Neutral Citation Number: [2010] IEHC 382

THE HIGH COURT

2009 1283 JR

BETWEEN

NIALL BYRNE

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Charleton delivered on the 11th day of November 2010

1. The various declaratory reliefs sought by the applicant can be condensed to this: Niall Byrne wants the internet wiped clean of any publicity or comment about the charges which he faces or the conduct of a previous trial where the jury failed to agree a verdict against him or in his favour. He asserts that an accused person has the right to demand that the Director of Public Prosecutions should search the internet in order to find any sites containing material that might be regarded as prejudicial to the prospect of a fair trial. Thereafter, it is argued, the Director of Public Prosecutions should write to the relevant internet service providers and demand that any offending material should be taken down. In the event of non-compliance, an application should be made to court in that regard. The danger otherwise faced by the applicant, it is argued, is that jury members will conduct their own researches during the course of the applicant's forthcoming trial, find some of the material complained of and reach conclusions prejudicial to the case he may be asserting at the trial. The applicant is twenty-six years old and previously worked for Securicor. He has no previous convictions and therefore, apart from an entitlement to challenge any prosecution evidence, and to give positive evidence himself explaining any adverse case that might be brought against him, he is also entitled to rely on his character as being one that would be unlikely to be involved in the offences charged, and to call witnesses in that respect.

Chronology

2. The applicant is charged with various offences of kidnapping and robbery arising out of a kidnapping and robbery on 13th and 14th March 2005. The circumstances of the crimes were horrible. That, however, in no way suggests that any particular person, much less the accused, was involved in them. A fellow employee of Securicor came home after a day of work and, on opening the door, found his wife and child trussed up. Armed raiders were at hand. They brought him from his house in a state of shock and told him that he had to co-operate in bringing a Securicor van full of money to a liaison point where it could be stripped by the criminal confederates of the money it contained. The victim was apparently required to take photographs of his family and to bring these to a fellow employee in order to ensure the success of the criminal enterprise. This the victim did. A considerable amount of money was taken and his wife and child, who had been taken from his home and tied up in a forest, were released after their ghastly ordeal. The money robbed in this way has never been recovered.

3. I have little idea as to the case being made by the prosecution against the applicant Niall Byrne. Even if I did, I would not repeat it here. For the purpose of these judicial review proceedings, it suffices to record that on 8th May 2006, following an extensive garda investigation, the applicant was charged. On 14th August 2006, a book of evidence was served and further disclosure of possibly relevant material by the prosecution followed. This was substantial, perhaps out of an abundance of caution. On 28th April 2009, a jury was empanelled to try the applicant together with a number of other people. Of these, two were unavailable because they had decided to emigrate to the Philippines. The empanelling of the jury took time. The trial was then under way. In the course of it, on two days in May 2009, the learned trial judge, His Honour Judge Tony Hunt had drawn to his attention certain material stored in the websites of newspapers which gave details as to bail hearings that concerned some of the accused men. These publications were contrary to s. 4(J) of the Criminal Justice Act 1967. The judge required the removal of this material from the internet. The newspapers complied. The trial continued for several more weeks. On 5th July 2009, a particularly unfortunate broadcast occurred on the Marian Finucane show on RTÉ Radio One. This included intemperate and silly comments from a panel member which were completely inappropriate in the context of a continuing criminal trial. Again, the defence made an application to the trial judge who required the attendance of relevant executives from RTÉ who, having apologised, removed the relevant broadcasts from the podcast area of their website. The judge was of the view that if the jury had heard these baseless comments, that he would have had no option but to stop the trial. In the event, on questioning, it turned out that the jury members were unaware of the programme. On 30th July 2009, three men were convicted of the offences of robbery and kidnapping. In respect of two others, including this applicant, the jury disagreed on their verdict. None of the men gave evidence. On 12th November 2009 the three convicted men were sentenced to 25 years in prison, the judge referring to them as "a revolting crew".

The Crime and the Trial

4. It can be readily imagined from this brief recital of facts that at the time of the robbery and kidnapping there was considerable newspaper and other media publicity. The public have an entitlement to be informed as to what is going on in their society and there is nothing wrong with that. In addition, it was highly probable because of the notorious nature of the crime, and it in fact happened, that various specialist journalists engaged in speculation or guess work as to the nature of the criminal gang and their origins. In this respect, no one was named. It was, however, said that some of the gang members may have been involved in murder in the past. A view that the criminals were particularly vicious and well-trained was also widely aired. This arose naturally from the nature of the crime, apart from any sources that might be consulted.

