THE HIGH COURT

[2016 No. 409 J.R.]

BETWEEN

RORY ECCLES

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 5th day of May, 2017

1. The issue to be determined in the within application is whether prohibition by the Court of the applicant's retrial is appropriate given the circumstances of the case.

2. The background to the within application is as follows: the applicant was returned for trial to the Circuit Court sitting at Naas Courthouse on 18th November, 2014. He is charged with assault causing harm, criminal damage and possession of an article, which offences are alleged to have occurred in circumstances where following a confrontation at his home the applicant attended at the complainant's home and damaged his motor car and struck him with a baseball bat. The applicant accepts that he damaged the complainant's vehicle but denies striking the complainant with a baseball bat. The applicant's instructions are that the complainant attacked him with a knife, in response to which the applicant struck him with his elbow, knocking him backwards and the complainant sustained his injuries in the fall. The applicant made a statement to the gardaí broadly in those terms. On 27th January, 2015, the applicant entered a plea to count 2 on the indictment, criminal damage, consistent with his statement and he pleaded not guilty to counts 1 and 3, assault causing harm and possession of an article.

3. On 5th April, 2016, a jury was empanelled and the trial proceeded before the Circuit Court. The only two prosecuting witnesses as to fact were the complainant and his partner. At the commencement of the trial an order was made excluding the complainant's partner from the courtroom while the complainant was giving evidence.

4. Following the evidence-in-chief of the complainant's partner, the trial was interrupted by the trial judge who indicated, in the absence of the jury, that he felt that the complainant's partner was looking to the complainant for inspiration, but was not receiving any inspiration. The trial judge then directed that the complainant's partner should have no contact with the complainant over the lunch period and stated that if contact took place, the trial would be stopped. Moreover, he directed that the complainant stay out of the courtroom for the duration of his partner's cross-examination.

5. In breach of the aforesaid direction of the trial judge, the applicant's solicitor observed the complainant's partner in conversation with the complainant immediately after the court rose for lunch, having been alerted to that fact by the applicant. This was brought to the attention of the trial judge after lunch. After hearing evidence from the applicant's solicitor and submissions from counsel for the applicant and counsel for the prosecution, and being of the view that there was no point hearing evidence from the complainant's partner on the issue as she was likely to deny any wrongdoing, the trial judge discharged the jury to ensure the fairness of the trial.

6. It is common case that following the trial judge's initial indication that he had no alternative but to stop the trial, counsel for the applicant applied to the trial judge for time to consider his position and simultaneously applied for a directed verdict of not guilty. This was, counsel contended, in circumstances where the trial judge had found that due to the contact as between the complainant and his partner, a fair trial could not be ensured for the applicant and in view of the fact that the unfairness for the applicant would be compounded with the passage of time because the offending parties resided together. The trial judge afforded time but at the same time indicated, following submissions from counsel for the prosecution, that he did not think that a directed verdict would be appropriate.

7. Following an adjournment in the proceedings, counsel for the applicant renewed his application for a directed verdict. Citing *Director of Public Prosecutions v. P. O'C* [2006] 3 I.R. 238, as authority for the inherent jurisdiction of a trial judge to direct a verdict at a point in the trial, counsel sought the direction on the basis that a point had been reached in the proceedings where a clear direction of the trial judge had been breached, and because contact had occurred between the complainant and his partner (and would inevitably take place in the future), the unfairness to the applicant could not be remedied. It was stated that was also the case in circumstances where the entirety of the applicant's proposed cross-examination of the complainant's partner had been already rehearsed with the complainant in the course of the trial and where the complainant himself now knew the questions which were going to be asked of him at any future trial. Counsel also referred to the unreality of the trial judge giving a warning to the complainant and his partner to cover the period from the termination of the trial to a reconvened trial. It was submitted that the question arose "whether or not one might consider ignoring the offer of a discharge verdict, and proceeding in front of [the] jury". The trial judge's immediate response to the latter submission was that proceeding with the trial was not on offer as, in his view, "if there was to be a conviction and a subsequent appeal following upon what has gone on", the appeal would be "for the asking".

8. The response of counsel for the prosecution to the application for a directed verdict was that the right to a fair trial inures both to the accused and the prosecution and that the prosecution had a stateable case to put before the jury and that while the trial had "fallen asunder" because of the breach of the trial judge's warning, the matters could be fully explored in another trial. It was also submitted that the cross-examination of complainant's partner had not been embarked upon and that as such she would not be returning to court prepared. Counsel also relied on the fact that there would be a transcript of the proceedings available on the next occasion so that if there was to be at any retrial "in fact a third or fourth account of what transpired", the transcript of the earlier trial would be available to the defence.

9. The trial judge's ruling on the application for a directed verdict was in the following terms:

> "I am not disposed under the circumstances to direct a verdict in this instance. I don't believe what occurred today is fatal in any way to the defence. I have to be conscious of the fact that Mr. Hanohoe himself, and properly so in my view, has introduced the memo of interview of the accused man, and what is contained in that. He will have the benefit of a transcript on the next occasion and, on the basis of the manner in which he cross-examined [the complainant] this morning in the context of replies that he had given to the gardai when completing out his statement of complaint, and

indeed in the manner in which he commented and agreed with Mr. Hanahoe's suggestion that [his partner] could not have seen certain things, I don't think a retrial would be fatal to the defence. I will direct a transcript and I will discharge the jury under the circumstances of this case."

