Neutral Citation Number: [2011] IEHC 378

THE HIGH COURT

JUDICIAL REVIEW

2010 1573 JR

BETWEEN

M. C.

APPLICANT

V.

THE DIRECTOR OF PUBLIC PROSECUTION

RESPONDENT

JUDGMENT of Mr. Justice Hedigan delivered on the 6th day of October 2011

1. The applicant resides at Our Lady's Manor Nursing Home, Dublin.

The respondent is the person charged with the direction, control and supervision of prosecutions in the State and his office is located at Chapter House, 26-30 Upper Abbey Street, Dublin.

2. The applicant seeks the following reliefs:-

> (1) An Order restraining the Respondent herein from continuing to prosecute the Applicant in respect of the 12 counts alleged in Indictment Bill No. 160/10, served on 29th day of November 2010, at present pending before the Dublin Circuit Criminal Court.
>
> (2) A declaration that the offence of buggery contrary to section 61 of the Offences Against the Person Act 1861 is not an offence known to law.
>
> (3) Such further or other relief as to this Honourable Court seems fit.
>
> (4) An order pursuant to Order 84, Rule 20, of the Rules of the Superior Courts staying the further prosecution of the Applicant herein on the charges complained of herein until the determination of these proceedings.
>
> (5) The costs of and incidental to these proceedings.

Background Facts

3.1 The applicant is accused in an indictment before the Dublin Circuit Criminal Court bearing Bill No. 160/2010 of committing twelve offences against a sole complainant, one C O'R. The offences that the applicant is alleged to have committed include four counts of indecent assault, contrary to common law, and eight counts of buggery, contrary to s. 61 of the Offences against the Person Act 1861. The Book of Evidence contains two witness statements; one of the complainant and one of the investigating Detective Garda Ken Donnelly.

3.2 The earliest charges date back to November 1967 (44 years ago), and the most recent date back to October 1969 (42 years ago). All offences are alleged to have taken place at the presbytery of Meath St. Church in Dublin. It is alleged that the applicant committed the abuse as some form of "punishment" of the complainant. The complainant was aged between 11 and 13 at the time of the alleged abuse. He claims to have been terrified of the applicant who was the local Parish Priest. It is claimed that the applicant would call to the complainant's house and demand that he accompany him to the presbytery. The complainant's brother has made a statement recalling the applicant calling to the house looking for the complainant. The alleged abuse consisted, inter alia, of the complainant being stripped naked, placed lying across the applicant's lap and being slapped by the applicant with his slipper. It is also alleged that the applicant fondled the complainant's genitals and that he gagged him and raped him while he was kneeling on a sofa.

3.3 In an interview, organised at the request of the applicant, which took place on 24th April, 2009, the applicant stated that he did not know the complainant and that the complainant did not attend the local school in School Street, save, perhaps, for a short time. When the matter was investigated by gardaí, it was discovered that the school's Register and Roll Book contained entries confirming the complainant's attendance. Entries were made during the period from 1st July, 1962, until 30th June, 1970.

3.4 The complainant specifically alleges that during the time in which he alleges being assaulted and molested by the applicant, the applicant took him out of school, got him a job with a company called TMDC, subsequently got him dismissed from that job and got him another job with a company called Ormond Printing Company. The applicant denies ever having any connection with either company. No records from TMDC or Ormond Printing Company are available at this remove of time, and none of the staff who worked at either company at the relevant time have been located. All that can be established is that these companies did exist.

3.5 The complainant claims that during the time in which he alleges being assaulted and molested by the applicant, the applicant took him to Kevin Street Garda Station where he alleges the applicant had him detained. The complainant states that a Sergeant P.J. Murphy was present on both occasions and a Sergeant 'Lugs' Brannigan was present on one of the occasions. The applicant denies ever having brought the complainant to Kevin Street Garda Station for any purpose. Sergeant Brannigan is deceased and Sergeant P.J. Murphy's whereabouts are unknown and he cannot be located. The applicant is now 78 years old and suffers from poor health he

is a permanent resident of Our Lady's Manor Nursing Home. The complainant is 55 years of age.

