THE HIGH COURT

JUDICIAL REVIEW

2018 No. 501 J.R.

BETWEEN

A.T.

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 1 February 2019

1. The Applicant herein seeks to restrain the further prosecution of criminal proceedings pending against him on the basis that there is a real risk that the trial would be unfair by reason of delay. The criminal proceedings involve allegations of child sexual abuse, and include a single count of rape. The offences are alleged to have occurred over a three year period in the late 1970s. As discussed presently, a significant feature of the case is that the alleged offences are said to have taken place at a family home shared by, *inter alia,* the Applicant and the Complainant. The Applicant contends that the fact that certain other members of the household have since died has prejudiced him in his defence of the criminal proceedings. It is suggested that had the criminal proceedings taken place earlier, i.e. at a time when these family members were still alive, they might have been able to give evidence which would have been helpful to the Applicant. In particular, it is suggested that the now deceased family members might have been in a position to give evidence to the effect that the alleged offences could not have occurred in the cramped circumstances in which the extended family was living without them having noticed.

2. There are two other features of this case which should be flagged now. First, the criminal proceedings are pending before the High Court exercising its criminal jurisdiction as the Central Criminal Court. There was some suggestion in the submissions made on behalf of the Director of Public Prosecutions *("DPP")* to the effect that the threshold for judicial review might be higher in circumstances where the High Court is not being asked to supervise an inferior court.

3. The second feature is that, for the purpose of these judicial review proceedings, the DPP has sought to rely on hearsay evidence filed by way of affidavit sworn by a Garda Sergeant. This raises a question as to the extent to which the High Court, in exercising its judicial review jurisdiction, should seek to resolve factual disputes.

LEGAL TEST

4. The parties were in broad agreement as to the legal test governing an application to restrain criminal proceedings on the grounds of delay. Both parties cited the judgment of the Supreme Court in *S.H. v. Director of Public Prosecutions* [2006] 3 I.R. 575. Murray C.J. formulated the legal test as follows at [46] to [49].

> "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'.
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> 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.
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> The court would thus restate the test as:-
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> 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.
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> 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 complainants' 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.
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> There is no doubt that difficulties arise in defending a case many years after an event. However, the courts may not legislate, the courts may not take a policy decision that after a stated number of years an offence may not be prosecuted. Also, as the legislature has not itself established a statute of limitations that itself may be viewed as a policy of the representatives of the People. Thus each case falls to be considered on its own circumstances."

5. Counsel on behalf of the Applicant, Micheál P. O'Higgins, SC, placed some emphasis on the recent judgment of the Court of Appeal in *B.S. v. Director of Public Prosecutions* [2017] IECA 342. Giving the majority judgment, Sheehan J. provides the following helpful analysis of the legal test.

> "15. At 17.36 Professor O'Malley states: In the penultimate paragraph of its judgement in *H v DPP* the Supreme Court said: 'The issue for a 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 does not exclude wholly exceptional circumstances where it would be unfair or unjust to put the accused on trial'. The conjunction of these two sentences suggests that, if the circumstances are sufficiently exceptional and compelling, a trial may be prohibited even if the applicant is unable to point to any specific factors demonstrating or indicating the risk of an unfair trial. The circumstances in which a trial may be prohibited on this residual ground will naturally be highly fact-specific.
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> In *P.T. v. DPP* [2008] 1 I.R. 701 the Supreme Court stated at p. 708:

> 'This is a test based on 'wholly exceptional circumstances', which are essentially fact and thus previous cases are of limited value as precedents. It is necessary when analysing this aspect of the test to consider the particular facts of a case, and to determine whether it would be unfair or unjust to put that specific accused on trial in all the circumstances of the case.'
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> 16. In *McFarlane v DPP* [2006] IESC 11, Hardiman J. on behalf of the majority of the Supreme Court stated para. 24, "In order to demonstrate that risk (of an unfair trial) there is obviously a need for an applicant to engage in a specific way with the evidence actually available so as to make the risk apparent… This is not a burdensome onus of proof: what is in question, after all, is the demonstration of a real risk, as opposed to an established certainty, or even probability of an unfair trial'."

