out the relevant factors involved, their assessment of them, and the reasons for arriving at their conclusion, in order to permit an assessment of the matter on appeal.

Facts

20. The relevant facts may be succinctly stated, as they have been in the judgment of the Chief Justice, whose account I gratefully adopt. The complainant, who I will call A.U., made a complaint in 2004 that she had been sexually abused by her uncle, the appellant, Mr. C., in 1971/1972 when she was 11 years of age. Two incidents were detailed, the more serious of which (and, for reasons which will become clear, also the one on which

most focus has been placed in these proceedings), involved a claim that she had been raped by the appellant in his bedroom at his house in County Clare, where she was staying at the time. She gave evidence that Mr. C. had had a serious row with his then partner, M.Cy., which had resulted in a dispute between Mr. C. and his son C.C., leading to a confrontation in which C.C. had produced a shotgun. Later in this dramatic evening, it is alleged that M.Cy. took A.U. to Mr. C.'s bedroom and took her nightdress off and left her on the bed, and that the rape occurred thereafter.

21. The Director of Public Prosecutions directed charges in 2006. Mr. C. was not in Ireland, having left Clare for Donegal, then Panama, and latterly the United Kingdom. In 2008, M.Cy. died. She had not been interviewed by An Garda Síochána at that time. No finding of culpability in any delay was made, whether on the part of the Gardaí in pursuing the complaint, or in relation to Mr. C.'s changes of address. The issue, therefore, turned solely on the question of the lapse of time and prejudice to the trial. In the course of the evidence in the trial itself, A.U., C.C., and a brother of A.U. gave evidence which differed in certain respects, but all of which referred to the altercation in the house at the time the three young people were staying there. C.C. also gave evidence of having confronted his father with allegations that he had inappropriate relations with a young woman, and that he did not deny it, but rather promised to stay away from young girls and to seek help. Mr. C. did not give evidence himself, but he had made a statement to the Gardaí which was introduced in evidence, in which he denied A.U.'s allegations, suggested that M.Cy. would confirm his account, and denied that A.U. had been in the house in County Clare.

22. In the course of evidence in the *P.O'C.* application, C.C. gave further evidence which is central to this application. He stated that he had been alerted to allegations of his father's behaviour in relation to other young girls, indeed his own sister, and therefore Mr. C.'s daughter. At one point, he had gone to Holyhead to meet his two aunts (the appellant's sisters). M.Cy. came to the meeting at some point. It is clear that this occurred prior to 2004. Mr. C. gave evidence that the three women indicated he should not contact A.U. because "it was all lies".

23. Essentially, the basis of the application in this case is that, unusually in cases alleging sexual abuse occurring some long time ago, there was considerable surrounding evidence available. In particular, M.Cy. was a third party witness whose evidence was clearly central, since it was an essential part of the allegation made by A.U. that M.Cy. had been complicit in bringing her to Mr. C.'s bedroom, and, furthermore, she was a person who had given an indication that she would dispute the allegation ("all lies"). This is, as I understand it, the basis on which the Chief Justice would conclude, as set out at para. 8.25 of his judgment, that:-

> "There can be little doubt that, had M.Cy. been available to give evidence, there is at least a real 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."

24. I think, however, that a real risk is created where the case turns on an assessment of facts, but a succinct statement of facts is given at appellate level, particularly where no issue of law arises. The facts that are identified, the level of generality at which they are stated, and the manner they are presented may, in fact, be highly influential in the decision. There is no doubt that M.Cy. was someone who, if available, would have been an important potential witness. If she gave evidence, and that evidence was considered credible, then it was very likely to be influential. If she confirmed the complainant's account, she would undoubtedly strengthen the prosecution case significantly: if, however, she denied it convincingly, that would correspondingly support the appellant's account and undermine the prosecution case.

