THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 64 JR]

BETWEEN

JC

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice Baker delivered on the 28th day of March, 2017.

1. The applicant seeks judicial review by way of prohibition to restrain the respondent from continuing to prosecute him on two counts of indecent assault. The applicant is has pleaded guilty in respect of one these following his arraignment on the three counts on the indictment on 18th June, 2015. The incidents are alleged to have occurred between 1st January, 1972 and 31st December, 1972.

2. The application raises an argument of delay, lost and unavailable evidence, and general unfairness.

3. The applicant was born in 1955, and is one of a family of eight children of whom the complainant was the only girl. There is an eight year age gap between the applicant and his sister. It is fair to say that the family was troubled, and both the complainant and the applicant have had difficult lives. The applicant has no permanent place of residence and in recent years has been accommodated in homeless hostel accommodation on a permanent or semi-permanent basis.

4. Both the applicant and complainant have multiple addiction and psychiatric problems.

5. The applicant claims general prejudice arising from delay and specific prejudice having regard to the non-availability of certain key witnesses, and relevant documents.

6. An argument is also made that the applicant is showing signs of an early dementing condition of an irreversible type, and he is unable to stand trial.

7. On 14th April, 2016 leave was granted by the Court of Appeal on appeal from an order of Humphreys J. of 1st February, 2016, in respect of all of the grounds set forth in the statement of amended grounds dated 3rd March, 2016. Mahon J. delivered a written judgment on behalf of the Court of Appeal on 16th June, 2016, [2016] IECA 183.

8. The grounds on which judicial review is sought may be broken down into the following categories:

> a. The disclosure grounds, and the allegation is that disclosure has been piecemeal, unjustifiably delayed and incomplete.
>
> b. The fairness of process ground, that the right to a fair trial has been irretrievably prejudiced having regard to the loss of certain evidence including the death of a number of witnesses the applicant asserts would have either undermined the credibility of the complainant or otherwise assisted him in defending the charges.
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> c. Exceptional circumstances in the form of a general unfairness in the light of all of the circumstances including delay, absence of disclosure and the present state of mind of the applicant and the complainant.

9. Details of the factual basis and arguments in respect of each these grounds will appear in the course of this judgment.

Sequence of court appearances

10. On 6th July, 2011 the complainant made a statement to Garda Patrick Tarrant at Rathfarnham Garda Station, wherein she set out the details of her background, family information and specifically, extensive details of three of episodes of sexual abuse allegedly perpetrated by her brother, the applicant.

11. The complainant having made this initial complaint later indicated on the 15th July, 2011 she no longer wished to pursue the matter. The matter was then in abeyance for a period of two and a half years when, on 16th January, 2014 the complainant attended at a garda station and made a further statement.

12. The applicant made a cautioned statement at a Garda station in Dublin city on 31st January, 2014 in the presence of two members of An Garda Síochána. At this interview he accepted that one incident had occurred when he was seventeen and his sister was about nine.

13. One year later, on 8th February, 2015 the applicant was arrested and charged, and on 20th April, 2015 was served with the book of evidence and sent forward for trial to Dublin Circuit Criminal Court on all three charges. The indictment came before the Dublin Circuit Criminal Court for the first time on 15th May, 2015 and on 18th June, 2015 the applicant pleaded guilty to one of the three counts. The remaining two counts were set down for trial for 9th February, 2016. Sentence was adjourned on the single count to which the guilty plea was entered pending the outcome of the trial.

14. When the appeal of the refusal of leave was listed in the Court of Appeal on 5th February, 2016 the DPP indicated that it was not proposed that the trial would proceed on the 9th February, 2016, having regard to the acceptance by the DPP that disclosure was still outstanding.

The request for documents

15. The solicitor for the applicant first wrote to the respondent seeking disclosure by letter of 5th May, 2015. That request in broad

terms sought disclosure of all documents in relation to the investigation and prosecution of the alleged offences, including documents relating to the complainant in the hands of the psychiatrist referred to in her statements, documents of the HSE in relation to any counselling undergone by the complainant, records and reports in relation to the assessment of the mental capacity of the complainant and details of any other allegations of physical abuse made by her. It was noted in that letter that many of the documents might not be in the possession of the DPP or the gardaí and attention was drawn to a Memorandum of Understanding between the DPP and the HSE of 15th May, 2013 in relation to disclosure of relevant material in the hands of the HSE. Attention was also drawn to the obligation of the respondent to seek out and preserve evidence generally.

