THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 471 J.R.]

BETWEEN

B. O'S.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 5th day of October

The nature of the case

1. The applicant seeks an order of prohibition restraining his prosecution by the DPP in respect of sexual offences allegedly committed by him during the period 1967-1974. The application is based on a combination of circumstances arising out of the lapse of time since the period during which the offences are alleged to have been committed by him, being a lapse of time of some 43-50 years.

2. The applicant bases his case for prohibition of the trial on the cumulative effect of a number of grounds. The first is his state of health; the second, the absence of records from a counsellor attended by one of the complainants; and the third, the fact that the complainants discussed among themselves the making of an complaint as far back as the mid-1980s but chose to postpone making of any complaint to An Garda Síochána until their mother had died, in order to protect her from the stress of a trial. As matters transpired, they did make a complaint before she died but at a time when she had reached a stage of incapacity such that she would not be a competent witness in the trial. The alleged relevance of the mother as a witness is somewhat unusual. The complainants say that their mother told them some decades ago that she was raped by the applicant. The applicant says that there was in fact no rape or sexual assault by him of the mother, and that she would have been able to give evidence to this effect in the course of the trial if the trial had taken place at a time when she was competent to give evidence. It is alleged that the deliberate delaying of making a complaint by the complainants which had the effect of depriving the applicant of a crucial witness at the trial constitutes a prejudice which tips the balance, in combination with the other factors in the case, and creates a real risk that any trial would at this stage be could not be fair notwithstanding any directions that might be given by the trial judge.

Relevant facts/chronology

3. The applicant stands charged with a number of indecent assaults in respect of two complainants, who are sisters. There are fifteen charges of indecent assault in relation to the first complainant, D, relating to the period 1967-1971. This complainant's date of birth is 5th December 1957. There are fourteen charges of indecent assault in relation to the second complainant, S, relating to the period 1971-1974. The second complainant is a younger sister of the first complainant and her date of birth is 21st September 1961.

4. The applicant was born on 2nd February 1946 and is now 71 years of age. He was first put on notice of the allegations on the 16th July 2014 by members of An Garda Síochána, and was interviewed by the gardaí on a voluntary basis on 23rd July 2014. He exercised his right to make no comment during the interview by the gardaí. He was arrested on 8th August 2015 and charged. He was served with the Book of Evidence on 11th December 2015 and sent forward for trial to the Dublin Circuit Criminal Court. He underwent quadruple heart bypass surgery in April 2016.

5. As noted, the complainants were born in 1957 and 1961 respectively. Their father died in 1966, when they were both young children. It appears that the applicant became a family friend after the death of their father and it is alleged that he sexually abused both complainants in the family home in circumstances where he was a regular visitor to the home and the complainants' mother was out working on a regular basis.

6. The first complainant, D, in her statement on the Book of Evidence (made in January 2014) says that she was regularly abused between 1967 and 1971 in their home when her mother was out at work. She says that she asked to go to boarding school and was sent there in 1971, which is when the abuse stopped. She says that she met her future husband when she was around 18 (approximately 1975) and told him that the applicant had molested her. She was married in 1978 and moved to Canada in 1986. She says that when she was around 38 or 39 (approximately mid-1980s), she went to see a psychologist in Canada and engaged in counselling for a "good few months". She says this was triggered by seeing the applicant while she was in Ireland visiting. Her mother had told the applicant that her sister A had had a baby and he called to see the baby. She was very distressed by seeing him again. She says that her mother "never knew what happened up until I went to the psychologist in my thirties", which implies that somebody, perhaps she herself, told her mother in the mid-1980s that she had been abused by the applicant. She also says that at one point, she had a discussion with her sister in relation to the abuse by the applicant and that she said "I am going after him", and that her sister said "please wait until after mum has gone, she wouldn't be able to handle it." She places this taking place after her move to Canada when she was in her late 20s, which would appear to place it around 1986/7, given the date of her move to Canada (1986) and her date of birth (1957). Nothing further appears to have happened until 2013, at which point various discussions took place in the context of the complainants' mother being placed in geriatric/psychiatric care. She says that during an interview with a male psychiatrist, "it just came out" and he told her to report it. He referred her to a social worker who took the complaint and said the gardaí would be in touch. She also says that her mother is in a nursing home and suffers from dementia; she says that from when she was around 11 years old, she knew her mum "wasn't well" and that "Now that I am an adult I realise that mum suffered from mental illness". She says that her mother tried to kill herself on a number of occasions.