25. However, these are only two of the possible hypotheses, and into the equation must also be factored some other possibilities, including that she might not have been available, or might not have been a willing witness, or that her evidence would have been vague, non-committal and neutral, and thus unhelpful to either side, or that whatever account she gave would have been incredible, or damaged in cross-examination to the extent that it was possibly unhelpful to the side which, at least ostensibly, her evidence had seemed to favour. What is beyond argument, and the significance of which must be evaluated here, is, however, the undeniable fact of the significant role alleged to have been played by M.Cy. in the complainant A.U.'s account, and the significance of the indication of M.Cy.'s views contained in the reference to it being "all lies".

Discussion

26. I appreciate that any application of the test in *P.O'C.* is highly fact-specific and involves a cumulative assessment of a number of different factors, to which, moreover, no fixed weight can be assigned in advance. It is, however, useful to isolate the factors involved in this case and consider their relative impact.

27. I think it is right to start from the position that the events are alleged to have occurred a very long time prior to the trial, and although it was some time before C.C. could be charged and brought before a court, it is not suggested that he is to be held responsible for any part of this period. The length of time which has lapsed is itself, in my view, a significant factor in this case weighing in the appellant's favour. No one suggests, however, that that lapse of time on its own is sufficient to render the trial unjust.

28. There is also no doubt that the unusual facts of this case mean that M.Cy. was a potential witness of considerable importance. Again, however, on its own, I do not think that the absence of M.Cy., at least without culpability on the part of the prosecution, can be said to be decisive in this case. She or any other witness could have been unavailable, whether through her own decision, or possibly death, even if the trial had occurred within a very short period after the events concerned. That possibility arises in any case, and trials are not rendered unfair or unjust simply because of the absence of a witness whose evidence, although relevant, is not an essential proof. If it were otherwise, then the

absence of a single witness, or even a co-accused or accomplice, would mean that any trial was impossible. Generally speaking, the trial process should be robust enough to handle the absence of witnesses or real evidence that occurs without fault, unless and until the cumulative impact is such as to render the trial either impossible or unfair. Once again, however, the significance of the role of M.Cy. in the complainant's account, and her absence (for whatever reason), coupled with the lengthy lapse of time, are substantial factors in any consideration of whether it was just to let the case proceed.

29. It seems, however, from this analysis, that the decisive element in the assessment urged by the appellant, and accepted by the Chief Justice, is the apparent indication given by the "all lies" reference that M.Cy. was not just a very relevant witness, but might have been in a position to give evidence that would be highly favourable to the defence "which had the real possibility of surviving an attack on its credibility so as to lead to the possibility that a jury might not be satisfied beyond a reasonable doubt of the guilt of the accused."

30. I would tend to agree that, all things being equal, *if* M.Cy. had been acquainted with the detail of the complainant's allegation, and had given, for example, an individual, comprehensive, detailed and perhaps formal, account denying the specific allegation made by A.U., then, leaving to one side for the moment the issue of the admission analysed by O'Malley J., and absent compelling countervailing factors, a trial court could not be satisfied that a trial in the absence of such evidence or some compensating factor (which is it not now necessary to consider) should be permitted to proceed. It is, however, necessary to consider in some detail whether the evidence reaches that point, and crosses the line between the "lost opportunity" type of cases, or those where it can be said that a real and substantial line of defence has been removed.

31. The relevant evidence in this regard was given in the course of the *P.O'C.* application. Significantly, it emerged during evidence-in-chief, when Mr. C. was being examined by counsel for the prosecution. The evidence given was somewhat general in its terms, being apparently directed towards the question of the reasons for the lapse of time. C.C. gave evidence that he went to Holyhead and spoke to his two aunts (one of whom was the mother of the complainant) about the allegation made by his sister (the daughter of Mr. C.) that she had been sexually abused by Mr. C. M.Cy. joined the discussion in the house at some point. It is clear that the focus of the conversation was the allegation made by C.C.'s sister. It is quite clear that he did not raise the allegations made by A.U. He was not aware of those at the time, and this meeting occurred prior to 2004, when she made her complaint. He was asked if he had revealed anything that he had learned from A.U. and replied "I hadn't spoken to [A.U.] at that stage. I spoke to them about what my sister had told me." (Transcript, Day 3, p. 13, line 11). The witness was asked if the women (who were dealt with collectively throughout this passage of evidence) had given any guidance, and he responded "the guidance was not to go to [A.U.]" (Transcript, Day 3, p. 13, line 30). The following exchange occurred:-

"Q. Did they say why?

