THE COURT OF APPEAL

Record No: 2021/207

Edwards J.
McCarthy J.
Kennedy J.

F.M.

APPELLANT (RESPONDENT)

-V-

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT (APPLICANT)

Judgment of Mr Justice Edwards delivered on the 10th of March, 2022.

Introduction

1. In this judgment references to "the appellant" are references to the appellant in these appeal proceedings who was the respondent to the proceedings before the High Court. Similarly, references to "the respondent" are references to the respondent in these appeal proceedings who was the applicant before the High Court. In an effort to avoid confusion the judgment which follows will, in so far as possible, refer only to "the appellant" and to "the respondent" and relevant quotations from transcripts and other court documents have been adjusted accordingly.

2. This is an appeal against the judgment of the High Court (Heslin J., [2021] IEHC 576) delivered on the 2nd of July 2021 and the Order reflecting that judgment which was perfected on the 22nd of July 2021. In his said judgment the High Court judge granted, at the behest of the respondent, an Order of Certiorari by way of judicial review, quashing an Order made by the Circuit Court judge sitting as the Circuit Criminal Court for the Eastern Circuit and County of Wicklow, at Bray Courthouse on the 28th of March, 2019 directing a jury in the case of *The People at the suit of the Director of Public Prosecutions v. F.M.*, Bill No WWDP47/2016 (who were in charge for the purpose of trying the issue as to whether the appellant was guilty or not guilty on each of the four counts of indecent assault on the indictment preferred against him) to find the appellant not guilty by direction of the trial judge on all counts.

3. There are two facets to this appeal, one procedural and one substantive. The procedural facet arises in circumstances where the High Court judge, notwithstanding that the

application before him was out of time, refused to uphold an objection based upon delay that was raised in oral argument in the court below, in circumstances where no plea had been made in that respect in the appellant's Statement of Opposition. The substantive facet to the case relates to whether the Circuit Court judge's decision was a rational one made within jurisdiction.

4. In circumstances in which I have arrived at a clear view on the substantive issue that the appeal should be allowed for the reasons I will now set out, it is strictly speaking unnecessary to express a definitive view on the procedural issue and it will suffice, if in due course I express a provisional view obiter dictum.

The substantive issue:

Procedural history of the proceedings in the Circuit Court.

5. The appellant was charged on indictment before Bray Circuit Criminal Court on Bill No WWDP47/2016 with four counts of indecent assault of his niece which were alleged to have occurred between the 1st of April 1968 and the 31st of December 1970 (during which period the complainant would have been aged between seven and nine years). The appellant was granted bail pending his trial. His case was returned for trial on the 9th of November 2016, and was listed for the first available sittings of the court after that, i.e., that commencing on the 6th of December 2016. On that date, there was an application for an adjournment to the next sessions at the behest of the defence, which was granted, in circumstances where they were seeking certain disclosure from the prosecution.

6. The next sessions of Bray Circuit Criminal Court were in March 2017, and the matter appeared in the list on the 14th of March 2017. Due to the number of cases ahead of it in the list there was no reality to it receiving a trial date during those sessions, or indeed during several subsequent sessions, and accordingly it was sequentially adjourned to the 4th of July 2017, the 5th of December 2017, the 10th of April 2018, and the 10th of July 2018 before finally receiving an actual trial date (with some realistic possibility that it might be heard) on the 2nd of October 2018. On that occasion it was listed as a back-up trial to another trial also listed for that date.

7. The affidavits before us do not indicate whether the trial listed ahead of the appellant's case on the 2nd of October 2018 in fact proceeded, and whether or not the appellant's case might have been reached, but it seems that in any case the prosecution were not ready to proceed on that date in circumstances where the principal investigating Garda had died, and his replacement who had taken over responsibility for the file was of the belief that there were counselling notes that needed to be obtained and disclosed. Accordingly, the matter was adjourned at the behest of the respondent to the 29th of January 2019. The affidavit evidence is silent as to whether the prosecution's adjournment application was opposed, but in any event it appears to have been granted.

8. The matter was listed for trial again on the 29th of January 2019. On that date the defence consented to an application for an adjournment by the prosecution in circumstances where a prosecution witness, a sister of the complainant, had suffered a tragic bereavement (her 19 year old son was killed in an accident while abroad) and was

too distressed to attend court. The trial was therefore adjourned to the 27th of March 2019.

9. On the 27th of March 2019 the appellant's case was listed third behind two other cases and was not expected to be reached early in that session. However, as it turned out there were problems with both cases listed ahead of the appellant's case and it was called on sooner than had been anticipated. When the case was called on, the prosecution indicated to the trial judge that they were not yet ready and that they were seeking yet another adjournment to the next sessions. The reasons given were that the complainant's sister, who had suffered the bereavement, was still not available. Further, the prosecution needed to disclose some counselling notes, which were still awaited, to the defence. There was no mention at this stage of any difficulty with the availability of the complainant herself. The adjournment application was opposed by the defence and it was refused. A jury was then empanelled to try the appellant and was put in charge, following which the matter was then adjourned overnight with the intention that on the following morning the case would be opened to the jury.

10. When the Court reconvened on the following morning, the 28th of March 2019, the prosecution made yet another application for an adjournment but on different grounds. The grounds advanced on this occasion were that the complainant was unavailable. A medical certificate was produced to the court from the complainant's General Practitioner, stating:

> *"To whom it may concern,*
>
> *[The complainant] is a patient of mine for several years and has a number of medical issues. She tells me that she is due in court today. At the moment she is under extreme stress and also has a flare-up of a variety of physical symptoms such as fibromyalgia, irritable bowel syndrome and painful bladder syndrome etc. I don't think that she is currently in a fit state to testify. When it does come to that point, it would be very helpful if she could be given as much notice as possible so that she can prepare herself properly and ensure that she has someone with her to support her. Your understanding is appreciated.*
>
> *Yours sincerely,*
>
> *Dr. J**"*

11. The court was further informed by prosecuting counsel that the medical report had been provided by the complainant in circumstances where she had been contacted by a Garda on the previous evening and advised that the case would be proceeding the next day. The complainant had protested at the time about the short notice in circumstances where she would have to travel some distance and had expressed unwillingness to travel. However, counsel assured the court, the complainant still wished to pursue the case and wanted an opportunity to do so at a future date.

12. This adjournment application was vehemently opposed by counsel for the appellant. A full transcript of the hearing on the 28th of March 2019 during which the adjournment application was made, opposed and ruled upon has been exhibited before us. The High Court judge in the proceedings the subject matter of the appeal, viewed the submissions advanced by counsel for the appellant in opposing the adjournment application as *de facto* amounting to a *P. O'C* type application.