16. A reply was received to this letter some four months later, on 18th September, 2015, by which were enclosed twelve statements, four Garda statements, four statements of the complainant, of her mother, of a brother of the complainant, CC, Noel Casey and Captain Paul O'Callaghan.

17. Further disclosure of records concerning the complainant was made by letter of 22nd December, 2015 comprising notes or records of counselling, a social work report, and a report by a senior clinical psychologist from the National Rehabilitation Hospital dated 7th May, 2014 outlining the details of treatment of the complainant when she was a patient on the brain injury programme at that hospital between July and November, 2013. There were also furnished three further documents from the National Rehabilitation Hospital, and notes from 1991 from the psychiatric unit at St. Brendan's Hospital, Dublin to which the complainant was referred. There is an entry that the complainant suffered from alcohol abuse and a "personality disorder", and had a "long history of disturbed behaviour". There is also an entry indicating that the complainant was "sexually abused in past by brother from age nine to fourteen years".

18. A notice of additional evidence, attaching the statement of CC, referred to at para. 16, was furnished on 6th January, 2016. In this statement he describes conversations in 2002 between himself, the applicant and the complainant.

19. The solicitor for the applicant was concerned that the documents disclosed identified that the complainant had made an allegation of rape in 1990 against a third party, that she had made allegations of a sexual nature against her father, and that a doctor's examination carried out in or around the time of the alleged incident or incidents the subject matter of the indictment had not established the complaint.

20. The solicitor sought additional disclosure by letter of 13th January, 2016, identifying in particular details of the records of a Doctor Taylor and/or Doctor Ormond, and records from the psychologist in Dun Laoghaire to whom disclosure was made by the complainant.

21. No response was received to this letter and a reminder was sent on 26th January, 2016, which, in addition, sought further information, specifically details regarding the four female friends identified by the complainant as persons to whom disclosures were made over the years, details regarding the former husband of the complainant, B, and details of care facilities in Athy and Carlow where the complainant had attended for treatment.

22. It was at that point that application for leave to bring judicial review was made and having regard to the appeal to the Court of Appeal the matter moved with less expedition than might be the norm.

23. Further disclosure was made by letter of 2nd February, 2016 in which replies were given to some of the specific queries as follows:

> a. The ex-husband of the complainant has not made a statement, is suffering from a medical condition and is unable to communicate.
>
> b. No reports exist from a psychologist in Blackrock or Dun Laoghaire, County Dublin.
>
> c. No further records from St. Brendan's Hospital exist.
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> d. No records from a Dr. Ormond exist.
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> e. Records have been sought in regard to the alleged rape incident in 1990.
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> f. A further statement of the complainant dated 1st February, 2016 was disclosed, in the opening sentence of which she says that "I have never made a complaint of sexual assault against any of my brothers or my father" and which does detail the alleged rape in 1990 and identifies that she attended at the Rotunda Sexual Assault Unit following this incident.

24. On 8th February, 2016 further disclosure was sought and it was noted that a Dr. Buckley had been identified for the first time in the statement of the complainant made on 1st February, 2016 as the relevant family doctor who had attended at the family home at the time of one of the incidents the subject matter of the indictment. The statement says that Dr. Buckley spoke to the mother of the complainant and that after the doctor left the family home following his physical examination of her that her mother told her that she disbelieved her and asked her why she was lying. This was the first time Dr. Buckley had been mentioned.

25. Documentation was also sought in the letter of 8th February, 2016 in relation to this doctor and to Dr. Taylor who had been mentioned in two statements, one of 1st February, 2016 and the other of 14th February, 2014, the former furnished following the solicitor's letter of 26th January, 2016. Records were sought from the foster homes or other residential homes where the complainant and her siblings resided during their childhood.

26. On 18th February, 2016 medical records from the Rotunda Sexual Assault Unit were received. These disclosed that the then female partner of the complainant, M, had been with her on the date of the alleged rape and that she is now deceased.

The question of capacity

27. The applicant makes the preliminary point that the medical evidence points to the fact that the applicant is not fit to stand trial.

28. The applicant has had a troubled personal life. His solicitor Edward O'Connor in an affidavit sworn on the 2nd June, 2016 says that he first met him in March, 2015 and that it has become increasing difficult to take instructions from him owing to his "chaotic lifestyle and his alcohol dependency". He considered that he was presenting with "apparent confusion" and advised him to attend a consultant forensic psychiatrist. The applicant missed a number of appointments, and it was only with the assistance of a "key worker" in the Salvation Army Hostel that the applicant was persuaded to attend, and she accompanied him to his appointment and spoke briefly to Dr. Paul O'Connor, Consultant Forensic Psychiatrist.