6. Sheehan J. also suggested that it may be instructive to consider how fair trial rights have been viewed on the *civil side*, citing the judgment of the Court of Appeal in *Cassidy v. The Provincialate* [2015] IECA 74.

7. Mr O'Higgins, SC sought to develop this theme before me. Whereas Mr O'Higgins, quite properly, accepted that there are distinguishing features in *Cassidy*—not least of which is that the individual alleged to have perpetrated the child sexual abuse had since died—counsel suggested that the evidential difficulties highlighted in that case were similar to those which arise in criminal proceedings.

8. To understand this argument, it is necessary to consider *Cassidy* in more detail. That case involved a claim for damages arising out of alleged assault, abuse, rape and false imprisonment said to have been perpetrated by an employee of the Religious Sisters of Charity. It was alleged *inter alia* that the religious order had vicarious liability for its employee. The events complained of were said to have taken place between 1977 and 1980. The personal injury proceedings were not instituted until 2012, i.e. more than thirty years later. It appears that the employee who was said to have perpetrated the abuse had since died.

9. The Court of Appeal dismissed the proceedings for inordinate and inexcusable delay. Irvine J., giving the judgment of the court, noted that whereas the death of the alleged perpetrator alone was of such prejudicial magnitude that it warranted the court determining the "balance of justice" issue against the plaintiff, the death of *other* potential witnesses put the issue beyond doubt.

10. Irvine J. summarised her conclusions as follows.

> "Having considered the evidence that was before the High Court, I am quite satisfied that to allow this action proceed would, to use the words of Henchy J., 'put justice to the hazard', given that I am fully convinced that the issues between the parties are now long 'beyond the reach of fair litigation'. The defendant would not only be at risk of an unfair trial but to my mind would enjoy no prospect whatsoever of a fair hearing or a just result. Any trial as might take place would, as Kelly J. stated in *Kelly v. O'Leary* [2001] 2 I.R. 526 at p.544, 'be far removed from the form of forensic enquiry which is envisaged in the notion of a fair trial in accordance with the law of this State' and would amount to what was described in *O'Keeffe v. Commissioners of Public Works* (Unreported, Supreme Court, 24th March, 1980) as a 'parody of justice'. Further, the Court itself would be unable in the circumstances to fulfil its constitutional mandate under Article 34 of the Constitution, given that this can only be met by the provision of a fair trial based on procedures which are fair and just for both parties."

11. Notwithstanding Mr O'Higgin's careful submissions, I think that the drawing of analogies with civil law judgments—such as that in *Cassidy*—carries more danger than benefit. An application to restrain a criminal trial requires consideration of matters far beyond the position of the parties immediately affected, i.e. the Applicant and the Complainant. In particular, it is necessary to seek to reconcile the right of an accused to a fair trial with the (lesser ranked) right of the public to have criminal offences prosecuted. The compass of an application to strike out *civil proceedings* is much narrower. An analogy with this parallel line of case law is only useful insofar as it serves to reiterate the very real evidential difficulties which the loss of witnesses can cause. The balancing exercise required of the court in the context of a criminal prosecution is so different, however, from that in civil proceedings that I prefer to inform my decision in this case by reference to the case law directly on point.

12. In this regard, Mr O'Higgins has very helpfully referred me to a number of cases which emphasise the importance of considering whether there is any objective evidence, i.e. so called "islands of facts", which might lessen the risk of a trial being reduced to a swearing match between an accused and his or her accuser.

13. Counsel opened the following passage from the judgment of Hardiman J. (dissenting) in *J. O'C. v. Director of Public Prosecutions* [2000] 3 I.R. 478 (at 504).

> "The effect of documentary physical or forensic evidence, where it exists, is to provide some basis on which the part of the 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 ones, in which no such evidence exists. In such a case each side will naturally look to the surrounding circumstances: the prosecution to see whether there is corroboration or at least evidence consistent with allegations being true, and the defence to see if there is material with which the complainant's story can be contradicted, even on a collateral matter, or his credibility challenged. Apart from the effect of 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 assertion countered by bare denial, the less it resembles a forensic inquiry at all."