13. Counsel for the appellant had commenced by stating:

> *"We are strenuously opposing any adjournment. We want the case to open and for the prosecution to present its case. At this stage, Judge, if it's not prepared to do so, I am going to make an application to you under the principles set out in the People (DPP) v. PO'C of 2006."*

14. Counsel for the appellant then opened the case of *The People (Director of Public Prosecutions) v. P. O'C* [2006] 3 I.R. 238 to the Circuit Court judge, quoting the following passage from paragraph 21 of the judgment of Denham J. in that case:

> *"…if a trial is delayed the appropriate remedy in which to raise that issue is by way of judicial review. However, whether an application for judicial review is made or not, the trial court retains at all time its inherent and constitutional duty to ensure that there is due process and a fair trial. Thus, in the course of the trial matters may arise, evidence may be given, which renders a trial unfair, or the process unfair. In these circumstances the trial judge retains the jurisdiction of preventing the trial from proceeding."*

15. However, and diverting momentarily from my chronology, as the High Court judge in the judgment now under appeal astutely points out in his judgment, the very next sentence (the sole remaining sentence in paragraph 21 of Denham J.'s said judgment) was for some reason not read out to the Circuit Court judge by counsel for the appellant. In that additional sentence Denham J. had gone on to say:

> *"This jurisdiction is exercised in the course of a trial but does not enable, or relate to, a preliminary hearing at the commencement of a trial on the issue of delay."*

16. Be that as it may, it seems clear that the Circuit Court judge was nonetheless alert to that point, because at one stage, in exchanges with counsel for the appellant after he had made his main submission, the Circuit Court judge asks of counsel, *"But does POC apply at the stage of applying for an adjournment as well?"* Counsel for the appellant's response was to say, *"Well, we're gone beyond that, we're in the charge of the jury"*, adding *"The trial has started. They're just not in a position to call any evidence."*

17. Returning to my chronology, counsel for the appellant, having quoted the previously mentioned passage from paragraph 21 of the judgment of Denham J. in P. O'C, then said, *"First of all, we don't accept the short notice aspect. It was listed for trial. To make an assumption that it was not going to be reached or not going to be dealt with was a*

serious error and should not ever have been made." He then immediately went on to allude to the fact that nine persons who potentially might have given evidence in the trial were now dead; that there was outstanding material which ought to have been disclosed but which had not yet been disclosed; that it was nearly three years since the return for trial, that there had been numerous previous trial dates, to the fact that such medical information as had been provided concerning the complainant's state of health was unsatisfactory in that *"we don't know when she's likely to be better and sufficiently well enough to give evidence"*, to the fact that the medical situation with respect to the complainant's sister was also uncertain and unsatisfactory, in that *"Again, we don't know if ever she will be in a position to attend"*; and that in the case of some charges it was more than half a century after the alleged events had occurred. Having recited these complaints, he remarked *"and we're expected to be able to run a fair trial in those circumstances."*

18. Counsel for the appellant then went on to submit:

> *"So, I'd simply ask the court to bear in mind the words of the Supreme Court in P. O'C, that it has an inherent jurisdiction, it's a constitutional duty to ensure fair trial and a fair process. And to grant an adjournment would in itself be an unfairness at this stage. And it is my intention that if he opens his case, to renew this application under P. O'C and say that the procedure is just completely unfair. There has to be a time reached where these cases cannot be prosecuted fairly. This is the first time I have come across a case where there are so many elements of it pointing and indicating to potential manifest unfairness. It's simply completely unacceptable. This man has had this hanging over him for three years. He's made a voluntary statement, attending at the Garda station voluntarily, where without a solicitor or anything else, he simply denies all of this, said it never happened, don't know where this is coming from. And in those circumstances, it's inevitably going to be a case where it's a she says he did it, he says he didn't do it. And it's the other aspects of the case that sometimes are to become so important in trying to persuade the jury that there's a reasonable doubt on the veracity of her evidence, and where it wouldn't reach the required standard for a conviction in a civil case. We are severely hampered, severely handicapped in the running of such a case, and it falls on this court to exercise its constitutional duty to make sure that the procedure is fair. And I think when one steps back and looks at it in the broad brush, it's clear that we can't have a fair trial at this juncture. It's through no fault of the accused man, he's been looking for this material since 2016, and if the case is to be adjourned, it could possibly be later this year before it ever gets heard, and only if these two witnesses recover sufficiently to be able to give evidence. But that doesn't get us over the principal difficulty, which is that at least nine persons are deceased and the principal person involved in the case, which is the brother of the complainant, who she says was in the location, in the huts where this was supposed to have happened, has absolutely no recollection of anything occurring due to the passage of time. … And it's my respectful submission that given everything that's in this case, and I say it surpasses anything I've seen before by way of difficulties, but*

the appropriate course is to call on the prosecution to open its case, and if there is no evidence to present to then direct an acquittal of the accused. It's the only way to remedy it."

19. In reply, counsel for the respondent submitted that *"primarily the points that [counsel for the appellant] makes are points to be made at the conclusion of the evidence adduced by the prosecution."*

20. The trial judge then asks of counsel for the respondent, apropos the points that had been made by counsel for the appellant, *"I don't know if you're disputing these, nine people are dead, it's a 50 year old case, these are points that are of relevance in relation to whether the case should adjourn are not. Do you understand? That's what [counsel for the appellant] is saying."* This then led to the following further exchanges:

> *"PROSECUTING COUNSEL: Yes, I don't think that they are, Judge. The primary -- the primary basis for my application for an adjournment is that the complainant is not …*
>
> *JUDGE: No, I understand what you said yes.*
>
> *PROSECUTING COUNSEL: And if we just confine ourselves to that, then these POC points don't really apply. Those points, in my submission, are points to be made at a conclusion of a trial in which evidence has been led. Obviously, I'm not in a position to call such evidence.*
>
> *JUDGE: No, no, I understand that, I understand that."*

21. Counsel for the respondent (i.e. prosecuting counsel) then went on to address a number of the individual points that had been made by counsel for the appellant. He submitted that while the trial had been technically listed for trial on previous occasions, there had in truth been little reality to it getting on, on the occasions in question. Further, he emphasised that the listing of the trial for the previous day had been on the basis that it was very much as a backup and that there had been a shared understanding between prosecution and defence that the case would not be reached, notwithstanding that it was technically listed as a backup. He also made the further point that in relation to the claim of non-disclosure, that the documents in question were not in fact in the possession of the prosecution at that point, they were still with the HSE, that the HSE were engaging with the complainant to see if parts of the records needed to be redacted, that this was a slow process, but that the prosecution had done their level best to get them.

