THE HIGH COURT

JUDICIAL REVIEW

2018 No. 463 J.R.

BETWEEN

H.S.

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

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

1. The applicant herein seeks to restrain the further prosecution of criminal proceedings pending against him on the basis that there is a real risk that the trial would be unfair by reason of delay. The criminal proceedings involve allegations of indecent assault and rape against two complainants. The complainants are sisters of the applicant. The offences are alleged to have occurred during the period between 1 October 1974 and 18 October 1978 in the case of the first complainant; and during the period between 24 December 1977 and 29 June 1985, in the case of the second complainant.

2. There are only two incidents in respect of which an identifiable date is specified in the statement of charges. The first is an incident which is said to have occurred on Christmas Eve 1977, and the second is an incident which is said to have occurred on the date upon which the applicant announced his engagement to his future wife. As discussed presently, a number of individuals who might otherwise have been expected to be in a position to provide evidence in relation to these events have since deceased or have no clear recollection of same. The unavailable witnesses include the applicant's own wife who died in 2012.

3. The Director of Public Prosecutions ("*the DPP*") has raised an objection that the judicial review proceedings were instituted outside the three-month time-limit prescribed under Order 84, rule 21 of the Rules of the Superior Courts. This objection is addressed at paragraph 27 below.

4. In order to protect the anonymity of the complainants, I have excluded any references to people or places which might otherwise have allowed them to be identified. I will also refer to the complainants simply as the "*first complainant*" and the "*second complainant*", respectively. The use of this impersonal language should not be mistaken for any lack of sympathy on the part of the court for the complainants and the difficult circumstances of their early childhoods. Rather, it is solely intended to assist in the protection of their identities.

LEGAL TEST

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

> "The court's judicial knowledge of these issues has been further expanded in the period since that particular case. Consequently there is judicial knowledge of this aspect of offending. Reasons for such delay are well established, they are no longer 'new factors'.
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> Therefore, I am satisfied that it is no longer necessary to establish such reasons for the delay. The issue for the court is whether the delay has resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial.
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> The court would thus restate the test as:-
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> The test is whether there is a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay. The test is to be applied in light of the circumstances of the case.
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> Thus, the first inquiry as to the reasons for the delay in making a complaint need no longer be made. As a consequence any question of an assumption, which arose solely for the purpose of applications of this nature, of the truth of the complainants' complaints against an applicant no longer arises. The inquiry which should be made is whether the degree of prejudice is such as to give rise to a real or serious risk of an unfair trial. The factors of prejudice, if any, will depend upon the circumstances of the case.
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> There is no doubt that difficulties arise in defending a case many years after an event. However, the courts may not legislate, the courts may not take a policy decision that after a stated number of years an offence may not be prosecuted. Also, as the legislature has not itself established a statute of limitations that itself may be viewed as a policy of the representatives of the People. Thus each case falls to be considered on its own circumstances."

6. Counsel on behalf of the DPP, Ms Eilis Brennan, SC, placed some emphasis on a line of case law which indicates that the issue of delay should generally be left to the trial judge to address. Reference was made, in particular, to the judgment of the Court of Appeal in *M.S. v. Director of Public Prosecutions* [2015] IECA 309.

> "66. First, in the light of the decision of the Supreme Court in SH it is not open to this Court to declare that after the lapse of a stated period of years a prosecution may not take place. Even though, therefore, the delays in the present case are, by any standards, exceptionally long, ranging as they do back to complaints dating from 1964/1965, the Court cannot say on some *ex ante* basis that these prosecutions should not proceed by reason of delay.
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> 67. Second, while there is no doubt at all but that the lengthy delays in the present case present difficulties for both prosecution and defence alike, it cannot nevertheless be stated that these delays have caused irremediable prejudice in

terms of either missing witnesses or evidence. Experience has shown that, special circumstances aside, the court of trial is generally better placed than the judicial review judge to make an assessment of this matter, particularly having regard to the run of the evidence and the evidence actually tendered. As O'Malley J. pointed out in PB, the trial judge's role is not confined simply to giving appropriate warnings to the jury, but extends further to the power to stop the prosecution continuing with a prosecution should the justice of the case so require it. It must be emphasised, however, that the system of criminal justice envisaged by the Constitution is one which (subject to exceptions which are not here relevant) involves trial by jury and not by judge alone. Accordingly, in this context the mere fact of a long delayed complaint is not in itself a reason by which a criminal charge of this nature should be dismissed."

7. As appears from the foregoing, Hogan J. cited with approval the judgment of the High Court (O'Malley J.) in *P.B. v. Director of Public Prosecutions* [2013] IEHC 401. Towards the end of her judgment in that case, O'Malley J. had summarised the effect of the Supreme Court judgment in *S.H. v. Director of Public Prosecutions* [2006] 3 I.R. 575 as follows.

> "59. The point of the decision in *S.H* and the authorities that followed is that the difficulties caused to a defendant in cases of old allegations (and I do accept that there can be very real difficulties) are best dealt with in the court of trial. Trial judges are now accustomed to dealing with such cases and using such powers as are necessary to prevent injustice to accused persons. It is perfectly clear that a trial judge is not restricted to simply giving warnings to the jury but may, where necessary in exceptional cases, withdraw the case from the jury on the basis that the difficulties for the defence are such that it is not just to proceed. Such a decision, in the normal course of events, will often be better taken in the light of the evidence as actually given rather than as speculated about in judicial review proceedings."

