THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 439 JR]

BETWEEN

M.H.

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice MacGrath delivered on the 31st day of July, 2018.

1. The applicant was born on 21st September, 1943. He brings this application for judicial review seeking an order of prohibition and/or an injunction restraining the respondent from proceeding with his trial in respect of four counts of indecent assault, which assaults are alleged to have occurred in 1972 and in 1973, and from prosecuting him in respect of these charges.

2. On 17th August, 2015 and again on 18th January, 2016, the complainant made statements to An Garda Síochána that the applicant, who was the complainant's sports coach, indecently assaulted him on four separate occasions in 1972 and 1973 when the complainant was aged between 9 and 11. The assaults are alleged to have occurred while they were alone in the clubhouse of a sports club. Following a garda investigation, the applicant was charged. He is being prosecuted on indictment and the charges are pending before the Circuit Criminal Court.

3. By Order of Noonan J. dated 29th May, 2017, the applicant was granted leave to apply by way of judicial review for, *inter alia*, an injunction restraining the respondent from prosecuting him, an order prohibiting the respondent from proceeding with the trial, and for a stay on further prosecution of the case pending the outcome of this application.

Grounds and basis of claim
4. The applicant identifies the following grounds upon which he contends that he cannot receive a fair trial:-

Delay and prosecutorial delay

5. It is pleaded and submitted that the lapse of time of 43 years, the delay in the investigation of the complaints and in the bringing of proceedings is of such prejudice to the applicant that he will not receive a fair trial. It is argued that he is prejudiced by prosecutorial delay between the dates of the taking of the applicant's statements in August, 2015 and January, 2016, and the date of the return for trial on 18th January, 2017. Mr. Donal Daly, solicitor for the applicant, in an affidavit sworn by him on 24th May, 2017 grounding this application, avers that apart from the delay of 43 years in making the complaint, there was a further delay in the return for trial by the respondent and that the applicant is thereby prejudiced.

6. Mr. Daly avers that several potential witnesses are no longer available. The alleged assaults happened over 43 years ago and since then, many people who knew the applicant and worked as sports coaches at that time have died or have left the jurisdiction and are therefore unable to be potential witnesses for the applicant. He lists the names of such witnesses including the founder of the club, a committee member of the club, the president of the club, a man and a woman who were aware of the applicant's coaching career with the club, two lodge caretakers, a bus driver for the club, a club helper and a club fundraiser. It is urged that their absence will undermine the right to a fair trial. Other than the evidence of the garda witnesses who interviewed him, the evidence against the applicant is solely that of the complainant. There are no other available witnesses who were there at the time the offences allegedly took place.

Absence of evidence and witnesses

7. The building where the indecent assaults are alleged to have occurred no longer exists. It has been demolished. The applicant contends that he is now unable to engage an engineer to assist his defence by carrying out an examination and inspection of the building. It is argued that such evidence would assist him in his defence and in testing or challenging the veracity and accuracy of the complainant's description of the location where the assaults are alleged to have taken place and thus the complainant's account of the alleged offences. He also argues that the prosecution in a criminal trial is obliged to preserve and make available to the defence all evidence relevant to the accused's guilt or innocence, otherwise the accused, as in this instance, is denied his right to prepare his defence and/or challenge or rebut the prosecution evidence. He asserts that the inspection of the building is relevant to the applicant's case as the complainant is very descriptive about the part of the building where the assaults allegedly occurred. Mr. Daly contends that the applicant is at a serious disadvantage in preparing his case as he is no longer in a position to retain an engineer to provide photos or prepare a map of the building to assist him in appraising matters from his own viewpoint.

Health issues

8. It is contended that the applicant suffers from a number of health issues which will render his trial unfair. The applicant is now 74, his health is deteriorating, and it is alleged that he suffers from memory loss. In support of this averment, Mr. Daly exhibits a medical report prepared by Dr. Morgan dated 10th February, 2017, a radiological report dated 24th January, 2017 and a report prepared by Dr. O'Regan, a consultant psychiatrist, on 3rd May, 2017.

9. Dr. Morgan, in his report, describes the applicant as being depressed, suffering a loss of self-esteem and being pessimistic. The applicant also reported to Dr. Morgan that in recent years he had experienced memory loss. He forgets meetings, loses track of time and ruminates over matters such as whether the electric light or oven have been left on. He reported being compromised in the daily management of his house, that his sleep pattern has been affected and that he requires constant reassurance. His wife died in 2012. While he lives alone, his family is supportive.

10. The applicant also has some residual physical impairment following a severe motorcycle accident in the 1960s. In addition, he

underwent bypass surgery in 2011, suffers from hypertension and is a diabetic. He requires medication for these conditions.

11. On mental state examination he was found to be depressed and Dr. Morgan thought the applicant had cognitive dysfunction. Dr. Morgan records apparent memory loss and reports that the applicant confabulates. The applicant's cognitive dysfunction indicated possible vascular cerebral changes. A brain scan showed vascular disease and changes including, *inter alia*, moderate small vessel ischaemic disease involving both cerebral hemispheres suggestive of vascular dementia. Dr. Morgan thought the applicant may have difficulty in recalling past events. He suggested that a report be obtained from an old age psychiatrist, to whom he referred the applicant.