22. The Circuit Court judge then ruled as follows:

> *"All right. Thanks. Well, this is an application, the trial now having commenced, to adjourn. There was an application before … the accused was put into the charge of the jury yesterday to adjourn this trial. That application was based on the unavailability of a witness, and that application was refused. At the stage of that application for an adjournment, i.e. before the accused was put into the charge of*

*the jury, no mention was made of any inability on the part of the complainant to attend to give evidence. The situation now is that there is consequently a fresh ground of adjournment, and I just want to very briefly say in relation to the background detail – [Counsel for the respondent] has outlined that and I'm not going to repeat it, but at no stage it is common case was anybody told, whether it was the investigating guard, whether it was the DPP's solicitor or anybody, was told that she would not going to be in a position to give evidence. Whatever chance this application had for success, it would have had it yesterday, not today. In addition, this is based on a medical report, which indicates difficulties that the lady may have in relation to symptoms of anxiety and so forth, but the reality is that I would need some degree of convincing further than the letter of Dr. J** to convince me that she's not in a position to attend to give evidence. After all, this is her complaint. She has brought a complaint as a result of the complaint of events which occurred more than 50 years ago in relation to some charges and not far shy of it in relation to other charges, she makes a complaint of wrongdoing against [respondent's name] the accused. She has to come and deal with it. This case has been in the list since 2016. I accept that it, insofar as it is concerned with hearing dates, the first effective hearing date was December 2018 and that adjournment of that was with the consent of the accused man and in circumstances where this Court, I would have granted an adjournment without any difficulty for a short period. And that's what happened, the case was adjourned to the 29th of January 2019 with a view to it getting on, remembering at all times that this is a case involving allegations of events a considerable period ago, a lifetime ago in some respects. It was listed for hearing on the 29th of January 2019. By that stage, the investigating guard, God rest him, was dead and now a new guard had come into it, and this guard had indicated to the State that there might be counselling notes which ought to be discoverable. No criticism can be made of that guard whatsoever, but you can see now that this is a case where many, many years after the events and after the case has been listed for hearing and was supposed to get on in December '18, there is now for the first time some mention of documentation which should have been disclosed. There is a rigmarole about how it has to be disclosed and how long; but in cases of this type where you're dealing with events that have occurred a long, long time ago, there's an absolute onus to get the case on quickly and to get the case on as efficiently as possible. So on the 29th January 2019, the State, if I can use that in its emanations, if I can use that phrase, was offside and an accused person was now going to be met with a further delay while these notes where being obtained. The case was put back to yesterday. It was, I accept, intended that the case would back up another trial, and I've no difficulty with that proposition; but equally everybody knows that just because a trial is listed no. 1 in the list doesn't mean that it's going on. There's various reasons why things don't go on. The case, in fact, in the list was one in which the complainant hadn't turned up on a previous occasion. So it would have been realistic to expect that [Respondent's name]'s the accused's could have got on. And unfortunately, the position is that, for whatever reason, this wasn't dealt with, and [named counsel] on behalf of the accused and*

on his instructions, made a legitimate point that he wanted the case to go ahead. I agreed with him and the case was due to start today, the accused being in the charge of the jury. A fresh ground of adjournment is really not appreciated at this stage. This should have been the ground of adjournment if at all yesterday and in the interests of justice, I've got to take into account fair process, fair procedures; how would anybody in this court feel, and I shouldn't ask rhetorical questions, but I'll just say I think it is unfair that a person who is dealing with allegations of events that are supposed to have occurred a half a century ago is constantly put back to have these investigations put in front of, sorry, investigations concluded and the matter put in front of a jury. There has to be a fair process for both sides. I accept in general terms, the PO'C type application is probably one that is made as the evidence unfolds, but it is apparently common case that nine people who have a relevance to this prosecution are now dead. The passage of time has certainly affected the position. But that's not giving a conclusion on the P O'C ground, it's just stating the obvious, that it's a case that had to get on and had to get on quickly. Rights of an accused are also present as well as rights of a complainant, and the accused carries with him a constitutional right and a constitutional presumption of innocence. He is entitled to have this case tested and it hasn't been tested. So I'm not going to accede to any application for an adjournment. The matter proceeds."

23. The adjournment application having been refused, the jury were then brought out, whereupon the following occurred:

JUDGE: There we go. Now, Mr [prosecuting counsel]

PROSECUTING COUNSEL: Judge, somewhat unfortunately, I'm not in a position to offer any evidence in this case, for reasons that the jury need not be concerned with, and I have no evidence to offer at this time.

JUDGE: All right.

DEFENCE COUNSEL: In the circumstances, Judge, I'd ask that you direct an acquittal, and that the foreman of the jury record the same on the issue paper.

JUDGE: Yes, that's -- Mr Foreman, that's exactly correct. The State are not offering any evidence, so consequently, I'm going to direct you … to find him not guilty, because there's no evidence offered."

The High Court's Judgment on the substantive issue

24. The respondent was granted leave by the High Court (Meenan J.) on the 31st of July 2019 to seek a judicial review of the Circuit Court judge's decision to refuse to adjourn the case, in consequence of which the state had been unable to offer any evidence, which led in turn to a direction to the jury to find the appellant not guilty on all counts. Leave had been granted upon grounds that included:

"(e) on the 28th March, counsel for the prosecution found himself without a complainant as she was suffering from ill health and was unable to attend court, a fact which was attested to by a medical certificate which was furnished to the court. A further application for an adjournment of the trial was made and refused by the trial judge;

(f) counsel for [the appellant] moved an application to have the charges dismissed in accordance with the principles set out in P.O'C v DPP. The court refused the application for an adjournment and directed the jury to enter a verdict of acquittal against the accused;

(g) in doing so, the trial judge failed to have any, or any adequate regard to the right of the complainant to have the complaint she had made determined in accordance with law and to her medical condition which required her to have some notice so that she could prepare for the trial of the complaint;

(h) the decision of the trial judge was premature and the incorrect test was applied by him, as it would have transpired in the evidence in the case that none of the witnesses who had died had witnessed any abuse and most of them were peripheral witnesses to the case;

(i) the refusing to adjourn the trial was unreasonable and failed to afford fair procedures to the complainant in the case. In particular, the trial judge failed to recognise that the complainant has rights under the Victim's Directive to be treated in a respectful, sensitive and professional manner without discrimination of any kind based on any ground such as health. He also failed to vindicate her right to appropriate support and access to justice and failed to enable the complainant to be heard and to participate in criminal proceedings;

(j) the decision of the judge was deliberate, invidious, and unreasonable and failed to give any, or any appropriate weight to the public interest in the prosecution of offences;

(k) it is in the interests of the good administration of justice and the prevention of disorder and crime that the aforesaid Order refusing the adjournment and directing the acquittal of the accused be quashed and that the charges are remitted to the next sitting of Wicklow Circuit Court so that they can proceed in accordance with law."