10. The discharge ruling given by the trial judge was as follows:

> "You may have gathered from the opening of this morning, part of my function as a trial judge is to ensure a fair trial. And I have come to the conclusion that this trial cannot continue, as the accused man cannot get a fair trial, as a result of matters which arose over lunchtime. So as to not to leave you entirely in the dark, you may recall that [the complainant's partner] was in the witness box coming up to lunchtime and the matter was put back till 2 o'clock for her cross-examination. In your absence, I directed that she have no contact or discussion with [the complainant] and I indicated that if there was discussion, the trial would be stopped, and [the witness] indicated that she understood that. You will appreciate in the context of the cross-examination of [the complainant] by Mr. Hanohoe, that the sanctity of the evidence was paramount, in the sense that there should be no discussion, no comparing of notes, no dealing with matters such as that. I became satisfied, when I heard evidence after lunch, that a discussion did take place between them, and I felt that under all the circumstances, that the accused man could not get a fair trial. Nobody knows what was discussed between them, but there's always the fear that there was comparing of notes, if I can put it that bluntly, particularly so in the context of Mr. Hanohoe's cross-examination of [the complainant], and you will recall that. So, I am left with no alternative but to discharge you as a jury in this matter. It is up to the State whether they wish to bring the case again, but it will be before a different jury."

11. On 26th April, 2016, the applicant's solicitor wrote to the respondent setting out his concerns and his belief that it was no longer possible for the applicant to receive a fair trial and requested the respondent to confirm that she would not be seeking a retrial on the outstanding counts on the indictment. By letter of 9th May, 2016, the respondent confirmed that she would be seeking a retrial.

12. By order of the High Court (Humphreys J.) dated 13th June, 2016, the applicant was granted leave to seek the following reliefs:

> (i) an injunction by way of judicial review restraining the respondent from
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> further prosecuting the applicant on the outstanding counts on bill of
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> indictment number KEDP0057/2014 currently pending before the
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> Eastern Circuit sitting at Naas;
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> (iii) a declaration that it is not possible for the applicant to receive a fair trial of foot of bill of indictment KEDP0057/2014;
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> (iv) a declaration that the interests of justice and fair procedures in the applicant's case required the trial judge not to direct the discharge of the jury but to direct the jury to a acquit the applicant of the remaining counts on the indictment.

13. The applicant grounds his quest for relief *inter alia* on the following contentions as set out in his statement of grounds:

> (i) That by reason of the trial judge's actions he is being deprived of "an advantage gained in the course of his first trial", namely the discrediting of both the civilian prosecution witnesses and the manifest disregard by one of the them of an Order made by the trial judge and the consequent impact on that witness's credibility;
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> (ii) That the risk identified by the trial judge was not, and cannot be, remedied by the discharge of the jury and in fact the prejudice to the applicant has been compounded;
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> (iii) The actions of the prosecution witnesses have created a real and substantial risk of an unfair trial and as a consequence the applicant cannot obtain a trial in due course of law;
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> (iv) To proceed with a further trial would involve breaching the applicant's right to a fair trial and his right to natural and constitutional justice (Articles 38.1 and 40.1 of the Constitution);
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> (v) The applicant in any retrial would be exposed to an additional and unnecessary stress and anxiety where he is blameless in the events that unfolded;
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> (vi) The respondent has failed to give reasons for her decision to proceed with the charges and has failed to engage in any meaningful way with the applicant's correspondence and;
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> (vii) In the exceptional circumstances of the applicant's case, justice requires that a further trial should not now proceed.

14. In his affidavit sworn on 13th June, 2016, grounding the within application, Mr. Anthony Hanohoe, the applicant's solicitor, avers as follows:

> "I say and believe that the trial judge discharged the jury in order to protect the fairness of the Applicant's trial, following a direct contravention of his direction by one of the civilian witnesses not to have contact with the other. This direction was made to ensure that there was no collusion in their evidence and to ensure that she was not provided with details of the evidence given by her partner, [the complainant], or the likely course of cross-examination. However, having regard to the fact that the parties reside together it is not realistic of credible that the parties will not discuss the court proceedings prior to any re-trial and it was for this reason that counsel appearing on behalf of the applicant sought to take instructions to whether he wished to proceed with the trial and use the direct contravention of the trial judge's order to his advantage to undermine the credibility of the witness.

Moreover, I say the unfairness of the trial Judge in refusing to direct an acquittal and instead discharging the jury is reinforced by the fact that the Applicant has now lost the benefit of this particular jury delivering their verdict on the basis of the evidence they heard live before them. The Applicant has unfairly been deprived of the impact all of this would have had the jury's deliberations, particularly having heard the discredited evidence of [the complainant].

While it is accepted that the Applicant will have access to a transcript at a re-trial, the accused will be deprived of a significant

advantage by reason of the trial judge's refusal to allow the trial to proceed and further it is now no longer possible for the applicant to receive a fair trial by reason of the following:

> (a) the attempted collusion between the witnesses as observed by the trial
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> judge, which it seems has already taken place;
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> (b) despite warning, the witnesses disregarded the trial judge's clear ruling;
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> (c) It is unrealistic to believe that the parties will not discuss their evidence and the conduct of the trial prior to any re-trial, having regard to [the complainant's partner's] conduct during the trial, as found by the Trial Judge."

