Neutral Citation: [2014] IEHC 65

THE HIGH COURT

JUDICIAL REVIEW

Record No: 2012/848 JR

BETWEEN:

S. Ó'C.

APPLICANT

-AND-

DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Ms Justice Iseult O'Malley delivered the 7th February, 2014.

Introduction

1. In this case, the applicant seeks injunctive relief relating to the pending prosecution against him of 159 counts of indecent and sexual assault, alleged to have been committed between 1981 and 1993, and a single count of rape alleged to have been committed in 1987. He also seeks a declaration that the respondent has failed to provide him with a trial with due expedition and damages for breach of his rights under the Constitution and under the European Convention on Human Rights.

2. The charges relate to one complainant, a sister of the applicant's wife, who was born on the 301h January, 1975 and at the relevant times was aged between five and eighteen years of age. The applicant was born in 1952 and is now sixty-one years of age. He is a former schoolteacher, having retired on health grounds in 1998.

3. The applicant has sworn an affidavit in which he verifies the Statement of Grounds in this application and denies the allegations made against him. He claims that the delay in prosecuting him has prejudiced him in his defence to the extent that there is a real risk of an unfair trial which could not be remedied by the rulings or directions of a trial judge. It is alleged that there is specific prejudice in that the delay has led to the loss of certain evidence.

4. In particular the applicant has pointed to the death of a psychiatrist to whom the complainant says she spoke in relation to the events; the inability of the complainant's referring GP to remember any mention by her of sexual abuse; the lack of any medical records or notes relating to a miscarriage the complainant may have had in 1990 or 1991; and the loss or destruction of notes belonging to a humanistic and integrative psychotherapist attended by the complainant. The applicant says that the loss of such information results in actual and specific prejudice to him. It is further argued in relation to certain of these matters that there has been a failure on the part of the Gardaí to seek out and preserve relevant evidence.

5. The applicant was originally charged on the 21st February, 2011. It was considered necessary to amend the charges and he was recharged with the offences set out in the Book of Evidence on the 13th June, 2011. The Book was served, and he was returned for trial to the Central Criminal Court, on the 23rd September of that year.

6. Leave to seek judicial review was granted by Peart J. on the gth October, 2012.

The evidence

7. Between the 7th January, 2009 and the 23rd September, 2011, when the Book of Evidence was served, the complainant (hereafter "C.") made six statements to the investigating Gardaí. The statement of her proposed evidence as set out in the Book is therefore a composite, redacted version of these statements. The first statement begins with the assertion that "*numerous assaults, indecency and rapes*" had been perpetrated against her but this sentence has been redacted from the Book.

8. In the statement C. describes how the relationship between her sister and the applicant developed when she herself was a small child. He became a regular visitor to the family home and C. often spent time with the couple. The applicant often put her to bed and told her a story.

9. C. makes it clear that she felt great esteem and affection for the applicant as she grew up. Her father had left the family home some years earlier and she saw the applicant as, to some extent, taking his place. She was also very close to her sister.

10. It was in these circumstances that the initial alleged sexual behaviour began to occur, with the applicant fondling C.'s vaginal area. According to C., this happened, at a minimum, once a week between 1981 and 1983 or 1984. In that year the applicant and C.'s sister bought a house together. After they had purchased the house she often stayed there overnight.

11. Over the following years, it is alleged, the applicant continued to engage in this type of sexual behaviour and progressed to digital penetration. He is also described as making both C. and other children visiting the house strip naked in his presence. He would on occasion get into C.'s bed naked. She describes what she refers to as attempted rapes occurring about once every two weeks. An incident of actual rape is alleged to have occurred in 1987. This is the only description in the Book of an act of penetrative intercourse. Thereafter, she says that the applicant continued to sexually assault her about once a fortnight.

12. As already noted, in the original, unredacted statement C. had referred to "rapes" in the plural, although only one such incident, in 1987, had been described. In a subsequent statement, served by way of Notice of Additional Evidence on the 3rd September, 2012, she said that following that incident, she and the applicant had sex "countless" times.