25. Following a substantive hearing of the application, on the 2nd of July 2021 the High Court (Heslin J.) granted an *Order of Certiorari* quashing the Orders of the Circuit Court judge made in the proceedings on 28th of March 2019 and remitted the matter to the Circuit Court.

26. The High Court judges' reasons for his decision are contained in a very detailed, 97 page judgment. Helpfully, towards the end of that judgment there is a section entitled, *"This court's decision summarised."* It will be helpful, I believe, to reproduce it verbatim:

"139. Counsel for [the appellant] undoubtedly made a PO'C application to the presiding judge on 28 March 2019 and did so with obvious skill and commitment to his client's case.

140. The attention of the presiding judge was not, however, drawn to the following statement by Denham J. (as she then was) in the PO'C case, with regard to a trial judge's jurisdiction (in particular, the limits in respect of same) to ensure due process and a fair trial: 'This jurisdiction is exercised in the course of a trial but does not enable, or relate to, a preliminary hearing at the commencement of a trial on the issue of delay'.

141. In the present case a preliminary application was undoubtedly made which related to the issue of delay and of alleged prejudice to [the appellant] which was said to render a fair trial impossible.

142. The evidence demonstrates that, to a material extent, the presiding judge entertained and engaged with a PO'C application and that his decision to decline an adjournment which led, inevitably, to the order which is challenged in the present proceedings, was based, to a material and significant extent on issues raised in the PO'C application.

143. The result was a halting of the prosecution case against [the appellant] in breach, it seems to me, of the principles in the PO'C and CCE decisions.

144. In circumstances where the presiding judge's attention was not drawn to the limits of his jurisdiction to ensure a fair process and fair trial, the presiding judge was, in reality, deprived of the opportunity (e.g. after an adjournment), to consider the prosecution case as it actually developed.

145. Equally, the presiding judge was deprived of an opportunity, at that juncture, to consider whatever evidence was available as to the testimony which might or could have been given, but which was said to be no longer available.

146. Similarly, the presiding judge was deprived of the opportunity to consider the available evidence about what might have been said by each of the missing witnesses. 147. The learned Circuit Court judge was also deprived of the opportunity to assess the materiality of such evidence as was alleged to be missing, all the foregoing being matters to be considered in light of the prosecution case as it actually evolved during a trial.

148. Thus, the presiding judge was deprived of an opportunity to reach an assessment as to whether the trial was, or was not fair, such a determination being one to be made on the basis of all materials before the court.

149. The presiding judge was also deprived of any opportunity to take into account, to the extent relevant, any alleged culpable prosecutorial delay as was asserted on behalf of [the appellant] in the context of a trial judge's consideration of fairness.

150. In short, it seems to me that the evidence demonstrates that the presiding judge was deprived of the opportunity to apply, properly, the principles outlined by the Chief Justice in the CCE decision.

151. As a consequence, I am satisfied that the order which is challenged in the present proceedings is one in respect of which certiorari is appropriate.

152. In opposing the reliefs sought in the present proceedings, both [the appellant] and his solicitor have sworn affidavits which contain numerous averments to the effect that a fair trial is not possible. The case before this Court is not a hearing as to substantive merits, but the foregoing highlights the importance of the principles derived from PO'C and detailed in CCE.

153. Plainly, there can be significant difficulties in bringing old cases to trial. In addition, the process is likely to be very stressful for both an accused and a complainant. The authorities make clear, however, that a trial judge has no jurisdiction to halt a trial on the basis of a preliminary application grounded on an assertion that, due to the passage of time and missing witnesses, an unfair trial is no longer possible or that a trial would present "a very serious and grave risk of a miscarriage of justice", as counsel for [the appellant] submitted to the presiding judge on 28 March 2019.

154. The evidence demonstrates that the order challenged in the present proceedings resulted from what was an impermissible preliminary application in breach of the PO'C and CCE principles.

155. It is plain from the learned judge's ruling in the Circuit Court that it was one which flowed from the fundamentally important principle of ensuring due process and a fair trial and the learned judge's commitment to that principle. Unfortunately, however, the attention of the presiding judge was not drawn with sufficient clarity to the limits placed upon that jurisdiction in the context of a preliminary hearing at the commencement of a trial on the issue of delay."

Analysis and Decision:

27. Distilling the various grounds of appeal that have been pleaded to their essence, and having regard to the issues focused upon by counsel on both sides at the oral hearing, the substantive issue for determination on this appeal would appear to me to be:

Was the High Court judge correct in finding in substance that the Circuit Court judge had, wrongly and in excess of jurisdiction, entertained and engaged with a P. O'C type application leading in turn to (i) a refusal in excess of jurisdiction to adjourn the case in circumstances where the principal prosecution witness had not attended, and (ii) the wrongful issuing of a consequential direction to the jury to find the respondent not guilty in circumstances where the prosecution was not then and there in a position to offer evidence in support of the charges?

28. The Court has received both written and oral submissions from both parties which were helpful and for which it is appreciative.

29. The first thing to be said is that every trial judge possesses an inherent and wide-ranging discretionary power to adjourn a case listed before him or her. However, like all such discretionary powers it must be properly and judicially exercised. Nevertheless, subject to that constraint, the bar for challenging a judge's decision to adjourn the case in the exercise of his or her undoubted discretion is a high one. See cases such as *O'Callaghan v Clifford* [1993] 3 I.R. 603; *Stephens v Connellan* [2002] 4 I.R. 321; *Adams v Reilly* [2005] 3 I.R. 190 and *The People (DPP) v Desmond* [2004] 3 I.R. 486.

30. I have carefully considered all of the paperwork provided to us in this case including the grounding affidavits, the submissions of the parties, the transcripts of the proceedings in the Circuit Court, the judgement of the High Court judge and the authorities furnished.

31. I find myself in complete agreement with the High Court judge when he said:

> *"I am satisfied that a PO'C application was, as a matter of fact, made on behalf of the respondent on the morning of 28th March, 2019. Fairly considered, the contents of the transcript demonstrate that this was a P. O'C application both in form and in substance."*

32. I further agree with the High Court judge that the law is clear that a *P.O'C* type application ought not to be entertained at the commencement of proceedings before any evidence is heard, because the essence of that type of application is that an unfairness arises in the context of an inability to meet and engage with such evidence as has been adduced at trial at the point at which the application is made. If, however, no evidence has yet been heard there is no context sufficient to allow the court to give proper consideration to the application. The court has to be fair to both prosecution and defence and the claimed unfairness cannot be advanced or engaged with on a hypothetical or theoretical basis. It must be assessed and engaged with in the light of evidence actually adduced.