The applicant's submissions

15. It is the applicant's core submission that the net effect of: the discharge of the jury; the refusal to grant a directed verdict; and the unfair decision of the respondent to proceed with a retrial, has been to deprive the applicant of a number of significant advantages which had been gained during the course of the trial itself. It is submitted that there is a very real risk that it will not be possible to replicate the advantages which the cross-examination of the prosecution witnesses had secured. Moreover, the logic and rationale of the trial judge's decision to stop the trial endures and will in fact be compounded by the passage of time, because the same two prosecution witnesses as to fact will now have an even greater opportunity to collude in their evidence, prepare rebuttal to defence counsel's questions and generally avail of the opportunity to improve on their performance having had the benefit of a dress rehearsal, the element of surprise having evaporated. The applicant contends that in all of the circumstances the complainant and his partner have lost their entitlement to expect to have the charges in question proceed to a conclusion.

16. It is further submitted, in reliance on Supreme Court and High Court authority, that if the unintended effect of a particular event at trial is such as to create a genuine unfairness or oppression, then the High Court should be at liberty to intervene appropriately. Counsel contends that the crucial issue is not so much who is to blame, but rather what is the effect of the trial event of which complaint is made.

17. While a trial judge has considerable latitude in the conduct of a trial, including discharging a jury in circumstances where no application has been made to do so, there are a number of unique factors in the present case such that the appropriate course of action is for the Court to injunct the respondent from proceeding with a retrial. The first of these is the loss of litigious advantage to the applicant, as deposed to on affidavit. Furthermore, the reason for the discharge of the jury by the trial judge was misconduct on the part of the complainant's partner and the complainant for disregarding the warning which had been given by the trial judge. Counsel also contends that the centrality and uniqueness of the position occupied by a complainant in a criminal trial was highlighted by Hardiman J. in J.F. v. Director of Public Prosecutions [2005] 2 I.R.174 when he stated:

> *"[The complainant] is not merely the institutor of the proceedings; he is himself the object of the alleged offence. His veracity and accuracy is central both to the criminal proceedings and to the contention at the centre of the case against the applicant's claim for judicial review."*

It is submitted that in *J.F.*, the Supreme Court directed the prohibition of the trial, an approach which the learned trial judge should have adopted in the present case, either by directing the jury to acquit the applicant, or by allowing the applicant's solicitor to take instructions as to whether the applicant wished to proceed with his trial, given the concessions which had been made by the complainant in the course of cross-examination. Moreover, the centrality of the complainant and his partner in the proceedings was underscored by the learned trial judge when he informed the complainant's partner that a breach of his order that there should be no contact would lead to the trial being stopped. Counsel queries as to why the complainant in the instant case should get the benefit of stopping of the trial in circumstances where that very event was brought about by the complainant and his partner.

18. It is also submitted that such is the importance of surprise that it may well have been in the applicant's best interests to continue with the trial. Contrary to the belief of the learned trial judge had such a course been adopted, it could not thereafter be used by the applicant to ground an appeal. In this regard, counsel cites the *People (Director of Public Prosecutions) v. Noonan* [1998] 2 I.R.439 and the *People (Director of Public Prosecutions) v. Cronin* [2003] 3 I.R. 377.

19. In the applicant's case the risk to a fair trial was in fact compounded by the discharge of the jury as it affords a greater opportunity to the complainant and his partner to discuss their evidence, which is the very danger identified by the trial judge on 7th April, 2016. In the trial of 7th April, 2016, the trial judge's warning to the complainant's partner not to interact with the complainant over lunch ultimately proved futile.

20. Counsel also submits that the fact that the trial judge was determined to ensure the fairness of the trial and was presented with the situation which he had sought to pre-empt does not provide an answer to the within application nor deprive the outcome of its effect as having deprived the applicant of a number of clear advantages. Counsel for the applicant cites *Furlong v. Director of Public Prosecutions* [2016] IECA 114 in aid of the contention that the effect of the discharge is to bring about unfairness for the applicant in his retrial.

21. It is submitted that in *O'Callaghan v. the Director of Public Prosecutions* [2011] 3 I.R. 356, the shifting of the burden of proof in relation to fitness to be tried was considered sufficient for a trial to be prohibited. Furthermore, *in Fitzgerald v. the Director of Public Prosecutions* [2008] IEHC 416, the loss of the opportunity to be acquitted in the first instance was identified as placing the applicant in a less advantageous position than another accused appearing for the first time for a properly conducted trial. This was sufficient for the court to direct that a further trial should not take place.

22. In answer to the respondent's position as set out in the statement of opposition, counsel for the applicant submits that no future judicial ruling will be sufficient to remedy the unfairness that the applicant will face at a future trial. This is so because the prejudice for the applicant is enduring and will only be compounded by the passage of time.

