THE HIGH COURT

[2021] IEHC 517

[Record No. 2019/209 JR]

BETWEEN

B

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered electronically on the 26th day of July, 2021

Introduction

1. At common law there was a rebuttable presumption that a child between the ages of seven years and fourteen years was *doli incapax*. The presumption was rebuttable by the prosecution, which had to satisfy the jury that the child knew that what he was doing was wrong, not merely that it was wrong, but that it was gravely or seriously wrong.

2. The presumption of *doli incapax* was abolished by s.52 of the Children Act 2001 (as amended). It was abolished as and from 16th October, 2006. The offending alleged in the present case, predated the 2006 Act, which was not retrospective. Accordingly, the presumption continues to apply in this case.

3. In this application, the applicant seeks to halt his trial before the Central Criminal Court on charges of raping and sexually assaulting the two complainants, who were his younger brother and sister.

4. The applicant is charged with the sexual assault of his younger sister, J, in circumstances which included the penetration of her mouth by his penis. He is also charged with sexually assaulting his younger brother, T, in circumstances which included the penetration of his anus by the applicant's penis. In addition, the applicant faces a charge of sexually assaulting J and a further charge of sexually assaulting T.

5. The applicant was born on 7th July, 1981. He is charged with the rape and sexual assault of his sister J on unknown dates between 8th September, 1994 and 25th November, 1995. The applicant was 13-14 years of age at the time of the alleged offences relating to J, who was then aged 6-7 years.

6. The applicant is charged with the rape and sexual assault of his brother, T, between 1st September, 1996 and 30th June, 1997. The applicant was 15 years of age at the time of the alleged offences. His brother, T, was then aged 12-13 years.

7. Against a background, which will be described in more detail later in the judgment, the complainants attended at a garda station and made complaints in the matter in January 2017. In March 2017 the applicant was arrested, detained and interviewed. He made no admissions in the course of eight interviews. In April 2018, the DPP directed that there should be no prosecution. When the complainants appealed that decision, a review decision by the DPP was issued on 15th October, 2018, directing that there be a prosecution in the matter.

8. On 31st October, 2019, the applicant was charged and released on station bail to appear before the District Court. The case came before the District Court for the first time on 23rd November, 2018. On 18th January, 2019 the applicant was sent forward for trial to the Central Criminal Court.

9. On 8th April, 2019, the applicant was granted leave to seek reliefs by way of judicial review and in particular, to seek an order prohibiting his further prosecution.

10. The applicant's core submission is that due to the delay in bringing the prosecution against him, he has suffered a real and serious prejudice such that he cannot get a fair trial. The applicant conceded that for the purposes of this application, the court should assume that the sexual acts complained of by the complainants occurred. The applicant maintains that given the time that has elapsed since the date of the alleged offences, the jury will not have the tools available to them to determine whether or not he had the requisite knowledge, at the relevant times, that what he did was seriously wrong.

11. It was submitted that in the circumstances of this case, that even if the trial judge were to instruct the jury on the application of the presumption of *doli incapax*, the jury will not have evidence on which it could properly decide whether the presumption should stand, or be held to have been rebutted, and therefore there is a serious risk that the applicant will not get a fair trial.

12. In response, the respondent has submitted that having regard to the relevant case law, there is a heavy onus on an applicant seeking to prohibit a trial. It was submitted that the case law establishes that such questions should be left to the trial judge, who can give the necessary warnings to a jury and if necessary, can withdraw a case from the jury. It was further submitted that the perceived unfairness in the trial in this case, was not relevant to the charges concerning the applicant's brother, T, as the applicant was 15 years of age at the relevant time and therefore the presumption did not apply.

13. In relation to the applicant's sister, J, the presumption would apply, but it can be rebutted by evidence called by the prosecution at the trial, which would tend to show that the applicant had an awareness that what he was doing was seriously wrong. It was submitted that the matter should be permitted to proceed to trial and the trial judge can ensure that a fair trial is obtained on the basis of the evidence actually tendered at the trial.

14. The submissions of the parties will be dealt with in greater detail later in the judgment.

Background

15. As this is an application to halt a criminal prosecution, the case law makes it clear that each application must be considered on its own facts. Hence, it is necessary to set out the facts alleged against the applicant in some detail.