33. However, where I diverge from the High Court judge and disagree with him is in respect of his further conclusion that the adjournment was refused on *P. O'C* grounds. It seems to me, following a close consideration of the transcript of the 28th of March, 2019 that the adjournment was refused on the basis that:

- it was being made late in the day, i.e., against a background that
    - it was not the first time the case had been listed for trial;
    - the case had been returned for trial in 2016 and had been waiting for almost three years to get on;
    - that there had already been a number of previous adjournments at the behest of the prosecution;

- the application was being made against the further background of an unsuccessful adjournment application by the prosecution on the previous day, at a point before the jury had been put in charge, that adjournment having been sought on grounds of the unavailability of a witness other than the complainant, and the need to make further disclosure;

- that there had been no intimation at the time of the adjournment application on the previous day of any difficulty with the complainant's availability;

- that the jury were now in charge, and

- that the evidence proffered in support of the claim that the complainant could not attend for medical reasons was unsatisfactory in the Circuit Court judge's assessment.

- That "*in cases of this type*" (i.e., cases alleging historic sexual abuse) the prosecution bore an onus to "*get the case on quickly and to get the case on as efficiently as possible*";

- that it was the complainant's complaint and "*she has to come and deal with it*";

- that the prosecution, in not being ready to proceed on the 29th of January 2019 due to a principal witness suffering a bereavement, had already been "*offside*" and a consideration in the refusal to adjourn on the previous day had been because "*an accused person was now going to be met with a further delay while these [undisclosed] notes were being obtained.*" Implicit in this observation was that if an adjournment was now to be granted on the admittedly different ground of the non-availability of the complainant, the consequence was going to be the same, namely that "*an accused person was now going to be met with a further delay*", which further delay would not be of his making and to which he was objecting;

- that a fresh ground of adjournment was "*really not appreciated at this stage*";

- that the application now being made should have been made on the previous day, i.e., before the jury were put in charge.

- That it was "*unfair that a person who is dealing with allegations of events that are supposed to have occurred a half a century ago is constantly put back to have … investigations concluded and the matter put in front of a jury..*"

- That both the accused and the complainant had rights of which account required to be taken – "*There has to be a fair process for both sides.*"

34. The transcript goes on to set out an acknowledgement by the trial judge that in substance he was being asked by counsel for the present appellant (i.e., defence counsel) to refuse the adjournment application effectively on *P. O'C* grounds, but he expressly states that he was not basing his decision on *P. O'C* grounds, but rather on the basis that there was an

imperative in the circumstances of the case before him that there should be no further delay. As he put it, "*it's a case that had to get on and had to get on quickly.*" It is important in my judgment to reprise yet again the context in which he offered that observation. He said:

> *"I accept in general terms, the PO'C type application is probably one that is made as the evidence unfolds, but it is apparently common case that nine people who have a relevance to this prosecution are now dead. The passage of time has certainly affected the position. But that's not giving a conclusion on the P O'C ground, it's just stating the obvious, that it's a case that had to get on and had to get on quickly. Rights of an accused are also present as well as rights of a complainant, and the accused carries with him a constitutional right and a constitutional presumption of innocence. He is entitled to have this case tested and it hasn't been tested. So, I'm not going to accede to any application for an adjournment. The matter proceeds."*

35. Although the Circuit Court judge accepted that *"it is apparently common case that nine people who have a relevance to this prosecution are now dead"* and that *"the passage of time has certainly affected the position"*, he did not make any finding that the appellant (i.e., the defendant) was irredeemably prejudiced in his ability to meet the prosecution case on that account to such an extent as to create a real risk of an unfair trial. Rather, his decision was based on his understanding, correct in law, that the accused had a free-standing positive right to an expeditious trial (uncontestably arising both under the Constitution and on foot of Article 6 of the ECHR, although neither provision was explicitly referenced), and that in his view, a point had been reached in the proceedings where that right required to be vindicated.

36. It matters not whether the High Court, or for that matter this Court, would have reached the same conclusion or would have made the same decision on the adjournment application. The conclusion reached by the Circuit Court judge was ostensibly a cogent, reasoned one based on relevant considerations. The decision to refuse the adjournment was a decision made within jurisdiction in my judgment and represented the lawful exercise of a discretion and as such it is unassailable. The fact that it might have been possible for another judge, faced with the same circumstances, to come to a different view is irrelevant. It is of the essence of the exercise of a discretion that it involves a judgment call. There will therefore be no single right answer. It is possible to disagree with a decision that has been exercised in a particular way, without the fact of there being a disagreement in any way implying that the discretion was not lawfully exercised. A discretionary decision, such as a decision to grant or refuse an adjournment, can only be impugned if it can be shown to have been made in excess of jurisdiction, or to have been irrational, or motivated by improper or irrelevant considerations. In my judgment none of those things arise here.

37. Counsel for the respondent has sought to argue that the Circuit Court judge's dissatisfaction with, and ultimate rejection of, the medical evidence (such as it was, i.e., the G.P's certificate) was irrational, something which I do not accept.

38. The basis on which the medically certified position was found to be unsatisfactory was a nuanced one. The Circuit Court judge's unhappiness was not with respect to what was stated, namely that the complainant (i) had a number of medical issues, (ii) was under extreme stress and also had a flare-up of a variety of physical symptoms "*such as fibromyalgia, irritable bowel syndrome and painful bladder syndrome etc*" and (iii) that it was the doctor's opinion that she was not "*currently in a fit state to testify.*" The expressed unhappiness was rather with what it did not state, namely whether the complainant was so unwell that she could not physically attend court; if not, when she might be fit to attend; and further, when (if ever) she might be well enough to testify. In fairness to the doctor it appears implicit from his certificate that he believed that she would be so fit at some point, because the next sentence of the certificate begins, "*When it does come to that point*". However, no indication is given as to whether that point might be in the near, medium or far future, and no prognosis as to her likely availability to testify was provided. For the Circuit Court judge to have pointed to these information deficits was neither unreasonable nor irrational. Moreover, no request was made by the prosecution for the matter to be put back for a short period to facilitate the obtaining of fuller information, nor offer or suggestion made to the Circuit Court judge that they might do so.

