THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 28 JR]

BETWEEN

J. S.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS AND JUDGE AINGEAL NÍ CHONDÚIN

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on the 5th day of February, 2016.

1. The applicant was granted leave to apply for judicial review on 10th January, 2015 (Noonan J.) for an order of prohibition against the second named respondent from taking any further steps against the applicant in a prosecution entitled Director of Public Prosecutions (at the suit of Garda Kieran Hubert Healy) v. J. S. on charge sheet number 14802404, or an order of *certiorari* quashing the decision of the Director of Public Prosecutions to proceed with the prosecution of the applicant on a charge of sexual assault contrary to section 2 of the Criminal Law (Rape) (Amendment) Act 1990 as amended by section 37 of the Sex Offenders Act 2001. In the alternative the applicant seeks an order of *certiorari* quashing the judgment of the second named respondent in determining that the destruction of independent objective video evidence said to be relevant to the applicant's defence upon the said charge, was not prejudicial. The applicant also seeks an injunction prohibiting the first named respondent from further prosecuting the applicant in respect of this charge.

Background

2. In the early hours of 6th January, 2013 Gardaí were called to a domestic apartment block in response to a complaint of sexual assault by one male upon another. On arrival the Gardaí met two men, the complainant and the applicant herein. The complainant alleged that having returned from work and having parked his car in an underground carpark; he approached the elevator that would take him to his apartment. He was followed by the applicant whom he recognised as a resident of the same complex but to whom he had never spoken. The applicant was standing at the entrance to the elevator as the complainant approached. The button for the elevator had been pressed. The following account of the incident, which gave rise to the charge of sexual assault, was furnished by the complainant in a statement made on the 16th January, 2013:-

> "On the night in question I opened the gate to the underground carpark and as I did so a male, now known to me as (the applicant) walked through the gate at the same time. I recognised this male from living in the same apartment block but I have never spoken to him. A(s) I parked my car in the carpark, I took my bag from the rear seat and I locked the car and made my way to the elevator to gain access to my apartment block. As I opened the door for the elevator in the carpark (the applicant) was already standing there. I did not engage him in conversation. He stood with his back to me and I could see the button for the elevator was pushed so I did not need to do that. Out of the blue (the applicant) turned to me, faced me directly on and stated "is it true what they say, guys with big cars have big cocks". Immediately after that he reached out with his right hand and grabbed me by the crotch on the outside of my jeans, squeezing my testicles hard. I immediately froze to the spot. I was holding my bag in my right hand and had my left hand in my jacket pocket. I was in shock and disbelief. It must have been obvious by the look of shock on my face because (the applicant) refused to let go. I had to physically remove his hand from my crotch with both my hands. As I done that, I pushed (the applicant) away from me in case he went to attempt it again. I wanted to get away from this man so I immediately turned and made my way up the stairs to my apartment floor. I took my time walking up as I was replaying what had just happened in my mind and what I should do next. As I got to my floor (the applicant) was waiting for me …."

3. Garda Healy who had arrived at the scene with his colleague in response to a 999 call made by the complainant gave his account of meeting the two men that night in his affidavit sworn the 4th October, 2015. Garda Healy states that the complainant outlined the circumstances of the alleged assault:

> "I say that the complainant told me that he had just returned home from work and had parked his car in the underground carpark and went into the elevator to go to his apartment. He said that the applicant followed him into the elevator, made a sexually suggestive comment and subjected him to a sexual assault. He said that the applicant was intoxicated and that he grabbed the complainant by the testicles. The complainant claimed that he was in shock and that he did not react to this. He also stated that he did not give this male permission to assault him and did not know this male nor had they ever had any contact with each other previously."

Garda Healy also states that the complainant indicated that he did not wish to make a formal complaint about the matter. This was noted by Garda Healy in his notebook which the complainant signed.

4. Garda Healy states that he then spoke to the applicant who stated, following the administration of the usual caution to him:-

> "… that the events complained of did happen and he was drunk and only messing and stated "it was only a bit of fun"."

Garda Healy then advised the applicant that his behaviour was unacceptable and the applicant then admitted that "it was wrong and said he was sorry". Garda Healy noted that the applicant had recorded some footage of the complainant after the alleged offence had taken place and that the complainant had taken a photograph of the applicant. He viewed the footage and the photograph. In his presence the applicant deleted the footage from his mobile phone and the complainant deleted the photograph. An entry was made in his notebook regarding the deletion of the footage. The applicant signed an acknowledgment that he had deleted all video footage of the injured party from his iPhone voluntarily and had not been forced to do so by the Gardaí. However, it should be noted that firstly, the complainant was a member of An Garda Síochána who had made this fact known to the applicant prior to, or at the time of telephoning for assistance, and secondly, the applicant claimed that he deleted the footage on the understanding that a complaint would not be pursued by the applicant. Thirdly, it is of importance that the applicant and the respondents accept that the footage does not relate to the occurrence of the alleged incident but only events immediately after, which are in dispute.