16. All the offences are alleged to have taken place in the family home. It was common case that prior to the death of the applicant's grandmother on 8th September, 1994, the four children in the family, being the applicant, his brother T, and his sisters J and R, all slept

together in the one bedroom. There were two sets of bunk beds. The boys slept in one set of bunk beds and the girls in the other.

17. After the death of the grandmother, the two girls moved into the room that had previously been occupied by her. The two brothers continued to occupy the room in which they had previously slept; although the bunks were dismantled into two separate beds.

18. The earliest of the sexual acts involved the applicant's sister, J, between 8th September, 1994 and 25th November, 1995. In her statement she recounted that after the death of her grandmother, when she and her sister were sleeping in that room, and when she was roughly 8 years of age, the applicant had suggested that they should have a sleepover. That was agreed upon. She went to sleep in the room that was normally occupied by her brothers and her brother T slept in the other room with her sister, being the room that had been formerly occupied by the grandmother.

19. She states that during the middle of the night, she awoke to find that the applicant was kneeling beside her and had his finger inside her vagina. She did not remember what happened after that, or if she told him to stop. She remembered going to the bathroom after the incident, as she was bleeding. She did not tell her parents about the incident.

20. She went on to outline a further incident, which happened subsequent to the first incident, when the applicant asked her to get into bed with him. It was still bright outside. The bedroom door was closed. He asked her to get under the bed clothes. All she remembered was giving him oral sex, a blowjob. She did not remember anything apart from the feeling of being under the blanket and being too hot.

21. In his statement, T stated that in 1996, probably in the period September to December, as he knew that school was going on and he recalled that he was in first year in secondary school at the time, the first incident happened. He stated that he had gone to bed just before the applicant. The applicant followed him up to the room after he had fallen asleep. He stated that the applicant pulled down the duvet cover and pulled his boxer shorts down to about thigh level. The applicant placed T's penis in his mouth. He stated that when he awoke and found this happening, he was frozen with shock. When he realised what was happening, he punched the applicant in the head.

22. T went on to describe a further incident, which happened subsequent to the first incident. It was a Sunday evening circa. 19.00/19.30 hours. He was doing his homework upstairs in his bedroom. He stated that the applicant came into the room and was talking to him about hypnosis. The applicant tried to hypnotise him. The applicant asked T to stand up. The applicant then stood behind him, bent him over the desk and with his left arm/hand pushed him down against the desk. He then penetrated T with his penis. It went on for about a minute. T stated that he was banging the desk for help. He shouted something. He stated that the applicant gave up after a minute. He stated that he had been inside him for the whole time. The applicant had been pushing against him, moving in and out

gyrating against him. He remembered feeling pain. He thought that the applicant stopped, probably because he was making such a noise banging on the desk.

23. Also of relevance to the issues in this application, are certain admissions that are said to have been made by the applicant to his siblings, both verbally and by means of text and WhatsApp messages and also in a number of handwritten notes.

24. In or about 2009, the applicant had a serious health incident while visiting his parent's house. J was also there at the time. She stated that while having the health incident, the applicant thought that he was going to die. She stated that he asked his mother to call J into the front sitting room, where he was. He was sitting on the couch. He could not get up. She stated "He just gave me a hug and said 'I'm sorry'". She stated that she did not react, as her mother was present. She just told her brother that he would be okay. The applicant was then taken away in an ambulance.

25. J further recounted how in or about Christmas 2015, the applicant and T had a falling out. Subsequent to that, she received a text message from the applicant just saying "Are we okay". That text message came out of the blue. She stated that she texted back saying "Say what now". She stated that the applicant replied on 29th December, 2015 saying "What I did when we were kids, I'll be forever sorry. Can you ever forgive me? Me and T got hammered the other night at Aslan, had an argument, he lost the plot and told B and possibly B, now today has told mam, I can't believe it. Mam wants a face to face with me".

26. J stated that the applicant telephoned her, but she did not reply. He then called up to her house. He reiterated what he had said in the text. She told him that "they were cool", as she did not like confrontation. There was then general chit chat about mountain climbing.

27. J went on to state that on 3rd January, 2016, the applicant texted her saying that he had had a chat with their mother. She replied "And?"; to which he replied that their mother was devastated and had lost a lot of love for him. She did not reply to that text. She got two further text messages from the applicant on 12th March, 2016 and 16th March, 2016, but she did not reply to them. He had tried to speak to her on the weekend of a family occasion on 15th March, 2016, but she did not talk to him. She stated that she just looked at him. She had not had any contact with the applicant since then. She went on to outline how she had gone to a counselling service in or about February 2016. After that she had had decided to make a statement to the gardaí.