Applicant's Submissions
4.1 It is submitted that a delay of some 42 years has specifically prejudiced the applicant in the preparation and presentation of his defence by denying him the opportunity to challenge, by collateral means, the credibility of his accuser. In *M.U. v. DPP* [2010] IEHC 156, Mac Menamin J. identified the following principle from the jurisprudence of the Irish Superior Courts at page 8:-

> "As has been frequently pointed out a trial after a long period without corroborating or contradicting evidence is in fact a trial of the credibility of the witnesses. Thus the issue of whether there are 'islands of fact' and, or, material items of evidence, becomes the more important …"

It is submitted that the ability of the applicant to test the credibility of the complainant herein against 'islands of fact' has been irrevocably lost due to the loss of collateral evidence in relation to TMDC, the Ormond Printing Company and Sergeants Murphy and Brannigan. The applicant is specifically prejudiced and there is a consequent risk of an unfair trial. It is clear that there are limited islands of fact in this case. Two islands of facts which would have been independently verifiable are the specific allegations the complainant makes that (a) the applicant got him a job from which he subsequently got him dismissed and subsequently obtained another job for him, and (b) that the applicant took him to Kevin Street Garda Station on two occasions and had him locked up there. No relevant personal or relevant documentary records, from either TMDC or the Ormond Printing Company can be located at this remove of over forty years. Sergeant Brannigan is deceased and Sergeant P.J. Murphy's whereabouts are unknown. These collateral 'islands of fact' have been lost forever through the effluxion of time.

4.2 It is further submitted that on an analysis of the items of specific prejudice identified, there are no rulings or directions which could be given at trial to remedy the disadvantages faced by the applicant. It is submitted on behalf of the applicant that if the evidence of Sergeants Murphy or Brannigan and of the staff from TMDC and the Ormond Printing Company were available to him, that this would have enabled him in a collateral way to challenge the credibility of the complainant. If he were able to prove, through independent islands of fact, that the complaint was, as a matter of fact, incorrect in relation to these specific accusations, then there would have to be very grave doubts as to the correctness of the allegations that the applicant molested and raped him.

4.3 The applicant adopts as part of his submission the dicta of Hardiman J. in *J.O'C v. Director of Public Prosecutions* [2000] 3 I.R. 478 at 504:-

> "If a defendant who is innocent is exposed to a trial where the only evidence is unsupported assertion and the only defence bare denial, his position is indeed perilous. Where these cases have been successfully defended it has, in my experience, always been because it has been possible to show that the complainant's account is inconsistent with the objectively provable facts relevant to the allegations, or that the complainant has made other allegations against other people lacking in credibility."

It is submitted on behalf of the applicant that the instant case is similarly a very old case. The most recent allegations date back some forty-two years at this remove. In the instant case, the "objectively provable facts" which would have enabled the applicant to effectively challenge the complainant's credibility are lost.

4.4 It is submitted that (a) the fact that the most recent allegation dates back 42 years; (b) the applicant's old age; (c) the applicant's poor health and (d) the applicant's recent admission to a nursing home are factors which, when taken together with the specific prejudice suffered as a result of the missing evidence, places this case in the wholly exceptional category of cases where a criminal trial should be prohibited. The applicant relies on the decision of the Supreme Court in *P.T. v DPP* [2007] 1 I.R. 701, where the Court applied the omnibus test at paragraph 28:-

> "No single factor renders this case an exception. This decision does not mean that a person may not be prosecuted for a crime committed many years ago, nor that a person in their eighties may not be prosecuted, nor that a person with ill health may not be prosecuted. It is the cumulative effect of all the factors which bring the case within the category of an exception requiring a balancing exercise to be conducted"

4.5 The applicant is charged with eight counts of buggery contrary to s. 61 of the Offences Against the Person Act 1861, which are alleged to have occurred between November 1967 and October 1969. The applicant submits that the offence of buggery was at the time of the alleged commission of the indicted offences at counts 5-12 an offence contrary to common law. It is submitted that the common law offence of buggery was repealed and abolished by s. 2 and s. 14 of the Criminal Law (Sexual Offences) Act, 1993. It is submitted that the Act of 1993 did not provide any saver for the prosecution of offences after that date which had occurred before that date. It is submitted that s. 1 of the Interpretation (Amendment) Act 1997, which provides for the institution of proceedings for prior common law offences, notwithstanding their repeal by statute, must be interpreted as having prospective effect only in order for it not to offend against the constitutional prohibition on retroactive penal legislation, and consequently is of no application as the alleged offences predate its coming into law. It is submitted that s. 21 of the Interpretation Act 1937 and s. 27 of the Interpretation Act 2005, are not applicable to offences contrary to common law. This issue has been fully argued before a Supreme Court of five judges in April 2011, in the case of *Michael O'Malley and Judge Mary Devins v. DPP*. The decision of the Supreme Court is still awaited. It was the contention of the applicant herein that the instant case should await the decision of the Supreme Court, but the respondent was insistent upon the case proceeding in the absence of a decision of the Supreme Court.