29. Dr. O'Connor has given a lengthy medical report dated 12th May, 2016 in which he details his examination of the applicant. He assessed his cognitive functioning with the assistance of psychometric tests and his scores are said to demonstrate "gross impairment of functioning", which were "highly indicative of a dementing process".

30. The clinical examination showed that the applicant was disorientated and demonstrated "little reactivity apart from mild irritability". He presented as confused and the clinical view was that his "insight and judgement can be expected to be grossly impaired".

31. The collateral information obtained from the key worker satisfied Dr. O'Connor that the condition with which the applicant presented was chronic rather than acute.

32. Dr. O'Connor considered that the current presentation was of an "irreversible and progressive" dementing process, albeit he noted that an underlying medical condition might explain some of the presentation, and may be treatable.

33. The opinion of Dr. O'Connor is that the applicant is unfit to stand trial. I was advised during the course of the hearing that Dr. O'Connor is recognised as an expert in the field of forensic examination and frequently gives expert evidence in fitness to stand trial pre-hearings.

34. Section 4 of the Criminal Law (Insanity) Act, 2006 (as amended) provides that the question of fitness to be tried is one to be determined "in the course of criminal proceedings", and that the question may arise at the instance of the defence, the prosecution or the court, and is to be determined by the court of trial. Provision is made for the adjournment of proceedings to deal with the issue of fitness generally.

35. The Oireachtas has firmly positioned the question of fitness to be tried as a matter for the trial judge, and where a determination is required as a matter of statute law to be made by the court of trial it is not appropriate that a court should engage the question in an application for judicial review. Charleton J., in *K. v. Moran & Anor*. [2010] IEHC 23, clearly located the assessment of fitness to stand trial as a matter for the trial judge, and said the matter was "fully governed" by s. 4 of the Act of 2006, and that there was no possible basis for substituting an inquiry on judicial review for this comprehensive statutory code.

36. I consider that statement to be dispositive of the question of the fitness to stand trial, but I return later to the argument of the applicant that the present mental state of the applicant is a factor to be taken into account in the overall assessment of unfairness.

General principles
37. The power of the High Court to order prohibition of a trial is an exceptional remedy, and Charleton J. usefully set out a summary of nine relevant propositions in his judgment in *K. v. Moran & Anor.*, which I will not repeat here.

38. O'Malley J. in *Ó'C v. DPP & Ors*. [2014] IEHC 65 adopted the summary of the principles and in the circumstances of that case refused to grant prohibition. She considered that where what was alleged was the absence of evidence, an applicant must point to "a real possibility that the witness or evidence would have been of assistance to the defence", and rejected the suggestion that it was sufficient to point to the theoretical possibility that something might emerge from the evidence of a missing person that would contradict the account of the complainant or of another witness. She explained the matter thus:

> "67. The question is, I consider, whether there is a real possibility that the missing material would reveal a material inconsistency which would be of benefit to the applicant. In my view, there is nothing in the evidence to suggest that this is a realistic possibility as might be the case if, for example, it was shown that she had given materially inconsistent accounts in other instances."

39. In *S.B. v. DPP & Anor*. [2006] IESC 67 the Supreme Court identified the test to be applied by a court hearing an application for prohibition as whether there was a "a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay".

40. The mere fact of delay therefore is not of itself sufficient, and there must be real and concrete unfairness consequent to the delay in the light of the circumstances of the case.

41. The Court will also look at the "degree of prejudice", whether the risk is unavoidable and cannot be ameliorated by appropriate rulings and directions on the part of the trial judge.

42. The approach of a court hearing an application for prohibition must be to respect the right of an accused person to a fair trial, the right of a complainant that a criminal trial be dealt with in due course of law by a jury of his or her peers and must have regard to the Constitutional imperative that the proper forum for the determination of criminal matters is a trial by judge and jury. The trial courts are uniquely competent to determine questions of guilt or innocence, and have evolved processes or procedures founded in the presumption of innocence and the nuanced respective roles of the prosecutor and defence and of the trial judge.

43. That historic sexual abuse cases are difficult to prosecute as well as defend is self evident. Witnesses may have frail or uncertain memories, and corroborating evidence in the form of medical and other notes may be unavailable, or may never have been compiled in the first place. Cross-examination is well recognised as the primary tool by which inconsistencies in oral and statement evidence, as well as differences in the evidence given by different witnesses, can fully be tested. It may in many cases be difficult to obtain information or independent documentation on which to conduct a full cross-examination, and many cases will depend on the relative strength of the often uncorroborated evidence of the primary witnesses for the defence and prosecution.