23. While endeavouring to protect the integrity of the trial process, the learned trial judge has significantly disadvantaged the applicant by depriving him of a number of significant advantages gained in the course of the trial. In those circumstances, to permit a re-trial would be unfair, oppressive and contrary to the principles articulated in *the State (O'Callaghan) v. hUadhaigh* [1977] I.R. 42. Furthermore, the learned judge's conclusion that the misconduct of the complainant and his partner was such as to render the trial unfair has not been challenged by the respondent. Absent any basis to conclude that the unfairness would dissipate (and the contrary is in fact the case), it is submitted that the applicant has demonstrated a real and substantial risk of an unfair trial. The reason given by the learned Circuit Judge for discharging the jury still stands and, by the same logic, operates to render any re-trial

of the matter equally unsafe and unfair.

The respondent's submissions
24. It is essentially the applicant's case that because the complainant and his partner live together it is likely that they will discuss matters in advance of the next trial. In the first instance, in the context of the trial judge's concern on 7th April, 2016 that the applicant would not get a fair trial if the trial were to proceed, it should be noted that the trial judge's concern was about the then trial of 7th April, 2016. It is also the case that before that trial commenced, the complainant and his partner would already have had opportunity to discuss the case given that they live together.

25. Counsel contends that there is ample case law to suggest that there have been many occasions where the need for a second or a subsequent trial arises, as a result of jury discharges, disagreements or otherwise. It is submitted that retrials regularly arise without any unfairness to the accused. The issue must be looked at in the context of trials that went to full course and those that did not. In the present case, there was not a concluded trial. Furthermore, there is nothing exceptional in the applicant's circumstances to merit prohibition. The mere fact that concessions were made by the complainant in the course of his cross-examination cannot be a sufficient ground for prohibition. It is open to the applicant in any future trial to rely on such a concession and he will have the benefit of the transcript of 7th April, 2016 in any future trial.

26. It is submitted that it is apparent from the transcript that the trial judge did not take the view that there could never be a fair trial. It is for the next trial judge to referee any new trial. Any concerns of the applicant can be cured by appropriate rulings by the trial judge in the newly directed trial.

27. It is submitted that Article 38 of the Constitution envisages that the proper administration of justice/trial in due course of law will take place in the trial court. Prohibtion, or jettison of the trial process, is an exceptional remedy that can only be ordered in extraordinary circumstances and then only where it is established that the perceived unfairness cannot be remedied by appropriate rulings and directions by the trial judge. The onus of proof rests on the applicant. The mere fact of a previous trial, or that a cross-examiner has revealed some or all of his hand, and/or the routine stresses and strains associated with court proceedings are not sufficient to trigger the remedy of prohibition. It further bears noting that injured parties are also subjected to the stresses and strains associated with the trial process, and, where the Director of Public Prosecutions has directed the relevant charges after a considered view of the evidence there is a public interest that these matters should be determined. In this regard, counsel cites *Z. v. Director of Public Prosecutions* [1994] 2 I.R. 476.

28. There is no suggesting in the present case that the applicant is in peril of double jeopardy. In *D.S. v. Judges of Cork Circuit Court* [2008] 4 I.R. 379, the Supreme Court expressly held that the principle of double jeopardy did not apply to prosecutions where the jury had failed to reach a verdict.

29. Counsel also points to *A.P. v. Director of Public Prosecutions* [2011] 1 I.R. 729 where the trial of the applicant for allegations of sexual assault had commenced on three previous occasions, each time the jury had been discharged because evidence given by the complainant was deemed inadmissible and prejudicial to the applicant. The applicant then sought an order of prohibition on the grounds that a fourth trial in relation to the same charges would amount to an abuse of the process and represent a breach of his right to a fair trial. The Supreme Court upheld the High Court's refusal to grant him relief on the basis that there was no rule under statute law, common law or the Constitution that limited the number of prosecutions or retrials that might occur and that the applicant had pointed to no particular element of unfairness and had failed to discharge the burden that was upon him to show that it would be a breach of his right to due process to put him on trial for a fourth time. It was further held that the Director of Public Prosecutions held an independent statutory office established to fulfil the role of initiating and continuing prosecutions and, although a court would intervene, if necessary, to protect constitutional rights and any relevant aspect of the public interest, including the due process of the trial, it would be slow to do so.

30. Counsel for the respondent thus submits that having regard to the established principles of law as set out in *Z v. Director of Public Prosecutions* [1994] 2 I.R. 476, *D.S. v. Judges of Cork Circuit Court* [2008] 4 I.R. 379 and *A.P. v. Director of Public Prosecutions* [2011] 1 I.R. 729, the applicant case does not meet the test for prohibition.

31. It is also submitted that the dicta of the Supreme Court in *Kearns v. DPP* [2015] IESC 23 readily answers the applicant's concern that a further re-trial breaches right to natural and constitutional justice. Furthermore, *McFarlane v. D.P.P.* [2008] 4 I.R.117 is authority for the proposition that exposure to additional stress and anxiety in a retrial does not counter balance the right the public interest has in having the applicant on trial. It is further contended that on the authority of *H. v. Director of Public Prosecutions* [1994] 2 I.R. 589 and *Dunphy (a Minor) v. Director of Public Prosecutions* [2005] 3 I.R. 585, the DPP is entitled to seek a retrial and is not obliged to provide reasons. The applicant has been served with the book of evidence. He has also had the benefit of hearing the testimony of the complainant and is fully aware of the basis of the prosecution.

