THE HIGH COURT

[2023] IEHC 724

Record No. 2021/ 1023 JR

BETWEEN:-

J.T.

APPLICANT

-AND-

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered on 7th day of November 2023.

Introduction.

1. The applicant was born in Q1 of 1952. He is currently 71 years of age. He stands charged with two counts of indecent assault contrary to common law, against the complainant, alleged to have occurred between 23rd September 1974 and 23rd September 1976.

2. The complainant was born in Q2 of 1962. At the time of the alleged assaults, he was between the ages of 12 years and 14 years. He was a member of a soccer team in a club in Dublin. The applicant was the coach of the team.

3. The first assault is alleged to have occurred when the applicant was treating the complainant for a groin strain in the building that was used by the team as a clubhouse. It is alleged that while administering treatment to the complainant, the applicant put his hand inside the complainant's underpants and masturbated him. The second assault is alleged to have occurred when the team had gone on a tour to Co. Kerry. It is alleged that complainant and other boys were sleeping in a caravan. It is alleged that the applicant and the complainant were sharing a sofa bed in the caravan, in a room in which there were other boys present. It is alleged that during the night, the applicant rubbed his penis against the complainant's bottom. It is alleged that that assault ceased, when the complainant sat up in bed and shouted "stop."

4. In these proceedings, the applicant seeks an order of prohibition in respect of his trial, which is due to take place in the Circuit Criminal Court on 7th May 2024. In summary, the applicant submits that due to the delay part of the complainant in making his complaint to the gardaí in 2017, coupled with prosecutorial delay thereafter, which resulted in the applicant not being charged until 9th June 2021; having regard to the fact that he is of advanced years; is in poor health; and that relevant witnesses and documents are no longer available; it is not possible for him to obtain a fair trial at this remove.

5. As the applicant has alleged that there was significant prosecutorial delay in this case, it will be necessary to set out the relevant chronology of events in some detail.

Chronology.

6. An account of the history of the garda investigation was set out in the affidavit sworn by D/Garda Bambrick on 5th May 2022 in the following terms: As already noted, the events giving rise to this prosecution are alleged to have occurred between 23rd September 1974 and 23rd September 1976. On 31st May 2017, an initial complaint was made by the complainant to D/Garda Brady at a Garda station in Dublin. On 26th June 2017, the complainant made a statement of complaint to the gardaí.

7. On 13th October 2017, the first witness statement was obtained by D/Garda Brady. Between 13th October 2017 and 28th November 2017, another potential witness was approached in relation to giving a statement, but was unable to assist the investigation. D/Garda Brady attempted to obtain records from the soccer club, but these were not available. On 28th November 2017, a further witness statement was obtained by D/Garda Brady.

8. On 7th January 2018, D/Garda Brady made enquiries with the relevant soccer authorities in relation to obtaining records from the soccer club; however, no records were available. On 7th March 2018, a further witness statement was obtained by D/Garda Brady. A further witness statement was obtained by him on 29th March 2018.

9. The investigating garda also approached another potential witness in relation to giving a statement, but the witness stated that he was unable to assist the investigation. In May 2018, the Garda approached a further potential witness, but he was likewise unable to assist the investigation.

10. In June 2018, D/Garda Brady transferred to another unit; whereupon D/Garda Brennan took over the investigation. In early 2019, D/Garda Brennan was transferred to a different unit; thereafter, D/Garda Bambrick was appointed as the investigating officer.

11. Between early 2019 and July 2019, D/Garda Bambrick stated that he made a number of enquiries in respect of witnesses, whom he hoped might be able to assist the investigation. He also stated that at that time, the gardaí at Mountjoy Garda station were heavily involved in murder investigations arising from the Hutch/Kinahan feud; he outlined the relevant murder investigations in his affidavit.

12. In June/July 2019, D/Garda Bambrick spoke with two potential witnesses; who were not able to assist the investigation. He stated that he also spoke to two further potential witnesses at that time, but he did not have exact dates in relation to those conversations.