7. As noted, the second complainant S was born in 1961 and alleges that she was regularly indecently assaulted during the period 1970-1974. In her statement, she describes a number of incidents of sexual abuse and that they took place in the family home; in the applicant's house; and in the applicant's car. She got married in 1983, and some time subsequent to that she told her husband about what had happened. She moved to Canada in 1987. She describes a conversation following a fire at her mother's house, in which she spoke to D (the first complainant) and "found out that each of us had been sexually abused" by the applicant. She says "we were all very angry" although "I personally had dealt with what had happened and had moved on" whereas "D's memories were hard for her to let go". She does not mention any discussion about deferring the making of a complaint to the gardaí. She places this conversation as taking place in the late 1980s or early 1990s. She says that D contacted her in 2013 to say that she had told someone in St.

Vincent's who said he would have to notify the gardaí, and that it was up to herself whether she wished to make a complaint also. She made a statement of complaint in July 2014.

8. As appears from the disclosure material furnished to the applicant, a third sister, A, also made allegations against the applicant but there are no charges on the Book of Evidence in relation to this because a decision was made by the Director of Public Prosecutions not to prosecute in respect of A's complaints. However, the applicant relies on portions of her statements in making this application. This complainant made two statements to the Gardaí in June 2014. She was born in December 1964 and alleges that she was indecently assaulted when she was approximately 4 or 5 years old. She says that the first person she told was her husband and that this was sometime between 1985-1987. She refers to a fire at her mother's home after which her mother stayed with her, and then went to Canada to stay with her other two daughters; this is placed at early 1990. She says that at this time, she learned that her sisters had also been abused. She says that in the summer of 1990 she drafted a letter to the applicant setting out what he had done; "I told him exactly what he had done, especially to mum, we were more upset that time about what he had done to mum". Her mother subsequently came back to Ireland and asked her not to send the letter, and she did not. She says that she had a baby in 1994, and while D was in Ireland visiting him, the applicant arrived at the door to see him and that "without actually saying anything between D and I he knew he wasn't welcome". She says that sometime after 1995 or 1996 she spoke to D about making a complaint to the gardaí but decided against doing so she did not want to do so "at the cost of upsetting my sisters or my mum". She says the issue of making a complaint "seemed to just keep bubbling up". She says that 'it came out' when she and D were talking to a psychologist.

9. The material disclosed during the pre-trial disclosure process also contains statements from this clinical psychologist and the social worker referred to above indicating the allegations made by the complainants to them in 2013. Ms. Lewis says in her statement that in the course of a discussion in April 2013, D told her that their mother had been raped by a family friend and this person had also abused the three daughters. Ms Allen in her statement says that D told her that when she informed her mother about the abuse, her mother informed her that she had been raped by the same man.

10. The disclosure material also indicates that the first complainant's husband made a statement indicating that he was informed by his wife that their mother had been raped by the applicant and that this information emerged in the mid 1990s. He said: "At that stage we all thought that the fire started in M's [the complainants' mother] was as a result of M's illness triggering something when in actual fact M started the fire after an incident with [the applicant] where he dragged her upstairs and raped her on the marital bed that she shared with her deceased husband. M disclosed it to A or D directly and D told me. D and A only found out years later exactly what had happened to M that day of the fire. M has mental health issues and was in Loman's after the fire. It was the mid 90s when this came out". He also says that D had told him that she wouldn't do anything about the abuse until her mother was dead, because of "not wishing to put her mam through a trial situation, she didn't feel that her mam would be able for it". The husband of the second complainant also made a statement in which he said that during the weeks after the fire, A told him that her mother had told A that on the afternoon before the fire, the applicant had forced himself upon her, "as in raped her". He thought this was 1993 or 1994. He also says that in 1993/4, "between the sisters they decided not to make a complaint". The husband of the third sister (in respect of whom there are no charges) made a statement to gardaí indicating that his wife had informed him in 1993 or 1994 that the complainant's mother had been raped by the applicant and that the three sisters had been sexually abused.

11. A statement was taken from the relevant social worker in Canada who said that she no longer had any medical records regarding treatment of the first complainant, and that she had no recollection of treating her. She recollected only two women with Irish accents who came to her for treatment arising out of sexual abuse. She says that the first complainant telephoned her in February 2014 and she recollected her voice, but could not recall any details of her history.