32. Insofar as the applicant argues that he did not ask for the jury to be discharged and that the trial judge unfairly refused to provide an opportunity for the applicant to be consulted in respect of whether he wanted the trial to proceed, the trial judge's decisions were made intra vires and in accordance with his duty to supervise a fair trial. Accordingly, the applicant's case can be distinguished from the circumstances which arose in *J.F. v. the Director of Public Prosecutions* [2005] 2 I.R. 174. While the applicant relies on the dictum of Baker J. in *J.F. v. the Director of Public Prosecutions* [2015] IEHC 616, it is to be noted that in that case prohibition was not granted. Equally, the applicant's case is not on all fours with *O'Callaghan*, given that in that case it was the prosecution who engineered the discharge of the jury. Nor are the applicant's circumstances similar to those in *Furlong*. Accordingly, it is contended that the case law relied on by the applicant does not advance his case.

33. It is also the case that the applicant accepts that he had interactions with the complainant and that he approached him with a bat, as is evident from his garda interview. These are matters for the jury to decide on in due course. In light of the evidence already rendered at that trial there was no basis whatsoever for the trial judge to direct an acquittal.

34. Accordingly, the applicant has not made out a case to merit the exceptional relief of prohibition that he seeks herein in the form of an injunction restraining his further prosecution. There has not yet even been one full trial of the allegations made against him. In the submission of the respondent, there is a public interest that there should be a proper determination and that his retrial should proceed.

Considerations
35. The issue for the Court is whether as order of prohibition should be made in this case. This issue must be addressed by asking whether there exists a real risk of an unfairness or oppression if the applicant is sent for retrial.

36. In *Z. v. Director of Public Prosecutions* [1994] 2 I.R. 476, Finlay C.J. addressed the principles of law in relation to prohibition of a criminal trial:

> *"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."*

Reference was made by Finlay C.J. to the dictum of Denham J. in D, namely that the right to a fair trial is "*one of the most fundamental rights afforded to persons*" and that "*on the hierarchy of constitutional rights there is no doubt that the applicant's right to fair procedures is superior to the community's right to prosecute"*

Finlay C.J. went on to state:

> *"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."(At p. 507)*

37. In *Byrne v. the Director of Public Prosecutions* [2010] IESC 54 O'Donnell J. opined:

> *"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."*

38. As to when prohibition is warranted, in *Wall v. the Director of Public Prosecutions* [2013] IESC 56, MacMenamin J. stated:

> *"…the onus rests on an accused who seeks judicial review to prohibit a trial to prove that circumstances exist which give rise to a real risk that the accused would not receive a fair trial, which cannot be avoided by appropriate rulings directions on the part of the trial judge… The risk must be a real one, and the unfairness of the trial must be unavoidable."*

39. As noted by Dunne J., in Kearns v. the Director of Public Prosecutions [2015] IESC 23:

> *"…the jurisdiction to prohibit a trial is one which should only be exercised in exceptional circumstances*
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> *…*
>
> *it is for the trial judge to ensure that the appellant's right to a fair trial guaranteed by the Constitution will be vindicated by making appropriate rulings on the issues before the court of trial".*

40. It was recognised by Finlay C.J. in Z that the onus of proof is on an accused person seeking prohibition to establish that "*circumstances have occurred*" which point to "*a real risk that by reason of those circumstances*" he or she could not obtain a fair trial.

41. As noted by Hogan J. *in Furlong v. D.P.P.* [2016] IECA 114, the classic authority as to whether a retrial in circumstances where a jury has been discharged would be oppressive or unfair remains the judgment of Finlay P. in *The State (O'Callaghan) v. hUadhaigh* [1977] I.R. 42. In *O'Callaghan*, the trial judge had ruled to the effect that the prosecution was not permitted to amend the indictment by the addition of different charges, in addition to the single count upon which the accused had been sent forward for trial. The prosecution's response to the ruling was to enter a *nolle prosequi* in respect of the original charges and to commence a fresh prosecution in respect of the charges which had been sought to be added, in addition to the original charge. The issue for determination therefore was whether the proposed retrial should be prohibited for want of fairness. In ordering prohibition, Finlay P. rationalised his ruling as follows:

> *"If the contention of the respondent in this case is correct, then it means that in any criminal trial the Director, on meeting a situation in which a ruling or proposed ruling by the trial judge on a matter within his discretion at the trial is unsatisfactory, from the point of view of the prosecution, can deal with that problem by entering a nolle prosequi and so avoid the consequences of technical matters that may have arisen in the course of the proceedings up to that time by instituting an entirely fresh prosecution freed from, or cured of, the difficulties which have arisen and which are likely to favour the accused." (at p. 52)*

42. The courts have recognised the "*primary role*" of the DPP in initiating prosecutions. In *D.S. v. Judges of Cork Circuit Court* [2008] 4 I.R. 379, it was held that a court should exercise its discretion to prohibit a trial with caution, given that it was a primarily a decision of the DPP. Denham J. stated:

> *"In each case there should be a balance sought between competing public interests. While protecting the public interest in prosecuting an accused, the integrity of the trial process also requires protection, guarding against the inherent dangers of repeat trials.*

43. In *A.P. v. The Director of Public Prosecutions* [2011] 1 I.R. 729, Denham J. again emphasised the primacy of the DPP's role in prosecuting crime and the circumstances in which the court would intervene, stating:

> *"It is well established that the Director of Public Prosecutions has the primary role in initiating prosecutions … A court would be slow to intervene but would intervene if necessary to protect constitutional rights and any relevant aspect of the public interest, including the due process of the trial."* (At para. 24)

44. Thus, it seems to me from a consideration of the relevant legal principles that the Court must ask itself whether the matters deposed to on behalf of the applicant establish that there is a real risk that he will not get a trial in due course of law.