5. Although the complainant initially declined to pursue the matter, he changed his mind the following day which led to the making of his statement on the 16th January. On the 25th March, 2013 the applicant was interviewed under caution and amongst other things accepted that he had an encounter with the complainant. He acknowledged that he had entered the gate to the underground carpark

at or about the same time. He was waiting for the elevator door to open when the complainant carrying a sports bag stood beside him. He accepted that he engaged the complainant in conversation. He said:-

> "I noticed he had a sporty car and I can't remember my exact words but I think they were something like "I hear people with big cars have small dicks". It was something like that. I meant this as a joke and a laugh. As I said this we were still outside the lift and I flicked my right hand towards his genital area and connected with this man. It was only a tap and I had no intention to hurt or cause pain to him. … He looked a bit shocked but initially said nothing but he then produced his identification and said he was a Garda and said to me I can't do that. At this point the lift had opened".

He said that he then apologised and said he was sorry. The complainant and the applicant differ in their accounts of the period between the alleged assault and the arrival of the investigating Gardaí.

Immediate Aftermath
6. Following the alleged assault the complainant states that he turned and made his way up the stairs to his apartment floor. He gave the following account in his statement of 16th January:-

> "I took my time walking up as I was replaying what had just happened in my mind and what I should do next. As I got to my floor (the applicant) was waiting for me. This was a bigger shock because he doesn't live on the same floor as me so it became obvious to me he was waiting for me. He kept repeating "ah come on". I was disgusted and told him that I was a Garda, that I was going to call the Gardaí in Coolock if he didn't move out of my way. (The applicant) refused to move and blocked me gaining access to my apartment. The initial walkway from the stairwell is small and (the applicant) filled up most of it. I immediately felt intimated by this. It was then, at approximately 2.20 a.m., I rang 999. I informed the call taker that I was after being sexually assaulted and that I required the Gardaí as the male would not leave me alone and was stopping me getting to my own apartment. (The applicant) heard me give my name to the call taker and repeatedly kept attempting to wind me up by laughing and saying "ah come on, come on now". I refused to make my way into my own apartment as my girlfriend was inside and I did not want to cause her any distress so I made my way back to the basement via the stairwell, walked through the underground carpark at a pace and waited outside in open area for Gardaí to arrive. As I was doing all this (the applicant) remained only several steps behind me. Gardaí were outside within seconds of me walking outside the apartment complex."

7. The applicant gives a diametrically opposing account as follows. He states that having flicked his right hand towards his genital area and connecting with him, the complainant looked a bit shocked but initially said nothing. It was at this stage that he produced his identification card and said he was a Garda, telling the applicant that he could not do that. The applicant states that they both then entered the lift at the same time. The applicant claims that he asked the complainant his name which was not given. The complainant told him that he knew who he was and that he lived at number 10. The applicant claimed that he left the lift and walked out ahead of the complainant who followed him towards his apartment. He lived in number 10 but stopped outside number 11 because he did not want the complainant to know where he lived. He states that the complainant then took out his phone and took a picture of the apartment door. He then walked down the corridor and went down the stairs. The applicant states that he remained at the lift and then heard the lift coming back up. He hit the button and when the lift door opened the complainant reappeared. He then said the following occurred:

> "He (the complainant) said stop following me and he took out his phone and made what I presumed to be a 999 call. I also had my phone out and I was recording on video the call he was making. He identified himself as a Guard to the person who answered the call and said he was being harassed and followed by somebody in his apartment. He then started saying go away from me, stop hitting me, but I was about two feet away from him recording all these actions at all times and I think he was saying this for the benefit of the person he made the call to … my concern was when he took a picture of number 11 … that this was an elderly lady and I didn't want to involve her in this. When I heard him coming back to the apartment block I thought he may knock on the door so I wanted to have a video of what was happening that's why I recorded this …"

8. The applicant accepts that he was preceded down the stairs by the complainant and that they stood separately waiting for the Gardaí to arrive. He had stopped recording at this stage. In respect of the allegation of sexual assault he said:

> "… I would not consider it a sexual assault it was merely a light tap but however if the complainant thinks it to be then I apologise".