12. A comprehensive report was prepared on 3rd May, 2017, by Dr. O'Regan, a consultant psychiatrist with the Older Adult Mental Health Team. She reviewed the applicant on two occasions, 7th March, 2017 and 10th April, 2017. He was also seen by a community mental health nurse and psychologist. In her report, Dr. O'Regan recounts that the reason for referral was his memory loss, forgetfulness, the loss of track of time and that he ruminated. He reported to her that his memory had been problematic for at least two years, that he was very worried about the impending court case and that he had no memory of perpetrating such acts. He denied the allegations. On initial assessment in March, 2017, Dr. O'Regan reported that the applicant's scores indicated cognitive impairment. She placed him on trial antidepressants and referred him to a clinical nurse specialist and a psychologist for a neuropsychological assessment and for anxiety management.

13. On further review on 10th April, 2017, the applicant continued to be anxious and was mildly depressed. Again he denied the allegations. Dr. O'Regan reported that the applicant was able to provide a level of detail regarding the charges as he understood them and "*appeared to have been able to retain that information".* She opined that he had the ability to communicate his needs and to instruct his solicitor.

14. In April, 2017, Dr. O'Regan conducted a further cognitive assessment, with scores suggestive of early dementia. She referred the applicant to a clinical nurse specialist to review him at home and to monitor his response to treatment. His antidepressant medication was increased. On review by the clinical nurse specialist on 25th April, 2017 there had been a clear improvement in his mood and anxiety symptoms. Nevertheless the applicant continued to display evidence of memory impairment.

15. Dr. O'Regan concluded that, given the applicant's presentation, his current mental state as well as his cognitive scores, he had an early dementia process, most likely Alzheimer's or "*mixed*". She reported that his depressive symptoms may be worsening his short-term memory deficits, and that dementia is a progressive neurodegenerative illness and will, despite treatment, deteriorate over time. She advised that he commence further medication for dementia once his depressive symptoms were fully resolved. She nevertheless concluded that, despite these diagnoses, the applicant retained the capacity to instruct his solicitors:-

> "*…it may be that his current mental state could impact on his ability to remember events over 40 years ago and in this sense his early Dementia may limit his ability to mount a defence to the alleged historical offences".*

The applicant's treatment is ongoing, and his mental state and cognition remain under review. Dr. O'Regan advised that he continue to attend a multidisciplinary service.

Omnibus considerations and risk of an unfair trial

16. Even if none of the above considerations, on their own, give rise to sufficient prejudice to justify the making of an order prohibiting the trial, it is contended that the combination and culmination of all these factors make this an exceptional case, warranting the granting of an order of prohibition. The lapse of time of 43 years, the delay in the investigation of the complaints and in the institution of proceedings is of such prejudice to the applicant that he will not receive a fair trial. Mr. Daly avers that the lack of access to the building, the bad health of the applicant and the fact that potential witnesses are no longer available has irretrievably prejudiced the applicant's right under the Constitution and the European Convention on Human Rights to a fair trial in due course of law. It is alleged that the balance of justice warrants relief being granted having regard to the seriousness of the incident and the potential sentence which may be imposed if the applicant is convicted.

Grounds and basis of defence

17. The respondent denies the claims made by the applicant. In the replying affidavit sworn on behalf of the Director of Public Prosecution by the investigating detective garda on 23rd November, 2017, the respondent contends as follows:-

Delay and prosecutorial delay

18. There has been no inordinate, culpable, unjustifiable and inexcusable prosecutorial delay in the investigation or the prosecution of these proceedings such as would threaten the applicant's right to a fair trial. There is no limitation period applicable to indictable criminal charges and there was no prosecutorial delay between 1972/1973 and August, 2015 when the complainant made his first statement. Up to that time the gardaí and the DPP were unaware of the alleged offences. In any event, the respondent argues that the applicant does not identify any specific prejudice arising therefrom. The respondent outlines the following timeline of the investigation and prosecution of the alleged offences in respect of post-complaint delay:-

> • The initial disclosure of the allegations was made to a counselling service by the complainant, and was then referred to An Garda Síochána for investigation. The first statement of the complainant to the gardaí was taken on 17th August, 2015. Following this a number of enquiries were conducted. The applicant was approached by gardaí on 4th November, 2015 and he advised that he wished to obtain legal advice before interview. On 19th November, 2015, the applicant attended voluntarily and was questioned after caution. He gave his account in reply. In December, 2015, a request was made for the notes made by his counsellor/therapist at the counselling service. These notes contained details of the first recorded disclosure and were received by the gardaí in March, 2016.
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> • The respondent identifies what is described as a complicating feature which required further investigation. The complainant made a report that on 16th January, 2016 he had been approached at his home by a third party regarding the allegations he had made against the applicant. The complainant made a further statement to the gardaí on 18th February, 2016 to the effect that the third party made the approach in an effort to "*sort the matter*". On 18th January, 2016, the detective garda spoke with the third party about his alleged intervention. On 15th February, 2016, a voluntary cautioned memorandum of interview was taken from the third party, in which he accepted that he had approached the complainant in an effort to "*sort things out*". The third party stated that he had done so on foot of a letter being shown to him by the applicant; that he had discussed the complainant's allegations with the applicant, but that he had not gone to the complainant at the request of the applicant. The

respondent submits that the approach to the complainant by the third party prolonged the investigation and that the detective garda involved was obliged to investigate such approach. This was particularly so, according to the affidavit of the detective garda, in circumstances where the gardaí had records of two similar formal complaints having been made against the applicant arising out of alleged incidents at the same sports club. These had been withdrawn after those complainants explained that compensation had been paid to them.

