Neutral Citation [2015] IEHC 616

THE HIGH COURT

[2014 No. 423 J.R.]

BETWEEN

J.F.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice Baker delivered on the 9th day of October, 2015

1. The applicant seeks by way of judicial review an order restraining further prosecution of the applicant in proceedings entitled Bill No. CC/07/2001 in relation to an alleged rape and indecent assault alleged to have been committed on diverse dates between the late 1960s and the mid 1970s.

2. The proceedings initially issued naming the judges of the Central Criminal Court as second named respondents, but the order of this court made on the 28th July, 2014 by which leave was granted to apply for judicial review permitted the applicant to amend the pleadings to remove them as second respondent from the proceedings.

3. The applicant seeks to prohibit what he says is a fourth trial on the same charges, three earlier trials having failed to reach a verdict or, more accurately in the case of the second and third trial, to run to their conclusion.

Background

4. The applicant is charged in respect of fourteen counts, twelve counts of sexual assault and two counts of rape, the earliest of which it is alleged to have occurred on the 12th April, 1969 and the latest on the 11th April, 1975. The applicant was arrested, detained and interviewed in relation to allegations made by the complainant, MC, and he was interviewed on several occasions on the 25th January, 2008. The applicant was charged with the offences on the 25th March, 2011 and returned for trial to the Central Criminal Court. The applicant denies each and every allegation but says that there was one incident of consensual sexual relations between him and the complainant.

5. The prosecution has not run smoothly. The applicant claims that he is now returned for trial on a fourth occasion, scheduled to run on the 2nd November, 2015. The respondent does not accept the characterisation of the earlier trials, and argues that as one of the trials, the third trial, was adjourned on consent immediately after the jury was empanelled, that trial could not be said to have even commenced.

6. Briefly the sequence of events is as follows:

7. The first trial commenced on the 9th October, 2012 before a jury in the Central Criminal Court. The applicant was acquitted on some of the charges by direction of the trial judge, and the jury disagreed in relation to the remainder.

8. The DPP elected to seek a retrial and this commenced on the 12th June, 2013. The second trial proceeded to a point where the evidence had concluded but the jury was discharged following submissions on matters arising in the course of the judge's charge to the jury.

9. Another date was set for the trial for the 24th June, 2014. Again a jury was empanelled, and the evidence opened but on the afternoon of the second day of the trial, as the complainant was about to commence her evidence, an issue arose in relation to the disclosure of certain documents by the DPP. Following legal argument the trial judge acceded to an application on behalf of the applicant to adjourn the trial and the jury was discharged a new trial date fixed for the 2nd November, 2015.

10. Leave to seek judicial review was granted on the 28th July, 2014.

Grounds on which relief is sought

11. The applicant claims that to deal with the fourth trial would be a breach of his constitutional rights to fair procedure and due process, and a breach of his rights under the European Convention on Human Rights. Delay of itself is not advanced as a ground upon which it is argued that prohibition ought to be granted but it is argued that the period of delay of nearly forty years from the date of the alleged incident to the date of the trial is one of a number of factors that ought to be considered by the Court in considering the application. It is argued that to subject the applicant to a fourth trial would be an abuse of process and a denial of his rights, and the applicant points to what he says is significant stress and anxiety caused to him and his family by the protracted process. In stark terms he says that it is now seven years since the allegations were first put to him by members of the Gardaí, and that the stress caused to him in that period has been exacerbated by the multiplicity of trials.

12. The applicant further argues that an unusual element arises in this case, namely that the second and third trial collapsed due to what is argued to be a failure on the part of the State to make full disclosure and that this failure has come to mean that the applicant has lost faith in the process, and in particular in the ability of the prosecution to discharge its duty of disclosure. Absence of disclosure is not advanced as a separate ground but rather as part of a mix of factors which ought to tip the balance in favour of prohibition.

13. The respondent says there is no unfairness and that the law is clear that to prohibit a trial is an exceptional remedy.

14. I will first examine the case law on prohibition, and the general law with regard to the interplay between the power of the High Court to prohibit a trial and the need to recognise the individual and separate role of the DPP in the prosecution of crime, and the role

of the trial in the criminal process.

