[2019] IEHC 671

THE HIGH COURT
JUDICIAL REVIEW

2018 No. 291 JR

BETWEEN:

N.S.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice Murphy delivered on the 16th day of October, 2019

1. This is an application for an order of prohibition, restraining the respondent from further prosecuting the applicant on fourteen charges of indecent assault, pending before Dublin Circuit Criminal Court on Bill No. DUDP 95/2018. The charges span the period from 1st September, 1962 to 31st October, 1963, some fifty-five years ago. All the charges relate to a single complainant.

2. The applicant submits that there are instances of specific and incurable prejudice, which create a real and serious risk that the applicant will not receive a fair trial. The applicant submits that by reason of the lapse of time and the loss of material evidence, the prosecution will amount to bare assertion against bare denial. The applicant submits that these are exceptional circumstances, which entitle him to an order of prohibition.

3. The respondent submits that a very high threshold must be reached for the court to find that there are wholly exceptional circumstances, such that it would be unfair to put the applicant on trial. The respondent submits that this threshold has not been met by the applicant. The respondent further submits that the issues raised by the applicant are matters for the trial judge, to be dealt with through appropriate rulings and directions.

Background facts

4. In order to protect the anonymity of the complainant, any reference to people or places, from which the complainant may be identified, have been excluded.

5. The complainant alleges fourteen instances of indecent assault by the applicant between 1962 and 1963 when she was aged approximately 8 years old. The applicant is a first cousin of the complainant. It is alleged that the offences were committed in the complainant's family home, on occasions when the applicant visited with his mother. It is alleged that the offences were committed at a time when a number of adults and young children were present in the house. The complainant also alleges that on one occasion in the applicant's family home in the summer of 1963 he exposed himself to her from the bathroom window while she was sitting in the garden below. While not the subject of any charge, this allegation may be of relevance in the context of assessing the credibility of the complainant.

6. In her first statement dated 14th April, 2016, made some 53 years after the offences are alleged to have been committed, the complainant states that in or around 2001, when she was in her forties, she contacted the Gardaí at Kells Garda Station, and informed a

Garda that she had been sexually abused by the applicant. She also informed the Garda that she had received information from her cousin, the applicant's sister, of allegations relating to another child. She was invited to make a complaint at that time, but declined to do so. In her statement of proposed evidence, the complainant explains her failure to make complaint as being due to her unawareness of the damage that had been caused to her and her fear that she would not be listened to. She states that she informed the Garda that if the child's case progressed, or if another allegation of abuse was forthcoming, that she would make a statement. A further reason for the complainants delay in making a statement is that she did not wish to make a statement while her cousin, the applicant's sister, was alive. The complainant states that she was close to the applicant's sister, who died in April 2016. The applicant was charged on 10th November, 2017, approximately 55 years after the alleged offences.

7. Having regard to the relevant law at the time of the alleged offences, these alleged offences are not arrestable offences in respect of which the applicant could be arrested and questioned. However, In February, 2017, the applicant engaged in a voluntary interview, during which he denied the allegations. In the interview, the applicant put forward the following:-

- that from September, 1962, he was in his final year at university and spent every weekday evening studying in the library;

- that he only attended at the complainant's family home when he had a car, and would drop his mother over to the house, save for one occasion the night before he travelled to the United States with his mother;

- that he is at a disadvantage as his sister is unable to confirm that he did not attend the complainant's family home during this period;

- that the complainant did not visit the applicant's family home while he was present, and that his sister would be in a position to confirm that this was the case; and

- that as a result of an accident when he was twelve or thirteen, that he was diagnosed with erectile dysfunction by his doctor, and that his mother and sister were aware of this.

8. On 16th April, 2018, leave for judicial review was granted by Noonan J.

Submissions on behalf of the applicant

9. The applicant submits that owing to the passage of time, there are a number of instances of specific and incurable prejudice, which create a real and substantial risk that he cannot receive a fair trial. The main arguments set out by the applicant relate to the absence of witnesses who, he submits, would have been of assistance to him in making his defence. These witnesses are now deceased. The applicant also relies on missing documentation, without which, he submits, he cannot fairly be tried. The applicant also submits that the trial should not proceed, on grounds of his ill health. The applicant avers that he is a man of advanced years, having been born on 27th November, 1939. He avers that as a result

of suffering a heart attack in 1988, for which he underwent quadruple by-pass surgery, that his heart function is greatly reduced and needs to be monitored, and that he is on medication.

