Neutral Citation Number : [2009] IEHC 81

THE HIGH COURT

JUDICIAL REVIEW

2007 34 JR

BETWEEN

A. P.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS AND

THE JUDGES OF THE CIRCUIT COURT

RESPONDENTS

JUDGMENT delivered by Mr. Justice McCarthy on the 2nd day of February, 2009

1. On the 22nd January, 2007 my colleague Peart J. afforded the applicant leave to apply for prohibition of, and an injunction against the continuance of, certain proceedings pending before Waterford Circuit Court entitled "Between Director of Public Prosecutions v. A. P.".

2. By an indictment filed in those proceedings the applicant is charged with some fourteen offences of indecent assault on one L.A.L., between divers dates (particulars whereof are apparently given in each charge on the indictment – or so I assume). It appears that L.A.L. is the half sister of the applicant and all alleged offences are alleged to have occurred at the then family home in Waterford. The Book of Evidence is exhibited in the grounding affidavit of David Burke. There is a "Statement Required to Ground Application for Judicial Review" dated the 17th January, 2001, a notice of motion issued following the grant of leave and a "Statement of Opposition on behalf of the First Named Respondent" dated the 17th April, 2007. Properly, there is no appearance by the judges of the Circuit Court against whom relief is also sought. There is also an affidavit in reply to the initial affidavit of David Burke, by Francis W. Hutchinson, solicitor for the Director of Public Prosecutions in the said proceedings, dated the 16th April, 2007, and, in turn an affidavit in reply thereto dated the 11th June, 2007, by Mr. Burke.

3. Peart J. gave leave as aforesaid on all of the grounds pleaded in the Statement of Grounds and the substantive parts thereof in terms of the matter now in dispute plead that at his first trial at Waterford Circuit Court on the 17th January, 2006, application was made by counsel on the applicant's behalf for a discharge of the jury (which was opposed) in consequence of the fact that in her evidence in chief L.A.L. "mentioned certain matters which were outside the book of evidence and prejudicial to the applicant", the expressed ground of the discharge being that the complainant had "given inadmissible evidence which was prejudicial to the applicant and could not be corrected by way of a direction by the trial judge". It is further pleaded that when a second trial of the applicant took place on the 4th April, 2006, during cross examination of L.A.L., she "mentioned certain matters" whereby counsel for the applicant successfully applied to the trial judge for a discharge of the jury "in relation to the said mentioned matters" and that after hearing argument the learned trial judge acceded to the application. It is also pleaded that when the matter came before such court for a third trial on the 23rd May, 2006, and on the 24th May, thereof, L.A.L. "mentioned certain matters" whereupon defence counsel successfully applied for a discharge of the jury, notwithstanding the opposition of the prosecutor and on the expressed grounds (as set out in the affidavit of Mr. Burke) that L.A.L. "had given inadmissible evidence which was prejudicial to the applicant in the said trial and could not be corrected by direction from the trial judge".

4. The matter fourthly came before that court for trial on the 19th December, 2006, but was adjourned in consequence of the fact that L.A.L. was apparently unable to give evidence, as set out in a medical report.

5. Mr. Hutchinson amplifies the information afforded by Mr. Burke in his first affidavit as to the circumstances of the discharges and in his second affidavit Mr. Burke does not controvert what Mr. Hutchinson so adds. The position appears to be that on the first trial evidence of ejaculation on the occasion of oral penile penetration was given when the book contained no reference to such ejaculation; on both the first and second trial's evidence as to rape and on the last of the three to so called "assaults" distinguishable from those with sexual connotations was given. Want of reference in the book to particular evidence has, of course, no bearing on admissibility but may, or may not, cause prejudice in some other respect (i.e. because a party has been taken by surprise). In any event at the time of these alleged offences no offences of s. 4 rape or aggravated sexual assault existed: all offences, involving sexual assault of the kind alleged were prosecuted as indecent assaults, and, in the case of rapes a rape count might or might not be also laid (although it usually was). The same position arises now in respect of prosecutions of cases of this type or a case of the age of the present one.