• In late March, 2016, the detective garda spoke with the applicant in relation to the further allegations made, and the applicant stated that he required legal advice. On 17th May, 2016, the detective garda again spoke with the applicant at his home, and the applicant informed him that he had been advised by his lawyer to not comment any further on those allegations.

• On 15th July, 2016, the detective garda submitted the investigation file to his superiors to enable it to be forwarded to the DPP for directions. The file was returned for further clarification by an inspector on 5th August, 2016. The queries raised were answered and the detective garda resubmitted the file for further directions on 20th October, 2016. The file was then submitted to the office of the respondent on 7th November, 2016 by the State Solicitor for the area. On 16th November, 2016, an officer of the respondent directed that the applicant be prosecuted on four counts of indecent assault. On 30th November, 2016, the applicant was charged by the detective garda consequent on the directions of the respondent. A book of evidence was compiled and was served on the applicant. He was then returned for trial to the Circuit Criminal Court on 18th January, 2017.

Absence of evidence and witnesses

19. The respondent submits that the duty to seek out and preserve relevant evidence should not be interpreted as extending to the preservation of a building that has long since been demolished and many years before the allegations were made known. Where the building once stood is now occupied by a business which has been operating at the site since 1985. The building is not an exhibit in the case. The applicant has not identified any relevant evidence that an engineer might give. The respondent rejects the statement of Mr. Daly that the applicant "*is denied his right to prepare his defence and or challenge and or rebut the evidence of the prosecution witnesses*". It is argued that while the complainant is stated to have been very descriptive about the building, the applicant was also descriptive about the building in his interview with the gardaí, as evidenced in the memorandum of that interview. This memorandum is contained in the book of evidence but appears to have been omitted from the copy of the book of evidence exhibited to the applicant's grounding affidavit. It has been exhibited to the affidavit of the investigating detective garda.

20. It is the respondent's case that the applicant's complaint about unavailable witnesses is an issue to be assessed by the court of trial in the context of the available evidence. Each alleged incident occurred while the complainant was alone with the applicant, and the respondent argues that it is difficult to see how the potential witnesses identified by the applicant's solicitor could be sources of relevant evidence. It is contended that the applicant does not identify in any particular way how any of the persons he mentions are in a position to give relevant evidence or how their absence means that the applicant will not receive a fair trial.

21. It is submitted that there are persons not mentioned in the affidavit of Mr. Daly who it appears are available to the applicant, and reliance is placed on the applicant's memorandum of interview where he names two coaches from other teams, one of whom resides in Ireland, the other residing outside the jurisdiction.

22. The respondent also asserts that the applicant has not established that any missing evidence points to material inconsistency with the allegations of indecent assault. He has not established that evidence did exist which could have been helpful. Taken at their height, all that has been adverted to on his behalf are theoretical possibilities. The respondent argues that the account of the complainant and the account of the applicant, and any inconsistencies in either account, are properly matters for the court of trial to assess.

Health and age issues

23. The respondent asserts that the age of the applicant or any medical difficulties he has are not of such a nature or extent as prejudice him in his defence or prevent him from receiving a fair trial in accordance with law. The psychiatric and medical evidence of memory difficulties and dementia are not of such a nature or extent as support a claim of prejudice to the applicant. The psychiatric report does not establish that the applicant is unfit to be tried. That is a matter for the court of trial to determine. The normal stress and anxiety experienced by an accused when facing a criminal trial is not sufficient for the court to conclude that it should restrain the trial, and it is submitted that it is apparent from a consideration of the voluntary memorandum of interview and the contents of the psychiatric reports that the applicant has already formulated a detailed approach to the case. The respondent argues that it is readily apparent from the report of Dr. O'Regan that the applicant has capacity to instruct his solicitor. While it appears that the primary cause for concern is the short-term memory of the applicant, the respondent asserts that the speculation on what "*could*" impact his ability to remember events from the relevant time, or "*may*" limit his ability to mount a defence, should not be relied upon to halt the prosecution. Notwithstanding the applicant's memory difficulties, he has been able to identify by name and description ten potential witnesses. The respondent asserts that this evidences that the applicant is able to instruct his solicitor and engage with the case.

Omnibus considerations and risk of an unfair trial

24. The respondent also contends that the issues raised by the applicant are issues that trial judges routinely rule upon before and during trial, and the grounds of review raised by the applicant should more properly be ventilated at trial. Such issues can be properly addressed through appropriate directions and rulings and, if the prosecution survives any application for a directed acquittal, through the judge's charge and any requisition of same. An appeal is available and the Court of Appeal may correct any errors of law or principle should the applicant be convicted. It is denied by the respondent that the prosecution amounts to an unwarranted and disproportionate interference with the constitutional rights of the applicant.

