[2019] IEHC 221

THE HIGH COURT

2018 No. 910 JR

Between:

X

Applicant

– and –

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

JUDGMENT of Mr Justice Max Barrett delivered on 3rd April, 2019.

I. BACKGROUND

1. The applicant is facing trial for 105 charges of historical sexual abuse, which abuse is alleged to have occurred between 1971 and 1982, and to have been committed against a relative who was between 6 and 18 years of age at the time of the alleged offences. The offences are alleged to have occurred in the applicant's home, in outdoor locations in and around that home, and in various motor vehicles owned by the applicant. The charges are drawn from what are claimed to be thousands of instances of abuse over the period aforesaid.

2. The complainant made three statements to An Garda Síochána one on 12.12.2016 and two on 22.12.2016. In one of the latter statements he touches on why he took the time he did to complain about the alleged abuse:

> *"About three to four years ago, throu*gh [a named counselling service]…*I spoke to their Child Protection Officer….I told her about the abuse but that I wasn't ready to report it officially. I think* [the Child Protection Officer]….*put through a report without my name about* [the applicant]….*I found out about* [that] *a year or so ago. I found out that my cousin brings her son up there* [to the applicant's house], *he's about 5 or 6. I contacted* [the Child Protection Officer] *and told her about my cousin's child being up there. I then contacted* [a named staff member of another domestic abuse support service]…*and told her about my cousin's child being up there.* [That staff member]…*said she would have to report it. I decided at this stage to make a complaint. I was afraid to report…before. I had so much going on in my life. I'm only two years out of a very abusive marriage. This is the final part of the jigsaw and I keep thinking of that young lad being up there. I think if somebody had to do something like that for me…I mighten* [*sic*, presumably 'mightn't'] *have…suffered the abuse. I have told my sisters…about 2 years ago….what* [the applicant] *did to me. I also told two friends of mine….I didn't go into details with them….I attend Dr* [A*], my GP., I think I told him about the sexual abuse. I did attend a counsellor*, [named*]….I saw her for three years but I haven't seen her in the last two years. I have also confided in* [the Child Protection Officer and the domestic abuse support service staff member referred to above]".

3. So, on his account, the complainant came forwards as a result of a sequence of events that transpired after he became concerned about what he perceived to be a risk of sexual abuse to a young child. The court of course makes no finding as to whether or not this evidence is true and/or whether or not such risk in fact presented.

4. Returning to the chronology of alleged events, the complainant alleges that when he was 6 or 7 years of age, the applicant engaged in unlawful behaviour with him for the first time. The complainant states that this alleged incident took place in the applicant's then motor-car. The complainant claims that alleged unlawful behaviours occurred more than once in the said motor-car, as well as in other motor-cars owned by the applicant. The complainant claims to recall certain details of the various motor-cars.

5. The complainant alleges that the applicant would also bring the complainant to the applicant's bedroom, in the applicant's family home. The complainant claims that at the time of such occurrences, his grandmother would be in the house or out at a social event. He alleges that his aunt would be present in the house or visiting neighbours. His statements to the gardaí include a description of the applicant's bedroom and certain alleged unlawful behaviours that transpired there.

6. The complainant alleges that if the applicant was driving him home, he (the applicant) would pull into a gateway on a roadway leading to a named location and allegedly engage in further unlawful behaviour. The complainant alleges that these alleged unlawful incidents occurred once a week during school terms and were more frequent during school holidays, when the alleged abuse would occur every day.

7. The second statement of the complainant refers to the alleged unlawful behaviour as having continued until he was 17 or 18 years of age. The complainant states that he began working for the applicant on leaving secondary school, that he would be picked up from home and dropped off by the applicant each night, which could often be late. The complainant states that a number of people worked for the applicant, including named persons B, C, D and E.

8. The complainant, in his second statement, also alleges that the applicant engaged in unlawful behaviour with him at the back of the applicant's house, the alleged abuse taking place in a particular room on an almost daily basis from the time that the applicant was 15½ years of age until he was 17 or 18 years of age. He also repeats his claim that the alleged incidents occurred in the applicant's motor vehicle, bedroom and the particular room aforesaid. The complainant maintains that the applicant also drove the complainant down a country road, a short distance from the applicant's home, passing a house that had either been burnt down or was never completed, and would there engage in unlawful behaviour with the complainant. The complainant alleges that this happened numerous times.