6. Mr. Hutchinson says that the third discharge occurred "because the complainant gave evidence of physical assaults", the trial judge having ruled that such evidence was "prejudicial because it was outside the scope of the charges preferred against the applicant". He points out, (as is in any event, evident form a perusal of the book) that the charges preferred included an element of assault; obviously every indecent assault is *per se* an *assault simpliciter*, but I take it that what he means is that there was evidence given of some form of violence attendant upon, but supposedly separate from, the sexual elements of the assault.

7. I would not have discharged the jury on any of the occasions in question.

8. The complaint in respect of reference at the first trial to the fact of rape and ejaculation, as asserted in L.A.L.'s statement in the book was, in my view, admissible: I do not see (and, this is a general point applying to the entirety of the criminal proceedings) any unlawfulness in the Director choosing to prosecute in respect of an offence which is less serious than that which might have been attracted by a given set of alleged facts. Thus, one would see no difficulty about, say, the prosecution of a person for careless driving when the facts might disclose dangerous driving or theft *simpliciter* when robbery might be disclosed. The proposition must be that if an indecent assault is alleged (and or course every rape is an indecent assault) if some more serious offence is disclosed on the book or mention is made of matters which show, say, rape the evidence of the event must be limited in some form of strait jacket and indeed, that the jury must effectively be mislead, by the exclusion of intrinsic elements of the wrong doing asserted. In my view, this is not the law and not merely are the attendant facts disclosing, as it happens, more serious offences than those charged *per se*, relevant and admissible, they are matters which ought not to be excluded in discretion as being more prejudicial than probative since that is the opposite of the case and the principle that a jury, in order to understand the case, must be given evidence of all relevant attendant circumstances, would otherwise be violated. Indecent assault is of course, merely an aggravated assault and rape an aggravated form of the former.

9. In respect of sexual assault occurring after the entry into force of the Criminal Law (Rape) (Amendment) Act 1990, of course, aggravated sexual assault, penile, oral penetration or digital, vaginal penetration (i.e. s. 4 rape) might be disclosed (as well as rape). Could anyone suggest that any of these would not be prosecuted as sexual assaults or because they were disclosed in the book of evidence in relation thereto was inadmissible?

10. With respect to the discharge which occurred in April, apart from the fact that the difficulty occurred during cross examination, the complainant *inter alia* referred to a certain letter which was written by her, apparently referring to the matters in complaint and seeking compensation as she stated that the complainant put his penis in her mouth and ejaculated therein when she was a small child; obviously I can make no comment upon the issue as to whether or not the answer followed rationally from a question asked by counsel for the defence or whether the matters which emerged, were matters of which counsel would have been aware or, indeed, whether they were matters *per se*, admissible. It must be rare, of course, unless counsel has no notice of the relevant evidence that a jury is discharged on the basis of a question asked in cross examination of a lay witness. In any event, there is ample reference in the Book of Evidence in L.A.L.'s statement to the effect that the applicant inserted his penis into her mouth and in those circumstances the only evidence given by her of which the applicant might not have had notice was of the ejaculation. Thus, the potential for a discharge of the jury arose on that ground and also due to the mention again, though what significant difference the former could have made, or how the applicant might have been prejudiced, is hard to see. In a case of this nature, grave risk must always exist (and a risk which, in the nature of the case, was unavoidable from the point of view of an applicant) that something untoward might be said and the incident must be regarded as a run of the mill hazard in a case of this kind, and certainly one which could not have amounted to a "grave reason" which is the only circumstance in which a jury should be discharged. The same observations in respect of rape as set out above, of course, apply.

11. As to the third discharge there is no doubt, but that the book of evidence fully and amply sets out the circumstances of each of the alleged assaults, involving, as they did, the application of significant acts of violence. It would obviously be impossible for a jury to obtain any true picture of the nature of the indecent assaults divorced from the references to elements of violence, therein, when such violence was an intrinsic part (if, of course, it occurred) of the offences charged. Otherwise the proposition in law would have to be that when an unlawful touching with circumstances of indecency (i.e. an indecent assault) occurred, evidence would have to be given shorn of any reference to violence attendant thereupon (e.g. the application of force such that the touching with the elements of indecency was made possible). This is wrong in law.