Respondent's Submissions
5.1 In these proceedings, the applicant is seeking an order restraining the respondent from proceeding with the trial of the applicant before the Dublin Circuit Criminal Court on eight counts of buggery contrary to s. 61 of the Offences Against the Person Act 1861, and four counts of indecent assault contrary to common law. Regarding the buggery offences, a declaration is also sought that the said offence being prosecuted is not an offence known to law. In *DPP v Judge Devins & Michael O'Malley* [2009] IEHC 584, O'Keefe J. held that buggery offences are known to law. At the time of hearing of the within application, judgment is awaited from the Supreme Court on appeal from the judgment of O'Keefe J. However, the respondent submits that the law as it now stands is as set out in *DPP v Judge Devins & Michael O'Malley* and that this Court should follow same.

5.2 In his statement of grounds, the applicant states that the complainant has delayed for over 39 years before making his first complaint to gardaí in or around November 2008. The respondent submits that it is now well established that the reasons for a delay are no longer issues in applications of this kind. In *S.H. v Director of Public Prosecutions* [2006] 2. I.R. 575 Murray C.J stated as follows at 620:-

> "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 trial would be unfair as a consequence of the delay. The test is to be applied in light of the circumstances of the case. Thus, the first inquiry as to the reasons for the delay in making a complaint need no longer be made. As a consequence any question of an assumption, which arose solely for the purpose of applications of this nature, of the truth of the complainant's complaints against an applicant no longer arises. The inquiry which should be made is whether the degree of prejudice is such as to give rise to a real or serious risk of an unfair trial. The factors of prejudice, if any, will depend upon the circumstances of the case."

It is submitted that the applicant has not identified a real risk of an unfair trial in this case.

5.3 The respondent submits that there has been no blameworthy prosecutorial delay in this case. The complaint was made in November 2008m and 13 months later, in December 2009, the applicant was charged. Detective Donnelly's affidavit illustrates that the investigation and prosecution teams put in a huge amount of work into processing the complaints made. It was held in *P.P. v DPP* [2001] 1 IR 403, that to come within a characterisation of culpable or blameworthy delay, the investigation must have been "conducted in a lackadaisical and slovenly fashion" Such a characterisation could not describe the work discharged by the investigation and prosecution teams in the instant case. The 13-month period compares favourably with the 5 years and 6 month period in *PD v DPP* [2001] 1 IR 403, which was not found to be blameworthy or culpable.

5.4 The applicant claims that his defence is prejudiced due to the unavailability of Sergeants Murphy and Brannigan and due to the unavailability of staff members from TMDC and Ormond Printing Company, and any such papers such staff members might have. The respondent submits that an order prohibiting a trial is exceptional in nature. The onus is on the applicant to show that the risk of an unfair trial cannot be avoided by the trial judge giving appropriate directions and rulings. It is submitted that the applicant has failed to establish that there is a real and unavoidable risk of an unfair trial in this case. The trial judge who deals with this case will be in a position to ensure that the trial is fair by giving appropriate rulings, directions and warnings on issues, should they arise, such as corroboration, the difficulty in assembling evidence after such a long lapse of time, the credibility of complainants, the damage to memories over time, the difficulties in finding witnesses and the delay in making complaints. The very nature of the offences at issue in this case is that they occur in private and in secret. In light of this fact, it is unclear what significance attaches to the absence of potential witnesses from the case as any evidence, which they might give, would be at best peripheral. Notwithstanding this, in an area in which the applicant sought to engage with the prosecutions case, namely that the applicant did not attend School Street, or if he did, he only did so for a short time, investigations have proved the applicants claims false in this regard. This contest on a relevant fact which was resolved in the complainant's favour has bolstered his potential credibility at trial and the case he wishes to make. It further supports the view that this is a prosecution that should be placed before a judge and jury.

