Neutral Citation: [2013] IEHC 401

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2012/74 JR

Between/

P.B.

Applicant

-and-

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Judgment of Ms. Justice Iseult O'Malley delivered the 6th September, 2013

Introduction

1. In this case the applicant seeks injunctive relief relating to the pending prosecution against him of 67 counts of indecent assault. The charges concern 11 female complainants and date from between 1965 and 1985. During this period of time the applicant was a schoolteacher in a small rural national school. Each of the complainants was a pupil in the school at the relevant times.

2. The applicant denies the allegations. He claims that the delay in prosecuting him has prejudiced him in his defence to the extent that there is a real risk of an unfair trial which could not be remedied by the rulings or directions of a trial judge. He further alleges specific prejudice in that his own memory of events after such a length of time is poor; that his health generally is suffering from the stress of the allegations and investigation; that witnesses who could have been of assistance to him are dead; and that the investigating Gardaí failed to make adequate notes of their interviews with the complainants. One further matter that arose after the grant of leave in the case is very much relied upon and that is the death of a man to whom I shall refer as A.

History of complaints and the investigation

3. The applicant was born on the 24th February, 1934. He qualified as a teacher in 1954 and after some years in the profession was employed by the school in question in 1964. He taught there until his retirement in 1989.

4. The school was as already stated a small one, with two teachers and two adjacent classrooms. One teacher took 1st, 2nd and 3rd class in one room, while the applicant took 4th, 5th and 6th in the other. In some years there was a 7th class, which the applicant also took. During the period of the applicant's employment the post of the second teacher was held by four women, the first three of whom are now deceased, while the fourth took up her position only in the final year of his time there. There are no complaints in relation to that year.

5. There is evidence regarding the layout of the school and it does not appear to be in dispute that there has been no change material to this case in that layout since the school was built in 1961. There is also evidence, from the current principal, that the original two-seater desks were there until relatively recently and at least one is still available for inspection.

6. On the 12th March, 2010 the man referred to as A. went to the local Garda station to make complaints against the applicant. A. was a past pupil, born in 1964, who had been in the school from 1968 to 1976. He spoke to Garda Margaret Wren, who recorded that he was very distressed. He told her that he had been physically assaulted by the applicant and that the applicant had on one occasion exposed himself to him and asked him to perform a sex act. He further alleged that he had witnessed the applicant touching girls inappropriately and that he had once seen him in the girls' toilet with a girl. A. was not able to make a statement at this time.

7. On the 18th May, 2010 A. returned to the station and made a written statement to Garda Wren. He recalled being in the applicant's class from 1972 until he left the school. He named one other boy and five girls as having been in his class, out of about 30 children in the classroom.

8. The complaints made in relation to A. himself concerned, for the most part, incidents of severe physical beatings. He described one such incident as having started at about half nine in the morning, continuing until lunchtime and then starting again after lunch for an hour. He said that his mother confronted the applicant over this, that he was off school for two weeks and that the applicant did not beat him again. A. said that not long before this beating he had gone with the applicant to clean the boys' toilet. He alleged that the applicant took his penis out saying "suck my mickey". A. said that he reacted by telling the applicant to "go fuck" himself and running out of the room.

9. A. also described the applicant's conduct with girls in the class. He said that the applicant used to ask the girls from the bigger classes to take out the ashes from the fire or to look after the daffodils. He would then leave the classroom after the girl and they might be gone half an hour. While the applicant was gone the class would go "out of control". A. said that it was always just one girl and it could be any one of them. He said that "thinking back on it" the girls used to be distressed but nobody ever said anything.

10. A. alleged that the applicant would often call a girl up to the front of the class, where he sat on a stool. He would make the girl stand between his legs and run his hands up under her skirt or inside her trousers. The girls were distressed by this.

11. Three specific events were recounted by A. In relation to one, A. said that he was passing the school shed one day when he heard a girl screaming. He said that he knew the applicant was in the shed with her. On another day he was walking past the toilets. The door was open and he saw the applicant in the girls' toilet. There was a girl with him and she was masturbating him. The third occasion was when the class had been taken out for a nature walk. A. said that he saw the applicant stripping a girl naked in a field. His trousers were pulled down. A. said that that was not the only time the applicant had taken a girl to that field. He stated that other boys saw this but nobody said anything, out of fear.