12. The position, accordingly, in my view, is that a fourth trial is proposed by the DPP where none of the previous trials proceeded to completion, but were aborted on grounds which I do not believe were well founded and at the instance of counsel for the accused: when it was submitted to the trial judge by senior counsel for the applicant that the jury should be discharged on each of the occasions in question, his accession to such applications, no doubt made with considerable fluency, imports no criticism of him, of course, inasmuch as a judge will necessarily rely on counsel.

13. It seems to me that Mr. Burke of course, was merely seeking to do his duty and is completely wrong when he says in his affidavit of the 11th June, 2007, at para. 6, that the question of his clients guilt or innocence will "most probably fall to be determined according to who the jury believes to be the most credible or prefers in terms of the delivery of testimony". This is to omit, firstly, any reference to the admissions which the accused allegedly made, as to extensive and repeated indecent assaults over a lengthy period. *Prima facie*, this is corroborative evidence and, indeed, in principle, a person could be convicted on his own admissions without more. Secondly, the evidence of the reaction of the applicant when confronted by P.M. about the alleged indecent assaults and that of C.D. about alleged assaults (without circumstances of indecency) supports the evidence of L.A.L., but may or may not be capable of amounting to corroboration. I ignore these aspects of the case since this is very much in the discretion of the trial judge and it is not possible for me to express any decided view for the purpose of this application.

14. Thirdly, Mr. Burke's assertion ignores the statement of evidence of J.M.: to say that he was a literal eye witness may be theoretically incorrect, but I would have thought that his evidence coercively corroborates that of the complainant, if accepted, when he says that on the accused arriving home in a drunken state, he "would" say to L.A.L. "come over and dress the bed" and then minutes after that (he would) hear L.A.L. saying "you're hurting me". He refers to the age at which he first had a recollection of such incidents. He refers to the fact that the applicant allegedly said "bite on this, it won't hurt so much and he'd have a piece of newspaper to stick into her mouth" (something which is not said by the complainant, but, is admissible nonetheless), that the wrongful acts alleged occurred "nearly every time the man came home, that the accused "would come in and say to (the complainant) to come into his room and dress the bed", that the complainant would return "half an hour later like an ice cube, cold and shaking"; he further states that "she'd say to me that he was at her" – *prima facie* evidence of consistency of her version of events as a complaint made at the first opportunity thereafter. On another occasion he says that he found that the accused was "crawling along the ground" in the bedroom he shared with the complainant and said "I was coming in to get L.A. to come in and dress the bed". He asserts that at lunchtime, when he and the complainant returned home from school, the accused "would send me down to the shop for sweets so that he would be left alone with L.A.".

15. To put the matter shortly, accordingly, this is a case with a very considerable body of evidence *prima facie* placing the prosecution in a position of great strength.

16. One cannot, of course, gainsay the fact that there has been very significant delay between the date of the alleged offences and the time when the accused was first interviewed in relation to the allegations on the 14th April, 2003, although by letter of the 29th November, 2002, the complainant demanded €5,000, effectively on the basis that the applicant would be prosecuted if he did not pay. The applicant was charged on the 14th April, 2004, there is no date on the book of evidence, save a reference to 2004. In any event, thereafter the matter appears to have proceeded without undue delay. The applicants knowledge, of course, of the allegations can be dated to a time described by P.M. as "three years ago" when she says that, in her company, the complainant confronted the applicant: I do not know when her statement was made, but it seems proper to infer that it was during 2004, at the latest, since the book was served at least before the end of that year. This would seem to give rise, again if accepted, to the inference that the applicant knew from in or about 2001 of the fact of allegations. For what it is worth, also, T.M. says in his statement that he confronted the applicant in terms of the allegations in or about 1978 or 1979. I cannot see accordingly, that there is any element of this case which takes it out of the ordinary, in terms of what one might term "old cases" giving rise to any specific prejudice or, to put the matter in another way, an unavoidable risk of an unfair trial, due to the antiquity of the events alleged. As we know this is a far cry from the cases of bare assertion and bare denial where the cross examiner, for example, is placed at the greatest disadvantages.

17. Reliance is placed, also, upon the fact that the applicant has suffered "very significant stress, embarrassment, anxiety and uncertainty" (as referred to in Mr. Burke's second affidavit) as a result of the "ongoing nature and history of the criminal process"; it seems to me, that this is an unavoidable consequence for accused persons, especially in cases of allegations of sexual offences; the only factor which might take such feelings out the ordinary, so to speak, would be the fact that there were three trials in the space of a number of months: I accept that the trial process itself may be the most stressful and anxious time for an accused person and that, undoubtedly, adverse consequences for him, of that kind, are worsened by a multiplicity of trials.

