THE COURT OF APPEAL

Ryan P.
Peart J.
Hogan J.

2015 No. 126

BETWEEN

M.S.

APPLICANT/

APPELLANT

- AND -

DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND

AND THE ATTORNEY GENERAL

RESPONDENTS/

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 22nd day of December 2015

1. The applicant in these judicial review proceedings is a 83-year old retired consultant surgeon who is currently facing a multiplicity of charges of indecent assault made by 22 separate complainants. The alleged offences are all said to have been committed either in the hospital where he worked or in the applicant's private consulting rooms. The applicant worked in the hospital in question between 1964 and 1995 when he retired. The applicant was served with these charges on 31st July 2012.

2. The applicant had previously faced charges of this nature in 2003. Between November 1994 and December 1996 he was interviewed several times by An Garda Síochána in respect of complaints made against him by former patients. He was then charged with 38 counts of indecent assault relating to 18 complainants. However, ultimately he stood trial in 2003 on an indictment containing 11 counts relating to six complainants. The applicant was acquitted on each of these charges.

3. The applicant's name was, however, erased from the register of medical practitioners by decision of the Medical Council in October 2008. He did not appeal that decision.

Summary of charges

4. The complaints themselves relate to events which are said to have occurred on a variety of dates between 1964 until 1991. At the date of the alleged incidents the various complainants were almost all teenage boys who had been admitted for relatively minor injuries or illnesses, such as, for example, football injuries and minor traffic or workplace injuries. While the details of the complaints vary from case to case, the general tenor of the complaints is that the applicant indecently assaulted the boys under his care by, for example, fondling their testicles and penises. In other cases it is contended that the applicant masturbated the boys to the point of ejaculation. Some of this abuse is said to have occurred when the applicant was doing his ward rounds. In other cases, the complaint is that the abuse happened at the applicant's private consulting rooms.

5. The complaints were very helpfully summarised in tabular form by O'Malley J. and I take the liberty of reproducing this summary for the purposes of this judgment. Complainant A has withdrawn his complaint, citing ill-health. The remaining complaints are as follows:-

Complainant B.

Date of complaint: 25th May, 2009

Date of alleged offence: 1965

Medical records: None available

Complainant C.

Date of complaint: 22nd June, 2009

Date of alleged offence: Between 1967 and 1969

Medical records: None available

Complainant D.

Date of complaint: 2nd July, 2009

Date of alleged offence: 1968/1969

The only medical records relevant to this complainant relate to a hospital admission in 1991. However, his mother has made a statement in which she confirms that when he was about eleven years old he spent about three weeks in hospital, followed by

several appointments as an outpatient with the applicant.

Complainant E.

Date of complaint: 20th, November, 2009

Date of alleged offence: 1969/1970

Medical records: None available.

Complainant E says in his statement that his father was in the room at the time of the assault but on the other side of a screen. He further says that he told his mother a few days later and she told his father. His father is apparently deceased and he did not wish his mother to be interviewed. However, during the hearing a statement from his mother was provided to the court. In it she said that she does not remember being told by her son that he had been molested or touched inappropriately by the applicant. She says that her memory is not as good as it once was.

Complainant F.

Date of complaint: 18th December, 2009

Date of alleged offence: 1970

Medical records: None available.

This complainant says that he told his mother what had happened. She discussed it with his sister and brother-in-law and they decided not to pursue a complaint.

Complainant G.

Date of complaint: 20th January, 2009

Date of alleged offence: 1970/1971

Medical records: None available

Complainant H.

Date of complaint: 28th November, 2009

Date of alleged offence: 1971

Medical records: None available.

Complainant H has said that his father accompanied him to the clinic in 1971. His father passed away in 1984.

Complainant I.

Date of complaint: 11th November, 2009

Date of alleged offence: 1972

Medical records: None available.

This complainant states that he is "nearly sure" that he made a complaint to his mother after being indecently assaulted in 1972. He also says that it was discussed with his brothers and sisters. His mother is deceased and this complainant does not wish his siblings to be contacted in respect of the matter.

Complainant J.

This complainant indicated that he would not be available for a trial as he resides abroad.

Complainant K.

Date of complaint: 28th May, 2009

Date of alleged offence: 1974

Medical records: Available.

Complainant K alleges that when he was indecently assaulted in the hospital in 1974 he made a complaint to a junior doctor. The doctor has not been identified. This complainant stated that a named nurse had been on duty in the applicant's outpatient clinic. The nurse in question, when approached by investigating Gardaí, stated that she did not recall this patient and that she had never at any time worked in the outpatient department.

