Neutral Citation Number: [2013] IEHC 396

THE HIGH COURT

[2012 No. 155 JR]

BETWEEN/

NIALL BYRNE

APPLICANT

AND

JUDGES OF THE CIRCUIT COURT AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

[2012 No. 186JR]

BETWEEN/

DAVID BYRNE

APPLICANT

AND

JUDGES OF THE CIRCUIT COURT AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on the 5th day of September, 2013

1. Where a jury fails to agree on a verdict after two long criminal trials in succession, is the accused entitled to demand a halt to any further prosecution in respect of the offence with which he has been charged? This is essentially the question which is posed by these two applications for judicial review which have been heard together. The issue arises in the following way.

2. In May, 2006 the applicants were charged, together with three co-accused, with the offence of robbery and false imprisonment arising from the abduction at gunpoint of the wife and children of a Mr. Richardson (who was an employee in a security company) in March, 2005. A criminal gang had broken into the Dublin home of Mr. Richardson on the evening of March 13, 2005 and held him, his wife, Marie, and children at gunpoint. Mr. Richardson was then held in the house overnight while his wife and children were taken to an undisclosed location in the Dublin mountains. In the early hours of March 14, 2005 the raiders permitted Ms. Richardson to speak with her husband by mobile telephone. The telecommunications records relating to this mobile telephone – described in the first two trials as the purple telephone – assume a particular significance in relation to Mr. David Byrne for reasons which are elaborated upon at greater length later in this judgment.

3. Later on the morning of March 14th, Mr. Rchardson was required to follow his usual routine, load his van with money and bring it to a pre-arranged location. He followed these instructions and some €2,280,000 was stolen from a cash-in-transit van. As we have just noted, Ms. Richardson and her children had been taken to the Dublin Mountains where they had been held overnight in the back of a vehicle. They were then tied up and abandoned in a mountain forest. They ultimately managed to free themselves and raise the alarm, but not before the robbery had been carried into effect.

4. There have been two trials involving the applicants. Mr. Niall Byrne was first arrested at the end of April, 2005. He was then charged with robbery and false imprisonment on 27th April, 2005. Mr. David Byrne was arrested at around the same time. The first trial commenced on 28th April, 2009 and continued until 30th July, 2009.

5. Following some four days of jury deliberations, three accused were found guilty by a jury. The jury were, however, unable to reach a verdict in respect of both Mr. Niall Byrne and Mr. David Byrne. (The fact that these two applicants share a common surname is a co-incidence and they are not related). The three other persons who were convicted of these offences on this occasion each received lengthy prison sentences, varying from twelve to twenty-five years. These accused successfully appealed their convictions and they are now facing a re-trial: see *The People v. Kavanagh* [2012] IECCA 65. (For completeness, I should record here that I sat as a member of the Court of Criminal Appeal in this appeal. I disclosed this fact as soon as the present case was assigned to me, but no objection was raised by either party). The re-trial of these accused is currently scheduled for October 2013. But even if I were to refuse to grant the relief sought in the present application, one may assume that neither applicant is likely to be tried along with those who are facing a re-trial following conviction and successfully appeal.

6. On the second occasion Mr. Niall Byrne and Mr. David Byrne were then tried together. The second trial commenced on 27th October, 2011, and concluded with a jury disagreement on 2nd December, 2011, the jury having deliberated for three days. The Director of Public Prosecutions has now determined that both applicants should stand trial on a third occasion and the essential question before me is whether this would be permissible in the circumstances of the present cases.

The case-law on successive trials

7. It is clear from the Supreme Court's decision in *DS v. Judges of the Cork Circuit Court* [2008] IESC 37, [2008] 4 I.R. 379 that while there is no firm *ex ante* rule in this regard, there is what amounts to a working presumption against permitting a third trial following two successive jury disagreements. Much will, however, depend on the circumstances of each case.

8. In *DS* the applicant had been charged with six counts of sexual assault on two complainants between 1994 and 1998. At his request the indictment was severed and separate trials were ordered. On the second day of the first trial on the charges involving the first complainant the jury was discharged. The accused was acquitted on the re-trial.

9. A few months later the accused faced a trial on the charges involving the second complainant. Following a jury disagreement at the first trial, on the retrial some months later again the accused was acquitted on one count, but the jury disagreed on the other counts. The accused then successfully applied to this Court for an order restraining the prosecution from prosecuting him for a third occasion on the outstanding count charged. The Supreme Court dismissed the appeal from this decision, albeit for slightly different reasons

10. Before examining the rather nuanced differences (such as they are) between the judgments of Denham and Kearns JJ. in the Supreme Court, it is worth emphasising that which is not in dispute. First, there is no *ex ante* rule prohibiting a third trial. Second, while the double jeopardy rule does not, as such, apply to this situation, if the trial is indeed prohibited it will be by reason of broader conception of "fundamental fairness of legal procedures inherent in our Constitution": see *The People (Director of Public Prosecutions) v. Quilligan (No.2)* [1989] I.R. 46, 57, *per* Henchy J. Third, while the court must exercise its jurisdiction to prohibit a third trial with some caution, it must also seek to protect the due process rights of the accused: see DS [2008] 4 I.R. 379, 395, *per* Denham J.