5. I wish to state immediately that the fact that a crime is vicious or depraved, does not impact on the fairness of a trial. The purpose of a criminal trial is to attempt to analyse whether the prosecution have proven their case against any individual accused beyond reasonable doubt. Whether the crime is trivial or vicious, the same standard applies. The accused is presumed, in every

instance, to be innocent; he may not be convicted unless the prosecution meet the required standard of proof and an accused has an unassailable entitlement to reasonably and fairly participate in the trial through cross-examination, the calling of evidence and by making submissions.

6. There is nothing in the publicity generated at or around the time of the offences which would, in any way, point to the applicant as being involved. It is argued on his behalf, however, that the accumulation of the publicity at the time, coupled with contemporary reports of the trial and sentencing process will prejudice his prospects of a fair re-trial. In particular, it is said that the adverse nature of pre-trial publicity can never be dissolved, whereby adverse publicity retreats from public view with the passage of time, because much of this material is stored on the internet.

The Internet

7. The internet consists of thousands of linked computers. Many newspapers have websites. Some of them may be accessed only on payment of a subscription, while others may be accessed free of charge. Often the archives of a newspaper will go back for five or more years. In addition to that, as has been pointed out in the course of the hearing, there are some specialist sites designed on a commercial basis, it is to be presumed for private detectives, whereby on paying a fee with a credit card one can search the supposed background of people through their name and date of birth.

8. As is well known, powerful search engines will, on the entry of a name within inverted commas, yield data on those persons holding that name in media websites and images that relate to them. With a name as common as that of the applicant, many results will relate to other people in various parts of the world.

9. The applicant has an entitlement under Article 38 of the Constitution to be tried by a jury. Of its nature, a jury is randomly selected from the general community. Those who are under 35 who are called for jury service can be expected to be particularly adept at internet searches. Many will carry portable devices whereby they can access the internet away from home, or even in the courtroom through satellite technology. The internet has become so pervasive that schools give lessons in computer technology, in emailing and in effective searching. Surfing the web has become a pastime for many people. It can be expected, as has been reasonably submitted, that of the jury panel that may be called in Dublin to try the applicant and his co-accused on a re-trial, that many will be adept at internet searches and that a few of them may pursue this activity as a habitual pastime.

10. The danger that emerges, it is therefore argued, is that whereas it may appear that the applicant is getting a trial on the basis of the evidence that is presented in court to the jury, they may be conducting their own research and reaching a conclusion based upon what the media may have reported months or years before or on what interested persons, or cranky individuals, may have said in blogging websites. Concurrent with that, members of the jury may be receiving messages on their mobile phones from persons who have looked at the internet and decided to randomly explore the case, or they may engage in social networking during the course of the trial, to the prejudice of a just disposal of the case and the appearance of justice.

Test of Unfairness

11. There is no new test in relation to the case made by the applicant. The various declaratory reliefs that he seeks would place a burden on the Director of Public Prosecutions which, if not fulfilled scrupulously, would result in the trial being stayed. Whereas orders of *certiorari* and *mandamus* have not been sought, in favour of declaratory relief, the effect is the same. It is therefore appropriate to refer to the test whereby, through adverse publicity, a trial should be prohibited. In this jurisdiction such prohibitions have, heretofore, only been temporary. Over a year has passed since the co-accused of the applicant were sentenced. Enough time has passed, therefore, for any aspect of that process and the publicity that it generated to have faded from public consciousness were it not for the potential power of the internet, if accessed.

12. A unified test is now established in relation to delay in the criminal process and adverse pre-trial publicity. Where there is a real and substantial risk of an unfair trial due to either delay in prosecution or adverse publicity, which could not be made fair by appropriate rulings and directions of the trial judge and by other circumstances, the trial should be prohibited; *Rattigan v. DPP* [2008] 4 I.R. 639. It is clear, however, that there is a difference between the two circumstances of delay and unfair publicity. Over time, pre-trial publicity can fade and render what would have been the risk of an unfair trial had it taken place immediately, a safe exercise in justice several months later. Prosecutorial delay is, on the other hand, something that has happened; the passage of time will make it worse and not better.