13. In July 2019, D/Garda Bambrick attended at a caravan park in Co. Meath, which was the listed address for the applicant. He was informed that the applicant was no longer residing there. In August 2019, D/Garda Bambrick attended at a further address in Co. Meath, where he was informed that the applicant was not residing there any longer and was possibly resident in the UK.

14. In his affidavit, D/Garda Bambrick stated that between August and December 2019, he attempted to ascertain where the applicant was residing. He stated that he obtained information in December 2019, that the applicant was in fact residing at the house in Co. Meath, that he had visited the previous August.

15. In June 2020, D/Garda Bambrick spoke with the applicant by telephone. He invited the applicant to attend at the Garda station for the purpose of conducting an interview with him. An arrangement was made to meet the applicant at the Garda station on 16th June 2020. On 12th June 2020, the applicant contacted D/Garda Bambrick and informed him that he could not attend the appointment scheduled for 16th June 2020; the appointment was rearranged for 20th June 2020.

16. On 19th June 2020, the applicant's solicitor sent an email to the D/Garda Bambrick, to inform him that he had been instructed in the matter. The Garda responded on the following day by email, outlining the nature of the investigation. The applicant's solicitor indicated that he required time to speak with his client and the meeting, which had been arranged for 20th June 2020, was cancelled. On 23rd June 2020, the applicant's solicitor contacted D/Garda Bambrick and informed him that he was due to meet the applicant on 1st July 2020. On 2nd July 2020, the applicant's solicitor informed the Garda that the applicant was not going to attend at the Garda station and was not prepared to give a voluntary statement.

17. On 10th November 2020, D/Garda Bambrick took an additional statement from the complainant, wherein he gave permission to the gardaí to access his medical records. On 11th November 2020, D/Garda Bambrick contacted the Rape Crisis Centre to request any records that they had relating to the complainant.

18. On 14th March 2021, D/Garda Bambrick completed the investigation file and submitted same to D/Sgt O'Sullivan for recommendations. Between 15th February 2021 and 4th April 2021, D/Garda Bambrick made numerous enquiries with the Courts Service to ascertain the prior convictions of the applicant; as the PULSE system contained no records in respect of same.

19. On 6th April 2021, the Garda file was submitted to the respondent for directions. On 30th May 2021, the respondent directed a prosecution. On 31st May 2021, D/Garda Bambrick made contact with the applicant's solicitor to arrange to meet the applicant for the purpose of arrest and charge.

20. On 9th June 2021, the applicant was arrested and charged by appointment. On 13th September 2021, the applicant was returned for trial to Dublin Circuit Criminal Court. The trial has been fixed to commence on 7th May 2024.

Submissions on behalf of the Applicant.

21. On behalf of the applicant, Mr McGillicuddy SC, submitted that while the applicant was not making the case that he had suffered any specific prejudice due to delay in the prosecution of the matter, which would be sufficient to prevent him obtaining a fair trial; it was submitted that he had suffered a significant prejudice, which, coupled with other relevant factors in the case, meant that cumulatively, he would be unable to obtain a fair trial such that it was appropriate for this court to make an order prohibiting the further prosecution of the matter.

22. It was submitted that the applicant had been prejudiced due to the significant delay on the part of the complainant in making his first statement to the gardaí in May 2017. It was submitted that where there had been delay by a complainant in making allegations of historical sex abuse, there was a particular burden on the investigating gardaí to proceed with their investigation in a timely manner. It was submitted that in this case, there had been significant prosecutorial delay on the part of the gardaí investigating the allegations made by the complainant in his statement to them and in submitting a file to the DPP for directions.

23. It was submitted that a period of almost 4 years had elapsed between the date of the initial statement by the complainant to the gardaí in May 2017, and the charging of the applicant with the offences on 9th June 2021. It was submitted that within that four-year period, there had been blameworthy delay on the part of the gardaí. It was submitted that the complaint made by the complainant had not given rise to a particularly complex investigation. At the end of the day, the file that was sent to the respondent at the conclusion of the Garda investigation, had only contained a small number of witness statements, as follows: two statements from the complainant and two statements from two other men, who had been named in the complainant's initial statement as having been on the soccer team with him in the relevant period.