Prohibition: exceptional jurisdiction
15. Both counsel accept that the power of the High Court to prohibit a trial is an exceptional jurisdiction arising only in what has been called "*exceptional circumstances*" by Kearns J. in *McFarlane v. DPP* [2008] 4 I.R. 117. The courts have recognised the need to balance the public interest in the prosecution of crime with the personal or private interest of the accused in fairness of process, and in finality. As Kearns J. said in *McFarlane v. DPP*:

> *"References to the community's right to prosecute are not mere shibboleths to which nominal lip service only must be paid. That right is an essential element in a properly functioning criminal justice system."*

16. Denham J. in *AP v. DPP* [2011] 1 I.R. 729 pointed to the "*primary role*" of the DPP in initiating prosecutions and that the court "*would be slow to intervene*". However, she in her judgment recognised the importance too of protecting the individual and that the court

> *"would intervene if necessary to protect constitutional rights and have any relevant aspect of the public interest, including the due process of the trial."*

17. The public interest is two-fold: to prosecute crime and to protect the public interest in fair process. The private interest too may said to be two-fold: the personal or private interest of the accused in fairness in his or her trial, and the interests of the victims of crime, to borrow from Kearns J. in *McFarlane v. DPP* whose interests must not be "*swept aside*" in this exercise.

18. This has the consequence that in any application for prohibition the onus is on the accused to establish circumstances which would justify the grant of prohibition. This is established in a long line of cases of which the judgment of Finlay C.J. in *Z v. DPP* [1994] 2 I.R. 476 is an early and authorative judgment. At page 506 of the judgment Finlay C.J. said as follows:

> *"…the onus of proof which is on an accused person who seeks an order prohibiting his trial on the ground that circumstances have occurred which would render it unfair is that he should establish that there is a real risk that by reason of those circumstances (which in that case also were pre-trial publicity) he could not obtain a fair trial."*

19. MacMenamin J. in *Wall v. DPP* [2013] IESC 56 pointed to the need for an accused to show a real rather than a hypothetical risk:

> *"It is by now well established that the onus rests on an accused who seeks judicial review to prohibit a trial to prove that circumstances exist which give rise to a real risk that the accused would not receive a fair trial, which cannot be avoided by appropriate rulings and directions on the part of the trial judge…. The risk must be a real one, and the unfairness of the trial must be unavoidable."*

20. Later in his seminal judgment Finlay C.J. in *Z v. DPP* pointed to the fact that the proof must be not merely by way of argument or hypothesis but that an accused must establish on the facts a real risk:

> *"…where one speaks of an onus to establish a real risk of an unfair trial it necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk is a real one but the unfairness of trial must be an unavoidable unfairness of trial."*

21. Thus in summary not only must an applicant for judicial review show factual grounds based on the circumstances of his or her case which establish an unfairness that requires a trial to be prohibited, but due consideration must also be given to the role of the trial judge. It is long established in our jurisprudence that the protection afforded by Article 38.1 of the Constitution, namely the right to a fair trial, is a right to a fair trial before a jury of one's peers at which the trial judge is required by law to give directions and guidance as to the law and the burden and standard of proof. Thus part of the consideration of the court is that directions and rulings by the trial court can avoid in many cases any injustice or unfairness in process that it is argued might arise.

Multiple Trials
22. The applicant argues that he now faces a fourth trial and points to the dicta of Hardiman J. in *AP v. DPP* [2011] 1 I.R. 729 at para. 47 where he says:

> *"But I am of the opinion that the circumstances that could justify a fourth trial, whether after discharge or after disagreement, must be extremely rare and require to be fully established and explained by the respondent."*

23. I do not consider that Hardiman J. expressed a view that a fourth trial will always be prohibited. Indeed earlier in that paragraph he rejected such a general proposition saying as follows:

> *"But I could not assent to the proposition, which is the applicant's sole proposition on the pleadings in this case, that a fourth trial, that is the giving in charge of the applicant to a jury 'to try and inquire whether he is guilty or not guilty' is in and of itself, and in all circumstances an abuse of process. There may be many circumstances, perhaps extremely rare, where such a trial might be justified: perhaps in the face of repeated interference with witnesses or jurors."* [emphasis in original]

24. This approach is in accordance with the authorities, and Denham J. in *AP v. DPP* at page 735 made the clear and unequivocal statement that:

> *"It is not simply a numerical matter of allowing a specific number of trials."*

This approach is in accord with the general view that prohibition is an exceptional remedy, and that the right to a fair trial is a right explained by O'Donnell in *Byrne v. DPP* [2011] 1 I.R. 346 at 356 as through trial by a jury, or on appeal, as the case may be. He explained the matter thus:

> *"The manner in which the Constitution contemplates that a fair trial is normally guaranteed is through the trial and, if necessary, appeal processes of the courts established under the Constitution. The primary onus of ensuring that that right is vindicated lies on the court of trial, which will itself be a court established under the Constitution and obliged to administer justice pursuant to Article 34."*

25. Counsel for the applicant argues that multiplicity of trials on the same set of charges is unfair per se, and that the true balancing of rights can be achieved only by prohibition after what he says were three opportunities on the part of the State to achieve a conviction. He argues that repeated trials of the same charges raise the possibility that a conviction could be achieved "*through sheer governmental perseverance*", a comment made by O'Connor J. in the US decision of *Tibbs v. Florida* 457 U.S. 31 (1982)..

