



THE COURT OF APPEAL

Record No. 78/17

**Birmingham P.
Woulfe J.
Edwards J.**

Between

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

-AND-

A.Z.

APPELLANT

JUDGMENT of the Court delivered on the 21st day of October, 2021 by Mr. Justice Woulfe

1. This is an appeal against the appellant's conviction by a jury on the 20th January, 2017, on five counts of indecent assault, and one count of sexual assault, following a 7 day trial. The appellant was subsequently sentenced to concurrent sentences of 8 years' imprisonment on all counts, with the final 2 years suspended.

Background

2. The complainant in this case was born in November 1974. He was the eldest of six children, and lived with his parents and siblings at an address in a North Dublin suburb at the relevant dates. He was a pupil in a secondary school in an area near where he lived during the period during which he alleged the appellant committed the offences of which he was convicted.
3. From the 1st April, 1989 to the 30th April, 1991, the appellant resided with his mother at an address in a South Dublin suburb. During that period, it was alleged that the complainant, a nephew of the appellant, and grandson of the appellant's mother, stayed over on various occasions at that address. It was alleged that the appellant sexually abused the complainant when he stayed over during that period, and all of the allegations made by the complainant allege that the sexual abuse happened specifically in the appellant's bedroom at that address.
4. The prosecution's case alleged that the complainant had been required to sleep in the same bed as the appellant due to the unavailability of the household's box room throughout the above period. The defence case was that, when the complainant stayed at the appellant's address, he always slept in the household's box room, which was fully furnished during the period in question, and was never unavailable. It was therefore contended that the sexual abuse did not happen as alleged by the prosecution.

5. As stated above, the offences complained of related to a period of approximately 2 years, starting on the 1st April, 1989 until the 30th April, 1991, when the complainant was aged between 14 and 16 years, and the appellant was aged between 43 and 46 years.
6. The appellant had worked as a third-level lecturer, but at the time of his trial he was 71 years of age and retired. The appellant's mother died in 1998.
7. The matters complained of were revealed many years later, when the complainant made relevant disclosures to his girlfriend, who later became his wife. He subsequently made a formal complaint to An Garda Siochana, and made statements in 2009 to the Gardaí.
8. The appellant denied the complainant's allegations when confronted with them, and maintained that position of denial all throughout the course of the trial.

The Complainant's Evidence before the Jury

9. The complainant confirmed his date of birth, family details and where he lived as a child in the Northside of Dublin. He identified the secondary school in a nearby area which he had attended, and he remembered doing his Junior Certificate in 1990 during the soccer World Cup tournament, known as Italia 90, which suggested that he had been in secondary school from 1987 to 1993.
10. He explained how his mother had two brothers, and one of them, the appellant, was the accused man here. When his grandfather died, the appellant had bought a house in a South Dublin suburb, and his grandmother had moved there with him. He remembered his family going over to see this house. It was a second-hand house, a nice house, but there was a lot of work needing to be done in terms of painting, taking up carpets, and work on the back garden and front garden. The appellant had asked if the complainant would be free to come over at weekends and help to do the work, and he agreed to do so.
11. The witness described how he subsequently went over to the appellant's house to have a look at the work that needed to be done, on an occasion when the appellant collected him after he was playing for his school in a sports fixture on the Southside of the City. At some stage later, he actually went to the house to do the work, when it was arranged that he would go over on a Friday evening and come home on a Sunday.
12. The witness explained the circumstances in which he stayed over with the appellant for the first time. He thought the appellant would have collected him and brought him over to the house in the evening. They would have had some tea, and gone to the local video shop. He described the sleeping arrangements and stated that, while there were four bedrooms in the upstairs of the house, only his Nanny's room and the appellant's room had beds in them, and the other two rooms had nothing in them. He had slept in the appellant's room in the same bed, a double bed, on the right-hand side of the bed.
13. When asked if he remembered anything happening on the first weekend that he stayed over, the witness described the layout of the appellant's bedroom, which included a television on a chest of drawers stand. He stated that when he went to bed, the appellant put on a pornographic movie, and asked him had he got a girlfriend, and when the

appellant put the movies on he had said don't get embarrassed, all men watch these movies. He could not remember what year he was in secondary school at this stage.