24. It was submitted that as a result of this delay, both in making the initial complaint to the gardaí and the prosecutorial delay thereafter, the applicant would have to face a trial in May 2024

relating to events that are alleged to have occurred some 48/50 years earlier. It was submitted that this was a very significant period of time, particularly, when one had regard to the fact that the applicant was currently 71 years of age.

25. It was submitted that there had been delay on the part of the various investigating gardaí in obtaining the relevant witness statements and in attempting to obtain witness statements from other men, who had been on the soccer team with the complainant. It was submitted that the gardaí had adopted a careless approach in their attempt to make contact with the applicant at the caravan site, because he had been resident there, from in or about the year 2000, until April 2017. It was submitted that as the applicant had been in receipt of social welfare benefits for many years, his address would have been readily ascertainable by making enquiries of the social welfare authorities.

26. Even if one allowed for the fact that the investigating Garda may have been incorrectly informed in August 2019 that the applicant had left the second residential address in Co. Meath, and even allowing for the fact that it may not have been until December 2019 that the Garda learnt that the applicant was in fact resident at that address; it was submitted that there had been no explanation as to why it had taken until June 2020 for the investigating Garda to make contact with the applicant by telephone.

27. Counsel accepted that delay in making the initial complaint, even coupled with subsequent prosecutorial delay, would not on its own warrant an order of prohibition in respect of the trial. However, it was submitted that when the delay that had occurred in this case was considered in conjunction with other relevant factors, the case came within the definition of "wholly exceptional circumstances" as set down in *SH v. DPP* [2006] 3 IR 575, such that an order of prohibition should be made.

28. Counsel submitted that the additional factors, which cumulatively warranted an order of prohibition being made, included the following: first, the applicant has considerable health issues. These had been set out in the applicant's affidavit sworn on 1st December 2021, and updated in his affidavit sworn on 27th September 2023. In those affidavits, the applicant had furnished evidence that he suffered from a number of significant health issues. He has heart issues, in respect of which he had previously required a femoral bypass and the insertion of two stents. On 8th December 2021, the applicant had had further surgery in relation to his heart complaint. He stated that in July 2023, he had been informed by his cardiac surgeon that it would be necessary for him to undergo further surgery to address his heart issues. The applicant stated that because he was

not feeling sufficiently well at that time, he indicated to the cardiologist that he could not undergo the corrective surgery. The applicant continues to take medication for his heart complaints, which was detailed in his updating affidavit.

29. The applicant had given evidence in his affidavit that he has suffered from chronic obstructive pulmonary disease (COPD), which causes him difficulties breathing. He stated that he had been informed by his treating consultant that apart from the use of inhalers, his complaint could not be further addressed or treated.

30. The plaintiff also gave evidence in his affidavit that he has suffered mental health difficulties for a considerable period. In particular, he stated that he had suffered from clinical depression and anxiety for a number of years. In this regard, he continues to require medication in the form of citalopram 40 mg and pregabalin 75 mg, as prescribed by his doctor. The applicant also stated that he had undergone surgery on 7th March 2022 for the removal of a polyp from his nose. He had feared that that may have been cancerous; however, he had subsequently been informed that it was benign. He had also had concerns in relation to kidney complications, for which he had attended with a consultant at the Mater Hospital on 5th March 2023. He was informed that the marks on his kidneys, which had shown up on a scan, were scars caused by kidney stones, which he had had several times in the past. He does not require any treatment in relation to that issue.

31. In his affidavit sworn on 1st December 2021, the applicant stated that his significant health difficulties had been exacerbated by the criminal proceedings brought against him and particularly, by the delay in prosecuting the matter.