18. Mr. Burke says that "all of the non garda witnesses" have addresses in Co. Waterford and that the trial has on each occasion proceeded there. I cannot see the relevance of this proposition having regard to the fact that a jury will act in accordance with its oath, the panel having been advised prior to empanelment of a given jury, that if any person is acquainted with any prospective witness in any case or information pertaining thereto, he or she should disqualify himself or herself (it being the practice for this purpose for counsel for the prosecution to briefly indicate the nature of the case and the identity of the witnesses in open court for the benefit of the panel). In any event if there was a well founded fear that there was a reasonable possibility of an unfair trial there is no doubt but that the trial judge would transfer it to another part of the same circuit or to the Dublin circuit. The applicant resides in Dungarvan and does not accordingly face a day to day chance of unavoidable contact with the complainant or any of the other non garda witnesses.

19. Two further matters are asserted to be relevant by Mr. Burke, firstly, that especially having regard to fact that the case proceeded into cross examination on the occasion of the second trial, where issues pertaining to consistency or motivation were raised, the potential for what is described as "adjustment of evidence" in a further trial exists. The latter risk arises, also, or so I infer it is suggested, by reason of not merely the trial where cross examination took place but because of the number of trials, taken together and, in any event, by reason of the multiplicity of trials, the complainant would be afforded a "significant advantage in terms of her presentation as a witness at any future trial". Exception is also taken, at least by implication, in terms of potential prejudice at a future trial to the fact that the complainant was, on one occasion, apparently accompanied in court by a person described as a counsellor. I cannot see what possible complaint could be made about the presence of such a person. A complainant in the case of a sexual offence, if the allegations are true, will be a person upon whom the trial process will place enormous strain, in the ordinary course of events, or so I think it is proper to infer from one's knowledge of human nature, and in any event a complainant may well have suffered psychologically or otherwise because of the alleged offence. The law does not deprive witnesses of the support of persons of this type, no more than it would deprive someone of the benefit of the presence, say, of a close relative, for moral support. Of course, theoretically, any spectator might coach or influence a witness in respect of his or her testimony. Such a thing is an inevitable hazard of the trial process in respect of controversial matters. The process of testing witnesses evidence by cross examination, is, in the ordinary course, the best, perhaps, which might be hoped for to avoid adjustment of evidence or otherwise. There is literally, I would have thought, nothing one can do about it unless there is evidence of an abuse of process – and there is no such evidence here.

20. In the light of the facts set out above, and the conclusions I have reached as to the circumstances of the case (including the issue of whether or not discharges should have taken place on three occasions) I turn now to consideration of the legal principles which are applicable. A number of authorities have been opened to me, but I think that both parties are agreed that the crucial decision is *D.S. v. D.P.P.* 2009, 1 I.L.R.M. in which judgments were delivered by Denham and Kearns JJ. However, before proceeding to address that decision in detail I think it appropriate to refer to the *Attorney General v. Kelly (No. 2)* [1938] I.R. 109. In that case the accused was convicted of murder, the conviction was quashed by the Court of Criminal Appeal and a new trial ordered. On the latter occasion the jury was discharged because they disagreed. On a retrial it was sought to quash the indictment on the basis that there was no jurisdiction to further prosecute the accused because the retrial ordered had already taken place, even though it had resulted in a disagreement. The court addressed the concept of a "retrial" in the context of the provisions of s. 5(1)(b) of the Courts of Justice Act 1928, (which has since been amended), which conferred jurisdiction on the Court of Criminal Appeal to order one. The court held that it was satisfied that where the provision spoke of a "retrial":-

> "It contemplates a proceeding in which the guilt or innocence of the accused is determined. There is no such determination when a jury is unable to agree on a verdict. The word "retrial" in its legal acceptation in such a context means, in the opinion of this Court, a complete and finished trial and, 'when there is no verdict there has been in law no trial'. It is established beyond question that when a jury in a criminal trial have failed to agree on a verdict and have been properly discharged, the accused may be put on trial again, and as often as may be necessary, until the question of his guilt or innocence is determined by a verdict. We are entitled to assume that the legislature that enacted the Courts of Justice Act 1928, was aware of that principle and that it contemplated that s. 5(1)(b) of that Act would be construed in accordance with it."