14. The witness testified that he would go over to the appellant's house every couple of weeks. He continued to stay the nights in the appellant's room, and it was on either the second or third time he was there that he started getting abused. He described the first occasion on which he was abused as having occurred when he was asleep, lying on his left-side, facing away from the appellant. He felt the appellant's hands rubbing his back, rubbing his legs, and then running around the side of his back, and then the appellant's hands would go inside his boxer shorts and rub around the back. The appellant would start rubbing around, and then the appellant's hand would touch his penis and would start rubbing it, and the appellant would turn him over onto his back. The appellant would say don't be afraid, all men do this, I am sure your own Dad has done it.
15. The witness continued his description of this event by stating that the appellant would pull down his shorts and lift his t-shirt up, and would then start rubbing him and playing with his penis. When asked if this was something that would have happened often, the witness replied "every night, every night that I was up there". When asked did anything else happen, the witness stated that the appellant would get down between his legs and perform oral sex on him. When he was doing that, the appellant would be rubbing around his bum.
16. The witness was asked whether he ever had to do anything to the appellant. He stated that the appellant would grab his hand and put it on the appellant's penis, but he would kind of just let it flop off, or try not to do anything, but the appellant used to say don't be afraid, don't be shy. He never ejaculated during any of these occasions, and he didn't know whether the appellant did so. On one or two occasions, not many, the appellant would get his penis and would turn around and ask him to go behind the appellant, and the appellant would try to get the complainant's penis to go into the appellant's bum. He would try to push his body away, and the appellant would pull him back and say don't be afraid, don't be shy. When asked how did he feel about this, he said he didn't want to do it.
17. The complainant could not recollect exactly what age he was when the abuse started, and he was not sure if he was in second year or third year of secondary school. He described the work he did when he went over to the appellant's house, including a lot of painting inside the house and work in the back garden and front garden. He said that he would not have gone as much in the winter time as the weather would be bad, and he would not be able to do anything out in the garden.
18. The witness described what happened the following year, and how it was arranged that he would go over and do a bit of studying for the Junior Certificate in the appellant's house, where there was a bit of peace and quiet. He could not say off hand how many times he was there in the run up to his Junior Certificate, but it was "every couple of weeks, maybe every three, four weeks". He knew that he did his Junior Certificate in 1990 because of the Italia 90 World Cup. When asked where he was doing his studying, he said that at this

stage the box room had been done up and there was bed in the room, and so he "stayed in the box room". However, when asked later where he was sleeping at this time, he stated that he only stayed once in the box room, and the other times were in with the appellant.

19. The witness testified that after September, 1990 he went back over again to the appellant's house to do jobs but when he went up to the box room, the bed was still there, but it was full of boxes of documents and things, the room was covered with boxes and things so that he could not go into it, he could not stay there so he had to go back in and sleep in the other room with the appellant.
20. The witness then described what happened the following year, the year after he did his Junior Certificate. He said that the same sort of things happened in the room at night. He would try to go to bed before the appellant and he would pretend to be asleep and the abuse would start again. This was in the spring time again. Around this time the appellant got a Spanish student and the box room was done up for him, and the student stayed in the box room and the complainant did not stay at the appellant's house at all while the Spanish student was there. Then the appellant was in the process of adopting a child, C, and they did up the back bedroom and put in bunk beds, and the witness thought he might have only stayed over once more after the adopted child arrived.
21. The witness related an incident involving C. The witness was in the appellant's bedroom and he was getting abused and there was crying in the room, and C had come in and was over sitting on the floor on the appellant's side of the bed. When asked approximately what age C would have been, the witness said he did not know, three or four, but he was not sure exactly. The abuse stopped and the appellant brought C back into his room, and the witness got himself dressed and got back to sleep. The witness concluded his direct evidence by stating that he did not agree to any of this happening.
22. The complainant was cross-examined in detail by counsel on behalf of the appellant. He was asked first about having made a second statement to the Gardaí, and how that came into being, and he said that he had remembered stuff that he had not told the Gardaí previously. He could not remember what those new things were. He had told nobody except his then girlfriend, now wife, before making a complaint twenty years after the event, as he was afraid of peoples' reaction to what he was saying.
23. The complainant was asked about the dates when he said the abuse occurred and if he had told the Gardaí that it all occurred between 1987 and 1989, but there had been no mention of 1990, and he said that he thought the mention of 1990 was in the second statement. While he could not hold down the exact dates, he knew that C was in the house on the last time he was abused, and that was the last time that he stayed in the appellant's house.
24. The complainant was asked about the configuration of the appellant's house, and in particular about the upstairs rooms. He confirmed that the box room was adjacent to his grandmother's bedroom, to the left when you went up the stairs. It was suggested to him

that the box room had been fully furnished, with a bed inside, from the middle of 1989 on the basis that the Spanish student had arrived during the summertime of 1989 and had come back again in 1990. The witness stated that he had only slept in the box room on one weekend, as any time he went over "you couldn't stay in the room because there was boxes and files and everything on the bed because [the appellant] wrote books or whatever and you daren't go near any of that stuff".