9. The applicant, who would have been a minor himself for a portion of the alleged period of offending, denies that he committed the alleged offences.

II. RELIEFS SOUGHT

10. The applicant seeks the following principal reliefs: (1) an injunction restraining the respondent from prosecuting the applicant for the alleged offences with which he has been charged; (2) an order of *certiorari* of the District Court order sending the applicant forward for trial in the Circuit Court; (3) a declaration that the respondent's prosecution of the applicant for the alleged offences with which he has been charged, after a period of between 37 to 48 years has elapsed amounts to a disproportionate interference with

the applicant's rights, as guaranteed by the Constitution and the ECHR; (4) a declaration that given the inordinate, inexcusable and unjustifiable delay in the prosecution of the alleged offences, the further prosecution of the applicant would involve a breach of his right to an expeditious trial and right to a fair trial, as guaranteed by the Constitution and the ECHR; and (5) an order pursuant to O.84, r.21, of the Rules of the Superior Courts, granting the applicant an extension of time for the purposes of bringing his application for judicial review.

III. GROUNDS FOR RELIEF SOUGHT

11. *Delay*. The applicant maintains, *inter alia*, that: (i) the prosecution of the alleged offences should be prohibited on the grounds that the respondent has not brought the prosecution against the applicant with reasonable expedition; (ii) unless the prosecution is stopped, his constitutionally protected right to an expeditious trial and his right to a fair trial will be breached; (iii) the delay presenting renders the applicant's case a very old one, yielding a serious and fundamental risk of an unfair trial; (iv) the delay between the alleged commission of the offences and the prosecution of the applicant diminishes the public interest in prosecuting the applicant; (v) specific prejudice is caused to the applicant by the delay in the making of the complaint, due to the difficulty in establishing what was referred to at hearing as an 'island of fact' surrounding the allegations; and (vi) the alleged failure by the respondent to take all necessary steps to ensure that the charges and trial were progressed with expedition, once the complainant made his statements, breached the heightened duty cast upon the respondent to ensure a speedy trial, where there has been pre-existing complainant delay.

12. *Identifiable Prejudice*. The applicant points to the fact that:

> (i) charges 8-31 in the book of evidence are alleged to have occurred at unknown locations between 1976-77. The applicant claims that the absence of date specificity and location hinders his ability to mount a defence to the allegations made and that his right to fair procedures consequently cannot be guaranteed if he is prosecuted for such offences. He maintains that the absence of adequate detail in this regard creates unavoidable prejudice to him as he is prevented from challenging the veracity of the allegations, due to the minimal detail offered.
>
> (ii) the complainant maintains that he was the subject of unlawful behaviour in the applicant's home at a named place; however, this residence was shared by the applicant with his parents (deceased) and a sister (deceased), with the result, the applicant claims, that he is prejudiced by the loss of evidence that those witnesses might have given. The applicant likewise points to no statement having been obtained from a surviving sister, who also lived in the said home for a portion of the period during which the alleged offences occurred.
>
> (iii) emphasis is placed throughout the book of evidence on various motor-vehicles that the applicant is alleged to have possessed between 1971-82, with certain of the alleged offences claimed to have taken place in such vehicles. The alleged prejudice facing the applicant in challenging the credibility of the complainant's allegations in this regard is complicated, the applicant claims, by his having difficulty in identifying what vehicles he possessed on the said dates (the nature of his trade being such that he had many motor vehicles over the years). It appears to be common case that there are no State records available indicating what vehicles were owned and when.
>
> (iv) a number of people (B, C, D and E) were employed by him at the premises where the alleged criminal conduct is said to have occurred. Statements have been included in the book of evidence from B (who refers in his statement to another employee, G) and C; however, no statement has been included from any of D, E or G. The applicant maintains that the absence of statements from all of Witnesses B-G deprives him of potentially exculpatory evidence.
>
> (v) administration at the work premises was poorly organised and there is an absence of available documentation to identify the hours various employees would have been at work. He points also to the fact that certain of his business records were destroyed in a fire in the late 1970s.