To answer this all the circumstances of the case must be looked at.

45. I turn now to the applicant's primary contentions in the within application. The applicant submits that in the present case the effect of the refusal to direct a verdict, the discharge of the jury and the decision to proceed with a retrial has been to deprive the applicant of significant trial advantages. The significant advantages which it is claimed the applicant had secured are:

> (a) The concessions made by the complainant in cross-examination in respect of inconsistencies in his own evidence, the statement given by his partner and the initial account given by her to the investigating Garda;
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> (b) The improbability of elements of the complainant's evidence including his attempt to reconcile the apparent contradictions between his partner's description of the incident and the layout of the complainant's house, culminating in his assertion that his partner had observed the applicant approach the house armed with a baseball bat but did not feel it necessary to wake the complainant ;
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> (c) The demeanour of the witness, as observed by the trial court, when placed under pressure in cross-examination;
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> (d) The attempts by the complainant's partner while in the witness box to communicate with complainant, as observed by the trial judge, and, one would assume, the jury;
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> (e) The opportunity to highlight to the jury that an order made by the trial court to ensure the absence of any collusion between the civilian witnesses had been disregarded by both the complainant and his partner; and
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> (f) The opinion formed by the trial judge of the credibility of the prosecution witnesses.

46. The respondent's position in relation to the application is that the applicant has failed to demonstrate how a retrial would result in any particular element of unfairness and has failed to demonstrate how it would be a breach of his rights to due process to put him on trial again. The respondent contends that any potential unfairness to the applicant can be satisfactorily dealt with by means of an appropriate judicial ruling, such as the one made at the original trial of the applicant. It is contended that the Court is entitled to assume that a trial judge will respect the law and will ensure due process and fair procedures for the applicant in his retrial. Furthermore, the respondent asserts that central to the present case is the fact that it was the trial judge who perceived an unfairness for the applicant in the course of his trial. Counsel for the applicant submits that nothing the respondent has stated refutes the central contention of the applicant, namely that no ruling or warning by the trial judge at the next trial will cure the unfairness to the applicant.

47. It is common case that the discharge of the jury occurred after a principal prosecution witness as to fact had been cross-examined and consequently the principal elements of the cross-examination had been revealed to the complainant. It is submitted by the applicant that in a prosecution based principally on the complainant's evidence, cross-examination is often based on small and isolated islands of fact and that the effectiveness of such cross-examination is considerably enhanced by the element of surprise. It is contended that in the instant case, the applicant has been deprived of the element of surprise due to misconduct on the part of the prosecution witnesses.

48. Counsel for the applicant cites *J.F. v. the Director of Public Prosecutions* [2015] IEHC 616 in support of the significance of the loss of the element of surprise. Baker J. addressed this issue as follows:

> *"45. I must however bear in mind the fact that the criminal justice system offers a particular degree of protection to an accused who does not have to disclose his or her defence or evidence prior to trial, and indeed the accused is further protected by the requirements of disclosure on the part of the prosecution. But the mere fact that both parties to a criminal trial will know more about the approach of the other at a second or third trial does not of itself mean that fairness is not achieved, having regard to the these general elements found in the approach of the criminal justice system to a fair trial. However, it must be recalled that no argument is ever made that the exchange or sequential furnishing of written legal submissions in a criminal appeal would cause prejudice to the accused, and that he or she would thereby lose an element of surprise. Thus a certain degree of common sense is required, and this is consistent with the general approach that a second or subsequent trial may be unfair and a breach of process if a specific prejudice can be shown to arise in the context of surprise elements that might have arisen in a first or earlier trial. No argument of any such has been made in this case."*

49. It is also argued that in line with the position adopted by the Court of Appeal in *Furlong v. Director of Public Prosecutions*, the focus should not be so much on the identity of the party who made the error which led to the discharge of the jury, but rather on the consequences of the error. In *Furlong*, Hogan J. put it thus:

> *"30. The ratio of O'Callaghan is essentially that special powers vested in the Director of Public Prosecution (in that case the power to enter a nolle prosequi) should not be permitted to be exercised in a manner which would serve to give an unfair advantage to the prosecution as compared with the defence. Here the plain facts of the matter are that vital pathology evidence adduced by the prosecution could no longer be relied upon in the wake of Professor Cassidy's intervention. It must be recalled, of course, that the principal defence witness, Dr. Gilsenan, had by this stage already given evidence contrary to that of Dr. Jaber and that Dr. Jaber had already been cross-examined.*
>
> *31. The effect of the prosecution's actions was to bring about a result where a duly empanelled jury would not be required to give a verdict against a backdrop of what, from the standpoint of the prosecution, amounted to an evidential fiasco. By requesting that the jury be discharged, the prosecution naturally - and, from its perspective, understandably - hoped that the best route lay with a fresh trial in which it could adduce fresh pathology evidence. But by so acting the prosecution claimed for itself - whether intentionally or otherwise - a power which was not available to the defence."*