25. The witness was asked about the incident he described in 1991 when C was crying on the floor, and why he was not staying in the box room at that point. He said again that it was full of files, books, and boxes of papers on the floor, on the table and "just stacked up on the bed" and "you wouldn't touch anything that belonged to [the appellant] because you were told not to touch his stuff". It was put to him that anybody looking on would see that the appellant was not using any sort of form of manipulation to get him into the his bed, and he responded that that is where he was told to sleep.
26. It was put to the witness that he had said, in his first statement to the Gardaí, that he had never stayed with the appellant again after the box room was done up and a bed put in it, because of the arrival of the Spanish student. He stated that this was incorrect, that he did stay after that, and it changed in a later statement because he could remember things that he had not remembered in his first statement.
27. The witness was challenged about his evidence that he stayed in the box room for one weekend only, when studying for his exams in 1990. He was asked about how the box room was clear for that one weekend he was there, and whether he was saying that the appellant had got fed up of abusing him and now he had removed all the files from the box room. He replied that he could not answer that. At this point it was put to him that there was no truth in what he was saying in relation to the allegations he was making against the appellant. He responded that it was all truth, and he knew what happened. It was specifically put to him that what he was saying about the box room was completely false, and he was adamant that it was not and that "you couldn't sleep in the room".
28. It was put to the witness that the appellant's house was purchased in October, 1988, and that what he had said in his first statement to the Gardaí about abuse having happened in 1987 and 1988 could not be correct. The witness acknowledged that if the appellant did not purchase the house until October, 1988 then the abuse did not happen then, but he stated that it did happen after that. He was asked if he could tell the jury of any incident where the appellant had abused him during 1990, and he said that he could not remember off hand, but he did know that he was abused on the night that C was in the room. It was suggested to him that if there was any sort of validity to the extraordinarily serious allegations he was making against the appellant, then surely he would have made some inquiries to see if the dates he was throwing out had anything to do with reality. He did not answer this question directly, but simply stated that "it was reality...it did happen".
29. The witness was then asked a series of questions about his late grandmother and her role in the appellant's house when he stayed there. He agreed that she was fully in control of her mental faculties. He was asked about his evidence that he was sleeping in the

appellant's bedroom, and whether his granny ever said "what's going on here", given the box room was there, to which he responded "no, never". It was then suggested if that could be because he was sleeping in the box room, and he again denied this. He stated that she never checked which bedroom he was sleeping in.

30. The witness was asked if he ever asked his grandmother why he was sleeping in the appellant's bed or ever said to her that the appellant was abusing him, and he answered no. When challenged as to why he did not do so, he stated that the appellant was the father figure of the whole family, and that everyone looked up to him. He was then asked about any knowledge his parents may have had. He said that his Dad never inquired about the sleeping arrangement in the appellant's house when he stayed there, and that he was too afraid to say anything. He never mentioned it to his mum, and his girlfriend, now wife, was the first person he ever mentioned it to. It was suggested to him that he was perfectly happy to go over to the appellant's house every time there was a question of going over, and he said that he was not happy to go but he went because of being afraid.
31. It was put to the complainant that he knew that when he made this allegation that the appellant emphatically denied it. The witness responded that the appellant knew that he did do it, and he asked why would he make the thing up and say the appellant did do that. He was then challenged as to why he had not made a complaint at the time, or at a much younger age, and he said that when he was ready to do it he went to the Gardaí. He had a young boy himself, and he would not want that to happen to him so he made the decision to go to the Gardaí.
32. It was suggested to the witness that the only person who could throw light on all of this would be his grandmother, to say whether he was talking complete nonsense or not. He initially said maybe, but then said that he could and the appellant could. It was put to him that she would be the ideal person to give an indication of what it was really like in the appellant's house in terms of sleeping arrangements etc, and he said that he did not think she would be the only person able to do so.
33. The cross-examination of the complainant continued on the second day of the trial, and much of the same ground was covered again. It was again put to the witness that the appellant was saying that nothing like what was alleged by him ever happened, and he repeated that it did. The issue of the box room was probed again, and it was put to the witness that in his second statement to the Gardaí he had referred to that room being covered up with books and files "after" he did his Junior Certificate, but not prior to same, in 1990. The witness stated that obviously he got his dates wrong and the same situation arose with the box room any time he came over to the appellant's house, with the exception of the one weekend when he was studying in that room for his exams in 1990. It was specifically put to him, in case it had not been done already, that the appellant would say that whenever he stayed over he stayed in the box room and never stayed in the appellant's bedroom, and in response he stated "that's lies".

34. The witness was cross-examined about various aspects of two statements he had made to the Gardaí, in August and December 2009. It was put to him that he had said in his first statement that he did not really remember the first night he was abused, and it was suggested to him that surely the first time that he was abused would stand out, to which he responded that the abuse was the same every time it happened. He was challenged about having omitted the incident involving C from his first statement, with the suggestion again that the last incident of abuse would stand out, and he stated that he remembered things that happened after the first statement.
35. It was suggested to the witness that there were various discrepancies in his statements to the Gardaí and in his evidence that called into question his credibility. One example put to him was that he had said in one statement that the appellant had asked him to perform anal sex on him approximately five occasions, but he had later given evidence in Court that this happened on one occasion. The witness responded that it had happened on that one occasion, but he could remember "a couple of times".
36. It was put to the witness that the appellant would say that the way the house worked was that his mother would always leave the door ajar to her bedroom, and that as part of that arrangement the appellant would keep his bedroom door open in case there was any emergency, given his mother's age. The witness denied that his grandmother's door was ajar at night, and said that his recollection was that the appellant's door was always closed when he stayed in his room, including after C arrived.
37. Towards the end of the cross-examination it was put to the witness again that he stayed in the box room, and that the appellant would say that he always closed the door to the box room. The witness repeated that he did not stay in the box room. It was also put to him that the appellant would say that he could remember his mother asking the complainant, before he would leave the house on a Sunday, if he had left the bedroom tidy and tidied the bed, and the complainant always replying that he had done so. The witness replied that she never asked him that because he did not stay in that bedroom.