26. Counsel primarily relies on the decision of the High Court in *DS v. Judges of Cork Circuit Court* [2008] 4 I.R. 379. That applicant was charged with six counts of sexual assault between the years 1994 and 1998. There were two complainants and the applicant was tried for the first time in November 2002 in respect of one complainant. The jury was discharged after two days and the applicant was acquitted on a retrial. He was tried twice in respect of the second complainant and on both occasions the jury failed to agree a verdict. The High Court prohibited a further trial and the Supreme Court refused the appeal of the DPP. The High Court had invoked the principle of double jeopardy but the Supreme Court held that the principle of double jeopardy did not apply in the case of prosecutions where a jury had failed to reach a verdict, and where there had been neither an acquittal nor a conviction jeopardy continues in relation to an offence. However the Supreme Court noted the importance of *"guarding against the inherent dangers of repeated trials"*, and prohibited a third trial, doing so in an assessment of the factual circumstances and factors which it considered relevant.

27. Denham J. outlined nine individual factors that have come to form the basis of an approach by the Superior Courts in dealing with an application to prohibit a trial. I turn now to deal with the relevant factor in the factual nexus of this application.

The first relevant factor: delay
28. The first factor is delay, and the length of that delay whether it be prosecutorial delay, or delay that arises merely on account of the facts that earlier trials had failed to reach a conviction or acquittal. In *D.S. v. Judges of Cork Circuit Court* the Court held that there was no prosecutorial delay, but Kearns J. noted that delay was a factor which was required to taken into account and regarded a delay between 1993 and 2004 as "*considerable*". The delay in this case has been some 46 years, and a period of seven and half years will have elapsed between the first interviews of the applicant and the proposed trial, a period of delay which is in my view considerable particularly in the context of charges relating to such old allegations. The applicant does not seek to rely on delay as a separate ground on which to prevent the trial but merely as one of the factors and no specific individual prejudice is alleged to have occurred as a result of the delay. I consider that the applicant has made out a case that the delay has been considerable in this case and that is one factor that must influence my decision.

The second relevant factor: personal anxiety
29. Another relevant factor relied on by the applicant is that there has been considerable stress and anxiety caused to him and his family as a result of the delay. The applicant does not swear an affidavit in these proceedings but his solicitor avers that he has been under enormous stress and anxiety as a result of the trial and the fact that he now might be required to once more confront the allegations. It is also said that his life has been "effectively on hold" for a period of seven and a half years since the first formal complaint, that this period must be seen in the context of the fact that it is approximately 24 years since the complainant first introduced the allegations within the family and that his quality of life and his physical and mental health have deteriorated as a result. It is said that he takes medication to address this combination of physical and psychological sequelae.

30. However, the case law suggests that I must have regard to the fact that no specific individual personal anxiety is identified by the applicant. As Denham J. said in *DS v. Judges of Cork Circuit Court*, it is *"unfortunately true that families of an accused may suffer anxiety and stress to varying degrees when their loved one is on trial."* Imprisonment or fear of imprisonment may affect deeply the family of an accused, and the *dicta* of Fennelly J. in *McFarlane v. DPP*, at paras. 79 - 80 of the judgment, must be borne in mind in any analysis of this factor:

> *"I do not accept that the type of anxiety about being charged with criminal offences, or being required to sign on or to attend at court could possibly justify an order preventing the applicant's trial. These disadvantages are inherent in the criminal process. They commenced, as the applicant says, on the 5th January, 1998. The applicant is entitled to complain about the extent to which they were exacerbated or prolonged by the breach of his right to an expeditious trial…. It is a question of degree.… An exacerbation of the complaint of pressure from facing criminal charges (including having to sign on and attend at court), for that additional period could not possibly, on the facts of the present case, counter balance the public interest in having the Applicant put on trial for the indisputably serious offences involved."*

31. I consider that the applicant in this case is in the same position as that noted by Fennelly J. in *A.P. v. DPP* in that he has not produced any evidence of stress or anxiety over and above the natural and inevitable tension and anxiety that any accused faces.