11. In her judgment Denham J. (with whom Hardiman, Fennelly and Finnegan JJ. concurred) had regard to a variety of factors in concluding that a third trial would be oppressive. These included the fact that the trials had consumed six years of the accused's life; the stress imposed on the applicant and his family; there was no change in the evidence to be tendered. She concluded ([2008] 4 I.R. 379, 396) that the Court must have regard to the entirety of all the facts and arrive at a conclusion which is balanced and proportionate:

> "In this case no individual factor is such that of itself it would be a ground upon which to prohibit the trial of the applicant. However, having considered the grounds individually it is also appropriate to consider them cumulatively, as 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 circumstances of the case, which have been set out above in the judgment. Bearing in mind all of the circumstances of the case, I am satisfied that it would be oppressive and unfair to prosecute a further trial in this case. In the interests of justice I would prohibit the third trial based on the complaint of S.L. Thus, while I have found for the Director on several of the grounds of appeal, in the interests of justice I would dismiss the appeal."

12. It may be possible to detect a slightly different emphasis in the judgment of Kearns J. who enunciated the governing considerations in the following terms ([2008] 4 I.R. 359, 413):

> "…..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 as an abuse of discretion on the part of the Director of Public Prosecutions. It may become an unfair procedure in itself to re-try. 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.
>
> I do not think that there should be an over-simplified "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. A factual analysis arising in an application to prevent a third trial would have regard to matters such as the following:-
>
> 1. The seriousness of the offence or offences under consideration.
>
> 2. The extent, if any, to which the applicant may himself have contributed to any mishap which led to the requirement for a further trial. By way of example, the first trial of the applicant (in relation to the complainant TL) collapsed because of defence error. It would be in my view inappropriate to accede to a defendant's request for relief where the applicant himself was the cause of the earlier trial mishap.
>
> 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. A court will necessarily take into account in this context the considerable delay likely to arise in mounting any re-trial. It is now unusual to have a re-trial immediately after an aborted trial, such as occurred in years past, notably in *The State v McMullen* [1925] 2 I.R. 9, where the re-trial took place two days after the first trial.
>
> 4. The extent to which the case now to be met has altered from that which was considered in previous trials."

13. Kearns J. then went on to hold ([2008] 4 I.R. 379, 414-415):

> "Looking at the facts of the present case, I would observe at the outset that the trial process has been in train since 2002. While O'Neill J referred to the prospect of five trials of the applicant, there have been two trials only on the charges under consideration. The trial in respect of the first complainant was severed from the other complainant's case at the request of the applicant, and the jury was discharged in the first of the trials in relation to the first complainant because of an error on the part of the defence. I do not see that the applicant can build a case on either of these grounds which in any event relate to different charges involving a different complainant.
>
> On the scale of gravity of sexual offences, however, the surviving charges in this case can only be described as being at the less serious end of the spectrum. In so saying I do not ignore the huge distress described by the complainant. However the offences occurred many years ago, mainly between 1993 and 1994 and there has thus been considerable delay in bringing this matter to a conclusion. This Court has frequently commented upon the deleterious effects of delay in the context of criminal prosecutions.
>
> The medical reports make it abundantly clear that the applicant and his family have suffered enormously as a result of the accusations which have been extremely damaging in the small rural community in which the parties reside. The applicant

> was asked to leave his position as trainer for the local GAA club. His wife has been alienated from her own family and driven to taking anti-depressants. His eldest daughter was verbally abused at school by some girls who asked her questions such as "When did your father last rape somebody?" His other children have also become withdrawn and stressed. The applicant's mother died during the court hearings and the applicant believes her death was hastened by the stress of the ongoing proceedings. The applicant himself missed work at times and found it difficult to socialise or go out with his wife. His psychiatrist says that he is under "very major stress".
>
> There is no suggestion that the applicant himself bears any responsibility for the prolongation of the criminal proceedings, albeit that he can not invoke the first aborted trial in aid of his application. However, any error which may have occurred at that particular juncture was not his personal fault.
>
> On a more general basis and because it is one of the factors to which I have adverted, I see no basis for holding that in the context of any re-trial (if one were to be permitted) the State would be precluded from serving a Notice of Additional Evidence if some further information or evidence had come to light between a first and subsequent trial: the Criminal Procedure Act 1967 so permits. ……Reviewing the case as a whole, however, I see no circumstances which suggest that there are unusual or exceptional circumstances which would justify treating this case as one where a third trial should be permitted following the two jury disagreements to date."

14. It is important to stress the judgment of Kearns J. also attracted majority support within the Supreme Court inasmuch as Fennelly and Finnegan JJ. also agreed with this judgment.

15. The decision in *DS* can be contrasted with the later decision of the Supreme Court in *AP v. Director of Public Prosecutions* [2011] IESC 2, [2011] 1 I.R. 729. Here the applicant had been charged with 14 counts of indecent assault, but in three trials in succession the jury was discharged at the direction of the trial judge. On each occasion the trial had not proceeded beyond the first witness (namely, the complainant) when the jury was discharged. The Director of Public Prosecutions sought a re-trial – so that the applicant accused would now be facing a fourth trial – and the Supreme Court refused to prohibit this fresh trial. The various judgments delivered by Denham, Hardiman and Fennelly JJ. mention various factors in arriving at this conclusion, including the fact that there had been no undue delay, the strength of the prosecution case and the underlying seriousness of the facts alleged, which in contrast to the facts alleged in *DS*, fell only marginally short of rape. Nor had there been any evidence of stress "over and above what would naturally and inevitably be accompanied by any trial process": [2011] 1 I.R. 729, 747, *per* Fennelly J.