Other Prosecution Evidence in the Case

38. The trial Court also heard evidence from the complainant's mother. She produced and identified his birth certificate and confirmed details regarding his upbringing and schooling. She confirmed that he would go over to the appellant's house quite a bit when the appellant was doing work to the house, and would stay there over the weekend. Under cross-examination she stated that when she visited the house herself, her mother never said anything about sleeping arrangements or anything that would cause her to wonder what was going on. Nothing was said that caused any suspicion on her part, and the complainant never said anything to her, and she never noticed anything about him that caused her to suspect anything. She always felt that the appellant was a bit domineering. She did not mind the complainant going over to the appellant's house because she knew he would be in safe hands with her mother and the appellant. She never heard about the box room being full of books or anything like that, and she would only go into the kitchen, she had no reason to go upstairs.

39. The final piece of the prosecution case was a short statement of an official in the Registry of Deeds, read out by agreement with the defence. This statement dealt with the date of certain property transactions relating to the appellant's house and the house where the complainant's grandmother had previously lived, prior to moving to live with the appellant after the complainant's grandfather died.

The Appellant's Evidence before the Jury

40. The appellant gave detailed testimony which was entirely exculpatory. He outlined his family history and described his mother as a "very headstrong woman". He described his own educational background and how he had studied at third-level and carried on a professional career for some years, before becoming a third level lecturer and working as such until he retired. He explained how he had bought the house in a South Dublin suburb in October, 1988, and how it had needed a lot of work to be done on it.
41. The appellant described the house's four bedrooms upstairs. As regards the box room, which he said was always referred to as the front room, he stated that this was finished from the middle of January 1989, in terms of being fully decorated and having a new bed and furniture in it.
42. The appellant described how the complainant had come over to the house on a number of occasions to help with work, such as putting down paving stones in the garden, and had stayed over from Friday until Sunday. He said that the first occasion was in February, 1989, and that there were five such occasions in total. He denied that the complainant had to stay in his bed on the first occasion because of the box room not having a bed, and he denied showing him a pornographic film and said that there was never any kind of pornographic material in the house.
43. The appellant denied ever abusing the complainant in any way. He said that the complainant never slept in his bed, and that on the five occasions he came to his house he always slept in the box room. He added that there was never any kind of sexual contact between them whatsoever. He specifically denied that he had ever got the complainant to penetrate his anus. He was adamant that the complainant's allegations were "absolutely untrue", and that there was no sexual activity or contact or behaviour between the complainant and himself anywhere, and in particular not in his bedroom and not in his bed.
44. As regards the complainant's evidence that he could not stay in the front bedroom because of all the books and files in the room, the appellant denied that this was ever the case. He referred to the weekend which the complainant acknowledged sleeping in the box room, and he asked where were all the books and papers that weekend. He described this evidence of the complainant as "complete fantasy". He had an adequate work room downstairs. He denied ever telling the complainant not to touch anything belonging to him.
45. As regards the incident when C was there, the appellant acknowledged that the complainant had stayed in the house once when C was there, after C came to the house

at the start of April, 1991. The complainant came over and slept in the box room. The appellant's recollection was that he and the complainant were not in the bed, they were on the bed watching television, and the appellant heard C in the next room and then C was standing in the doorway of the appellant's bedroom. The appellant told the complainant to go downstairs and he put C into his bed, and C stayed in his bed that night. The appellant also testified that every time the complainant stayed in the house, his mother's door was left open and his door was left open, in case there was an emergency, particularly as a result of his mother smoking in bed.

46. Under cross-examination the appellant denied that his work as a third-level lecturer at the relevant time would have generated much paperwork, or that his role as an author of textbooks would have done so. He was specifically asked about the complainant's evidence of the piles of files and books that were in the box room, and of that being the reason that he could not sleep there, and he replied that there was nothing on the bed other than the bed clothes, and that there was nothing left in the box room.
47. The appellant was asked why he had felt it necessary to introduce such detailed evidence of his mother's history, and he said that a picture had been painted by the complainant's mother which tried to show that his own mother was a weak woman, weak in spirit and maybe weak physically, and that picture did not fit the facts. He was asked if there was any chance that he had introduced this evidence to portray himself in a particular light, as the only person who understood his mother and treated her with the appropriate respect, in order to enhance his own credibility with the jury, and he denied this suggestion.
48. It was put to the appellant that the reason he remembered details about the complainant coming over to his house was because he was abusing him at the time, and he was adamant that the complainant was never abused when he came over, and was treated with complete respect. He was asked if he was saying that the complainant had an agenda, and he said that he could not answer that, but the complainant had to have had some reason for doing this. When asked if the reason was that the complainant felt that he was wronged by the appellant, he stated that if the complainant had raised this when his mother was alive the case probably would never have come to Court, because her evidence would have supported him.

