Neutral Citation [2015] IEHC 511

THE HIGH COURT

Record No: JR 134/2014

Between

K.

Applicant

- and -

THE DIRECTOR OF PUBLIC PROSECUTIONSRespondent

JUDGMENT of Mr. Justice Max Barrett delivered on 31st July, 2015.

PART I

NATURE OF APPLICATION

1. This is an application for an order of prohibition in respect of the pending prosecution of the Applicant for certain alleged offences.

PART II

BACKGROUND FACTS

2. The Applicant is accused of burglary and sexual assault. It is alleged that in October 2008, after consuming alcohol, the Applicant twice entered the Complainant's hotel bedroom uninvited and committed a sexual assault upon the Complainant. The Applicant admits that he was twice present in the Complainant's hotel bedroom and that he came into physical contact with the Complainant when he sought to rouse her from her sleep. The Applicant denies that he committed any sexual offence.

3. The Gardaí were called to the hotel and arrived less than an hour after the alleged offence was committed. Thereafter the Complainant was brought to the sexual assault unit of a nearby hospital and various tests done and samples taken. DNA swabs were used and blood was taken. A physical examination of the Complainant showed that she was suffering from some internal bleeding. The doctor who examined the Complainant found no conclusive evidence of a sexual assault but concluded that the finding of blood was "*consistent with trauma*" to the area of the alleged assault.

4. The Applicant was brought to the local Garda station. Counsel for the Applicant contends that, given the particular nature of the offence that is alleged to have occurred, the full details of which it is not necessary to recount in the within judgment, an obvious procedure would have been to place the Applicant's hands into evidence bags at the hotel room, bring him to the Garda station and perform forensic tests on his hands for later comparison with such swabs as were taken from the Complainant. In fact, no forensic examination was carried out on the Applicant at this time. The Applicant was subsequently released but returned on a later occasion to the Garda station where he provided saliva samples from his mouth. It was understood by the Applicant and his legal team that the saliva samples were taken for comparison with DNA samples recovered in the forensic examination previously carried out on the Complainant.

5. The Applicant's legal team eventually realised, following receipt of a notice of additional evidence dated 14th February, 2014, that no forensic examination of the samples taken from the Complainant or the Applicant had been conducted. The DPP maintains that the Applicant's legal team would have known from the time the book of evidence was served on 7th February, 2011, that no test results or analyses of samples taken from the Complainant and/or the Applicant was to be relied upon. However, it seems to the court that there is a significant difference between knowing that no such evidence will be relied upon, and realising that no such evidence exists. The court accepts that the applicant's legal team did not so realise, and had no reason to so realise, until 14th February, 2014. All this leads to the inexorable conclusion that there has been no delay in bringing the within proceedings, which were in truth commenced with admirable promptness by notice of motion on 3rd March, 2014. The claim by the DPP that there has been delay in bringing the within application for an order of prohibition is not therefore accepted by the court.

6. Why are there no test results or analyses of the various samples taken? Shortly put, because after reviewing the samples taken from the Complainant and the Applicant and the information supplied by the Gardaí, a senior member of the State Forensic Laboratory concluded, in a letter of 2nd June, 2009, that "*Having assessed the information supplied, it is my opinion that a scientific examination will not further the investigation in any direction*." Counsel for the Applicant contends that for the now-pending trial to proceed in the absence of test results or analyses of samples taken from the Complainant and the Applicant would, to use counsel's words, render it akin to 'Hamlet without the Prince'. More particularly, counsel for the Applicant claims that the absence of such evidence is sufficient to justify the requested order of prohibition because:

> (a) such evidence would, it is claimed, have shown that the Complainant had consumed a considerable quantity of alcohol on the night in question (a factor relevant to the level of the Complainant's consciousness at the time of the alleged assault and a 'dream theory' that the defence may seek to advance);
>
> (b) the only scientific evidence corroborating the Complainant is that of the doctor who examined her on the night of the alleged assault, and the samples she (the doctor) obtained should have been forensically examined;
>
> (c) had DNA analysis been conducted on the swabs taken from the Complainant on the night of the alleged assault, this, it is claimed, would have disclosed that none of the Applicant's DNA subsisted in same;
>
> (d) had the blood found within the Complainant been analysed, this, it is claimed, would have disclosed whether, for example, the blood found within the Complainant was attributable to menstruation.

7. Given the foregoing, counsel for the Applicant contends that there is a real risk that his client will not obtain a fair trial or that a trial will be unfair in the absence of the forensic evidence.