21. It seems to me that this definition is strictly pertinent in the context of the Act, but one would have thought that without a concluded trial, as a matter of common law, the accused may be "put on trial again, and as often as may be necessary, until the question of his guilt or innocence is determined by a verdict", i.e. notwithstanding discharges, whether on the grounds of disagreement (or so I infer) or otherwise. It is, of course, subject to the jurisdiction of the courts, as exercised in *D.S. v. D.P.P.* to restrain a trial. I mention it for the purpose of pointing out that at common law

repeated trials were lawful and as excluding a legal bar to a third, or, indeed, a subsequent trial in the event of jury disagreements giving rise to discharges and, I do not believe that there is any rule of practice in this jurisdiction inhibiting more than two trials, after discharges otherwise than on disagreements. As will be seen from his decision, Kearns J. made no finding as to whether or not, even on disagreements, such a rule exists.

22. With respect to *D.S.* the first thing to remember, accordingly, is that it was an attempt, after two disagreements, to inhibit a third trial. Whether or not there is any rule of law or practice inhibiting such a third trial it would undoubtedly be the position, in most cases, and as pointed out by Kearns J. that:-

> "In the ordinary course two trials which end in jury disagreement should be seen as an adequate discharge of the public's interest in the prosecution of crime unless there are unusual factual circumstances which suggest otherwise."

This, of course, is because if two juries disagree successively it seems proper to infer that the evidence will be so intrinsically weak, even if, *prima facie*, it is possible to make out a case against an accused, that there is as a minimum a significant chance, if not a likelihood, that a jury would acquit. In those circumstances it might seem meet for the DPP not to pursue the matter further, whatever the notional position might be, and that there is no reasonable prospect of a conviction. This may not, of course, always be the case; as pointed out by Kearns J., and by reference to the judgment of the English Court of Appeal of Kennedy L.J. in *R. v. Henworth* [2001] 2 Cr. App. R. 4, there may be special or unusual circumstances where this might not be the case. It seems clear, however, from both Supreme Court judgments that two disagreements by no means, *per se*, gives rise to a basis for inhibiting further prosecution, and that each case must be decided according to its own circumstances. In particular, Kearns J. took the view that he did not think:-

> "There should be an oversimplified 'one size fits all' approach to the question of how many criminal trials for the same offence should be permitted. An oversimplified or stark black and white approach to the issue would, in my view, be a mistake. As Kennedy L.J. pointed out in *Henworth*, jury disagreement may occur in unusual circumstances and for unusual reasons which might suggest that a further trial should take place. Nevertheless I think that in the ordinary course two trials which end in jury disagreement should be seen as an adequate discharge of the public's interest in the prosecution of crime, unless there are unusual factual circumstances which suggest otherwise."

23. We are not here concerned with a case of successive disagreements by a jury, giving rise to discharges after the jury retired to consider its verdict but quite a different position to that which obtained in *D.S.*, or the English decision of significance *(Henworth).* I do not accordingly read *D.S.* as being authority for any general proposition that more than two trials cannot take place in given circumstances where discharge is not as a result of a disagreement. The present situation is not so divorced from the circumstances of *D.S.*, however, as to exclude it as a helpful authority as to the principles which should now be applied.

24. In the first instance, I have referred to the view expressed by Kearns J. that two trials ending in disagreement should be an "adequate discharge of the public's interest in the prosecution of crime…" and his approbation of what he "hoped correctly" was the practice that a third trial would not take place after a jury disagreement similar to that which arose in England and Wales. Such a practice, however, even if it exists in this jurisdiction, obviously has no application to the present circumstances.

25. What is, however, in my view, of particular assistance in the present context is the conclusion by Kearns J. that:-

> "…As is apparent from both the authorities in the United States and in Britain, there must come a time in the criminal process where repeated trials of a citizen may come to be seen as oppressive and an abuse of discretion on the part of the Director of Public Prosecutions. It may become an unfair procedure in itself to retry; put another way, a breaking point may be reached where no further trial should be permitted if the fairness and due process requirements of Article 38.1 of the Constitution and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms are to be properly observed."