25. If the Court is to find that there has been blameworthy prosecutorial delay, then the Court must conduct a balancing exercise and consider, in that context, the public interest in proceeding with the prosecution. To accede to the application would adversely affect the public interest in the prosecution of offences and potentially the rights of the complainant under the EU Victims Directive (Directive 2012/29/EU). Complainant delay is not unusual in this type of case. It is submitted that there is nothing exceptional about this case to suggest that the applicant's right to a fair trial is prejudiced. The respondent also asserts that the potential sentence on conviction is not a relevant consideration in these proceedings. It is also argued that the applicant has not discharged the burden of satisfying the court that he is or will be prejudiced in his defence or that there is a real and substantial risk that he will be denied a fair trial by virtue of the matters complained of in these proceedings. The respondent argues that this is not an exceptional case in

which the discretion of the Court to grant relief by way of judicial review should be exercised.

The applicant's legal submissions
26. Counsel for the applicant, Ms. Fawsitt S.C., has fairly conceded that none of the grounds of challenge, individually and without more, is sufficient to warrant the Court interfering to prohibit the trial of the action. It is accepted on behalf of the applicant that he must establish exceptional circumstances in order to be granted the relief sought. She argues that on an omnibus view, the Court should intervene and that all the issues, taken together, amount to exceptional circumstances, which result in the applicant being prejudiced and to the probability of an unfair trial.

27. Counsel relies principally on two authorities where orders of prohibition were granted – the first being a decision of Baker J. in *J.C. v. Director of Public Prosecutions* [2017] IEHC 213, and the second, a decision of White J. in *T.C. v. Director of Public Prosecutions* [2017] IEHC 839. The applicant also opened to the Court the recent decision of McDermott J. in *P.H. v. Director of Public Prosecutions* [2018] IEHC 329, in which prohibition was not granted, and submitted that in some situations, relief will be granted, and in other situations, it will be refused. Each case must depend on its own facts.

The respondent's legal submissions
28. The following general principles, which I have summarised below, are relied upon by the respondent as principles which emerge from relevant caselaw. These principles must be seen against the backdrop of the constitutional right of an accused to a fair and expeditious trial.

(i) Each case must be considered on its own particular facts.

(ii) There is no statute of limitations or stated number of years beyond which an offence may not be prosecuted. The courts may not take a policy decision. This is a matter for the legislature.

(iii) The test governing delay in a child sexual abuse case, as formulated by Murray C.J. in *S.H. v. Director of Public Prosecutions* [2006] 3 I.R. 575 emphasises the requirement of establishing prejudice. The test is whether there is a real and serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that the trial would be unfair in consequence of the delay.

(iv) The inquiry which should be made is whether the degree of prejudice is such as to give rise to a real or serious risk of an unfair trial. The factors of prejudice, if any, will depend upon the circumstances of the case.

(v) An inquiry into the reasons for the delay in the making of a complaint need not be made.

(vi) The onus is on the applicant to establish a real risk of an unfair trial which necessarily and inevitably means unfairness which cannot be prevented or 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 unavoidable.

(vii) Prohibition may be ordered where the facts of the case give rise to a wholly exceptional circumstances which would render the trial unjust. Even where no single factor renders the case an exception, the cumulative effect of all the factors may bring the case within the category of an exception requiring that a balancing exercise be conducted by the court. Decisions which establish such exceptional circumstances do not necessarily mean that an elderly or unwell person may not be prosecuted for a crime committed many years ago. It is the cumulative effect of all factors which must be considered in conducting a balancing exercise between the rights of the accused and the right of the public to have crimes prosecuted. A prosecution is not an exercise in vengeance and while a court should pay due regard to the position of victims it must protect the integrity of the justice system as a whole (see *P.T. v. Director of Public Prosecutions* [2008] 1 I.R. 701 per Denham J.).

(viii) The fact of refusal to grant an injunction or prohibition does not detract or impinge upon the inherent jurisdiction of the trial court to protect its processes and to make necessary orders during the course of the trial. These include orders arising from evidence and issues relating to delay (*The People (Director of Public Prosecutions) v. P.O.C.* [2006] 3 I.R. 238).

(ix) In appropriate cases a trial judge should warn a jury of the dangers and effects of a lengthy delay. In the absence of such appropriate rulings, directions and warnings, a conviction may be held to be unsafe.

(x) There is a presumption that the trial judge will act fairly, exclude all inadmissible evidence and will apply all appropriate safeguards in the criminal process to ensure that no injustice is done (*J. Harris Assemblers v. Director of Public Prosecutions* [2009] IEHC 344). In addition, there are numerous other safeguards in the criminal process which will ensure that no injustice is done including the higher standard of proof in criminal cases, judicial directions, explanations and warnings, the availability of appeal, the possibility of a consultative case stated and the scope for judicial review of any serious errors of law or irrationality at trial (*J. Harris Assemblers*).

(xi) Where there is an allegation that evidence is missing, the missing evidence must be such as to give rise to a real possibility that the accused, in consequence, will be unable to advance a material defence point. In order to demonstrate the risk there is a requirement for an applicant for judicial review to engage in a specific way with the available evidence so as to make the risk apparent.

(xii) Where an applicant seeks to establish that the absence of a specific witness 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. It is insufficient 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 in the context of missing material or evidence.

(xiii) In such cases the onus of proof is on the applicant not to prove his innocence, but to establish that there is a real risk, being a real possibility that evidence did exist which would have been helpful but is no longer available. The onus is on the applicant to point to a specific identifiable prejudice.