The third relevant factor: the seriousness of the charge
32. Both Kearns J. and Denham J. in *D.S. v. Judges of the Cork Circuit Court*, in identifying the various factors that might be taken into account in the exercise of the court's discretion regarded the nature of the charge as relevant. Kearns J. specifically pointed to the seriousness of the offence or offences as a matter to which regard ought to be had. Denham J., in more general terms, suggested that the position of the victim ought not to be overlooked. This would suggest that a person who is the victim of an alleged very serious crime, such as rape, requires herself or himself the protection of the court. Kearns J. in *D.S. v. Judges of the Circuit Court*, noted that the offences were on the less serious end of the spectrum, and such analysis is not appropriate in this case where as here the charge includes two charges of rape.

33. The applicant argues that the facts of *A.P. v. DPP* are not sufficiently analogous. In that case the Supreme Court, on appeal from the High Court, refused to order prohibition. The applicant faced a fourth trial, the trial having commenced on three separate occasions, but on each of those occasions the trial process had not advanced beyond the first witness. It is argued that this case is closer, in terms of the relevant facts, to those in *D.S. v. Judges of the Cork Circuit Court*, where a jury failed to agree on two separate occasions and the third trial was prohibited.

34. The applicant has had to face being present in court on two occasions during the entire currency of a trial. The third trial lasted less than two days. The point is made specifically that, had the trial judge's charge to the jury not raised a difficulty which justified the discharge of the jury, the second trial would have concluded and the jury would have completed its deliberations, that the error was not of the applicant's making, and accordingly the applicant cannot bear the responsibility of the fact that a further trial was then necessitated.

Discussion
35. I consider that the case law points to a proposition that, in a criminal trial where the jury disagrees on two occasions, a third trial may not generally be warranted. Hardiman J. in *AP v. DPP* at para. 45 certainly suggests that a fourth trial is one in respect of which he would feel a degree of disquiet:

> *"The concept of a fourth trial of a person on the self same charges as those that were the subject of the first three is a matter of grave concern to me."*

36. I consider then that it is appropriate in the current case that I would examine the circumstances that gave rise to the collapse of the third trial, and also consider whether the second trial ought to be treated as equivalent to the circumstances that gave rise to the granting of prohibition in *D.S. v. Judges of the Cork Circuit Court*.

37. Kearns J. in *D.S. v. Judges of the Cork Circuit Court* suggested that "*unusual or exceptional circumstances*" might be required to justify a trial in those circumstances. Equally Denham J. at para. 29 of her judgment in that case suggested that two full trials ending in a disagreement might justify prohibiting a third trial, and she refers at para. 29 to a *"long standing practice"* not to commence a re-trial in those circumstances, and that this might have "*a sound basis*" and be a convention which has "*inherent wisdom*". She pointed out that the Oireachtas has not chosen to delimit by statute the maximum number of trials that a person may face, and has chosen the route of permitting the DPP to determine the matter as an independent decision-maker.

38. Exposing an accused to a series of repeat trials fails to respect the interests of the accused in fairness and finality. It also could be said to exposes the accused to a statistically greater risk of being convicted. However, this is a factor where there was, or was likely to be, a change in the evidence to be given. Both judges who gave judgment in the case of *D.S. v. Judges of the Cork Circuit Court* agreed that *"there appears to be no change in the evidence"* and if the evidence offered is to be similar to that in two previous trials *"[e]ach subsequent trial becomes more oppressive, and requires to be assessed objectively"*.

39. Perhaps the matter might be put thus: the general proposition appears to be that a person will not be tried a third time when a jury has disagreed on two previous occasions. To direct a third trial, save in exceptional circumstances where perhaps evidence points to some interference with a jury, would be to fail to respect the process before the jury, or the presumption of innocence of which the accused has the benefit. Kearns J. in *D.S. v. Judges of the Cork Circuit Court* rejected a "*simplistic approach*", but suggested that a third trial may happen if the public interest justifies such, where *"careful analysis of all the surrounding circumstances may suggest that an aborted trial, including one resulting from a hung jury, may be amenable to an explanation"*. He considered the proposition as stated by Kennedy L.J. in *R. v. Henworth* [2001] EWCA Crim 120 to be persuasive. Kennedy J. had pointed to circumstances where evidence emerged that a jury had been interfered with or, on the opposite end of the spectrum, where some persuasive piece of evidence were to emerge during the course of a trial, too late to be used in that trial but capable of constituting "*devastating evidence*" in a further trial.