16. Yet the critical factor in *AP* was that the re-trials all came about as a result of the discharge of the first prosecution witness at a very early stage in each of the three earlier criminal trials. Accordingly, Fennelly J. thought ([2011] 1 I.R. 729, 748) that it was important to bear in mind that, unlike the facts in *DS*, the trial of the applicant:

> "never reached the stage where the jury was required to consider its verdict. On each occasion the trial came to a halt during the evidence of the complainant. The court has at best incomplete evidence as to the precise reasons for the discharge of the jury and cannot pronounce on the correctness or otherwise of the decisions of the trial judge. Ultimately, I do not believe that the applicant has shown grounds for prohibiting his further trial."

17. In this general context, it may also be observed that paragraph 4.33 of the Director of Public Prosecution's, *Guidelines for Prosecutors* (November, 2010) provides:

> "If a jury fails to reach a verdict in a particular case or a trial otherwise does not proceed to a conclusion, consideration should be given as to whether the public interest requires a second or subsequent trial of the issue. That consideration should include an assessment of the likelihood that a jury on a retrial could deliver a verdict on the available evidence. *Where a second jury disagrees the public interest would usually not require a third trial of the accused person but every case should be decided on its own merits*." (emphasis supplied)

18. Bearing these considerations in mind, how, then are the relevant principles to be applied to the present case? Proceeding from the working rule as articulated by Kearns J. in *DS*, one starts from the proposition that a third trial must be regarded as excluded in those cases where two successive juries have already disagreed on a verdict unless there are unusual or exceptional circumstances. Are there, then, any factors which suggest that there are unusual or exceptional factors which justify a departure from this working rule so far as the present cases are concerned?. There are, I think, a number of special considerations in the present case, not at all of which pull in the same direction.

The gravity of the offences with which the applicants have been charged

19. First, it should be stated that the offences at issue are exceptionally grave, involving as they do false imprisonment (including as an aggravating factor the false imprisonment of young children), robbery and the brandishing of firearms with menaces. While not taking from the seriousness of the allegations in *DS*, the offences alleged in that case – the manual penetration of the vaginal area of two girls aged 12 and 13 respectively – cannot be regarded as approaching the degree of seriousness of the offences alleged here. This is a factor which, to some degree, counsels against the granting of any order restraining a re-trial.

20. But even in cases of the utmost seriousness, it has nonetheless been held that a third trial can amount to an abuse of process. A striking example here is the decision of the Privy Council in *Carter v. State* [1999] UKPC 24, [2000] 1 WLR 384, a decision cited with approval by Kearns J. in *DS*. Here the appellants were arrested the day after an individual was shot dead in a street at Morvant, Trinidad and they were detained in prison since that date until their convictions were ultimately quashed by the Privy Council in May, 1999.

21. The appellants were first tried in late 1991 when they were first convicted of murder. Their convictions were quashed by the Trinidadian Court of Appeal in June, 1994. There was a jury disagreement in April, 1995 following a re-trial. A further re-trial commenced in September, 1996 with the trial court overruling counsel's objections that a third trial following such a long delay amounted to an abuse of process.

22. On the third occasion the appellants were convicted and sentenced to death. An appeal was rejected by the Court of Appeal, but the appeal was ultimately allowed by the Privy Council. There is no doubt but that these were quite special features of this case which, it may be inferred, may have influenced the judgment of Lord Slynn. Three obvious issues stand out. First, the appellants had been incarcerated for some twelve periods during which they remained under the shadow of death. Second, counsel had been assigned to accused only the day before their trial for capital murder was about to commence. Third, defence counsel were deprived of access to the transcripts of the previous trials, even though this would have been indispensable for any counsel wishing to cross-examine witnesses.

23. These considerations notwithstanding, the following comments of Lord Slynn are nonetheless of interest:

> "The respondent accepts that it is a common practice, though not a rule of law, for the prosecution to offer no evidence where two juries have disagreed but that here the position is different; only one jury was unable to reach a verdict. It was thus for the prosecution to decide whether the public interest in the conviction of criminals required the second retrial to go ahead subject to the discretion of the trial judge to stay the proceedings for abuse of process. Since the trial did go ahead Mr. Guthrie Q.C. submits that the only question is whether that trial was unfair. Here it was not unfair since the facts were not complicated; two of the appellants gave evidence and did not show any real difficulties in recollecting what had happened."

24. Lord Slynn then went on to say:

> "…..Even so there may come a time when the delay is so great that even having regard to the public interest in convicting the guilty it becomes an abuse of process and unacceptable for a prosecution to continue. The delay is here on any view considerable and disturbing. The appellants contend that there has been no case in the Caribbean where the delay has been so great, particularly when the charge is one of murder and when the appellants have been under sentence of death for many years, with the increased agony recognised in *Pratt v. The Attorney-General for Jamaica* [1994] 2 A.C. 1 which such incarceration imposes. It must be stressed that the complaint here is not just on the ground of delay but also on the ground that it was quite wrong that these appellants should have been put on trial not for the second but for the third time after so many years and when one conviction had already been quashed and when one jury had been unable to agree on a verdict. It may be contrary to due process and unacceptable as a separate ground from delay that the prosecution having failed twice should continue to try to secure a conviction. In this case however both factors fall to be considered. Their Lordships recognise that the trial judge has a margin of discretion in these cases and that they will not readily interfere with the exercise of this discretion. After careful consideration, however, they are satisfied that the combination of these two factors required the trial judge in this case to stay the third trial. For the prosecution to continue was wrong in principle and constituted a misuse of the criminal process."

25. While accepting that this case has the special features to which I referred and further accepting that the case turns in part on the long delays inherent in the re-trial process, it is nonetheless of interest that the Privy Council considered that a third re-trial could but rarely be justified, even in the case of accused charged with murder.