(xiv) The fact that there has been a total destruction of a building where an offence is alleged to have taken place does not assist an applicant unless he can point to some piece of material evidence which might affect his trial. However, the

duty on the prosecution to seek out and preserve relevant evidence cannot be interpreted to extend to preserving a building which had been demolished before allegations were made or were known to the prosecution authorities.

(xv) Where there are issues as to an applicant's capacity, there are separate specific procedures to be applied and it is a matter for the trial court to determine a person's fitness to stand trial. On their own, the issues of capacity or disability do not constitute exceptional circumstances. The fitness of an applicant to plead is a matter for the court of trial. This includes situations where it is suggested that the unfitness arises by virtue of age, ill health, disability or incapacity. Fitness to plead must be determined in accordance with the Criminal Law (Insanity) Act 2006. There is no possible basis for substituting an inquiry on judicial review for the comprehensive statutory code contained in s. 4 of the Criminal Law (Insanity) Act 2006.

(xvi) If blameworthy prosecutorial delay is established, this Court must engage in a balancing exercise. In doing so, the Court must take into account the following factors:-

(a) It is not the applicant's interests alone which have to be considered, it is necessary to balance the applicant's right to reasonable expedition in the prosecution of the offences with a community's right to have criminal offences prosecuted;

(b) the primary function of deciding to initiate or continue a prosecution is conferred on the Director of Public Prosecutions – by virtue of his or her office, he or she is made aware of all the relevant circumstances of each particular case;

(c) a court called upon to prohibit a trial must give due weight to the gravity and seriousness of the offence when exercising its jurisdiction and in considering whether exceptional circumstances which arise such that prohibition may be granted;

(d) even though the applicant cannot establish a specific ground of prejudice, the court nevertheless retains a jurisdiction which, in appropriate cases, it may exercise to intervene to prohibit a criminal trial;

(e) in engaging in the balancing exercise, the court must take into account all rights including potential rights of a complainant under the EU Victims Directive.

(f) In appropriate cases, a trial judge should warn a jury of the dangers and effects of a lengthy delay. In the absence of such rulings, directives and warnings a conviction may be held to be unsafe.

(xvii) The fact that an applicant has been unsuccessful in a judicial review application in no way detracts from the power and duty of the court of trial to assess the case as it develops, including the assessment whether there is any unfairness to the applicant for which the prosecution is responsible but is capable of being remedied by the trial court.

Decision

29. In *S.H. v. Director of Public Prosecutions* [2006] 3 I.R. 575, Murray C.J. explained that the fundamental test which this Court must apply in a case such as this is as follows (at p. 620):-

> *"The test 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. The test is to be applied in light of the circumstances of the case.*

48. Thus, the first inquiry as to the reasons for the delay in making a complaint need no longer be made. As a consequence any question of an assumption, which arose solely for the purpose of applications of this nature, of the truth of the complainants' complaints against an applicant no longer arises. The inquiry which should be made is whether the degree of prejudice is such as to give rise to a real or serious risk of an unfair trial. The factors of prejudice, if any, will depend on the circumstances of the case."

Each case falls to be considered on its own facts. He observed at p. 621:-

> *"49. There is no doubt that difficulties arise in defending a case many years after an event. However, the courts may not legislate, 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 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."*

30. Regarding prosecutorial delay, in *P.T. v. Director of Public Prosecutions* [2008] 1 I.R. 701, the Supreme Court found that a delay of 28 months post complaint did not establish prosecutorial delay sufficient to prohibit the trial. Denham J. referred to the decision in *P.M. v. Malone* [2002] 2 I.R. 560, where Keane C.J. stated that the right of the accused to be protected from stress and anxiety caused by an unnecessary and inordinate delay must be balanced against the public interest in the prosecution and conviction of those guilty of criminal offences. In all such cases, the court is necessarily concerned with the nature of the offence and the extent of the delay. In *P.T.*, the applicant had not discharged the onus of establishing, on the balance of probabilities, that he had been prejudiced by the delay to such an extent that there was a real or serious risk of an unfair trial. He had similarly not discharged the onus of establishing that there had been prosecutorial delay. Nevertheless, the court had stated that it had to consider whether there were wholly exceptional circumstances such as would make it unfair or unjust to put the applicant on trial. Relevant factors require to be identified and a balancing exercise must be undertaken by the court. The factors relevant to the applicant's position in that case were that it was an old case, he was elderly and was in ill health. On the other hand, factors relevant to the prosecution included the public nature of criminal law and the fact that the Director of Public Prosecutions has been given an independent role in determining whether a prosecution should be brought. Prosecutions are taken on behalf of the People of Ireland by the Director of Public Prosecutions and the court should not lightly intervene with a decision of the Director.

31. In *D.C. v. Director of Public Prosecutions* [2005] 4 I.R. 281, it was observed by Denham J. that, in general, intervention to prohibit a trial will not be necessary as the trial judge has a duty to ensure due process and a fair trial. The basic assumption is that all pending trials will be conducted fairly under the presiding judge. A prosecution is not an exercise in vengeance and a court must have regard to the position of victims. Nevertheless the court must ultimately protect the integrity of the justice system as a whole.