8. Ms Brennan, SC also relied on the judgment of the Supreme Court in *Nash v. Director of Public Prosecutions* [2015] IESC 32, [23].

> "23. It will be noticed that the law has moved on since those decisions. The trial judge now has the primary role in decisions of this kind and judicial review is rarely appropriate. An application to the trial judge is an alternative to judicial review. As Clarke J states in his judgment on this appeal, if the case is one that there has been a diminishment in the availability of a trial that would be otherwise complete in every respect due to the factors complained of, then this judgment would concur that since the appropriate balance may best be seen by the trial judge in the context of a complete analysis of the facts of the case, it is preferable that an application to halt the trial be made to that forum. Where however, as Clarke J states, the case is one of a clear denial of justice resultant upon the factors found to be culpably wanting, prohibition by the High Court should be granted. An application to stop a trial before the trial judge may best be decided upon a consideration of all of the evidence and how the alleged defect, be it delay or missing evidence or unavailable witnesses, impacts on the overall case. Whether the real risk of an unfair trial that cannot otherwise be avoided then exists is, in such cases of an argument that justice has been diminished, often best seen in the context of such live evidence as has been presented and not through the contest on affidavit that characterises these cases on judicial review seeking prohibition in the High Court or on appeal. As a matter of factual analysis, however, the nature of the prosecution case and the effect of the missing evidence in the selection of cases previously outlined is demonstrated as central to the issue of the safety of the trials prohibited. Of importance, also, in prior cases has been the fact that an accused is alleged to have made an admission.
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> […]."

9. Counsel on behalf of the applicant, Mr Barry White, SC, sought to distinguish this line of case law. It was submitted that the judgment in *Nash* was distinguishable by reference to the fact that the delay involved there was much shorter than in the present case. Counsel also emphasised that there was DNA evidence potentially available in *Nash*. This was contrasted with the circumstances of the present case, where, it was suggested, the criminal trial would be reduced to a swearing match as between the accused and the two complainants. Emphasis was also placed on the fact that a number of potential witnesses are now deceased.

10. Both sides made reference to the recent judgment of the Court of Appeal (Peart and Sheehan JJ, Hedigan J. dissenting) in *B.S. v. Director of Public Prosecutions* [2017] IECA 342. Giving the majority judgment, Sheehan J. provides the following helpful analysis of the legal test governing an application to restrain a trial on the grounds of delay.

> "15. At 17.36 Professor O'Malley states: In the penultimate paragraph of its judgement in *H v DPP* the Supreme Court said: 'The issue for a court is whether the delay has resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial. The Court does not exclude wholly exceptional circumstances where it would be unfair or unjust to put the accused on trial'. The conjunction of these two sentences suggests that, if the circumstances are sufficiently exceptional and compelling, a trial may be prohibited even if the applicant is unable to point to any specific factors demonstrating or indicating the risk of an unfair trial. The circumstances in which a trial may be prohibited on this residual ground will naturally be highly fact-specific.
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> In *P.T. v. DPP* [2008] 1 I.R. 701 the Supreme Court stated at p. 708:
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> > 'This is a test based on 'wholly exceptional circumstances', which are essentially fact and thus previous cases are of limited value as precedents. It is necessary when analysing this aspect of the test to consider the particular facts of a case, and to determine whether it would be unfair or unjust to put that specific accused on trial in all the circumstances of the case.'
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> 16. In *McFarlane v DPP* [2006] IESC 11, Hardiman J. on behalf of the majority of the Supreme Court stated para. 24, 'In order to demonstrate that risk (of an unfair trial) there is obviously a need for an applicant to engage in a specific way with the evidence actually available so as to make the risk apparent… This is not a burdensome onus of proof: what is in question, after all, is the demonstration of a real risk, as opposed to an established certainty, or even probability of an unfair trial'."

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

12. Sheehan J. then stated his conclusions as follows.

> "24. The appellant in this case has engaged with the evidence and his belief that the 3 deceased witnesses could have been of assistance to him goes beyond mere assertion. If he is not prejudiced according to the dicta of O'Malley J. in *S.*

> *O'C v DPP* [2014] IEHC 65 then he has at least established 'moderate prejudice'. Further, there is in my view inherent prejudice in a delay of what will now be 47 years if this trial is allowed to proceed. This is particularly so in a case that is wholly dependent on oral testimony of the complainant and the appellant. Two separate tests arise following the judgment in the H. case. With regard to the first test I hold that the appellant has established sufficient prejudice which gives rise to a real risk of an unfair trial which cannot be overcome by any delay warning.
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> 25. Having considered all of the particular facts and circumstances of this case and looking at them cumulatively I hold that this case comes within the 'wholly exceptional circumstances category' as a result of which it would be unfair and unjust to put this specific accused on trial. I therefore allow this appeal on the 2 separate grounds envisaged in "H" whereby a trial should be prohibited. Accordingly, I grant the application for an injunction restraining the Director of Public Prosecutions from proceeding further in this matter.

13. Ms Brennan, SC very properly brought to my attention the fact that the Supreme Court has refused leave to appeal against the decision of the Court of Appeal in *B.S.*, on the basis that the judgment involved the application of established principles to a particular set of facts. See *B.S. v. Director of Public Prosecutions* [2017] IESCDET 134.