13. C. says that in "the summer of 1990-1991" she was in the Gaeltacht and had to see a doctor because she had stomach pains and was passing blood. The doctor, whose name she did not recall, suggested to her that it might have been an early miscarriage. The

applicant does not in her statement give any indication as to how she might have become pregnant but she does say that in 1991 she began a relationship with another adult man, whose name she gave to the Gardaí. According to her, this relationship terminated at the behest of the applicant.

14. The investigating garda succeeded in identifying the relevant health centre but there was no record of C.'s attendance there. This, it was suggested, might have been due to the transfer of records to computer in the intervening period. The man in question was also interviewed and he agreed that he had had "a brief romantic liaison" with C. He professed a belief that she was over seventeen at the time.

15. After leaving school C. began a teacher training course in 1993. At some point she started seeing a different man and again the applicant intervened, leading to the ending of that affair.

16. C. relates in her statement that, in the immediate aftermath of this event, she attempted suicide by medication overdose on the 24th May, 1994. She was brought to Beaumont Hospital, had her stomach pumped and was referred to a psychiatric hospital. The admission notes from Beaumont are available, as are the senior house officer and the registrar in psychiatry who saw her there. The notes describe what had happened as a "serious suicide attempt" in which more than 40 tablets had been taken. There is a reference to the breakup with her boyfriend earlier that day. The notes then record

> *"Ongoing rows with brother-in-law [Applicant].*
>
> *(Complaint of child sexual abuse by [Applicant] from age 7 until 2 months ago).*
>
> *Attended Dr Louise [sic] O 'Carroll ...*
>
> *Re child sex abuse in January, 2004. Did not attend appointment.*
>
> *No other psychiatric history no deliberate self harm. "*

17. Under the heading "Mental Examination" the note reads:-

> *"Bright and articulate*
>
> *Good eye contact and rapport*
>
> *Very upset when talking about child sex abuse"*

18. The impression recorded is "High suicide risk."

19. There is then a reference to a discussion with Dr. O'Carroll, who agreed to admit her. C. also agreed to a voluntary admission. However, the admission notes from the relevant psychiatric hospital record the fact that she and her family insisted later that day that she should go home and she discharged herself contrary to medical advice.

20. In explaining the background to this episode C. told the Gardaí in her first statement (in January 2009) that before it happened she "had spoken" to her GP, a Dr. McGuinness. A subsequent statement is more explicit- she said

> *"While I was still attending Dr. McGuinness I confided in him that I had been raped and sexually abused by [the applicant]".*

21. Dr. McGuinness could not initially find his files relating to C. When he did, after a request from the investigating officer to look again, he reported as follows:-

> *"I recall a former patient called [C) who I saw professionally at my surgery in Artane from 516/1992 until Dr. Mitry took over as her doctor on 221511996. In that time I have recorded seeing her ten times. I also saw her on a separate visit on 261411999 when her car had been stolen and burned I have located her original chart and all the other 15 visits recorded, refer to Dr Mitry. I have handed D/Garda Kelly,[C}'s original chart on today's date 31/08/2012. Attached to[C}'s chart was an acknowledgment posted to Dr Mitry dated 30/6/97 confirming an appointment for [C) with North East Dublin Psychiatric Service by an "E. Dunne" Community Psychiatric Nurse. This document is signed in the bottom right hand corner to be placed into [C)'s chart. We began to computerise our records in 2002 and I purchased a system called "Dynamic" which was a specialised medical IT system and there is no records for [C) on this system at alL From memory I cannot remember any conversation that I had with [C) during which she confided in me that she had been a victim of sexual abuse. From perusal of her chart, there is a remark in Dr Mitry's handwriting dated 25/6/97 stating that she had a problem with "brother in law".*

22. In her last statement, made on the 21st September, 2012, C. said that she had refreshed her memory by reading her previous statements. She went on:-

> *"I believe that while I attended Dr. McGuinness prior to my attempted suicide I believe that the reason was for depression which was brought about as a direct result of my sexual relationship with [the applicant}. I believe he referred me to Dr Louis 0'Carroll who put pressure on me to inform somebody. I don 't know whether it was the Guards or a person in authority or somebody in the family. I believe that is the reason why I discontinued seeing him. I took a drugs overdose in 1994 and subsequent to that I attended at Dr Mitry 's surgery. I don 't remember the context of when !first disclosed [the applicant's} sexual abuse of me to Dr Mitry or the time ... "*

23. It does appear to be clear that Dr. McGuinness referred C. to Dr. O'Carroll.

24. After her suicide attempt C. attended Dr. Mitry. C. said that this was because Dr. McGuinness was very popular and therefore hard to get to see.