The Delay and the Unavailable Evidence
9. The complainant did not make an immediate complaint and indeed indicated that he did not intend to do so just after the incident. Later, on the 7th January, having considered the matter overnight, he decided to proceed with the complaint. He had been concerned because of the stigma that might attach to him as an injured party in a sexual assault and the embarrassment that may attach to any prosecution within his employment as a member of An Garda Síochána. However, he felt that he could overcome this and proceeded with the complaint. He was then interviewed on the 16th January. The applicant was interviewed under caution on the 26th March, 2013. It is said that the delay in interviewing the applicant has not been explained as the applicant was at all times available to Gardaí and was residing at the same address. Garda Healy states that he made several attempts to contact the applicant prior to the interview of the 26th of March. The delay was due to a difficulty in organising a mutually convenient time. The applicant was first contacted within a couple of weeks of taking the initial report and was fully aware that it concerned the incident of the 6th January.

10. On the 21st August, 2013 Garda Healy prepared a file for the office of the Director of Public Prosecutions. The directing officer raised some queries on the 21st November, 2013 which were replied to on the 20th January, 2014. A direction was given to prosecute the applicant by letter dated 27th March, 2014. On the 30th May, 2014 the applicant was arrested and brought before the Dublin Metropolitan District Court No. 4. He was granted his own bail of €200.00 and remanded to the 27th June, 2014, on which date the District Court accepted jurisdiction. The matter was then to proceed by way of summary trial. Disclosure was furnished which included statements from the complainant, the prosecuting Garda, the cautioned interview made by the applicant and the notebook entries made on the night of the event. A further statement from the complainant was furnished in September 2014. The applicant's solicitor wrote to the Director of Public Prosecutions requesting a reconsideration of the decision to prosecute because of the deletion of the video evidence on the night of the incident.

11. The matter was remanded from time to time and was listed for hearing before the District Court but did not proceed due to witness difficulties. It was listed for legal argument on 17th December, 2014 before the second named respondent. At this hearing

Garda Healy gave evidence that he had responded to a call and when he arrived at the scene there were two men standing at opposite ends of the road. A colleague spoke with the alleged offender. The complainant alleged to Garda Healy that he was followed into the elevator and that his testicles were grabbed, that he was in shock and had pushed the alleged offender away and then placed a 999 call. The complainant did not wish to make a complaint at that time. He stated that the applicant had a video on his mobile phone which Garda Healy viewed at the time and which lasted 30 seconds approximately. It showed the complainant walking down the corridor with the applicant recording him from behind. The complainant stated that if the video were to be deleted the matter would go no further. The applicant was asked to delete the video and did so voluntarily and signed the Garda notebook accordingly. The complainant also signed the Garda notebook to say that he was not making a formal complaint at that time. The complainant did not view the video. The complainant changed his mind the next day and rang Garda Healy at Coolock Garda station. Garda Healy accepted that the video showed a corridor and may have shown apartment doors with numbers but could not recall at that stage. He also accepted that since there were two versions of these events it would be important to have independent evidence as to the floor upon which they occurred, which might go to the credibility of the witnesses. He further accepted that he could have seized the phone rather than delete the video but did not do so because he believed that the complaint would not proceed any further.

12. Garda Healy states that the footage did not show the complainant making a "999" call. He said that it was about 30 seconds long and showed the complainant walking down a corridor. The applicant appeared to be following him while using his phone to record the complainant. Garda Healy does not state whether a voice or voices could be heard on the recording.

13. On the basis of this evidence, an application was made to the second respondent for an order staying the prosecution of the applicant based on the inherent jurisdiction of the Court to do so, on the ground that the deletion of the video from the iPhone was prejudicial to a fair trial. The learned judge refused the application, considering that the deletion of the video was not prejudicial to the applicant's fair trial and stating that the evidence would have been "helpful at best". The matter was remanded until the 3rd March, 2015 for continuation of the trial before a different judge. The applicant contends that issues of fact concerning who followed whom and on what floor subsequent exchanges occurred were relevant to the credibility of the complainant and that the video evidence was crucial to resolving those issues. The learned judge was not so satisfied.