13. Article 34.1 of Bunreacht na hÉireann establishes the double foundation to the administration of justice within our system. Judges are independent in the exercise of their function; they are not amenable to popular pressure or to political opinion: and the administration of justice is to take place in public. Very often, during the hearing of court cases no member of the public is present in court. The doors are, however, always open save in the limited circumstances in respect of which in camera trials are provided for. These exceptions include family law and the trial of rape offences; but in that instance the press attend and are entitled to report all relevant facts, save for the name of the alleged victim and the accused, and they may report the name of any convict unless thereby the victim will be identified. Everything that a judge does, therefore, is subject to public scrutiny. In the majority of cases, that public scrutiny is exercised through the presence of media representatives who are enjoined by their own ethical standards to provide a fair and balanced account of court proceedings. The exemption from the law of defamation that inures to this exercise requires that this ethic should be upheld. The media therefore have a responsibility to represent the people of Ireland in their attendance at court proceedings. In any consideration as to the nature of publicity and as to whether it interferes with the trial process, this important role should be borne in mind.

14. It is clear, as well, that outside the courtroom, the media are entitled to report on matters of public controversy, be they political, administrative, judicial or general news. The kidnapping and manipulation of the victims in this case are both newsworthy and important. The course of the trial of anyone accused of a crime, and presumed innocent, is a matter of public importance. The course of the trial, the case to be made by the prosecution, the evidence presented by the defence and the directions of the trial judge are entirely appropriate as a focus of media attention.

15. What is not appropriate is for the media to whip up prejudice against an accused, by stating or inferring that his guilt is obvious, or is to be presumed by reason of his background or his association with a criminal gang. As bad would be the mischievous revelation of previous convictions, should an accused have these, or the publication prior to the jury verdict of evidence excluded by ruling of the trial judge. In *Rattigan v. DPP*, at p. 648, Hardiman J. stated:-

> "The basis upon which such material is not permitted to be published is that it interferes with the right of every citizen to a fair trial before a jury unaffected by loud unreasoned assertions of the defendant's guilt. The applicant, and every citizen, is entitled to have the evidence against him, if any, presented in court in his presence and that of his representatives so that no improper evidence is admitted against him and he is able to make an immediate answer to any proper evidence adduced against him. Publishing one sided statements to the effect that the applicant is guilty of the crime in question, or that the defendant is an associate, or a leader, of other persons who are guilty of the crime, or of similar crimes, destroys the citizen's right to a fair trial. Since Ireland is committed, both by its Constitution and by the European Convention on Human Rights which it has incorporated into its law, to provide a fair trial, it must of necessity inhibit publications which are inconsistent with such a fair trial. There are, in particular, two types of publications that tend to prejudice the right to a fair trial. The first is a publication of a sort which will make it difficult for the jury or other tribunal of fact to approach the case with an open mind for example because it suggests information which is not proven in evidence or strongly proclaims the guilt (or the innocence) of a defendant. The second and quite different type of contempt which interferes with the constitutional right to a fair trial is published material of a sort which, by repetition or otherwise, so affects the person about whom it is written as to hamper his ability properly to conduct his defence."

16. Although this judgment was not that of the Supreme Court, this observation was not one from which Geoghegan J., on behalf of the majority, dissented. I see no difficulty with a reference to a victim of a crime in favourable terms, a matter touched on later in the judgment of Hardiman J., unless it is pursued as part of a malicious and inflammatory strategy.

17. Indeed, Geoghegan J., speaking on the issue of contempt of court through publicity that interferes with the criminal process, at p. 666 of the report, had this to say:-

> "It follows that a newspaper may be guilty of a flagrant contempt of court on the basis of potentially prejudicing a fair trial and yet it may be inappropriate at the end of the day to stop the trial for any one of a number of reasons but especially if a considerable lapse of time has ensued in the meantime. The law is quite simple and newspapers and other organs of the media should not have all that much difficulty in ensuring compliance with it. If a person has been charged with a crime, that has an immediate effect on the manner in which the crime can be reported. It must not be reported or discussed in a way in which it could potentially prejudice jurors in a trial. While the fade factor may be relevant and indeed is relevant in considering whether a trial should be injuncted altogether, it is not a relevant matter which a newspaper or other organ of the media is entitled to take into account in its reporting of the crime. It simply must adopt the long established rules of protection of the person charged with the crime to which I have referred."