25. Dr. Mitry gave a report to the investigating Gardaí on the 5th April, 2009, stating that C. had been attending him since 1994. He reported that C. had told him that she had been molested by her brother in law from the ages of five to nine, and that she had been raped by him from age ten. The report mistakenly places the suicide attempt as having occurred in 1992. The reason for this may be

found in a subsequent statement by Dr. Mitry, in which he says that he made the report from memory, his original records having been lost.

26. C. said that some time after the suicide attempt she confided in her best friend but she was still unable to report the offences to the authorities because of the love she felt for the applicant and fear of the impact of such a disclosure on her mother. The friend in question has made a statement and is listed as a prosecution witness.

27. A statement by a Dr. Roy Browne, served by way of a Notice of Additional Evidence, indicates that C. was an outpatient at the Psychiatry Liaison clinic at Beaumont Hospital during 1997. Dr. Browne said that he had no memory of the patient but could identify his handwriting on the relevant notes. He believed that in the circumstances she must have been referred by a GP. The notes, which commenced in August 1997, refer to the fact that she had last been seen 2-3 years earlier, with a history of overdose, and had been seen by Dr. O'Carroll "for a period of time". They continue, in a part that may or may not be a quotation from a GP's referral letter (I find Dr. Browne's statement unclear on this point):-

> *"Currently feeling okay, saw doctor end of June was feeling low mood Difficulties with brother-in-law who brought her up. Very possessive difficulties with her boyfriend etc. Sexual abuse by him from early age, penetration from 12, first abuse from 4. "*

28. Dr. Browne saw her on four further occasions before the end of 1997, on the last of which she was feeling well. He recommended that she return after Christmas for review, but she did not.

29. In March or April of 2008 C. began to see a counsellor by the name of Elizabeth Mernagh, a humanistic and integrative psychotherapist. She gave the Gardaí a report in March, 2009, which records the attendance by C. at 22 sessions of therapy since April 2008. According to the report

> *"It was within the first three sessions that C. disclosed that she had [been] abused by her brother in law [from] the age of 5 to 17. While working with the abuse she did not go into explicit details and this is done only if the client feels safe or the need to do so. "*

30. The report, which is about a page and a half long, gives some further detail about the family circumstances and C.'s reasons for deciding in late 2008 to report matters to the Gardaí. Ms. Mernagh subsequently informed the Gardaí that the report represented the content of the sessions with C. and that her notes had been destroyed.

31. On the 4th June 2012, on the request of the applicant's solicitors, Garda Kelly wrote to Ms Mernagh enquiring as to what date and under what circumstances the notes were destroyed.

32. Ms Mernagh replied on the 1 ih June 2012:

> *"In March 20 I 0 my computer crashed and I unfortunately lost my files which included that of [C}. I did try to retrieve these but it was not possible. "*

33. C. went to the Gardaí on the 1st December, 2008. She made her first statement on the ih January, 2009 and made a number of further statements over the course of 2009.

34. The applicant was questioned by Gardaí on a voluntary basis on the 24th April, 2009 and on three further occasions during the course of the investigation. He made no admissions.

35. The Book of Evidence contains a statement from C.'s best friend confirming the content of the complaint made to her; a statement from a friend from her teenage years who confirms having seen C., two other named girls and the applicant all naked in bed together and statements from each of those girls and another male friend confirming that they had been in bed naked with the applicant.

The Garda investigation of the complainant's attendance with Dr. O'Carroll

36. According to the affidavit of the investigating officer, Garda Jonathan Kelly, the first phase of the Garda investigation involved collecting statements from a number of witnesses with a view to "*gathering relevant independent evidence which was capable of corroborating or disproving the account given by the complainant*". Statements were taken from 26 witnesses and six discrete lines of inquiry, including medical and educational records, were pursued. This phase of the investigation ran from when the complainant made her first statement to the Gardaí in January 2009 until a file was submitted to the Director of Public Prosecutions in October 2009.