Missing evidence

Applicant's mother

10. The applicant submits that his mother would have been in a position to attest to a number of matters that support his defence, but that she cannot do so, owing to her passing in July, 1984. The applicant submits that she would have been able to attest to the following:-

    - that the applicant did not attend the complainant's house in 1962 and 1963, and that it was his sister who used to attend with her during this period;

    - that the applicant was undergoing his final year of an undergraduate degree in University College Dublin from October, 1962 to May, 1963;

    - that following the completion of his exams in May, 1963, the applicant travelled to London to work, as he had done the previous year in the summer of 1962. The applicant submits that his mother would have been able to attest to the fact that while in London, the applicant obtained work with a construction company from June to August, 1963;

    - that owing to his travels to London, he was absent from the jurisdiction during the period of the allegations, spanning the entirety of the summer of 1963. The applicant submits that his mother would have been able to attest to the fact that he returned home from London on only one occasion, during the summer of 1963, for the purpose of attending his conferral ceremony, and that he only returned to Dublin in August, ahead of his travels to the United States in September that year;

    - that the applicant lodged with a relative while in London during the summer of 1963, as he had done the previous year during the summer of 1962; and

    - that his mother was one of the few people who was aware of his erectile dysfunction diagnosis, and that she would have spoken to his treating doctor.

11. The applicant avers on affidavit dated 12th April, 2018 that that his mother would have been able to give additional material evidence relating to the allegation of indecent exposure alleged to have been perpetrated by the applicant, during the complainant's stay at the applicant's family home. The applicant denies that the complainant ever stayed at the house while he resided there, and that his mother would have been in a position to give evidence in this regard. The applicant also submits that his mother could have given evidence in relation to the layout of his house, which he submits contradicts the complainant's account of the alleged events. The court has no evidence as to whether or not the house is structurally the same as it was at the time of the alleged events.

The applicant's sister

12. The applicant submits that his sister, who passed away in April, 2016, would have been in a position to attest to the above matters, either in addition to or separately from his mother. The applicant submits that his sister would have been able to give evidence in relation to the following:-

- that it was she who attended the complainant's family home with their mother, and that such visits took place on Fridays and not on Thursdays, as is suggested by the complainant;

- that she would be able to confirm that the applicant was absent from the jurisdiction during the period in which the allegations against him have been made; and

- That while the applicant was in his final year at UCD, that he spent every weekday evening studying in the UCD library.

13. The complainant's statement includes an assertion that the applicant's sister informed the complainant that she had read her mother's diary, and that she had enquired of the complainant as to whether the applicant had ever abused her. The complainant asserts that the diary entry did not detail what had happened, but referred to the worst day of her (mother's) life, being the day when a letter arrived from her brother (the father of the complainant and uncle of the applicant). The applicant submits that this assertion is inconceivable; that not only would his sister not have informed the complainant of this, because of the close relationship that he enjoyed with his sister, but also that he would have been informed had such a conversation with the complainant taken place. The court has no information as to the current whereabouts of this diary, which appears to have been in his deceased sister's possession.

The applicant's doctor

14. The applicant explains on affidavit that he had an accident at the age of twelve or thirteen, which led to a diagnosis of erectile dysfunction. The applicant avers to treatment by a local doctor who he continued to attend until the age of twenty-three, at which time he emigrated with his mother to the United States. The applicant's doctor retired to England and died in 1974. His daughter, took over the practice, and the applicant avers that he contacted her in 1994 when he returned to Ireland temporarily. He avers that he contacted her for the purpose of obtaining his medical records but that these efforts were unsuccessful. The applicant submits that these medical records would support his defence, but that given the antiquity of the records, it is unlikely that they would have been retained. The applicant avers that he has been attending another practice in the South-East since approximately 2003, and avers that on one occasion, he received a prescription for Cialis.

The applicant's relatives

15. The applicant submits that he stayed with a relative while he was in London, during the summer of 1962 and 1963, who is now deceased. The applicant submits that this relative would have been in a position to confirm:-

- That he was not in the jurisdiction during the summer of 1963,

- that he only returned to Ireland for the purpose of attending his conferral ceremony; and

- that he returned to Dublin in August, 1963, in advance of his travels to the United States.

16. The applicant submits that he visited other relatives in the United States on multiple occasions during his travels. These relatives, the complainant asserts, received a letter similar to the one she claims that the applicant's mother received from the complainant's father. The applicant submits that such relatives, now deceased, never raised any issue with the applicant during his visits.

Documentary evidence

17. The applicant avers that his medical records, as mentioned above, which detail his diagnosis of erectile dysfunction, are not available to him, due to the lapse of time between the alleged offences and the making of the complaint. The applicant also avers that documents and records which would have confirmed his absence from the jurisdiction are unavailable due to the passage of time. He avers that his solicitor has been in contact with the construction company that he worked for, while in London from June to September, 1962, and again from May to August, 1963. However, he claims that his solicitor was informed that documents of this antiquity were not retained, and were no longer available. He was informed that this was in part, owing to the fact that the construction company was purchased by another company, and is now operating under a different name.

Specific prejudice and the Omnibus principle

18. The applicant submits that he has identified a number of islands of fact, which, it is submitted, would have been capable of corroboration and open for rebuttal, had the allegations been advanced and prosecuted without a lapse of some 55 years. The applicant submits that he engaged with the investigative process. The fact that allegations of sexual abuse are usually alleged to have taken place in private, shifts the focus of the defence in such matters to testing the complainant's credibility, in respect of collateral matters.