44. In recognition of the uniquely complex and evolved practice in the trial courts, particularly that which has evolved in the context of historic sexual assault cases, an application for judicial review to prohibit a trial of a person accused of such assault is established only in what Charleton J. described as "wholly exceptional circumstances" where as a matter of fact, and not hypothetically, circumstances have come to render unfair and unjust the continuation of the trial process.

Unavailability of potential witnesses
45. The applicant argues that he has lost the opportunity of calling in evidence his mother and father, the GP who saw the complainant in the 1970s, a number of the complainant's female friends, her former husband and her former partner M, to all of whom it is alleged disclosures were made over the years which are exculpatory of the accused.

46. The loss of the evidence of the complainant's mother is the most critical to the defence. She gave a statement on 14th March

2014 and has since died. She describes an incident when the complainant was nine years of age when the family "had to call the doctor", following an allegation by the complainant that "something was done to me". Mrs. C. said that she rang Dr. Taylor who examined the complainant in the presence of her mother. The examination included an examination of her vagina. The complainant's mother says "I didn't know that night what had happened", but that it was only when another son told her in 2012 that she understood "what had happened". She goes on to say that "Dr. Taylor said kids of their age say anything to get anybody in trouble". She says the complainant was always "a bit nervous" of the applicant, and describes an incident in later years when the complainant stopped talking when the applicant came into the room when she was in hospital.

47. I do not consider that the loss of evidence from the father of the complainant and the applicant is critical to the defence. At its height it is said that the complainant made an allegation of abuse against her father, but that he denied it. The making of other complaints of a similar nature might be an acceptable approach to cross-examination of the complainant in the course of the trial, but it is difficult to see what real prejudice can now be argued to exist by reason of the loss of evidence from the complainant's father in circumstances where it is the making of a complaint by the complainant, and not the behaviour of the father that is in issue and likely to be an element in the defence. The applicant has not shown any basis on which the false allegations, if they were such, might form the basis of a line of defence.

48. The applicant places particular importance on the fact that the complainant's mother said that when the complainant was nine "she accused her father of molesting her" and that when she confronted him he said "what the hell do you think I am" and that she apologised to him. She also stated the applicant did admit one incident of sexual assault of the complainant to her in 2012.

49. The applicant argues the loss of the evidence of his mother is crucial to the defence in a number of respects: It sets up a complaint against the father of the complainant at precisely the same time as the incidents the subject of the indictment; it presents a scenario arising from the doctor's examination and it supports the assertion of the applicant that there was one incident only of which he is rightly accused. However, the mother's statement is not unequivocally exculpatory of the applicant as she had noted that the complainant was always a bit wary of her brother.

50. The loss of the evidence of the complainant's mother is important to the defence, because her statement is the sole source of information regarding the examination by Dr. Taylor following one incident in 1970. It is not been possible to locate Dr. Taylor to whom reference is made. From the evidence of the complainant's mother it seems that the doctor had no cause for concern, but it is not possible to now ascertain his reasons or the basis of this view. The matter is further complicated by the fact that the complainant herself, in her statement of 1st February, 2016 states that her mother called the doctor, and she identified the doctor as a Dr. Buckley and to be the family doctor at that time. She describes an examination by him of her "private areas" and she goes on to say that "my mother told me I wasn't touched and asked me why I was lying". She went on to say "there and then they didn't believe me. I don't remember anything after that. It was all hush hush after that". She says she had never heard of a Dr. Taylor, and although she did know of Dr. Ormond, that he never examined her.

51. Neither Dr. Taylor nor Dr. Buckley can be located, and the only Dr. Ormond who might be relevant was not qualified as a doctor until 1974. Accordingly, no evidence is available of the doctor who is said to have attended at the family home in 1971 and examined the complainant. The evidence of that doctor might assist the defence of the case, and it is clear from the statement of the complainant's mother that the doctor found no evidence of abuse. It is also clear that the mother did not believe that there was abuse.

52. If this trial proceeds and assuming the complainant's evidence will be along the lines of that given in her various statements, she will accept that she was examined by a doctor in her family home, and it is clear it was a male doctor, but that she was not believed either by the doctor or by her mother. The mother's evidence would therefore support the statement of the complainant, which itself is exculpatory of the accused.