Complainant L.

Date of complaint: 18th June, 2009

Date of alleged offence: 1974/1975

Medical records: Available.

Complainant M.

Date of complaint: 16thJanuary, 2009

Date of alleged offence: 1975/1976

Medical records: Available.

Complainant M. made to a statement to the Gardaí in which he says that he informed a (named) neighbour about the manner in which he was abused by the applicant. He claims that the neighbour said in response that he had also been abused by Mr. S. The neighbour then made a statement to the investigating Gardaí in which he said:

> "I have no knowledge of this ever being discussed with [M.] I was a patient of Mr. S's in the…hospital. I was under his care with a broken arm when I was a teenager. Mr. S. did not abuse me in any manner at all."

Complainant N.

Date of complaint: 18th June, 2009

Date of alleged offence: 1975/1976

Medical records: Available.

Complainant N says in his statement that he was accompanied to the applicant's clinic by his father on the occasion of which he complains (in 1975 or 1976) but that he did not tell his father. No statement has been taken from his father, because he is an elderly man and N did not wish him to be interviewed in respect of the matter.

Complainant O.

Date of complaint: 21st May, 2007

Date of alleged offence: 1976

Medical records: Available.

Complainant P.

Date of complaint: 9th December, 2009

Date of alleged offence: Between 1979 and 1981

Medical records: None available

Complainant Q.

Date of complaint: 24th April, 2009

Date of alleged offence: 1981

Medical records: None available.

Complainant R.

Date of complaint: 25th May, 2010

Date of alleged offence: 1984

This complaint was withdrawn in a written statement citing ill health.

Complainant S.

Date of complaint: 25th January, 2009

Date of alleged offence: 1985

Medical records: Available.

Complainant T.

Date of complaint: 27th April, 2009

Date of alleged offence: 1988

Medical records: Available

Complainant U.

Date of complaint: 17th September, 2009

Date of alleged offence: 1990

Medical records: Available

Complainant V.

Date of complaint: 6th May, 2010

Date of alleged offence: Between 1989 and 1991

Medical records: None available.

6. The applicant now seeks orders restraining the prosecution of these offences. He does so on three distinct grounds, first, delay in the bringing of the charges; second, prejudicial publicity; and, third, the joinder of additional charges on the indictment. The oldest of the allegations dates from 48 years before the applicant was charged in July 2012, while the most recent dates from 22 years before the charge. The applicant says that the delay has been such as to imperil his right to a fair trial; that he has been the subject of publicity that also endangers that right, and that the joinder of charges is in breach of the relevant legislation.

7. These issues can now be considered in turn.

Lapse of time

8. There is no doubt that judged by any ordinary standards the lapse of time since the events complained of is very considerable indeed. To put all of this in perspective, if the applicant were to stand trial in 2016 in respect of the oldest of these complaints, this would relate to matters which are said to have occurred some 52 years previously. This is probably the longest interval between alleged incident and ultimate trial with which the courts in this jurisdiction have ever had to contend. It must be said, however, that something similar occurred in *PB v. Director of Public Prosecutions* [2013] IEHC 401 where O'Malley J. refused to prohibit a trial on grounds of lapse of time where the applicant faced charges of indecent assault stretching back to 1965. An appeal from this decision was subsequently dismissed by the Supreme Court in an *ex tempore* decision.

9. There is no doubt at all but that the courts in this jurisdiction have struggled to deal with the phenomenon of child sexual abuse since the first waves of complaints emerged in the early to mid-1990s. This problem has proved itself to be especially acute so far as lapse of time is concerned. Here the case-law has ebbed and flowed as the courts endeavoured to strike a fair balance between the effective prosecution of offences on the one hand and the rights of the accused to trial with reasonable expedition on the other. Leaving the vast corpus of case-law on the question of delay and sexual offences to one side for the moment and approaching the matter from the standpoint of first principles, it can be said that Article 38.1 of the Constitution (with its guarantee of trial "in due course of law") serves two general objectives. First, the reflecting the Constitution's commitment to the dignity of the individual (as per the Preamble) and to a democratic state (Article 5), the guarantee of trial in due course of law in Article 38.1 presupposes that any trial will be conducted in accordance with civilised standards as befits a democratic State committed to the rule of law. Second, a key objective of Article 38.1 must be to reduce the risk of miscarriages of justice.

10. It is the second of these objectives that is potentially put in jeopardy by these prolonged delays. There is no question at all but that lengthy delays of this kind present difficulties for the courts in their endeavours to administer justice, not least where the accused has been falsely accused. Memories fade or are liable to be distorted, witnesses die or become unavailable and the capacity of the parties to test the credibility of the opposing party by reference to past known events is often completely undermined by the passage of time.