19. It is submitted that by reason of the long delay in making complaint, the applicant is deprived of the ability to undermine in a meaningful way, the credibility of the complainant on collateral matters. The applicant submits that the facts of this case bring this matter within the exceptional category of cases, which result in a real and serious risk of an unfair trial. The applicant submits that in *PO'C v DPP* [2000] 3 IR 87, Hardiman J. stressed the importance of islands of fact, stating that every effort must be made "*to try to avoid a situation where there is no island of fact, and where bare assertion can be countered only by bare denial."* The applicant also cites the below passage from Hardiman J.'s judgment:-

"The effect of documentary, physical or forensic evidence, where it exists, is to provide some basis on which the part of a case which depends on mere assertion can be assessed and tested. Inevitably there will be a certain number of criminal cases, and far fewer civil cases, in which no such evidence exists. In such a case each side will normally look to the surrounding circumstances: the prosecution to see whether there is corroboration or at least evidence consistent with the allegations being true, and the defence to see if there is material with which the complainant's story can be contradicted, even on a collateral matter, or his credibility challenged…If a defendant who is innocent is exposed to a trial where the only evidence is unsupported assertion and the only defence bare denial, his position is indeed perilous. Where these cases have been successfully defended it has, in my experience, always been because it has been possible to show that the complainant's account is inconsistent with the objectively provable facts relevant to the allegations, or that the complainant has made other allegations against other people lacking in credibility."

20. The applicant submits that the complainant has been unable to support the assertions advanced by her, either by way of oral or documentary evidence, and he submits that this inevitably and fundamentally prejudices his defence. It is submitted that the extensive delay is compounded by the fact that the allegations relate to a sole complainant, who was approximately eight years of age at the time. It is submitted that these facts serve to magnify the effect of the specific prejudice that has been identified and complained of.

21. It is submitted on behalf of the applicant that in the cases of *JT v Director of Public Prosecutions* [2008] IESC 20 and *PT v Director of Public Prosecutions* [2008] 1 IR 701, Denham J. applied the "omnibus principle". This concept was referred to by McCracken J. in *DK v Director of Public Prosecutions* [2006] IESC 40, where it was stated that while none of the factors in that case taken individually justified prohibiting the trial, the court could have regard to their "*cumulative effect*". The applicant submits that in *PT v DPP*, Denham J. upheld the High Court judgment of Dunne J., which granted an order of prohibition in relation to allegations of abuse, which dated back 40 years. The defendant was in his eighties and in bad health. The court held that it was no single factor which rendered the case exceptional, but that it was "*the cumulative effect of all the factors which bring this case within the category of an exception requiring a balancing exercise to be conducted by the court."*

22. The applicant submits that in *MS v Director of Public Prosecutions* [2015] IECA 309, Hogan J. while emphasising the importance of illustrating specific prejudice, accepted that certain prejudice must be presumed to arise, once a significant period of time elapses.

23. The applicant cites *BS v DPP* [2017] IECA 342, in which the Court of Appeal prohibited a trial involving sexual assault and rape allegations from 1970, in which the sole complainant alleged that she was raped by a farm labourer, who was employed on the family farm. A contemporaneous complaint had been made to the complainant's mother, who was since deceased. The complaint had been passed on to the complainant's father,

who allegedly dismissed the applicant on foot of this disclosure. The applicant denied the complaint, and averred that if the complainant's father were still alive, he would have been able to attest to the fact that he had ceased working for him on very good terms. The applicant also argued that two other men who worked on the farm, both deceased, would have been in a position to assist his defence. In refusing the prohibition, the High Court found that there was not enough evidence to suggest that either of the farm labourers would have anything of significance to say. The court also took the view that the missing evidence of the father was not so prejudicial as to give rise to a real or serious risk of an unfair trial. On appeal, the Court of Appeal overturned the High Court's refusal. In delivering the majority judgment, Sheehan J. held that the appellant was "*undoubtedly disadvantaged*" by the absence of three potential witnesses, and that this was particularly important in a case where credibility was likely to be a deciding factor. In observing that the trial, if it was permitted to proceed, would take place 47 years after the alleged event, Sheehan J. referred to the previous decision of Hogan J. in *II v JJ* [2012] IEHC, where it was held that by reason of the passage of time, the evidence available had "*become eroded to the point that a jury is left to choose between two different narratives advanced by a plaintiff and the defendant*", and that there was "*a real risk that justice will be put to the hazard."*

Delay

24. The applicant submits that the test to be applied in deciding whether a trial is to be prohibited on grounds of delay, is the test as stated by Murray CJ. in SH v DPP [2006] 3 IR 575:-

> *"The test is whether there is a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay. The test is to be applied in light of the circumstances of the case."*

25. The applicant submits that inherent in any analysis of whether or not the accused is at risk of an unfair trial, is the question of whether any unfairness is capable of being cured by appropriate rulings and directions of the trial judge. The applicant submits that the High Court retains a duty to prohibit a trial where exceptional circumstances exist, where the applicant has engaged with the potential evidence in a specific and purposeful way, in order to identify the risk. It is submitted that the present case is an exceptional case, in which the court should exercise its discretion to prohibit prosecution.