Delays in the criminal justice process

26. Second, it cannot be said that the delays involved in the prosecution of the applicants have been excessive bearing mind the huge complexities involved in these prosecutions. It is true that the applicants have been emeshed in the criminal justice system since the date of their first arrests in April, 2005 and even if a re-trial is ordered, it is likely that this re-trial will take place in 2014 at the earliest. Yet, measured by the delays which have been tolerated in other types of prosecutions, it cannot be said that such delays are in themselves excessive. As Kearns J. acknowledged in *DS*, some allowance has to be given under modern conditions for potentially adverse publicity to fade from the public consciousness. Some of the delays which have been occasioned in the present case have been brought about judicial review applications brought by the applicants and, of course, I do not take these periods of delay into account. Taken as a whole, therefore, it cannot be said that the delays, while regrettable and doubtless stressful for all concerned, have been excessive.

The onerous bail conditions

27. Third, the applicants have been subjected to extremely onerous bail conditions. In addition, both were detained in custody for relatively short periods pending the grant of bail by this Court. Thus, for example, Niall Byrne, has been required to attend Garda stations on a twice daily basis (excluding days on which he was attending court) on virtually every day for five years. (Special exceptions had been made for Christmas Day, his wedding and the birth of a child). While the bail terms were relaxed somewhat (in February, 2011 in the case of David Byrne and in February, 2012 in the case of Niall Byrne), it is impossible nonetheless to deny the pervasive effect which the prosecutions have had on their daily lives. It is only fair to record that both have at all times honoured their bail.

The stress suffered by the applicants and their families

28. Fourth, just as in *DS*, the applicants have suffered from considerable stress and anxiety as a result of the prosecution. In the case of John Byrne, his mother, wife and himself have all sought medical assistance to help them cope with these on-going pressures. He lost his job as a Securicor employee on the day of his arrest. This has also been true in the case of David Byrne, with his wife seeking medical assistance. His young children have met with social ostracization in that his neighbours will not allow their children to associate with them. At the time of his arrest he was working as a taxi driver and he then began driving a van as a courier, but he said that he could not obtain any work as a result of these proceedings. One of the senior investigating Gardaí, Detective Inspector Scott maintains, however, that Mr. David Byrne found employment in the film industry and that he still holds that position.

29. It is, however, worth noting that neither applicant have supplied medical reports from third parties. Thus, for example, in *DS* the applicant had supplied a report from a psychiatrist detailing the effect the stress of a pending trial had upon him and other members of his family. While accepting, therefore, that the applicants and their families have probably suffered from stress and perhaps from a degree of stress over and above that which is inherent in the trial process, it cannot be said that this is a decisive or dispositive factor.

The fact that two juries have already reached disagreement on the merits following two lengthy trials

30. Fifth, far and away the most striking feature of the case is the fact that the applicants had to face two exceptionally long trials, both of which ended in jury disagreement so far as these applicants are concerned. In this context two facts stand out, namely, that the jury disagreed on the merits in both trials and that the two trials were exceptionally lengthy. The fact that the jury disagreed on the merits on both occasions is significant, since as Marshall C.J. put it in *Williams v. State of Georgia* 258 Ga. 305, 369 S.E.2d 232 (1988) (and cited with approval by Kearns J. in *DS*): "The general rule is that retrial of the defendant is not barred where reversal of the conviction results from trial error rather than evidentiary insufficiency." Conversely, where as here, the failure to convict – looking at the matter for the moment through the eyes of the prosecution – stemmed from evidentiary insufficiency this suggests that a third trial should not be permitted.

31. The fact that the trials took so long and the juries in both cases deliberated for days is also a factor which strongly favours the applicants. Some raw statistics serve to put the enormous dimensions of these trials in perspective. Over 200 witnesses gave evidence at the first trial and 163 witnesses gave evidence at the second trial and cumulatively the two trials came to 90 days.

32. Indeed, it is not clear to me whether there has ever been a third re-trial in this jurisdiction following two jury disagreements in

circumstances such as the present one. In this respect, this type of case is totally different from a case such as *AP* where the re-trials all happened following the collapse of the trials very shortly after they had commenced. But even if there has been such a third re-trial, one may safely assume that the circumstances must have been different from the present one in terms of the duration of the various trials. Here it may also be noted that in the first trial – which was the longest ever trial in the Circuit Court - the jury had found itself in a position to deliver guilty verdicts against three of the accused, even if could not agree verdicts in respect of the two applicants. A further striking fact is that while the second trial concerned these two applicants exclusively, the jury again disagreed. Nor was the necessity for the re-trials brought about in any way by any conduct on the part of the accused.

33. In this context counsel for the respondents, Mr. McGinn S.C., placed some emphasis on *United State v. Gunther* 546 F.2d. 861 (1976). Here eight defendants were charged with the theft of a quantity of tyres from a railway goods wagon. The first jury which was empanelled was unable to agree on a verdict. A short time later the second trial commenced. On this occasion two defendants were convicted and there was a jury disagreement in respect of the remaining six defendants. A month later again, the remaining six defendants were again tried and on this occasion the six were convicted on all counts on the indictment.