11. This poses a considerable difficulty for accused persons. How, it might be asked, could an accused hope to defend himself is faced with an allegation after such a very long lapse of time? In reality, quite often the only defence will be to counter the allegation by a denial which demonstrates that he was not the kind of person who could or did commit this type of offence. It has to be acknowledged that this is not altogether satisfactory and that the position of the person accused in such circumstances after such a lapse of time may well be regarded as "perilous": see the comments of Hardiman J. in *SB v. Director of Public Prosecutions* [2006] IESC 67.

12. If, on the other hand, the courts were to adopt any other attitude, it would lead to a situation where historical sexual cases might not effectively or realistically be prosecuted. The sexual abuse of minors invariably occurs in private: it is – almost by definition – furtive and hidden from view. The (by now) extensive experience of the criminal justice system has demonstrated that there are many reasons why the victims of such abuse delay making such complaints: see, *e.g.*, the comments of O'Donnell J. to this effect in *The People (Director of Public Prosecutions) v. McNeill* [2011] IESC 12, [2011] 2 I.R. 669, 716.

13. In this context it must be recalled that the phrase "due course of law" as it appears in Article 38.1 of the Constitution "requires a fair and just balance between the exercise of individual freedoms and the requirements of an ordered society": see Re Article 26 and the Criminal Law (Jurisdiction) Bill 1975 [1977] I.R. 129, 152, per O'Higgins C.J. Quite apart from the fact that the sexual assault of a minor is a serious criminal offence and gravely morally wrong, such conduct also amounts, as I put it in my judgment as a judge of the High Court in *FH v. Staunton* [2013] IEHC 533, to "an open attack on the 'person' of the child within the meaning of Article 40.3.2 of the Constitution." The "fair and just balance" envisaged by the Supreme Court in the *Criminal Law (Jurisdiction) Bill* reference must accordingly be informed by the established realities in relation to the nature of sexual abuse of the kind identified in cases such as McNeill. The balance thus struck must therefore ensure that the right of victims to the effective protection of the person within the meaning of Article 40.3.2 is adequately protected. This in turn means that the criminal justice must, to some degree, at least, build in a tolerance for the delayed nature of complaints emerging so far as historical cases of child sexual abuse are concerned.

14. Returning to the circumstances of the applicant's case, it may be noted that he has (quite reasonably) deposed to the fact that given the volume of patients which he saw in any given year – perhaps 9,000 in all – he does not recall the identity of any of these complainants, save for one, Complainant Q. The applicant says that he can recall the identity of this patient because the latter happened to be the plaintiff in a medical negligence action in 1987. (The present complaint made by Complainant Q formed no part of those proceedings.) In a significant number of cases no medical records are available. In other cases potential witnesses (such as, for example, other doctors and nurses who were said to have been in the vicinity of the applicant as he conducted ward rounds) are no longer available or cannot be easily traced. Thus, for example, complainant G. is said to have complained to a nurse after his testicles had been fondled by the applicant. The applicant has sought further particulars regarding the identity of the nurse, but none has been forthcoming.

15. In other litigious contexts delay of this magnitude would have been fatal so far as the complainants are concerned. Before the problems presented by the veritable avalanche of sexual abuse allegations, it would almost certainly have been regarded as contrary to precepts of fair procedures to require any litigant to face a trial after such a length of time. Thus, for example, Henchy J. considered that a delay of 17 years prevented a defendant mounting an effective defence to a claim of negligence in respect of a road traffic accident so that the claim had faded "into the dim uncertainties of the past as to be beyond the reach of fair litigation":

see *Sheehan v. Amond* [1982] I.R. 235, 239. Two years later Henchy J. took the same view *in Ó Domhnaill v. Merrick* [1984] I.R. 151, 159 when he said that a delay of 24 years in prosecuting a personal injuries case was "so patently and grossly unfair to the defendant that her claim to have the case against her dismissed is unanswerable."

16. It would also have to be said that at various times the Supreme Court has applied similar reasoning to restrain the prosecution of a criminal trial after periods of delay much shorter than some of the charges in the present case. Two cases must serve as representative examples. In *JL v. Director of Public Prosecutions* [2000] 3 I.R. 122 the applicant faced charges that he had raped a young girl some 21 years previously. The offences were said to have taken place in a mobile home which he said that had been moved several months before the alleged incident, but that he could no longer verify this change of location. The Supreme Court held that the lapse of time was prejudicial and restrained the trial.