14. From the above facts it is clear that the video recording and the photograph were items of real evidence purporting to provide some record of what happened in the immediate aftermath of the alleged assault. The issue in this case arises from the deletion of the photograph footage, facilitated by Garda Healy and his colleague in circumstances in which it was clearly understood at the time that the complainant would not pursue a complaint against the applicant. It is clear that the footage and photograph constituted material which was relevant to and part of the events surrounding the charge in this case. Garda Healy accepted in the District Court that he could have taken possession of the applicant's phone rather than permit the video recording to be deleted but did not do so because he thought that the matter was not proceeding any further. He also accepted that the video showed a corridor and "may have shown" apartment doors with numbers but simply could not recall at that stage whether such numbers were shown.

15. It is clear from the relatively short ruling by the learned judge that while she considered the material to be of some relevance or "help" to the applicant, she did not consider that the absence of the recording or the photograph reached the threshold required to establish a real risk of an unfair trial.

The District Court Ruling

16. At the request of the applicant, the issue as to whether the proceedings should be stayed or dismissed as an abuse of process because of the deletion of the footage, and photograph, was treated as a preliminary issue at the trial. By this stage the applicant had been arrested and charged and the District Court had full jurisdiction to deal with the trial of the matter, the Director of Public Prosecutions having consented to summary disposal. No particular procedure is prescribed for the hearing or determination of "preliminary issues" in the District Court and it was simply in the interest of efficient case management that the issue was determined as a preliminary point.

17. There are many reasons why determination of a single issue such as admissibility of evidence may be considered at the outset of a case and the applicant and the Director of Public Prosecutions were both satisfied that the learned judge had jurisdiction to determine this matter. In doing so, all relevant evidence and all relevant exhibits were adduced in the course of the hearing. The applicant had the opportunity to cross examine Garda Healy on all relevant issues and to adduce any evidence upon which he wished to rely. The learned judge therefore had the advantage of hearing oral testimony in relation to the issue and the parties were not constrained by the more formal procedures applicable to judicial review. On the contrary, it was open to the applicant, had the trial proceeded in the normal way, to revisit the determination made by the learned judge if, during the hearing, additional evidence or matters arose which provided further proof of the real risk of the unfairness alleged. A trial judge who has a continuing duty to ensure the fairness of the trial under article 38 of the Constitution at all times, arguably has a much better understanding and overview of the reality of any such unfairness having heard all relevant evidence in a case. The test applied by the learned District Judge was the same as that applicable on judicial review (*see Director of Public Prosecutions v Byrne* [1994] 2 I.R. 236: *Director of Public Prosecutions v Mc Neill* [1999] 1 I.R. 91: *Director of Public Prosecutions v Arthurs* [2000] 2 I.L.R.M. 363 and *Devoy v DPP* [2008] IESC 13).

18. The normal rule is that a trial, once commenced, should proceed to its conclusion without interruption. As stated by Ó Dálaigh CJ. in *The People (Attorney General) v McGlynn* [1967] I.R. 232 at page 239:-

> "The nature of a criminal trial by jury is that, once it starts, it continues right through until discharge or verdict. It has the unity and continuity of a play. It is something unknown to the criminal law for a jury to be recessed in the middle of a trial for months on end, and it would require clear words to authorize such an unusual alteration in the course of a criminal trial by jury".

19. This statement is equally applicable to non-jury trials, subject to the jurisdiction to grant a case stated (see *Director of Public Prosecutions v Special Criminal Court* [1999] 1 I.R. 60 at p. 89 per *O'Flaherty J. and Blanchfield v Harnett* [2002] 3 I.R. 207 at p. 225 per Fennelly J.). It is only in the most exceptional circumstances that this Court will exercise the jurisdiction to intervene in a criminal trial since the trial judge possesses the necessary powers, which it is presumed he will exercise fairly and justly in respect of all matters in issue. (See *Blanchfield* supra and *Clune v The Director of Public Prosecutions* [1981] I.L.R.M. 17).

20. Although the integrity and unity of a trial process is regarded as a fundamental requirement in the administration of justice under article 38, the Court must also consider the fundamental legal principle, that an accused must not be placed on trial where there is, clearly, a real and unavoidable risk of an unfair trial. The issue of whether judicial review is the most appropriate or effective form of remedy to ensure vindication of that right was considered in *Wall v. Director of Public Prosecutions* [2013] IESC 56 and was the subject of extensive obiter dicta but the issue was left over for future consideration.

The Stirling Case
21. In *Stirling v. District Court Judge Collins and The Director of Public Prosecutions* [2014] IESC 13 the Supreme Court considered how the tension between the continuity of a criminal trial, and a real and unavoidable risk of an unfair trial might be approached. In that case the appellant sought relief by way of judicial review during the currency of a criminal trial.