34. Judge McWilliams commenced his analysis with the classic US authority on the point, *United States v. Perez* 22 US 579 (1824). Here the accused had been tried on a capital crime, but the jury was discharged following a disagreement, The accused claimed that the re-trial was barred by the double jeopardy provisions of the Sixth Amendment, but this argument was rejected by Story J. Judge McWilliams then continued:

> "Certainly the rationale of *Perez* and the other cases cited would not preclude a third trial where the first and second trials both resulted in mistrials based on the fact of a hung jury. Indeed the rationale of *Perez* suggests to us the propriety of a third trial where the prior juries were unable to agree upon a verdict. This assumes, of course, that the concept of "manifest necessity" and "ends of public justice" referred to in *Perez* are met. Here, in the first trial of the matter, eight defendants were brought to trial in a single trial, with each defendant apparently having separate counsel. In such circumstance some jury confusion would appear to be inevitable. The same situation prevailed at the second trial. Here, however, two defendants, Myers and Lamb, were convicted. Bringing the six remaining defendants to a third trial would appear to us to meet the conditions of *Perez* concerning manifest necessity and public interest. There indeed may be a breaking point, but we do not believe it was reached in the instant case."

35. The decision in *Gunter* calls for some comment. First, while the length of the first trial in that case is not set out in the judgment, one may nevertheless assume that it lasted at most a few days. In this respect, it was quite unlike the 65 days which was represented the duration of the first trial in the present case. Second, McWilliams J. surmised that the jury might have been confused in the first trial in that case given the multiplicity of defendants. Yet the jury in the first trial in the present case convicted three defendants. Moreover, the second trial exclusively concerned the present two applicants and last for a shorter period. Yet even under those circumstances there was a jury disagreement.

36. Pausing at this point, therefore, it cannot, I think, be said that, subject to one important caveat in the case of Mr. David Byrne, the respondents can realistically show that a third trial would pass the test articulated by Kearns J. in *DS*. It is true, as we have noted already, that the charges here are more serious than those faced by the applicant in *DS*. It is also true that the delays between the date of the offences and the ultimate trial (2005-2014) involved here are shorter than those at issue in *DS* (1994-2008). At the same time both applicants and their families have certainly suffered psychological stress which is to some degree over and above that which is at issue in the average criminal trial process, even if this is not, perhaps, quite as marked as in *DS*.

37. But even if the seriousness of the charges and the delay points might be thought to favour a third trial, this is more than cancelled out by the remarkable and special facts of the duration of the first two trials and, just as important, the fact that these re-trials resulted from jury disagreements on the merits. While, as we have already noted, there is no *ex ante* rule in relation to such matters, it seems clear from the cases such as *DS* and *Carter* that a third re-trial following two jury disagreements *on the merits* will *normally* constitute a Rubicon beyond which no prosecution should generally cross. So far as the present case is concerned, it must particularly be borne in mind that a third trial involving these applicants alone would presumably take another twenty five days. If that too resulted in a jury disagreement, is to be said that we are then to have a fourth such prosecution? In these circumstances I am driven to the conclusion that, based on the test articulated by Kearns J. in *DS*, a further trial would amount to a *ne plus ultra* in terms of oppression, unless there was compelling new evidence available against either applicant.

Is there compelling new evidence?

38. Notwithstanding all that I have just said, the availability of compelling fresh evidence may nonetheless be a factor which points to permitting a third re-trial.

39. This issue was examined in the context of an abuse of process argument by the English Court of Appeal in the case of *R. v Henworth* [2001] 2 Cr. App. R. 4, a case which was cited with approval by Kearns J. in *DS*. In *Henworth* the appellant was charged of murder of which he was convicted. The conviction set aside by the Court of Appeal whereupon a retrial occurred which resulted in a jury disagreement. A second retrial then began in which the appellant conducted his own defence. Owing to difficulties in the conduct of his defence the jury was discharged. A further retrial then took place and the appellant was convicted. He appealed against conviction and argued that the convention which provided that if a jury disagreed on two occasions the prosecution would not seek a further trial should also apply to the circumstances of this case where the jury on the first occasion convicted.

40. The Court of Appeal held, however, that when a serious crime is committed and a clear case to answer as far as a defendant was concerned is established, the clear public interest lies in having a jury decide positively one way or the other whether that case was established. In the course of his judgment, Kennedy L.J., considered the reasons for the existence of the convention, stating:

> "We suspect that at least part of the rationale for the convention to which [counsel] has referred is that the prosecution should only proceed against any given defendant if they consider that there are real prospects of obtaining a conviction from a jury. If two juries have disagreed when presented with substantially the same evidence inevitably the prosecution must carefully reconsider its position.
>
> We see no reason to conclude that it should apply in the sort of circumstances with which we are concerned in this case. Furthermore, we would not elevate it into a proposition of law. We do have to have in mind, for example, the situation which might arise if one jury which disagreed was shown consequently to have been interfered with, or some highly persuasive piece of evidence were to emerge during the course of a retrial, too late perhaps to be used in that trial but capable of constituting devastating evidence on behalf of the Crown if there were to be further proceedings."

41. Is, there, then compelling new evidence available to the prosecution so far as these applicants are concerned? It is accepted

that so far as Niall Byrne is concerned, there is no such new evidence. The situation with regard to David Byrne is, however, different and deserves separate consideration.

The original unapproved judgment

42. Before considering this new evidence it is necessary to relate that in the original unapproved judgment delivered by me on 2nd July, I had erroneously stated that the prosecution contended that the new evidence would show that Mr. David Byrne had subsequently used the mobile telephone (*i.e.*, the "purple" telephone) which had been used by the kidnappers in the course of the robbery. This error was in part based on an (admittedly) erroneous statement in an affidavit.