28. In his statement, T stated that when he had gone to the Aslan concert with his brother and a friend on 27th December, 2015, he had a flashback to something that had happened between him and the applicant. He stated that when his brother had gone to the toilet, he had stood there looking very shocked. His friend had asked him what had happened. He stated that he had had a memory from when they were younger. He told his friend what he had witnessed, but he could not remember the exact words. His friend brought him outside and put him in a taxi, to go home. His friend stated that he was going to have a chat with the applicant when he came back from the toilet.

29. T stated that he did not have contact with his brother after that, but on 28th December, 2016, he received a message from the applicant via WhatsApp saying "We good". [The date given in the statement maybe incorrect. It should probably read 28th December, 2015]

30. T stated that on 25th January, 2016, he got a further WhatsApp message from the applicant stating "I need a list from you point by point of all you told about me, recently with ages of us and the times included". He received a further WhatsApp message on the following day saying "[T], I am sorry for any pain and hurt I've caused you, R and J, I will always be. I've apologised to R and J several times over the years, including when I was having [the health incident] I can't go back in time but I wish I could".

31. T stated that he got a text from the applicant on 16th March, 2016 saying "Hey [T], I think me and you have to meet up, I can't stand the way things are, I'll be sorry for causing you guys pain for ever, I hope we can find a way to be pals again". T stated that these messages all came from the applicant's mobile phone.

32. As part of the investigation, Garda Simon Halpin was furnished with three handwritten notes by T. It was believed that the notes had been written by the applicant. T stated that he had received the notes from his mother. The first of the notes read as follows:-

> *"[T] I remember one incident. Not sure what age. I put [T]'s penis in my mouth for a few second – acting out sex."*

33. The second note read as follows:-

> *"First just want to say I didn't mean anything by the last letter being so short or on the small notepad paper. All I really remember about the bedroom incident is touching and putting my penis against [J]'s vagina but nothing happening. I didn't even know how to have sex. I don't really remember much more. My memories of it are more like snapshot photographs in my memory than motion pictures or whatever. I think this might have been when [T] saw what I was doing, not 100%. (2) Bathroom incident is a bit clearer. I think I was looking at + licked [J]'s vagina. I got her to touch my penis. I think I masturbated myself to ejaculate – I'll be sorry for the pain I've caused till the day I die. I hope we can + our kids can be friends again."*

34. The third of the notes read:-

> *"[J] I remember two incidents. I was around 14/15 [J] 8/9. In our bedroom. It involved looking [sic] and touching [J]. And touching myself against [J]. Acting out sex. (2) In out bathroom involved looking at + touching [J] again + getting her to touch me."*

35. The complaints came to be made by T and J in the following way. T stated that in or about the summer of 2015, he started to get very angry over small things. He went to his GP, stating that he had become irrationally angry. The GP referred him to a

counselling service. He had his initial counselling session in October of 2015. There then followed the incident at the Aslan concert, already described, and the subsequent text and WhatsApp message. A statement of complaint was made by T to the gardaí on 31st January, 2017.

36. J stated that she had 8/10 sessions of counselling commencing in or about February 2016. She made her initial statement of complaint to the gardaí on 19th February, 2017. Subsequent statements were made by both of the complainants to the gardaí in March 2017.

37. The only other matter of relevance was that J stated that when she was 14 years of age, she told her then boyfriend what had happened to her. She stated that he had had an argument by text with the applicant at that time, during which he had called the applicant a "rapist" and a "paedo".

38. On 23rd March, 2017, the applicant was arrested, detained and interviewed. He made no admissions during his eight interviews with the gardaí.

The Applicant's Submissions

39. It was accepted by Mr. Staines SC on behalf of the applicant that the burden lay on the applicant to establish that the trial should be stopped. He further accepted that this was a heavy burden. He stated that the case law established that a court will only prohibit a criminal prosecution in exceptional cases where it is clear that there is a serious risk that the applicant cannot get a fair trial. He stated for the purposes of this application, the court should proceed on the basis that the acts complained of by the complainants took place, though not necessarily at the times alleged by the complainants.