12. The applicant swore an affidavit for the purpose of the judicial review proceedings in which he swore that he was not guilty of the offences charged or complained of, and that he had not raped the mother of the complainants. He said that he had "a good friendly relationship" with the mother of the complainants over a period which went on for decades after the alleged abuse. In later years, communication was confined to exchanging Christmas cards and photographs and phone conversations at Christmas time. It may be noted that the last communication of which he has proof is a Christmas card received from the complainant's mother in 2006 enclosing family photographs and extending good wishes for Christmas.

13. The applicant in his affidavit states that if the mother were now capable of making a statement or giving evidence, she would be of crucial assistance in establishing that the allegation that she had been raped was a false allegation made by the first and second complainants. He averred that the mother would also be in a position to give evidence tending to show that the allegations made by the complainants were highly unlikely to be true, having regard to their lifestyle and her whereabouts at the time of the alleged offences. He says that he was employed in the Defence Forces and was resident in Gormanstown Camp until his marriage in 1969, when he continued to work primarily there but was resident in Drogheda. From 1971, he was heavily committed to caring for an elderly lady and he also regularly visited his parents at weekends. Although his wife is still alive, he says that other, and in some cases more independent, witnesses who could have given evidence as to his lifestyle and commitments or whereabouts are not now available because they are deceased. There are no further details of who these persons might be. He indicates that he had heart by-pass surgery in April 2016, and that he suffers from anxiety and stress as a result of the allegations and that the trial process could aggravate his medical condition.

14. The only medical evidence proffered on behalf of the applicant was a report of Mr. Michael Tolan, Consultant Cardiothoracic Surgeon, dated 16th June 2016. This report indicates that the applicant underwent coronary artery bypass grafts in April 2016 and that he had made "an excellent post-operative recovery". He said that he had recovered very well from his operation, had excellent exercise tolerance, and that he had been discharged from the consultant's care.

Relevant authorities

15. In the leading Supreme Court decision of *S.H. v. Director of Public Prosecutions* [2006] 3 I.R. 575, the principles for examining cases involving so-called 'complainant delay' were laid down for future cases. The court held that it was no longer necessary to analyse the reason for a complainant's delay in making a complaint to the gardaí. Murray C.J. said that the issue for the court was whether the delay had resulted in a prejudice to an accused so as to give rise to a real or serious risk of an unfair trial and that each case was to be assessed in light of the circumstances of the particular case.

16. Since the decision in *S.H. v. Director of Public Prosecutions*, there have been numerous cases in which applicants have sought to establish that particular circumstances, alone or in combination, satisfy the test for prohibition as set out in the *S.H.* case itself. It is not necessary for present purposes to engage in a comprehensive review of those cases, but it may be helpful to refer to particular cases dealing with the discrete issues raised in the present case, including the absence or loss of documentary records relating to particular matters, the absence of particular witnesses, and the question of an applicant's age and state of health.

17. The applicant relies, inter alia, upon *S.B. v. Director of Public Prosecutions* [2006] IESC 67, a Supreme Court decision in which prohibition was upheld in circumstances of missing documents and witnesses. Hardiman J. emphasised the perilous position of a defendant where a case comes down to "bare assertion countered only by unsupported denial". In that case, the allegations were made against a nurse in a hospital, and it was alleged that the complainant was assaulted in the hospital at night-time in a room off the ward from which the complainant was removed for the alleged assaults. As was noted by Hardiman J., the locus of the alleged offences was therefore a 'confined and somewhat structured context'. There had been in existence at one time many documentary records such as work schedules, records of hours actually worked, and pay records, but these had been destroyed by the time the complaint was made. The court held that the absence of these notes created a real risk of an unfair trial as it removed from the applicant the possibility of demonstrating that the assaults could not have taken place on the dates alleged because he was not present in the hospital. The complainant had also asserted that he made a complaint about the sexual abuse to two particular nurses who worked in the hospital and that they had agreed to pass on the complaint to a named doctor, and then gave him an injection to put him to sleep. The named nurses and the doctor were deceased. Hardiman J. found that this also involved the loss of a "real possibility of an obviously useful line of defence".

18. Another case in which prohibition was granted was that of *K.D. v. Director of Public Prosecutions* [2011] IEHC 384. One of the grounds for the application was that certain hospital records were no longer available, in circumstances where there was a conflict of information as to when the applicant had been in hospital following a road traffic accident, which date would have been relevant to deciding the issue of whether he had committed one of the alleged offences. The applicant had said in his garda interview that he was in hospital in 1966 and on crutches for approximately two years thereafter, and could not have committed the offence alleged, whereas the complainant believed that his accident and hospitalisation had taken place at a later date, and the investigating garda had found a newspaper article supporting this. The High Court pointed out that the newspaper article was inadmissible and could in any event be erroneous, and that the hospital records would have established the date of his hospitalisation definitively, whereas it was now impossible to establish the date of hospitalisation one way or another. She said that she would have been disposed to grant prohibition on this ground alone.