32. The second factor which is stated to be of considerable relevance was the fact that the complainant's parents had died. The complainant's mother died in 2012. The complainant's father died one month after the complainant had made a statement to the gardaí, in 2017. It was submitted that even though the loss of these witnesses could not be ascribed to prosecutorial delay on the part of the gardaí; their absence was due to the overall delay in the case and was still relevant, due to the fact that they could have given relevant evidence at the trial, had the complaint been made at an earlier time and had it been investigated in a timely manner.

33. In this regard, counsel submitted that the evidence of the complainant's parents would have been material, because the complainant had alleged in his statement that the applicant had given him presents on various occasions. It was also alleged that he used to call to the complainant's family home to have tea with the complainant's parents and that he would praise

the complainant on such occasions. In addition, it was submitted that the absence of these witnesses was relevant, having regard to the fact that in the witness statements from the complainant's former teammates, they had stated that, the applicant used to visit the complainant's house and on occasion, sleep in the house overnight. They stated that that was strange, having regard to the fact that the applicant lived close to the complainant's house.

34. It was submitted that an additional prejudice which had occurred due to the lapse of time, was the inability of the investigating garda to obtain counselling records from various individuals that had been identified by the complainant as having given him counselling over the years. Some records had been obtained and disclosure had been made of these, but the investigating garda had not been able to either track down the remaining counsellors, or obtain records from them. He continued to pursue this aspect of the investigation. It was submitted that the absence of these records would be prejudicial to the applicant in the conduct of his defence at the trial. It was submitted that the absence of the complainant's parents as witnesses, and the absence of some of the counselling records, constituted a significant prejudice to the applicant in the conduct of his defence.

35. In conclusion, Mr McGillicuddy SC submitted that when taken cumulatively, the factors in this case, being the delay in making the initial complaint; the prosecutorial delay in not ensuring that the applicant was charged within a reasonable time; with the result that the applicant would have to face a trial dealing with allegations concerning events that were alleged to have occurred 48/50 years prior to the trial; coupled with his health difficulties; the death of relevant witnesses and the loss or unavailability of relevant documents; all combined to bring this case within the definition of "wholly exceptional circumstances", such that it was appropriate that an order of prohibition be made preventing the trial taking place in May 2024.

Submissions on behalf of the Respondent.

36. On behalf of the respondent, Mr Clarke BL submitted first, that the relevant factors as outlined by counsel on behalf of the applicant, had not been established by admissible evidence. Secondly, it was submitted that even if the court were to find that these factors had been established in evidence, they did not cumulatively amount to grounds on which the court should order prohibition of the trial.

37. By way of opening submission, counsel submitted that the authorities had made it clear that it was only in rare cases where there were "wholly exceptional circumstances", that this court should grant an order prohibiting a trial. It was submitted that the decided cases had made it clear

that in the vast majority of cases, the appropriate course was for the matter to be left in the hands of the judge dealing with the trial, who was best placed to decide whether or not there was any prejudice to the accused in relation to obtaining a fair trial. It was submitted that the trial judge was in the best position to deal with the matter, either by way of appropriate rulings or warnings to the jury and, if necessary, the trial judge had the power to withdraw the matter from the jury, if he or she was of the view that it was not possible for the accused to obtain a fair trial.

38. It was submitted that there had been no culpable prosecutorial delay on the part of the investigating gardaí. The steps that had been taken in the investigation of the matter, had been set out in considerable detail in the affidavits sworn by D/Garda Bambrick. It was submitted that the investigating gardaí had carried out a careful and diligent investigation of the complaints that had been made in 2017, in relation to two alleged assaults that were alleged to have occurred between September 1974 and September 1976.

39. It was submitted that it was reasonable for the investigating Garda to say that he and other colleagues at the station had been required to work on a number of murder investigations during the period when he was also investigating the complaints that had been made by the complainant. It was submitted that it was unreasonable to expect the investigation into the complainant's complaint to take priority over all other investigations that may be going on in a particular Garda district at a particular time. It was further submitted that it was reasonable for D/Garda Bambrick to state that he was unable to pursue the investigation for a relatively short period while he was on parental leave. In addition, it had been recognised that in the period March 2020 to June 2020, the attention of the gardaí had been almost exclusively taken up by matters relating to the Covid-19 pandemic and the regulations enacted to deal with that situation.