53. The evidence of the complainant might be challenged on the basis of credibility with regard to a complaint that she made regarding an alleged abuse by her now deceased father. In her own statement of the 1st February 2016 she makes an assertion that she never accused either her brother or her father of sexual abuse. The former part of that statement is clearly wrong as a matter of fact, and her credibility can be tested on that account alone.

54. The loss of material witnesses has no impact on a defence challenge to the credibility of the complainant on these two issues, and while the evidence of the mother might support the applicant in a general sense, the concrete factual basis on which prejudice is asserted relates to the intimate examination by the doctor and the possible complaint made against the complainant's father at or near the same time as the complaints in respect of which these indictments are false. The facts surrounding these can still be tested. I do not consider that the loss of the evidence of the parents or friends of the complainant can be sufficient in the light of the case law to stop the trial. The complainant's own evidence contains contradictions and references to not being believed by her mother and she may be cross-examined on this basis. The loss of the mother's evidence therefore is not critical.

55. The non availability of medical evidence could be critical in some cases, but again the complainant herself confirms the doctor who examined her found nothing of concern.

56. Therefore while the trial may be rendered more difficult as a result of the loss through death of possible witnesses, or because some of them cannot be identified, the trial court has the ability and obligation to ensure that fairness can be achieved in the process by excluding evidence, giving directions and warnings to the jury and other steps of procedural nature uniquely available to that court.

57. To prevent the trial on the basis of unavailable witnesses or documentary evidence would be an unwarranted interference with the rights of the parties, and with the public interest in the prosecution of crime. It is a more blunt and absolute remedy than is justified in the circumstances.

58. The documentary disclosure is admittedly patchy and complete but I consider this arises because of historical poor record keeping or because documents have been destroyed or cannot be traced. A case such as this can, and often must, proceed without full records, and the problem is one to which the trial court will have considered regard.

Exceptional circumstances?

59. The applicant argues that the circumstances of the present case come within the "omnibus test" identified by Hedigan J. in *T.C. v. DPP* [2009] IEHC 400, and that the court can, having looked at the circumstances in the round, and taking all of the factors into account come to a conclusion that the trial ought to be prohibited.

60. The factors identified are the poor mental and cognitive state of the applicant, the loss or unavailability of documentary evidence and witnesses, the admitted frailty of health and memory impairment of the complainant herself and the fact that the applicant has pleaded guilty to one count on the indictment.

61. Reliance is placed in particular on the decision of Charleton J. in *K. v. Moran & Anor*. where he did make an order of prohibition on the grounds of the frailty of mind of the applicant, and regarded the applicant as being "one of the very few applicants who fall within the category of succeeding in showing that there is a real risk of an unfair trial due to delay" (para. 14). Charleton J. had identified a class of exceptional circumstances justifying prohibition:

> "(9) I will attempt to apply these legal principles to my adjudication of the circumstances in this case. In doing so, I would simply comment, as a final observation on the law, that having read the relevant case law, 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." (para.9)

62. The particular factors noted by Charleton J. were the antiquity of the alleged events, the loss of available evidence (in that case also the evidence of the mother of the accused) and the real fact that the likely means by which the case would proceed was on the basis of credibility, and that this would require that the applicant himself give evidence. Charleton J. took the view that having regard to the "level of intelligence, and therefore of recall" of the applicant he could not see that it was reasonably open to him to "gently undermine the case being made by the complainant" by the recall of details and the ability to instruct counsel as to those details.

63. Charleton J. based his conclusion on the presumption of innocence and the question of whether it would be unfair or unjust to put an accused on trial, not by means of a consideration whether fairness could be achieved by means of detailed and concrete directions by the trial judge. The unfairness was in putting a person of limited intelligence and significant cognitive impairment on trial when the trial of its very nature required that he give evidence and be able to instruct his lawyers.

64. I consider that this approach is relevant to the present case, and consistent with the approach identified by Hedigan J. The progressive and now irreversible cognitive impairment from which the applicant suffers is such that it would be unfair that he further engage with this criminal trial. In that regard I consider it important that he has fully engaged insofar as he could with the allegations made against him, and he has pleaded on one count on the indictment at a time when he was of capacity. The passage of time and the delay in obtaining the historic evidence, or ascertaining that some of this evidence is no longer available or was never generated, means that in my view the accused is now faced with an insurmountable hurdle. Having pleaded guilty to one count, he is vulnerable to the extent that he cannot now instruct his lawyers in sufficient detail to challenge the complainant with regard to the other two counts, and this is a particularly acute problem when the description by the complainant of the events is not fixed by reference to a particular date, and when all of the incidents are said to have happened in the family home.