8. Before moving on from its consideration of the background facts, the court notes that counsel for the Applicant sought to make much ado about (a) the form of forensic testing requested by the Gardaí of the State Forensic Laboratory in a form completed on or before 23rd February, 2009, not being compatible with the content of an Acceptance Form signed by a member of the State Forensic Laboratory and (b) the fact that the member of An Garda Síochána with whom the State Forensic Laboratory corresponded on 2nd June, 2009, was not the member who had requested the testing, and that had it communicated with the Garda who submitted the request for testing he would have queried the conclusion reached by the State Forensic Laboratory. The court would make a number of observations in this regard:

> - first, the Form C.56 completed by the member of An Garda Síochána seeking testing, a copy of which has been seen by

the court, requests 'DNA/Biology' testing.

- second, the 'Biology, Chemistry & DNA Case Acceptance Form' that issued, it appears, to An Garda Síochána mentions 'Biology' testing only but is not the form in which the testing sought is requested.

- third, the letter of 2nd June from the State Forensic Laboratory states that *"a scientific examination will not further the investigation in any direction"*.

- fourth, the court notes that the wording "*scientific examination*", read naturally, would appear to embrace all scientific examinations, not just those sought.

- fifth, the court accepts that the member of An Garda Síochána who completed the form and the member of An Garda Síochána who received the letter were different.

- sixth, the court accepts the contention for the DPP that no regular member of An Garda Síochána would have the competence to challenge the view of the State Forensic Laboratory that "*a scientific examination will not further the investigation in any direction*."

- seventh, the court does not consider, to apply various tests that will be considered in detail hereafter, that either or both of the circumstances mentioned at points (a) and (b) above justifies/justify an exceptional intervention by way of prohibition, or offers/offer an example of circumstances that entail a real or serious risk that the Applicant cannot obtain a fair trial. If anything, they seem precisely the type of issues that would be better addressed by appropriate examination of witnesses at a court of trial under the watchful eye of a presiding judge.

PART III

ONE PERSON'S WORD AGAINST ANOTHER

9. To the extent it is contended that, in the absence of the above-mentioned forensic evidence, the proposed trial will descend into nothing more than 'one person's word against another', the court does not accept that this is so. The proposed trial will involve more than the testimony of the Complainant and such testimony as the Applicant may elect himself to provide. Thus the Complainant's sister, who was also staying at the hotel but was not with the Complainant at the time of the alleged assault, witnessed the early report of the alleged assault by the Complainant, and her condition in the immediate aftermath of same. There is also evidence from the hotel manager and the attending and investigating Gardaí. Additionally, there is evidence from a medical doctor that the blood discovered during the examination at the sexual assault was "*consistent with trauma*" to the area of the alleged assault. There is also evidence supplied by the Applicant in a voluntary cautioned statement and in numerous memoranda of interview. There are also, it seems, some inconsistencies in the evidence so supplied by the Applicant which would seem precisely the type of matter that a jury is qualified to consider and assess. The court notes too that there is nothing to impede the Applicant's legal team from urging what, to borrow the phrase employed by the Applicant's counsel at hearing, might be described as the 'Hamlet without the Prince' contention concerning the absence of test results or analyses of samples taken from the Complainant and the Applicant.

10. The court notes in any event that even if the proposed criminal trial was to descend into 'one person's word against another', such trials are not unknown to our criminal courts, even when it comes to the trial of sexual offences. In this regard, the court is mindful of the observation by Geoghegan J., when giving judgment for the Supreme Court in *D.D. v. The Director of Public Prosecutions* [2004] 3 I.R. 172 at p.178 that:

> *"It has never been the law that a charge of rape or gross indecency or indecent assault cannot be tried if, to use a colloquialism, the trial is tantamount to 'one person's word against another'".*

11. It is true that Geoghegan J. immediately goes on to note that "*It is quite different of course where there was some concrete and identifiable evidence unhelpful to the applicant and now lost"*. However, the court does not consider that the within application is concerned with such a case. Here, it is not the case that evidence existed and was lost. Instead samples taken were sent to the State Forensic Science Laboratory, an independent body, which concluded that "*a scientific examination will not further the investigation in any direction*." As a consequence of the view adopted by the State Forensic Science Laboratory, evidence that might have been generated was not. The court does not understand there to be any contention that there was an absence of any scientific basis on which the State Forensic Science Laboratory could so conclude.

PART IV

EVIDENTIAL BASIS FOR APPLICANT'S CASE

12. It seems to the court that there were and are significant evidential deficiencies in the contentions advanced for the Applicant at the hearing of the within application. So, for example, it seemed to the court throughout the hearings that the not-lightly-to-be-disparaged professional view formed by the doctor at the sexual assault unit was all but ignored by the Applicant. The court notes too that there is no evidence before it supporting the contentions made by the Applicant that testing of the samples would have been probative. Nor is there any evidential basis to support the assertion made that samples taken from the Applicant's hands on the night of the alleged assault would have yielded any evidence. In truth, the within application seems to have commenced largely on the mistaken, if understandable, misapprehension that the Gardaí had never sent the samples for forensic testing whereas, as established at the hearing of the within application, the truth of the matter is that the samples taken were sent by the Gardaí to the State Forensic Science Laboratory, an independent body, which concluded that "*a scientific examination will not further the investigation in any direction*."