13. *Right to a Fair Trial*. The applicant claims, *inter alia*, that: (i) the respondent's decision to prosecute him for alleged historical offences after many years have elapsed between the dates of the alleged commission of same, poses a serious, substantial and real risk to his receiving a fair trial; (ii) the alleged prejudice suffered by him is aggravated by the respondent's allegedly failing to seek out material evidence that could assist the applicant in challenging the respondent's case, should the matter proceed to jury trial; (iii) he is prejudiced in the prosecution by the loss of potentially exculpatory witnesses who are now deceased, by the fading and incomplete memory of the applicant and by the loss of evidence in the period between the alleged commission of the offences and today; (iv) he has been prejudiced, per the statement of grounds, "*by the failure of An Garda Síochána, enjoying their unique investigative role, to obtain all the potentially relevant statements, which could assist the applicant in mounting a challenge to the complainant's allegations*", with (v) the cumulative effect of the alleged prejudice identified at (i)-(iv) being that the applicant is facing a real, serious and unavoidable risk of an unfair trial.

14. Health. The applicant also claims that his health has been compromised due to the additional stress of the proposed prosecution against him, at such a remove from the time of the alleged offences.

IV. EXTENSION OF TIME

15. This application was commenced two months out of time. (The applicant was returned for trial on 06.06.2018 and the leave application was moved on 05.11.2018). Although leave to bring the application was granted, the question of time was expressly left over until both sides were represented. Thus it falls to this Court to determine whether to grant the extension of time sought.

16. Order 84, rule 21(1), RSC, provides that *"An application for leave to apply for judicial review shall be made within three months from the date when grounds for an application first arose"*. Here, as mentioned, the judicial review proceedings were brought a full two months out of time, *i.e*. two-thirds again of the three-month period allowed for the bringing of the proceedings. However, O.84, r.21(3), RSC, provides, *inter alia*, that *"Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made",* which extension can only be granted if the court is satisfied, *inter alia*, that "*there is a good and sufficient reason for doing so*". The Supreme Court in *MOS v. The Residential Institutions Redress Board and ors* [2018] IESC 61 emphasises the traditional idea that in approaching an application for extension the interests of justice remain the overarching test. In this regard, the court would make a number of observations:

> (1) the delay in commencing these judicial review proceedings seems to the court to be particularly egregious in a case where delay is the very subject of the application, and the applicant was treating with lawyers all the way through the District Court and onwards;

(2) it was suggested that a reason for the delay was that the applicant sought to engage fully with the disclosure process; however, it is not accepted by the court that the applicant required to be in receipt of every item of disclosure before the decision whether or not to bring the within application could be considered and reached; moreover, to the extent that complaint is made as to the receipt of original Garda notes (in practice, often not disclosed in advance of the trial) and medical notes, the court does not see that the disclosure of these materials had any bearing on the issues raised in this application, which is primarily concerned with the issue of delay;

(3) there is, notably, an alternative remedy open to the applicant, being the ability to make his application to the trial judge;

(4) notwithstanding the lapse of time between the alleged offences and the making of complaint, the court does not see any prosecutorial or other culpable delay on the part of the respondent (nor any significant or unexplained delay on the part of the gardaí) to present;

(5) the failure of the applicant to act within a prescribed limitation period does not in any event fall to be balanced against any (if any) delay by the respondent;

(6) the complainant enjoys the right under the Criminal Justice (Victims of Crime) Act 2017 to a timely disposal of his complaints and an expeditious prosecution, rights that fall to be factored in when deciding whether to exercise the discretion to grant leave (admittedly this would seem a lesser factor where, as here, the court has in any event heard the substantive judicial review application and gives judgment on same in the same judgment as the judgment on whether to grant an extension of time);

(7) although the applicant has a constitutional right to an expeditious trial, he does not have a right to enforce that constitutional right by way of judicial review where he does not move with the expedition required in the bringing of judicial review proceedings;

(8) the court does not see that "*good and sufficient reason*" for granting an extension of the time for bringing the within application has been advanced by the applicant, nor does the court see that the interests of justice require that such an extension be granted.