22. McMenamin J., delivering the judgment of the Supreme Court (Laffoy and Dunne JJ. concurring) set out the circumstances in which, exceptionally, this Court might entertain an application for judicial review of a matter which has been the subject of a ruling by the trial court. He stated:-

> "A review court must, therefore, proceed on the basis that it is plainly undesirable that any applicant should seek judicial review during the currency of any criminal trial; but very occasionally, a matter may arise which is so fundamental that it goes to jurisdiction, that is, whether the trial should proceed at all. In fact, in *The Director of Public Prosecutions v. Special Criminal Court,* Carney J., who heard the judicial review application in the High Court, strongly deprecated the possibility that, when there are adverse rulings to an accused, a trial might be punctuated by "expeditions" to the review court. I entirely agree. However, in that case, this Court on the appeal, while again strongly deprecating the principle of any break in trial – continuity, went on to hold that, on the very unusual facts, the High Court had been correct to entertain the application for review at first instance. This was for two reasons: first, because the trial court had addressed the point sought to be reviewed as a single discrete issue – the case had been "opened" for that purpose; second, judicial review was necessary because of the importance that there should be a definitive ruling on the matter of informer privilege. There were very exceptional circumstances. Counsel for the prosecution had, in fact, been invited by the Special Criminal Court to "open" the case, purely for the purposes of giving the members of that Court an idea of the issues at stake. Speaking for the Court, O'Flaherty J. pointed out, "essentially the ruling (in the Special Criminal Court) that was sought and given was by way of preliminary ruling before the trial was embarked on". That observation precisely describes the position in the instant case, where the first named respondent was asked to rule on the "lost evidence" question as a preliminary issue. Here, as in that earlier judgment of this Court, the *trial* was not interrupted, but rather judicial review was sought in regard to a discrete point, which had been addressed, considered, and ruled on at what was, effectively, the hearing of an issue. There is no doubt that the second element present in that earlier case is also to be found here. The point of fundamental importance here is whether the appellant should be exposed to a trial at all in view of the real and unavoidable risk of unfairness. The question goes to jurisdiction."

The learned judge noted that there was no suggestion that the respondent judge had acted with anything other than complete propriety in hearing the actual issue but the question remained, as a result of the ruling, whether there was a real and unavoidable risk of an unfair trial.

23. The Supreme Court in *Stirling* determined that the circumstances of the case rendered it genuinely exceptional. The complaint raised and determined by the District Court was not of a relatively minor nature, (*Treacy v. Malone and others* [2009] IEHC 14). The Court noted "the exceptional clarity of the prejudice caused by the absence of what, by any standard, is vital evidence." McMenamin J. stated:-

> "17. … There is a real and unavoidable risk of unfairness. That real risk arises because vital evidence is missing, which admission cannot be conceivably remedied in a trial. The hearing on the issue was a preliminary one. These unusual features render the case exceptional."

24. In *Stirling* the appellant was charged with criminal damage and public order offences which had been observed via remote surveillance on CCTV by a Garda. He alerted another Garda, who arrested the appellant, after which he was subsequently charged with criminal damage. It was intended that the CCTV footage of the offender kicking a phone box on Aston Quay, Dublin and the windows and shutters of premises in Merchants Arch were to be relied upon by the prosecution. There was no eye witness to the alleged incident and the CCTV footage was therefore of primary importance to the intended prosecution. Though initially the District Court was informed that the videotape was available in relation to the matter, it subsequently emerged that the tape had been lost or mislaid in circumstances that were never fully explained. McMenamin J. noted that the evidence lost was "the one vital piece of objective evidence" in the case, which it was the duty of An Garda Síochána to preserve. The District Court ruled that circumstances were not such that the trial ought to be restrained, though the learned judge acknowledged that matters might arise in the course of the trial which would indicate prejudice to the applicant which could then be addressed. The Supreme Court regarded the application to stop the hearing in the District Court as a discrete issue, holding that the question to be determined was whether there was an unavoidable risk of an unfair trial. The case proper was not underway". This was described as "an unusual but not unique feature" of the case.

25. I am satisfied that the issue of lost evidence in this case may be determined by way of application for judicial review since the real question, is "whether there is a real and unavoidable risk of an unfair trial to which the appellant should be exposed at all" – the same issue as arose in *Stirling.*

26. In *Stirling* the Court concluded that the prejudice to the accused was inevitable. The entire basis of the prosecution concerned his identification and the only objective verifying evidence had been lost through neglect and failure to preserve the material. The reliability of the main witnesses to fact could not be tested in the most obvious way. The Court noted that the defence would be prevented from relying upon evidence which it was the duty of the Garda to preserve and make available to both the defence and the Court. McMenamin J concluded:

> "18. … to the extent that the precept of continuity applies, it must, in this exceptional instance, yield to the vindication of the appellant's constitutional right to a fair trial in the circumstances where the trial simply should not proceed. This is because a main building block of the case, material plainly within the reasonable scope of the investigation, has been lost by the prosecution."