A. Well, they said it was all lies.

Q. Did they give any reason for not going forward?

Counsel for the defence: Sorry, the witness has already answered the question. Counsel for the prosecution may not like the answer but –

Counsel for the prosecution: Were they surprised at the information? Was it news to them?

A. They didn't seem to – well, really it's hard to answer for other people. They didn't seem surprised. [F.] said nothing ever happened to hers and –

Counsel for the defence: I'm not on notice of this now. This goes beyond what's in the book.

Counsel for the prosecution: Well I'm not on notice of what has just been stated either.

Counsel for the defence: At some point there has to be some attempt to give my client a fair trial."

32. It is clear that the particular answer on which such reliance has now been placed is something which both counsel had not anticipated. Counsel for the defence understandably sought to isolate it, and in the event did not himself seek to cross-examine on the point at all. Later in the sequence of questions, the witness returned to the disposition of the women:-

"Q. Was there any other reason put forward [for not bringing up the matter or seeking further information from A.U.] that you can remember, please?

A. It was difficult to talk because [F.] said she didn't want her husband to know anything, his name is [G.], that he would go mad, and [B.] was – I don't know if she was married or living at the time with – she didn't want her partner to know anything and [M.Cy.] was also, I believe, married to a man and she didn't want him involved in any of this."

33. This evidence is, on any view, a significant distance from a detailed formal account rejecting a specific allegation which has been put in detail to the witness. It is apparent that the reference to "all lies" was in reference to an allegation which did not involve either M.Cy. or the complainant at all. It related to the allegation made by the appellant's daughter, and the sister of C.C.. It was suggested that C.C. should not go to A.U., or perhaps do anything else, because the allegation being made by C.C.'s sister was not true. It is perhaps possible to infer from this that there was an implication that there was a concern that A.U. would support her cousin's allegation. If so, and this is also speculative, then it might be thought that if A.U. supported allegations which were "all lies", that would be damaging to her credibility. It might also imply that if A.U.'s

allegations were put to M.Cy., including the suggestion of her involvement in the incident, that she might dismiss that too as "all lies". It seems difficult to suggest that it meant that the three women in general (and M.Cy. in particular) were somehow aware of what A.U. had not yet said concerning Mr. C. and M.Cy.'s involvement, and considered that too to be a lie. However it is viewed, it is, self-evidently, very far from a clear-cut and formal statement challenging a specific account.

34. However, even this evidence does not stand alone. C.C.'s account included an explanation of the attitude of the women to the matter, which puts the reference to "lies" in a somewhat different light. This was relevant to the weight which this, or any other court, should accord to the suggestion that M.Cy. would give evidence highly favourable to Mr. C. Furthermore, the court of trial had a much greater opportunity to assess the family dynamic than is available to any appellate court. Additionally, as counsel for the prosecution pointed out, the fact was that the specific issue raised at the meeting in Holyhead, that is, C.C.'s sister's allegation of sexual abuse by her father, resulted in a prosecution and conviction. It followed, necessarily, that what was said in a general way at the meeting in Holyhead to be "lies" had been found by a jury to be true beyond any reasonable doubt. This was something which the court was entitled to take into account in considering the weight it should give to the suggestion that the reference at the meeting in Holyhead to C.C.'s sister making allegations which were "all lies" might suggest that M.Cy. would give evidence highly favourable to the defence in respect of allegations made by A.U. that had not been aired at the time of the Holyhead meeting.