General prejudice

26. It is submitted that the delay of more than 55 years constitutes an exceptional factor, and renders a fair trial of the applicant impossible. It is also submitted that such delay in and of itself, even without the identification of specific prejudice, may be a sufficient basis in itself to prohibit a trial. The applicant submits that this position has been repeatedly highlighted in case law, and makes specific reference to two cases. The applicant cites *PC v DPP* [1999] 2 IR 25 in which it was stated that:-

"…the delay may be such that, depending on the nature of the charges, a trial should not be allowed to proceed, even though it has not been demonstrated that the capacity of the accused to defend himself or herself will be impaired."

The applicant also cites PO'C v DPP [2000] 3 IR 87, where Hardiman J. stated that:-

"…there may be a lapse of time so gross that, in the circumstances of a particular case, it is open to the court to conclude that the lapse of time of itself gives rise to a real risk of an unfair trial."

27. It is submitted that in a case of this antiquity, where the applicant's only defence is one of bare denial, that there exists a very real and substantial risk that the applicant would not receive a fair trial. It is submitted that on the facts, that the delay is of itself so excessive as to deprive the applicant of his ability to properly defend himself, and that the prejudice suffered, while unavoidable and incurable, cannot properly be dealt with by the trial judge.

Submissions on behalf of the respondent

General principles and delay

28. The respondent submits that the principles applicable to cases of this nature are well-settled; that delay, in itself, is not a sufficient ground to prohibit a trial. The respondent highlights that in recent jurisprudence, a more stringent test for prohibition has been applied, such that the remedy is now truly exceptional. It is submitted that the applicant has not met the threshold for an order of prohibition to be granted.

29. The respondent submits that since the case of *SH v DPP* [2006] 3 IR 575, it is no longer a requirement for the court to analyse the reason(s) as to why a complainant delayed in making the initial complaint to the Gardaí, as the courts take judicial notice of the inherent difficulties in coming forward to report child sexual abuse. The respondent cites the principles set out by Murray C.J.as follows:-

"47. The issue for the court is whether the delay has resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial. The court would thus restate the test as:-

The test is whether there is a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay. The test is to be applied in light of the circumstances of the case.

48. Thus, the first inquiry as to the reasons for the delay in making a complaint need no longer be made… The inquiry which should be made is whether the degree of prejudice is such as to give rise to a real or serious risk of an unfair trial. The factors of prejudice, if any, will depend upon the circumstances of the case.

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

decision that after a stated number of years an offence may not be prosecuted. Also, as the legislature has not itself established a statute of limitations that itself may be viewed as a policy of the representatives of the People. Thus each case falls to be considered on its own circumstances."

30. The respondent submits that *SH* was applied by the Court of Appeal in *MS v Director of Public Prosecutions* [2015] IECA 309, where the relief sought was refused by Hogan J., on the grounds that no irremediable prejudice had been caused, despite there being a delay of some 40 years. In delivering his judgment, Hogan J. observed that a balance must be struck between the rights of the victim and the rights of the accused, and that any matters that arose could properly be dealt with by the trial judge.

31. The respondent also submits that the trial judge can withdraw a case from the jury in the event that prejudice arises during the course of the trial, and relies on the decision of *PB v Director of Public Prosecutions* [2013] IEHC 401, which was affirmed on appeal.

32. The respondent submits that in the case of *Nash v Director of Public Prosecutions* [2015] IESC 32, Clarke J. (as he then was) expressed his view that the trial judge would be best placed to determine whether or not the trial should go ahead. The respondent submits that in his concurring judgment, Charleton J. stated that "*the trial judge now has the primary role in decisions of this kind and judicial review is rarely appropriate".*

Specific prejudice

33. The respondent submits that it is speculative for the applicant to assert that his mother and sister would have given exculpatory evidence on his behalf. Speculation is an insufficient basis for an order of prohibition. It is asserted by the complainant in her statement of complaint that the applicant's mother had become aware of the abuse, as had the applicant's sister, who the complainant states was "*appalled*" to learn of the allegations. In these circumstances, it is submitted that these witnesses may have been of no assistance to the applicant. The respondent submits that the prosecution is equally deprived of this evidence, and that its absence may in fact be advantageous to the applicant at trial.

34. The respondent submits that there are still a number of witnesses available to the applicant who can give evidence. In particular, the respondent refers to two siblings of the complainant, one who stated that he did not see any abuse, and another, who lived in the family home at the time, and is available to give evidence at trial. The respondent submits that the complainant will be cross-examined at trial, which will allow for any issues (including potential prejudice) to be explored.