Application of the Test

18. The publicity complained of by the applicant does not meet the test of adverse pre-trial publicity which potentially could have an affect on the fairness of his re-trial for the offences with which he is charged. I must briefly refer to some of those instances of media comment which, in the case of some newspapers, may still be available for search on the internet either on payment of a fee, or through an ordinary search.

19. Around the time of the offences, the nature of the crime, and the nature of those who might be behind the crime, was discussed extensively. I have read the relevant articles. Much of it consists of speculation and the presentation of apparent knowledge as fact. None of it refers to the applicant. Insofar as there is a deprecation of the nature of the offence, this is to be expected. The offences were deeply distressing. Nor is there any identification of the applicant as being a particular suspect of any individual crime correspondent to a newspaper, either on the basis of any particular reason, or at all. Some newspapers draw inferences that the crime was planned over a long period of time and was executed with the kind of precision indicative of involvement by a professional criminal gang. This does not identify the applicant and it is entirely a reasonable comment, though it may or may not be accurate. There is no connection between any description given of the facts of the crime and no inference is made or implied that it must be the accused who is responsible. He is presumed to be innocent and that entitlement is not infringed. Whereas there may be some speculation that the crime had assistance from within Securicor, the applicant having been an employee of that organisation, elsewhere it is stated that the number of frontline employees, engaged in the delivery of money and valuables in security vans, exceeds 800. This justifiable media commentary proves nothing.

20. At the time of the trial the prosecution evidence was presented in various media sources. There is some focus on the victim of the crime and the manner in which he drove a van out of the Securicor depot at the time of the offences. Any reaction by anyone to that driving is more than capable of an innocent explanation, though I make no comment on the relevance of evidence as I do not know and am not entitled to judge the facts. The employment record of the applicant is also briefly touched on and in some of the articles there are errors of fact.

21. On the conviction of three of the accused, the newspapers covered the matter extensively. One of the victims of the offence was interviewed as to his relief at the result and the gratitude he feels towards the gardaí and those friends who had supported his family through their ordeal. Apparently this is available as a television interview on a podcast. That is not in any way prejudicial. One newspaper focused on the accused as the alleged participant from within Securicor and certain tangential points of the evidence. These are presented as allegations, or as part of the prosecution's case as made in court. It is hard to imagine the case would be substantially different the next time. Even if it is, it makes no difference. There is also focus on mobile phone evidence. This, as was pointed out by the judgment of the Court of Criminal Appeal in *The People DPP v. Colm Murphy* (Unreported, Court of Criminal Appeal, 21st January, 2005), is admissible. Mechanical devices are presumed in law to be working correctly. Perhaps an attempt will be made by the defence to rule such evidence out; that is their entitlement, but perhaps on a re-trial the applicant will call evidence or give evidence himself. Trials may be slightly different when, for whatever reason, they are repeated and that that makes no difference.

22. Finally, the entirely temperate and justifiable remarks of the trial judge are reported when he came to sentence those found guilty of the offences. His Honour Judge Hunt contrasted the victims of the crime as being "the best type of people in our society" with "the spineless criminals who carried out this crime". While there is no doubt that those who carried out the crime behaved in a loathsome way, this does not in any way imply that the applicant was involved. The jury will be told by the trial judge that he is presumed to be innocent.

Juries and the Internet

23. As a mark of deference to the interesting argument of counsel, I wish to briefly refer to the issues that might arise in the course of criminal trials consequent upon almost universal access to the internet in our society.

24. The Law Reform Commission, in a consultation paper published in March 2010 (Law Reform Commission, *Consultation Paper on Jury Service*, LRC CP61-2010, Dublin, 2010), are of the view that dangers can arise to the fairness of a criminal trial because some jurors may be tempted to access the internet. They recommend the creation of an offence, to be inserted into the Juries Act 1976, whereby it will be an offence for jurors to conduct independent inquiries outside the courtroom. They also recommend that it should be an offence for a juror to disclose matters discussed in the jury room. Sensibly, they recommend that a booklet should be provided to jurors indicating why independent investigations or internet searches about a case should never be undertaken by them. This is a good idea and there is no reason why the Courts Service should not prepare brief written guidelines on proper conduct for jurors in consultation with the Judicial Studies Institute.