12. No girl is named or described by A. in respect of any of these incidents.

13. In the concluding part of his statement A. referred to having had a lot of counselling, and needing more. He said that the applicant and another named man had, between them, ruined his life.

14. The Book of Evidence contains the statements of 11 complainants, four of whom are sisters. The initial statements are dated as having been taken on the 6th July, 2010, the 8th July 2010, the 1st October, 2010, the 7th December, 2010, the 20th December, 2010, the 27th December, 2010, the 29th December, 2010 (two complainants), the 3rd January, 2011, the 13th January, 2011 and the 15th January, 2011. There is controversy as to how the complaints came to be made.

15. Detective Garda Oliver Downes says in his statement that on the 7th December, 2010 he obtained from the current principal of the school the roll books covering the period 1964 to 1989. He and Garda Wren then endeavoured to contact past pupils as potential witnesses. It is however clear that they had commenced the process before getting the roll books, in that a number of contacts are recorded as having been made in earlier months. According to a "diary" of the investigation the Gardaí succeeded in speaking with about 155 past pupils, the vast majority of whom appear to have had nothing to say on the issue, or said that they saw nothing of an indecent nature.

16. The behaviour alleged against the applicant by the complainants can be grouped into the following categories:

a) Holding a girl between his legs while he sat on a stool at the front of the class and making her put her hand on his genital area or rub against it outside his clothing

b) Putting his hand inside a girl's underwear while sitting at his table in front of the class

c) Sitting beside a girl at her desk and putting his hand inside her top, rubbing her chest, and inside her underpants, touching her private parts

d) Following a girl into the toilets and pushing his body up against her or otherwise touching her

e) Keeping a girl in over lunchtime and engaging in similar activity

f) Sitting on the desk part of the girl's seat, making her stand between his legs and putting his hand inside her clothing

g) Rubbing his face against a girl's cheek

h) Keeping a girl back after school, trying to make her put her hand on his crotch and touching her chest

17. It is important to state here that none of the female complainants described any events such as those allegedly witnessed by A. In most cases, the conduct complained of is alleged to have taken place in the classroom, in the presence of the other pupils. Other instances are alleged to have happened in the toilet. In some cases, assaults were described as having occurred during lunchtime or after school hours. There is no reference to masturbation and no reference to the shed or the field.

18. There are many references to the applicant's violence, particularly to boys but on occasion to girls. It is alleged that he slapped and hit the pupils and sometimes used a stick or, in the later complaints, a ruler. These allegations of violence span the entire 20-year period of the complaints of sexual assaults.

19. It is also of relevance to note that a number of complainants refer to the applicant as suffering from severe migraine or headaches. A particular girl (not herself a complainant but a sister of four of them) is mentioned as being often sent to buy aspirin from the local shop.

20. A letter from the applicant to one of the complainants is exhibited in the Book. This complainant was born in 1952 and it appears that she was taught by the applicant up to 7th class. She complains in her statement that the applicant regularly rubbed her breasts outside her clothes while standing beside her desk or when making her stand between his legs. She says that he used to keep her back on her own after school and engage in the same behaviour, and that she was the only one that would be kept back. She also says that she, as well as all the other pupils, got hit by him with the stick.

21. Written on the 23rd November, 1980, the letter congratulates her on winning an award for her work and refers to an article about that award in the local newspaper. The part relied upon by the prosecution reads as follows:

"I didn't call down home or try to meet you because, quite honestly, I feel tongue tied in your presence. No, it is not your fault, you are always quite pleasant, it is a memory which haunts me all the time and especially when I see you.

Well here's wishing you all the best for the future and every good fortune and success..."

22. The Book of Evidence also contains the statements of a number of male past pupils. None of them say that they witnessed any sexual assault but they confirm that girls would be brought up to the top of the class and put sitting on the applicant's lap or standing between his legs; that the applicant would sit into their desks beside them and that the girls were uncomfortable with his behaviour.

23. A. was not listed as a prosecution witness in the Book of Evidence and no charges were brought in relation to his complaints.