40. Counsel submitted that the acts complained of by J, took place when the applicant was less than 14 years of age. The acts complained of by T, were alleged to have occurred when the applicant was 15 years old. However, counsel stated that in cross-examination, it could transpire that given his uncertainty as to the dates on which the acts occurred, it may be possible that the judge will have to leave it to the jury to decide whether those acts could have occurred on different dates and in particular, when the applicant was less than fourteen years of age. In which case, the trial judge would have to instruct the jury on the applicability of the presumption of *doli incapax*. Thus, the presumption certainly arose for consideration in respect of two of the charges and it was possible that it would arise as an issue in respect of the other two charges.

41. The applicant's core submission was that in order for the prosecution to rebut the presumption of *doli incapax*, the jury must be satisfied beyond a reasonable doubt that at the time of the offences, the accused knew that what he was doing was seriously wrong. In attempting to decide that issue, the jury could not have regard to the circumstances of the commission of the offence itself to rebut the presumption: *KM v. DPP* [1994] 1 IR 514; *C v DPP* [1997] Crim App Rep 375; *C (a minor) v DPP* [1996] AC 1 and *R v Kershaw* [2002] 18 LTR 357.

42. Counsel submitted that the relevant test was a subjective test, which focussed on the actual cognitive functioning of the particular accused at the relevant time. It was not a test that could be satisfied by reference to evidence concerning the cognitive ability of children generally between the ages of 7 and 14 years.

43. Counsel pointed out that in this case, the applicant's solicitor had written to a forensic psychiatrist, Dr. Stephen Monks, to see if he would be able to establish the applicant's level of cognitive functioning at the age of 14, or lower, at this remove. By letter dated 20th November, 2019, which was exhibited to the affidavit sworn by the applicant's solicitor, Dr. Monks confirmed that in the absence of any contemporaneous interview notes from the time, or other contemporaneous records, he would not be able to give an opinion of the applicant's capacity at the time and whether he knew that what he was doing was wrong.

44. It was submitted that at this remove, the delay that had occurred between the date of the alleged offences and the bringing of the prosecution, meant that the issue of the rebuttal, or sustainability, of the presumption of *doli incapax*, could not be properly decided by the jury, irrespective of what warning or instruction might be given by the trial judge. It was submitted that in these circumstances, it was not possible for the jury to decide on the issue of *doli incapax*. Therefore, it was not possible for the applicant to get a fair trial.

45. It was submitted that insofar as it was alleged that the making of admissions by the applicant in the manner outlined in the Book of Evidence may be relevant to the issue that had to be decided by the court; while such admissions may be relevant in the normal run of delay cases, where an accused denied that the acts had taken place; it was different here, where the issue was whether, at the relevant time, the accused had the necessary moral awareness that the acts were seriously wrong. In these circumstances, it was submitted that the admissions contained in the Book of Evidence, even if taken at their height, merely established that at the time when the admissions were made, the applicant was sorry for the hurt that he had caused and acknowledged that he had done wrong. That did not establish that he knew that what he was doing was seriously wrong at the time that the acts had been carried out by him. Accordingly, it was submitted that the making of admissions in this case, should not be a decisive factor in the court's consideration of whether the trial should be prohibited.

The Respondent's Submissions

46. On behalf of the respondent, Mr. Dwyer SC submitted that the presumption of *doli incapax* did not apply to the complaints made by T, as the period during which he alleged that the offences had occurred related to a time when the applicant was 15 years of age. It was submitted that the court should not prohibit the trial on the assumption that T's evidence at the trial may open up the possibility that the offences occurred at a time earlier than that contained in his statement in the Book of Evidence. It was further submitted that even if that possibility did arise, the trial judge could give the requisite instruction to the jury, as to the applicability of the rebuttable presumption and on what was necessary to rebut it.

47. It was submitted that the case law leaned heavily against prohibiting criminal trials by way of bringing judicial review proceedings. It was submitted that the law was clear that the matter should be left to the trial judge to deal with on the evidence as it actually emerged at the trial. The trial judge was the person best placed to decide what instruction or warning would be required to ensure that the accused got a fair trial. In the event that the trial judge was not satisfied that it was possible for the accused to get a fair trial, even following the giving of warnings or instruction to the jury, then the trial judge could withdraw the case from the jury: see *PB v. DPP* [2013] IEHC 401; *Nash v. DPP* [2015] IESC 32; *X v. DPP* [2020] IECA 4.