13. This Court, in truth, is presented in the within application with a situation not completely dissimilar to that contemplated by McMenamin J. in his judgment in *Wall v. Director of Public Prosecutions* [2013] IESC 56. In *Wall* the Gardaí failed to carry out a fingerprint test on the steering-wheel of a crashed car before they released the car from their custody. In the within case, of course, the Gardaí ensured that necessary samples were taken of the Complainant by having her attend at the sexual assault unit; they also later took a saliva sample from the Applicant; and they had the samples so taken brought to the State Forensic Science Laboratory. It was that last-mentioned, independent body which concluded that *"scientific examinations will not further the investigation in any direction"*. However, despite such factual differences as exist between Wall and the case now presenting, the court considers pertinent the following observation of McMenamin J., at para.45 of his judgment:

> *"To what extent are the courts to be placed in the position of prescribing the nature, structure and range of a garda investigation? To what extent are the courts to be put in the position of deciding what avenues of investigation the gardaí should pursue? In my view, the court should be cautious in so prescribing. This Court can only act on the evidence before it. There is simply no evidence as to why…delay occurred. Furthermore, the fingerprint hypothesis hinges on an invitation to this Court to speculate on what the outcome of such a hypothetical forensic test* ***might*** *have been. This is not borne out in the evidence in this case. There is no evidence as to what the outcome of such a test would have been, or even might have been…". (Emphasis in original).*

14. Here, as mentioned, the Gardaí ensured that necessary samples were taken of the Complainant, they also later took a saliva sample from the Applicant, they had the samples so taken brought to the State Forensic Science Laboratory, and they clearly accepted the conclusion reached by that Laboratory that scientific examination would not further the Garda investigation. The 'Hamlet without the Prince' line of argument hinges on an invitation to the court to speculate on what the outcome of a hypothetical forensic test might have been. As in *Wall*, there is no evidence before this Court as to what the outcome of such a test would have been or even, beyond mere assertion, as to what it might have been. Mindful of McMenamin J.'s observation that the court should be cautious in prescribing what further action the Gardaí ought to have taken, the court will confine itself to a single observation as to the course of action that the Gardaí did take: given the conclusion of the State Forensic Science Laboratory, an independent body, that "*a scientific examination will not further the investigation in any direction*", it is not clear what further scientific testing the Gardaí ought to have insisted upon or even, indeed,that regular members of An Garda Síochána are competent, as 'lay-people', to challenge the conclusions of the State Forensic Science Laboratory in any regard.

PART V

THE 'MISSING EVIDENCE' CASE-LAW

i. Overview

15. The court has been referred in some detail to a quartet of Supreme Court cases as offering the relevant principles to be applied where a court is presented with an application for prohibition of prosecution brought on the basis of missing evidence. A nuance to note in this regard is that the so-called 'missing' evidence in this case is not, *strictu sensu*, missing evidence at all. It is evidence that was never generated because the view of the State Forensic Laboratory, as expressed in its letter of 2nd June, 2009, was that "*a scientific examination will not further the investigation in any direction.*" It does not seem to the court that evidence that never existed because it was thought by those expert in forensic science to be redundant even to generate can properly be described as 'missing' evidence. Be that as it may, the court proceeds below to consider the quartet of cases to which it has been referred in this regard.

ii. Savage v. The Director of Public Prosecutions

[2009] 1 I.R. 185

16. This was a case in which an order of prohibition preventing a further criminal prosecution was sought by Mr Savage on the basis that the respondent had failed to preserve material evidence.

17. In the course of his judgment, Fennelly J., at pp.208–209 of his judgment, in a passage with which Hardiman J. agreed, "*set out and synthesised*" (per O'Donnell J. in *Byrne*, at p.356 of his judgment (considered below)) the modern law on prohibition in the context of missing evidence as follows:

> *"The following is an attempt to summarise the principal points relevant to whether a court will make an order prohibiting a trial…*
>
> *(a) It is the duty of the prosecution authorities, in particular An Garda Síochána, to preserve and retain all evidence, which comes into their possession, having a bearing or potential bearing on the issue of guilt or innocence of the accused….The extent to which that duty extends to seeking out evidential material not in the possession of the gardaí does not arise in the present case…*
>
> *(b) The missing evidence in question must be such as to give rise to a real possibility that, in its absence the accused will be unable to advance a point material to his defence. This is, like the garda obligation to retain and preserve evidence, to be interpreted in a practical and realistic way and 'no remote, theoretical or fanciful possibility will lead to the prohibition of a trial (see Dunne v. Director of Public Prosecutions)…*
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> *(c) The fact that the prosecution intends to rely in evidence independent of the missing evidence at issue in order to establish the guilt of the accused does not preclude the making of an order of prohibition…*
>
> *(d) The application is considered in the context of all the evidence likely to be put forward at the trial. The court will have regard to the extent to which aspects of the prosecution case are contested…*
>
> *(e) The applicant must show, by reference to the case to be made by the prosecution, in effect the book of evidence, how the allegedly missing evidence will affect the fairness of his trial…*
>
> *(f) Whether the applicant, through his solicitor or otherwise makes a timely request of the prosecution for access to or an opportunity to have the articles at issue expertly examined may be highly material….However, a suspect or an accused person will be unable to make a timely request, if the gardaí have destroyed or parted with possession of the material. Thus, they must give consideration to the likely interests of the defence before making such decisions.*
>
> *(g) The essential question at all times, is whether there is a real risk of an unfair trial….The court should focus on that that issue and 'not on whose fault it is that the evidence is missing, and what the degree of that fault may be' (… Dunne)"*

iii. Byrne v. The Director of Public Prosecutions

[2011] 1 I.R. 346

18. Byrne involved a failed appeal to the Supreme Court against a refusal by the High Court of an order of prohibition restraining a

prosecution in circumstances where it was alleged that the Gardaí ought to have obtained and retained certain CCTV footage. The significance of Byrne in the context of the within proceedings is that the Supreme Court made clear that the superior courts are reticent to prohibit a trial, this reticence deriving from the fact that a trial court has the power and duty to assess a case as it develops to assess whether there is any unfairness to an applicant that is incapable of remedy by the trial court, and even to exclude evidence as appropriate. Thus, per O'Donnell J., at p.356 of his judgment:

> *"The point was made in McFarlane…that the fact that an applicant was unsuccessful in judicial review proceedings did not detract from the power and duty of a court of trial to assess the case as it developed at the trial. At p.147 of his judgment Hardiman J. (with Murray C.J., Geoghegan and Fennelly JJ. concurring) stated that the court of trial "[34]…will be able to assess whether there is indeed a prima facie case at the appropriate stage. More than that it will be able to assess, on the evidence as it actually develops, whether there is any unfairness to the applicant, incapable of remedy by the trial court, for which the prosecution is responsible. Its powers in this regard are wholly unaffected by the result of the present application….*
>
> *This, in my view, is an important observation."*

iv. Wall v. The Director of Public Prosecutions

[2013] IESC 56
19. In *Wall*, it was alleged that the accused had pulled on the steering-wheel of a car being driven by his then girlfriend. It was claimed that this action had led to the car colliding with an oncoming vehicle. Both cars involved in the collision were examined by a Garda Forensic Collision Investigator at the scene and by a Public Service Vehicle Inspector at a recovery yard. Unfortunately the car was destroyed before the Applicant was questioned and so was unavailable to the defence. Additionally, no fingerprint analysis was conducted on the steering wheel which the Applicant was alleged to have pulled on. It was therefore a case not unlike that before this Court in which the evidence was not so much 'missing' evidence as evidence which had never been generated (in the within application because the State Forensic Laboratory considered that "*a scientific examination will not further the investigation in any direction*."). Of especial interest as regards the issue of the so-called 'missing' evidence at issue in the within application, are the following observations of McMenamin J., at paras.42–44 of his judgment:

> *"A duty to obtain evidence cannot simply be imputed to the gardaí without basis. What might be clear in retrospect is frequently not at all clear at the moment a decision in the investigation is made. There may, of course, be circumstances where an omission to obtain evidence is so glaringly obvious that it is self-evidently remiss not to obtain it, even absent a defence request. As I will now seek to explain, this is not the case here, on the evidence adduced in the case…".*

v. Stirling v. Collins & anor.

[2014] IESC 13
20. This was an application for prohibition in the context of an ongoing trial where the oral testimony of a garda, together with some lost or mislaid CCTV evidence, were the only evidence in a case concerning certain criminal damage and public order offences. It is therefore unlike the present case in that, (a) in *Stirling*, evidence existed and was lost (here certain evidence was not generated via forensic testing in circumstances where the State Forensic Laboratory was of the view that "*a scientific examination will not further the investigation in any direction*"), (b) here there is other evidence apart from the so-called 'lost' evidence.

21. Granting the relief sought by Mr Stirling, McMenamin J., for the Supreme Court, indicated, at para. 6, that "*In Wall, this court emphasised that judicial review by way of prohibition, if it is the appropriate remedy should be granted only in exceptional cases, where evidence of prejudice is clear"*, eventually concluding, at para.18, that the case presenting before the Supreme Court was *"not just a case where prejudice and, therefore, risk is probable, but rather it is inevitable…the only objective verifying evidence has become lost through neglect and failure to preserve the material."*

vi. Some conclusions
22. It has not been established that the Gardaí in the within proceedings are guilty of any failure to preserve and retain all evidence which has come into their possession.