19. In *C.O'B. v. Director of Public Prosecutions* [2010] IECA 41, the Supreme Court prohibited a trial in circumstances where the partner of the applicant was deceased and sexual offences were alleged to have occurred in the applicant's home, where he lived with his deceased partner. More specifically, during the relevant period, the applicant and his partner were in the habit of travelling into town and returning home together by car. The complainant had said that he was picked up in town and driven by the applicant to the applicant's home, where he was abused. Hardiman J. referred to the State's contention that the absence of the deceased's partner/spouse could not avail an applicant unless he could prove what they would have said if they had been available, and described this as a "ludicrous and self-defeating proposal" because where a spouse dies or becomes disabled before any allegation is made, it was "plainly impossible to demonstrate what he or she would have said". He said this would be the application of a test which a defendant would in every case fail to satisfy. He also noted that the deceased witness would have been in a position to give evidence as to the layout of the house, in respect of which the complainant gave descriptions which were disputed by the applicant.

20. In *R.C. v. Director of Public Prosecutions* [2009] IESC 32, a Supreme Court decision in which judgment was delivered by Denham J. (as she then was), the loss of certain telephone records (because they had been sought outside the three year period during which the records were kept by Vodafone) was held to be sufficient for the grant of an order of prohibition in circumstances where an important aspect of the complainant's description of events was that the applicant would call or text her and request him to visit her in his apartment. Denham J. said that while in general, the absence of phone records was not a reason to prohibit a trial, it was the particular circumstances of the case which created the real risk of an unfair trial in the absence of those records.

21. The applicant also relies on a number of decisions in which it was emphasised that the totality of the circumstances may bring a case into the exceptional category warranting prohibition, even if no single factor of those relied upon would do so. Included in these authorities is *P.T. v. Director of Public Prosecutions* [2008] 1 I.R. 701, in which the Supreme Court justified the upholding of the grant of prohibition on the basis of the cumulative effect of a number of factors; it was an old case (34-39 years between the dates of the alleged offences and the return for trial); the prosecutions took some time to mount, that the applicant was now 87, and he was in poor health (with his consultant cardiologist expressing the opinion that the stress of a criminal trial could have a major effect on his health and possibly precipitate heart failure or acute myocardial infarction). Denham J. said that while there was a public interest in having crimes prosecuted and that the position of victims should be carefully considered, it "demeans a system of justice if its process is one of vengeance or has such a perception" and "evokes concepts of primitive jurisprudence". She said that the Courts and the Constitution were required to protect the integrity of the criminal justice system and that this may mean that in "exceptional circumstances", a prosecution might need to be restrained. She said that it was the cumulative effect of all the factors which brought this particular case into the exceptional category requiring prohibition.

22. The respondent relies in particular upon a number of more recent authorities. In *S. O'C. v. Director of Public Prosecutions* [2014] IEHC 65, the High Court (O'Malley J.) rejected an application for prohibition based upon the absence of records from a health centre and the death of a doctor to whom a complainant had spoken to about the alleged sexual abuse. She said that where an applicant seeks to establish that the absence of a specific witness or piece of evidence has caused prejudice, "he or she must be in a position to point to, at least, a real possibility that the witness or evidence would have been of assistance to the defence" and said that it was not sufficient "to point to a theoretical possibility that an unavailable witness might have had something to say that would contradict the complainant's account and that of other witnesses". She said that the question was whether there was a "real possibility" that the missing material would "reveal material inconsistency which would be of benefit to the applicant". She said there was nothing in the evidence before her to suggest that this was a realistic possibility as might be the case if, for example, it was shown that the complainant had given materially inconsistent accounts in other instances. She also said that she did not consider that the presumption of innocence required the court to assume, in the absence of any supporting evidence, that the complainant might have given an inconsistent account to the deceased doctor. This did not mean that the applicant bore any onus to prove his innocence, but rather that the establishment of a 'real risk' must involve establishing a 'real possibility' that evidence did exist which could have been helpful but is no longer available. It is clear from the judgment that O'Malley J carefully analysed the role that the missing evidence would or might have played in the case in light of the precise case being made by the complainant and the evidence still in existence. This demonstrates the need for the court to carefully assess the potential content of the missing evidence and its significance (in light of various possible contents) in the particular context of the facts of each case. It is the relationship of the missing evidence to the rest of the case that must be focussed upon.