> "Applying that approach to the circumstances of this case the Court is not persuaded that the judgment of the majority in the Court of Appeal involves anything other than the application of established principles to the facts of this case. A careful reading of the judgment of Sheehan J. makes clear that he identified the appropriate principles and proceeded to consider whether, in the light of those principles, the trial of Mr. S. should be prohibited. There will always be cases where the application of general principles to the facts of an individual case involves a matter of judgment and possibly a judgment on which reasonable people may differ. Indeed it may even be possible to suggest that the application of accepted principles to the facts of a particular case is in error.
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> However, as pointed out earlier, this Court is no longer a Court for the correction of error but rather a Court which has the principal constitutional task of determining issues of general importance. It follows that the fact that Hedigan J. (and indeed the High Court) took a different view as to the application of established principles to the facts of this case does not mean that there truly is an issue of general importance involved. Rather, it simply means that it may be possible to take two different views as to the application of those principles to the facts of this case or, indeed, that it might be possible to argue that one or other view was erroneous. But none of that means that this potential appeal would involve anything other than the application of established principles to the facts of this case."

THE ALLEGED OFFENCES

14. An indictment has not yet been served on the applicant. As discussed at paragraph 31 below, this is potentially relevant to the DPP's objection that the proceedings are inadmissible by reason of delay.

15. The applicant has, however, been served with a book of evidence. This identifies a total of five witnesses for the prosecution: the two complainants; their mother; and two of the investigating police officers.

16. The statement of charges before the District Court sets out seventeen charges. In the case of the first complainant, the offences are alleged to have occurred on dates unknown between 1 October 1974 and 18 October 1978.

17. In the case of the second complainant, the dates of the alleged offences range from 24 December 1977 to 29 June 1985. There is only one charge in respect of which a specific date is identified: it is alleged that on 24 December 1977 the applicant indecently assaulted the second complainant contrary to common law and as provided for by section 6 of the Criminal Law Amendment Act 1935.

18. It appears from the witness statements contained in the book of evidence that neither complainant alleges that she was aware at the time that the other had also been subject to sexual assault by the applicant. The legal significance of this is that neither complainant is, therefore, capable of providing corroboration of the other's evidence.

19. As discussed under the next heading below, the applicant asserts specific prejudice arising from the death of a number of potential witnesses. In order to put this assertion in context, it is necessary to refer to the following aspects of the witness statements.

20. The narrative set out in the various witness statements indicates that—aside entirely from the alleged sexual abuse—the two complainants had a very difficult and traumatic childhood. In particular, their father is described as being an alcoholic and as abusive and aggressive towards his wife (the complainants' mother). The second complainant describes life in her home at [location redacted] as like living in a war zone. One could not but have genuine sympathy for the complainants in this regard. However, the task of the court in this application is to seek to determine whether a fair trial can be carried out at this remove.

21. As noted above, the only charge in respect of which a specific date is identified involves an allegation that the applicant indecently assaulted the second complainant on Christmas Eve 1977. It is alleged that this occurred in a bedroom other than the second complainant's own bedroom, and that the applicant was dressed as Santa Claus, wearing a red suit and a false beard. The complainant stated that she recalls telling someone, perhaps her mother, that Santa or someone dressed up as Santa had come into her room. The complainant also says that a few weeks after Christmas she found a karate type suit which had been dyed red hidden in a cupboard in the house. (See pages 9 and 10 of the book of evidence).

> "He told me that I wasn't to tell anybody about this and that if I did he'd hurt me. As he said this his voice changed and I recognised then it was my brother [the accused] and not Santa. I had no idea what had just happened, I was seven years of age with no clue of anything sexual. I do recall telling someone, perhaps my mother, that Santa had come into my room or someone dressed up as Santa. My mother later told me [the accused] did that it was [the accused] that had worn the suit that night. A few weeks after Christmas I found a Karate type suit that had been dyed red hidden in a cupboard in the house. This confirmed in my young mind that I had no imagined the whole thing and that it was [the accused] all the time."

22. As appears, the circumstances of this alleged offence have been described in detail. This offence is said to have occurred at Christmas time when, presumably, there were other people in the house. But for the lapse of four decades since the date of the alleged offence, one might have expected that there would be witnesses available who might be in a position to corroborate or contradict the circumstantial evidence. However, it appears from the mother's witness statement that she has no clear recollection of

these events. (See page 36 of the book of evidence).

23. The second complainant also recounts an incident which she said she witnessed one Christmas Day. (The precise year is not stated, but the mother has suggested in her supplemental statement that it may have been Christmas Day 1978). The second complainant states that her uncle had entered into the home on a Christmas Day with a loaded shotgun and had threatened her father at gunpoint. She recalls that her uncle fired the shot gun and blew a window out of the house. Relevantly, the complainant's mother has a different recollection of this event. In her supplemental statement, the mother states that she does not recall her brother (the complainant's uncle) being armed with a shot gun, nor does she recall his firing a gun. The uncle has since deceased and is not available as a witness.

24. The second complainant also alleges that she was raped by the applicant on the day upon which he announced his engagement to his future wife. The complainant provides a detailed description of the alleged rape and the events thereafter. In particular, the complainant alleges that after the alleged rape she ran back into her own bedroom, and wedged a sweeping brush under the door handle and remained for hours with her back to the door and her legs to the headboard of her bed. It is said that the applicant left the next day. (See page 14 of the book of evidence).