35. The respondent submits that it is not enough for the applicant to prove theoretical possibilities in the absence of certain pieces of evidence, and that it has to be proven by him that the absence of this evidence would be of significance to his case. On this point, the respondent cites the case of *O'C v Director of Public Prosecutions & Ors* [2014] IEHC 65. In that case, the applicant sought an injunction to prevent his prosecution for 159 counts of indecent assault and sexual assault, as well as one count of rape. The

complainant alleged that the offences were committed between 1981 and 1993, though she did not make her first statement to the gardaí until 2009. The applicant denied the claims and sought a prohibition, in circumstances where, he argued, evidence which would have vindicated his innocence had been lost, owing to the passage of time. On the evidence, O'Malley J. held that the arguments raised by the accused were not sufficient to persuade the court to grant prohibition. At para. 65 of her judgment, O'Malley J. stated:-

> *"…it seems to me that when an applicant seeks to establish that the absence of a specific witness or piece of evidence has caused prejudice, he or she must be in a position to point to, at least, a real possibility that the witness or evidence would have been of assistance to the defence. In other words, I do not believe that it is sufficient to point to a theoretical possibility that an unavailable witness might have had something to say that would contradict the complainant's account and that of other witnesses."*

36. The respondent submits that on the issue of the applicant's medical history, in particular, his heart problems, it would be expected that he would have had to disclose to his treating doctor any medical history and medication that he was taking when being treated by his doctor, so that it should be possible to track whether or not he was receiving ongoing treatment for an erectile dysfunction diagnosis.

37. The respondent submits that it is difficult to see at this juncture, what issues will be of significance at trial, in advance of that trial, as opposed to those that feature on paper. On this point, the respondent cites the decision of *J(S)T v President of the Circuit Court and Another* [2015] IESC 25, where Denham J. approved of the reasoning in the O'C case. In that case Denham J. stated that the absence of important witnesses, namely the school principal to whom complaints had allegedly been made, was not of itself, sufficient to prohibit a trial. The counselling records of one of the complainants had also been destroyed, but Denham J. held that in the circumstances, the missing records were not a basis upon which to prohibit the trial. She did note, however, that each case had to be considered on its own facts, and that the absence of documents is an issue for the trial judge, who was best placed to deal with the matter.

38. The respondent submits that in *MS v DPP*, Hogan J. refused to accept that the unavailability of witnesses would lead unavoidably to an unfair trial. The respondent submits that in his decision, he stressed that mere supposition about the loss of potential evidence is not sufficient to prohibit a trial, and that decisions regarding such prejudice are best taken by the court of trial, which is best placed to evaluate the run of evidence. At para. 48 of his judgment, Hogan J. stated:-

> *"…it is difficult to say that any established or likely prejudice is at such a level as would justify restraining the trial of the applicant on some ex ante basis. There has been a growing recognition at various levels throughout the criminal justice system that it requires something exceptional to justify the prohibition of a criminal trial, especially if any potential unfairness to an accused is capable of being mitigated by appropriate rulings in the course of the trial…"*

39. The respondent also cites the following passage of the judgment of Coffey J. in *RB v DPP* [2018] IEHC 326 where, Coffey J. summarised the current law, and concluded that the actual issue of prejudice was best left to the trial judge, who would be in a position to hear the relevant evidence:-

> *"15. It seems to me that the effect of the modern jurisprudence relating to allegations of undue delay in historic sexual abuse cases is to postpone the issue of prejudice to the trial itself so that it can be assessed by the trial judge having regard to the granular detail of the actual evidence that is to go to the jury with the result that prohibition should only be granted in advance of a trial where the prejudice complained of is manifest, unavoidable and of such significance as to give rise to a real or serious risk of an unfair trial."*

40. The respondent submits that the applicant's contention that he was out of the jurisdiction at the time of the alleged offences is also a matter to be proven by the applicant at trial, or that it is possible that the matter could be canvassed at trial by the removal of some of the charges from the charge sheet.

Exceptional circumstances

41. The respondent submits that none of the factors outlined by the applicant, taken separately or cumulatively, outweigh the public interest in having these allegations prosecuted in accordance with law. The respondent submits that poor health and age are not, in themselves, a form of prejudice, such that there is a real and serious risk of an unfair trial. The respondent further submits that no medical report has been adduced to show that the applicant would experience health difficulties attending a trial. To illustrate this point, the respondent submits a passage from Derek Dunne, *Judicial Review of Criminal Proceedings* (Round Hall, 2011) where at para. 8-99, he stated the following:-

> *"…The courts, regard the age, ill-health, disability or incapacity of an applicant as matters that are relevant to the issue of whether an applicant is fit to plead and that the fitness of an applicant to plead is a matter for the court of trial to be determined in accordance with the procedures contained in the Criminal Law (Insanity) Act 2006."*

42. The respondent also relies on the case of *DT v DPP* [2007] IESC 2 where Denham J. stated that the alleged disability of the applicant was not part of the jurisprudence on delay and of the right to a fair trial, and was not an issue of prejudice caused by delay. She further stated that the capacity of the applicant was not an exceptional circumstance, and that it was a matter for the trial judge to determine a person's fitness to stand trial.

43. The respondent submits that there is a very high threshold before a trial will be prohibited on grounds of exceptional or cumulative, circumstances, and that the Supreme Court has stressed that something truly extraordinary is required to give rise to prohibition being ordered.