25. The Law Reform Commission ideas seem to me to be all sensible. The Court has no entitlement, however, with a view to enforcing a recommendation, to make a ruling in favour of an applicant; O' Higgins C.J. put the principle thus in *Norris v. A.G.* [1984] I.R. 36 at 53:-

> "Judges may, and do, share with other citizens a concern and interest in desirable changes in reform in our laws: but, under the Constitution, they have no function in achieving such by judicial decision. It may be regarded as emphasising the obvious but, nevertheless, I think it proper to remind the plaintiff and others interested in these proceedings that the sole and exclusive power of altering the laws of Ireland is, by the Constitution, vested in the Oireachtas. The Courts declare what the law is – it is for the Oireachtas to make changes if it so thinks proper."

26. It follows that the merits of each application are to be judged individually and without regard to any view that a court may have as to whether the law is sensible, might be changed, or that a provisional recommendation of the Law Reform Commission is or is not correct.

27. A study by the Law Commission of New Zealand in 1999, reported on the issue of jury conduct in a paper entitled, '*Juries in Criminal Trials'* (New Zealand Law Commission, *Juries in Criminal Trials*, NZLC PP32) These summarised research findings. These findings strongly support two propositions that are inherent in the relevant decisions within this jurisdiction on adverse conduct by the media during and before criminal trials. Firstly, the paper notes that the passage of time tends to erase any memory which jury members may have of pre-trial publicity. Secondly, it is recorded that juries approach a case in the same way as a judge: they may have heard of the case and, indeed, may be interested in it; when, however, the case begins to unfold they look at it with a fresh mind intent on discovering what the case is about and whether the standard of proof will or will not be met by the prosecution.

28. The Law Commission of New Zealand also reports that individual jurors commonly provide the jury as a whole with their knowledge about issues pertinent to the case. These include the signs of schizophrenia, financial procedures in the construction industry, the street value of cannabis, and the legal procedures for buying and selling property. This information is gleaned from life experience. Jurors cannot be expected to engage in a case as naïve adult children who know nothing. That cannot suit the proper administration of justice. They are entitled and bound to bring their shrewdness and common sense to bear on the evidence in the context of what they know about life, how people behave and the likelihood, or patent lack of likelihood, of events in issue or about allegations put to witnesses during the course of a trial.

29. The study discloses that very few jurors had any pre-trial knowledge of any details of any alleged offence tried by them, or of the allegation that the accused was involved in it, which may have inspired pre-judgment. Each juror who may have read or heard something about a case prior to trial was well able to change their initial view in the context of the evidence. The general direction by trial judges to jurors that they should judge the case only on the basis of the evidence seen and heard in court was well complied with. When publicity occurred during the trial, the approach of the jury was to view themselves as being much better informed than the media about what the true story was. I do not regard this as smug, but as sensible and an indication of a proper assumption of responsibility. In instances where a juror did something out of order and brought in newspapers clippings, they were told by their fellow jury members that they were irrelevant and unwanted. At para. 7.57 of Volume 2, Part 2, of the report, the following occurs:-

> "In summary, therefore, jurors were only warily aware of sufficient details of pre-trial publicity to enable them to form any bias or pre-judgment. When they were, for the most part the reported that they consciously made an effort to put that aside and focus upon the evidence alone; and when they did not, other jurors in the process of collective deliberations generally overrode any individual bias or predetermination. While some other jurors were more affected by media coverage during the trial, there is similarly no evidence that any of the collective deliberations of the juries in the sample were ultimately driven or even influenced by this. It is impossible to know whether this was because the jury took the judge's instructions to heart or because they thought it was unfair or inappropriate to take media publicity into account in any event."

30. A paper by Bell J. of the High Court of Australia entitled, '*How to Preserve the Integrity of Jury Trials in a Mass Media Age*', delivered to the Supreme and Federal Courts Judges' conference in January 2005 nonetheless raises concerns. There have been isolated cases where jurors have conducted internet searches. There have also been cases of potential concern as to racial prejudice. Bell J. tends towards the view that the integrity of the jury system must be clearly seen to operate in the context of criminal trials. With that view, I agree. Two potential solutions are discussed by her in the paper. The first is that the prosecution in pending cases should carry out searches on the internet and in the event that prejudicial material is identified, requests its removal. The second is to have a special form of direction once a jury is sworn in. Her paper also includes as appendices some model forms of warning that might be given to jurors in written or oral form by trial judges hearing cases. These are not very different to what already happens in this jurisdiction.