24. On the 11th February, 2011 the applicant was spoken to in his home by D/Garda Downes, who informed him that 16 allegations had been made against him. The applicant was interviewed, by arrangement, in his home on the 3rd March, 2011. Nothing of evidential value emerged from that interview.

25. On the 8th September, 2011 the applicant was arrested by arrangement for the purpose of charge. Having been charged, he was released on his own bail. The case was sent forward to the Circuit Court on the 9th November, 2011 and was eventually listed for trial on the 13th March, 2012.

26. It is important to note that the applicant's solicitor has, through diligent, persistent and entirely proper correspondence and effort, made contact with 15 past pupils who are prepared to speak to the defence legal team. As of March, 2013, nine had done so.

They are supportive of the applicant, stating that they saw no inappropriate behaviour on his part and no excessive punishment. This group varies in age, with some who must have been in the school for at least part of the same time as A. in the 1960s and others as late as the 1980s. Some are in a position to deal with specific issues. For example, one can give evidence that the applicant always drove past her within the 25 minutes that it took for her to walk home, tending to demonstrate that he did not keep girls in after school.

Evidence in the judicial review application

27. Leave to seek relief by way of judicial review was granted by the High Court (Peart J.) on the 6th February, 2012.

28. In his affidavit the applicant denies all allegations of sexual assault. He also denies the allegations of extreme physical violence and specifically avers that he ceased to inflict corporal punishment entirely after an incident in 1966. In a supplemental affidavit he says that this incident involved the complainant to whom he wrote the letter already mentioned, and that this is the explanation for the expression of regret in the letter. (He also states that this particular complainant wrote to him on his retirement thanking him for his patience, but that he no longer has this letter. She accepts that she wrote to him, wishing him well, and that she may have used the words "thanking you" but not in relation to patience. She now regrets writing the letter.)

29. The applicant says that he discussed his attitude to corporal punishment with two of the now-deceased female teachers, with his mother and with two named friends, all of whom are now deceased. He says that if he had been violent to the extent alleged the teacher in the adjoining classroom would have heard the noise. That teacher would also have had to walk past the door of his classroom to go to the toilet or exit the building. The glass in the door of the room was opaque but he cannot remember the colour.

30. It is denied that he left the classroom to follow girls to the toilet, or that he ever left the classroom for any appreciable length of time. Again, he says that the teacher in the next room would have noticed the disorder in his class if he had. He did not keep pupils in at lunchtime, when he was usually on yard duty, or after school hours. His mother prepared his dinner for him in the afternoons at approximately 3.15. She passed away in 2003.

31. The applicant denies having suffered from migraines or headaches during the period covered by the charges. He says that the deceased teachers could have given supportive evidence in relation to this. His doctor has not retained records relating to him from before 1990.

32. The applicant's sister lived with him and his mother for part of the relevant period but for the most part was there only on a sporadic basis. However, she is in a position to say that she does not recollect him suffering from headaches during this time. She can also say that she was aware that her mother would have the applicant's dinner ready for him when he came home from school.

33. The girl mentioned as being sent to the shop to buy aspirin has sworn an affidavit in which she confirms that she did so. The applicant, maintaining his denials in this regard, says that he is prejudiced because the owners of the shop in question are deceased.

34. In relation to the complainants, the applicant says that he cannot recall details such as the personality or temperament of a number of them, or what they looked like or where they sat. He is thus unable to give instructions that could assist his counsel in cross-examining them and raising issues as to their credibility.

35. The applicant says that he has a history of high blood pressure and his medication has had to be substantially increased since the allegations. He also has a history of tinnitus, which has deteriorated. He has a hearing aid in one ear. The stress and anxiety has interfered substantially with his sleep and well-being and he has suffered from panic attacks. He says that arising from these matters he is unable to withstand the pressures of the proposed trial.

36. The applicant's solicitor, Ms. Carmody, has exhibited a report from Dr. Mary McInerney, a consultant psychiatrist. She has also attempted, unsuccessfully so far, to get an assessment from a consultant neuropsychologist, to see if the applicant's memory difficulties go beyond what might be expected having regard to his age and the passage of time.