17. The second example also dates from the same period: *POC v. Director of Public Prosecutions* [2000] 3 I.R. 87. In that case the allegation was that a music teacher had locked a particular door before sexually abusing a pupil. The applicant maintained that given the lapse of time – some 18 years – he could no longer exactly when security locks had been fitted to the music rooms. The Court held that this fact coupled with the lapse of time meant that delay had been prejudicial.

18. Since, however, the seminal decision of Murray C.J. in *S.H. v. Director of Public Prosecutions* [2006] IESC 55, [2006] 3 I.R. 575 a completely different approach to the issue of delay in cases involving allegations of child sexual abuse has been mandated. The Court noted that judicial thinking had evolved through experience of these cases to the point where there was no longer any necessity in general to justify the reasons for the delayed complaint. Murray C.J. also quoted ([2006] 3 I.R. 575, 617) with approval from an expert affidavit sworn by Professor Harry Ferguson, an expert in the history of child welfare in Ireland. Professor Ferguson had noted in the context of an endeavour by a mother to bring a complaint of sexual abuse of her son to the attention of the authorities in the late 1960s:

> "…it is my opinion that it cannot be said that child sexual abuse had a sufficient public or official reality at that time such that would have made it possible for a victim successfully to initiate a complaint and/or bring a case against an alleged perpetrator. Any 'disclosure' of sexual abuse that occurred in the decades prior to the late 1980s and 1990s cannot reasonably be defined or treated as a disclosure in the sense that the term is understood today, given the massive social pressure that existed which rendered the child's statement illegitimate and a protective response unthinkable."

19. The decision in *SH* thus presaged a completely different judicial attitude to lapse of time issues in the context of older child sexual abuse cases. It was no longer generally necessary for the prosecution to advance a specific reason for the delay such as, for example, the presumed dominion of the alleged offender over the victim by reason of the disparity in age or power, even though these considerations had featured in numerous earlier judgments such as *B. v. Director of Public Prosecutions* [1997] 3 I.R. 140.

20. In the light of *SH*, two fundamental questions fall to be determined. First, is the lapse of time simply too great? Second, can the applicant nonetheless demonstrate potential prejudice by reason of the lapse of time? These questions can be considered separately.

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 *S.H.* 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. An example here is *SB v. Director of Public Prosecutions* [2006] IESC 67, a case where the indecent assault offences were alleged to have occurred within a hospital up to 31 years previously. The lengthy lapse of time, coupled with the clinical setting, means that the facts of *SB* echo in some respects the facts of this case, although there are also some important differences.

27. In this case it was alleged that a nurse had regularly woken the victim at about 2am and taken to the nursing station where the victim was abused. The victim claimed that he had made a complaint to two named nurses after this had first occurred. He said that the nurses told him that they would tell another doctor, but that he was simply given an injection and put to sleep.

28. There were, however, some singular features of the complaint and the potential prejudice alleged. First, the offences were said to have occurred only at night and in a specific location. Second, the applicant pointed to the fact that the doctor who it was alleged had been told of the complaint was now dead. Hardiman J. continued:

> "I now turn to the two missing nurses, and the missing doctor, all unfortunately deceased. On the face of the complainant's statement the fact that he made a complaint to the nurse would be admissible, as a recent complaint in a sexual allegation, and the evidence of the nurses, if they were available, would have been admissible on the same topic. Since they are deceased, the defendant is deprived of any possibility of contradicting the making of the complaint, itself admissible to show consistency on the part of the complainant. But the matter goes further than that. The nurses or one of them (it is not quite clear from the wording of the statement) is alleged to have said that he would pass on the complaint to a named doctor and that the complainant was then put to sleep by injection. The applicant says that this could not have occurred, at least legitimately, because nurses were not permitted to give injections by the hospital procedures of the time. The doctor could have confirmed this. If the trial proceeds the prosecution will have the benefit of the allegation that a complaint was made to the nurses. The nurses if available would either confirm this or deny it. If they confirmed it the prosecution will be little or no better off than they are simply on the basis of the complainant's own evidence. If they denied it, however, the credibility of the complainant would have suffered a considerable blow. It appears to me that the applicant has lost the real possibility of an obviously useful line of defence."

29. The Supreme Court accordingly granted an injunction restraining the trial of the applicant in respect of a majority of these offences.