37. Garda Kelly says that the second phase of the investigation began in January 2010 arising from disclosure requests made on behalf of the applicant. During this phase, 14 statements were taken, the complainant made further statements, the applicant was interviewed on a number of occasions and six exhibits were obtained.

38. Garda Kelly wrote to Dr. Louis O'Carroll on 23rd January 2009 requesting a detailed report in relation to the allegations of sexual abuse. He says that he received no reply to the letter but it appears elsewhere in his affidavit that he was informed that the records might have been sent from the relevant psychiatric hospital to a Health Centre or outpatient clinic where Dr. O'Carroll had been based during the time when he saw C. He subsequently made "a number of phone calls", mostly to that Health Centre, "to no avail".

39. On 4th March 2009, Garda Kelly wrote to a doctor in the Health Centre requesting records relating to C.'s attendances on Dr. O'Carroll and enclosing a letter of consent from her. There is no reference to any reply to this letter, and nothing further appears to have happened in relation to Dr. 0'Carroll until 2012.

However, it is quite clear from the affidavits and exhibits that this is not a case of the Gardaí letting matters slide - there was in fact a great deal of activity on their part in what was not a straightforward investigation. It may be necessary to note that this was not the only complaint under investigation.

40. By letter dated 3rd March 2012 Garda Kelly again wrote to the Health Centre seeking records of C.'s attendances on Dr. O'Carroll. He says that he was aware at this stage that Dr. O'Carroll had retired and he believed that the doctor would be unlikely to have any memory of the case without reference to his contemporaneous notes. He did not therefore wish to interview him until the notes had been obtained. Unfortunately Dr O'Carroll died as a result of a road traffic accident on the 2nd March, 2012.

41. One of the complaints made on behalf ofthe applicant is that despite ongoing correspondence and reminders seeking disclosure of Dr. O'Carroll's records and any statement taken from him, the Gardaí did not inform his solicitor of his death until September, 2012.

42. In July 2012, Garda Kelly made further contact with the administration in the psychiatric hospital requesting the hospital records and notes pertaining to C. It is relevant to note the terms of the request.

> *"In relation to the above matter I wish to inform you that I am currently conducting a criminal investigation into allegations made by (C) against a third party. It would appear that {C) attended at Beaumont Hospital on24/5/1994 having attempted suicide. From perusal of her clinical notes from Beaumont Hospital it is recorded that she subsequently attended Dr. Louis O'Carroll, who agreed to admit her to ... Hospital on or around 241511994. As part of the criminal investigation and forthcoming criminal trial it is imperative that all notes held by you in relation to this patient be disclosed to the civil authorities for further disclosure to the defence counsel in this matter.*
>
> *From my previous enquiries with [the hospital] in February 2009 I was informed that this patient's files may have been transferred to X Health Centre as Dr. Louis 0'Carroll performed a role there. I have already been in telephone contact with X Health Centre in relation to this matter but I note from my records I have had no response committed to hard copy. I request that a search be made for the above records. If these records are discovered I will require them for the reason outlined above and if they are not discovered I will require a reason for same. " [Emphasis added.]*

43. On the 17th July 2012 the hospital replied that the file had not been found, following a search of the hospital and the clinic patient medical records. However the hospital admissions book confirmed that C. had been admitted as a voluntary patient on the 24th May, 1994 and had been discharged the same day contrary to medical advice. The record pertaining to that admission has been discussed above.

44. There followed further correspondence in an effort to find the relevant records relating to Dr. O'Carroll. The Health Centre records were rechecked but nothing was found. The possibility that C. had attended a different Health Centre was investigated. Amongst other avenues, Garda Kelly wrote to Dr. O'Carroll's solicitors and requested them to carry out a search of any retained records. This was done by Dr. O'Carroll's widow, again with no result.