40. It was submitted that the investigating Garda had made reasonable enquiries to ascertain the location of the applicant, but had been told that he had moved, when he visited the caravan site and when he had visited the further address in the following month, he had been informed that the applicant had relocated to the UK. Further enquiries had revealed that the applicant had not in fact move to the UK. It was submitted that the investigating Garda could not be faulted for the delay that had occurred due to the fact that he had been given incorrect information when he attended at the second address in August 2019.

41. It was submitted that when the entire investigation was looked at in the round, there had been no blameworthy prosecutorial delay in the investigation of this complaint.

42. It was submitted that the health difficulties that had been outlined by the applicant in his two affidavits were unsupported by any medical evidence. It was further submitted that those health difficulties did not prevent the applicant either giving instructions to his legal team, or defending himself at the trial by giving evidence, if that became necessary.

43. On the issue of alleged prejudice, it was submitted that the assertions made by the applicant, fell far short of establishing that he had suffered such prejudice in the conduct of his defence, that he could not get a fair trial. In relation to the death of the complainant's parents, it was submitted that that was not due to any prosecutorial delay on the part of the gardaí. Furthermore, it was pointed out that their evidence, whatever it may have been, was going to be on tangential issues, concerning whether the applicant had brought gifts for the complainant and whether he stayed over in the complainant's house on occasion. It was submitted that such evidence did not go to discredit the allegations that had been made by the complainant; nor was such evidence relevant to those complaints, given that the alleged assaults had taken place at locations outside the family home.

44. In relation to the unavailability of counselling records, it was pointed out that some records had been obtained and these had been furnished to the applicant by way of disclosure. While the remaining records had not yet been obtained, there was no definitive evidence that they had been permanently lost, or had been destroyed. It was submitted that even if it was the case that such records were missing or destroyed, there was no evidence that the content of those records was going to be material to any of the issues that would arise at the trial.

45. It was submitted that in respect of both these alleged grounds of prejudice, it was insufficient for the applicant to allege a vague and hypothetical prejudice. In order to obtain an order of prohibition due to the absence of such witnesses or documents, the applicant would have to establish that that evidence was critical on central issues that would arise at the trial. It was submitted that he had failed to do that.

46. In conclusion, counsel submitted that the applicant had not established that there had been any culpable delay on the part of the gardaí; nor had he established that due to any delay that there may have been due to the delay on the part of the complainant in making his initial statement to the gardaí, that he could not get a fair trial in May 2024, even having regard to the other matters alluded to by him in his affidavits.

47. Counsel submitted that the applicant's right to obtain a fair trial would always be preserved. It was the function of the trial judge to ensure that an accused had a fair trial. He or

she was best placed to decide on that issue having regard to the run of the evidence in the case up to that point. It was always open to the accused to make whatever application may be appropriate to the trial judge, at whatever stage of the trial was appropriate. It was submitted that in the circumstances, the court should not grant the relief sought by the applicant in these proceedings.

The Law.

48. There is considerable jurisprudence concerning the issues of delay and prejudice that can arise in the context of the trial of historic sex abuse allegations. A summary of the relevant principles which should be applied where an application is brought to prohibit a criminal trial on grounds of delay and prejudice, was set out by Charleton J. (then sitting as a judge of the High Court), in *K v. Judge Moran & DPP* [2010] IEHC 23 at para. 9. That statement of the relevant principles was adopted and endorsed by O'Malley J. (then sitting as a judge of the High Court), in *PB v. DPP* [2013] IEHC 401. It is not necessary to set out this general statement of principles in this judgment; save to note that the court has had regard to these principles in reaching its judgment herein.