> "He got off the bed and I started screaming. I was in a lot of pain to my private area and to my stomach where his entire weight had been and to the back of my neck from his weight on the hand he had put on my mouth. I was shaking. He left the room and I ran back into my bedroom. I grabbed a sweeping brush in the hall and wedged it under the door handle and I remained four hours with my back to the door and my legs to the headboard of my bed. [The accused] left the next day."

LATE DISCLOSURE: SUPPLEMENTAL WITNESS STATEMENT

25. The complainants' mother provided a supplemental witness statement to An Garda Síochána on 7 December 2017. This statement was not, however, disclosed to the defence until 4 April 2018. The fact that the prosecution made late disclosure of inter alia the supplemental witness statement of the complainants' mother is relied upon as part of the applicant's response to the DPP's objection that the proceedings are inadmissible by reason of delay.

26. Although the supplemental witness statement is relatively short, it does address a number of potentially significant matters as follows. In some instances, this involves an elaboration on matters addressed in the mother's first witness statement of 4 November 2015.

> (i) The statement sets out in detail the mother's version of the incident when her brother, i.e. the complainants' uncle, and another man attended at the family home on Christmas Day. Relevantly, the mother suggests for the first time that this occurred on Christmas Day1978, *i.e*. within twelve months of the alleged incident of Christmas Eve 1977. As noted above, the second complainant recalls there being a shotgun discharged. The mother states that she did not recall either man being armed with a shotgun nor does she recall a gun being fired. As also noted above, the uncle has since deceased, and the other witness is stated to be very unwell and not fit to be interviewed as he is in the advanced stages of [a chronic disease]. (The Christmas Day incident is referred to in the mother's first statement, but more detail is now provided).
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> (ii) The statement sets out in more detail the circumstances in which the second complainant was taken to a medical doctor in about the time of some of the alleged indecent assaults. The medical doctor is now deceased. The statement says that the medical doctor told the mother that there was nothing physically wrong with the second complainant, that something had happened to her that was traumatic and that her problems were psychosomatic. The statement goes on then to suggest that the root cause of the complainant's problems were the alcoholism of her father and the abuse by her brother.
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> (iii) The mother provides a description of the layout of one of the houses in which the indecent assaults are said to have taken place. In particular, she addresses the question of whether the bedrooms had functioning locks. This is relevant to the allegation by one of the complainants that the sexual indecent assault took place behind a locked door.
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> (iv) The statement provides further details of an alleged admission by the applicant to the effect of his "touching" or "petting" his sister. The applicant is recorded as maintaining that this was "harmless" and did not go as far as sexual assault.

ORDER 84 TIME LIMIT

27. The DPP has raised an objection that the application for judicial review was not made within the three-month period allowed under Order 84 of the Rules of the Superior Courts. This is pleaded at paragraph 11 of the statement of opposition of 1 October 2018 as follows.

> "11. The Applicant has not acted promptly and is guilty of delay in instituting these proceedings, outside the three month time limit. No good and sufficient reason has been given for the delay and therefore this Honorable Court should refuse any extension of time to seek such relief."

28. Order 84, rule 21 (as inserted in 2011) provides as follows.

> "(1) An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose.
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> (2) Where the relief sought is an order of certiorari in respect of any judgement, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgement, order, conviction or proceeding."

29. The chronology of events is as follows.

1 June 2017 Applicant returned for trial to the Central Criminal Court

26 June 2017 Case listed before Central Criminal Court.

Trial date fixed for 25 July 2018

7 December 2017 Further statement of applicant's mother (not disclosed until 4 April 2018)

8 March 2018 Request for further disclosure

4 April 2018 Disclosure of mother's further witness statement

23 April 2018 Response to request

10 June 2018 *Ex parte* application for leave

18 June 2018 Leave to apply granted after *inter partes* hearing

30. As appears from this chronology, a period of just over twelve months had elapsed between the date of the return for trial (1 June 2017) and the *ex parte* application for leave to apply for judicial review (10 June 2018). The DPP contends that time begins to run for the purposes of Order 84, rule 21 from the date of the return for trial. If the DPP's contention is correct, then the application was made out of time, and the applicant will have to persuade the court that an extension of time should be granted.

31. It is not clear from the case law, however, as to the date from which time is to be calculated for the purposes of an application to restrain a criminal prosecution. In particular, there is some debate as to whether the time-limit should be calculated (i) from the date of the return for trial, or (ii) from the later date of the formal service of an indictment.

32. The Supreme Court judgment in *C.C. v. Ireland* [2006] 4 I.R. 1 indicates that the time-limit runs from the date of the indictment. Geoghegan J. dealt with the point as follows.

> "94 It may well be that, because the trial judge embarked on a consideration of the substantive issues, the notice of appeal in the C.C. case does not contain any appeal relating to the time point though the notice of appeal in the P.G. case does. The time point in each case was argued before this court on appeal. I would differ with the view of the trial judge that either applicant was out of time. It is not necessary to go into the details of the periods which he considered applicable. It is sufficient to say that in neither case has an indictment yet been served. The time in my view would only commence to run from the service of the indictment. Neither application for leave to bring judicial review proceedings was, therefore, out of time."