37. Dr. McInerney examined the applicant in February, 2012. She records his account of the effects of the stress caused by the allegations and pending proceedings. In her conclusions she says that there is evidence of a psychological reaction to the trauma of being accused of abuse, characterised by subjective distress and emotional disturbance. He does not have suicidal ideation but would be happy to die. She notes that the stress has precipitated severe nose bleeds as well as anxiety, panic attacks, palpitations and blood pressure elevation. His tinnitus has become more acute.

38. Dr. McInerney describes the applicant as "a vulnerable 77 year old at the present time with a death wish". She says that she "would have some concerns about his ability to deal with a trial" and that he should be carefully monitored.

39. It appears that, unfortunately, A. died on the 30th April, 2012, some weeks after the leave application in this case. The applicant says that he is particularly prejudiced by this development, in that he had instructed his solicitor that his defence included the proposition that A.

> "was the central figure *inter alia* in making false allegations against me to the Gardaí; in communicating with other potential complainants and witnesses and in procuring their participation in the criminal investigation and proceedings the subject of this application".

40. It is asserted that in the absence of A. and without the opportunity to cross-examine him, a jury would not find this proposition credible and would see it as an attempt to take advantage of his death.

41. Complaint is made of the fact that the investigating Gardaí did not take notes when interviewing witnesses, in circumstances where A. had suggested persons who should be interviewed and had discussed his allegations with such persons before they were so interviewed. Apart from the absence of Garda notes, there is the fact that two complainants have received counselling but have refused to make available the notes therefrom.

Submissions

42. It is accepted on behalf of the applicant that prohibition of a criminal trial on grounds of delay is appropriate only in exceptional circumstances and that the applicant bears the burden of establishing as a matter of probability that he will not receive a fair trial because of the lapse of time. He must engage with the facts of the case and establish that evidence has become unavailable by reason of the delay. Even where specific prejudice has been established prohibition will not be granted if the effects of such prejudice can be remedied by appropriate rulings and directions by the trial judge. It is further accepted that prohibition would not be warranted

purely on the basis of the applicant's age, state of health, or memory.

43. Having regard to the proposed evidence in the case against the applicant, specific prejudice is asserted. It is contended that the deceased teachers could have given evidence in relation to the applicant's attitude to corporal punishment and whether they heard noise emanating from his classroom indicating the use of violence or his absence from the room for prolonged periods of time. His mother could have given evidence that he was home for his dinner and did not keep pupils after school.

44. The applicant does not accept (although he is not certain) that he sat at pupils' desks and he does not accept that the desk referred to by the current principal is the same as during his time. Nor can he be sure that the glass in the classroom door is the same.

45. It is contended that medical notes from the time would have constituted independent medical evidence demonstrating that those complainants referring to headaches are unreliable.

46. It is further submitted that the age and ill-health of the applicant is a relevant factor to be taken into account.

47. At the hearing of this application a considerable amount of time was spent debating the issue relating to A. The applicant submits that he has lost the opportunity to cross-examine this man. It is argued that the defence would have applied to the trial judge to direct the prosecution to call him, or, in the discretion of the trial judge, for the judge to call him.

48. The respondent says that there is nothing in the specific items of alleged prejudice, either on their own or in combination with the age and state of health of the applicant, to bring this case into the exceptional category where prohibition should be granted.

The applicable law

49. The law relating to this type of case is well settled since the decision of the Supreme Court in the case of *S.H. v. Director of Public Prosecutions* [2006] 2 I.R. 575. There is no requirement for the court to inquire into the reasons for the delay or to make any assumption of the truth of the complaints. The issue is whether prejudice has arisen as a result of the delay and, if so, whether it is such as to give rise to a real or serious risk of an unfair trial. Each case falls to be considered on its own facts and in the light of the undoubted power and obligation of the trial judge to ensure a fair trial by means of appropriate rulings and directions. This includes the jurisdiction to withdraw the case from the jury where the trial judge considers that that is the only way to prevent injustice to the accused.