49. In the seminal decision of the Supreme Court in *SH v. DPP* [2006] 3 IR 575, it was established that when looking at cases of delay in historic sex abuse cases, it was no longer appropriate to look at the reasons why a complainant did not make their complaints at an earlier time. The sole focus of the court's attention should be on whether, in all the circumstances, the accused has been prejudiced by the delay, such that he or she can no longer receive a fair trial. Delivering the judgment of the court, Murray C.J. stated as follows at para. 47:

> "*Therefore, I am satisfied that it is no longer necessary to establish such reasons for the delay. 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.*"

50. In dicta that have been adopted and applied in a number of subsequent cases, Murray C.J. stated his conclusion as follows at para. 54:

> "*In this case the developing jurisprudence as to delay in bringing a prosecution for offences of child sexual abuse was considered by the court. I am satisfied that in general there is no necessity to hold an inquiry into, or to establish the reasons for, delay in*

making a complaint. The issue for a 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 does not exclude wholly exceptional circumstances where it would be unfair or unjust to put an accused on trial."

51. Under the test in *SH*, an accused can seek to prohibit the trial on either of two grounds: that he has suffered specific prejudice due to the delay in prosecuting him; or that due to the cumulative effect of wholly exceptional circumstances that arise in the case, it would be unfair to expect the accused to stand trial, as there would be a significant risk that he would have an unfair trial.

52. The second limb of the test in *SH* was considered in *PT v. DPP* [2008] 1 IR 701. The applicant, who was 87 years of age, was returned for trial on charges of indecent assault. A period of between 34 and 39 years had elapsed between the dates of the alleged offences and the return for trial. When the matter came on for hearing before the Supreme Court, the applicant submitted that the case was exceptional, in that it would be unfair to put him on trial given his age and the fact that the charges related to events alleged to have occurred between 37 and 42 years previously. In addition, there was medical evidence adduced to the effect that the stress associated with a criminal trial, could have a major adverse effect on the applicant's health.

53. Delivering the judgment of the court, Denham J. (as she then was) stated that in *DC v. DPP* [2005] 4 IR 281, it had been noted that an application for prohibition of a trial may only succeed in exceptional circumstances. Where the DPP had taken a decision to prosecute, the courts must be slow to intervene. However, bearing in mind the duty of the courts to protect the Constitutional rights of all persons; in exceptional circumstances, the court would intervene and prohibit a trial. However, she also noted that in general such a step was not necessary, as the trial judge always maintained the duty to ensure due process and a fair trial. The basic assumption to apply in relation to all pending trials, was that they would be conducted fairly, under the direction of the presiding judge.

54. Denham J. went on to note that a prosecution was not an exercise in vengeance. While the court should give careful regard to the position of victims, it must protect the integrity of the justice system as a whole. In finding that in the circumstances of that case, it was an exception as envisaged in the *SH* case, and accordingly in holding that the trial should be prohibited, she stated as follows at paras. 28 and 29:

"*28. In considering an application for prohibition a review court should not merely pick out an element and conclude that arising from it there is a possibility of an unfair trial. That is not the test. The test is, as stated in Z. v. Director of Public Prosecutions [1994] 2 I.R. 476, that of a serious risk of an unfair trial. The applicant here is applying on the basis of a hypothesis which might or might not happen. The alleged facts of the two events are dissimilar in circumstances and time. Whether any further basis for such an application pursuant to s. 3(1)(5) of the Act of 1981 can be established is within the realm of the trial judge, in the context of the evidence adduced at trial, the cross-examination and the defence raised on behalf of the applicant. The applicant in this case has not raised an arguable case that there is a serious risk of an unfair trial.*

29. The refusal of leave to apply for judicial review to the applicant will return the case to a position in which it is assumed that the trial judge will ensure a fair trial. An arguable case has not been established that there is a serious risk that the applicant will not receive a fair trial."