Submissions on behalf of the applicant

45. Senior counsel for the applicant, Mr. Hartnett SC, submits that in the foregoing circumstances the lapse in time between the dates of the alleged offences and the bringing of charges against the applicant has resulted in specific prejudice to him within the criteria set out by the relevant authorities and in particular the Supreme Court in *S.H v. D.P.P.* [2006] 3 I.R. 575. He further submits that the failure of the Gardaí to obtain a statement and records from Dr. O'Carroll before his death constitute a breach of the duty to seek out and preserve relevant material and relies in this regard on the line of authority beginning with *Braddish v. D.P.P* [2001] 3 I.R. 127. This argument is based upon the proposition that the Gardaí should have made an approach to Dr. O'Carroll before he died. However, Mr. Hartnett also says that this is not really a case where prosecutorial delay is the main issue.

46. The submission on prejudice is made with, it is said, full regard to the fact that prejudice is implicit in all delay cases and that this is the rationale for the warning given by trial judges in such cases.

47. The specific issues raised in this case relate for the most part to the issue of credibility on the part of C. and the importance in this regard of having the specific terms of the earliest complaints said to have been made by her. Any inconsistency between such complaints, the terms of the statement of a complainant to Gardaí and, of course, evidence given by her in a trial would be of great significance to the defence. This, it is said, is implicitly acknowledged in the terms of the letter written by Garda Kelly, quoted above, where he said that it was "imperative" that the relevant documents be disclosed. The fact that no records are available from Dr. O'Carroll means that potential material for cross examination has been lost to the applicant. Furthermore, there might have been highly relevant material in Dr. O'Carroll's notes as to the mental state of C. when she made the allegations to him.

48. It is also submitted that the fact that Dr. McGuinness cannot remember a complaint, stated by C. to have been made to him, demonstrates the difficulties with memory that the elapse of time may have caused to one or both of them. If the first complaint made by C. was indeed to Dr. McGuinness, some 18 years ago, the applicant has been deprived of the reasonable possibility of evidence of a significant nature. The difficulty here, it is said, illustrates the nature of the problem caused by delay- C. cannot now remember who she told. A jury could not be asked to speculate on the issue.

49. The absence of records from the Gaeltacht Health Centre means, it is contended, that the defence cannot test C.'s implied assertion that she had become pregnant at that time. It is further submitted that the records could "reasonably be expected" to contain an account of questions and answers as to whether C. had been having intercourse and if so with whom.

50. It is conceded that the argument with respect to Ms. Mernagh is less strong, but it is argued that it "adds to the mix".

51. It is asserted that no warning by a trial judge could be framed in a way that would overcome the prejudice arising from these matters.

Submissions on behalf of the respondent

52. On behalf of the respondent Mr. James B. Dwyer BL says, in relation to Dr. O'Carroll, that it was reasonable for the Gardaí presume that a clinician would want to see the records before making a statement. There was an exhaustive search for the notes and the death of Dr. O'Carroll was, obviously, unexpected.

53. It is submitted that evidence of C.'s mental state can be found in the circumstances of the suicide attempt and the hospital records and witness statements relating thereto.

54. Mr. Dwyer submits that it is apparent from the final statement made by C. that she is now of the beliefthat she did not make the first complaint to Dr. McGuinness and that this is a matter that can be explored in cross-examination.

55. The notes, now missing, from the sessions with Ms. Mernagh are said to be of no relevance in circumstances where C. did not give Ms Mernagh any "explicit detail" of her allegations.

56. As far as the missing records from the Gaeltacht Health Centre are concerned, it is submitted that the unconfirmed possibility of a pregnancy cannot be seen to make a trial unfair.

Discussion and conclusions
57. The test in a case of this nature as set out by the Supreme Court in S.H v. D.P.P. is

> *"whether there is a real or serious risk that the applicant, by reason of the delay would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay".*

58. This case is concerned with the first part of the test.

59. There have been a number of written judgments since the decision in *S.H* and the parties in this application have both referred to them at length without any disagreement as to the applicable principles. I do not consider it necessary to discuss them further and instead respectfully adopt the summary set out by Charleton J. in the case of *K v. His Honour Judge Carroll Moran (*unrep., 5th February, 2010) in the following nine propositions:

> *"(1) The High Court should be slow to interfere with a decision by the Director of Public Prosecutions that a prosecution should be brought. The proper forum for the adjudication of guilt in serious criminal cases is, under the Constitution, a trial by judge and jury; D.C. v. DPP [2005] 4 JR. 281 at p. 284.*
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> *(2) It is to be presumed that an accused person facing a criminal trial will receive a trial in due course of law, one that is fair and abides by constitutional procedures. The trial judge is the primary party to uphold the relevant rights which are: the entitlement of the accused to a fair trial; the right of the community to have serious crime prosecuted; and the right of the victims of crime to have recourse to the forum of criminal trial where there is reasonable evidence and the trial can be fairly conducted; P.C. v. DPP [1999] 21R. 25 at p. 77 and The People (DPP) v J.T. (1988) 3 Frewen 141.*
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> *(3) The onus of proof is therefore on the accused, when taking judicial review as an applicant is to stop a criminal trial. That onus is discharged only where it is proved that there is a real risk of an unfair trial occurring. In this context an unfair trial means one where any potential unfairness cannot be avoided by appropriate rulings and directions on the part of the trial judge. The urifairness of the trial must therefore be unavoidable; Z v. DPP [1994] 2 I.R. 476 at p. 506-507.*
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> *(4) In adjudicating on whether a real risk occurs that is unavoidable that an urifair trial will take place, the High Court on judicial review should bear in mind that a District Judge will warn himself or herself and that a trial judge will warn a jury that because of the elapse of time between the alleged occurrence of the facts giving rise to the charges, and the trial, that the accused will be handicapped by reason of the lack of precision in the presentation of the case, and the disappearance of evidence such as diaries, or potentially helpful witnesses, or by the normal failure of memory. This form of warning is now standard in all old sexual violence cases and a model form of the warning, not necessarily to be repeated in that form by all trial judges, as articulated by Haugh J. is to be found in the decision of the Court of Criminal Appeal in The People (DPP) v. E.C. [2006] IECCA 69.*
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> *(5) The burden of a proof on an applicant in these cases is not discharged by merely making a general allegation of prejudice by reason of the years that have elapsed between the alleged events and the commencement of the criminal process. Rather, there is a burden on such an applicant to fully and actively engage with the facts of the particular case in order to demonstrate in a specific way how the risk of an unfair trial arises; C.K v. DPP [2007] IESC 5 and McFarlane v. DPP [2007] 1 JR. 134 at p.144.*
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> *(6) Whereas previously the Supreme Court had focused upon an issue as to whether the victim could not reasonably have been expected to make a complaint of sexual violence against the accused, because of the dominion which he had exercised over her, the test now is whether the delay has resulted in prejudice to an accused so as to give rise to a real risk of an unfair trial; H v. DPP [2006] 3 JR. 575 at p. 622.*
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> *(7) Additionally, there can be circumstances, which are wholly exceptional where it would be unfair or unjust to put an accused on trial. Relevant factors include a lengthy elapse of time, old age, the sudden emergence of extreme stress in consequence of the charges, and which are beyond that associated with the normal stress that a person will feel when facing a criminal charge and, lastly, severe ill health; P. T v. DPP [2007] IESC 39.*
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> *(8) Previous cases, insofar as they are referred on the basis facts that are advocated to be similar, are of limited value. The test as to whether a real risk of an unfair trial has been made out by an applicant, or that an applicant has established the wholly exceptional circumstances that had rendered unfair or unjust to put him on trial, are to be adjudicated in the light of all of the circumstances of the case; H v. DPP [2006] 3 JR. 575 at p. 621.*
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> *(9) ... it can be the case sometimes that circumstances such as extreme age or very poor health will be contributory factors to an applicant succeeding in making out that a real risk of an unavoidably fair trial is established. Old age and ill health can assist in establishing that there is prejudice by reason of a delay, since memory fails with time and the ability of an accused to instruct counsel with a view to mounting a defence can be, in extreme circumstances, undermined by those factors. Where extreme delay, old age and serious ill health are, of themselves, pleaded as a circumstance which would make it unfair or unjust to put a specific accused on trial then, in the absence of proven prejudice, those circumstances will indeed occur rarely; The People (DPP) v. P. T [2007] IESC 39 and Sparrow v Minister/or Agriculture, Food and Fisheries [2010] IESC 6."*

60. In applying these propositions to the facts of the instant case, I am fully cognisant of the difficulties faced by the accused in defending himself against accusations of this nature and this antiquity. I accept that, where the accused denies the allegations, it is of the highest importance from the point of view of the defence that any available material bearing upon the credibility of the complainant be fully explored. However, in this kind of application the onus is nonetheless on the applicant to show that there is a real risk of an unfair trial, bearing in mind the obligations of a trial judge. Those obligations do not extend only to the giving of appropriate warnings- where necessary, it may be the duty of the trial judge to halt the trial if fairness to the accused cannot otherwise be ensured.