44. The respondent also cites the case of *B'OS v DPP* [2017] IEHC 687, where Ní Raifeartaigh J. rejected the argument that there were exceptional circumstances sufficient to entitle the applicant to an order of prohibition, and stated that she would be minded to see how the trial of the case unfolded. The respondent submits that the factors taken into consideration by Ní Raifeartaigh J. in that case were as here, missing witnesses, and the age and ill-health of the applicant. Ní Raifeartaigh J. concluded her judgment by stating the following:-

> *"29. Finally, while the applicant is now 71 and has had by-pass heart surgery, the evidence currently before the court is that he has made a good recovery. There is nothing before the Court to suggest that his ill-health is extreme, or that the stress and anxiety of the pending trial could be very serious or even fatal, as has been the medical opinion in other cases. Nor is the applicant at the extreme end of the age spectrum in terms of such cases.*
>
> *30. I have therefore concluded that the grounds relied upon, whether considered separately or cumulatively, do not reach the high threshold for prohibiting a criminal trial in advance of its commencement. The trial judge will undoubtedly have careful regard to the considerable lapse of time since the period within which the offences are alleged to have taken place, a period of between 43 and 50 years ago, together with the various factors raised in this application. The trial judge will be in a position to monitor the case as it unfolds, with a keen eye as to the missing evidence in that context, and the position can be kept under constant assessment as to whether a point is reached during the trial itself such that it would be unfair to continue, in which situation, if it arose, the trial judge would have a duty to take the necessary steps to bring the trial to an end. However, I do not consider that the trial should be prohibited on an ex ante basis in light of the evidence adduced before this court."*

Discussion

45. I venture to suggest that no single issue has received more judicial scrutiny in the past quarter century than that of delay in the prosecution of complaints of child sexual abuse. As awareness of the extent of the problem of child sexual abuse in Ireland grew, in the late 1980's and early 1990's, so too did the number of prosecutions. Many of the complaints which came forward, related to events which were alleged to have occurred perhaps 10, 20 or 30 years earlier. This case, as we have seen, relates to events alleged to have occurred 54 to 55 years prior to complaint being made. Those early prosecutions led to a multiplicity of judicial review applications for prohibition, primarily on fair trial grounds. It was accepted by the courts that the fair trial rights of an accused ranked higher in the hierarchy of constitutional rights than the right of society to have crime prosecuted. It was acknowledged that a trial in due course of law includes the requirement that a trial be conducted with reasonable expedition,

46. Concerns about balancing the fair trial rights of an accused with the societal right to have serious offences prosecuted, led to a process of complainants being called on to explain their delay in making complaint, within the context of a judicial review application.

Complainants and psychologists/psychiatrists gave evidence and were cross-examined on the reasons for delay in making complaint. In essence a *voir dire*, on delay which would normally be an issue to be canvassed within a trial, became a central part of judicial review applications. This practice continued until the watershed decision of *SH v DPP* [2006] 3 IR 575. The test for prohibition was restated by Murray CJ:

> *47. The issue for the court is whether the delay has resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial. The court would thus restate the test as:-*
>
> *The test is whether there is a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay. The test is to be applied in light of the circumstances of the case.*
>
> *48. Thus, the first inquiry as to the reasons for the delay in making a complaint need no longer be made… The inquiry which should be made is whether the degree of prejudice is such as to give rise to a real or serious risk of an unfair trial. The factors of prejudice, if any, will depend upon the circumstances of the case.*
>
> *49. There is no doubt that difficulties arise in defending a case many years after an event. However, the courts may not legislate, the courts may not take a policy decision that after a stated number of years an offence may not be prosecuted. Also, as the legislature has not itself established a statute of limitations that itself may be viewed as a policy of the representatives of the People. Thus each case falls to be considered on its own circumstances."*

47. The *SH* decision made it clear that unless and until the legislature decides to impose a statute of limitations on sexual offences, delay per se is not a bar to prosecution. In the intervening years our jurisprudence has evolved to the point that it is now settled law that where prejudice is asserted to have occurred by reason of delay, the forum in which that assertion is to be tested is the court of trial. The court of trial has all the tools necessary to test the significance of disputed or lost or missing evidence. It can conduct a *voir dire* where there is a challenge to the admissibility of evidence on the basis of asserted prejudice. It is charged with the protection of an accused's fair trial rights. It can and must withdraw a case from the jury where it is established that an accused's fair trial rights have been impaired by delay. That said, the jurisprudence does leave open the possibility that in an exceptional case prohibition might still be available pre-trial. What amounts to an exceptional case has not been defined, but is likely to be a case in which an accused is manifestly unable to defend himself by reason of the passage of time. An accused who is suffering from alzheimers or dementia might fall into the category of 'exceptional' even though generally speaking the question of capacity is reserved to the court of trial.