23. There is no evidence beyond assertion to suggest that so-called 'missing' (in truth, never-generated) evidence will prevent the Applicant from making a point material to his defence. In truth, such evidence as there is before the court regarding the so-called 'missing' evidence is that, to paraphrase the State Forensic Science Laboratory, even had such evidence been generated it would not have furthered the investigation in any direction. The Applicant remains free to make such contentions in this regard as he wishes at the court of trial.

24. The application falls to be considered in the context of all the evidence likely to be put forward at the trial. The court considers later below the failure of the Applicant to engage in a specific way with the evidence actually available so as to demonstrate a real risk that, by virtue of the circumstances presenting, it is not possible for the Applicant to obtain a fair trial.

25. There was a failure by the Applicant in this case to make a timely request to conduct its own forensic testing; however, the court accepts the Applicant's contention that this was because he assumed the forensic testing was being or had been undertaken by the State and was unaware until after receipt of the notice of additional evidence dated 14th February, 2014, that no forensic examination of the samples taken from the Complainant or the Applicant had in fact been conducted.

26. Fennelly J. emphasises in *Savage* that the essential question, at all times, in an application for prohibition of a criminal prosecution is whether there is a real risk of an unfair trial. The court moves on to consider this essential issue and further authorities of relevance in the next part of its judgment.

PART VI

REAL/SERIOUS RISK OF AN UNFAIR TRIAL
27. When it comes to the issue of whether there is a real risk of an unfair trial, the court has been referred to a further four decisions of the Supreme Court that usefully address this issue in more detail. These are considered below.

i. Z. v. Director of Public Prosecutions

[1994] 2 I.R. 465
28. The Z case was concerned with the impact of pre-trial publicity on the possibility of obtaining a fair trial. Giving the sole judgment in the Supreme Court, Finlay C.J. observed as follows at p.506:

> *"This Court in the recent case of D. v. The Director of Public Prosecutions [1994] 2 I.R. 465 unanimously laid down the general principle that the onus of proof which is on an accused person who seeks an order prohibiting his trial on the ground that circumstances have occurred which would render it unfair is that he should establish that there is a real risk that by reason of those circumstances (which in that case also were pre-trial publicity) he could not obtain a fair trial."*

29. At p.507 of his judgment, Finlay C.J. observed as follows:

> *"With regard to the general principles of law I would only add to the principles which I have already outlined the obvious fact to be implied from the decision of this Court in D. v. The Director of Public Prosecutions, that where one speaks of an onus to establish a real risk of an unfair trial it necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk is a real one but the unfairness of trial must be an unavoidable unfairness of trial."*

ii. D.C. v. Director of Public Prosecutions

[2005] 4 I.R. 281
30. At issue before the Supreme Court in *D.C., inter alia*, was whether the duty of the Gardaí to obtain evidence extended to obtaining the prior sexual history of the complainant. The concluding paragraphs of the judgment of Denham J., as she then was, at pp.296–297 of the case-report, contain observations that seem of no little relevance in the within proceedings. Per Denham J (McGuinness and McMenamin JJ. concurring):

> *"In considering an application for prohibition a review court should not merely pick out an element and conclude that arising from it there is a possibility of an unfair trial. That is not the test. The test is, as stated in Z. v. Director of Public Prosecutions…that of a serious risk of an unfair trial. The applicant here is applying on the basis of a hypothesis which might or might not happen….The applicant in this case has not raised an arguable case that there is a serious risk of an unfair trial.*
>
> *The refusal of leave to apply for judicial review to the applicant will return the case to a position in which it is assumed that the trial judge will ensure a fair trial. An arguable case has not been established that there is a serious risk that the applicant will not receive a fair trial.*
>
> *The issues raised are matters for the trial judge. In particular, issues going to consent, credibility and the presence or absence of a witness, for example Ms R., who is presently outside the jurisdiction and who has apparently indicated that she will neither attend the trial nor give evidence by video link are matters for the trial judge….*
>
> *The entire trial will be under the control of the trial judge, who has the duty to conduct a fair trial and who is able to make orders and directions in relation to all relevant matters as they arise. The fact that an application such as this has been brought prior to trial does not preclude the trial judge from dealing with any issues which may arise as the trial proceeds."*

iii. The People (Director of Public Prosecutions) v. P.O'C

[2006] 3 I.R. 238
31. In *P.O'C.*, the Supreme Court had to consider the following point of law certified by the Court of Criminal Appeal: *"Does a trial judge in the Central Criminal Court have jurisdiction under the Constitution or at common law to hear an application to stay or quash an indictment on grounds of delay?"* The Supreme Court held in effect that the answer to this question was to apply to the High Court for leave to apply for judicial review. In the course of her judgment, with whom the other members of the Supreme Court concurred, Denham J., as she then was, noted as follows, at p.246:

> *"There is no doubt that the trial court has a general and inherent power to protect its process from abuse and that this power includes a power to safeguard an accused person from oppression or prejudice. However, this applies during the course of the trial and does not establish a right to a separate, discrete, preliminary process at the commencement of a trial to inquire into issues of delay. The correct procedure pre-trial is to make an application for leave to seek judicial review. It must be stressed that whether such an application for judicial review is granted or not, and even if such an application results in a refusal to grant an injunction or prohibition, the trial court retains its inherent power to protect its process and to make such orders as are necessary during the course of the trial. This includes orders arising from evidence or issues relating to delay."*

iv. Byrne v. Director of Public Prosecutions

[2011] 1 I.R. 346.
32. Byrne involved a failed appeal to the Supreme Court against a refusal by the High Court to grant an order of prohibition restraining a prosecution in circumstances where it was alleged that the Gardaí ought to have obtained and retained certain CCTV footage. On appeal, the Supreme Court made clear that it will only be in exceptional circumstances that the superior courts will intervene and prohibit a trial. This reticence to intervene springs from the fact that a trial court has the power and duty to assess a case as it develops, to assess whether there is any unfairness to an applicant that is incapable of remedy by the trial court, and even to exclude evidence as appropriate. Per O'Donnell J., at p.356 of his judgment (with whom the other members of the court concurred):

> *"The constitutional right, the infringement of which is alleged to ground an applicant's entitlement to prohibit a fair trial, is the right to a fair trial on a criminal charge guaranteed by Articles 38 and 34 of the Constitution. The manner in which the Constitution contemplates that a fair trial is normally guaranteed is through the trial and, if necessary, appeal*

processes of the courts established under the Constitution. The primary onus of ensuring that that right is vindicated lies on the court of trial, which will itself be a court established under the Constitution and obliged to administer justice pursuant to Article 34. It is, in my view, therefore, entirely consistent with the constitutional order to observe that it will only be in exceptional cases that superior courts should intervene and prohibit a trial, particularly on the basis that evidence is sought to be adduced…or is not available".

v. Some principles arising
33. What principles of relevance can be identified in the above-quoted elements of the *Z., D.C., P.O'C* and *Byrne* cases? It appears to the court that the following principles can be identified:

(1) It will only be in exceptional cases that superior courts should intervene and prohibit a trial, particularly on the basis that evidence is sought to be adduced or is not available. (*Byrne*).

(2) The onus of proof on an accused person who seeks an order prohibiting his trial on the ground that circumstances have occurred which would render it unfair is that s/he should establish that there is "*real risk*"("*serious risk*" per Denham J. in *D.C.*) that by reason of those circumstances s/he cannot obtain a fair trial. (*Z., D.C.*)

(3) When one speaks of an onus to establish a real (serious) risk of an unfair trial it necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk is a real/serious one; the unfairness of trial must be unavoidable unfairness. (*Z.*)

(4) In considering an application for prohibition, a review court should not merely pick out an element and conclude that arising from it there is a possibility of an unfair trial. (*D.C., P.O'C.)*

(5) A relevant factor in the court's considerations is that if the trial is allowed proceed it will be under the control of the trial judge, who has the duty to conduct a fair trial. (*D.C., P.O'C., Byrne*)

(6) That a pre-trial application, such as a prohibition application, is brought, be it successful or not, does not preclude the trial judge from dealing with any issues which may arise as the trial proceeds. (*D.C., P.O'C.*)

vi. Some conclusions
34. The court does not consider that the within application is possessed of such exceptional features as to warrant intervention by the court in the usual criminal trial (and appeal) process through the issuance of the order of prohibition sought.

35. It does not appear to the court that there is a real/serious risk that the Applicant cannot obtain a fair trial. There is no evidence before the court beyond assertion to suggest that so-called 'missing' (in truth, never-generated) evidence will prevent the Applicant from making a point material to his defence. The Applicant is free to raise before the trial court all the substantive issues raised before this Court and the trial court will make of his contentions what it will – and it may make much of them; there is no way yet of knowing.

36. For the reasons indicated later below, the court considers that there has been a failure by the Applicant to engage in a specific way with the evidence actually available so as to demonstrate a real risk that, by virtue of the circumstances presenting, it is not possible for the Applicant to obtain a fair trial. Even were the court to consider otherwise (and it does not), to focus solely on the so-called 'missing' evidence would, the court considers, involve it plucking one sheaf from a bushel of evidence and concluding therefrom that overall there is a possibility of an unfair trial; this is a manner of analysis that the *D.C.* and *P.O'C.* cases preclude the court from taking.