Potential prejudice: missing documents

30. Returning now to the facts of the present case, the applicant submitted that, given that the allegations dated back to some 50 years previously, he could not recall without the assistance of medical records whether most of the complainants had been patients of his. He further submitted that at his outpatient clinics he was always accompanied by a nurse and very often by students and junior doctors. On the rare occasions when he saw a patient on his own he was never more than a few metres from the vision or hearing of other patients. He commented that many of the complainants had come back to him as adult patients. On request, he offered the Gardaí the contact details for his secretaries and access to his diaries.

31. To my mind, this complaint of prejudice is simply too general and non-specific to meet the threshold articulated by the Supreme Court in *SH*. For a start, medical records are available in about half the cases. But even in those cases where the medical records are unavailable or incomplete, it cannot be said that this goes to the heart of either the prosecution or the defence. The availability of records simply acts as a check on the question of whether the complainant was actually a patient. In this respect the case differs from *SB* where the missing roster records were important to assist the applicant's defence that he was simply not present on night duty on the specific dates alleged.

32. It is true that in the present the applicant runs the risk of prejudice by reason of the absence of the records in that it is possible that a complainant who was not a patient has simply made up a complaint against Mr. S. There are, however, other ways in which a malicious complaint of that kind can be detected, by, for example, a line of questioning directed towards establishing the nature of the illness for which he was treated, what he can recall regarding the lay-out of the consulting rooms or the ward (as the case may be) and so forth.

33. Even, however, in those cases where the medical records are available their existence is likely to be of only peripheral relevance to both prosecution and defence alike. Of far greater importance is likely to be the applicant's defence that the allegations are inherently implausible if only because of the fact that a consultant in his position had no opportunity to commit such an offence as he was in the constant presence of junior doctors, nurses and other hospital staff. That defence will continue to be available to him irrespective of the presence or absence of medical records.

Potential prejudice: missing witnesses

34. The applicant has identified two categories of potential witnesses who, he says, could have been of assistance. In the first category he has identified a number of individuals, named in the book of evidence and disclosure materials, who could have had relevant evidence relating to specific allegations, but who are now unavailable or not identifiable. For the most part, this arises where a complainant has said that another person was present in the vicinity at the relevant time, or was informed of the complaint at an early stage.

35. In the second category of unavailable witnesses are certain doctors and nurses who gave evidence on behalf of the applicant in the 2003 trial. The applicant's solicitor has deposed to the efforts made by him to ascertain their availability in the pending trial. He says one is untraceable by him, one has Alzheimer's disease and three have told him that they will not be "in a position to assist".

36. So far as these missing witnesses are concerned, similar problems of this kind appear with almost all of the individual 19 complainants. It may suffice for our purposes to take a few representative examples.

Complainant E

37. In the case of complainant E, the allegation is that he was referred while a 12 year old to the applicant in a case of suspected appendicitis. Complainant E recalls accompanying his father to the applicant's consulting rooms and gives a detailed account of those rooms. He says that his father was present in the room the applicant examined him with curtains around the bed and conducted a rectal and abdominal examination. He then alleges that the applicant stroked his penis and general genital area until he ejaculated. This all happened on the bed within the curtained area and out of sight of his father.

38. Complainant E stated that he later told his mother of what had happened, but she told him that what happened must have been part of the examination. Complainant E. attended the hospital to have his appendix removed some three weeks after this incident. He says that following the surgery the applicant came to visit him on the ward at about mid-day when no other nurse or doctor was

present. He says that the applicant put on rubber gloves, examined his wound, but then massaged his penis until Complainant E ejaculated.

39. Complainant E's father unfortunately died in 2012 and his mother has made a statement to the effect that she had cannot recall her son saying that he had been abused, although she also concedes that her memory is not as good as it might have been.

40. I cannot see that the absence of these witnesses is inherently prejudicial to the applicant so far as this complaint is concerned. After all, it can be put to Complainant E that the fact that his father was actually present in the room rendered his account of the alleged abuse unlikely. Likewise, the fact that Complainant E's mother says she does not remember him making a complaint at the time cannot be said to assist the prosecution.

Complainant G and Complainant K

41. In the case of Complainant G he says that when he was sixteen he suffered minor injuries in a motor bike accident. At one point he was attending out-patients when he was directed by a nurse to a cubicle where he was examined by the applicant. Having examined the wound he claims that the applicant then proceeded to undress him and to grope his testicles. Complainant G. says that he jumped up and severely reproached the applicant who attempted to explain that he was examining him for a rupture. His wound was not dressed.

42. Complainant G says he was then seen by two nurses (whose identity he cannot now recall). He says that he said to the nurse who changed the dressing:

> "Do you know what he is doing in there?" She looked at me and said nothing. I remember thinking that she understood."