5.5 It is submitted that the Constitution and the State, through legislation, have given the Director of Public Prosecutions an independent role in determining whether or not a prosecution should be brought on behalf of the people of Ireland. A decision to prosecute often involves the balancing of many factors and an examination of the evidence in order to determine whether the evidence is of a sufficient weight to warrant a charge being preferred. Where a decision to prosecute has been made, courts ought to be slow to intervene with such a decision. In determining this case, the Court must have regard to the issue of the public interest in the prosecution of serious crime. Indecent assault and buggery are serious offences. Relevant in this regard are the findings of the Supreme Court expressed in the judgment of Kearns J. (as he then was) in *Devoy v DPP* (Unreported Supreme Court, 7th April 2008):-

> "Under our jurisprudence, as noted by Denham J. in D.C. v DPP [2006] 1 ILRM 348, prohibition is a remedy to be granted only in exceptional circumstances. The Court does not adopt a punitive or disciplinary role in this context. Further, any court called upon to prohibit a trial must give due weight to the gravity and seriousness of the offence when exercising this jurisdiction."

5.6 In *P.T. v. Director of Public Prosecutions* [2007] I.E.S.C 39 (Unreported, Supreme Court, 31st July, 2007), prohibition was ordered in circumstances where the facts of the case gave rise to wholly exceptional circumstances. It is submitted that in this case, there are no such "wholly exceptional circumstances" which would warrant the granting of relief. In this regard, firstly, it is submitted that the specific grounds for relief are so devoid of merit that combining same could not improve their worth to a standard requiring the proceedings to be stopped. Secondly, it seems to have influenced the Supreme Court in *PT* that the prosecution took "some time to mount." It took less than half the 28-month period in *PT* to mount proceedings in the instant case. Thirdly, although criminal proceedings possessing the "features of an old case" seemed to be a factor in Denham J's analysis in *PT*, which would seem to be a reference to faded memories etc., it is a feature of the instant case that it seems clear that the applicant has engaged with certain of the allegations. On 29th of April, 2009, the applicant invited the gardaí to call to him for the purposes of an interview. The applicant was able to recall detail concerning (a) knowing the complainant; (b) claims as to his connection with Ormond Printing; (c) whether the complainant attended School Street; (d) what teachers taught at that school; (e) what vehicle he drove at the relevant time and (f) details of where he lived and with whom. Fourthly, direct evidence from a Consultant Cardiologist was given in PT of ill health of a worse degree than that which seems to be a feature in the instant case. The applicant has not sworn any affidavit concerning his health. Hearsay claims and concerns are contained in the affidavit of the applicant's solicitor in relation to stress, anxiety and worry on the part of the applicant and the fact that he is in remission, having received treatment for cancer in the past. It is submitted that the medical evidence in this case fails to establish any real impairment or dysfunction that would prevent the applicant from defending himself. Fifthly, it is relevant that there exists herein this extra element in the case concerning the complainant's attendance at School Street School. This was an issue which the applicant sought to contest, in his interview of 29th April, 2009, and this adds to the case made against the applicant by the complainant. Such a discrete issue does not seem to have featured in *PT*. Finally, the respondent submits that it is worth recalling the following words of Denham J. expressed in *PT*:-

> "This decision does not mean that a person may not be prosecuted for a crime committed many years ago, nor that a person in his eighties may not be prosecuted, nor that a person with ill-health may not be prosecuted."

It is submitted that neither the individual nor cumulative effect of the various circumstances in this case brings it within the exceptional category of cases in which it was unfair or unjust to put the accused on trial.

Decision of the Court

6.1 I do not accept that there has been any culpable prosecutorial delay in this case. In fact, I consider that the authorities moved with reasonable expedition once the complaint was made.

This case concerns an application to prohibit the trial of the applicant who is a retired priest accused of committing four counts of indecent assault and eight counts of buggery. The complainant, one C O'R, was aged between 11 and 13 at the time of the alleged abuse. The charges date back over forty years. All alleged offences occurred between 1967 and 1969 at the presbytery of Meath St Church in Dublin. The complainant's brother has made a statement recalling the applicant calling to the house looking for the complainant to accompany him to the presbytery. The complainant alleges that at the presbytery, he was stripped naked, slapped