14. Towards the end of the same judgment, Hardiman J. outlines, at page 522, the practical difficulties which would arise from the fact that an important witness, namely, the wife of the accused, had since deceased. These passages have a resonance with the present case in that it too concerns an allegation of child sexual abuse said to have occurred within a family home (albeit on the facts of *J. O'C.*, it was a neighbour's home).

> "Where constant visits to the applicant's home by a child neighbour forms an essential part of the background, ordinary experience suggests that a housewife working at home will have much to say about the circumstances of the visits, if they happened as alleged. Still more so, where the prosecution case involves frequent and regular visits to a particular part of the house by the complainant and the applicant alone. If the wife were alive, it would be extraordinary and very damaging to the applicant if he did not call her. Nor can it fairly be said that her evidence would add nothing to the

applicant's own. It is corroboration from a source other than a person accused of a reprehensible offence. And the wife may very well be able to say more than the applicant: whether the child called when he was not there, what he or she did in the house, whether visits to the alleged location of the crimes occurred in other contexts, whether she herself would have been absent or otherwise engaged often enough and long enough to allow the husband to behave as alleged so frequently.

To require the applicant to prove affirmatively that the wife had specific evidence to give, when no allegation had been made in her lifetime, is to require him to attempt the impossible. Experience, certainly that of anyone who has acted in any number of these cases, strongly suggests that she will have some relevant, and perhaps vital, evidence in circumstances such as those of this case. And if the wife is an impressive witness, the very fact of her support and her evidence as to character is significant, and not capable of substitution by any other relative or friend. To suggest that that evidence itself might not have been available is to ignore the presumption of innocence and to use the onus of proof as a sort of catch 22. It is no doubt for that reason that the respondent in this case felt obliged to contend for the non-applicability of the presumption and against the concept of the inferring of prejudice from very long delay.

Counsel for the respondent equally submitted that while memories, whether of the complainant, the applicant or other persons might well have faded so as to make detail unavailable, this was not really relevant in a case involving multiple allegations over a period of years. Even if the applicant could show that one allegation, or a few allegations, could not be true or were most unlikely, that would not avail him in relation to the bulk of the charges.

In my view this submission runs contrary to common experience of criminal trials. If a vital witness is demonstrated to be incorrect about one charge it will undoubtedly affect the confidence which a jury will repose in him or her on the others. In *Director of Public Prosecutions v. F.,* the fatal defect affecting a particular period of time did not exclude the possibility that the complainant might have been assaulted at some other time in respect of which no such difficulty arose. However, the Director did not seek a retrial presumably on the sensible basis that the complainant's reliability in general had been gravely compromised."

15. I will return to consider these issues by reference to the circumstances of this case at paragraph 45 below.

16. On behalf of the DPP, Mr Kieran Kelly, BL, opened a number of judgments, including two very recent judgments which involved periods of delay of similar magnitude to that at issue in this case. More specifically, counsel referred me to the judgments of McDermott J. in *P.H. v. Director of Public Prosecutions* [2018] IEHC 329, and McGrath J. in *M.H. v. Director of Public Prosecutions* [2018] IEHC 560.

17. These two judgments are distinguishable on their facts. In *P.H. v. Director of Public Prosecutions*, there were nine complainants and, therefore, there were potentially other witnesses who would be able to give corroborating evidence as against the accused. Here, the only offences as charged are said to have taken place against the Complainant herself.

18. Insofar as *M.H. v. Director of Public Prosecutions* is concerned, the deceased witnesses were not as relevant as they are in this case. See paragraph 33 as follows.