50. There are a number of written judgments dealing with cases bringing up similar issues since *S.H.* and the parties in this application have both referred to them at length without any disagreement as to the applicable principles. I do not consider it necessary to discuss them further and will rely instead upon the summary set out by Charleton J. in the case of *K v. His Honour Judge Carroll Moran* (unrep., 5th February, 2010) in the following nine propositions:

> *"(1) The High Court should be slow to interfere with a decision by the Director of Public Prosecutions that a prosecution should be brought. The proper forum for the adjudication of guilt in serious criminal cases is, under the Constitution, a trial by judge and jury; D.C. v. DPP [2005] 4 I.R. 281 at p. 284.*
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> *(2) It is to be presumed that an accused person facing a criminal trial will receive a trial in due course of law, one that is fair and abides by constitutional procedures. The trial judge is the primary party to uphold the relevant rights which are: the entitlement of the accused to a fair trial; the right of the community to have serious crime prosecuted; and the right of the victims of crime to have recourse to the forum of criminal trial where there is reasonable evidence and the trial can be fairly conducted; P.C. v. DPP [1999] 2 I.R. 25 at p. 77 and The People (DPP) v J.T. (1988) 3 Frewen 141.*
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> *(3) The onus of proof is therefore on the accused, when taking judicial review as an applicant is to stop a criminal trial. That onus is discharged only where it is proved that there is a real risk of an unfair trial occurring. In this context an unfair trial means one where any potential unfairness cannot be avoided by appropriate rulings and directions on the part of the trial judge. The unfairness of the trial must therefore be unavoidable; Z. v. DPP [1994] 2 I.R. 476 at p. 506-507.*
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> *(4) In adjudicating on whether a real risk occurs that is unavoidable that an unfair trial will take place, the High Court on judicial review should bear in mind that a District judge will warn himself or herself and that a trial judge will warn a jury that because of the elapse of time between the alleged occurrence of the facts giving rise to the charges, and the trial, that the accused will be handicapped by reason of the lack of precision in the presentation of the case, and the disappearance of evidence such as diaries, or potentially helpful witnesses, or by the normal failure of memory. This form of warning is now standard in all old sexual violence cases and a model form of the warning, not necessarily to be repeated in that form by all trial judges, as articulated by Haugh J. is to be found in the decision of the Court of Criminal Appeal in The People (DPP) v. E.C. [2006] IECCA 69.*
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> *(5) The burden of a proof on an applicant in these cases is not discharged by merely making a general allegation of prejudice by reason of the years that have elapsed between the alleged events and the commencement of the criminal process. Rather, there is a burden on such an applicant to fully and actively engage with the facts of the particular case in order to demonstrate in a specific way how the risk of an unfair trial arises; C.K v. DPP [2007] IESC 5 and McFarlane v. DPP [2007] 1 I.R. 134 at p.144.*
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> *(6) Whereas previously the Supreme Court had focused upon an issue as to whether the victim could not reasonably have been expected to make a complaint of sexual violence against the accused, because of the dominion which he had exercised over her, the test now is whether the delay has resulted in prejudice to an accused so as to give rise to a real risk of an unfair trial; H. v. DPP (2006) 3 I.R. 575 at p. 622.*
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> *(7) Additionally, there can be circumstances, which are wholly exceptional where it would be unfair or unjust to put an accused on trial. Relevant factors include a lengthy elapse of time, old age, the sudden emergence of extreme stress in consequence of the charges, and which are beyond that associated with the normal stress that a person will feel when facing a criminal charge and, lastly, severe ill health; P. T. v. DPP [2007] IESC 39.*
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> *(8) Previous cases, insofar as they are referred on the basis facts that are advocated to be similar, are of limited value. The test as to whether a real risk of an unfair trial has been made out by an applicant, or that an applicant has established the wholly exceptional circumstances that had rendered unfair or unjust to put him on trial, are to be*

adjudicated in the light of all of the circumstances of the case; H. v. DPP [2006] 3 I.R. 575 at p. 621.

(9) ... it can be the case sometimes that circumstances such as extreme age or very poor health will be contributory factors to an applicant succeeding in making out that a real risk of an unavoidably fair trial is established. Old age and ill health can assist in establishing that there is prejudice by reason of a delay, since memory fails with time and the ability of an accused to instruct counsel with a view to mounting a defence can be, in extreme circumstances, undermined by those factors. Where extreme delay, old age and serious ill health are, of themselves, pleaded as a circumstance which would make it unfair or unjust to put a specific accused on trial then, in the absence of proven prejudice, those circumstances will indeed occur rarely; The People (DPP) v. P. T. [2007] IESC 39 and Sparrow v Minister for Agriculture, Food and Fisheries [2010] IESC 6."