with a slipper, fondled, and raped by the applicant. In an interview with gardaí on 24th April, 2009, the applicant denied knowing the complainant and stated that there was no way the complainant would have attended School Street School unless for a short time. In fact, on investigation, the gardaí discovered that the school's roll book contained entries confirming the complainant's attendance at the school between 1962 and 1970. The complainant alleges that the applicant took him out of school, got him a job with a company called TMDC, subsequently got him dismissed from that job and got him another job with a company called Ormond Printing Company. The applicant denies ever having any connection with either company. No records from TMDC or Ormond Printing Company are now available, nor can any staff that worked at either company at the relevant time be located. The complainant also alleges that the applicant took him to Kevin Street Garda Station where he alleges the applicant had him detained. The complainant states that a Sergeant P.J. Murphy was present on both occasions and a Sergeant 'Lugs' Brannigan was present on one of the occasions. The applicant denies ever having brought the complainant to Kevin Street Garda Station for any purpose. Sergeant Brannigan is deceased and Sergeant P.J. Murphy's whereabouts are unknown and he cannot be located. Although this seems strange, bearing in mind the Sergeant surely is in receipt of a pension, I am assured by counsel for both sides that he cannot now be found. The applicant is now 78 years old and suffers from poor health; he is a permanent resident of Our Lady's Manor Nursing Home. The complainant is 55 years of age.

6.2 An order prohibiting the holding of a criminal trial is exceptional in nature. In *Devoy v DPP* (Unreported Supreme Court, 7th April 2008) Kearns J. (as he then was) stated as follows:-

> "Under our jurisprudence, as noted by Denham J. in *D.C. v DPP* [2006] 1 ILRM 348, prohibition is a remedy to be granted only in exceptional circumstances. The Court does not adopt a punitive or disciplinary role in this context. Further, any court called upon to prohibit a trial must give due weight to the gravity and seriousness of the offence when exercising this jurisdiction."

There are very good reasons why an order prohibiting the holding of a criminal trial should be exceptional in nature. The court must have regard to the public interest in ensuring that crime is prosecuted and that the wrongdoer is convicted and punished. Furthermore, prohibition is not necessary where the trial judge can give appropriate rulings, directions and warnings on issues such as corroboration, the difficulty in assembling evidence after such a long lapse of time, the credibility of complainants, the damage to memories over time, the difficulties in finding witnesses and the delay in making complaints. Such rulings and direction should normally be sufficient to ensure a fair trial. Furthermore, it is vital for the efficient conduct of criminal matters that criminal trials proceed through the criminal courts and are not dispersed between the court of trial and other courts. In *Corporation of Dublin v Flynn* [1980] IR 357 at 365, Henchy J. stated:-

> "It is the essence of a criminal trial that it be unitary and self contained, to the extent that proof of the ingredients of the offence may not be established as a result of a dispersal of the issues between the Court of trial and another tribunal."

Moreover, in applications such as herein, the Court must bear in mind that a criminal trial will be conducted before a court established by law and presumed capable of providing a trial to an accused person in conformity with all the requirements of natural and constitutional justice. Save for the most exceptional cases, criminal proceedings belong in the criminal courts.

6.3 The applicant argues that this is one of those cases where exceptional circumstances exist requiring an order of prohibition. In this case, the most recent allegation dates back 42 years. In cases where there is a trial after a long period of time has elapsed, the issue of whether there are 'islands of fact' against which to test the credibility of witness becomes key. In *MU v. DPP* [2010] IEHC 156, Mac Menamin J. held at p. 8:-

> "As has been frequently pointed out a trial after a long period without corroborating or contradicting evidence is in fact a trial of the credibility of the witnesses. Thus the issue of whether there are 'islands of fact' and, or, material items of evidence, becomes the more important …"

It seems to me that the 'islands of fact' in this case are (a) whether the applicant got the complainant two job's; (b) whether the applicant took the complainant to Kevin Street Garda Station and (c) whether the complainant attended School Street.

6.4 In my opinion, the 'islands of fact' remaining in this case are extremely limited. Such as they are now, they are only peripherally related to the allegations made and their usefulness has been severely eroded by the passage of time. In relation to the first 'island of fact', the complainant states that:-

> "This priest got me work when I was 13 and a half and he took me out of school. This is engraved in my head. He took me to a place called TMDC (Traders Magneto Dynamo and Co), 32-35 South William Street. I worked as a messenger on a bike for about six months. Then this priest came to this place and told them to sack me and he took me to another job, the Ormond Printing Co., in Ormond Quay."

No relevant personal or relevant documentary records from either TMDC or the Ormond Printing Company can be located, nor can any staff that worked at the relevant time be located. In a later statement made by the complainant, which is exhibited at page 142 of the book of evidence, the complainant claims that, in fact, a friend told him about the job at Ormond Printing Company; this later account does not tally with the earlier statement. Insofar as this 'island of fact' lends credibility to either party, it favours the applicant.