> "33. In this regard and in this case it is averred in a general way that a number of witnesses who would have known the applicant including the club founder, members of the committee, other coaches, caretakers, club helpers, club fundraisers and a bus driver, have died or have left the jurisdiction and are unable to be considered as potential witnesses for the applicant. Apart from a general non-specific averment that these individuals may have been potential witnesses, the applicant does not contend with any degree of particularity how such witnesses may have been relevant and how any evidence which they might now give may have contradicted or called into question the complainant's allegation in any material way. No averment is made as to the nature or type of evidence that such potential witnesses might have been in a position to give. Similarly, regarding the destruction of the building the applicant has not pointed to any clear absence of material evidence which might affect his trial. It does not appear to me on the basis of the evidence or arguments before the Court that the absence of the building or concerns regarding witness availability are matters which cannot be adequately dealt with by the trial judge in terms of warnings, cautions or directions as may be necessary during the course of the trial."

THE ALLEGED OFFENCES

19. A formal indictment has not yet been served on the Applicant. It appears, however, from the Statement of Charges before the District Court that the alleged offences are said to have occurred over a period of three years from 1 March 1976 to 28 February 1979. There is one charge of rape contrary to common law as provided for by section 48 of the Offences Against the Person Act 1867 (which is said to have occurred between 1 February 1979 and 28 February 1979), and a large number of offences of indecent assault contrary to common law.

20. The Applicant is married to the Complainant's older sister. The Applicant has sworn an affidavit to the effect that he and his wife had moved back into his wife's family home in the early part of 1976. It is averred that this caused significant resentment on the part of other family members.

21. At the time the alleged offences are said to have occurred, the Applicant and the Complainant were living in the same extended household. There were ten people living in what has been described by the Applicant in his grounding affidavit as a *"small three-bedroom house with a small sitting room in which conditions were extremely cramped".*

22. The Complainant has provided a detailed statement of evidence to An Garda Síochána. This statement forms part of the book of evidence, and has been exhibited as part of the within judicial review proceedings. The statement provides details of the alleged offences, and of the Complainant's family circumstances. In order to preserve the anonymity of the Complainant, the details of the alleged offences as set out in the statement will not be repeated in full in this judgment.

23. It is sufficient for the purposes of these judicial review proceedings to note the following aspects of the statement.

> (i). The Complainant indicates that at the time of the alleged offences she had been sharing a bedroom with her grandmother.
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> (ii). The Complainant alleges that the sexual abuse occurred on an almost daily basis, and at least a couple of times a

week. The abuse ranged from the Applicant grabbing the Complainant's breast and vagina through her clothes, to inserting his fingers into the Complainant's vagina. It is alleged that the Applicant raped the Complainant on one occasion by penetrating her with his penis.

(iii). It is also indicated in the statement that, on occasions, the abuse took place when there were other family members present in the house. The Complainant states that *"[The Accused] had to be careful and clever because there were always people in the house*", and that "*If there was no one in the house the assaults were longer".*

(iv). The alleged offences are all said to have taken place in the family home. (The Complainant does make an allegation in relation to an event when she was older, and the Applicant had moved out of the family home, but this event is not included in the Statement of Charges).

24. The book of evidence includes a number of other statements. The first statement is from the Complainant's medical doctor. This statement provides details of the Complainant's disclosure of the alleged sexual abuse. This disclosure occurred in October 2014. The second statement is from one of the Complainant's sisters. This statement addresses a partial disclosure of the abuse, which disclosure is said to have been made when the Complainant was aged 16 years, and a full disclosure of the abuse in October 2014. The statement also alleges that on one occasion the Applicant grabbed her (the sister's) breasts. It is said that this incident was reported to the Complainant's mother at the time.

25. The final statements are those of the Garda Sergeant and the Applicant himself.

ORDER 84 / APPLICATION FOR EXTENSION OF TIME

26. The DPP has formally raised an objection that the application for judicial review was not made within the three month period allowed under Order 84, rule 21. The relevant dates in this regard are as follows. The Applicant was returned for trial to the Central Criminal Court from the District Court on 12 March 2018. The matter was then listed before the Central Criminal Court on 21 March 2018, and a trial date fixed for February 2019. The application for leave to apply for judicial review was made on 25 June 2018. If one calculates the three month time-limit from the date of the return for trial, the application for judicial review was moved some 14 days or so out of time.