17. For the reasons aforesaid, the court declines to grant an extension of time for the bringing of the within application. It is therefore out of time and must fail for that reason. Although the court could end its judgment at this point, it proceeds hereafter, and without prejudice to its findings as to the extension of time, to consider the substantive issues raised in the applicant's application. That way, if the court's judgment is appealed, the entirety of the proceedings will be capable of being ruled upon on appeal, thus minimising any exacerbation of the delay that presents between the occurrence of the alleged offences and the pending trial of the applicant.

V. SOME APPLICABLE LAW

18. Overview. As long ago as *K v. Judge Moran and anor* [2010] IEHC 23, para.9, Charleton J., then a High Court judge, was moved to observe that "*In all of these* [prohibition of criminal prosecution] *cases a multitude of decisions are opened to the Court*". The within application has been no different. The court has been referred by counsel in their submissions to an abundance of relevant case-law, including but not limited to *JO'C v. DPP* [2000] 3 IR 478, *DC v. DPP* [2005] 4 IR 281, *SH v. DPP* [2006] 3 IR 575, *PO'C v. DPP* [2000] 3 IR 87, *McFarlane v. DPP* [2007] 1 IR 134, *PT v. DPP* [2008] 1 IR 701, *MU v. DPP* [2010] IEHC 156, , *SO'C v. DPP* [2014] IEHC 65, *MS v DPP* [2015] IECA 309, *BS v. DPP* [2017] IECA 342, *BO'S v. DPP* [2017] IEHC 687, *MO'S v. The Residential Institutions Redress Board and ors* [2018] IESC 61, *AT v. DPP* [2019] IEHC 54, *DPP v. H* (Unreported, Court of Appeal, 8th February, 2019), and *RAS Medical Ltd t/a Parkwest Clinic v. RCSI* [2019] IESC 4.The distillation of principle in *K,* certain of the observations in *MS*, and the recency of the judgment in *DPP v. H* has meant that those three authorities were of especial use to the court. They are considered in a little detail immediately hereafter, with other propositions of interest from the above case-law also being touched upon later below.

19. *K.* The judgment in *K v Judge Moran and anor* concerned an application to prohibit the trial of criminal charges on grounds of delay. The applicant claimed that the delay had caused such prejudice that there would be a real risk he would not obtain a fair trial, "*notwithstanding the presumption that the trial Judge will give appropriate directions as to the law and warnings as to the evidence*" (*K*, para.1). Additionally, the applicant in K claimed to have a mental disability and so urged the court that his case was "*one of those now rare cases where it would be unfair to allow the trial to proceed*" (*K*, para. 1). A couple of points immediately jump out from the just-quoted text: (1) the significance Charleton J. attaches to the trial judge's directions/warnings; and (2) his reference to it being "*rare cases*" where "*it would be unfair to allow* [a]…*trial to proceed*". But what makes Charleton J.'s judgment of especial interest is his distillation, at para.9, in the following terms, of the legal principles applicable to an application such as that now presenting:

> "*(1) The High Court should be slow to interfere with a decision by the Director of Public Prosecutions that a prosecution should be brought. The proper forum for the adjudication of guilt in serious criminal cases is, under the Constitution, a trial by judge and jury;* DC v. DPP *[2005] 4 I.R. 281….*
>
> *(2) It is to be presumed that an accused person facing a criminal trial will receive a trial in due course of law, one that is fair and abides by constitutional procedures. The trial judge is the primary party to uphold the relevant rights which are: the entitlement of the accused to a fair trial; the right of the community to have serious crime prosecuted; and the right of the victims of crime to have recourse to the forum of criminal trial where there is reasonable evidence and the trial can be fairly conducted;* PC v. DPP *[1999] 2 I.R. 25…and* The People (DPP) v JT *(1988) 3 Frewen 141.*
>
> *(3) The onus of proof is therefore on the accused, when taking judicial review as an applicant is to stop a criminal trial. That onus is discharged only where it is proved that there is a real risk of an unfair trial occurring. In this context, an unfair trial means one where any potential unfairness cannot be avoided by appropriate rulings and directions on the part of the trial Judge. The unfairness of the trial must therefore be unavoidable*; Z v. DPP [1994] *2 I.R. 476….*
>
> *(4) In adjudicating on whether a real risk occurs that is unavoidable that an unfair trial will take place, the High Court on judicial review should bear in mind that a District Judge will warn himself or herself, and that a trial Judge will warn a jury that because of the elapse of time between the alleged occurrence of the facts giving rise to the charges, and the trial, that the accused will be handicapped by reason of the lack of precision in the presentation of the case, and the disappearance of evidence such as diaries, or potentially helpful witnesses, or by the normal failure of memory. This form of warning is now standard in all old sexual violence cases and a model form of the warning, not necessarily to be repeated in that form by all trial Judges, as articulated by Haugh J. is to be found in the decision of the Court of Criminal*