48. The evolution of our jurisprudence to its current state can be traced through a number of decisions: *PB v Director of Public Prosecutions* [2013] IEHC 401, *O'C v Director of Public*

Prosecutions [2014] IEHC65, *Nash v Director of Public Prosecutions* [2015] IESC 32, *J(S)T v President of the Circuit Court and Another* [2015] IESC 25 *MS v Director of Public Prosecutions* [2015] IECA 309*, B'OS v DPP* [2017] IEHC 687. There have also been several recent decisions of McDermott J., including *MS v DPP* [2018] IEHC 285 and *PH v DPP* [2018] IEHC 329. The most recent iteration of the law is the decision Baker J. in *RB v DPP* [2019] IECA 48 which was delivered several days after the hearing of this case

49. In that case, the appellant sought to appeal the decision of Coffey J., in which his application to prohibit prosecution of one count of sexual assault was refused. The assault was alleged to have been committed between January, 1992, and December, 1993. The appellant raised arguments of, *inter alia*, the unavailability of evidence, and placed particular emphasis on the loss of his mother's evidence, owing to her death in 2015. The appellant's mother was the first person to whom the complainant was said to have communicated the details of the alleged incident, and the offence was also alleged to have been committed in her home. As a result, the appellant submitted that the loss of evidence was crucial and was prejudicial in a real and substantive way to his defence of the charge. On appeal, the appellant argued that Coffey J. erred in refusing the application, as the learned judge had found that he was effectively being asked "*to speculate and to make an unwarranted inference*" as to the evidence that would be given by the appellant's mother. The appellant also argued that the fact that he was charged in respect of a single incident that occurred over 25 years previously, in itself, established a degree of prejudice sufficient to justify prohibition of his trial. The appellant argued that the case was exceptional, and relied on the case of *BS v DPP*.

50. Baker J. conducted a detailed review of the case law, and stated that it was unequivocal; that the power of the High Court to order prohibition is an exceptional remedy, to be granted in an exceptional case. She stated that recent jurisprudence had shown a preference for leaving any matters arising on fairness to the trial judge.

51. She referred approvingly to the decision of Clarke J. (as he then was) in the Nash case, and to the judgment of O'Malley J. in *SO'C v DPP*, where O'Malley J. stated that an applicant for prohibition must engage in a real way with evidence, and that the question to be considered was whether there was a "*real possibility that the missing material would reveal a material inconsistency which would be of benefit to the applicant*." Baker J. further stated that each case is to be decided on its own facts, and that there is no formula by which an application for prohibition is to be assessed. She held that the instant case could be distinguished from *BS v DPP,* on the basis that the delay in that case was twice that in the present case, that the appellant in that case was a minor at the time, and that the appellant had also engaged with the evidence and had identified matters that the three deceased witnesses could have offered, in support of his defence.

52. A further issue had been raised in relation to the psychological difficulties of the appellant. Baker J. held that such difficulties were not sufficient to deprive the appellant of his capacity to plead, and that there was no medical evidence to suggest that it bore any relation to any culpable delay on behalf of the respondent. Baker J. was satisfied that any

issue in relation to fitness to plead was an issue for the trial court. Baker J. concluded that in her view, the appellant had not made out any basis to suggest that Coffey J. had failed in his application of the established legal principles, and dismissed the appeal.

53. Two decisions of Simons J. have been delivered in recent months, which suggest the emergence of an alternative jurisprudence. Simons J. granted the prohibitions sought by the applicants in both cases. The first of these decisions is *AT v DPP* [2019] IEHC 54. This case involved allegations of child sexual abuse, including one count of rape, which were alleged to have occurred over a three year period in the 1970s. The offences were alleged to have been committed in the family home, which the applicant and complainant shared. The house was the home of 10 family members and had three bedrooms. It was argued by the applicant, *inter alia*, that four of these family members, who were now deceased, would have been in a position to confirm that the applicant was never alone with the complainant in the house, and whether or not the complainant had confided in them, owing to the close relationship that they shared with the complainant.

54. Simons J. acknowledged that while the trial judge can make directions and rulings, and can even withdraw a case from the jury in some instances, he did not believe that that fact absolved him of his obligation to do what he could, to ensure that there would be a fair trial. He found that owing to the death of these witnesses, there were a number of matters that could not be explored in evidence. He observed that owing to the passage of time, the applicant would have a difficulty in obtaining alibi evidence, such as employee records, to support his defence that he was away from the family home, on dates when some of the alleged offences were alleged to have been committed. He held that in the particular circumstances of the case, that there was a real risk of an unfair trial.

55. In the second decision of Simons J., *HS v DPP* [2019] IEHC 107, allegations of indecent assault and rape were brought by two complainants, who were both sisters of the applicant. The offences were alleged to have been committed in the 1970s and 1980s. It was submitted on behalf of the applicant that a number of witnesses, namely the family members of both complainants and the accused, would have been in a position to provide exculpatory evidence, but whose testimony was unavailable due to their passing, or due to the fact that they did not have a clear recollection of the events. Simons J. also noted that neither complainant alleged that they were aware that the other had been subject to sexual assault by the applicant, and were therefore incapable of providing corroboration of the other's evidence. A medical doctor who examined one of the complainants in or about the time of the alleged abuse, was also deceased.