43. In the case of Complainant K, the allegation is that the applicant had been referred on several occasions for both appendicitis (in 1974) and meningitis (in 1982). On both occasions he says that his penis was fondled by the applicant to the point of ejaculation. On the first occasion he was just 11 years old and he says that he was abused in this fashion, first, in the course of medical examination and, second, post-operatively. Complainant K. says that he first met a named nurse who was working at out-patients when he was first admitted. The nurse has made a statement to the effect that she never worked at the out-patients department; that the applicant was always accompanied when he did his rounds and that she never witnessed anything amiss.

44. On the second occasion he was drowsy as he recovered from treatment for meningitis. He says that he woke up to find the applicant masturbating him. Complainant K. says that he later complained to a junior doctor (whose name he cannot recall but who was under the supervision of another (named) clinician), but the doctor dismissed it as "delirium due to sickness."

45. So far as the nurse's statement is concerned this will naturally assist the defence. It is true that the junior doctor to whom the complaint was allegedly made by Complainant K cannot now be called. The same is true of the nurse who changed Complainant G.'s dressing.

46. The existence of a recent complaint in sexual matters is, however, admissible simply to show consistency (and, in that sense, to support the general credit of the witness), but does not amount to corroboration: see *The People (Director of Public Prosecutions) v. Brophy* [1992] I.L.R.M. 709, 716, *per* O'Flaherty J. It is also quite possible, of course, that had the junior doctor or treating nurse been identified, he or she *might* have assisted the applicant by giving evidence to the effect, for example, that no such complaint was made or by otherwise contradicting its general terms.

47. It is true that this was a feature of *SB* as well and the absence of the nurses to whom the recent complaint was made was acknowledged to be potentially prejudicial. But as Hardiman J. acknowledged, the real prejudice in that case was the fact that the complainant contended that the nurses had then put him to sleep by injection, something which the applicant maintained that they were not legitimately entitled to do. The absence of the nurses, therefore, deprived the applicant of "the real possibility of an obviously useful line of defence."

48. I do not think that this can realistically be said in the present case. I do not deny that the absence of the junior doctor and the treating nurse is potentially prejudicial, but it is difficult to say that any established or likely prejudice is at such a level as would justify restraining the trial of the applicant on some *ex ante* basis. There has been a growing recognition at various levels throughout the criminal justice system that it requires something exceptional to justify the prohibition of a criminal trial, especially if any potential unfairness to an accused is capable of being mitigated by appropriate rulings in the course of the trial. This point was well expressed by O'Malley J. in her judgment in *PB*, but a similar trend can be seen in the "missing evidence" cases where, typically, the applicant seeks to restrain a trial on the ground that he is prejudiced by the failure to preserve vital evidence. As I said in a judgment for this Court in *Sirbu v. Director of Public Prosecutions* [2015] IECA 238:

> "…. the present case is one where any potential prejudice to the accused is best assessed by the trial judge who, of course, is bound to uphold the applicant's constitutional rights to basic fairness of procedures (Article 34.1 and Article 40.3.1) and to trial in due course of law (Article 38.1). This was the very point which was made by Dunne J. in *Kearns*, since a determination of this issue adverse to the applicant in judicial review proceedings emphatically does not mean that there has been a judicial determination to the effect that the missing evidence is no longer relevant or that it is non-prejudicial to the defence.
>
> In the present case, any potential unfairness to the applicant is capable of being addressed by a judicial ruling or rulings at the trial. Depending on the run of the evidence at the trial, this might (or, for that matter, might not) require the trial judge to exclude certain prosecution evidence relating to the video footage. A decision to exclude some or all of that evidence might well be required if it were to transpire that the applicant's counsel could not effectively cross-examine prosecution witnesses. It is not necessary for this Court to anticipate the types of circumstances in which this issue which possibly arise beyond saying that it would be obviously prejudicial if these witnesses were to depart in a material way regarding what they said they saw on the CCTV beyond what is already contained in their statements.
>
> In these circumstances it is sufficient to state that I have no reason to believe that the trial judge will not be alive to such potential unfairness and astute to ensure that any dangers to the fairness of the trial presented by the missing footage will be addressed by appropriate rulings."

49. This reasoning applies, *mutatis mutandis*, to the present case. Indeed, as O'Malley J. pointed out in PB, the contemporary case-law stresses the power – and, perhaps, even in some exceptional cases, the duty – of the trial judge to intervene to stop the prosecution of some or all charges in the light of the run of the evidence. This, however, is a decision which is *generally* best left to

the court of trial which is again generally better placed than the judicial review judge to assess potential fairness having regard to the *actual conduct* of the trial and the run of the evidence which has been actually tendered by the prosecution. It must be emphasised, however, that the system of criminal justice envisaged by the Constitution is one which (subject to exceptions which are not here relevant) involved trial by jury and not by judge alone. In this context the *mere* fact of a long delayed complaint is not *in itself* a reason by which a criminal charge of this nature should be dismissed.