The authorities to which he referred, and I do not believe that I need deal with them elaborately, all pertain to retrials after jury disagreements, and whether from the United States or England and Wales.

26. In my view, accordingly, even in the case of trials which have been repeatedly aborted before a jury had retired to consider its verdict and, accordingly otherwise then on the basis of a disagreement, it might well be that a further trial ought not to be permitted so that the fairness and due process requirements of Article 38.1 and Article 6 of the Constitution and Convention respectively were observed. It seems to me, however, that as pointed out by both Kearns and Denham JJ. such an inhibition would arise only on a case by case basis, having regard to its particular circumstances and, similarly, the idea that "one size fits all" must be rejected.

27. The factors which Kearns J. considers (and I do not quote them precisely but merely seek to summarise them) are as follows:-

> 1. The seriousness of the offence or offences under consideration.
>
> 2. The extent, if any, to which the applicant may have himself contributed to any mishap which led to the requirements for a further trial.
>
> 3. Any period of delay which is plainly excessive and beyond the norm for cases of the particular type and the reasons for such delay (including any likely delay in mounting a retrial).
>
> 4. The extent to which the case to be met on the further trial sought to be stopped has altered from that arising in previous cases.

28. In applying these factors to the facts in *D.S.* it appears that the sexual offences there referred to were at the "less serious end of the spectrum": there were, in fact, two only remaining counts of indecent assault in circumstances where the accused had been acquitted on one of three tried together. Without setting out the factors exhaustively I place this case in a significantly more serious category because of the multiplicity of charges over a very lengthy period, the nature of the relationship between the complainant and the accused, the violence associated therewith, the immediate circumstances of the alleged offences and including, as they do on the prosecution case, rape and in the complainant's own home and even if, at the end of the day, any convictions were merely for indecent assaults carrying penalties of two years, as prescribed by the Criminal Law Amendment Act 1935. One might anticipate, I think, that in the event of convictions consecutive sentences would certainly be lawful, if not appropriate. I say all this of course, knowing that they remain allegations.

29. I do not think that the accused can be said to have contributed to the discharges in the sense contemplated by Kearns J., even if the discharges occurred as a result of what I believe to be erroneous submissions advanced by counsel for the accused. There will come a point where counsel might successfully advance propositions which, because of the strength of counsel's advocacy or counsel's standing, could give rise to a discharge of a jury, even though they were not merely erroneous but "beyond the pale". I do not exclude such an event as being laid at the door of an accused. Nothing of this kind has, of course, occurred here so there is no mishap or any fault attributable to the accused, whether vicariously or otherwise, which is relevant to this decision.

30. As to the period of delay Kearns J., in addressing the facts referred to the antiquity of the case (the charges related to the period between 1994 and 1997) (and the deleterious effects in terms of defending charges, for accused persons, of such delay) as well as adverse effects upon the accused and his family, supported by medical reports (without, of course, ignoring the "huge distress" of the complainant). It is obvious that the lengthier criminal proceedings are the greater the strain and ill effects, psychologically or otherwise, upon an accused and members of his family and, as I have said above, it is undoubtedly the case that the greatest period of strain is a trial itself. There is no medical or analogous evidence of this kind in the present case.

31. Reference has been made to so called "adjustment of evidence" by Mr. Burke in his affidavit. It is quite plain that in the context of retrials following disagreements, Kearns J. took the view that there was no basis for holding that, on any retrial, the State was precluded from serving a notice of additional evidence: he felt it necessary to:-

> "Mention this point as the trial judge expressed concerns that repeated trials increased the risk of an innocent man being convicted through the "adjustment" of evidence where it was seen to have been inadequate in previous trials. I am not quite sure what he meant by this comment, which, on one view, implies that evidence might be fabricated or doctored if a retrial was to be permitted…"