27. The leading authorities in respect of "lost evidence" cases involve the loss or destruction of evidence which is central to the proof of the core element of the prosecution's case, or the defence, described as "vital" in *Stirling*. It appears to me that notwithstanding the extensive jurisdiction vested in the trial court to consider a preliminary point, the present state of the law allows for judicial review of a determination made by way of preliminary issue in "lost evidence" cases in nonjury trials, although prohibition may only be granted in exceptional cases. In *Stirling,* the Court was satisfied to regard the "vital" nature of the evidence lost or mislaid as a basis upon which to decide that the case was "exceptional" having regard to the real risk of unavoidable unfairness thereby created. I am satisfied therefore that the Court has jurisdiction to consider this application notwithstanding the determination made by the learned judge following the preliminary objection taken. The question of whether relief ought to be granted brings the focus back onto the issue of the relevance or materiality of the deleted images in the overall assessment of the case.

The Test
28. An Garda Síochána has a duty in the investigation of crime to preserve material evidence as to the accused's guilt or innocence insofar as that is necessary or practicable (*Murphy v Director of Public Prosecutions* [1987] I.L.R.M. 71). This duty continues regardless of whether the prosecution intends to rely upon the evidence or not, or whether its case is assisted or not. The material must be preserved and disclosed and any notes or records of it must not be destroyed or rendered unavailable. Where evidence is not of direct or manifest relevance, the duty to preserve or disclose it has to be interpreted in a fair and reasonable manner on the facts of the particular case (*Braddish v Director of Public Prosecutions* [2007] 3 I.R. 127). It must be interpreted realistically. In many of the "lost evidence" cases, including *Murphy* and *Braddish*, the items destroyed or lost, a motorcar in the former and a videotape in the latter, were in the possession of An Garda Síochána at the time of their destruction or loss. The Supreme Court in *Braddish* also adopted with approval an analogy with the principles applicable to interparty discovery as set out in *Sterling-Winthrop Group Ltd. v. Farben-Fabriken Bayer A.G.* [1967] I.R. 97 (at p. 102). Thus, the principles applicable to the preservation and disclosure of evidential materials applied not only to items of clear and established evidential significance, but items which may give rise to the reasonable possibility of securing reliable evidence. It should be noted, however, that the Gardaí purported to identify the accused from the lost video in *Braddish* and therefore in the particular circumstances, the CCTV recording was of "vital" importance notwithstanding the existence of admissions by the appellant. In this case, the phone images were never taken into the possession of An Garda Síochána and did not constitute part of the file submitted to the Director of Public Prosecutions on the conclusion of the investigation.

29. The complainant and the applicant offer different accounts of what transpired in the immediate aftermath of the alleged offence. It may be that the complainant will be cross-examined on the basis of the account set out in the cautioned interview. However, it is common case that a 999 call was made by the complainant, whether on the floor where the complainant's apartment was situated or that upon which the applicant's apartment was situated. There is no controversy about the fact that the call was made and there is a transcribed note of what is to be heard on the telephone call.

30. The applicant made a number of admissions to Garda Healy at the scene of the incident under caution. He was clearly at the scene when the Gardaí arrived. He has at all times accepted that he had an encounter with the complainant outside the lift. He accepted that he made comments which were sexually explicit and substantially coincide with the comments he was alleged to have made by the complainant. He also accepts that he made contact with the area of the complainant's crotch when he "flicked" at him. The difference between the two accounts lies in the degree and duration of his contact with the complainant's testicles. There is no issue of visual identification. The video recording and photograph do not contain any images of this central aspect of the encounter and offer no assistance in resolving that matter. The primary evidence against the applicant is that of the complainant. There was no CCTV coverage of the lift area. The applicant accepts that he "flicked my right hand towards his genital area and connected with this man". He accepts that he tapped him, but states that he had no intention to hurt or cause him pain.