50. The applicant further relies on the dictum of Kearns P. in *Furlong v. Director of Public Prosecutions* [2015] IEHC 269:

> *"In considering the question of oppression, the Court must take all the circumstances into account, and it seems to this Court that an "object or effect" test is the appropriate test to apply. If the object is to manipulate the trial process in such a way as to secure an unfair advantage for the prosecution, then the Court should intervene to prevent that happening. Likewise, if the unintended effect of a particular event at trial is such as to create a genuine oppression, then the Court should also be at liberty to intervene appropriately. By "genuine oppression", the Court would mean a re-trial being sought in circumstances where a real unfairness would result to an accused person".*

51. Thus, the question which arises here is whether, in the words, respectively, of Baker J. in *J.F.,* and Kearns J. in *Furlong*, "*a specific prejudice*" or "*genuine oppression*" arises for the applicant on a retrial such as to merit the intervention of this Court.

52. I am not persuaded that the applicant has discharged the onus that is on him in this regard.

53. In the first instance, it has to be acknowledged that the present situation is not one where the prosecution has engineered a discharge of the jury so as to overcome a procedural ruling adverse to it, such as occurred in *The State (O'Callaghan) v. O'hUadhaigh*. The intervention here was entirely initiated by the trial judge himself whilst acting in the best interests of the applicant. It was the trial judge who identified the possibility of a risk and it was he who ordained the remedy to meet the concerns raised. It is quite evident that the trial judge was concerned about the possibility of interference with the trial process, at a time proximate to the complainant's partner's proposed cross-examination. Whereas the trial judge need not have made the requirement that the witness not speak to her partner as her cross-examination had not yet commenced, he expressly did so in the applicant's best interests, and out of an abundance of caution. He then discharged the jury because of a breach of his direction and because the witness contact was deemed by him to render the trial of 7th April, 2016 unfair. To my mind, however, the events which triggered the discharge of the jury could not, of themselves, be said to ground a case that a real risk of unfairness pertains to any future trial. I am fortified in this view by the approach of Hogan J. in *Furlong* where he cites, *inter alia*, the *dictum* of Hardiman J. in *McNulty v. Director of Public Prosecutions* [2009] IESC 12:

> *"Of course, where there is a re-trial, both legal teams will inevitably know more about each others case than they did at the start of the first trial. They will also be in a position to re-assess their own evidence and whether their own case should be bolstered in some way. As Hardiman J. noted in McNulty v. Director of Public Prosecutions [2009] IESC 12, [2009] 3 IR 572, 581:*
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> > *"The trial process may involve two or more hearings for a number of reasons. The jury may disagree, as happened in this case, and happens not infrequently. Or the first jury may be discharged for one reason or another. In either event the prosecution may bring the case on again for trial before a separate jury unless the defendant can show that such a step would be oppressive.*
> >
> > *Where there is a second trial, neither side is bound to approach the case in the same way that they approach the first trial. New witnesses may be called, or witnesses called on the first occasion may be omitted. Almost every trial, especially if it proceeds to the point where the defendant is given in charge to the jury, will develop in a way which could not be wholly predicted before it started. Each side will have learned a good deal more about the other side's case. A witness who looked very impressive on paper may appear to some disadvantage in giving oral evidence, cross examination may put an entirely different complexion on certain evidence, and legal argument, where there is any, may reveal weaknesses in the case of either side in the way they address certain topics, which had not previously occurred. It is perfectly legitimate for either the prosecution or the defence to adapt these discoveries by looking again at how it will present its own case.*
> >
> > *Where there is a second trial, almost inevitably, each side will know more about the other side's case than it did when the first trial started. I do not consider that it is in any way oppressive of the other side for a party or his advocates to deploy more or different evidence on a second trial. It would be a wholly artificial exercise to say that because something had not occurred to the prosecution (or defence) for the first trial it could not benefit from the knowledge and information that the trial had given to them. It would be a wholly unrealistic form of gamesmanship to hold that because the prosecution had not thought it necessary to prove a particular fact at the first trial, they were stuck with that decision at a retrial." (At para. 22)*

54. I am also in agreement with the respondent's contention that the suggestion that a person cannot get a fair trial or a fair retrial simply because prosecution witnesses co-habit is without foundation. It seems to me that that purported fear would be equally applicable to all retrials whether or not the witnesses were related to one another, or in a relationship with one another or otherwise. I am further in agreement that any concerns that the actions of the prosecution civilian witnesses have created a real and substantial risk of an unfair trial in the future are readily countered by the duty of the trial judge to intervene as appropriate, in the same way as the trial judge did in the trial on 7th April, 2016. It is only where a risk cannot be ameliorated by appropriate rulings and directions that an application for prohibition will succeed.

55. It is also undoubtedly the law, as set out in *Furlong*, that the Court must look at the effect on an applicant of a decision to discharge the jury irrespective as to whether this has been brought about by an application by the prosecution or on the initiative of the trial judge, as occurred here.