33. See also the following passage from the judgment of Denham J.

> "14 However, these three cases may be distinguished from a situation where judicial review is sought in the currency of a criminal trial. These applications have been brought at the preliminary stage of the criminal process. No indictment has yet been laid, although the charges are known. There is an important difference between considering an application for judicial review in the currency of a trial as opposed to an application prior to the commencement of the trial, prior to the laying of an indictment. While an application for judicial review in the currency of a trial may be successful only in the most exceptional circumstances, applications for judicial review prior to trial fall into a different category. However, even in these latter cases it is still, inter alia, within the discretion of the court to refuse the application for judicial review on the grounds that the issue would be best met at the trial by the trial judge."

34. The correctness of the approach adopted in *C.C. v. Ireland* has, however, since been queried by the judgment of the High Court (Kearns P.) in in *Coton v. Director of Public Prosecutions* [2015] IEHC 302.

35. Kearns P. suggested that the time-limit issue was not fully argued in *C.C.* In particular, it was suggested that the Supreme Court had not considered the fact that, in practice, an indictment may not be served until the morning of the criminal trial. If followed through to its logical conclusion, fixing the time by reference to the date of the indictment could have the result that applications to restrain a criminal prosecution could take place on the eve of the trial.

> "With considerable diffidence, I venture to suggest that these observations could scarcely be regarded as a full or reasoned analysis of why the date of service of an indictment should be the operative date for the commencement of the time provided for by Order 84. Given the fact that the evidence before this Court clearly demonstrates that the indictment is normally served at the start of a trial, fixing this time as the relevant date when time begins to run simply makes no sense. It would mean that, regardless of gross delay by an applicant, a trial might have to be called off at the twelfth hour—just as it is about to begin—at a time when all preparations have been completed, with legal teams instructed and potentially vulnerable witnesses in attendance, and when precious court time has been set aside and allocated to the trial. This flies in the face of every requirement for an efficient criminal justice system, not least the interests of the victims of crime for whom the adjournment of an upcoming trial may be fraught and stressful.
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> Furthermore, and even more illogically, any application brought to prohibit a trial before service of an indictment could, by application of this method of determining when time begins, be actually deemed premature.
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> In contrast, at the date of return for trial, the accused has sight of all the evidence which may be offered against him at his subsequent trial. He has everything he needs to determine whether grounds for making an application for judicial review have arisen. This Court can see no reason why the date of service of an indictment on the morning of a trial should be preferred to the date of the order returning him for trial. The indictment contains no 'information' which would provide grounds for making an application and is derived only from the information and proposed evidence contained in the book of evidence."

36. Kearns P. does, however, go on to indicate that the rule is sufficiently flexible to allow for contingencies such as, for example, where material is not disclosed to the defence until late in the day.

> "That an outer time limit of three months from that date is not absolute is perfectly clear from the terminology of the amended Order 84 which permits an extension of the period provided for if the Court is satisfied that there is 'good and sufficient reason' for doing so and that the circumstances that resulted in the failure to make the application were outside

the control of or could not reasonably have been anticipated by the applicant for such extension.

For example, a notice of additional evidence served after the return for trial, but before the trial itself, might have the effect that the applicant is severely prejudiced because he has no capacity to deal with evidence intended to be offered from a particular witness or to deal with evidence of a particular type, so that his grounds for making an application arise only from that time. It is not difficult to think of other examples where latitude would be extended.

There is thus no inflexible rule and there is sufficient latitude within the terms of 0.84, r.21 to permit a judge of the High Court to grant an exception where the same is sought and where the circumstances outlined in rule 21 may be seen to apply."

TIME-LIMIT: DISCUSSION

37. The judgment of the Supreme Court in *C.C. v. Ireland* [2006] 4 I.R. 1 is binding on this court, and, accordingly, I cannot accept the DPP's submission that time begins to run from the date of the return for trial.

38. In any event, even if this court were in a position to adopt the alternative approach suggested by the High Court (Kearns P.) in *Coton v. Director of Public Prosecutions* [2015] IEHC 302, I am satisfied that the late disclosure of the supplemental statement of the complainants' mother on 4 April 2018 was a sufficiently significant event so as to reset the clock for the purposes of judicial review proceedings. The content of the supplemental statement is summarised at paragraph 26 above. (As discussed below, a further letter of 23 April 2018 from the Chief Prosecution Solicitor is also relevant to the time-limit).

39. There was some debate at the hearing before me as to whether the supplemental witness statement contained material which was sufficiently relevant to the issues in the judicial review proceedings as to affect the running of the time-limit. It was also suggested that the supplemental witness statement merely elaborated upon material in the first statement.

40. I must admit that I have a concern as to whether this is the correct approach to take in the context of judicial review proceedings in respect of a pending criminal prosecution. The applicant is entitled to the presumption of innocence. This applies not just to the pending criminal trial, but also to these judicial review proceedings. (See comments of Hardiman J. in *J. O'C. v. Director of Public Prosecutions* [2000] 3 I.R. 504 at 517 et seq.). It does not seem to me to be consistent with the presumption of innocence to expect the applicant and/or his solicitor to explain on affidavit why it is that the belatedly disclosed material is relevant. To require an accused person to do so may well have the undesirable consequence of requiring him to disclose aspects of his proposed defence of the criminal proceedings.