48. It was submitted that delay of itself was not a ground to prohibit a trial. In this case, while there was delay between the date of the alleged offences and the time when the applicant was first charged, that delay was not at the extreme end of the scale. The courts had allowed prosecutions to proceed after much longer periods of delay. Furthermore, the applicant did not allege that he had suffered any specific prejudice, as a result of the delay. His submission was solely in relation to delay and the alleged inability to deal with the presumption of *doli incapax.* The applicant had not argued that there was a real risk of an unfair trial due to delay simpliciter.

49. It was submitted that the applicant's primary argument was that the delay was prejudicial to him because it prejudiced the jury's consideration of the presumption of *doli incapax.* It was submitted that that was a matter that could be addressed by the trial judge and could be decided upon by the jury on the evidence available at the conclusion of the trial, and with the benefit of such instruction or warning as the trial judge may think necessary. If as a matter of law, there was not sufficient evidence to rebut the presumption, or if for any other reason the trial judge felt that the accused could not get a fair trial, he or she could withdraw the case from the jury.

50. It was submitted that the case law established that juries can have regard to a wind range of matters when considering whether the presumption had been rebutted. It was not the case that the jury could only have regard to the inability of a forensic psychiatrist to determine that issue by means of an interview with the accused at this remove. That was not the only evidence to which the jury could have regard.

51. It was submitted that in this case there was the evidence of J about the applicant arranging a sleepover in his room, thereby ensuring that he would be alone in the room with her and his ensuring that the bedroom door was closed in the second incident. In addition, it was well settled that the fact that the applicant was almost 14 years of age at the relevant time, would mean that the evidence necessary to rebut the presumption would be less than that which would be necessary if the applicant was younger at the date of the alleged offences.

52. It was submitted that the court could have regard to the fact that admissions had been made by the applicant. It was submitted that the case law established that it would be very unusual for a court to prohibit a trial where admissions had been made by an accused.

53. Finally, it was submitted that the court was entitled to weigh in the balance, the public interest which existed in relation to the prosecution of serious criminal offences.

Conclusions

54. It was accepted by Mr. Staines SC on behalf of the applicant that the case law establishes that it is only in exceptional cases that the High Court will prohibit a prosecution from continuing on grounds of delay. The general principles were set out by Charleton J in *K v. Moran* [2010] IEHC 23. Those principles are well known, so it is not necessary to set them out in this judgment. They have been applied in many subsequent cases.

55. It was further accepted by counsel on behalf of the applicant that there are *dicta* in the cases governing this matter, to the effect that ordinarily the trial judge is the person best placed to deal with issues concerning the fairness of a criminal trial: see dicta of O'Malley J in *PB v. DPP* at para. 59; as endorsed by the Court of Appeal in *MS v. DPP* [2015] IECA 309; see also *X v. DPP* [2020] IECA 4 and *People (DPP) v. CC* [2019] IESC 94.

56. The principles laid down in *K v. Moran* were helpfully summarised in the judgment of Barrett J at first instance in the *X v. DPP* case reported at [2019] IEHC 221, in the following way at para. 20:-

> *"The above-quoted text makes clear just how formidable a task faces an applicant hoping to succeed in an application of the type now presenting. So, for example, Charleton J. states that the High Court should be "slow to interfere" with a decision by the DPP that a prosecution should be brought, he points to the presumption "that an accused person facing a criminal trial will receive a trial… that is fair and abides by constitutional procedures", he notes that it is the trial judge, not the court engaged in judicial review, who is the "primary party to uphold the relevant rights", perhaps most notably he observes that "[t]he unfairness of the trial must … be unavoidable", i.e. incapable of being avoided by appropriate rulings/directions on the part of the trial judge (a strikingly high threshold). These and Charleton J.'s other observations perhaps point to why he observes, in K, para. 1, that it is now only in "rare cases where it would be unfair to allow the trial to proceed". The jurisdiction which the applicant asks the court to bring to bear in this application is an exceptional jurisdiction and falls only to be applied in exceptional circumstances. The court does not see that such circumstances present here."*

57. At para. 23 of the same judgment, Barrett J gave a review of the principles in light of subsequent cases which had also dealt with the issue of delay. He summarised the resulting position in the following way:-

> *"At least five points of note arise from the foregoing, viz. that (1) the difficulties caused to a defendant in cases of old allegations are best dealt with in the court of trial, (2) trial judges are now accustomed to dealing with such cases and using such powers as are necessary to prevent injustice to accused persons, (3) a trial judge is not restricted to simply giving warnings to the jury but may, where necessary in exceptional cases, withdraw the case from the jury, (4) a potential decision of the*

type referred to in (3) is often better taken in the light of the evidence as actually given rather than as speculated upon in judicial review proceedings, and (5) even if the interval between the date of alleged offences and any subsequent trial is extremely long, such delays in themselves will not necessarily prevent such trial."