39. It also bears commenting upon that the Circuit Court judge was best placed to assess the significance of this certificate in the context in which it was being produced, particularly in circumstances where he had heard evidence that following his refusal to adjourn the case on the previous day the complainant had been contacted by a Garda on the previous evening and advised that the case would be proceeding the next day. The complainant's response had been, as reported by the Garda in question, to protest to the Garda about the short notice given to her in circumstances where she would have to travel some distance, and she had expressed unwillingness to travel. There was no assertion at that time of health difficulties that would preclude her attendance, or of an inability to testify due to on-going health difficulties. Further, in that regard it is noteworthy that what I would characterise as "the short notice issue" featured again in the medical certificate, with the doctor stating that, "*When it does come to that point*,[i.e., the complainant being fit to testify] *it would be very helpful if she could be given as much notice as possible so that she can prepare herself properly and ensure that she has someone with her to support her.*" I do not consider that it was unreasonable or irrational for the trial judge to have considered that the evidence proffered to him in support of the adjournment application was unsatisfactory in the respects that he identified. To have perceived an information deficit and to criticise it as he did was legitimate. To say that, is not to seek to cast an aspersion of any sort on the doctor concerned, who may not have been apprised of what exactly the court would need to know. However, it was the prosecution's duty, if intending to rely upon medical reasons to support a last-minute adjournment against a background of the matter having been adjourned several times previously, to

request a certificate in sufficiently detailed terms, and particularly, giving a prognosis as to when the witness was likely to be available and fit to testify, to support their adjournment application. Moreover, it is clear that the Circuit Court judge's unhappiness with the extent of the medical evidence was only one consideration amongst many that led him to conclude that it was not appropriate in the circumstances of the case to further adjourn this case.

40. In conclusion, I cannot agree with the learned High Court judge that the refusal to adjourn in this case was unlawful or made in excess of jurisdiction such that that decision required to be quashed. Moreover, in circumstances where the adjournment application was lawfully refused, and in circumstances where the prosecution then offered no evidence in support of the charges, the direction to acquit was appropriate and also lawful.

41. I would allow the appeal in the circumstances.

The Procedural Issue:

Procedural history of the proceedings under appeal.

42. Following the directed verdict in the trial before the Circuit Court the respondent sought, *ex parte* and in the usual way, to obtain the leave of the High Court to apply by way of judicial review for an Order of Certiorari quashing the decision to grant the said direction, and for certain ancillary relief. The application for such leave was made on the 29th of July 2019 notwithstanding that the three-month time limit provided for in Order 84, Rule 21(1) of the Rules of the Superior Courts had already expired and the fact that the application was out of time by approximately a month. The ancillary relief sought in the ex parte docket included a prayer for "*an extension of time for the bringing of this application, if necessary.*" The application for leave was grounded upon an affidavit of Rory Benville, sworn on the 29th of July 2019. While this affidavit proffered relevant evidence in support of the respondent's intended challenge to the Circuit Court judge's decision to grant a direction, it was completely silent on the issue as to why leave to apply for judicial review had not been made within the permitted time limit, or as to any basis upon which the High Court was being, or would in due course be, asked to exercise its discretion to extend time. The Order of the High Court of the 29th of July 2019 (per Meenan J.) granted to the respondent leave to apply for the reliefs set forth at paragraph (d) of the respondent's Statement of Grounds, on the grounds set forth at paragraph (e) in the said Statement of Grounds. Apart from reciting that "*an extension of time, if necessary*", was prayed for in the *ex parte* docket, the leave Order is otherwise silent as to that issue.

43. The granting of leave was followed by service of the Order and supporting papers on the appellant, including the respondent's Notice of Motion dated the 1st of August 2019 formally applying, pursuant to the leave granted, for an *Order of Certiorari* by way of judicial review and for ancillary reliefs. As in the case of the *ex parte* docket the Notice of Motion again prayed for "*an extension of time for the bringing of this application, if necessary.*" Again, the aforementioned affidavit of Rory Benville sworn on the 29th of July 2019 was relied upon in support of this motion.

44. A Statement of Opposition was filed by the appellant on the 12th of November 2019. It is common case that this made no reference to the application being out of time, and neither did the affidavit of the appellant's solicitor, Aonghus McCarthy, sworn on the 6th of December 2019, grounding that Statement of Opposition.

45. A supplemental affidavit of Rory Belville, sworn on the 24th of June 2020 was filed in reply to the affidavit of Aonghus McCarthy. Again, this was silent as to the issue of the time limit and it again failed to explain why leave to apply for judicial review had not been made within the permitted time limit. Further, nothing was asserted as constituting good and sufficient reason why there should be an extension of time, such extension having been sought "*if necessary*" in the Notice of Motion, nor was any case made as to why it might not be necessary for time to be extended.

46. An affidavit sworn by the appellant personally on the 8th of September 2020 was filed in response to Mr Belville's supplementary affidavit of the 24th of June 2020, but again this makes no reference to the application for judicial review being out of time.

47. We have not been provided with the written submissions filed in advance of the hearing in the court below but we have been given to understand that neither side addressed the time issue in those submissions. However, we do understand that the time issue was addressed *in arguendo* during oral submissions at the hearing of the substantive judicial review case before the High Court.

48. The belated objection based on delay and non-adherence to the Order 84 time limit is dealt with as follows in the High Court's judgment:

> *"83. The very first time delay is raised was after the [respondent's] counsel concluded her opening oral submissions on day-1 of the trial and counsel for the [appellant] made oral submissions in reply. On behalf of the [appellant], this court is urged to, of its own motion: "end the matter in a couple of paragraphs" i.e. to deliver a very short judgment refusing to entertain the [respondent]'s case at all by virtue of what the [appellant]'s counsel submitted was delay of one month and one day in seeking leave to bring Judicial Review proceedings.*
>
> *84. In making this submission, counsel for the [appellant] drew this Court's attention to the Supreme Court's 19 June 2002 decision in Shannon v. McCartan [2002] 2 IR 377. In that case, the Supreme Court dismissed an appeal against a decision of the High Court (Kearns J., as he then was) in which the applicant was refused certiorari in respect of a decision by the Circuit court which had been made three and a half years earlier. Keane C.J. stated (at p. 383):*
>
> > *'I would leave for another occasion the question as to whether, in such circumstances, having regard to the requirements of O. 84, r. 21(1) and the repeated insistence of this court that applications for judicial review must be made in an expeditious manner, the question as to whether, even where*

delay is not expressly raised by the opposing party, the court should, of its own motion, raise the matter.'

Counsel for the [appellant] also relied on the 1st October 1990 decision of Mr Justice Barr in DPP v. McDonnell, wherein the learned judge stated, inter alia that '…a person who wishes to apply for relief by way of judicial review has a primary obligation to do so as soon as possible and in any event within a prescribed period (unless an extension thereof is granted by the court).' The Supreme Court's decision in Shannon, which involved delay in applying for Judicial Review of over three years, is certainly not authority for the proposition that this Court is obliged, of its own motion, to refuse to engage with the substance of the dispute as pleaded and, instead, to focus exclusively on the one issue of delay which is not pleaded. As to the decision in DPP v. McDonnell, there can be no dispute in relation to the principles outlined therein, but that is not the end of the analysis in light of the particular facts in the present case.