37. In all of its considerations, the court has been mindful of the protections that the Applicant will enjoy in the person of the trial judge when the intended prosecution comes to court.

PART VII

CORRECT FORUM FOR DETERMINATION OF ISSUES
38. The Director in the within application has suggested that the court, in determining whether or not to grant an order of prohibition, should consider whether the issues raised by the Applicant might better be considered in another forum, specifically the court of trial. *I.e.* is an application before this Court the correct forum for the determination of the issues raised?

39. The court must admit that it has struggled somewhat with this line of objection to the order for prohibition. It is clear that the Applicant has the right to bring the within application. It is clear too, from the authorities considered above that a critical issue arising is whether the Applicant can satisfy the court that there is a real/serious risk that, by reason of such circumstances as he has identified, he cannot obtain a fair trial. So what is the significance of the issue of forum? Is it a preliminary issue that falls to be considered before the court progresses to the 'real/serious' test? Is it a subsidiary issue that falls to be considered if an Applicant fails to satisfy the 'real/serious' test? Is it a complementary issue that ranks in importance, and falls to be considered in tandem, with the 'real/serious' test? The court returns to this trichotomy after a brief consideration of the cases to which it has been referred in this regard.

i. Ryan v. The Director of Public Prosecutions

[1988] 1 I.R. 232
40. This case arose in circumstances where, at a Circuit Court trial, a written statement that had been ruled inadmissible by the trial judge was inadvertently provided to the jury when it retired. Mr Ryan subsequently applied to the High Court for an order restraining the Director of Public Prosecutions from seeking to have the statement admitted at the re-trial. The order was refused by Barron J. on the basis that the High Court has no jurisdiction, whether by way of judicial review or otherwise, to make advance rulings on matters which may or may not arise at trial before another tribunal. Per Barron J., at p.234 of his judgment:

"A trial whether before a judge alone, or before a judge and jury, is under the control of that judge. It is not for some other judicial authority to tell him how to conduct his court and the proceedings before him….No objection is taken in the present application to the jurisdiction of the Central Criminal Court to retry the applicant. That in itself is an absolute

bar to the issue of an order of prohibition. There is no jurisdiction in this court whether by way of judicial review or otherwise to make rulings in advance upon matters which may or may not arise in a trial before another tribunal. Such rulings form no part of the supervisory jurisdiction of this court. If the prosecution seek to introduce the particular statements in evidence, it is solely a matter for the trial judge, having regard to the course of the trial before him and the submissions made by either party, to rule upon the admissibility of such statements."

ii. McNulty v. The Director of Public Prosecutions

[2009] 3 I.R. 572
41. In advance of a re-trial of Mr McNulty, a notice of additional evidence was served by the prosecutor which Mr McNulty alleged had the effect of curing certain defects in proofs at the first trial. His application for an injunction prohibiting the Director from pursuing the prosecution against him failed in the High Court; an appeal to the Supreme Court was likewise unsuccessful, Hardiman J. noting as follows, at p.576 of his judgment (in which Geoghegan and Fennelly J. concurred):

> "The correct locus for the determination of these issues
> *…In his oral and written submissions, the applicant made the following significant concession:-*
> *'The applicant accepts that in general judicial review relief is not appropriate for the purposes of seeking rulings from the High Court as to the admissibility of evidence in advance of criminal trials where the trial judge is capable of making all the appropriate determinations of law and fact.'*
> *In my view this was a well advised concession. The fact that it was made relieves this court of the necessity to set out the authorities supporting the proposition just summarised: but there can be no doubt of its correctness…".*

iii. Some principles arising
42. What principles of relevance can be identified in the above-quoted elements of the *Ryan* and *McNulty* cases? It appears to the court that the following principles can be identified:

> [1] A trial is under the control of the trial judge. It is not for some other judicial authority to tell him/her how to conduct his/her court and the proceedings before him/her. (*Ryan*) *McNulty* indicates that 'in general' this is not appropriate.
>
> [2] Where no objection is taken to the jurisdiction of the trial court to retry the applicant, that is an absolute bar to the issue of an order of prohibition. (*Ryan*)
>
> [3] There is no jurisdiction in the High Court, whether by way of judicial review or otherwise, to make rulings in advance upon matters which may or may not arise in a trial before another tribunal. (*Ryan*)

43. In essence, it seems to the court that these principles are but aspects of the general cautiousness with which the superior courts will approach proceedings such as the within application. As O'Donnell J. observes in *Byrne,* our system of court-administered justice contemplates that the criminal process will commence with a criminal trial, followed by an appeal in the event of suggested or actual, with a peremptory prevention of that process being exceptional. Thus if one returns to the question posed by this Court as to whether the issue of locus is a preliminary, subsidiary or complementary issue, the court inclines to the view that it is a concern that permeates the general approach to an application such as that now presenting, with the superior courts inclining to the view that aspects of a criminal trial, including evidential and other issues presenting, are almost always better dealt with by the judge presiding at the criminal trial, and not by a judge sitting in contemplation of such a trial. This is a general disposition which the court has brought to bear in its consideration of the within application.