Application to Withdraw the Case from the Jury on P O'C Grounds

49. After the evidence concluded, defence counsel made an application to the trial judge to withdraw the case from the jury on the grounds that there was a risk of an unfair trial, relying on *the People (DPP) v. P. O'C.* [2006] 3 I.R. 238. In that case the Supreme Court held that a trial Court had an inherent power and jurisdiction, irrespective of whether or not judicial review had been sought, to prevent a trial from proceeding (or proceeding further) if matters arose, or evidence was given, in the course of the trial which rendered the trial unfair. The Court cited authority to the effect that the onus was on the applicant to satisfy the trial judge that there is a real or serious risk of an unfair trial such as cannot be avoided by appropriate rulings and directions on the part of the trial judge.

50. Defence counsel highlighted the fact that it was approximately 20 years before the complainant made a complaint to An Garda Síochána in August, 2009, and the evidence was that five years before that he had disclosed to his then girlfriend. This delay caused tremendous prejudice to the defendant in terms of attempting to defend himself with the passage of time. As regards the consequences of that delay, the evidence disclosed that there was no evidence to corroborate the account of the complainant. At the core of the case was the complainant's evidence that the abuse all happened in his uncle's bedroom, in contradistinction to the defence evidence that he always slept in the box room. The grandmother's evidence would have been absolutely critical as to whether the box room was, in fact, fully furnished as a bedroom early in 1989, and that was a palpable prejudice in terms of the appellant being able to defend himself in the absence of his mother.
51. Defence counsel also stated that the nature of the allegation was that every two or three weeks the complainant was over in the appellant's house and allegedly sleeping in the same bed as the appellant, and that once the abuse started the essence of the complainant's evidence was that every single time he was there he was obliged to sleep in the bed in the appellant's room. He argued that if it were that frequent, then the importance of the appellant's mother as a witness would be even more critical, given the fact that she slept upstairs and passed the box room going to and from her own room, and the idea of this abuse happening without her knowledge would be very low.
52. Counsel for the prosecution argued in reply that the position taken by the Supreme Court in *P. O'C.* was that, save in exceptional circumstances, trials involving allegations of a historic nature should proceed to the jury, and that they should only be withdrawn from the jury if the trial judge was satisfied in the circumstances that there was a real and substantial prejudice to the accused person that could not be remedied by the ordinary warnings that are given to a jury, and he submitted that this was one of those cases where such a remedy was possible. He conceded that it was difficult for the defence to defend a case of a historic nature, but added that it was also difficult for the prosecution to prosecute a case this old. He suggested that any risk of unfairness could be removed by the Court giving the appropriate corroboration and delay warnings.

The Trial Judge's Ruling

53. It is convenient at this point to set out the trial judge's ruling. In doing so it is appropriate to point out that the ruling pre-dated the valuable guidance subsequently provided by the Supreme Court in *The People (DPP) v. C.C.* [2019] IESC 94, and now available to trial judges and indeed to this Court. The ruling was as follows:-

"JUDGE: Now, in relation to ... *P. O'C.*... I am refusing that application and I will explain why. This is a case which is, dare I say, in principle or perhaps I should say in general of a type which is quite unexceptional, that is to say allegations of sexual offences made many years later by an adult about something which occurred when that person was a child, or in this instance a teenager. And there is nothing untoward or odd about that, the law permits such trials to proceed. One must then engage with the evidence in this case in order to decide whether or not there is an unavoidable risk, a reasonable risk of an unfair trial and of course what is meant by

that is a risk which is unavoidable, notwithstanding the exercise by the trial judge -
- of his powers to ensure that a trial of this type is fairly conducted by, for example,
appropriate warnings to the jury as contemplated originally by Mr. Justice Haugh
and approved by the...Superior Courts.

That is one of the ways in which one copes with the antiquity of a case, even cases
where there is a deceased potential witness and...it seems to me that, in this case,
allied, so to speak, with a corroboration warning are sufficient to exclude any real
risk of unfairness in the case. A number of points have been made, quite
legitimately made, in relation for example not just to the antiquity, per se, but also
in relation to the variation of dates, discrepancies in statements, discrepancies
between what may have been said in this case and in a previous trial...It seems to
me that those are, in fact, in some instances both grounds for the delay warning
and the corroboration warning and of course in others for one or other of them on a
freestanding basis and I am going to ensure that such warnings are given in clear
terms to cater for those factors which spring in part at least from the antiquity of
the case.