35. It was also relevant that the circumstances in this case meant that the absence of M.Cy. did not mean that the case was reduced to one of simple allegation and bare denial. The detail of the allegation and the unusual features of the case meant that there were a number of aspects of the case which could be challenged and tested. While Mr. C. did not give evidence, he did make a statement to the Gardaí, which was relied on in part in this respect, since it contained the statement that Mr. C. was confident that M.Cy. would support his version of events. That statement, however, also denied that A.U. had ever stayed in the house in County Clare. In that regard, there were three witnesses to the contrary: the complainant herself, her brother, and C.C. If that evidence was undermined, then it would be a significant blow to the credibility of A.U.'s account of the alleged abuse. The evidence given by the witnesses in this respect was, however, challenged only in a formal way. Furthermore, there was the significant evidence of the tacit admission to C.C. This evidence, if not challenged and undermined, was strong evidence supporting the prosecution case, since innocent recipients of allegations of serious sexual abuse, particularly against their young female relatives, do not normally receive them in silence and promise to reform. It is necessary to set out this evidence. C.C. was asked in evidence-in-chief (Transcript, Day 2, p. 48, line 14 to p. 49, line 9) whether he had an intention to talk to his father about something:-

Q. And when you went there, did you have an intention or a purpose to talk to [Mr. C.] about something?

A. Yes.

Q. And was it a result of what you'd heard from [A.U.]?

A. Yes.

Q. And did you tell him anything of what she said to you?

A. I did, yes.

Q. And what was his reaction to that?

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

Q. And in talking about what – her own fault, did you tell him what it was that he was supposed to have done with [A.U.]?

A. Yes. There was a – she had – she had said he had been sexually abusive towards her.

Q. And is that what you told him?

A. Yes.

Q. And did you have any further discussion after that as to what should be done about that?

A. Yes.

Q. What – what did – what was said or what happened?

A. Well, on – there was a lot said. But I suggested that he should – because I had children at the time, I suggested he should stay clear, he told me that that was in the past, I made a suggestion that he should stay clear of children and that his wife at the time should know, you know, that he needs to be careful.

Q. And what did he say to that suggestion?

A. And he said there was no problem with that and I suggested maybe he get some help or something, and he agreed to that. He met me at some point later when he had a letter of appointment or something to see somebody in [name of town], some psychologist or…

Q. Yes. Thank you, Mr. [C.C.], would you answer my friend's questions?

36. In this context, however, this allegation also provided a separate issue upon which the prosecution case could be tested, and if possible undermined. It was suggested to C.C. that he had a grudge against his father, and his recall and reliability were challenged

robustly. In regard to the specific evidence, however, the cross-examination in this regard was essentially formal. It was put to C.C. (Transcript, Day 2, p. 67, lines 2 to 21) that his father disputed this account, and little more:-

A. [...] And all I had at that time then was a worry that this might have happened, when I approached my father and he didn't deny this to me on – then I got worried and –

Q. And I appreciate that has been your evidence and I'm putting it to you that it's not the truth, there was no such conversation with your father.

A. That's – that's your job, sorry.

Q. Ah well, with the greatest of respect now Mr. [C.C.], it's not as simple as that?

A. Sorry?

Q. I have to – I have to indicate to you, it's a legal requirement, I have to indicate to you what aspects of your evidence are disputed?

A. I'm aware of that.

Q. You understand that?

A. Yes, course.

Q. It's not fair to you if I simply sit here and allow you give your evidence and then say to the jury, well you shouldn't believe Mr. [C.C.]?

A. Oh I'm aware of that, I'm not asking anyone to believe me.

Q. Right, all right. It's not simply a matter of me doing my job, Mr. [C.C.]?

A. What I meant is it's your job to bring the defences.

Q. Thank you, Mr. [C.C.]?

A. Thank you.

37. Counsel for the defence, it should be said, conducted of a difficult case with great skill in difficult circumstances. Again, however, this was an issue raised in the case which allowed for the possibility of dispute, challenge and testing, if that was possible. But it also went to the issue that the trial judge had to decide on the *P.O'C.* application, since it was part of the dynamic of this case. If, for example, this evidence had been strongly challenged, and the account or presentation of the witness seriously shaken, that would be something that would weigh in the balance on any consideration by the trial judge as to whether it was just to permit the case to proceed. I fully agree with the analysis of this aspect of the case contained in the judgment of O'Malley J.