56. In deciding to invoke his "*exceptional jurisdiction to vindicate an individual's constitutional right to a fair trial",* Simons J. stated that a trial of this nature would be ultimately reduced to a "*swearing match*", and that, in his opinion, he did not think that the risk of an unfair trial could be avoided by specific warnings and directions being given to the jury. While it appears to the court that some support for this position can be found in the majority decision of the Court Of Appeal in *BS v DPP*[2017] IECA342, the decisions ignore the now established law that the issue of prejudice be postponed to the trial. An

accused is entitled to argue prejudice to the fullest extent before the court of trial and it is more appropriate that it be dealt with in that forum than on a paper review in the High Court. In any event, this court is bound by the decisions of the Court of Appeal and the Supreme Court on this issue.

Decision

57. The court is of the view that the arguments advanced by the applicant do not establish the type of exceptional circumstances which would warrant a prohibition of a trial of the accused. In coming to that conclusion, the court is not finding that the accused is not prejudiced in the conduct of his defence, but is merely holding in line with current jurisprudence that the issue of prejudice is a matter for the trial judge.

58. In the case of *O'C v DPP*, it was highlighted by O'Malley J. that the test requires an applicant to do more than simply raise the theoretical possibility that the lost evidence would have supported his defence at trial. At para 77. O'Malley J. states that:

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

59. Counsel for the respondent argued that although the applicant stressed that the evidence of his mother and sister would be integral to his defence, such witnesses might equally have given evidence that supported the complainant's allegations. The applicant cannot say as a matter of fact what the oral evidence of either witness would definitively be. It thus falls under the heading of theoretical or hypothetical possibility rather than established evidence of prejudice, which would render it an exceptional case in which prohibition should be granted.

60. The applicant understandably places great emphasis on the decisions in *PC v DPP* and *PO'C v DPP*. The applicant argues that these cases are of direct relevance to the case at hand. The applicant avers that given the lapse in time between the alleged incidents and his prosecution that he is at real risk of an unfair trial. However, these decisions predate *SH* and there is no doubt that the jurisprudence on the issue of delay and any potential prejudice arising therefrom has evolved considerably in the interim. This is not to set the contents of those decisions at nought but merely to point out that these are now matters to be canvassed in the course of the trial rather than in judicial review.

61. The evolution of the jurisprudence was explained by Charleton J. in the case of *Nash v DPP* at para. 23:

> *"An application to stop a trial before the trial judge may best be decided upon a consideration of all of the evidence and how the alleged defect, be it delay or missing evidence or unavailable witnesses, impacts on the overall case. Whether the real risk of an unfair trial that cannot otherwise be avoided then exists is, in*

such cases of an argument that justice has been diminished, often best seen in the context of such live evidence as has been presented and not through the contest on affidavit that characterises these cases on judicial review seeking prohibition in the High Court or on appeal."

62. The logic behind this shift, is to allow the court to assess, on the actual evidence presented, whether any prejudice has been caused to the accused. During an actual criminal trial issues are examined at a much deeper level than in judicial review proceedings, making a trial judge better placed to decide on the matter. Hogan J. confirmed this sentiment in the decision in *M.S v DPP*, wherein he stated at para. 49:

> *"49. [T]he contemporary case-law stresses the power – and, perhaps, even in some exceptional cases, the duty – of the trial judge to intervene to stop the prosecution of some or all charges in light of the run of evidence… This … is a decision which is generally best left to the court of trial which is again generally better placed than the judicial review judge to assess potential fairness having regard to the actual conduct of the trial and the run of the evidence which has been actually tendered by the prosecution."*

63. This has been again reaffirmed in the judgement of Coffey J. in *RB v DPP* (upheld by the Court of Appeal on ….) where he states at para. 15 that:

> *"15. It seems to me that the effect of modern jurisprudence relating to allegations of undue delay in historic sexual abuse cases is to postpone the issue of prejudice to the trial itself so that it can be assessed by the trial judge having regard to the granular detail of the actual evidence that is to go to the jury with the result that prohibition should only be granted in advance of a trial where the prejudice complained of is manifest, unavoidable and of such significance as to give rise to a real or serious risk of an unfair trial."*

64. There is no doubt that recent jurisprudence places a heavy burden on trial judges to ensure a fair trial in cases of historic sexual abuse. The older the case, the heavier the burden. Trial judges must engage fully with the evidence in the case as it emerges, to ensure an accused's fair trial rights are being maintained. It is no longer sufficient to merely issue a delay warning to a jury, in line with the classic delay warning formulated by the late Haugh J. in *People(DPP) v R.B*. unreported, Court of Criminal Appeal, 12th February 2003,

65. In this particular case the complainants statement is a detailed one. Both in relation to the alleged abuse and the locations and circumstances in which it occurred. She allegedly reported to Gardaí in 2001 that she had been abused by the complainant but chose not to make a statement of complaint at that time. That may or may not be a matter of significance in the course of the trial. All of the detail contained in the complainant's statement is open to challenge and examination in the course of the trial. If upon examination of any issue, it becomes clear that the applicant has been prejudiced in his defence, then it would be the duty of the trial judge to withdraw the case from the jury.

66. For the foregoing reasons, the Court refuses the application.