In relation to the absence of a witness one, as I say, must always avoid falling into
the sin of speculation. It may well be, for example, in given cases that it might be
suggested, perhaps I could paraphrase the matter, if such and such an event
occurred then so and so must have seen that event or seen some incident
associated with the event. In the absence of at least, putting the matter no higher
than this, at least in the absence of a witness statement, for example, from such a
person who might be rationally presumed likely to give his evidence under oath in
accordance with that statement, one would be speculating to suppose that evidence
of a given kind might ultimately be given by a particular witness, so the defence
could not rely on the absence of witnesses in many instances. In this instance, it
seems rationally inevitable that a person who was *compos mentis* and physically
well slept upstairs in the house would...have been in a position to give evidence as
to the configuration of the house and whilst even though we do not know what she
would have said about it, but even if something unfavourable were said it would
give rise to material which could be engaged with. So, I am of the view that it is
something which ought to be referred to in the context of the delay warning with an
appropriate explanation of the necessity to avoid...speculation. It is, in my view, the
most coherent, if I may put it that way, I do not mean, when I say coherent, the
manner in which the other points were articulated obviously, it is the point which
could be considered to be the most significant point in terms of alleged prejudice,
but it is something which can be catered for by the delay warning, okay, thank
you."

54. Following the trial judge's ruling, the jury heard the closing speeches from counsel for the prosecution and counsel for the defence, followed by the trial judge's charge to the jury. During the course of his charge the trial judge gave a detailed delay warning, as promised by him during his ruling as set out above.

Grounds of Appeal and Submissions on Appeal

55. The appellant made a number of complaints in his notice of appeal, but ultimately has pursued on appeal only the ground of appeal that "the trial judge was wrong in law in not withdrawing the case from the jury because of the prejudice caused to the defendant by delay in the unavailability of a crucial witness". As mentioned above, since the appellant's trial at first instance the Supreme Court has rendered its decision in the C.C. case and furnished valuable guidance in this area, and the appellant relies on the judgments in that case in support of his appeal.
56. In the C.C. case the Supreme Court was concerned with the proper approach which should be taken by a trial judge in a case where the accused applies to have a trial halted on the grounds of alleged unfairness arising out of a significant lapse of time between the alleged offence and the trial. The circumstances of the case involved the absence of a witness, M.Cy., whose evidence, as was argued, would have been of material assistance to the defence case. Four members of the Court delivered judgments in which they agreed that the proper approach at the level of principle required an assessment by the trial judge as to whether a trial is fair and just in the light of the lapse of time complained of, and whether the accused had thereby been deprived of a realistic opportunity of an obviously useful line of defence.
57. In the judgment delivered by Clarke C.J., with whom MacMenamin J. agreed, the elements of that assessment were set out from paras. 9.2 to 9.4:-

"9.2 In that regard the trial judge must (a) first consider the prosecution case as it has actually developed at the trial. Thereafter, the trial judge must (b) consider whatever evidence is available as to the testimony which might or could have been given but which is said to be no longer available. That exercise will generally involve two principal considerations. First, the court must (c) consider the available evidence about what might have been said by the missing witness or what might have been contained in missing physical evidence, such as documents or objects. The trial judge will be required to have regard to the degree of confidence with which it can be predicted that the particular evidence would have been available, while recognising that the very fact that the evidence is not available means that that exercise must necessarily be speculative at least to some extent.

9.3 If the trial judge is satisfied that it has been established that there was a real prospect that the evidence concerned could have been tendered, next, he or she will be required to (d) assess the materiality of any such evidence. The materiality of that evidence will need to be considered in the light of the prosecution case as it evolved at the trial.

9.4 In the light of all those factors, the court must finally (e) reach an assessment as to whether the trial is fair. The assessment of whether the trial is fair involves a conscientious determination by the trial judge whether, on the basis of all of the materials before the court, it can be said that the test identified by Hardiman J. in

S.B. has been met, being that the absence of the missing evidence has deprived the accused of a realistic opportunity of an obviously useful line of defence.”

58. There was express agreement in the judgments of the O’Donnell J., Charleton J. and O’Malley J. with this step by step approach. At para. 46 of his judgment, which was the majority judgment for the Court when it came to the application of the principles to the facts of the particular case, O’Donnell J. also suggested that the following principles might be identified (and Charleton J. and O’Malley J. expressly concurred with same):-

“(i) The jurisdiction to determine whether it is just to permit a trial of an accused person on historic allegations to proceed, is one normally best conducted at the trial;

(ii) The decision the trial judge should make is whether he or she is satisfied that it is just to permit the trial to proceed;

(iii) The obligation on the trial judge is to make a separate and distinct determination in this regard, and the trial judge must do so conscientiously, in the light of everything that has occurred at the trial,

(iv) The test to be applied does not involve any assessment of the guilt or innocence of the accused, which is a matter for the jury, but rather the fairness and justice of the process by which it is sought to determine that matter;

(v) While an appellate court must recognise that a trial court has particular advantages in the making of this assessment, the decision of a trial court is subject to appeal, and trial judges should therefore set out clearly the considerations leading to the conclusion that it is or is not just to permit the trial to proceed.”