27. There was some debate before me as to whether the time-limit should be calculated from the date of the return for trial or from the later date of the formal service of an indictment. Reference was made in this regard to the judgment of Kearns P. in *Coton v. Director of Public Prosecutions* [2015] IEHC 302.

> "In contrast, at the date of return for trial, the accused has sight of all the evidence which may be offered against him at his subsequent trial. He has everything he needs to determine whether grounds for making an application for judicial review have arisen. This Court can see no reason why the date of service of an indictment on the morning of a trial should be preferred to the date of the order returning him for trial. The indictment contains no 'information' which would provide grounds for making an application and is derived only from the information and proposed evidence contained in the book of evidence."

28. This suggests that the date from which time runs is the date of the return for trial. In the event, it is not necessary for me to resolve this particular dispute. It is clear that, *at the very earliest,* the date from which the time-limit ran in this case is 12 March 2018. The alleged delay in this case is in the order of 14 days, and a detailed explanation has been given in an affidavit by the Applicant for this delay. More specifically, the Applicant indicates that whereas he had engaged with his solicitor as to the possibility of seeking judicial review in April 2018, he was thereafter admitted to hospital and underwent surgery under general anaesthetic. He was required to undergo a second emergency procedure again under general anaesthetic. In brief, the Applicant was in hospital for a very substantial part of the period between the date of the return for trial and 5 June 2018.

29. Order 84, rule 21(3) and (4) provides as follows.

> "(3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:—
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> (a) there is good and sufficient reason for doing so, and
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> (b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either—
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> (i) were outside the control of, or
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> (ii) could not reasonably have been anticipated by the applicant for such extension.
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> (4) In considering whether good and sufficient reason exists for the purposes of sub-rule (3), the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party."

30. I am satisfied that the legal test for an extension of time under Order 84, rule 21 is met. Specifically, there is good and sufficient reason for the extension of time, and the delay was as a result of circumstances outside the control of the Applicant. I am also satisfied that the DPP has not suffered any prejudice as a result of the delay. The Office of the Chief State Solicitor was notified of the intended application for judicial review on 8 June 2018, i.e. with the three month period. Moreover, at the time the application for judicial review was made, there were more than eight months to go before the scheduled trial before the Central Criminal Court.

31. I therefore make an order extending the time for the bringing of the judicial review proceedings to 25 June 2018.

PREJUDICE ALLEGED

32. According to the first affidavit filed by the Applicant, there were ten members of the extended family living in the family home during the period during which the alleged sexual abuse is said to have occurred, i.e. March 1976 to February 1979. Four of these family members have since deceased. These include the Complainant's father and mother, and her grandmother. It should be noted, however, that the grandmother had died in the year 1983, i.e. four years after the date of the latest offence charged. Thus, even if the criminal prosecution had taken place in early course, the grandmother's evidence would not have been available.

33. In order to protect the anonymity of the Complainant, I do not propose to specify the precise dates of death in this judgment. It is sufficient to note that the Complainant's father and mother died at dates some thirty to forty years after the alleged sexual abuse is said to have first occurred.

34. The Applicant contends a fair trial has been prejudiced by the deaths of these potential witnesses. In particular, it is suggested that the deceased family members would have been in a position to confirm that he (the Applicant) was never alone in the house with the Complainant, and that he could not have abused the Complainant in such a small house without this coming to the attention of the other members of the household. It is also suggested that the Complainant had a close relationship with two of the deceased family members (her grandmother and her uncle), and that had the abuse occurred then she is likely to have confided in them. If these witnesses had given evidence at trial to the effect that no such disclosure was made, then it is suggested that this would go to the Complainant's credibility.

35. It is also suggested that the mother would have been able to give evidence in respect of the Complainant's sister's allegation that there was a single incident of sexual abuse against her. The sister's statement indicates that this incident was reported to her mother. The Applicant suggests that if the mother had given evidence to the effect that no such report was made, then this would go to the sister's credibility.