Responsibility of Director of Public Prosecutions

31. I do not accept that the Director of Public Prosecutions must undertake the duty of sweeping the internet, through extensive searches, and then engaging in correspondence with local and foreign internet service providers with a view to cleansing cyberspace of any potential reference to an accused person whose trial is pending. In *Rattigan v. DPP* [2008] 4 I.R. 639 at 667, Geoghegan J. commented that he found it surprising that the Director of Public Prosecutions did not embark on contempt of court proceedings against certain newspapers. He said:-

> "The prohibiting of a trial by a court cannot be adopted simply to punish the media. The contempt of court laws are more than adequate for that purpose and are the appropriate vehicle to use for that purpose. I find it surprising that the Respondent, who clearly has an interest by virtue of his office in the fair administration of justice in a criminal trial had not, at least up to the time of the hearing of the appeal, embarked on any contempt of court proceedings but left the accused to do so himself. The respondent, of course, would not be bound to bring such proceedings simply at the behest

> of an applicant but there is nothing in the papers before me to indicate that he had formed any particular view or had even adequately considered the matter. In making this comment, I am relying on the affidavits of Mr. Eagar in the various motions. It would seem appropriate for the respondent to adopt a more pro-active role in the area of contempt of court proceedings where adverse pre-trial publicity is concerned."

32. The defence is paid, usually from public funds, to attend to the interests of an accused person. The prosecution has specific duties laid down by law, including the duty of disclosure and of providing information in relation to any convictions that proposed witnesses on their side of the case may have recorded against them. That is entirely within their sphere. The world of the media is not the responsibility of the Director of Public Prosecutions. It has always been the case that the defence have, historically, included among the interests which they see as being required to protect, that of the accused being free from adverse pre-trial publicity. In the event of any particularly unfortunate report before or during a trial, the defence have always sought in aid the ability of the trial judge to ensure a fair trial. This, indeed, occurred during the course of this case and was dealt with in an exemplary and fair manner by the learned trial judge.

Warnings and Directions

33. It is not appropriate that this Court should see as its function the statement of any model warning to a jury panel, prior to individual jurors being sworn to try a case, or to indicate to trial judges what it is appropriate for them to say once the jury have been sworn in and begin to participate in the trial. As a matter of practice, however, trial judges swearing in a jury have tended to read out the indictment to the panel of potential jurors, giving the name and general location of the accused, of the victim, and the place where it was alleged the offence was committed. Generally, the trial judge will then go on to indicate to jurors that if they know the parties, or know anything about the case, or otherwise feel themselves in a position where it is difficult for them to exercise an impartial and objective judgment, that the court should be informed. During the course of argument in this case, counsel for the applicant mentioned a situation whereby other requests by an accused were put to the Circuit Court on swearing in a jury and which, rightly, he deprecates. Apparently, it has been submitted to courts that persons who have suffered in the past from some form of sexual violence have been invited to reveal that fact, contrary to their statutory entitlement to anonymity, to the trial judge and not to sit on the jury. Counsel said that this argument to the judge swearing in the jury had even been extended to anyone who knew someone who had been sexually abused. Since there is no precise evidence of this having occurred, I simply say, out of an abundance of caution, that any such submission is incorrect. People who are the victims of crime are not thereby disenfranchised from serving on a jury. The victims of crime are not to be punished by the criminal trial system. A jury trial is not only an entitlement of the accused person who faces a serious criminal charge; it is also part of the democratic entitlement of every citizen of the State, subject to law, to participate in the trial of serious offences as judicial officers. Those who have suffered from muggings or robberies or sexual violence, or who know people who have been the victims of crime, are as able jurors as those who have escaped the attention of criminals, through good fortune. Why not argue that those who have no personal experience of any kind of crime should never serve on juries? That is not a matter for the courts. The Juries Act 1976, as amended, contains an exhaustive list of those who are ineligible for or disqualified from jury service. That list cannot be added to by judicial decision. Nor is any decision of the Court of Criminal Appeal to that effect, however it may have been misconstrued in a misguided submission. Furthermore, many people would be disenfranchised of their democratic entitlement were such a grave legal error to ever be accepted, much less become entrenched. It must be noted that the responsible survey on the important matter of sexual violence within our community, published as *Sexual Abuse and Violence in Ireland* (Liffey Press, 2002), indicates that over their lifetime, 13% of the female population experience serious sexual violence. The figure in relation to those who are free of any unwanted attention through penetrative abuse, non contact abuse, non penetrative contact abuse, or attempted penetration is just under 60%. In *The People DPP v Marie Norris*, (Unreported, Court of Criminal Appeal, 2nd April, 2009) Finnegan J. explained the position as to the victims of crime serving on a jury clearly at pp. 13 and 14:-