43. In the wake of the delivery of the draft judgment and before it was finalised or any any order was drawn up on foot of it, counsel for Mr. David Byrne, Mr. Marrinan SC and Mr. Fitzgerald very properly drew these errors to my attention. For their part, counsel for the Director, Mr. McGinn SC and Ms. Phelan, readily accepted that I had – all too characteristically, I fear – fallen into error in respect of these vital facts. It was agreed that in these special circumstances I should vacate that part of this judgment in relation to the new evidence. The Supreme Court has made it clear that this Court can re-open findings of fact in exceptional cases, provided that the re-opened hearing is confined specifically to the erroneous findings: see *Re McInerney Homes Ltd.* [2011] IESC 31 at paras. 61-62 of the judgment of O'Donnell J.

44. This is plainly such a case. The errors in question were central to any fair evaluation of the new evidence issue. I then agreed to hold a fresh hearing confined solely to the question of findings of fact in relation to the new evidence and an evaluation of that evidence. This process was very helpful in ascertaining the precise nature of the new evidence and, indeed, I believe it is probably fair to say that in the course of this further hearing both sides further refined their presentation of the new evidence issue. This judgment as thus amended reflects these further submissions.

The new evidence concerning David Byrne

45. So far as David Byrne is concerned, the prosecution maintain that there exists significant new evidence against him which was not admissible at his second trial. It is accepted that at that trial His Honour Judge McCartan ruled against the admissibility of this new evidence by reason of its late delivery to the defence.

46. The new evidence consists mainly of an analysis of certain telecommunications records relating to what came to be described as the "purple" mobile telephone. Evidence had already been given at the first and second trials that the purple telephone had been used at a critical stage in the robbery and kidnap of the Richardson family. It was thus the telephone which was used by the kidnappers at about 2.30 am in the early hours of 15th March 2005 to enable Ms. Richardson to speak with her husband. Closed circuit television evidence from a Texaco filling station on the evening of the robbery (allegedly) shows Mr. David Byrne purchasing credit for this mobile phone. Three separate mobile telephones were also found in Mr. Byrne's car - which was a taxi - which had been parked in the driveway of his house. These telephones were given the designations DOC 1, DOC 2 and DOC 3 respectively at these earlier trials.

47. The new evidence on which the prosecution would now seek to rely at any further trial requires a subtle and painstaking analysis of these telecommunications records with a view to showing that a (now deceased) person known to Mr. David Byrne and with whom he was in contact during this period – namely, one Terence Dunleavy – telephoned the purple mobile telephone on 14th March 2005. The prosecution will accordingly seek to invite the inference that the late Mr. Dunleavy telephoned the purple telephone in the belief that by doing so he could speak to or otherwise contact Mr. David Byrne, thus connecting him (*i.e.*, Mr. Byrne) in a material way with the kidnap by reason of his possession of or his access to that telephone.

48. The purple telephone was first used on 11th March 2005 and it was not used again after 15th March 2005. During the period from 11th March to 15th March 2005 the purple telephone initiated contact with only 12 different numbers and was the recipient of contacts from only nine persons. Five of these contact numbers are also linked with DOC1, DOC 2 and DOC3. It is also contended that these numbers included numbers associated with Terence Dunleavy and another key prosecution witness, an Alan Drumgoole.

49. It is important to stress again that the telephone records in relation to the purple telephone do not constitute new evidence as such. These records were, after all, in use in both the first and second trials. What is new is the level of attention given to the numbers and detailed examination of the numbers with which the purple telephone was in contact.

50. In the two previous trials, evidence was given that the person (or persons) who used the purple telephone was (or were) in contact with three other persons involved in the kidnap and with Alan Drumgoole. Mr. Drumgoole gave evidence that he had spoken to Mr. David Byrne on the day of the robbery on this number. What the prosecution contend is that the additional evidence demonstrates that the purple telephone was in contact with twelve telephone numbers only and that one of those numbers was that of Mr. Terence Dunleavy.

51. It is alleged that Mr. David Byrne telephoned Mr. Dunleavy in mid-April 2005 using the telephone known as DOC 3. (As it happens, Mr. Dunleavy was shot dead minutes later, but tragic as this event is, it is not directly relevant to the issues in the present case.) The call was answered by Samantha Ellis, the girlfriend of Mr. Dunleavy. Ms. Ellis cannot immediately identify Mr. Byrne by name, but says that she knew him as "Mousey" and that he drove a small blue taxi. The prosecution contends that the significance of this evidence is that it shows that Mr. David Byrne and Mr. Dunleavy knew each other.

52. It is further alleged that Mr. Dunleavy had previously sought to contact Mr. David Byrne on 14th March 2005 and, critically, that the calling pattern shows that Mr. Dunleavy believed that Mr. Byrne used or had access to the purple telephone. The prosecution accordingly contend that Mr. Dunleavy rang (i) the purple telephone, (ii) a telephone number corresponding to a contact listed as "Davey" in Alan Drumgoole's mobile telephone and (iii) a telephone number corresponding to contact listed as "Mousey Byrne" in Alan Drumgoole's mobile telephone in quick succession. One of these calls lasted some 62 seconds.

53. In essence, therefore, the prosecution's case on this issue is that Mr. David Byrne knew Mr. Dunleavy and that they were in telephone contact with each other during this period. That in itself would be of no particular significance save that Mr. Dunleavy rang the purple telephone on 14th March 2005 and thereafter rang the telephone numbers corresponding to – or so the prosecution allege - the contact numbers listed as "Davey" and "Mousey Byrne" in Alan Drumgoole's mobile telephone. Mr. Drumgoole maintains that the references to "Davey" and to "Mousey Byrne" in his telephone are to Mr. David Byrne. The prosecution contend that the inference from this sequence of telephone calls this is that a person who knew Mr. David Byrne – namely, Mr. Dunleavy – believed that the former could be contacted on 14th March 2005 via the purple telephone and that when he could not be reached at that number, Mr. Dunleavy then tried to contact him via the "Davey" and "Mousey Byrne" numbers.