51. Applying those principles to the instant case it seems to me that the applicant has not discharged the burden of showing a real or serious risk of an unfair trial.

52. I accept that the applicant is elderly, that he has some health problems and that these charges have caused real stress and upset to him. However, that is a normal reaction to being charged with a criminal offence and the degree of disability suffered as a result does not approach the level present in, for example, the case of *P.T*. I accept that a teacher cannot be expected to remember all the pupils taught over a career spanning decades but that does not mean that old allegations may not be tried.

53. These are old charges, some of them very old, but it is clear that antiquity is not of itself sufficient. There is nothing intrinsically unusual about the case that points to a serious risk of an unfair trial. With regard to many features of the evidence the applicant may in fact be said to be in a better position than many accused. His sister is available to give evidence as to his way of life and timekeeping habits for at least part of the relevant periods. Through the commendable efforts of his solicitor he has a number of past pupils who are prepared to state that he did not indulge in violence or inappropriate touching of his students. The physical layout has not changed in any material particular. Given his belief that the glass in the classroom door was opaque at the time, it is difficult to see how it matters whether it has changed since. The question whether the desk retained by the school is one of the original ones is insufficiently important on its own.

54. The fact that the interviewing Gardaí did not take notes, as well as narrative statements, does not seem to me to be a particularly relevant consideration. It is suggested that the Gardaí may have employed leading questions. However, there is no authority for the proposition that the failure to take notes is a ground for prohibition and there can be no presumption that notes of any conversation prior to the making of such statements would provide material of use to the defence.

55. I am of the view that the issue raised in relation to A. is not of assistance to the applicant. The logic of the argument in this regard seems to be as follows: the applicant is presumed to be innocent; it follows that the complainants are lying; the applicant is of the view that A. persuaded them to lie; if A. was still alive he would have been cross-examined to this effect at the trial. Without such cross-examination it will be very difficult for the defence to put forward a theory as to why so many complainants should make false allegations against the applicant. The applicant is therefore prejudiced by the death of A. and prohibition should follow.

56. I do not think that the court can act on this basis. Firstly, there is simply no evidence at all before the court to back up the theory that the complaints, spanning a 20-year period and from women whose ages vary accordingly, were orchestrated by this man. It is true that he made the first complaint and could be said to have brought about the investigation, but he did not name most of the current complainants to the Gardaí and not all the female pupils he named have made complaints. No complainant made allegations that come anywhere close to the three specific incidents he described.

57. Secondly, the prosecution did not intend to call A. as a witness. He did not claim to have witnessed any of the complainants being assaulted. He did not have, it would appear, admissible or relevant evidence to give on these charges. Having regard to the law relating to the obligation of the prosecution to call witnesses named in the Book of Evidence only, (see *People (DPP) v. Lacy*, (unrep. 12th May, 2005); *R v. Oliva* (1965) 49 Crim. App. R. 298) it is purely speculative to suggest that the trial judge would have directed that he be called, in the absence of any evidence to ground an application for such a direction.

58. It seems to me that the applicant's argument on this point involves an unwarranted extension of the implications of the presumption of innocence. An accused person is entitled to be presumed innocent unless he or she is proved beyond reasonable doubt to be guilty, after a fair trial based on admissible evidence. That does not necessarily involve acceptance by the court of a particular theory of the case advanced by the defence. An acquittal, whether by the jury or by direction of the trial judge, may simply be based on failure to meet the standard of proof beyond reasonable doubt. Neither the trial judge, nor the court dealing with a judicial review application, is obliged by the presumption to adopt a theory as to why prosecution witnesses have made the allegations in question. The fact that the defence may find it difficult to explain a multiplicity of allegations other than by reference to such a theory does not change the court's position. It may be that in a particular case, there is evidence supporting the theory but in my view that is not the position in this case.

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

60. In the circumstances, I do not believe that the applicant has made out a sufficient case that he is prejudiced by the delay in this case to the extent that there is a real or serious risk of an unfair trial such that the trial should not be permitted to proceed.

61. I therefore refuse the reliefs sought.