I have already addressed the issue of the potential for what I might shortly term contamination of evidence by virtue of the fact that the claimant would, on a fourth trial, have had experience of examination in chief and cross examination and, further, that a counsellor was present in court on one of the trials. What is really suggested, effectively, is that the accused would be placed at a disadvantage by virtue of the fact that the complainant might have some notice of the manner in which cross examination would occur and that this is a relevant factor. I reject this proposition. There is no such thing as an entitlement, in order to obtain a fair trial, to surprise or ambush witnesses. The obligation on the prosecution to prove every element of a case does not presuppose that witnesses must come to the case "cold" and, of course, if, say, at least two trials were permitted and if, say, one had contested evidence in each which had to be dealt with on the voir dire a witness might have given evidence on as many as four occasions. Could it be suggested that a trial should be inhibited for this reason or, indeed, that this was in some sense a factor relevant to the issue of whether or not a fair trial could be obtained? I think not, the nature of the trial process in that regard may, *per se*, place an accused in this position. That does not mean that there is any diminution of his rights.

32. I turn now to the decision of Denham J. and she considered a number of matters relevant to the decision as to whether or not (as occurred) a further trial should be prohibited (and of course I summarise relevant aspects) as follows:-

> 1. The extent of the delay (including the fact that the charges related to a period between 1994 and 1997) (the accused in the instant case had been before the courts in one set of proceedings or another for six years approximately at the time of the judgment). Whilst it is plain that it was not regarded by her as a significant factor the accused had been originally charged with sexual offences with respect to two complainants and the indictment had been severed (but obviously no factor of this kind arises here).
>
> 2. The stress and anxiety of the accused and his family, acknowledging that the former is not of itself a ground for prohibiting the trial and the latter may be the unhappy consequence for innocent people of the prosecution of a loved one.
>
> 3. The situation of the complainant that each subsequent trial "becomes more oppressive".
>
> 4. That having regard to earlier trials in respect of a different complainant (being the complainant in respect of charges which were severed) there had, "taking a general view" been a fifth trial.
>
> 5. The court should exercise its discretion to prohibit a trial with caution given that the power to make a decision to prosecute has been given to the DPP and no legislation prohibits more than two trials. (It might be appropriate to say here that one is not dealing, in the present context, with an application to restrain a trial because there was a real and unavoidable risk that it would be unfair but rather that the mere fact of putting someone on trial would be a breach of his Constitutional and, perhaps, Convention rights. It seems right to say that this serves to buttress the proposition that the capacity to stay proceedings in this context must be dependent on the circumstances.)
>
> 6. That, since the court has an obligation to protect due process, it is appropriate to consider the grounds advanced by the accused, not merely individually but cumulatively, and even though no individual factor would be such as, of itself, to ground a successful application, viewed cumulatively, it might be appropriate to stay the

proceedings. This is because, as Denham J. pointed out:-

> "The ultimate decision should be proportionate, relate to the process as a whole, and to the fairness of the procedures. The court is required to exercise a supervisory role, and to take into account all the circumstance of the case which have been set out above in the judgment."

33. In the present case the relevant factors appear to me to be:-

1. That the jury was discharged on two occasions whilst the complainant was giving evidence in chief and on a third, during cross examination, but not by virtue of a jury disagreement.

2. The fact that there could be no inference, as might be derived from a jury disagreement, that there was no reasonable prospect of a conviction due to the infirmities or intrinsic weakness of the case, such that the community's right to prosecute was vindicated, or the public duty of the DPP discharged by placing the matter before a jury on only two (or even three) occasions.

3. That the decisions of the Learned Circuit Judge to discharge the jury on the three occasions in question were erroneous in law. It seems to me that if all of the circumstances of a case are to be taken into account including, for example, the fact, as occurred in *D.S.*, that a jury was discharged because of a mistake by counsel for the accused, it is proper to have regard to the grounds of the discharges. One could never, of course, in the same way, analyse the reasons for a jury disagreement and, hence, one is in a more advantageous position in the present class of case to judge the circumstances of discharge.

4. The case is of some antiquity but does not suffer from what is a common, if not the most significant, difficulty in defending it, from the point of view of the defence i.e. that one is dealing with bare assertion and bare denial. As I have said above, there is a body of evidence giving rise to a strong prosecution case.

5. There is no special factor in the case pertaining to stress, or ill health or otherwise.

6. There is no basis for alleging prospective unfairness of the trial by reason of the fact that the complainant has had an opportunity of giving evidence in the past, or because of the fact of the presence of a counsellor on one occasion or the fear of "adjustment".