50. For these reasons I cannot say that the potential prejudice which the applicant may suffer by reason of the missing evidence or witnesses has attained such a level as would justify the grant of prohibition to restrain the prosecution of these offences.

Adverse pre-trial publicity
51. At the heart of the applicant's case on this topic is the contention that he has been prejudiced by the welter of publicity generated, particularly since the decision of the Medical Council in October 2008. As O'Malley J. noted, the allegations against him were mentioned in Dáil Eireann on some 19 occasions between 2009 and 2012 and it is not disputed but that his case has generated enormous publicity. Furthermore, on the 8th June, 2009, RTE broadcast a programme about the applicant. The applicant's solicitor describes it as :

> "… a strongly emotive, documentary type programme purporting to be an investigation into the applicant. A highly unusual and significantly prejudicial aspect of this programme was the attempt to undermine the verdict of the jury in the 2003 trial and the suggestion in the programme that particular persons who were witnesses [called] in evidence by the applicant at that trial were persons that required some form of professional or other investigation. I say that this is the only occasion in my professional career when I have witnessed that type of attack on witnesses."

52. Even accepting that this is so, the fact remains that this broadcast took place over six years ago and the dramatic nature of this broadcast is likely to have receded from the memory of the public. While it is true that the allegations against the applicant have at times generated saturation coverage, it may be noted that there are really almost no examples of where coverage of this kind has been held to justify the *prohibition* – as distinct from the postponement – of a criminal trial: see*, e.g., D. v. Director of Public Prosecutions* [1994] 2 I.R. 465, *Z. v. Director of Public Prosecutions* [1994] 2 I.R. 476; *Rhattigan v. Director of Public Prosecutions* [2008] IESC 34, [2008] 4 I.R. 639 and *O'Brien v. Director of Public Prosecutions* [2014] IESC 39.

53. It may be accepted that had this welter of publicity occurred within the last 6 months or so, an application for an order staying the prosecution of the charges for a period of somewhere between 6 months and 12 months in order to enable memories to fade might well have been justified. In the present case, however, the wave of potentially prejudicial publicity has long since passed and there has been little by way of public comment since he was charged with these offences in July 2012. Judged, therefore, by the standards consistently articulated in this quartet of Supreme Court decisions from *D.* to *O'Brien* which I have just mentioned, I see no basis on which the applicant's pending trials can be prohibited on this ground.

Joinder of charges
54. The draft indictment served on the 8th April, 2013, included counts relating to six complainants who had not been the subject of any of the charges sent forward from the District Court. These individuals had made statements of complaint before the applicant was charged on the 31st July, 2012, and summaries of their complaints had been included in the material furnished to the applicant in 2010.

55. The applicant submits that these additional counts can be validly added only with his consent, which he has not given. The Director of Public Prosecutions submits, on the other hand, that she is entitled to add the counts by virtue of the provisions of s. 4, and, in particular, s. 4B, 4C and 4M, of the Criminal Procedure Act 1967 ("the 1967 Act") as inserted by ss. 8 to 10 of the Criminal Justice Act 1999 ("the 1999 Act").

56. The effect of the 1999 Act was to abandon the former preliminary examination procedure contained in the 1967 Act. Section 4 of the 1967 Act (as so amended) now requires (with exceptions not here relevant) the District Court to send an accused for trial on an indictable offence, provided the documents referred to in s. 4B have been served on the accused including a statement of the charges against the accused (s. 4B(1)(a)); a list of the witnesses the prosecutor proposes to call at the trial (s. 4B(1)(c)); and a statement of the evidence that is expected to be given by each of them (s. 4B(1)(d)).

57. Section 4C of the 1967 Act (as amended) provides in relevant part as follows:

> "(1) At any time after service of the documents mentioned in section 4B(1), the prosecutor shall cause the following documents to be served on the accused or his solicitor, if any:
>
> (a) a list of any further witnesses the prosecutor proposes to call at the trial,
>
> (b) a statement of the evidence that is expected to be given by each witness whose name appears on the list of further witnesses….
>
> (2) As soon as any documents are served in accordance with this section, the prosecutor shall furnish copies of them to the trial court."