38. In my view, this case can usefully be compared with *S.B.* and the judgment of Hardiman J. therein (Kearns and Macken JJ. concurring), which can be taken as perhaps the high point of the jurisdiction in which the absence of evidence and witnesses was found to justify the prohibition of a trial and was relied on by the defence at the trial in this case, and is, of course, the source of the "lost opportunity vs real possibility of a loss of an obviously useful line of defence" distinction. In *S.B.*, an allegation was made by a patient in a psychiatric hospital that on a number of occasions he had been woken from his bed, brought to a room by the accused, and sexually abused there. He further alleged that he had made this complaint to two different nurses, and that one of them had told him that it had been passed on to a named doctor. It is suggested that, after making his complaint, the complainant was given an injection and put to sleep. He later left the hospital and had forgotten all about the incidents until many years later when he visited the hospital "which brought it all back". The two nurses and doctor were no longer available. Furthermore, there was evidence that the hospital had employment records, which had however been routinely destroyed by the time of the trial. Such records would have been capable of showing if the defendant was employed on night duty on at least four occasions when the complainant was a patient in the hospital. There was, furthermore, evidence of a period of sick leave taken by the accused during a relevant period which appeared wholly to exclude his presence in respect of one incident, and partially or wholly in respect of another. The Supreme Court concluded that the accused had "lost the real possibility of an obviously useful line of defence" and upheld the decision of the High Court to prohibit the trial.

39. It seems clear that the facts in S.B. presented a much stronger case that any trial would be unfair than arises here. The account, not merely of abuse by an individual nurse in a hospital, but also of contemporaneous complaints without any follow-up and the apparently suspicious administration of an injection, is more than a little unusual, and to that extent may be said to at least raise questions as to its credibility. Moreover, it presented obvious points at which it could be challenged. It was significant that, in one respect in which there was independent evidence, the account given by the complainant was inconsistent with it. Moreover, among the evidence which was now unavailable was evidence in the shape of attendance records which could have dealt a decisive, indeed fatal, blow to the credibility of the complainant's account, and which would not be in any way dependent on the assessment of individual witnesses. It simply cannot be said that the indication, given by a very general account of a collective conversation, that certain allegations (which did not include the allegations which are the subject of these proceedings) were "all lies", comes close to this type of situation. It has not been suggested, at least directly, that the account given by the complainant in her oral evidence had been damaged in any way. Reference is made to differing accounts being given of the altercation in the house resulting in the production of a shotgun.

40. Significantly, however, all three accounts were inconsistent with the appellant's statement that the complainant never stayed in the house. It is quintessentially a matter for the judge and jury at a trial, exercising their respective functions, to come to a conclusion as to what, if anything, was to be deduced from this. But I do not understand that this court

now suggests that this was in some way damaging to the complainant's credibility, or indeed, if it did so suggest, that it could prefer its own assessment of this issue to that of the trial judge. This case is therefore markedly less compelling than the situation which arose in *S.B*.

41. Taken in the round, therefore, I am, for my part, unable to accept that the evidence in this regard, taken together with the admissions evidence as analysed by O'Malley J., should be characterised as giving rise to a real possibility that M.Cy. might have been in a position to give evidence "highly favourable" to the defence, which would, moreover, have survived any challenge to its credibility, with the result that the defence had lost not just an opportunity, but the real possibility of an obviously useful line of defence. That is not only speculative, but is a speculation which, at least in my view, is remote. I would not, therefore, for my part, disturb the finding of the Central Criminal Court and the Court of Appeal that it was not unjust to proceed with the trial.

42. In this regard, I do not understand there to be a difference of principle between the approach taken by the Chief Justice and that taken by the majority: the Chief Justice would, as I understand it, give somewhat more weight to the absence of M.Cy. and to the possibility that the evidence she might give would be helpful to the defence, and less weight to the admissions than the majority would. This difference of degree is perhaps unavoidable where it is a matter for the judgment of individual judges. However, my respectful disagreement with the judgment of the Chief Justice is not merely that I am not persuaded by the assessment of evidence, but rather that the approach seems to make that assessment de novo, and, in doing so, does not sufficiently respect the separate functions of the trial court and the Court of Appeal, both of which came to a different conclusion, or indeed the underlying logic that has led the courts to prefer that challenges of this nature should best be addressed in the real life context of a trial with oral evidence, rather than through the prism of judicial review.