61. In my view that onus has not been discharged in this case.

62. Starting with the lost records pertaining to the complainant's attendance at the Health Centre in the Gaeltacht in 1990 or 1991, I do not consider that this matter can bear any great weight. The evidence as it stands amounts to this:- C. says that she went to a doctor complaining of stomach pains and bleeding, and the doctor told her that it might have been an early miscarriage. From the

point of view of the applicant, the records, if they were available, might a) simply record that fact; b) record some statement by her as to the possibility of pregnancy and if so, by whom, or c) record some utterly unrelated cause of the problem, with no reference to pregnancy. None of these possibilities seem to me to be particularly relevant to a risk of an unfair trial of the charges against the applicant. If the complainant were to assert in evidence that she was pregnant by the applicant, he can rely on the admitted relationship between her and the other man at the proximate time the prosecution will not be in a position to dispute it. If she does not make such an assertion the relevance of the issue is peripheral at best. In any event, cross examination on the topic of sexual history would be subject to the ruling of the trial judge, who, having regard to the run of the evidence, would be in a better position than this court to consider the significance to be attached to the matter.

63. As far as the lost records of Dr. O'Carroll are concerned, I do not see in the first instance that the argument in relation to the duty to seek out and preserve evidence- the *Braddish* issue- has been made out. This is not a case where a Garda, knowing that relevant evidence exists, has not made the effort to obtain it. It is quite clear from the affidavits and exhibits that Garda Kelly did appreciate the significance of the various potential sources of medical evidence and spent a lot of time following up the different lines of enquiry. The end result is that there is a degree of confusion about when and how often C. saw Dr. O'Carroll, but it appears to be a fact that his records are not to be found in either the hospital, the possible health centre/outpatient clinic where he might have seen C. or in amongst his private papers. This is not the scenario dealt with in *Braddish*.

64. Nor do I consider that either the unfortunate death of Dr. O'Carroll or the absence of his records regarding C. might render the trial of the applicant unfair. Firstly, the death of a potential witness in a road traffic accident has nothing to do with any lapse of time in an individual case - by definition, it is something that could happen at any time. I accept that it was reasonable for the investigating Gardaí to look for the records before asking him for a statement. Other Gardaí in a different case might have taken a different approach but that is not grounds for holding that there has been a breach of the duty to seek out evidence.

65. Secondly, it seems to me that when 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. In other words, I do not believe that it is 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.

66. In this case, it is theoretically possible that C. gave an account to Dr. O'Carroll which was wholly at variance with that given to others and consistent with the innocence of the applicant, or which, at least, was materially inconsistent with her other accounts. On the basis of the evidence, however, that is not a real possibility.

67. The question is, I consider, whether there is a real possibility that the missing material would reveal a material inconsistency which would be of benefit to the applicant. In my view, there is nothing in the evidence to suggest that this is a realistic possibility as might be the case if, for example, it was shown that she had given materially inconsistent accounts in other instances. I do not consider that the presumption of innocence requires the court to assume, in the absence of any supporting evidence, that it did happen in relation to Dr. O'Carroll.

68. This is not to suggest that the applicant bears an onus of proving his innocence it is simply 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.

69. It is true that there is a degree of confusion about the question of what, if anything, was said to Dr. McGuinness. That is normal in a case of this antiquity. It is a matter for cross-examination and it is certainly the type of issue requiring a warning from the trial judge. It is not, however a ground for holding that a trial would be unfair.

70. Finally, it seems to me that the issue in relation to the psychotherapist adds little or nothing to the case. She has said that C. did not give details of the alleged abuse and there seems to be no reason to disbelieve her.

71. In the circumstances I refuse the reliefs sought.