Appeal in The People (DPP) v. EC *[2006] IECCA 69.*

(5) The burden of a proof on an applicant in these cases is not discharged by merely making a general allegation of prejudice by reason of the years that have elapsed between the alleged events and the commencement of the criminal process. Rather, there is a burden on such an applicant to fully and actively engage with the facts of the particular case in order to demonstrate in a specific way how the risk of an unfair trial arises; CK v. DPP *[2007] IESC 5 and* McFarlane v. DPP *[2007] 1 IR 134….*

(6) Whereas previously the Supreme Court had focused upon an issue as to whether the victim could not reasonably have been expected to make a complaint of sexual violence against the accused, because of the dominion which he had exercised over her, the test now is whether the delay has resulted in prejudice to an accused so as to give rise to a real risk of an unfair trial; H. v. DPP [*2006] 3 I.R. 575….*

(7) Additionally, there can be circumstances, which are wholly exceptional, where it would be unfair or unjust to put an accused on trial. Relevant factors include a lengthy elapse of time, old age, the sudden emergence of extreme stress in consequence of the charges, and which are beyond that associated with the normal stress that a person will feel when facing a criminal charge and, lastly, severe ill health; PT v. DPP *[2007] IESC 39.*

(8) Previous cases, insofar as they are referred on the basis [of] facts that are advocated to be similar, are of limited value. The test as to whether a real risk of an unfair trial has been made out by an applicant, or that an applicant has established the wholly exceptional circumstances that had rendered unfair or unjust to put him on trial, are to be adjudicated in the light of all of the circumstances of the case; H v. DPP *[2006] 3 I.R. 575….*

(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. PT *[2007] IESC 39 and* Sparrow v Minister for Agriculture, Food and Fisheries *[2010] IESC 6."*

20. The above-quoted text makes clear just how formidable a task faces an applicant hoping to succeed in an application of the type now presenting. So, for example, Charleton J. states that the High Court should be "*slow to interfere*" with a decision by the DPP that a prosecution should be brought, he points to the presumption "*that an accused person facing a criminal trial will receive a trial…that is fair and abides by constitutional procedures",* he notes that it is the trial judge, not the court engaged in judicial review, who is the "*primary party to uphold the relevant rights*", perhaps most notably he observes that "[t]*he unfairness of the trial must…be unavoidable*", *i.e.* incapable of being avoided by appropriate rulings/directions on the part of the trial judge (a strikingly high threshold). These and Charleton J.'s other observations perhaps point to why he observes, in *K*, para. 1, that it is now only in "*rare cases where it would be unfair to allow the trial to proceed*". The jurisdiction which the applicant asks the court to bring to bear in this application is an exceptional jurisdiction and falls only to be applied in exceptional circumstances. The court does not see that such circumstances present here.

21. In passing, the court notes that Charleton J.'s eighth observation has a particular resonance in these proceedings, it being put to the court by counsel for the applicant that the court is bound, as a matter of precedent, to find in favour of the applicant, given the recent decision of Simons J. in *AT v. DPP* [2019] IEHC 54. But, as Charleton J. makes clear, ultimately "[t]*he test as to whether a real risk of an unfair trial has been made out by an applicant, or that an applicant has established the wholly exceptional circumstances that had rendered unfair or unjust to put him on trial, are to be adjudicated in the light of all of the circumstances of the case* [presenting]". *AT* was decided on the circumstances of that case; the within application is being decided on the circumstances of this case. The court does not see any factor presenting in *AT* that would incline it to reach a different conclusion on any aspect of the within application from that which it has reached.