56. A core element of the applicant's complaint is that he has lost the benefit of the concessions which the complainant made in the course of his cross-examination with regard to his partner's state of knowledge of the applicant's whereabouts at given times and the frailties which cross-examination exposed in the complainant's own evidence. Central to the applicant's challenge is that in any retrial he will be without the element of surprise, which is a hallmark of cross-examination, and that, in the next trial, both the complainant and his partner will be armed with knowledge of the likely mode of questioning which counsel for the applicant will embark on. While it is undoubtedly the case that the element of surprise is well reduced at this juncture, it is also the case that the applicant in the retrial will be armed with a transcript of the proceedings of 7th April, 2016 which record not only the concessions made by the complainant regarding his partner and the frailties exposed on the complainant's cross-examination, but also the warning given to the complainant's partner and the ensuing breach of that warning resulting in the ultimate discharge of the jury. In my view, the availability of the transcript and the right to cross-examine using the transcript gainsays any question that a real risk of unfairness will arise because the element of surprise is gone. Counsel for the applicant will be at liberty to deploy the transcript to the applicant's advantage in the course of his cross-examination. In this regard, the applicant will be in no better or worse a position than any other accused who is required to face a retrial. Furthermore, as observed by counsel for the prosecution in her submissions on 7th April, 2016, the applicant will be at liberty to cross-examine both the complainant and his partner in the event that any different version of events is proffered at the retrial to those which are already a matter of record. This is the type of scenario which to my mind is covered by the observations of Hardiman J. in *McNulty*.

57. Counsel for the applicant also makes the point that it is likely that the jury would have observed the actions on the part of the complainant's partner which led to the trial judge warning her not contact the complainant over the lunch period. It is submitted that such actions as led to the trial judge's warning action is unlikely to be repeated at a future trial. Consequently, it is submitted that the applicant has lost the benefit to avail of the credibility deficits which the complainant's partner's actions would have revealed to the jury. As regards the impact which the discrediting of the complainant's partner and/or the contravention of the order made by the trial judge may have on the complainant's partner's credibility, from a perusal of the transcript, it is not apparent to this Court, that

other than being apprised of events in the course of the trial judge's discharge, the jury had been aware of the breach by the complainant's partner of the judge's order or that the jury were aware of what the trial judge perceived as her attempt to seek assistance from the complainant during her examination-in-chief. Thus, on the face of the record, there is nothing to suggest these matters went to credibility as far as the jury is concerned. Even if I am wrong in this regard, it remains the case that the applicant will have the transcript of the 7th April, 2016 trial for the purposes of his cross-examination of the complainant and his partner with regard to these matters, for credibility purposes.

58. I am further of the view that the applicant's complaints do not approach the level of unfairness found by the Supreme Court in *O'Callaghan v. Director of Public Prosecutions.* In that case, the accused (who had been found unfit to be tried) was put at a significant disadvantage in the subsequent trial by being required to produce evidence of his unfitness to be tried in circumstances where the entering of a nolle prosequi in respect of the first trial had revived the normal presumption of fitness to be tried. Nor do I find that a retrial would be oppressive in the manner contemplated by *The State (O'Callaghan) v. O'hUadhaigh.*

59. In the present case, the trial judge refused to accede to the applicant's counsel's application for a directed verdict or to let the trial proceed. As is clear from his ruling on the issue of a directed verdict, the trial judge rationalised his refusal both by reference to the fact that the applicant on the next occasion will have the benefit of the trial transcript which recorded the concessions made by the complainant, and also by reference to the contents of a memorandum of a Garda interview with the applicant. In my view, the ruling was made within jurisdiction and it is not for this Court to trespass on the trial judge's ruling, absent manifest unfairness, which I do not find. Furthermore, I am not satisfied that there was any error of law on the part of the trial judge in refusing to let the trial proceed. Again, even if I am wrong in this regard, any error was one made within jurisdiction. Moreover, the ruling made by the trial judge on the issue as to the availability of the transcript for any future trial negates any perceived unfairness for the applicant by dint of the trial judge's refusal to let the trial proceed.

Summary

60. Many of the grounds raised by the applicant herein as the basis for judicial review are within the competence of, and/or are more appropriate for ruling upon and determination by the trial judge at his retrial, in accordance with the trial judge's constitutional mandate to protect the integrity of the trial process. At the first trial, the trial judge discharged the jury on the basis that he felt that by reason of the contact which took place between the civilian prosecution witnesses the applicant could not get a fair trial. The discharge of the jury was an appropriate and *intra vires* order made by the trial judge in the full knowledge that, depending on the decision of the respondent, there might be a retrial before a new jury panel. This Court is satisfied that the applicant is constitutionally entitled to the same scrupulous fairness at his retrial and it is to be presumed that the trial judge will deal with any eventuality that may arise there, so as to ensure that fairness. In light of the foregoing, and by reason of the fact that the applicant will have the benefit of the transcript from the earlier trial, I am not satisfied that the applicant has discharged the onus which is on him to establish that his retrial would be unfair or oppressive or that he would be specifically prejudiced. Accordingly, the relief claimed in the notice of motion is refused.