43. It is apparent from the account given in the judgment of the Chief Justice and set out at the outset of my judgment that the jurisdiction identified by the court in *P.O'C*. places a heavy obligation on trial judges. It follows, however, that some margin of appreciation must be afforded to a trial court's assessment, and, in this context, to the review by the Court of Appeal, whose function it is to hear appeals from all trials on indictment, and which therefore has unrivalled experience in comparing any given trial with what is normally encountered. The Chief Justice suggests that this court is free to reconsider this matter afresh because he considers an error of principle was made by the trial court. Both courts addressed the test in *S.H* and, while one might have reservations about the manner in which the decisions were expressed, or some of the matters raised, it is necessary to keep in mind that the ruling of the trial court occurred in the middle of the trial, and that in both the trial court and the Court of Appeal, there were many other issues raised for consideration. There is no doubt, however, that both courts addressed the fundamental question posed in *S.H*. and adopted in subsequent decisions: was it just to permit the trial to proceed? The conclusion of the trial judge that this was a lost opportunity case must, I think, be understood as implicitly rejecting the contention that it

was a real possibility of an obviously useful line of defence in the case. I am not persuaded that there was an error of principle in failing to say so expressly. The formulation of the Court of Appeal, both in how it characterised the absence of M.Cy., and its subsequent analysis is, I accept, unsatisfactory, but I do not think this court should lose sight of the fact that both courts understood the basic test to be applied, and had considerable experience of the trial and appellate process to permit them to do so. But in any event, I do not think an appellate court should approach its task as if it were in the same position as the trial court, in particular. I would approach this case on the basis that both courts were aware of the fundamental issue, and, moreover, that a court reviewing matters from a transcript should be conscious of the limitations of that exercise.

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

45. These considerations are present to some extent, at least when the matter is sought to be reviewed on appeal by reference to the transcripts. It is the case that the evidence has been cross-examined, and to that extent more concrete information is available, but the fact remains that an appellate court is viewing the case through the prism of paper, in this case a transcript, just as much as the judicial review court viewed it in advance through an affidavit exhibiting a book of evidence. It is not necessary to indulge in any undue enthusiasm for the advantages of the eagle-eyed judge of trial, but it remains the case that, as has been observed, appellate courts should not interfere with findings of fact by trial judges unless compelled to do so, not least because, in making such decisions, the trial judge will have regard to "the whole sea of evidence presented to him, whereas an appellate court will only be island hopping", and "the atmosphere of a court room cannot in any event be recreated by reference to documents, including transcripts of evidence": see the judgment of Lewison L.J. in *ACLBDD Holdings Ltd. v. Staechelin* [2019] EWCA Civ 817, [2019] 3 All E.R. 429. These observations apply with particular force in the context of a test which involves a consideration of the overall justice of a trial, and, in particular, the assessment of the impact on the trial of the absence of a witness. The logic of the decisions in in *P.O'C.* and *S.H.*– that such assessment is best made at the trial – has some continuing validity here, and an appellate court, when reviewing such a decision, should have good reason to disturb the finding of the trial court, having regard to the limitations of the material available to the appellate court in respect of the adjudication which the trial court was obliged to make.

46. It is, I think, apparent that there is a consensus in this court as to how a court of trial should approach an application such as this. The difference between us in this case involves the assessment of the facts in this particular and unusual case. Insomuch as this case can be said to raise any distinct issue of law, rather than the application of general

principles to particular, if unusual, facts, then I would suggest that the following principles might be identified:-

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

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

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

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

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

47. Applying this approach, I would not interfere with the determination of the trial court in this case, as upheld in the Court of Appeal. I agree with the judgments of Charleton and O'Malley JJ. and the approach suggested by the Chief Justice at paragraphs 9.2 -9.4 of his judgment. I would accordingly dismiss the appeal.