65. I consider it improbable that the applicant would be in a position to instruct his lawyers with any degree of detail to enable them to challenge the details contained in the statements of the complainant. Indeed the evidence of the solicitor who has acted for the applicant now for over two years is that he cannot take instructions. While the evidence adduced with regard to the mental capacity of the applicant may have come to be considered by the trial judge in the course of the hearing as to his fitness to plead, or to stand trial, the question that must be addressed by me is whether the accused should be put at the hazard of a criminal trial when he cannot give instructions to his lawyers and where the defence to the charge is to be met almost entirely by way of a test of his credibility and that of the complainant and the other witnesses.

66. I do not consider that the delay which has resulted now in the loss of ability on the part of the applicant to instruct his lawyers is to be blamed on the respondent. The unhappy and chaotic life of both the applicant and the complainant, his sister, are the real source of the difficulty that the DPP has encountered in obtaining the necessary evidence. Furthermore, the mother of the complainant, who has now died, was herself suffering from serious ill health, and some degree of cognitive impairment.

67. It is true that the solicitor who acts for the accused himself interrogated the documentation with a great deal of scrutiny, and identified other possible sources of disclosure, documentary evidence, and other witnesses. His letters requesting further documentation were answered with reasonable expedition. Part of the difficulty has been the inability of the complainant herself to identify some of the persons involved, and the fact that some of the witnesses are deceased.

68. The particularly stark factor in this case is that the solicitor for the applicant was not aware of the death of his mother, a witness said to be essential, until after the application for judicial review was instituted. It is said that the accused was present at his mother's funeral, but it seems from the evidence that he did not instruct his solicitor of this, as that information was imparted by counsel for the prosecution on 14th February, 2016, and not by the applicant. The solicitor draws the conclusion that the failure of the applicant to tell him of his mother's death arose from the applicant's forgetfulness, or failure to understand the possible import of the evidence that his mother might give and that this was now irretrievably lost. The applicant has by reason of cognitive impairment shown that he does not to have the ability to understand the importance of the evidence of his mother, and his cognitive frailty has severely impacted on the ability of the defence team to take instructions.

69. The defence of the charges at trial will depend on the ability of the applicant to challenge the description of events which are alleged to have happened close to one another, where there are few distinguishing features of the alleged events, and the blunting of memory by the passage of time has been exacerbated to an unacceptable degree by the intervention of a dementing type illness or condition. The complainant herself delayed and after her initial statement in 2011 requested that the matter not proceed. At that time the applicant would have has sufficient capacity to deal with the complexity of the evidence, even if it emerged in the course of trial that his memory was less than perfect.

70. The plea of guilty was made at a time when the applicant did not suffer form cognitive incapacity. A trial at that time could have been fairly conducted. At this point in time some seven years later, the applicant does not have the capacity to engage with the difficult and complex facts surrounding the accusations and to instruct his lawyers in a way that enables them to isolate the distinguishing features of the three incidents giving rise to the three charges on the indictment.

Conclusion and summary

71. I consider that this applicant has made out a case that for the prohibition of his trial. The applicant has already pleaded guilty on

one count on the indictment, and the interconnection between the three counts, the length of time that has passed since the alleged incidents, the chaotic and difficult lives of all parties concerned, the consequential impairment of their memories and mind, and the irreversible and serious cognitive impairment of which the applicant now suffers, all combine to make this an exceptional case. It is not in the strict sense a case where the absence of evidence or the delay of themselves can be said to render the trial unfair, but the circumstances of the applicant and the nature of the indictment, and the fact that the trial will be one that will depend almost exclusively now, in the events that have unfolded, on questions of the credibility of both the complainant and the accused, render it unfair that the applicant should now be required to face trial. He should not be put on the hazard of facing a trial, and to borrow the words of Denham J. in *P.T. v. DPP* [2007] IESC 39, [2008] 1 I.R. 701, "wholly exceptional" circumstances exist.

72. Further, it would be disproportionate and unfair to require that the trial proceed having regard to the fact that the accused has pleaded guilty on one count, and that the progress of the prosecution was delayed after the complainant indicated she did not wish to pursue the matter in 2011. The resultant delay has caused a loss of the ability of the applicant to now fully and adequately defend himself.

73. For this reason and in these exceptional circumstances, I propose making an order that the trial of the applicant be prohibited.