Denham J. concluded that no single factor in that case rendered the case an exception, but in all of the circumstances she was satisfied that the court should restrain the trial, on the basis of the cumulative effects of all of the factors which brought the case within the category of an exception requiring a balancing exercise to be conducted by the court. The applicant was in his 87th year, was in bad health and while there was no prosecutorial delay, there was a lapse of time in the mounting of the prosecution.

32. With regard to the absence of evidence in *Ó C. v. Director of Public Prosecutions* [2014] IEHC 65, O'Malley J. expressed the opinion that the applicant must point to a real possibility that the witness or evidence would have been of assistance to the defence. It is insufficient to point to a theoretical possibility that something might emerge from the evidence of a missing person that might contradict the account of the complainant.

33. In this regard and in this case it is averred in a general way that a number of witnesses who would have known the applicant including the club founder, members of the committee, other coaches, caretakers, club helpers, club fundraisers and a bus driver, have died or have left the jurisdiction and are unable to be considered as potential witnesses for the applicant. Apart from a general non-specific averment that these individuals may have been potential witnesses, the applicant does not contend with any degree of particularity how such witnesses may have been relevant and how any evidence which they might now give may have contradicted or called into question the complainant's allegation in any material way. No averment is made as to the nature or type of evidence that such potential witnesses might have been in a position to give. Similarly, regarding the destruction of the building the applicant has not pointed to any clear absence of material evidence which might affect his trial. It does not appear to me on the basis of the evidence or arguments before the Court that the absence of the building or concerns regarding witness availability are matters which cannot be adequately dealt with by the trial judge in terms of warnings, cautions or directions as may be necessary during the course of the trial.

34. In so far as the applicant's medical condition is concerned, the Court agrees with the submissions of the respondent that even at their height, the wording of the medical reports relied upon are such as to express a possibility that his current mental state could impact on his ability to remember events from over 40 years ago, or that his early dementia may limit his ability to mount a defence to the alleged historical offences. It is evident from Dr. O'Regan's report that the plaintiff is currently a patient of the Older Adult Mental Health team, his treatment is ongoing and his mental state and cognition remain under review. In my view, any likely prejudice to the accused because of his ill health can properly be assessed and adjudicated upon by the trial judge at the time of trial. On the basis of the information currently before the Court, I am not satisfied that it is appropriate to intervene to prevent the trial from proceeding on the ground of the applicant's health.

35. On the application of the omnibus principle, the facts of this case are far removed from the facts of *T.C. v. DPP*, or *J.C. v. DPP*. In *T.C.* very exceptional circumstances arose. The applicant was 80 years of age. He was terminally ill with bowel and lung cancer. His medical professionals had advised that intervention was not warranted except with palliative care. White J. observed that the applicant's medical experts could not predict the date of his death but had gave reasoned opinions that it was best measured in a short number of years and possibly less. Further, while the applicant had other general health problems which would not ultimately prevent his trial, such as poor hearing and possible memory loss, White J. viewing the circumstances in their entirety concluded at para. 24:-

> *"The antiquity of some of the alleged offences is also exceptional, and while delay on its own would not prevent the trial, a significant portion of the delay could have been avoided if complaints had been made by the H family after their meeting in 2003 when the behaviour of the Applicant was discussed. While the public interest would strongly dictate that the prosecution should continue it is the view of the court that in all the circumstances, due to the exceptional circumstances of this case the court should prohibit any further proceedings in the trial of the Applicant."*

36. Similarly, in *J.C. v. DPP*, Baker J. observed that the applicant had already pleaded guilty to one count on the indictment. The intricate connection between the three counts in that case, the length of time that had passed since the alleged incidents, what she describes as the chaotic and difficult lives of all the parties concerned, the consequent impairment of their memories and the irreversible and serious cognitive impairment suffered by the applicant, all combined to make it an exceptional case. She concluded at para. 71:-

> *"It is not in the strict sense a case where the absence of evidence or the delay of themselves can be said to render the trial unfair, but the circumstances of the applicant and the nature of the indictment, and the fact that the trial will be one that will depend almost exclusively now, in the events that have unfolded, on questions of the credibility of both the complainant and the accused, render it unfair that the applicant should now be required to face trial."*

Baker J. decided (at para. 72) that:-

> *"…it would be disproportionate and unfair to require that the trial proceed having regard to the fact that the accused has pleaded guilty on one count, and that the progress of the prosecution was delayed after the complainant indicated she did not wish to pursue the matter in 2011. The resultant delay has caused a loss of the ability of the applicant to now fully and adequately defend himself."*

37. The factual circumstances in each of those cases are illustrative of the exceptional circumstances which must exist before this Court ought properly to intervene to grant an order prohibiting the trial of the action.

38. A more recent decision of McDermott J. in *P.H. v. DPP* [2018] IEHC 329 is also to be considered. The applicant, a retired schoolteacher, aged 76, faced 16 charges of indecent assault which were alleged to have occurred in the late 1960s and early 1970s. It was claimed that there were exceptional and specific circumstances which would render it unfair to put the applicant on trial. The charges had occurred over 45 years previously and, with the exception of one complaint, the gardaí appear to have first approached the complainants. Reliance was placed on his age and bad health. He had previously been charged with 25 counts of indecent assault and had not been convicted. There were nine complainants. Statements were initially taken in August, 2013. It was not in issue that the applicant was a teacher in the school at that time. The investigation process was extensive. Several interviews were conducted with the applicant between May and December, 2015, when he denied the allegations. An investigation file was prepared and forwarded to the Director of Public Prosecutions in January, 2016, directions were given on 3rd August, 2016 and summonses were issued in November, 2016. These were made returnable before the District Court of 16th March, 2017. The book of evidence was served on 17th May, 2017 and the applicant was returned for trial. The case was first listed before the Circuit Court on 16th June, 2017. Considerable disclosure was made by the respondent.