85. The penultimate paragraph of the 23rd March 1996 decision of Mr. Justice Barron in DPP v. McMenamin states as follows:

'It has been submitted on behalf of the Notice Party that the application for Judicial Review is out of time in that it has not been brought within the period of six months form the date of the Order. This is correct. However, it is submitted on behalf of the Applicant that as the Notice of Opposition does not raise this issue, it cannot now be raised, since the Applicant has been deprived of the opportunity to indicate grounds upon which the Court should exercise its discretion to extend the time for seeking Judicial Review. Since it was not so raised, such evidence is not before the Court. In the circumstances the objection must be refused.'

86. Notwithstanding the fact that the relevant time limit in the present case is 3, rather than 6 months and despite any changes in respect of the provisions of Order 84 in its current form, it is entirely true to say that, in the present case, the [appellant] did not raise the issue of delay in his Statement of Opposition. Nor did he do so in any affidavit sworn by or on his behalf. Furthermore, delay is not referred to at all in the [appellant]'s written submissions. That being so, it seems to me that the [respondent], who plainly had sought 'an extension of time for the bringing of this application, if necessary', in the Order and Motion which were served on the [appellant], was entitled to take the view that delay as regards seeking leave to bring Judicial Review proceedings was not an issue taken by the [appellant]. If one looks at the pleaded case, it is not put in issue and, thus, is not an issue for this Court to determine.

87. It also seems to me that the effect of the [appellant] not pleading delay was to deprive the [respondent] of the opportunity to indicate grounds upon which this Court should exercise what is an undoubted discretion to extend time for seeking Judicial Review (something that, from the outset, the [respondent] flagged as relief

it was seeking, to the extent necessary). Not having been met with any plea of delay, it was not necessary.

88. Furthermore, the decision of the Supreme Court in AP v DPP [2011] 1 IR 729 seems to me to be authority for the principle that the parameters of a case are set out in the pleadings and, as I say, delay is simply not pleaded by the [appellant]. As to the parameters of the case before this court, it is very clear that the [appellant] has engaged fully with the substance of the [respondent]'s case. This is clear from the 9-page Statement of Opposition, and the contents of 3 affidavits, running to 20 pages between them, sworn in opposition to the [respondent]'s claim.

89. As well as not pleading delay in the Statement of Opposition, the [appellant] has not put forward any evidence of prejudice allegedly suffered by reason of the delay of one month and one day referred to in the oral submissions made by his Counsel in the context of encouraging this court to dispose of the matter 'in a couple of paragraphs' i.e. to refuse to entertain the [respondent]'s case at all.

90. In short, the [appellant] having pleaded its opposition to the [respondent]'s case and having engaged fully with the substance of same asks this Court to refrain from doing what it did, i.e. it submits that this Court should not to engage with the case before it but, instead, dismiss the case summarily, of the Court's own motion, in view of the delay in seeking leave.

91. In light of the foregoing, I am satisfied that it is appropriate to decide the case before me, leave to seek judicial review having been granted on 29 July 2019, and no plea being made in the statement of opposition that any delay in seeking leave deprives the [respondent] of the entitlement to seek judicial review. Even if this court has the discretion to decide, of its own motion, not to entertain an application for judicial review, (i.e. due to delay in seeking leave, even where no such plea is made in opposition to the claim in question) I am satisfied that it would be to create a patent injustice and would be an impermissible exercise of such a jurisdiction if this Court were to do so in the present case, in light of the particular facts."

49. The decision of the High Court judge to grant an Order of *Certiorari* has now been appealed to this Court and amongst the grounds of appeal being advanced by the appellant is ground No 15 which is cast in these terms:

> "Judicial review has strict Rules of Court governing the making of applications. A court hearing an application is obligated to ensure that those rules are complied with. It ought, where its attention is drawn to a breach, on its own motion require an explanation as to why and how the breach occurred as same could impact the exercise of its discretion regarding the granting of the remedy sought given the nature and circumstances of the case. Having regard to the requirements of O. 84, r. 21 and the repeated insistence of the courts that applications for judicial review

must be made in an expeditious manner, even where delay is not expressly raised by the opposing party, the court should, of its own motion, have raised the matter and found that no explanation for the delay had been given. Absent any explanation for the delay and given the particular circumstances appertaining to the case, it was erroneous in principle to entertain the application. The failure or refusal to exercise a discretion one way or the other amounts to an error in law. A finding that a refusal to entertain the application on the grounds that it was taken outside of the time permitted where no explanation for the delay was forthcoming would create a patent injustice and be an impermissible exercise of jurisdiction and an error in law."

50. Further written submissions were filed by the parties for the purposes of the present appeal. The submissions filed on behalf of the appellant make the following brief reference to the fact that the judicial review application was out of time. In paragraph 12 thereof, counsel states:

> "This is a case that was prosecuted almost entirely without expedition. On the morning of the trial the respondent had still, after repeated requests, not made disclosure of materials that it conceded it was obliged to disclose. … In a further example of dilatory conduct, the judicial review application itself was undertaken outside of the strict time limits provided for in the Rules of the Superior Courts. The Court will have noticed that the respondent has not yet been asked to account for either of these circumstances. It is submitted that the respondent should be and must be so asked if the principles of trial with expedition is to have any meaning."

51. The written submissions filed on behalf of the respondent seek to engage with the complaint that the judicial review application was brought out of time, in paragraphs 25 to 29 inclusive. It was submitted that:

> "25. It is important to state that the appellant has not in fact raised delay as an issue he relies on. There is no reference to it as an objection in the statement of opposition, affidavits or written legal submissions in the High Court. Rather, it was an invitation made orally to the Judge, by the appellant after the close of the respondent's case during the course of replying submissions that the Judge, of his own motion, should consider the question of delay and should find against the respondent for reasons of delay.
>
> 26. It is somewhat illogical for [the appellant] not to raise the issue of delay in his own defence but rather to ask a judge 'of his own motion' to do so. A request by a party to litigation to a judge, for the judge to consider a matter can hardly be an issue raised by a judge on his 'own motion'."