54. It is important to state that Mr. David Byrne does not accept that he is the person referred to variously as "Davey" or "Mousey Byrne" in the contacts section of Mr. Drumgoole's mobile telephone and, moreover, denies any involvement with the purple telephone.

In evaluating this evidence it must be further acknowledged that Mr. Drumgoole has already accepted that he perjured himself during the course of the first trial.

55. It is accepted that the case against David Byrne is purely circumstantial. In essence, much of it turns on an analysis of the use of mobile telephones during the course of the kidnapping and the subsequent false imprisonment of the Richardson family. Here the identity of the person or persons who used or who had access to the purple telephone during the four days in which it was in use in mid-March 2005 is crucial. In many respects, the entire prosecution case rests on showing that there was a link between Mr. David Byrne and the possession or usage of the purple telephone. While the analysis of the telecommunication records urged by the prosecution is complex and sophisticated, nonetheless three points emerge.

56. First, if the account of Ms. Ellis is accepted, there is evidence that Mr. David Byrne rang Mr. Dunleavy immediately before the latter's death in April 2005. If this is so, it suggests that both men were in contact during this general period and that they knew each other.

57. Second, if the account of Mr. Drumgoole is accepted, then the telephone numbers ascribed to "Mousey Byrne" and "Davey" in his list of contacts in his mobile telephone are in reality those of Mr. David Byrne. In making any assessment of this evidence it must not be overlooked that Mr. Drumgoole has already confessed to have given perjured evidence at earlier stages of these trials.

58. Third, the prosecution stress the fact that Mr. Terence Dunleavy rang the purple telephone and the mobile telephones of both "Mousey Byrne" and "Davey" in quick succession on March 14th. Of course, the evidence that these telephone contact numbers also refer to Mr. David Byrne rests entirely on accepting the evidence of Mr. Drumgoole in relation to the underlying identity of the person or persons referred to in his mobile telephone contact numbers, the inevitable frailties which attach to his evidence notwithstanding. Nevertheless, if Mr. Dunleavy was indeed one of the limited number of persons to make contact with the purple telephone during the short period during which it was in use, this might be regarded as a singular fact. How, for example, did he come to know of the existence of this number and why did he ring it? If it is further accepted that Mr. Dunleavy rang the three numbers (the purple telephone, the "Mousey Byrne" and the "Davey" numbers) in succession and that the latter two numbers refer to Mr. David Byrne, then this might well suggest that a person who knew Mr. David Byrne and who was seeking to contact him on that critical day rang the purple telephone because that person believed (or even knew) he could thereby speak to him.

59. The assessment *in abstracto* of this new evidence is not an easy task to perform. One must recognise that the prosecution case depends on the acceptance of the evidence of both Ms. Ellis and Mr. Drumgoole. From the prosecution's perspective it is necessary – but not in itself sufficient – that this evidence be accepted in full. If these hurdles are cleared, then the prosecution case rests on the further inferences to be drawn from the fact that a now deceased person, Mr. Dunleavy, rang thee telephone numbers (including the purple telephone) in succession on March 14th.

60. At one level, the new evidence could – and might very well be – dismissed by the jury as weak and speculative, even if – which is by no means certain – the jury also accepted the credibility of the evidence of Ms. Ellis and that of Mr. Drumgoole. In the end, the prosecution case in relation to the new evidence effectively now comes down to an invitation to draw an irresistible inference from the banal and routine actions of a now deceased person and in respect of which matters many might think only an equivocal inference could at best be drawn.

61. The evidence can, of course, also be read differently. Here one might dwell on the fact that the purple telephone was only in use for a short period which was contemporaneous with the robbery; that Mr. Dunleavy knew Mr. David Byrne and that both were in telephone contact around this period; that the purple telephone was in contact only with twelve telephone numbers during the four day period associated with the robbery and the fact that Mr. Dunleavy rang two numbers associated with Mr. David Byrne immediately after ringing the purple telephone all suggest that Mr. Dunleavy believed (or, if you wish, even knew) that the purple telephone belong to Mr. David Byrne. One might also ask how it was that Mr. Dunleavy came to ring the purple telephone just a few days after it came into use.

62. Divorced as I am from the complex underlying facts which have already been presented to two juries, it is well nigh impossible to make any predictive assessment of how a jury might treat this new evidence. This is particularly so given that the new evidence is but an additional strand of circumstantial evidence, all of which rests on an analysis of the highly complex underlying facts. In many respects, the new evidence could really only be fairly weighed by a person who had the benefit of hearing the entirety of the prosecution evidence.

63. Yet it is, I think, sufficient to say that there is at least a possibility that a jury might regard this evidence as highly compelling, even if other options would seem to be equally open to them. It is true that the new evidence here is perhaps very different from that which Kennedy L.J. probably had in mind in *Henworth*. The test is, of course, so much easier to apply in straightforward cases where the new evidence consists, for example, of an important new witness not heretofore available or, where, in cases of assault or homicide, the hitherto concealed offensive weapon has now been discovered. The present case is anything but straightforward, but is possible that the new circumstantial evidence will prove crucial in a case which itself otherwise rests on circumstantial evidence. While the issue is difficult and troubling, I nevertheless find myself obliged to conclude that in this respect the Director has demonstrated enough to show that the case comes within the rubric of both *DS* and *Henworth*.