PART VIII

ENGAGING WITH THE EVIDENCE
44. To borrow from the judgment of Hardiman J. in *McFarlane v. The Director of Public Prosecutions* [2006] IESC 11 at para.24, in order to demonstrate a real risk that, by virtue of certain circumstances that have occurred, it is not possible for an applicant to obtain a fair trial, *"[T]here 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."* The Applicant in the within application has failed to do as the just-quoted text contemplates. A few examples suffice to demonstrate his failure in this regard:

> (1) there are two charges on the indictment, viz. sexual assault and burglary; the Applicant does not engage at all with existence of the burglary charge;
>
> (2) the Applicant maintains that while the Complainant made a first recent complaint she did not complain that she was sexually assaulted; in fact the Complainant maintained from the outset (within minutes of the alleged assault) that she had been sexually assaulted;
>
> (3) the Applicant maintains that there is no forensic explanation available for the blood found in the swabs taken of the Complainant; this ignores the fact that the examining doctor at the sexual assault unit (who will be available, along with the Complainant, for cross-examination at trial) has expressed the professional view that the blood was "*consistent with trauma*" to the area of the alleged assault;
>
> (4) in the statement of grounds, it is stated that the complainant was asleep at the time of the alleged assault and dreamed of it while in some manner of intoxicated state; however, in her statement the Complainant states that "*I fully came around to what was going on*", and then gives certain details of the alleged assault;
>
> (5) the Applicant has neither exhibited the book of evidence nor engaged at all in his application with the various memoranda of interviews between himself and the Gardaí and some ostensible, but perhaps explainable, inconsistencies therein.

PART IX

THE PUBLIC INTEREST IN PROSECUTING OFFENCES

45. The people, through the medium of the State, have vested the Director of Public Prosecutions with an independent discretion in determining whether or not a prosecution should be brought on their behalf. A decision to prosecute often involves the balancing of many factors and an examination of the evidence in order to determine whether the evidence is of a sufficient weight to warrant a charge being preferred. It does not behove a court removed from this careful balancing process lightly to intervene in the exercise of this discretion or in the ensuing trial and (if availed of) appeal process through which the constitutional right to a fair trial falls generally to be assured. As Denham J. noted, under the heading "*Community's right*", at pp.195–196 of her judgment in *B. v. The Director of Public Prosecutions* [1997] 3 I.R. 140, a case concerned *inter alia* with the right to having a criminal trial with prosecuted with reasonable expedition:

> *"It is not the applicant's interests only which have to be considered. It is necessary to balance the applicant's right to reasonable expedition in the prosecution of the offences with the community's right to have criminal offences prosecuted."*

46. The general regard to be afforded decisions of the Director of Public Prosecutions was more recently considered by the Supreme Court in *Murphy v. Ireland and Others* [2014] IESC 19, O'Donnell J. noting as follows, at para.22 of his judgment:

> "*In* The State (McCormack) v. Curran *the Superior Courts had to deal with the general reviewability of decisions of the Director of Public Prosecutions in prosecutorial matters. In that case, the plaintiff wished to be tried in this jurisdiction under the Criminal Law (Jurisdiction) Act 1975 rather than in Northern Ireland. The Director of Public Prosecutions refused to prosecute him. The High Court (Barr J.) and a unanimous Supreme Court rejected the claim that he was entitled to review the decision of the Director of Public Prosecutions in part on the authority of the earlier decisions on Part V of the Offences Against the State Act. However, the court qualified the earlier absolute statement made in Savage [i.e. Savage & McOwen v. The Director of Public Prosecutions* [1982] I.L.R.M. 385] *and held that the Director's actions were not entirely outside the scope of review by the courts. Finlay C.J. said*:
>
> > *"If … it can be demonstrated that he reaches a decision mala fide or influenced by an improper motive or improper policy then his decision would be reviewable by a court." (p. 237)*
>
> *In the light of subsequent decisions of this court quashing decisions of the Director, it is necessary to qualify that statement so as to provide that a decision of the Director is reviewable if it can be demonstrated that it was reached mala fides or influenced by improper motive or improper policy, or other exceptional circumstances. However, as so qualified, the decision in The State (McCormack) v. Curran has remained the law…".*

PART X

47. For the reasons stated above, the court declines to grant (i) an order of prohibition in respect of the prosecution arising from the return for trial of the Applicant in respect of the charges of which he is accused, and (ii) all other reliefs sought.