52. Following a further quotation from the judgment at first instance, wherein the trial judge reiterated his view that it would be inappropriate for him not to engage with the substantive issues and to simply, as he was being requested to do, dismiss the respondent's case "in a couple of paragraphs", i.e., on the basis of the respondent's delay

in seeking leave, the respondent's submissions go on, in paragraph 28, to place reliance on a High Court decision in *The Director of Public Prosecutions -v- McMenamin*; and *McGinley, Notice Party* (Unreported, High Court, Barron J., 23rd of March 1996). It was submitted in that respect:

> "In relation to this matter the respondent relies upon the decision of Barron J. in DPP v McMenamin where delay was not raised by the respondent in his statement of opposition. However, the respondent to this appeal is in an even stronger position because the appellant is not in fact raising the delay on his own behalf but issuing an invitation to the High Court judge to do so. Barron J. stated: —
>
> > *'it has been submitted on behalf of the notice party that the application for judicial review is out of time in that it has not been brought within the period of six months from the date of the order. This is correct. However, it is submitted on behalf of the Applicant that as the notice of opposition does not raise this issue, it cannot now be raised, since the Applicant has been deprived of the opportunity to indicate grounds upon which the court should exercise its discretion to extend the time for seeking judicial review. Since it was not so raised, such evidence is not before the court. In the circumstances the objection must be refused'*
>
> The decision in *McMenamin* related to an earlier edition of the Rules of the Superior Courts namely the 1986 version. The underlying principle relating to time limits remains unchanged however. (The "promptness' requirement has been removed and the conditions for granting extensions have been further elaborated upon in the new rules but these amendments do not alter the principle set out by Barron J.)
>
> 29. For the reasons indicated by Barron J. it is submitted that it would have been unfair to the respondent to allow the appellant raise this issue on his own behalf after the closure of pleadings and submissions in the case. He should not be allowed to do so collaterally by invitation to the judge either. The High Court judge dealt appropriately with this issue."

The procedural issue on this appeal:

Was the High Court judge entitled to disregard the delay issue raised in oral argument on the basis that it had not been pleaded?

53. It is strictly speaking unnecessary for me to engage with this issue and offer a definitive view on it in circumstances where I am of the view that the High Court was in any case in error on the substantive issue, and that the appeal should be allowed. However, I am also of the view, which I express as an *obiter dictum*, that the High Court was not in fact entitled to disregard the delay issue raised in oral argument merely on the basis that it had not been pleaded. This is in circumstances where Order 84, Rule 21 of the Rules of the Superior Courts expressly provides:

"21. (1) An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose.

(2) Where the relief sought is an order of certiorari in respect of any judgement, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgement, order, conviction or proceeding.

(3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:

(a) there is good and sufficient reason for doing so, and

(b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either:

(i) were outside the control of, or

(ii) could not reasonably have been anticipated by the applicant for such extension.

(4) In considering whether good and sufficient reason exists for the purposes of sub-rule (3), the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party.

(5) An application for an extension referred to in sub-rule (3) shall be grounded upon an affidavit sworn by or on behalf of the applicant which shall set out the reasons for the applicant's failure to make the application for leave within the period prescribed by sub-rule (1) and shall verify any facts relied on in support of those reasons.

(6) Nothing in sub-rules (1), (3) or (4) shall prevent the Court dismissing the application for judicial review on the ground that the applicant's delay in applying for leave to apply for judicial review (even if otherwise within the period prescribed by sub-rule (1) or within an extended period allowed by an order made in accordance with sub-rule (3)) has caused or is likely to cause prejudice to a respondent or third party.

(7) The preceding sub-rules are without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made."

54. The Rules of the Superior Courts are secondary legislation. The time limit in sub-rule (1) is expressed in mandatory language. Rule 21, sub-rule (3) confers a discretionary power to extend the time limit in sub-rule (1), but the exercise of that power is conditioned upon the court being satisfied as to certain matters. Imperative language is used. The sub-rule says, *"but the Court shall only extend such period if it is satisfied that"* the conjunctive requirements specified at (a) and (b) exist. Moreover, sub-rule (5) prescribes the manner

in which an applicant for an extension should seek to so satisfy a court from which an extension of time is being sought. It is specified that the application for an extension under sub-rule (3) should be grounded upon an affidavit sworn by or on behalf of the applicant which should set out the reasons for the applicant's failure to make the application for leave within the period prescribed by sub-rule (1), and *"shall verify any facts relied on in support of those reasons."* While the Rules do not ostensibly preclude a court from deciding of its own motion, and independent of any application being made by the party in default, to grant an extension, there is no reason to believe that a court could do so of its own motion without having an evidential basis for doing so, i.e., without having received evidence in some form sufficient to demonstrate that the conjunctive requirements specified at (a) and (b) of sub-rule (3) exist. It seems to me that the imperative nature of sub-rules (1) and (3) of Order 84, Rule 21, requires that a court which has discovered, either accidentally or through being informed by a party in the course of the proceedings that the application is ostensibly out of time, has no jurisdiction to hear it unless satisfied following due enquiry, either that that it is not so, or that it is appropriate to extend the time on the basis that there is evidence before the court which is sufficient to satisfy it that the conjunctive requirements specified at (a) and (b) of sub-rule (3) exist. The High Court in this case had no such evidence. It could not in my view choose to ignore the conditions precedent to it having jurisdiction simply on the basis that it had not been formally pleaded that the application was out of time. Therefore, had I been required to decide the issue I would also have been disposed to allow this appeal on the basis that it was out of time, and that no sufficient evidential basis for the granting of an extension of time pursuant to sub-rule (3) had been put before the court.

55. Finally, in so far as reliance was placed on *The Director of Public Prosecutions -v- McMenamin; and McGinley, Notice Party* (Unreported, High Court, Barron J, 23rd of March 1996) that decision was based on Order 84, Rule 21 of the Rules of the Superior Courts 1986, which have since been radically amended. In the 1986 iteration of the Rules, Order 84, Rule 21 simply stated:

> "(1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is certiorari, unless the Court considers that there is good reason for extending the period within which the application shall be made.
>
> (2) Where the relief sought is an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding.
>
> (3) The preceding paragraphs are without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made."

56. The strongly imperative language which now appears in the existing sub-rule (3), namely that, "*the Court shall only extend such period if it is satisfied that*: [(a) and (b) exist]", was not to be found in the 1986 version of Rule 21. Moreover, it is no longer enough for the court to consider that there is a good reason to extend the time. The court must now be satisfied on an evidential basis that there is both a good and a sufficient reason for doing so, and that the circumstances leading to the failure to apply in time were either outside of the control of the applicant or could not reasonably have been anticipated. In the circumstances it is doubtful, in my view, that the views of Barron J. as to the necessity for an Order 84, Rule 21 time objection to be formally pleaded before it can be relied upon, reflect the current legal position. However, this view is expressed provisionally and *obiter dictum* and a definitive decision on this will be a matter for another court on another day.

Conclusion.

57. The appeal should be allowed.