58. Turning to the presumption of *doli incapax*, the presumption that a child between the ages of 7 and 14 years is *doli incapax*, has had a long history in the common law. It has not been without its critics, particularly in the latter half of the twentieth century. It was abolished by statute in the UK in 1998. Its effect was ameliorated by the Children Act 2001 and was subsequently abolished by an amendment to that Act in 2006. In the Australian case *ALH* [2003] 6 VR 276, Cummins AJA gave a most interesting account of the history and development of the presumption at common law from the earliest times: see pp. 16-18 of the judgment.

59. In Irish law, the presumption was considered by Morris J (as he then was) in the *KM v. DPP* case. He adopted the definition of the presumption as given by Slater J in *R v. Gorrie* [1919] 83 JP 136, where Morris J stated as follows at p.523:-

> *"[…] I take as a correct statement of the law that contained in the direction given in Slater J. in R v. Gorrie [1919] 83 JP 136 when he told the jury that they must be satisfied 'that when the boy did this he knew what he was doing was wrong, not merely what was wrong but what was gravely wrong, seriously wrong'. I am satisfied that a jury would have to be satisfied beyond all reasonable doubt that the accused in this case knew that his conduct was seriously wrong in the sense that it was not merely naughty or mischievous."*

60. In the more recent case of *Minister for Justice and Equality v. PK* [2016] IEHC 180, the presumption was considered by the High Court in the context of an application for surrender of a person to England on foot of a European Arrest Warrant in relation to certain offences, some of which were alleged to have been carried out by him when he was less than 14 years of age. In the course of his judgment, Hunt J stated as follows at para. 6:-

> *"Whilst the current position regarding the criminal responsibility of a child is now governed by s. 52 of the Children Act 2001, in 1994 this issue was governed by the common law doctrine of doli incapax. This doctrine comprised of a conclusive presumption that a child under seven years of age was incapable of committing a crime, together with a rebuttable presumption that a child between 7 and 14 years of age was similarly incapable. The effect of the latter presumption was the creation of a very strong presumption of innocence for a child between the ages of 7 and 14, which was not displaced merely by the production of evidence of the external element of the crime. Possession of the necessary capacity was not equated solely with the mental element of the relevant offence, nor was the presence thereof automatically proved by the conduct constituting the offence charged. Proof of an extra specific element was required in order to defeat the presumption. It was incumbent upon the prosecution to rebut this presumption at the outset of a case,*

by evidence showing that the child knew that the conduct was gravely or seriously wrong, as opposed to being merely naughty or mischievous."

61. As to what evidence can be led by the prosecution to rebut the presumption, the case law establishes two things: Firstly, evidence of commission of the crime itself cannot be used to establish that the minor had the requisite knowledge that what he/she was doing was seriously wrong: *R v. Kershaw* [1902] 18 LTR 357.

62. Secondly, the nearer the minor is to the age of 14 years at the time of commission of the offence, the easier it is for the prosecution to rebut the presumption.

63. Beyond those two principles, the jury can have regard to a wide range of evidence when considering whether the accused had the necessary appreciation of the quality of his actions at the time that he carried them out. In *KM v. DPP*, where the applicant, who was 13 years old, had been indicted on four counts of sexual assault contrary to the Criminal Law (Rape) (Amendment) Act, 1990, two of which related to a girl when she was 8 years old and two against another girl, who was 11 years old; Morris J held that in view of the evidence that had been given by one of the girls that the applicant had threatened to kill her if she told anyone about what had happened, it would be open to the jury to conclude that the accused was aware that his conduct was seriously wrong.