36. Separately, the Applicant contends that the lapse of time has adversely affected his ability to adduce alibi evidence. The Applicant had worked as a bar man in a public house [name redacted], and that—had the trial occurred earlier—he might have been able to demonstrate that he was at work, i.e. away from the family home, on dates when some of the alleged offences were said to have occurred.

REPLYING AFFIDAVIT ON BEHALF OF THE DPP

37. The Director of Public Prosecutions ("*DPP*") has sought to downplay the potential relevance of the deceased witnesses by filing affidavit evidence to the general effect that the deceased family members were often away from the family home for long periods of time at work, and thus would not be able to give relevant evidence.

38. This evidence was adduced by way of affidavit filed by a Garda Sergeant who had interviewed the Complainant. The Garda Sergeant was cross-examined at the hearing before me on 18 January 2019. The Garda Sergeant very fairly conceded that much of her evidence was hearsay, and based on information provided by the Complainant. Unfortunately—and I intend no criticism at all of the Garda Sergeant personally in this regard—the structure of the affidavit did not make it clear as to what was direct evidence and what was hearsay. In many instances, the affidavit is phrased in such a way that it reads as if the Garda Sergeant had direct knowledge of the individuals involved, and their personal circumstances. See for example paragraph 9 of the affidavit as follows.

> 9. At para. 19 the Applicant suggests that if his father in law [name redacted] was still alive, he would be in a position to confirm that the applicant was never alone in the house with the complainant. However, I believe [name redacted] was a […] with the Department of […] and, in that capacity, he worked long hours. I believe that he sometimes worked down the country and that he would be away from home for weeks at a time, and, when working in Dublin that he was gone virtually all day every day and he only came home in the evenings. He died almost thirteen years ago, but in light of the foregoing, even if he was alive today I don't believe he would be in a position to state that the Applicant was never at home alone with the complainant. In any event as I have already deposed at para 5 herein, the complainant does not assert that the incidents occurred whilst she was home alone with the applicant."

39. The drafting of the affidavit was ambiguous: this passage might be read as indicting direct knowledge by the Garda Sergeant. It is quite possible that a Garda might personally know individuals living in her community.

40. At other points in the affidavit, the Garda Sergeant is referring to searches or inquiries carried out by her or her fellow officers. For example, one of the points made by the Applicant is that the uncle of the Complainant may have had a criminal record and/or may have been on the run. The Garda Sergeant deals with this on the basis of evidence from police records.

41. As I say, the structure of the affidavit is unsatisfactory in that it draws no distinction between these two different sources of information. On each occasion that the affidavit was simply rehearsing information provided by the Complainant, this should have been expressly stated.

42. But for the fact that the evidence is almost all hearsay, the approach adopted by the DPP could have presented an important issue of principle. By purporting to engage with—and contradict—the affidavit evidence filed by the Applicant, the DPP appeared to invite the High Court to resolve a controversy on disputed facts. Aside from the obvious obstacle that no leave had ever been sought to cross-examine the Applicant, a more fundamental difficulty arises as follows. It is a cornerstone of our criminal justice system that an accused person is presumed to be innocent. To what extent, therefore, should an accused person be required to give evidence in order to seek the prohibition of a criminal trial in the context of an application for judicial review. See comments of Hardiman J. in *J. O'C. v. Director of Public Prosecutions* [2000] 3 I.R. 478 at 517 et seq.

43. In the event, this issue does not have to be determined by me in this case because the contest or dispute on the facts is as between a person with direct knowledge, i.e. the Applicant, and a person who fairly concedes that she is giving hearsay evidence only, i.e. the Garda Sergeant. The legal position would have been much more complicated had the Complainant chosen to go on affidavit herself. However, insofar as the evidence before this court is concerned, the position is that it is not disputed that certain family members who lived within the family home at the relevant time have since deceased.

DISCUSSION AND DECISION

44. The alleged offences are said to have occurred some forty years ago. Whereas, of course, this length of time is not in itself a reason for granting an order of prohibition, it is something to be considered in assessing the question of prejudice, and, in particular, the likely recollection of any surviving witnesses.