59. Returning to the present case, the appellant submitted that the trial judge applied the legal test incorrectly when assessing the prejudice caused to the appellant by the unavailability of material evidence, namely the evidence of the appellant’s mother. Had he applied the legal test correctly, he would have had to withdraw the case from the jury due to the way in which the evidence at the trial evolved, which accentuated the materiality of the unavailable evidence and therefore deprived the appellant of a realistic opportunity of an obviously useful line of defence. The appellant relied on how the evidence unfolded at trial regarding the sleeping arrangements at the appellant’s house, and whether the box room was available for the complainant to sleep in or whether he was required to sleep in the appellant’s bed.

60. The appellant submitted that the missing witness, the appellant’s mother, would have been able to give evidence highly material to the case, because she was said to have been present in the house throughout the alleged abuse and therefore would have been in a position to comment on matters which were central to the allegations. It was submitted that the trial judge, in the course of his ruling, accepted that there was a realistic basis for suggesting that the appellant’s mother’s evidence could have been tendered and

would have been material to the case, but it was submitted that he failed to consider whether the omission of this evidence deprived the defence of a real possibility of an obviously useful line of defence.

61. The appellant argued that it was difficult to see how the specific prejudice identified by the trial judge could be nullified or made practically harmless by a "strong direction". A jury could be warned to consider with special care the risk of memories becoming unreliable through the passage of time, but the jury had to decide the case on the evidence. No general warning could in this case be a substitute for the witness who was missing.
62. The respondent submitted in reply that in the present case the trial judge comprehensively addressed the fundamental question in relation to the application on *P.O'C.* grounds, that being whether it was just to permit the trial to proceed. Whilst he did not expressly state that he rejected the contention that the defence had lost the real possibility of an obviously useful line of defence, it was submitted that it was implicit from his ruling on the issue that he considered how the missing evidence impacted on the appellant's ability to mount a defence, and therefore his finding had the relevant test as its focus. Ultimately, it appeared that the trial judge was not satisfied that the evidence that might have been given by the appellant's mother would be obvious and decisive, and that it was only speculation to try and determine what her evidence would actually have been if she had given evidence.
63. It was submitted that the absence of the appellant's mother was, using the judicially adopted phrase "no more than a lost opportunity". The absence of the appellant's mother certainly did not render the trial either impossible or unfair. In the instant case the learned trial judge had the fairness of the trial process at the heart of his considerations. It was submitted that the arguments made by the appellant – both in this appeal and during his trial – were based on "pure speculation" as to what his mother might have said if she was available. In all the circumstances it was submitted that there was no error of law or fact, and that this Court should not interfere with the verdicts of the jury.

Decision

64. As regards the extent of the delay, as set out earlier, the complainant was born in November, 1974 and the alleged abuse was said to have begun in or about April, 1989, when he was aged fourteen, and to have continued until in or about April, 1991, when he was aged sixteen. The complainant reported the matter to An Garda Síochána in August, 2009. The trial took place between 12th and 20th January, 2017, although it should be noted that this was a re-trial and the original trial took place in January, 2012. Accordingly, the incidents complained of took place during a period beginning approximately 23 years, and ending approximately 21 years before the original trial, and beginning approximately 28 years, and ending approximately 26 years, before this trial.
65. The delay was undoubtedly very substantial and was capable of creating both general and specific prejudice. However, on the issue of general prejudice many cases involving such delay have been safely tried in circumstances where the jury were given a suitable and

appropriate delay warning by the trial judge. The trial judge in this case gave the jury a delay warning, and its adequacy is not the subject of any criticism by the appellant. The alleged specific prejudice will be examined under the next sub-heading below.

The Alleged Specific Prejudice

66. The specific prejudice alleged is the non-availability of the complainant's grandmother to give evidence at the trial, due to her death in 1998. It is necessary, as per the approach set out by the Supreme Court in *C.C.*, to consider whether, if this witness had been available, she could have provided the appellant with a realistic opportunity of pursuing an obviously line of defence. The appellant submits that the missing witness would have been able to give evidence highly material to the case, in terms of the sleeping arrangements upstairs and the availability of the box room for the complainant to sleep in.
67. Clearly, the complainant's grandmother would have been of potential assistance to the defence if she was in a position to say that the complainant always slept in the box room, or that the abuse could not have happened as described. However, we do not know what she might or might not have said. While an accused should not be deprived by reason of delay of pursuing a realistic opportunity of an obviously useful line of defence, we cannot say that the opportunity allegedly lost here was either realistic or that it constituted an obviously useful line of defence. As the trial judge stated in his ruling, in the absence of something further such as a witness statement from such a person, one can only speculate as to what such a person might have said. She might have supported what the complainant had said, she might have sought to contradict it, or she might have simply been unable to remember.
68. The appellant has offered no evidence to establish that the trial judge, and now this Court, could have any degree of confidence that the possible supportive evidence of the missing witness would have been available. The best the appellant has offered is that the witness might have given such supportive evidence. However, we see nothing in the evidence to establish that there was in fact such a realistic prospect. It seems equally possible that the witness, if she was available, could have been damaging to the defence case or at best that she would have been of no assistance to the defence. In the circumstances, we would characterise the non-availability of the deceased grandmother to testify as nothing more than a lost opportunity to explore an issue with her that might have been explored. However, her non-availability did not deprive the appellant of a realistic opportunity of an obviously useful line of defence.
69. In the *C.C.* case, O'Donnell J. made some important observations concerning the possible impact of a missing potential witness. In that case, as in the present, the missing witness was deceased. At para. 28 of his judgment he stated as follows:-