40. Thus a third trial, still less a fourth trial, where there have been two full trials may occur if the circumstances show that the public interest justifies it but it would in general not be desirable absent such.

41. The judgment of Kearns J. in *D.S. v. Judges of the Cork Circuit Court* would suggest that a third trial is to be prohibited even if the first two trials did not result in a disagreement, as he refers to an abortive trial, and not merely one resulting from a hung jury. The first trial in this case resulted in a disagreement and the second was aborted at the conclusion of the evidence, and only after the judge had completed his charge to the jury. To prohibit a further trial after those events would not of itself fail to respect the role of the jury in the criminal trial, as the evidence in the second trial never went to a jury.

Discussion: exceptional reasons to justify a further trial?

42. I consider in the first place that this case is more properly one where what is sought to be prevented is the third rather than a fourth trial. The third trial had run only a short distance before it was aborted, and that occurred on the application of the applicant, who sought additional documentary evidence in the form of notes alleged to have been kept by the complainant, and which were not previously disclosed. The third trial here could be regarded as similar to the three trials that had commenced and not advanced beyond the first witness in the case of *A.P. v. DPP*, where in each case the trial judge ordered the discharge of the jury on the basis that evidence given by the complainant was inadmissible and prejudicial to the applicant. I am influenced by the fact that the Supreme Court in that case considered that there had not been, in truth, three earlier trials, or at least not three trials where the factors giving rise to the decision in *D.S. v. Judges of the Cork Circuit Court* were not apparent.

The so-called adjustment of evidence

43. In *A.P. v. DPP* Fennelly J. rejected the argument that the applicant might suffer any disadvantage from what has come to be called "*adjustment of evidence*". That phrase had in fact been used by Kearns J. in *D.S. v. Judges of the Cork Circuit Court* where he had stressed that if the phrase meant "*that evidence might be fabricated or doctored if a re-trial were to be permitted"*, that such an inference ought not to be drawn. Fennelly J. took a more benevolent interpretation of the phrase, by reference in particular to the judgment of Hardiman J. in *McNulty v. DPP* [2009] 3 IR 572. He quoted with approval para. 37 of that judgment as follows:

> *"Where there is a second trial, neither side is bound to approach the case in the same way that they approached the first trial. New witnesses may be called, or witnesses called on the first occasion may be omitted. Almost every trial, especially if it proceeds to the point where the defendant is given in charge to the jury, will develop in a way which could not be wholly predicted before it started. Each side will have learned a good deal more about the other side's case. A witness who looked very impressive on paper may appear to some disadvantage in giving oral evidence, cross-examination may put an entirely different complexion on certain evidence, and legal argument, where there is any, may reveal weaknesses in the case of either side in the way they address certain topics, which had not previously occurred. It is perfectly legitimate for either the prosecution or the defence to adapt to these discoveries by looking again at how it will present its own case. Where there is a second trial, almost inevitably, each side will know more about the other side's case than it did when the first trial started."*

44. The applicant in *A.P. v. DPP* had asserted that the complainant was aware from three previous trials of the approach likely to be taken by the defence at any further trial. That would be so, of course, in the context even of a second trial, and there can be no argument that a second trial should be prohibited as a general proposition, nor has any example of the prohibition of a second trial been argued from the authorities. It seems to me, further, that Hardiman J. is correct that at a second or subsequent trial both parties would have improved their understanding of the evidence and approach of the other, and will therefore be in a position to refine their approach, tailor their evidence.

45. I must however bear in mind the fact that the criminal justice system offers a particular degree of protection to an accused who does not have to disclose his or her defence or evidence prior to trial, and indeed the accused is further protected by the requirements of disclosure on the part of the prosecution. But the mere fact that both parties to a criminal trial will know more about the approach of the other at a second or third trial does not of itself mean that fairness is not achieved, having regard to the these general elements found in the approach of the criminal justice system to a fair trial. However, it must be recalled that no argument is ever made that the exchange or sequential furnishing of written legal submissions in a criminal appeal would cause prejudice to the

accused, and that he or she would thereby lose an element of surprise. Thus a certain degree of common sense is required, and this is consistent with the general approach that a second or subsequent trial may be unfair and a breach of process if a specific prejudice can be shown to arise in the context of surprise elements that might have arisen in a first or earlier trial. No argument of any such has been made in this case.