22. *MS*. In *MS v DPP*, the applicant was a retired consultant surgeon facing a multiplicity of charges of indecent assault following allegations from multiple complainants. The alleged offences were said to have occurred on various dates between 1964 and 1991. The applicant sought orders restraining prosecution on three grounds, one of which was delay in the bringing of the charges. Given that the applicant's case in the present proceedings is to, a significant extent, that the lapse of time is too great for the prosecution of the applicant to proceed, the following observations of Hogan J. are of especial interest, as are his follow-on observations as to the nature of the prejudice for which the courts nowadays will look:

***"Is the lapse of time simply too great*?**

21. The applicant's case is, in effect, that the lapse of time is simply too great. If this argument were to be accepted, however, it would mean in effect that the courts could simply impose some ex ante limit in respect of prosecutions of this kind. Unlike civil cases where even if the action is not actually statute-barred, questions of inordinate and inexcusable delay can nevertheless be measured by analogy with the Statute of Limitations, it has to be recalled that the Oireachtas has not seen fit to prescribe a limitation period governing prosecutions on indictment. As Murray C.J. observed in SH *([2006] 3 I.R. 575, 621):*

> 'There is no doubt that difficulties arise in defending a case many years after an event. However, the courts may not legislate [and] the courts may not take a policy decision that after a stated number of years an offence may not be prosecuted. Also, as the legislature has not itself established a statute of limitations [for offences tried on indictment] that itself may be viewed as a policy of the representatives of the People. Thus each case falls to be considered on its own circumstances.'

22. As O'Malley J. was later to observe in PB v. Director of Public Prosecutions [*2013] IEHC 401:*

> 'The point of the decision in *SH* and the authorities that followed is that the difficulties caused to a defendant in cases of old allegations (and I do accept that there can be very real difficulties) are best dealt with in the court of trial. Trial judges are now accustomed to dealing with such cases and using such powers as are necessary to

> prevent injustice to accused persons. It is perfectly clear that a trial judge is not restricted to simply giving warnings to the jury but may, where necessary in exceptional cases, withdraw the case from the jury on the basis that the difficulties for the defence are such that it is not just to proceed. Such a decision, in the normal course of events, will often be better taken in the light of the evidence as actually given rather than as speculated about in judicial review proceedings.'
>
> *23. It is accordingly clear from* SH *and* PB *that it is not open to this Court to announce that after a stated period of years an offence may not be prosecuted. This is so even where the periods of time involved are, when judged by the ordinary standards of the criminal justice system, extraordinarily long. No one can deny that the ability of the judicial system to discharge the mandate conferred by Article 34.1 of administering justice is hampered by such delays. It is equally plain that one of the objectives of the guarantee of the right to trial in due course of law in Article 38.1 – namely, minimising the risk of miscarriages of justice – is sometimes put to the test by delays of this kind.*
>
> 24. *Few, therefore, can view with any enthusiasm the prospect of a trial after intervals of more than forty years and, in some cases, even fifty years in the light of these considerations. But it is clear from SH and, indeed, from the judgment of O'Malley J. in PB (and affirmed on appeal by the Supreme Court) that there is no ex ante rule in this regard. While the interval between the date of the alleged offences and any subsequent trial is extremely long, I cannot say that these delays in themselves necessarily prevent the trial of these charges.*

Does the applicant face likely prejudice as a result of a trial after such a lapse of time?

> *25. The subsequent case-law also suggests that questions of potential prejudice by reason of lapse of time have also been re-evaluated in the wake of* SH. *As O'Malley J. observed in* PB, *experience has shown that in many cases, questions of prejudice are best addressed by trial judges in the light of the evidence actually given in the course of the trial.*
>
> *26. While acknowledging the real difficulties presented by the prosecution of bare assertions countered by bare denials after such a lapse of time, the courts have generally required applicants to demonstrate more specific types of potential prejudice than might have previously been the case."*

23. At least five points of note arise from the foregoing, *viz*. that (1) the difficulties caused to a defendant in cases of old allegations are best dealt with in the court of trial, (2) trial judges are now accustomed to dealing with such cases and using such powers as are necessary to prevent injustice to accused persons, (3) a trial judge is not restricted to simply giving warnings to the jury but may, where necessary in exceptional cases, withdraw the case from the jury, (4) a potential decision of the type referred to in (3) is often better taken in the light of the evidence as actually given rather than as speculated upon in judicial review proceedings, and (5) even if the interval between the date of alleged offences and any subsequent trial is extremely long, such delays in themselves will not necessarily prevent such trial.