> "In *The People (Director of Public Prosecutions) v Tobin* [[2002] 3 I.R. 469], the appellant was convicted of rape and sexual assault. The foreman of the jury disclosed to the court that during the jury's deliberations a member of the jury had related a personal experience of sexual abuse. The foreman assured the court that it was not affecting the impartiality of that person in any way but explained that the jury believed that they should report the matter to the court. The learned trial judge refused an application to discharge the jury. In the special circumstances of the case applying the objective test the court held that the juror might have been unconsciously influenced by his or her personal experience and for that reason the appellant might not receive a fair trial and the conviction was set aside. The court conducted an extensive review of the authorities in this jurisdiction, in England, in Australia and considered the decisions of the European Court of Human Rights. The court held that it does not follow that such a person as the juror in question is incapable of acting impartially. However, the circumstances of the events disclosed at the trial must have been sufficiently similar to the experience of the juror to cause her to raise her experience with the other members of the jury. In that situation a reasonable and fair-minded observer would consider that there was a possibility that the juror might have been unconsciously influenced by her personal experience and for that reason that the appellant might not receive a fair trial. Other jurors might well be influenced by sympathy for a fellow juror. The issue had been explicitly raised by the juror. Such considerations would not apply to the trial of every type of offence where a juror had undergone a similar ordeal to that with which the trial was concerned. However sexual abuse falls into a special category. Even then, subsequent discovery that a juror had an experience of that kind would not of necessity warrant quashing the conviction. The special circumstance in the case which led the court to its decision is that the concerns were explicitly raised by the jury."

34. The applicant claims that there are special dangers attached to the internet and its abuse during criminal trials by jury members. Undoubtedly that is correct. The dangers identified include that noxious material as to a person's background, if it exists, can be stored and potentially accessed over a long period of time. Further, juries can be composed, in part, of people who pursue internet searches as one of their ordinary forms of entertainment. The print and broadcast media, however, also are redolent of danger for the criminal trial process. Silly comments may appear in the newspaper, and while reading generally, as many adults do every day, one's eyes can be drawn to them. On going along in a car, many people have the radio on and this can mean that there is no escaping a loose or thoughtless comment by a professional commentator or a public participant in a phone-in type programme.

35. Fundamentally, however, there is no reason to believe that juries cannot be trusted if appropriate directions are given to them, perhaps coupled with an explanation as to why this is necessary. There is every indication that they take their task seriously and see it, correctly, as an important and elevated public function.

36. On the subject of a warning to a jury in the context of the commencement of their involvement in the trial process, it has often been the case that the judge warns jurors, either on being sworn in or on the first break, that they must not discuss the case with anyone, that they are not entitled to make their own inquires in relation to the case and that they should judge the case solely on

the basis of the evidence that they hear and see in the courtroom. Recently, many judges have also added a warning that they should not surf the internet in relation to any participant in the case, be they a witness, the judge, counsel or an accused. It could be added that to do so is a contempt of court allowing the imposition of an appropriate, but potentially unlimited, fine or period of imprisonment. Some of the studies cited during the hearing of this case indicate that juries will be more inclined to heed such a direction if they are told of the reason behind it. That makes sense. Beyond recording this observation, I do not feel it is my place to give any advice to trial judges. They can be trusted to exercise the control of trials properly. Juries are to be trusted to act judicially.

Result

37. The application is refused. It is no part of the function of the Director of Public Prosecutions to surf the internet and to find and to attempt to deal with any observations concerning an accused facing a criminal trial. Pre-trial publicity, to be taken notice of by a court, must involve a statement or necessary implication that an accused facing a criminal trial is guilty of the offence with which he is charged. The material in this case comes nowhere near to meeting that test. No one in the media has suggested or implied that the accused is either guilty or innocent: there has been no usurpation of the function of the jury. There is no risk of an unfair trial. As to what warnings and directions are appropriately to be given by the trial judge to the jury hearing this case, that is a matter for the trial judge.