41. At all events, I am satisfied that—on an objective reading—the supplemental witness statement does disclose material which is relevant to and supportive of the application for judicial review. In particular, and as noted at paragraph 26 above, the differing recollections of the shotgun incident are potentially relevant to the second complainant's credibility. This is now said to have occurred in 1978. The fact that neither of the two relevant witnesses are available (through death and illness, respectively) is something which the applicant is entitled to rely upon in the judicial review proceedings. More generally, in the context of a case where there is only one prosecution witness (other than the complainants themselves) who might potentially be in a position to give first-hand evidence of the events of the late 1970s and early 1980s, namely the mother, the disclosure of a supplemental statement by the mother is, almost by definition, significant.

42. It is to be recalled that Order 84, rule 21 indicates that time begins to run from "when grounds for the application first arose". The supplemental witness statement at the very least strengthened the case for judicial review—and perhaps even presented grounds for the first time—by allowing the applicant to point to specific issues in respect of which the unavailable witnesses might have given evidence. Separately, a further letter of 23 April 2018 from the Chief Prosecution Solicitor also disclosed further details of the police investigation, and, in particular, the fact that two relatives (another uncle of the complainants, and the mother-in-law of one of the complainants) had indicated that they had no recollection of these matters and did not wish to make statements.

43. More generally, there is something unattractive about a respondent, who is itself culpable of delay in disclosing relevant material, seeking to take a delay point against an applicant. No explanation has been provided by way of affidavit in these proceedings as to why there was a delay of some three to four months in furnishing the mother's supplemental witness statement to the defence.

44. It should also be noted that—at one stage—the applicant sought to pursue a separate ground of judicial review to the effect that there had been *prosecutorial delay* in this case. This arose in circumstances where there had been some confusion as to when one of the complainants had first made a complaint to An Garda Síochána. It seems that when the second complainant (the younger sister) made her complaint to An Garda Síochána in July 2015 she had mistakenly suggested that her older sister had made a complaint in or about 2010, but retracted same. One of the issues which the applicant's solicitor was pursuing in the request for disclosure related to this. Again, I think that any alleged delay in seeking this material was justified.

45. The matter is pleaded as follows in the statement of grounds.

> "18. Further or in the alternative, An Garda Síochána were aware of the allegations made by the complainants since at least 2010 and they took either no steps or inadequate steps to investigate the said allegations until formal statements of complaint were made by the complainants in 2015. Had they sought out a statement from the Applicant's ex-wife when they first became aware of the allegations, at which time she was still alive, they would have preserved significant evidence which had a potential bearing on the issue of guilt or innocence. However, they failed or omitted to do so. As a result, the Applicant has been deprived of possible corroborative and/or exculpatory evidence and his opportunity of defending the case against him has been materially affected to his detriment. In the circumstances, the actions or omissions of An Garda Síochána amount to a breach of fair procedures."

46. It appears that this issue was only finally resolved after the institution of the judicial review proceedings when Detective Garda [name redacted], who swore the affidavit verifying the statement of grounds, confirmed the factual position and the mistaken reference to an earlier complaint.

> "5. I say that An Garda Síochána were not aware of the allegations of the Complainants until 2015, when [name redacted] made a formal statement to the Gardaí. While [name redacted] had sought and engaged in counselling with the HSE in 2010, as is set out in her statement, the HSE did not inform the Gardaí of these allegations. Although [name redacted] had believed that her sister had made a complaint to the Gardaí prior to 2015, this was not in fact the case.

> [Name redacted] did not make a statement to the Gardaí prior to March 2016, as is detailed in the letter from the DPP dated 4 May 2018, exhibited at […] to the affidavit of [Solicitor's name redacted] filed on behalf of the Applicant herein."

47. For all of the foregoing reasons, I am satisfied that the application for judicial review was made within three months from the date upon which the grounds first arose. The applicant was entitled to await receipt of the response to the request for further disclosure. This was received in April 2018, and the ex parte application for leave to apply for judicial review was made within three months of that date.

48. Moreover, in circumstances where an indictment has not been formally served, it is at least arguable, in accordance with the judgment of the Supreme Court in C.C. v. Ireland, that the three-month time-limit has not yet begun to run.

APPLICATION FOR EXTENSION OF TIME

49. Lest I am incorrect in my finding under the previous heading to the effect that the application for judicial review was made within time, I propose to consider whether this is an appropriate case to grant an extension of time.

50. Order 84, rule 21(3) and (4) (as amended in 2011) provides as follows.

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

51. The interpretation of Order 84, rule 21(3) has been considered in detail by the Supreme Court in its very recent judgment in *M.O'S. v. Residential Institutions Redress Board* [2018] IESC 61.

52. The majority judgment was delivered by Finlay Geoghegan J. It emphasises the discretion which a court retains even following the amendments made to Order 84 in 2011.