46. I consider that a useful starting point is the approach of the Supreme Court as noted by Fennelly J. in *D.S. v. Judges of the Cork Circuit Court*. The single most important factor in that case was that a jury had twice disagreed. All the members of the Supreme Court held that that was an adequate discharge of the public interest in the prosecution of crime, save for exceptional circumstances which I have mentioned above. If a jury has come to a determination in a criminal trial, and has failed to agree on two occasions, then an accused has had the benefit of a trial by his peers, and thus the individual interests of justice are also met. A third trial in those circumstances, would fail to respect both interests, the public and the private, and to allow a third trial in those circumstances would be equivalent to trial by attrition, where what came to be the focus was not the interest of the public in the prosecution of crime, nor the interest of the citizen in being tried by a jury of his or her peers, but the interest of the prosecution in securing a conviction. It would, in my view, be oppressive for the State to pursue an accused a third time following two disagreements, as the pursuit would be a pursuit of a guilty verdict, and not an exercise in the prosecution of crime, as is understood in our system and where an accused is presumed to be innocent until proved to be guilty.

47. In the instant case, the second trial was aborted following submissions on the judge's charge to the jury. The accused did not get the benefit of a trial by his peers, nor did the public interest in the prosecution of crime come to be fully protected by the constitutionally mandated public involvement in the fact-finding exercise. The accused had the benefit of a legal argument with regard to the judge's charge to the jury, and succeeded in having that jury discharged. The accused's interest in the due administration of justice and in fair process was more than adequately met.

Conclusion
48. Thus I consider that this accused has not shown any individual and exceptional distress or anxiety as arising from the further prosecution of him by the trial due to commence in November 2015. I consider that he has had the benefit of due process in the decision of the judge to discharge the jury in the second trial, and following the request for disclosure in the third trial. I do not consider that the law points me to a conclusion that a fourth trial is always to be prohibited, and I also consider that what is in issue here is the prosecution of the accused for a third time, as the third trial had scarcely commenced, and was aborted following a request for further disclosure by the accused, when arguably other options such as a short adjournment or an application to exclude certain evidence might also have been open to him.

49. Accordingly, in those circumstances, I consider that the applicant has not made out a case for the prohibition of his trial, bearing in mind the exceptional nature of the remedy of prohibition in those circumstances.

50. That is not to say that the conduct of the fourth trial of the accused will be a straightforward matter. The trial judge, who can be assumed to be an experienced judge of the High Court, will require to be watchful in the protection of the rights of the accused having regard to the very considerable delay that has occurred between the alleged offences and the trial date proposed in November 2015. The proper treatment of evidence and testing of evidence of witnesses of matters which are alleged to have happened long since are a matter that the trial judge must and will deal with in his or her directions to the jury, both in the course of the trial and in his or her final charge to the jury. The applicant has the advantage of having a very competent solicitor and counsel, whose experience in the area has already been successfully availed of and successfully presented the case to a jury which failed to agree a verdict. The constitutional right to a fair trial is properly and mostly to be dealt with by a trial by jury, and the High Court ought to be, as I am, reluctant to prohibit the trial knowing, as I do, that the trial judge has an armoury of skill and legal principals to guide the jury in its task.

The evidence made available at the third trial
51. Finally, the applicant argues that he has lost confidence in the trial process because full disclosure was not made to him in any one of the earlier trials.

52. The matter disclosed in the course of the fourth trial was a "journal" of the complainant in which she wrote an account of her dreams. The respondents argue that there is nothing in that material which is relevant to the matters in respect of which the applicant is charged. The journal was produced immediately upon request and there is no argument that that was not available in sufficient time to enable the legal advisors for the accused to consider its content. In the course of the consideration of those journal notes, however, it seemed that certain handwritten notes were observed in the margins of the notes which had been made by a member of An Garda Síochána involved in the prosecution of the case. The explanation of how those notes came to be on the "journal" was available at the third trial, and the respondent argues that no new material or evidence or fact is contained either in the journal or in the margin notes. The respondent asserts that any matter dealing with non-disclosure may be dealt with by the trial judge both in directions to the jury, and in consideration of the admissibility of certain evidence or class of evidence. I agree with that assertion, although the matter might have been different had the notes produced fresh evidence which ought to have been disclosed at an earlier trial, as that fact alone might have tipped the balance in favour of the accused with regard to due process in general. However, no argument to that effect may be made in the instant case.

Conclusion
53. Accordingly and for the reasons stated I refuse prohibition.