58. It is also necessary to consider the provisions of s. 4M and s. 4N. Section 4M provides:

> "Where the accused has been sent forward in accordance with this part, the indictment against the accused may include, either in substitution for or in addition to counts charging the offence for which he has been sent forward, any counts that –
>
> (a) are founded on any of the documents served on the accused under section 4B or 4C, and
>
> (b) may lawfully be joined in the same indictment."

59. Section 4N deals with "unrelated" charges as follows: "

> "Where the accused has been sent forward for trial in accordance with this Part, the indictment against the accused may, with the consent of the accused and notwithstanding any other enactment, include counts that –
>
> (a) charge an offence justiciable within the State, other than the offence for which the accused was sent forward,

and

(b) are not founded on the documents served on the accused under section 4B or 4C and s. 25(3) of the Courts (Supplemental Provisions) Act, 1961 shall be construed accordingly."

60. Finally, it is necessary to note Rule 3 of the First Schedule to the Criminal Justice (Administration) Act, 1924:

> "Charges for any offences may be joined in the same indictment if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character."

61. The respondent says that the new charges are founded upon the documents served under ss. 4b and 4C, as required by s.4M, and that s.4N has no bearing.

62. In the judgment under appeal O'Malley J. held that s.4M provides for the joinder of additional charges "if they arise from the material served under ss. 4B and 4C" She stated that these additional charges did not "arise" from this material in this sense, since they represented independent and separate charges against the applicant. I entirely agree with her conclusion that s. 4N is the provision dealing with the joinder of new charges not arising from that material. The consent of the accused is required for the joinder of new charges of this kind under s. 4N.

63. Nevertheless, O'Malley J. did not think that, having stated this view, it was appropriate to grant any relief in respect of what she had, in any event, understood to be simply draft charges. For my part, however, I consider that as this is a jurisdictional matter the rules for which are contained in the 1967 Act (as amended), it would be just and convenient to grant appropriate declaratory relief. I would accordingly vary the order of O'Malley J. by granting a declaration to the effect that the joinder of charges arising from the six further complaints which had not been the subject of any of the charges sent forward from the District Court is governed by s. 4N of the 1967 Act and that such additional charges may only be added with the consent of the applicant accused.

64. It follows that as the applicant has not given such consent that should the Director wish to prefer these additional charges this can only be done by way of a separate free standing prosecution.

Conclusions

65. In summary, therefore, I would conclude as follows:

66. First, in the light of the decision of the Supreme Court in SH it is not open to this Court to declare that after the lapse of a stated period of years a prosecution may not take place. Even though, therefore, the delays in the present case are, by any standards, exceptionally long, ranging as they do back to complaints dating from 1964/1965, the Court cannot say on some *ex ante* basis that these prosecutions should not proceed by reason of delay.

67. Second, while there is no doubt at all but that the lengthy delays in the present case present difficulties for both prosecution and defence alike, it cannot nevertheless be stated that these delays have caused irremediable prejudice in terms of either missing witnesses or evidence. Experience has shown that, special circumstances aside, the court of trial is generally better placed than the judicial review judge to make an assessment of this matter, particularly having regard to the run of the evidence and the evidence actually tendered. As O'Malley J. pointed out in PB, the trial judge's role is not confined simply to giving appropriate warnings to the jury, but extends further to the power to stop the prosecution continuing with a prosecution should the justice of the case so require it. It must be emphasised, however, that the system of criminal justice envisaged by the Constitution is one which (subject to exceptions which are not here relevant) involves trial by jury and not by judge alone. Accordingly, in this context the *mere* fact of a long delayed complaint is not in *itself* a reason by which a criminal charge of this nature should be dismissed.

68. Third, while the applicant's case has generated considerable adverse publicity, this all occurred before the latest charges were preferred in July 2012. There are almost no cases of where the courts have restrained – as distinct from postponing – a prosecution on these grounds and in the light of the principles articulated in the quartet of leading Supreme Court decisions (*D, Z, Rhattigan and O'Brien*), the applicant is not entitled to relief on this ground.

69. Fourth, the additional charges sought to be preferred by the Director of Public Prosecutions relating to six complainants who had not been the subject of any of the charges sent forward from the District Court do not "arise" from the earlier charges for the purposes of s. 4M of the 1967 Act (as amended). As such, the consent of the applicant for this purpose under s. 4N of the 1967 Act (as amended) is required. As this consent has not been forthcoming, it follows that these charges must be the subject of a separate prosecution.

70. Fifth, as this is a jurisdictional matter, it is appropriate to grant declaratory relief to this effect and I would accordingly vary to this effect the order of O'Malley J. as declined to grant such relief.