> "60. I have concluded that the case law cited above, insofar as it applies to the extension of the time specified under O. 84 for the bringing of judicial review proceedings, makes clear that the jurisdiction which the Court is to exercise on an application to extend time is a discretionary jurisdiction which must be exercised in accordance with the relevant principles in the interests of justice. It clearly requires an applicant to satisfy the Court of the reasons for which the application was not brought both within the time specified in the rule and also during any subsequent period up to the date upon which the application for leave was brought. It also requires the Court to consider whether the reasons proffered by an applicant objectively explain and justify the failure to apply within the time specified and any subsequent period prior to the application and are sufficient to justify the Court exercising its discretion to extend time. The inclusion of sub-rule (4) indicates expressly that the Court may have regard to the impact of an extension of time on any respondent or notice party. The case law makes clear that the Court must also have regard to all the relevant facts and circumstances, which include the decision sought to be challenged, the nature of the claim made that it is invalid or unlawful and any relevant facts and circumstances pertaining to the parties, and must ultimately determine in accordance with the interests of justice whether or not the extension should be granted. The decision may require the Court to balance rights of an applicant with those of a respondent or notice party. The judgments cited do not, in my view, admit of a bright line principle which precludes a court taking into account a relevant change in the jurisprudence of the courts when deciding whether an applicant has established a good and sufficient reason for an extension of time. Further, the judgments cited above do not envisage any absolute rule in relation to what may or may not be taken into account or constitute a good reason or a good and sufficient reason. The Court, in an application for an extension of time, is exercising a discretionary jurisdiction and in the words of Denham J. in de Roiste, '[t]here are no absolutes in the e exercise of a discretion. An absolute rule is the antithesis of discretion. The exercise of a discretion is the balancing of factors - a judgment.'."

53. Applying these principles to the facts of the present case, I am satisfied that both limbs of the test under Order 84, rule 21(3) have been met. If and insofar as there was any delay in instituting these proceedings, same is justified by the delay on the part of the DPP in disclosing the supplemental witness statement of the complainant's mother. Notwithstanding that the statement was, seemingly, taken on 7 December 2017, same was not disclosed to the defence until 4 April 2018. As discussed earlier, the content of this supplemental witness statement is clearly relevant to the grounds pursued in the judicial review proceedings. The late disclosure of the witness statement is something which was outside the control of the applicant. Again as discussed earlier, a further letter of 23 April 2018 from the Chief Prosecution Solicitor is also relevant to the time-limit.

54. In reaching this conclusion, I have attached some weight to the nature of the application for judicial review and the underlying merits of same. The applicant is seeking to vindicate his constitutional right to a fair trial. This is self-evidently a significant constitutional right, and a court should be careful before dismissing such an application on the basis of delay. I have also had regard to the fact that there has been no prejudice alleged on the part of the DPP arising from the delay on the part of the applicant. No affidavit evidence has been filed in this respect. It is clear from the terms of Order 84, rule 21(4) that third-party prejudice is something which the court is entitled to take into account in the exercise of its discretion.

IS THERE A RISK OF AN UNFAIR TRIAL?

55. One of the tragic features of cases of alleged sexual abuse is that the offences often occurred at a time when the victims were vulnerable young children. This feature makes the crime especially abhorrent. Unfortunately, it can also present practical difficulties in

the prosecution of such offences in that the adult complainants are seeking to recall traumatic events from a time when they were very young. The court must seek to balance the public interest in the prosecution of offences against an individual's right to a fair trial. On the facts of the present case, I have come to the conclusion that the circumstances are such that there is a real risk of an unfair trial.

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

57. The principal specific prejudice alleged by the applicant is the loss of potential witnesses, as follows.

> (i). The applicant maintains that he was not, in fact, resident in the family home during the period 1974 to 1978. He maintains that he lived with his grandparents and latterly with his grand-aunt. All of these relatives are now deceased. Thus the delay will make it more difficult for the applicant to establish an important line of defence, namely that he was not in residence during the time the alleged sexual abuse was being carried out.
>
> (ii). The applicant's wife is now deceased. The applicant asserts that he had been living with her for some of the period of the alleged offences. The wife might have been in a position to provide exculpatory evidence. For example, she might have been able to confirm that he did not regularly visit the family home during the relevant period. See, by analogy, the comments of Hardiman J. (dissenting) in *J. O'C. v. Director of Public Prosecutions* at [2000] 3 I.R. 478 at 522 ("To require the applicant to prove affirmatively that the wife had specific evidence to give, when no allegation had been made in her lifetime, is to require him to attempt the impossible.").
>
> It is also to be noted that one of the only two identifiable dates referred to in the second complainant's witness statement is the occasion upon which the applicant announced his engagement. It is not clear from the witness statement as to who is said to have been in the house on this occasion, and, in particular, it is not clear whether it is said that the applicant's fiancé was present.
>
> As noted above, the alleged rape and the events thereafter have been described in some detail in the second complainant's witness statement. But for the lapse of time, it might have been expected that the other people in the house that day would have been available to give evidence as to their recollection of events. In particular, it might have been relevant to the jury's assessment of the credibility of the complainant to consider whether the events as alleged could have occurred without having come to the attention of the other people in the house. However, as a consequence of the delay, it appears as if there are now no witnesses available to give evidence. The mother's witness statement indicates that she has little recollection of the time period over which the alleged sexual abuse occurred, and the applicant's wife is now deceased.
>
> (iii). The two key participants in the event on Christmas Day 1978, namely the complaints' uncle and his friend [name redacted] are now deceased. The second complainant and her mother have provided very different accounts of this incident, and, in particular, as to whether it involved the discharge of a shotgun. Given that this alleged incident seems to have happened within a year of the alleged indecent assault on Christmas Eve 1977, the accuracy of the complainant's recollection of this incident is something which the applicant's legal team might otherwise have sought to pursue at trial as a matter going to the credibility of the second complainant. The fact that the two principal witnesses are now deceased or unavailable through illness is a potential cause of prejudice.
>
> (iv). The medical doctor who had examined the second complainant in or about the time of the alleged sexual abuse is also now deceased. Both the second complainant herself and the mother (in her supplemental witness statement) report that the medical doctor ascribed the physical symptoms as being psychosomatic. Again, this is something which the defence legal team may have wished to pursue at trial.
>
> (v). Two other relatives (another uncle of the complainants, and the mother-in-law of one of the complainants) have indicated that they had no recollection of these matters and did not wish to make statements.