6.5 In relation to the second 'island of fact', the complainant states that:-

> "On two occasions I definitely remember he took me to Kevin Street Garda Station and he spoke to someone inside. Then I was put in a cell and left there for 15 minutes and he was always waiting for me. Sergeant P.J Murphy was present on both of these occasions and I remember Lugs Brannigan was there on one of them. I don't know what this priest said to the Gardai but I was just put into a cell for 15 minutes. He raped me a few times after that but it stopped shortly after that."

Sergeant Brannigan is deceased and Sergeant P.J. Murphy's whereabouts are unknown. This 'island of fact' has been lost through the passage of time and does not assist the credibility of either party.

6.6 The third 'island of fact' concerns whether the complainant attended School Street School. In an interview with the gardaí on 24th April, 2009, the applicant stated that he did not know the complainant and that the complainant did not attend School Street School, or if he did, then it could only have been for a short time. When the gardaí investigated the matter, they found roll books

which contained entries confirming the complainant's attendance at the school, entries were made during the period from 1st July, 1962, until 30th June, 1970. It seems to me that this 'island of fact' is more a test of memory rather than of credibility. Nonetheless, it does confirm the complainant's account.

6.7 In *J.O'C v. Director of Public Prosecutions* [2000] 3 I.R. 478, Hardiman J. stated at 504:-

> "The effect of documentary, physical or forensic evidence, where it exists, is to provide some basis on which the part of a case which depends on mere assertion can be assessed and tested. Inevitably there will be a certain number of criminal cases, and far fewer civil cases, in which no such evidence exists. In such a case each side will normally look to the surrounding circumstances: the prosecution to see whether there is corroboration or at least evidence consistent with the allegations being true, and the defence to see if there is material with which the complainants story can be contradicted, even on a collateral matter, or his credibility challenged. Apart from the effect of a lapse of time on the memories of those principally involved, an interval of 20 or more years makes it difficult if not impossible to clarify the surrounding circumstances and to introduce any element at all of undoubted fact with which the statements of the parties can be correlated and tested. The element of hazard or chance which this state of affairs introduces into a trial has been recognised for centuries. The more nearly a serious trial consists of mere assertions countered by bare denial, the less it resembles a forensic inquiry at all."

Hardiman J. went on to state at 504:-

> "If a defendant who is innocent is exposed to a trial where the only evidence is unsupported assertion and the only defence bare denial, his position is indeed perilous. Where these cases have been successfully defended it has, in my experience, always been because it has been possible to show that the complainant's account is inconsistent with the objectively provable facts relevant to the allegations, or that the complainant has made other allegations against other people lacking in credibility."

I gratefully adopt the *dicta* of Mr. Justice Hardiman. It seems to me that this case comes down to an 'unsupported assertion' and a 'bare denial' thereof. As a result, the applicant's position is undoubtedly perilous. The 'islands of fact', which would have allowed the applicant to challenge the credibility of the complainant, have been lost by the passage of time. The intended trial would be of offences allegedly committed between 44 and 42 years ago. I accept that there are circumstances where a trial involving events occurring so long ago could take place. It would surely, however, require some concrete evidence to back up the evidence of memories inevitably weakened by the passage of time. The provision of a fair trial to a person presumed innocent until proved guilty is something so central to society's concept of justice that this Court must be careful to ensure that where there is a real risk of an unfair trial, it will act to prevent such an occurrence. The applicant's old age, poor health, and recent admission to a nursing home are factors which, when taken together with the specific prejudice suffered as a result of the missing evidence and the antiquity of the events in question, places this case in the wholly exceptional category of cases in which prohibition is justified. While the High Court must remain extremely slow to intervene in decisions made by the relevant authorities to prosecute, nonetheless, it is obliged to do so where the fundamental right of an accused person to a fair trial seems subject to a real risk. I am satisfied that there is such a real risk present in this case. I will therefore grant the applicant an order restraining the respondent from continuing to prosecute the applicant.

This finding is dispositive of the case and I do not propose therefore to address the question of whether the offence of buggery is an offence known to law. This is an issue which will shortly be clarified by the pending decision of the Supreme Court in the case of *Michael O'Malley and Judge Mary Devins v. DPP*.