23. More recently in a Supreme Court decision, *T(S)T v. President of the Circuit Court* [2015] IESC 25, Denham C.J. held that the prosecution should not be prohibited notwithstanding (1) the absence of counselling records in relation to one of the complainants, which had been destroyed; (2) the fact that three counsellors from whom statements were taken were no longer available, and (3) the fact that the principal of the school, to whom the complainants said they made complaints, was now deceased. Denham CJ referred with approval to the SO'C case discussed above and said that each case must be considered on its own facts and that while the absence of documents in the case did not warrant a grant of prohibition, it was a matter which could be opened to the trial

judge, who would be best placed to determine the matter.

24. In another recent decision of the Court of Appeal, *M.S. v. Director of Public Prosecutions* [2015] IECA 309, prohibition was refused notwithstanding a delay of over 40 years and the absence of certain evidence. Hogan J. said that decisions regarding prejudice were best taken by the court of trial which was in a good position to evaluate the run of the evidence and has the power and duty to intervene if necessary. In that case a junior doctor and treating nurse were no longer available, but Hogan J. said that it was difficult to say that any likely prejudice was at such level as to justify restraining the trial on ex ante basis. He said that there had been "growing recognition at various levels throughout the criminal justice system that it requires something exceptional to justify the prohibition of a criminal trial, especially if any potential unfairness to an accused is capable of being mitigated by appropriate rulings in the course of the trial". He referred with approval to the same point made by O'Malley J. in her judgment in the *P.B.* case. In *P.B. v. Director of Public Prosecutions* [2013] IEHC 401, in which the judgment of O'Malley J. was affirmed on appeal by the Supreme Court, O'Malley J. had emphasised that each case falls to be considered on its own facts and in light of the undoubted power and obligation of the trial judge to ensure a fair trial by means of appropriate rulings and directions which included the power to withdraw the case from the jury where the trial judge considers that that is the only way to prevent injustice to the accused. She said that the decision whether or not a case should proceed "will often be better taken in light of the evidence as actually given [at the trial] rather than as speculated about in the judicial review proceedings".

Conclusions

25. A central plank of the application for prohibition in the present case concerned the fact that the mother of the complainants now suffers from dementia and is incapable of giving evidence. It was argued that the complainants had deliberately chosen to delay the making of a complainant to the Gardaí, after having discussed this matter amongst themselves some decades ago, until after their mother had died. It appears to be suggested that their intention in so delaying the making of a complaint was to ensure that the mother would never be able to give evidence at any trial. In my view, the evidence does not support that interpretation but suggests, rather, that the intention was to protect the mother, who apparently suffered from poor mental health for many years, from the stresses of a trial. In fact, it is not entirely clear whether the mother would ever have had the capacity to give evidence at a criminal trial, given her history of mental illness, but I do not have sufficient evidence on that one way or another. It is clear that she is not now capable of giving evidence. The relevant question, following the approach laid down by the Supreme Court in the *S.H.* case is whether this creates a real or serious risk of an unfair trial; *S.H.* makes it clear that the reason for the delay in making the complainant does not matter and that the key issue is whether the lapse of time has given risk to this real or serious risk of an unfair trial.

26. The applicant relies upon the loss of the mother's evidence as the foundation for his 'prejudice' argument in a most unusual way. It is not merely that he suggests, as is common in such cases, that the mother would have been able to shed light on practical matters such as the layout of the house, their living arrangements, and their day to day routines at the time of the alleged offending, in circumstances where the offences are alleged to have taken place in the family home. Rather he alleges, more particularly, that the mother would have given evidence refuting what he describes as a false allegation emanating from the daughter(s) that he raped the mother herself. As we have seen, there is evidence in the statements of the daughters/complainants and their husbands that the mother reported to at least one of her daughters that the applicant raped her. This is linked in time with an incident in which the mother set fire to the family home. As noted above, not only do the sisters say that the mother reported this to one of them a long time ago, perhaps the mid-1990s, but two of the husbands of the allegedly abused sisters say that this report was also passed on to them in the mid-1990s. The applicant denies having raped the mother and says that he was on friendly terms with her long after the date of alleged rape, as evidenced, he says, by their friendly contact with cards and phone calls, as well the fact that he was told by the mother when one of the daughters had a baby, as a result of which he came to visit her at the family home (as described earlier). Accordingly, he says that the daughters have falsely created the story of the mother having been raped and that if the mother were available to give evidence, she would give evidence supporting him on this issue, which would in turn undermine the credibility of the complainants more generally.