24. Again, as in *K*, one can see in the above the uphill struggle that any applicant will face in terms of succeeding in an application of the type now presenting.

25. *DPP v. H*. The decision of the Court of Appeal just a few weeks ago in *DPP v. H*, a case where the appellant faced 16 charges concerning historical sex offences involving a multiplicity of complainants and involving matters that dated back 45-50 years, also includes some useful observations on the lapse of time, the public interest in the prosecution of serious offences and the type of analysis to be brought to bear in terms of any assessment of prejudice. *Per* Edwards J:

> *"110. The delay in this case, being close to 50 years, is one of the longest that the courts have encountered. However, be that as it may that fact alone would not necessarily, in and of itself, justify the prohibiting of the appellant's trial. There is a public interest in this trial proceeding, notwithstanding that the matters complained of are said to have occurred a very long time ago, but that can only happen provided that the appellant can receive a fair trial.*
>
> *111. The parties on both sides are agreed that the relevant test is that enunciated in* SH v. Director of Public Prosecutions [*2006] 3 IR 575, namely 'whether the delay has resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial.' Moreover, the decision in SH holds open the possibility that, in addition to identifiable specific prejudice that meets the required threshold, the threshold can also be met, at least in principle, by general prejudice, or a combination of general and specific prejudices, where it amounts, or they amount, to 'wholly exceptional circumstances where it would be unfair or unjust to put an accused on trial'.*
>
> *112. The jurisprudence makes clear that any judicial consideration of a claim of prejudice relied upon to prohibit a trial, requires a rigorous analysis of the overall circumstances in which the case is brought, including engagement with the currently available evidence".*

26. In this last regard, the court notes that for a court to conduct such a rigorous analysis, it must be placed by an applicant in a position where it can do so.

VI. SOME CONTENTIONS CONSIDERED

27. *Absence of Specificity/Location re. Charges 8-31.* There is a certain lack of geographic particularity in the referenced charges. However, they are not entirely wanting. So, for example: there is reference to a gateway into which the applicant would allegedly pull his car when dropping the complainant home; there is a description of the relevant stretch of road and where it led; but what is most striking is that the complainant, on his own account, did not know exactly where this location was *even at the time the offences occurred*. So nothing has been lost as a result of the elapse of time. As counsel for the DPP noted at hearing, even if the trial had taken place a week after the alleged events, the same description of the location of the alleged offence would have been provided. So in this regard the applicant is facing the same case now that he would have faced even in the immediate aftermath of the alleged events. That the complainant has always been unable to be more specific is not a basis for declining to allow the trial to proceed at this time.

28. *Death of Witnesses*. The applicant complains that he is prejudiced by the absence of evidence that his late father, mother and sister might have given, in particular as to their presence in the house where certain of the alleged offences are said to have occurred. The court does not see that this is so. For starters, the complainant has not suggested that any of the offences were witnessed by any of the said deceased persons, so it is difficult to see how their absence causes the necessary prejudice.

Additionally, in an interview with the gardaí, contained in the book of evidence, the following exchange occurs between the applicant and an interviewer: *"Q. Would* [the complainant]*…be in your bedroom?/A. He was often in the room./Q. Would you be in the room when he was there?/A. Probably."* So even the applicant agrees that the complainant was often in his bedroom and that he himself was also probably there. It is in this context that the credibility of what the complainant alleges will fall to be tested at trial. This is not a case where the applicant says that he could never have been alone with the complainant.

29. In passing, the court notes the medical evidence before it that the applicant's late sister "*suffered from an intellectual disability*". So, in particular when it comes to her, there seems little reality to the contention that her absence has caused the applicant serious prejudice. In truth it is unlikely that she would have been tendered as a witness.