64. In the Australian case of *ALH* referred to above, the judge noted that while the mother had had significant personal problems and the family appeared to have been dysfunctional, there was clear and undisputed evidence that the applicant was "very intelligent", "very clever" and "extremely sensitive"; the latter characteristic being elicited by a question put by the applicant's counsel in cross examination of the applicant's mother. The judge further stated that a jury might recoil from the proposition that twelve days before his 14 birthday, the applicant did not know that inserting an adult's vibrator into the vagina of his younger, isolated, vulnerable and crying sister, was seriously wrong.

65. In *CC (a minor) v. DPP*, where the appellant had been aged 11 years and 11 months at the date of the incident, he had taken a six-inch lock knife from his pocket and handed it to his accomplice, who had placed it across the victim's throat. Prior to the victim's release the appellant said "cut his nose to make sure", referring to the victim bringing money to school for them the next day. In allowing the appeal, the court held that before the justices were entitled to convict the appellant, they had to be sure that the prosecution had rebutted the presumption of *doli incapax* and that the appellant knew that what he did was seriously wrong and went beyond mere naughtiness or childish mischief. In determining that question, the tribunal of fact must avoid the trap of applying a presumption of normality. The prosecution is required to prove that the accused was mentally normal. Very little evidence is needed, but it must be adduced as part of the prosecution case. They found that in the instant case, the prosecution had failed to produce any evidence to rebut the presumption of *doli incapax*.

66. In *Minister for Justice and Equality v. PK*, Hunt J stated as follows in relation to the evidence necessary to rebut the presumption:-

"To rebut the presumption of doli incapax, the prosecution must, at the outset, produce evidence capable of satisfying a jury beyond all reasonable doubt that the accused in a case knew that his conduct was seriously wrong in the sense that it was not merely naughty or mischievous. In that context, I am satisfied that where the potential evidence suggests that the alleged victim was removed from her siblings on a pretext, that an advanced sexual act occurred, that there was an instruction not to tell anyone else, and that there was a final statement that this act demonstrated how he loved his stepsister, it would be clearly open to a jury to conclude that the respondent was aware that such conduct was seriously wrong. Having regard to the relatively close proximity of the two events, it would also be possible to conclude beyond any reasonable doubt that at all times during this period he knew that such conduct was seriously wrong. In these circumstances, the material available suggests a clear basis upon which the presumption in favour of the respondent would be capable of being rebutted."

67. Finally, in *C v. DPP* [1996] AC 1, the appellant, who was aged 12, and another boy, were seen by police officers using a crowbar to tamper with a motorcycle in a private driveway. The appellant ran away, but was caught and arrested. The magistrates had held that it was to be inferred from the fact that he had run away and that the motorcycle had been damaged, that he knew that what he had done was seriously wrong. The court held that the prosecution was required to prove, according to the criminal standard of proof, that a child defendant between the ages of 10 and 14 did the act charged and that when doing that act, he knew that it was a wrong act as distinct from an act of mere naughtiness or childish mischief, and the evidence to prove the defendant's guilty knowledge could not be mere proof of the doing of the act charged, however horrifying or obviously wrong that act might have been.

68. The court held that the act of running away was usually equivocal, because flight from the scene could as easily follow a naughty action as a wicked one. The court stated that there must however, be a few cases where running away would indicate guilt and knowledge, where an act was either wrong or innocent and there was no room for mere naughtiness. An example might be selling drugs at a street corner and fleeing at the sight of a policeman. The court allowed the appeal, because there was no evidence outside the commission of the offence, upon which one could find that the presumption had been rebutted.

69. In the present case, the applicant has relied on the opinion furnished by the Consultant Psychiatrist, Dr. Monks. The court is not satisfied that the content of that letter means that the evidence necessary to rebut the presumption can never be obtained. It merely shuts down one avenue of establishing the applicant's cognitive or moral appreciation at the time of the sexual acts. It does not mean that there is no other way that the presumption could be rebutted.

70. The court is satisfied that having regard to the age of the applicant at the time of the commission of the sexual acts with his sister, it would only require relatively little evidence for the prosecution to rebut the presumption.

71. The jury could consider that the actions of the applicant in taking steps to arrange the "sleepover", whereby his other brother and sister would sleep in a different room, the act occurred in the middle of the night, and his ensuring that the bedroom door was closed for the second incident, may indicate that he planned to carry out a sexual act with his sister, which he knew to be seriously wrong. That is an issue that should be left to the jury to consider after having received the appropriate charge from the trial judge.