27. I am mindful of the comments of Hardiman J in the *C.O'B* case referred to above, when he rejected the proposition that the applicant must prove what the deceased or now incapacitated witness would have said. It is of course, strictly speaking, impossible to know what the mother would have to say about whether or not she was raped. One can imagine that, no matter what the truth of the matter, any mother would be reluctant to give sworn evidence in court effectively accusing her daughters of telling lies. But theoretically, it is possible to envisage a situation where a mother might do so if the allegations of rape were indeed untrue. On the other hand, I am also mindful of what was said by O'Malley J. in the *SO'C* case, namely that the presumption of innocence does not require the court to simply make an assumption that the missing evidence would necessarily have been helpful to the applicant. The test applied by O'Malley J. appears to have been whether there is a 'real possibility' that the missing evidence could have been helpful. It seems to me that this can only be assessed, for the purposes of the present application, on the basis of the evidence currently before the court. Here, it seems that the mother set fire to her house in the early or mid-1990s. It seems she then reported to at least one her daughters that this was linked with the applicant having raped her that day or the day before the fire. The daughters, or some of them, passed this report on to their husbands. Thus, the report that the mother was raped by the applicant appears to have been circulating within the family (including the husbands) as far back as the mid-1990s, at a time when no criminal complaint was in contemplation by anyone and there would have been no apparent benefit to anyone to falsify such an allegation. Indeed, it is difficult to see how falsifying such an allegation would be perceived to be 'of benefit' to the complainants even after they had made their own complaints to An Garda Síochána. It may be that the applicant would say that the daughters and their husbands are lying when they say the mother's report that she had been raped by the applicant was in circulation in the 1990s, but that particular matter (whether such a report was passed on to the husbands, as distinct from whether the rape itself took place) is one upon which the daughters and husbands are the relevant witnesses, and are available to be questioned, on deposition prior to the trial if necessary. It seems to me somewhat far-fetched to suggest that there is a real possibility in this case that the mother, if available to give evidence, would have stated that she had not raped by the applicant and that her daughters were falsifying the allegation to that effect. Further, the entire issue of whether or not the mother was raped is a collateral issue in the trial. The charges laid relate to alleged sexual assaults in respect of two daughters. The question of whether the applicant raped the mother is not directly in issue in the trial. I am not persuaded by the applicant's attempts to suggest that this would have been a central plank of the defence strategy if the mother had been competent to give evidence.

28. As regards the records no longer (if ever) available from the counsellor/social worker in Canada, Ms. Doran, attended by the first complainant, it seems to me that the *SO'C* case is again relevant and that it cannot be simply assumed that the complainant may have made inconsistent statements to this person, in the absence of any evidence, for example, of a pattern of inconsistency on the part of the complainant. Further, this is not a case where the role of the records currently appears to be central to establishing a matter such as some date intrinsic to testing the allegations of abuse, as was the case in *KD*. Nor is the record intrinsic to the pattern of abuse itself, as was alleged in the *RC* case referred to above. Accordingly, I am not persuaded that the absence of these records from the trial mean there is inevitably a real risk of an unfair trial. Of course, it is a matter which can and should be kept carefully under review by the trial judge.

29. Finally, while the applicant is now 71 and has had by-pass heart surgery, the evidence currently before the court is that he has made a good recovery. There is nothing before the Court to suggest that his ill-health is extreme, or that the stress and anxiety of the pending trial could be very serious or even fatal, as has been the medical opinion in other cases. Nor is the applicant at the extreme end of the age spectrum in terms of such cases.

30. I have therefore concluded that the grounds relied upon, whether considered separately or cumulatively, do not reach the high threshold for prohibiting a criminal trial in advance of its commencement. The trial judge will undoubtedly have careful regard to the considerable lapse of time since the period within which the offences are alleged to have taken place, a period of between 43 and 50 years ago, together with the various factors raised in this application. The trial judge will be in a position to monitor the case as it unfolds, with a keen eye as to the missing evidence in that context, and the position can be kept under constant assessment as to whether a point is reached during the trial itself such that it would be unfair to continue, in which situation, if it arose, the trial judge would have a duty to take the necessary steps to bring the trial to an end. However, I do not consider that the trial should be prohibited on an *ex ante* basis in light of the evidence adduced before this court.