30. *Absence of Evidence from Complainant's Mother*. The court is somewhat mystified by the prejudice claimed in this regard. The complainant's late mother (who died as the garda investigation proceeded) receives no mention in the statement of grounds. Moreover, she lived some distance from the applicant's house, so it is not clear what evidence, apart from the most speculative of evidence, she could have given. No offence is claimed to have taken place at her home; they are alleged to have taken place about 10 km away. It is claimed that the complainant's mother could have given evidence as to whether there was any opportunity for the applicant to be alone with the complainant but this is not in issue. Moreover, the complainant's father is alive and has given a statement, yet there is no engagement with this fact by the applicant.

31. *Absence of Evidence from D, E and G.* It emerged at the hearing that D is in London and has not yet proven contactable, E has suffered a brain seizure and is apparently not capable of giving a statement, and G, for whatever reason, has declined to make a statement (though he can always be asked by the applicant to give evidence on his behalf, if the applicant believes that G has relevant evidence to give). Given the foregoing, only a statement from D is absent. Work is ongoing on the investigation and if any statement is obtained it will be disclosed. And there is, of course, evidence from B and C.

32. *The Applicant's Motor Vehicles*. It appears to be common case between the parties that no State documents are available evidencing what vehicles were owned by the applicant and when. However, while the applicant claims to have difficulty in identifying what motor vehicles he owned between 1971 and 1982, he undoubtedly recalls owning three of the motor vehicles that have been identified by the complainant as motor vehicles in which certain of the alleged offences transpired. In this regard the court notes the following averment of the investigating garda:

> *"The Applicant refers to the various vehicles which have been mentioned by the Complainant in his statements (and indeed the existence of which has been corroborated to a significant degree by the statements in the Book of Evidence of* [C]*…and* [D]*…who worked in the Applicant's…*[business premises]). *His claim that he is prejudiced as he has 'encountered difficulty in establishing ownership of the vehicles' must be regarded with some scepticism…..*.[Of] *significance is the fact that at interview the Applicant did not state that he could not remember the cars which he owned or that this caused him any difficulty. At page 81 in the Book of Evidence he agrees that he owned* [(1) a stated brand of car of a stated colour]…[(2) another stated brand of car of a stated colour]…[(3) another stated brand of car] *…and* [(4) another stated brand of car]. *Consequently, there is no reality to the prejudice he alleged in this regard."*

33. The court respectfully agrees with this reasoning. The position in this regard is unaffected by the fact that the applicant's business premises was poorly organised administratively; his administrative failings do not per se offer a basis for prohibition. As to the fire in 1979, the applicant has failed to demonstrate that as a result of same there are records of relevance that would otherwise have been available to him and which are no longer available.

34. *Ill-Health*. Even if one takes the applicant's medical evidence at its height, *i.e*. ignoring any issue claimed by the respondent to present as regards his health, the court does not see that exceptionality to present which the Court of Appeal in *DPP v. H* (para.101), and indeed Charleton J. in *K* (para.9), contemplate as the type of ill-health that would need to present before prohibition could issue on this ground.

VII. CONCLUSION

35. This application stumbles at the very first hurdle in that it has been brought out of time and the court sees no reason to grant an extension of time for the bringing of the application. Even if the foregoing were not so, the applicant's application would in any event have failed. This is because the court does not accept, for the reasons outlined above, that the applicant has discharged the onus of proof upon him to prove that there is a real risk of an unfair trial occurring. (The court is especially mindful in this regard of the warning, referenced in *K*, as to the elapse of time, etc. that will issue at trial and also of the sheer breadth of the trial judge's powers as referenced by O'Malley J. in *PB*). Nor, even taking the applicant's case at its height and ignoring any evidential difficulties contended for by the respondent in this regard, does the court consider that the ill-health contended for by the applicant approaches the nature and level of ill-health which would justify the court's now granting any of the reliefs sought. Notwithstanding that the interval between the date of alleged offences and the pending trial is long, it is clear, *inter alia*, from *MS*, that such delay in itself will not necessarily prevent such trial and here, for the reasons aforesaid, it does not. (The court cannot but also note in passing that even if matters were otherwise and it considered this to be a case where the reliefs sought might issue – and it clearly does not so consider – there would still have been a significant additional difficulty for the applicant to overcome before relief could have issued, being that slowness, to which Charleton J. refers in *K*, that a court should manifest when it comes to interfering with a decision by the DPP that a prosecution should be brought).

36. Given the foregoing, all the reliefs sought are refused.