72. The issue of admissions in this case is not that straightforward. This is due to the fact that this is not a case where the applicant denies that sexual acts took place. In such circumstances the making of admissions would be of considerable significance. Nevertheless, there is some substance to the submission of the applicant that the making of these admissions in 2009 and in or about 2015/2016, does not necessarily constitute an admission that the applicant knew, at the time that he did the acts, that what he was doing was very wrong; rather than being merely admissions made later as an adult, that he recognised the wrongfulness of his acts and was sorry for the adverse consequences that those acts had caused to his siblings.

73. Having said that, it is a matter for the jury, having been properly instructed by the trial judge, as to whether the admissions could be held to indicate an acceptance by the applicant that he had known at the time that he carried out the sexual acts, that what he was doing was seriously wrong.

74. While the court accepts the submission made by Mr. Dwyer SC on behalf of the respondent, that the court should also consider the public interest in the prosecution of serious crimes, the court cannot allow that imperative to trump as it were, the right of the accused to a fair trial. In this regard, the court is mindful of the dicta of Denham J (as she then was), in *B v. DPP* [1997] 3 IR 140, as cited with approval by both Hardiman J and Charleton J in the *Nash* case, which were to the following effect:-

> *"The community's right to have offences prosecuted is not absolute but is to be exercised constitutionally, with due process, if there is a real risk that the applicant would not receive a fair trial then, on the balance of these constitutional rights, the applicant's right would prevail."*

75. Hardiman J having quoted that passage, continued as follows:-

> *"I believe this pithy but complete statement correctly represents the test to be applied in deciding cases of this kind. I would add only that what the applicant must demonstrate is a 'real risk' and not an absolute certainty, that he would not receive a fair trial. Equally, however, the 'real risk' must be a risk which could not be avoided by an appropriate charge to the jury by the trial judge or other step that might be taken within the power of the courts, such as a long adjournment to allow*

the effect of a prejudicial publication to fade, if the court is satisfied that that would in fact take place."

76. Taking all of these matters into account, the court is not satisfied that the applicant has discharged the onus of establishing that there is a real or serious risk that as a result of the delay in prosecuting him and the effect of that delay on the consideration by the jury of the issue of whether he was *doli incapax* at the time of the offences, he cannot now get a fair trial.

77. Having regard to the dicta of O'Malley J in the *BP* case, which dicta have been adopted and approved in a number of subsequent cases, the court is satisfied that in this case, the trial judge is the person best placed to deal with any issue of unfairness that may arise. He or she will be able to give the jury the requisite instruction or warnings to eliminate any unfairness, and if that cannot be done, the trial judge can withdraw the case from the jury.

78. Having regard to the principles laid down by Charleton J in *K v. Moran*, as applied by Barrett J in *X v. DPP,* which judgment was affirmed by the Court of Appeal, the court is satisfied that it is not appropriate to make an order prohibiting the further prosecution of the applicant in respect of these charges.

79. In addition, and in relation to the charges concerning the sexual acts with T, the court is satisfied that there is a further ground why the trial should not be prohibited. The acts alleged by T are alleged to have occurred at a time when the applicant was 15 years of age. While there is some uncertainty as to the specific dates on which the alleged acts occurred, from a reading of the entirety of T's statement, he appears to be pretty certain that the sexual acts took place in the latter part of 1996. He was able to anchor the year in question by reference to the following facts: he recalls that the European Football Championships took place that year; his father had a 1996 registered car; the incidents took place while he was in the first year of secondary school and he recalled that it took place during the school year. All of these facts tend to indicate that the incidents took place during the time when he said they did, namely in the period 1st September, 1996 to 30th June, 1997. Thus, there is no evidence at this stage, on which the court could hold that the presumption arises in relation to the complaints made by T.

80. In the event that the evidence given at the trial should raise the possibility that the sexual acts with T took place at a time when the applicant was less than 14 years of age, the trial judge can give the necessary instruction/warnings to the jury.

81. In light of its findings herein, the court proposes to make an order providing for the following: (a) refusing the reliefs sought by the applicant; (b) prohibiting the publication of any matter that would identify the applicant, or the complainants, so as not to jeopardise the applicant's right to a fair trial.

82. As this judgment is being delivered electronically, the parties will have four weeks within which to make brief written submissions on the terms of the final order and on costs and on any other matter that may arise.