7. The trauma to the complainant, which must be taken into account notwithstanding the fact that she is not at this stage to be regarded as a victim, since there has been no conviction: because of the relationship between the parties, the place where the offences allegedly occurred (her home), their repetition, their nature (the violence attendant thereon) and the necessity on three occasions to give evidence in circumstances where a jury was erroneously discharged, the stress must be extreme.

8. There is no reality in the idea that the prospect of chance meeting between the complainant (or other non garda witnesses) may take place in any widespread way: it was, obviously, a factor but, I think it is fair to say, a relatively minor factor, in consideration in *D.S.*

9. Of very great significance is the fact that on the face of the matter there is a partial confession of guilt (as the prosecution would have it).

10. The seriousness of the case as set out at para. 27 above

I think that it is important that I address the last of these propositions with an element of detail.

34. In *McFarlane v. The DPP and Ors.* (Unreported, Supreme Court, 5th March, 2008), the court was required to address the concept of systemic delay in terms of the disposition of proceedings: having elaborated the test applicable when a party seeks to restrain continuation of proceedings the court considered it relevant (especially per Kearns J.) to have regard to any alleged admissions made and in particular Kearns J. said:-

> "Where an applicant has made admissions in the course of an investigation the court should be entitled to have regard to that fact. That is not to say that the admissions may not be contested or ruled out at trial, but in the context of a quite different application on the civil side an uncontested admission is a factor which must go into the balancing exercise. This point was well made by Denham J. in *B. v. D.P.P.* [1997] 3 I.R. 140 and has been pointed out in another judgment of this Court in *S.A. v. D.P.P.* [2007] I.E.S.C. 43, where it was said that it would be "extraordinary" to prohibit a trial in circumstances where the defendant admits to behaviour of a criminal nature."

35. As indicated by Kearns J. this aspect was addressed by Hardiman J. in the context of an application for prohibition or injunction restraining continued prosecution in the context of delay in *S.A.* In that case, in the course of extensive interviews, the applicant/accused had, on the prosecutions case, made extensive admissions of guilt in respect of offences which had occurred many years before, though they did not extend to all aspects of the allegations against him; Hardiman J. put the matter thus:-

> "It appears to me that these admissions are a significant factor in the present case. Admissions, depending on their context, may vary greatly in their significance on an application like this. An unrecorded and disputed allegation may of little or no significance . . . 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."

In the present case no one could doubt the significance of the admissions, if they were made and it appears from the book of evidence that they were recorded on video tape in accordance with modern practice. Counsel informed me that their admissibility would be contested, but there does not appear on the face of the book any legal basis upon which this might be done. In this context whilst I was willing to accept counsel's assurance that on his client's instructions their contents were to be contested, no significant degree of specificity could be afforded as to the grounds. Accordingly, it

seems to me that for the purpose of this application, as in *S.A.,* it is proper for me to take them at face value, notwithstanding the proposed contest.

36. Most importantly, in my view, as to how any application for prohibition or injunction should be approached, and, as referred to by Kearns J. whether in the present case, or any other basis, Hardiman J. said:-

> "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 . . ."

37. As set out above I have taken into account the circumstances in which the discharges occurred and in particular whether or not it was appropriate on an application of this kind to go behind the decision of the learned circuit judge as I have done. It seems to me that even if one were to take the view that one should take the decisions of the learned circuit judge at face value, so to speak, and adjudicate on the basis that as a matter of comity between courts or in acknowledgment of the fact that such a discretion would not lightly be interfered with, say, by analogy with an appellate court (whereby one should not go behind it in the present case), this application should be refused. In the first instance, it would be the case that the discharges merely form part of the totality of circumstances, in an adjudication where each case will depend on its own facts and circumstances and the discretion, accordingly, is a wide one. I think that this approach would not gainsay the existence of the other factors which are, in my opinion, even if taken to the exclusion the reasons for the discharges, insufficient to warrant prohibition or injunction. One cannot build up a strong case, perhaps I should say a decisive case, clearly by marrying a series of factors which, on a free standing basis, are not meritorious. I would go further and say that even if an individual point were of substance that in itself would not be enough, when married to other factors either here or, necessarily, in any case.

38. I therefore refuse the application herein.