"There is also no doubt that the unusual facts of this case mean that M. Cy. was a potential witness of considerable importance. Again, however, on its own, I do not think that the absence of M. Cy., at least without culpability on the part of the

prosecution, can be said to be decisive in this case. She or any other witness could have been unavailable, whether through her own decision, or possibly death, even if the trial had occurred within a very short period after the events concerned. That possibility arises in any case, and trials are not rendered unfair or unjust simply because of the absence of a witness whose evidence, although relevant, is not an essential proof. If it were otherwise, then the absence of a single witness, or even a co-accused or accomplice, would mean that any trial was impossible. Generally speaking, the trial process should be robust enough to handle the absence of witnesses or real evidence that occurs without fault, unless and until the cumulative impact is such as to render the trial either impossible or unfair. Once again, however, the significance of the role of M. Cy. in the complainant's account, and her absence (for whatever reason), coupled with the lengthy lapse of time, are substantial factors in any consideration of whether it was just to let the case proceed."

70. The essential facts in the C.C. case are set out in paras. 3.1 and 3.2 of the judgment of Clarke C.J., as follows:-

"3.1 The complainant, whom I will refer to as A.U., made allegations against Mr. C., A.U.'s uncle, in relation to events which were said to have taken place on dates unknown between August, 1971 and April, 1972, when A.U. and her family stayed with Mr. C. in Clare. It was A.U.'s account that she had been indecently assaulted by Mr. C. on an occasion when he had taken her hunting. She also gave evidence of a second incident, where she alleged that she had been raped by Mr. C. during the same holiday. In this regard, she referred to the background to the rape, involving a row between Mr. C., Mr. C.'s partner at the time, M. Cy., and his son C.C., in the course of which the latter was said to have produced a shotgun. She further stated that later that evening, M. Cy. had led A.U. from her bed to the bedroom where Mr. C. was, undressed her, and placed her naked in the bed alongside Mr. C.. After M. Cy. left the room, Mr. C. was alleged to have raped A.U..

3.2 The allegations against Mr. C. were made to the Gardaí by A.U. in April, 2004. In December, 2004, Mr. C. was arrested, detained and interviewed. The direction to prosecute Mr. C. on these charges was issued by the DPP in February, 2006. In 2005, Mr. C. had left the jurisdiction, living in several different countries until this arrest and extradition from the United Kingdom in July, 2013. It transpired that M. Cy., and also B.C., A.U.'s mother, had both passed away in 2008."

71. There are a number of important points of distinction between the situation regarding the missing witness in the C.C. case and that of the missing witness in the present case:-

(a) Firstly, in the C.C. case there had been a garda investigation underway for approximately two years before the death of the witness, although the witness was not interviewed during this time. In the present case the complainant had not disclosed his alleged abuse to anybody before his grandmother died, and

accordingly there had been no garda investigation in the course of which the witness might have been interviewed before her death;

(b) Secondly, the deceased potential witness M.Cy. in the C.C. case was alleged to have played a significant role as an active participant in the events leading to the rape of the victim in that case, namely by taking the victim to Mr. C's bedroom, removing her nightdress and leaving her naked on the bed. In contrast, the deceased potential witness in the present case had arguably played a much more limited and largely passive role, as another resident in the appellant's house who had a bedroom upstairs;

(c) Thirdly, the deceased potential witness, M. Cy., in the C.C. case was aware of the allegations against Mr. C. before she died and had told three people who had been present at a meeting in Holyhead which she had also attended and at which the allegations were discussed, that "it was all lies". The defence were therefore in a position to suggest that there was a reasonable possibility that she would have maintained that position had she been available to testify at the trial. In contrast in the present case there was no evidence at all to suggest what the complainant's grandmother might have said in evidence had she been available to testify.

72. The truth is we simply do not know what the complainant's grandmother might have said, and unlike in the C.C. case there is no extrinsic evidence to suggest that any of the possibilities that we have identified is more likely than another or the others. In the circumstances, we are not persuaded that the non-availability of the complainant's grandmother as a witness deprived the appellant of a realistic opportunity of pursuing an obviously useful line of defence, and we therefore dismiss this ground of appeal.

Conclusion

73. In circumstances where we have not seen fit to uphold the complaint made by the appellant in the sole ground of appeal ultimately pursued by him, we are satisfied that his trial was satisfactory and the verdict is safe. We therefore dismiss the appellant's appeal against his conviction.