45. The principal prejudice alleged by the Applicant is the loss of potential witnesses, namely the four members of the extended family who have since deceased. For reasons similar to those outlined by Hardiman J. in his judgment in *J. O'C. v. Director of Public Prosecutions* (discussed at paragraphs 13 and 14 above), I think that the loss of these witnesses does give rise to a real risk of an unfair trial. There are several aspects of the alleged offences which indicate that the evidence from other members of the extended household could have had a significant bearing on the ultimate outcome of the criminal proceedings. The alleged offences are all said to have taken place within the family home; to have taken place on a very regular basis (at least a couple of times a week); and to have occurred at a time when the three-bedroom house was being lived in by ten people. The witnesses would have been in a position to give general evidence as to the day-to-day running of the household, and this would be relevant to the question of

whether sexual abuse on the scale alleged by the Complainant could have taken place without their noticing.

46. If the prosecution had been unable to lead evidence from the other members of the household to the effect that they had witnessed suspicious activity, then this is something which a jury might have attached weight to. Similarly, if the prosecution had been unable to establish that the Complainant had disclosed the ongoing sexual abuse to any other member of the household, then this too is something which might go to the credibility of the Complainant in the eyes of a jury. This is especially so where three of the deceased, namely the Complainant's grandmother, father and mother, are persons whom a jury might think the Complainant would have been likely to confide in.

47. As discussed above, the evidence of the father and mother would also potentially be relevant to the Complainant's sister's allegation that the Applicant made an inappropriate sexual advance towards her. The sister has stated that she reported this to her mother at the time.

48. Of course, it is possible that the witnesses would have given evidence to contrary effect and this would have been of assistance to the prosecution. The point is, however, that the death of these witnesses means that these matters cannot now be explored in evidence.

49. The unfortunate fact of the matter is that a trial of this type will ultimately reduce itself to a form of swearing match between the Applicant and the Complainant. The absence of corroborating witnesses, one way or the other, is a real difficulty. I do not think that a trial could fairly be held in the circumstances.

50. Given the fact that the alleged offences occurred exclusively within the family home, alibi evidence would also be extremely important. The Applicant may, for example, wish to establish that he was away from the family home at particular times of day or night when the alleged abuse is said to have occurred. Given the extreme lapse of time, it will be difficult if not impossible for the Applicant to adduce witnesses to this effect now. Moreover, there are unlikely to be any documentary evidence, e.g. in terms of, wage slips or employee records, which might otherwise confirm his presence or absence from the home. I think that there is a real risk of prejudice for this reason too.

TRIAL BEFORE CENTRAL CRIMINAL COURT

51. It has been argued on behalf of the DPP that the fact that the criminal trial will take place before another judge of the High Court is something that I should bear in mind in the exercise of my discretion in judicial review. Of course, I have great reluctance to trespass upon a criminal prosecution before a court of co-ordinate jurisdiction. However, the fact remains that the application for prohibition has been made in the context of these judicial review proceedings. I must determine that application: I cannot simply wash my hands of the matter and leave it over to the trial judge.

52. As I read the authorities, it appears that what must be considered in determining an application for prohibition is whether the trial judge will be able to ameliorate any risk of an unfair trial by giving warnings to the jury. Whereas it is true, of course, that the trial judge might ultimately withdraw the issue from the jury or dismiss the case by way of a direction, I do not think that absolves me from my obligation in judicial review proceedings to seek to do what I can to ensure that there is a fair trial. On the facts of the present case, given the particular circumstances including the great length of delay, and the death of the four witnesses, I think that there is a real risk of an unfair trial. I do not think that there is any warning which the trial judge could formulate to ensure a fair trial. It would not be enough simply to warn on the danger of convicting on uncorroborated evidence. The trial would be reduced to a swearing match between the Complainant and the Applicant.

53. Accordingly, I propose to make an order prohibiting the Director of Public Prosecutions taking any further steps in the criminal proceedings.