The potential impact of the Supreme Court's decision in Damache

64. During the course of the hearing there was much argument concerning the impact of the Supreme Court's decision in *Damache v. Director of Public Prosecutions* [2012] IESC 12 which held that the search warrant powers contained in s. 29 of the Offences against the State Act 19039 were unconstitutional. It is undeniable that this power was widely used by the Garda authorities in the course of the investigation into this case and it is plain from the decision of the Court of Criminal Appeal in *The People v. Kavanagh* [2012] IECCA 65 concerning the appeals of the three co-accused that certain items of evidence relied on by the prosecution during the course of the first trial will probably be excluded at any re-trial.

65. It is, however, in its own way a reflection of the immense complexity of this case that it is nonetheless really impossible for me to form any view as to what the trial judge is likely to do or rule in the course of any re-trial in relation to the admissibility of any such evidence. Much may depend on which accused may invoke the *Damache* principles and in what circumstances. Thus, for example, three telephones (described already as DOC 1, DOC 2 and DOC 3) were seized from Mr. David Byrne's car which was parked in a driveway of his house. Detective Inspector Scott initially suggested that these telephones had been seized under the provisions of the Criminal Law Act 1976, but it now appears to be accepted that the seizure took place pursuant to the terms of a search warrant which had been issued under s. 29 of the 1939 Act. But even if the Gardaí had no power to seize the telephones, issues may yet arise as to whether this evidence should be excluded given that the telephones were not physically present in Mr. David Byrne's house when this occurred.

Conclusions on the new evidence
66. In summary, therefore, I am left with the impression that at a third trial the prosecution may be able to tender new evidence against Mr. David Byrne which, *if* the prosecution's analysis were to be accepted (and I stress the conditional nature of this), is capable – to adapt the words of Kennedy L.J. in *Henworth* - of constituting "highly persuasive evidence" against him. I express no view on whether this is so or whether the prosecution ought to be able to establish this analysis before the jury. I would merely say that the evidence is capable of having a highly persuasive effect and it is this single factor which persuades me that, in contrast to the case of Niall Byrne, I should not grant an order restraining a third trial.

Witness coaching
67. Objection was also taken to the fact that a further statement was taken from Mr. Alan Drumgoole on 7th March, 2012, by Detective Inspector Scott which it is proposed to tender at any third trial as additional evidence against Mr. David Byrne. Mr. Drumgoole was formerly a good friend of Mr. David Byrne and he was arrested in the course of the investigation. It is accepted that he did not tell the full truth in the course of earlier interviews and it is now proposed to tender a new version of his evidence at any re-trial.

68. It is, of course, axiomatic that there cannot be any witness "training" or "coaching" on the part of either the prosecution or the defence in the sense that prospective witnesses in a forthcoming criminal trial are allowed to practice giving evidence in the presence of legal professionals or to otherwise co-ordinate their evidence by means of some sort of practice sessions. Quite apart from the fact that such practice would be unethical for legal professionals (*cf*. Rule 5.18 of the Bar Council's Code of Conduct), a practice whereby witnesses are so trained or coached runs the real risk that witnesses will tailor their evidence in the manner which they believe is apparently expected of them. The practice is objectionable at several levels, but chiefly because it assists the dishonest witness to calculate how his or her evidence may come across as consistent and convincing. It further helps to create an environment where the evidence of all participating witnesses may be contaminated: see generally the comments of Judge L.J. in *R. v. Momodou* [2005] 1 W.L.R. 3442, 3453-3454.

69. For my part, I cannot see that this has come about in the present case. Detective Inspector Scott took a further statement from Mr. Drumgoole and a full record of that statement has been disclosed to the defence team. While I express no view at all on the merits of what is contained therein or, indeed, its very its admissibility in evidence, I cannot see how the mere taking of a further statement in the course of a Garda investigation even from a witness whose evidence was controversial and who was subject to the most searching of cross-examinations during the course of the earlier trials infringes this rule.

Conclusions
70. It remains only to summarise my principal conclusions:

A. It is clear from cases such as the Supreme Court's decision in *DS* that a third trial following two jury disagreements on the merits is presumptively excluded unless there are special and unusual circumstances. This, however, is merely a working hypothesis and is not a firm rule of law.

B. It is true that both applicants face very serious charges, a factor which in itself suggests that the public interest in pursuing the matter to finality on a third trial is very strong. In the present case, however, the fact that the applicants have already faced two lengthy trials culminating in jury disagreements is a factor which also pulls strongly in the opposite direction.

C. The prospect that new and potentially highly persuasive evidence will be available on a re-trial is also a strong factor suggesting that such a trial will be permitted.

D. As there is no new evidence against Niall Byrne, I consider that the fact that he has already faced two long trials which culminated in jury disagreements is decisive in his favour. A newly empanelled jury would be in no better position to arrive at a verdict than the two previously empanelled juries who could not arrive at a verdict and in these circumstances it would be unfair to submit him to the ordeal of a third trial. Based, therefore, on the principles enunciated by Kearns J. in *DS*, I would accordingly grant him an order of prohibition restraining his third trial.

E. Not without some hesitation, I have come to the opposite conclusion in the case of David Byrne for the sole reason that there is a prospect that the prosecution will be able to introduce new (admittedly circumstantial) evidence which may be of a highly persuasive character in a case which rests wholly on circumstantial evidence. It is this factor which, I think, tips the balance against him and which constitutes an unusual factual circumstances within the meaning of *DS* which points towards a re-trial. It is for this single reason that I would refuse to grant such relief in his case.