58. I have reached the conclusion that the very significant lapse of time since the alleged offences occurred in this case has created a real risk of an unfair trial. The death of the individuals referred to above has the effect of denying the applicant an opportunity to advance lines of defence based on matters such as (i) his residence; (ii) the circumstances of his visits to the family home—especially at times such as Christmas Eve and the announcement of his engagement when one might have expected there would be other people in the house—and (iii) the credibility of the complainants' recollections.

59. Such potential witnesses as have survived are elderly, and a number of same have indicated to An Garda Síochána that they have no clear recollection of events. (See letter dated 23 April 2018 from the Office of the Director of Public Prosecutions). It appears from the mother's two witness statements that she does not have a clear recollection of many of the events.

60. The unfortunate fact of the matter is that a trial of this type will ultimately reduce itself to a form of swearing match between the applicant and the two complainants. The jury will be required to assess the credibility of the accused, and the complainants, respectively.

61. I do not think that the risk of an unfair trial can be avoided by the trial judge giving specific warnings to the jury in relation to matters such as the danger of convicting on the basis of uncorroborated evidence, or of convicting in cases of significant delay. Counsel for the DPP, Ms Brennan, SC, referred me to the model charge on the effect of delay from the judgment in *People (DPP) v. R.B.*, unreported, Court of Criminal Appeal, 12 February 2003, as set out in Coonan and Foley, *The Judge's Charge in Criminal Trials* (Thomson Round Hall, 2008). I have carefully considered this model charge, and have concluded that even it is not sufficient to mitigate the real risk of an unfair trial. The lack of specificity in relation to the dates of most of the alleged offences makes it almost impossible for the applicant to challenge the evidence by way of cross-examination or to rely on an alibi defence. In respect of the two offences in respect of which a date is identifiable, the consequence of the delay is that potential witnesses are now deceased, and those who have survived have no clear recollection of the events.

62. I have also carefully considered whether it would be preferable to leave over the question of delay to the trial judge. The trial judge has jurisdiction to stop the trial, and as explained in cases such as *M.S. v. Director of Public Prosecutions* [2015] IECA 309, the court of trial is generally better placed than the judicial review judge to make an assessment of this matter, particularly having regard to the run of the evidence and the evidence actually tendered. I have concluded, however, that the risk of an unfair trial in this case

is obvious, and that this is an appropriate case to grant an order of prohibition. All of the case law makes it clear that the High Court retains an exceptional jurisdiction to vindicate an individual's constitutional right to a fair trial. This jurisdiction complements the jurisdiction of the trial judge. In circumstances where the High Court's jurisdiction has been invoked, I must make a decision on the matter—one way or another—and cannot simply abdicate the difficult decision to the trial judge.

63. Applying the test in *S.H. v. Director of Public Prosecutions* [2006] 3 I.R. 575, as recently applied by the Court of Appeal in *B.S. v. Director of Public Prosecutions* [2017] IECA 342, I have reached the conclusion that there is a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial.

ADDITIONAL GROUNDS OF CHALLENGE

64. The principal ground of challenge pursued at the hearing before me was that in relation to delay. There are, however, a number of other additional grounds of challenge pleaded in the statement of grounds. First, there is an allegation of prosecutorial delay. As explained earlier, this appears to have arisen as a result of a mistaken belief that one of the complainants had made a complaint in 2010 to An Garda Síochána, but had then retracted same. This confusion has since been cleared up by the affidavit of the Detective Garda filed in these proceedings. This ground was not pursued before me.

65. Secondly, there is an allegation that, as the result of publicity in relation to an earlier unrelated conviction for a sexual offence against a third party, the applicant would not receive a fair trial in respect of the allegations the subject-matter of the judicial review proceedings. This ground was not pressed at the hearing before me. In any event, there is simply no evidence before the court to substantiate the allegation that there has been ongoing negative or unfavourable publicity which would impact upon a fair trial. The court has received no evidence of the nature of the sexual offence for which the applicant had been convicted nor of the media coverage, if any, which same attracted at the time. Accordingly, this ground of challenge is not made out.

66. Thirdly, there is an allegation that the complainants delayed making the complaints in order to coincide with the applicant's release from prison having served a custodial sentence in relation to the other unrelated offence. Again, this was not a ground which was pressed with any enthusiasm at the hearing before me. For the avoidance of any doubt, however, I should formally record that this allegation against the complainants is not substantiated in any way by the evidence before the court. Accordingly, if the ground had been pursued, I would have had no hesitation in dismissing same.

CONCLUSION

67. For the reasons set out above, I have concluded that there is a real risk of an unfair trial in this case. Accordingly, I propose to make an order in accordance with paragraph (d)(i) of the statement of grounds prohibiting the Director of Public Prosecutions from further prosecuting the applicant in respect of the prosecution as described therein. In order to protect the complainants' identity, the precise details and reference number will not be set out in this judgment.

68. If and insofar as it is necessary to do so, I also make an order pursuant to Order 84, rule 21(3) extending the time for the bringing of the application for judicial review to 11 June 2018.