31. In *Enright v Finn and the Director of Public Prosecutions* [2008] IESC 49 Denham J. (as she then was) considered the relevance of admissions in an application for prohibition of a criminal trial and stated:-

> "If there have been admissions by an applicant this is an important factor in an application to prohibit a trial, even if they are subsequently contested. This factor goes into the factual mix upon which the Court applies the appropriate legal test. The relevance of admissions in the application for judicial review has been recognized previously. I noted it as a factor in my judgment in *B. v The Director of Public Prosecutions* [1997] 3 I.R. 140 at page 202, and Hardiman J. observed its relevance in *S. A. v The Director of Public Prosecutions* [2007] IESC 43. Thus, the statements in this case are relevant in this process, even if they are to be contested at the trial."

32. The learned judge affirmed the High Court judgment and, in particular, the conclusion reached that where there is an inculpatory statement which is not challenged as involuntary, the weight to be attached to it should be against granting an order of prohibition (at paragraph 11). Hardiman J. in *S. A. v DPP* noted that it would be extraordinary to prohibit a trial in circumstances where a defendant admitted a significant amount of the criminal behavior alleged. I am satisfied, in the circumstances, that the applicant's responses in this case, to the questions posed during interview, may be regarded as inculpatory evidence and accord to a significant extent with the account given by the complainant of the encounter which gave rise to the charge. It seems to me that this is a factor which the Court is entitled to take into account and weighs against the granting of a prohibition in this case.

The Effect of Deletion
33. The deletion of recorded material from an iPhone may, of course, involve a vitally important element in a criminal trial both for the prosecution and the defence. In *R.C. v Director of Public Prosecutions* [2009] IESC 32, the appellant sought to prohibit his further prosecution on charges of sexual assault. He had at all times denied the allegations. It was an important part of the complainant's account of events that the appellant would call or text her and request her to visit him in his apartment. His account, when interviewed, was that the calls were instigated by the complainant. The prosecution procured his telephone records and exhibited them, notwithstanding his contention that it was the complainant who initiated the calls. No effort was made to procure the complainant's telephone records on the mistaken assumption that his records would reveal both all incoming calls from the complainant and his own outgoing calls. Initial attempts to procure the complainant's records following the return for trial failed because they were made to the wrong mobile phone company. When application was made to the correct company it was discovered that the records were no longer available because a period of three years had passed, after which such records were not retained. The High Court refused the relief on the grounds *inter alia* that, the records were "collateral" to the central feature or issue in the case. The Supreme Court granted an order of prohibition. The Court accepted that such an order should only be granted in exceptional circumstances but the telephone records of both the appellant and complainant were relevant in the circumstances of this case to the core issue, which was the credibility of the appellant and the complainant. Delay in the case was also an important factor because it led to a reasonable conclusion on the part of the appellant that, notwithstanding the interviews conducted with him, no prosecution would take place in respect of the allegations. The alleged assaults occurred in 2001 as did the application for the phone records and the interviews with the appellant. Charges were not brought until January 2004. Delivering the judgment of the Court, Denham J. (as she then was) (Hardiman and Geoghegan JJ. concurring) stated:-

> "In general the absence of phone records is not a reason to prohibit a trial. It is the particular circumstances of this case, including the approach taken in the investigation, and the questions asked and answered as to mobile phone use, together with the failure of the prosecution to seek the phone records of the complainant, while obtaining those of the appellant, which create circumstances where there is a real risk of an unfair trial".

The relief was granted "because of the entrenched issue of the phone records in the investigation and the circumstances of the offences alleged".

34. This Court is obliged to consider all the circumstances of the case including the materiality of the deleted records to the core issues that arise. I am not satisfied that the deletion of the records gives rise to a real or unavoidable unfairness of trial. I am not

satisfied that the deleted recording relates to essential, vital or entrenched issues such as those considered in cases such as *R.C., Braddish* or *Murphy*. In this case, the applicant and the complainant are agreed on a number of core facts in respect of the encounter on which the charge is based. I am not satisfied that the issues of fact that arise in respect of the deleted material impinge more than peripherally on the central issues of the case. In that regard the Judge who hears the case has full jurisdiction to ensure fairness in the course of the trial under the provisions of Article 38 of the Constitution. It is against that background that the ruling of the second respondent on the deleted material, that it was "helpful at best", should be understood, and I am satisfied that her succinct determination in that regard is correct as a matter of law.

35. There remains the issue as to the circumstances in which the recording came to be deleted and the extent to which they impinge upon the relief claimed.