39. McDermott J. was satisfied that the investigation and the court proceedings had been conducted with reasonable expedition. The applicant had claimed that there was a real risk of prejudice and an unfair trial arising from lengthy delays, because there were a

number of potential witnesses who may have been available to him at an earlier stage but were now deceased. Further pieces of material evidence, such as the rollbook for one of the classes, were unavailable. A fellow teacher was now deceased. It was contended that he would have been within sight and sound of the pupils and teachers from an adjoining room, which had retractable partition. The applicant in his affidavit grounding the application for judicial review, had listed a number of teachers, school inspectors and caretakers who may have been in a position to assist. There were regular visitors to the classroom who he claimed, would have been in a position to describe its physical layout and comment on the disposition of the class. The investigating garda deposed, however, that there were witnesses available to the applicant such as a teacher in the school from 1968 and 1972, who would state that in his experience, the partition between the two classrooms were always closed. McDermott J. observed that there were witnesses who could give evidence as to the experience of the applicant as a teacher during the relevant period but that the generalised nature of the possible evidence outlined in respect of most of the named individuals did not address a specific identifiable prejudice. The court could only speculate as to what they might have said for or against the applicant. He was not satisfied that a sufficient or any particular or specific prejudice had been demonstrated which give rise to a real or serious risk of an unfair trial arising from the deaths of the said potential witnesses.

40. McDermott J. observed at para. 58 of his judgment that death or unavailability of a potential witness in any criminal trial, even if it is held within a reasonable time, may also give rise to difficulty for either side but this may not of itself render the trial unfair. Delay cases are normally dealt with in the legal directions of the trial judge, who has an overriding obligation to ensure a fair trial. While the applicant has certain health issues, McDermott J. emphasised the conclusion in a report of a cardiologist that there was no doubt that the stress related to upcoming legal proceedings may have a significant adverse effect on the applicant's prognosis and raised the risk of acute coronary syndrome/myocardial infarction. To the extent that the applicant's mental facilities or memory were impaired, McDermott J. was not satisfied that there was any cogent evidence to support the proposition that the applicant's recollection of matters was so inhibited as to give rise to real or serious risk of an unfair trial. The applicant had been interviewed extensively and at interview was able to offer a view on many issues of fact alleged in the complainant's statements. He was not satisfied that the evidence adduced regarding age or ill health give rise to a real and serious risk of an unfair trial, or that the circumstances in *P.H.* were exceptional. Considering all of the factors separately and cumulatively including the fact that the charges were 50 years old, the applicant was an elderly man of 76, had an illness which may give rise to the described qualified difficulties if the trial was to proceed, he observed:-

> *"It is clear from the authorities that cases of a similar nature have been allowed to proceed but of course each case must be determined on its own facts."*

41. In *M.S. v. Director of Public Prosecutions* [2015] IEHC 84, O'Malley J. considered an application by an 82 year old retired consultant surgeon in respect of whom complaints of assaults were made by 22 complainants, the oldest complaint relating to matters alleged to have occurred 48 years previously. O'Malley J. stated that while it was true that having regard to his profession, the applicant could be expected to have particular difficulty in recollecting individual patients over a lengthy period of time, the same problem had arisen in many cases involving teachers and it is clear that this is not considered to be a bar to a prosecution. She observed at para. 79:-

> *"To prevent a trial from getting off the ground, however, there is a clear onus on the applicant to demonstrate that the passage of time has caused identifiable prejudice. It is not sufficient to claim that a particular witness, now unavailable, might have had something helpful to say on behalf of the applicant without some indication as to why that should be so."*

42. On appeal, Hogan J., in the Court of Appeal ([2015] IECA 309) did not accept the applicant's case that the lapse of time was simply too great.

43. Returning to the circumstances of this case, while there may have been a lapse of time between the date of the initial complaint on 17th August, 2015 and the date upon which the matter was returned for trial on 18th January, 2017, I do not believe, in the circumstances that this amounts to prosecutorial delay, whether blameworthy or not. Further, I am not satisfied that the applicant has established any blameworthy prosecutorial delay. An additional statement had to be obtained from the complainant on 18th January, 2016. The applicant was approached by the gardaí on 4th November, 2015 and on 19th November, 2015 he attended voluntarily and was questioned after caution, giving his account in reply to the accusations made. In addition, enquiries had to be made thereafter regarding the notes of the counsellor and therapist made on initial disclosure. Those notes were sought in December, 2015 and were ultimately received by the gardaí in March, 2016.

44. I do not believe that the Court should overlook the fact that the gardaí also investigated a complaint that a third party had attempted to intervene with the complainant to "sort the matter out". While it appears to be accepted that the approach by the third party was not at the applicant's behest, nevertheless it required to be investigated. The applicant was approached about this complaint in March, 2016 when he stated that he required legal advice. He was further approached by the detective garda in May, 2016 and he informed the garda that he had been legally advised not to comment any further regarding the allegations relating to the third party.