How the Deletion Occurred
36. The Court is satisfied that the deleted material would have been taken into Garda possession if the complainant had indicated his intention to pursue his complaint. It was clearly of concern to the alleged injured party that images recorded by the applicant be deleted. He simply wished to return to his apartment after working his shift and was somewhat shocked by what had happened. Both the applicant and the complainant were satisfied to conclude matters on that basis. Garda Healy facilitated this in a well- intentioned effort to defuse a fraught and unpleasant situation between two neighbours living in the same apartment block. He took into account their respective positions and recorded the substance of what happened in his notebook which was signed by both men. It is clear that the recording was deleted in the expectation that the complaint would not proceed and that there would be no further investigation of the matter. However, as is clear, the applicant changed his mind overnight: but the deletion could not be undone. Though I have considered these facts as part of the overall circumstances of the case I am satisfied that they cannot be regarded as the determining factor in the test to be applied (per Denham J. in R. C. at paragraph 24, per Denham C.J. in *Wall v DPP* [2013] IESC 56 at paragraph 10). The fundamental issue for the Court is the issue of the fairness of the intended trial, rather than the shortcomings of a Garda investigation. I am satisfied that notwithstanding the actions of Garda Healy on the night in facilitating the deletion of the recording, for the reasons set out above, this has not created a real and/or serious and unavoidable risk of an unfair trial.

37. The applicant also claims that he had a legitimate expectation arising from the circumstances in which the recording was deleted when the complainant agreed not to pursue his complaint on the 6th January, 2013, that he would not be prosecuted and, acting upon that belief, deleted the recording. It is submitted that the decision in *Eviston v Director of Public Prosecutions* [2002] 3 I.R. 260 where the applicant had been informed unequivocally and without caveat that the complaint would not be pursued against him is relevant. This submission must be considered in the context of the overall fairness of the proceedings envisaged and having regard to the respective roles of Garda Healy and the Director of Public Prosecutions in this matter.

38. The Director of Public Prosecutions received the file in August, 2013. Clearly, it did not contain the deleted recording. A decision to prosecute was based on the materials presented including the statement made by the alleged injured party and the interview conducted with the applicant. It was entirely within the discretion of the Director to direct that the applicant be charged with the offence of sexual assault on the material and evidence produced by Garda Healy. I am not satisfied that the Director's decision could be regarded in anyway as *mala fides, ultra vires,* or in breach of the applicant's right to fair procedures as discussed in *Eviston*. In particular, the Director never gave an undertaking of any kind that the applicant would not be prosecuted in respect of this offence.

39. It was the complainant who indicated on the 6th January, 2013 that he did not wish to proceed with the complaint at that time. This is not an unusual occurrence, in particular, in cases of sexual assault or more serious sexual offences. The Court must have regard to the circumstances in which the investigation evolved. When Garda Healy and his colleague attended at the scene, the plaintiff's allegation of sexual assault was made. However the complainant did not wish to make "an official complaint at this time to Gardaí". Garda Healy appears to have adopted the role of an arbitrator or umpire at this stage between the two men, rather than the investigator of a serious criminal offence. Policing in this context can be a multi-faceted and delicate challenge requiring the application of discretion and common sense. However, Garda Healy gave no guarantee on behalf of An Garda Síochána to the applicant that the complaint would not be revived or pursued, nor is it suggested that he compelled the applicant to delete the recording. The complainant, as he was entitled, revived his complaint the following morning. Once revived, Garda Healy had a duty to investigate the matter to the fullest extent possible and to submit his file to the Director of Public Prosecutions, which he did. I am not satisfied that any alleged culprit has a legitimate expectation that a serious criminal offence alleged to have been committed by them will not be fully investigated by An Garda Síochána once a complaint has been made or that the Director of Public Prosecutions will not in the exercise of her duty under the Prosecution of Offences Act 1974 consider a file submitted to her in respect of an alleged sexual assault. In Eviston the Supreme Court considered the application of the doctrine of equitable estoppel in an application to prohibit the further prosecution of an offence in the context of a prior indication by the then Director that he would not do so. Keane C.J. stated that, even assuming that the doctrine applied, it could not be said that a legal detriment resulted for an accused if her ability to defend the proceedings had not in any way been impaired, for example by the loss of evidence resulting from the Director's actions. However, having regard to the findings which I have made in relation to the deleted recordings and the materiality of this evidence to the core issue in the case I am not satisfied that the principle of legitimate expectation or equitable estoppel has any application to this case.

40. Furthermore, I do not consider that the duty and discretion of the Director of Public Prosecutions is to be limited, circumvented or pre- empted by statements made by an investigating Garda, no matter how well- intentioned.

Conclusion
41. For all of the above reasons I am not satisfied that the applicant is entitled to any of the reliefs claimed.