45. The investigation file was initially submitted to the detective's superior on 15th July, 2016, was returned for further clarification on 5th August, 2016 and the finally submitted on 20th October, 2016. Directions were given on 16th November, 2016 by the DPP to prosecute the applicant on four counts of indecent assault. The applicant was charged on 30th November, 2016 and returned for trial to the relevant Circuit Criminal Court on 18th January, 2017.

46. In my view, any lapses of time have been explained. In P.T., the High Court held that a delay from the date when the complaint was first received, 29th May, 2002 until date the applicant was first brought before the court, 28th September, 2004 amounted to prosecutorial delay. On appeal, the Supreme Court was satisfied that no case of prosecutorial delay had been proved. Denham J. observed that while there was delay, the finding of the High Court judge that the delay of 28 months post complaint was unacceptable, was not sufficient to meet the requirement in law to establish prosecutorial delay to prohibit a trial. The Court stated that even if there was blameworthy prosecutorial delay of significance, that was not sufficient to justify prohibiting the trial. One or more of the interests protected by the right to expeditious trial must also be shown to have been so interfered with such as would entitle the applicant to relief. While each case must be determined on its own facts, the lapse of time in this case between the date of the complaint on 17th August, 2015 and the return for trial on 18th January, 2017 is shorter than that which the court had to deal with in *P.T.* and in any event, such lapse of time, in my view, has been satisfactorily explained.

47. Regarding missing evidence, Hardiman J. stated in *McFarlane v. Director of Public Prosecutions* [2007] 1 I.R. 134 that in order to demonstrate the risk of a real possibility that the accused will, as a result of such missing evidence be unable to advance a defence point, the applicant must engage in a specific way with the evidence actually available so as to make the risk apparent. Similar considerations apply in relation to missing or absent witnesses in this case and in my view the applicant has failed to sufficiently

engage with the facts and to discharge the onus of proof of establishing a risk of an unfair trial or that he will be unable to advance a material defence point at trial in consequence. To adapt and adopt the words of O'Malley J. in *Ó C.*, in my view, the applicant has not pointed to, "*at least, a real possibility that the witness or evidence would have been of assistance to the defence*". In this regard I reiterate the comments and observations of O'Malley J. in *Ó C.* that it is not "*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*".

48. Thus, I must conclude that the applicant has not pointed to evidence that might have assisted in the defence in a particular way and he has not established, to borrow *dicta* from O'Malley J., a real risk, involving a real possibility that evidence did exist which could have been helpful but is no longer available. The applicant's expressed concerns are matters best to be dealt with, and ruled upon, at trial, when the trial judge will have the benefit of assessing the evidence placed before him or her.

49. While each case must be considered on its own facts in order to determine whether exceptional circumstances exist, the overriding requirement is whether there will be a real risk of an unfair trial and what emerges from the authorities is that this Court should be reluctant to intervene in circumstances where the trial judge may be in a better position to assess matters in the context of his or her overriding duty to ensure that fairness is achieved. In so far as the applicant's health is concerned, I do not believe that the evidence adduced in that regard, including medical evidence, leads to a conclusion that there is a real risk of the applicant having an unfair trial. At their height, and as previously commented upon, the medical reports and the opinions of the medical experts are phrased in terms of concerns that might arise. The use of the word, "*may*" and "*could*" in the report of Dr. O'Regan as describing the risks and concerns relating to the applicant's mental state and memory capacity, in my view, places such risks very much in the realms of possibility. Again, it seems to me that these are matters which the court of trial will be in a position to assess and address. It may very well be that at the time of trial, the applicant's health issues may have progressed to a stage where he is exposed to a risk of an unfair trial, but that will be a matter for the trial judge. On the evidence before this Court, I am not satisfied that such point has been reached. In this regard I have considered the contents of the memorandum of interview of 19th November, 2015. Although the applicant's counsel suggests that certain of the answers may be seen as evidence of confusion in the applicant's mind, I accept the submission of the respondent that the contents of the memorandum illustrate that the applicant was in a position to give some considerable detail regarding his childhood, family, work history, the time in which he commenced coaching with the sporting club, where it was based, who founded it, when he participated in coaching, the ages of the boys and the names of other coaches one of whom is stated to be abroad and the other one residing in a local area. Further, I note that he also vehemently denied the allegations and provided certain detail as to why it could not have happened as suggested by the complainant.

50. In all the circumstances, I do not believe that the applicant has discharged the onus of proof of establishing any particular prejudice which cannot be addressed by the trial judge at the hearing, or that on the application of the omnibus principle or otherwise, this is an exceptional case which requires intervention by the Court to prohibit the further prosecution of the case.

51. The respondent also submits that the applicant, in his pleadings and on his application for leave to apply for judicial review, failed to exhibit a memorandum of interview which was conducted with him by members of an Garda Síochána and which is contained in the book of evidence. It is submitted that in exercising the discretion of this Court in granting or refusing the relief sought that such failure should influence me to refuse the relief.

52. Given that I have come to the conclusion that the applicant has not discharged the onus of proof, it is not necessary for me to express a view in relation to the respondent's submission. In my view even disregarding this factor, this is not a case in which the court should intervene to prohibit the trial.

53. In the circumstances, I must refuse the relief sought.