55. In *DPP v. CC* [2019] IESC 94, Clarke C.J. noted that the courts took the view that it was preferable that, other than in very clear-cut cases, which would not be affected by the development of the evidence at the trial, the issue of historic delay, should be left to the trial judge. He stated as follows at para. 1.3:

"*One of the developments in the case law in recent times has been a suggestion that the question of whether it is possible to provide a fair trial, in such cases involving a lengthy lapse of time, should be left to the trial judge rather than, as tended to be the case during the earlier stage of the development of the jurisprudence, be decided in proceedings which sought to prohibit the conduct of the criminal trial before it commenced. It will be necessary to refer briefly to that development in due course, but the underlying reason behind it was a view that the trial judge would normally be in a much better position to assess the real extent to which it might be said that the prejudice had been caused to the defence by the lapse of time in question*."

56. In the same case, O'Donnell J. (as he then was) emphasised the primacy of the role of the trial judge in dealing with applications of prejudice due to delay. He stated as follows at para. 13:

"*I fully agree that the developments in P.O'C. and S.H., as traced in the judgment of the High Court quoted above, mean that in other and clear-cut cases where the deficiency is of a kind which will not be affected by the manner in which the trial proceeds or by the*

evidence adduced, the trial is the appropriate location for any decision as to whether the lapse of time and impact on the case is such that the case is beyond the reach of fair adjudication – or, in the words of O'Malley J., that it is not just for the trial to proceed."

57. O'Donnell J. also dealt with the issue in relation to missing witnesses or lost documents, in the following way:

"Few trials, however, are perfect reproductions of all the evidence that could possibly exist. The absence of a witness or a piece of evidence does not render such trials unfair. A trial judge has therefore a vantage point which allows him or her to consider whether what has occurred crosses the line between a just and an unjust process. In shorthand terms, this involves considering whether the evidence which is no longer available is "no more than a missed opportunity", as the trial judge and the Court of Appeal considered, or by contrast whether the applicant has "lost the real possibility of an obviously useful line of defence", as considered by the majority in this court, adopting in this regard the language of Hardiman J. in S.B. v. Director of Public Prosecutions [2006] IESC 67, (Unreported, Supreme Court, 21 December 2006) ("S.B."), at para. 56 […]"

58. Thus, the essential test in relation to missing witnesses or missing documents, appears to be whether the absence of the missing evidence has denied the accused of a realistic opportunity of an obviously useful line of defence.

59. In *JJ v. DPP* [2021] IEHC 564, Heslin J. held that the central issue for the court on an application such as this was, regardless of the reasons for delay, whether the applicant will receive a fair trial, or whether there is a real or serious risk of an unfair trial. He summarised the principles which are applicable in cases of missing witnesses or evidence in the following way at para. 65:

"*a. whether the applicant has engaged with the facts and demonstrated the materiality of unavailable evidence and whether the evidence can be obtained elsewhere or can be dealt with by warnings from the trial judge (M.U. v. DPP [2010] IEHC 156);*

b. if certain witnesses are absent, does that absence give rise to irredeemable prejudice on the basis that their presence was "demonstrated to be essential in order to assist the applicant's defence in respect of the charges" and whether other witnesses were available who could provide evidence in relation to the same matters (K.D. v. DPP [2011] IEHC 384);

c. an applicant must be able to point to a "real possibility that the witnesses or evidence would have been of assistance to the defence" as opposed to a theoretical possibility that

the evidence of an unavailable witness might contradict the complainant's account or that of other witnesses (O'C v. DPP [2014] IEHC 65);

d. whether the evidence which is no longer available is "no more than a missed opportunity" or whether the applicant has "lost the real possibility of an obviously useful line of defence (S.B. v. DPP [2006] IESC 67) and that 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";

e. in order to raise the real possibility that the missing evidence would assist in the defence, an applicant for prohibition "must engage in a real way with that potential evidence and identify how and why it might assist in defending the charge" (R.B. v. DPP [2019] IECA 48)."

60. In *MS v. DPP* [2021] IECA 193, Kennedy J., delivering the judgment of the court, noted that the inherent jurisdiction vested in a trial judge to give the necessary directions or warnings to a jury, and in exceptional cases, to withdraw a case from a jury; did not exclude the possibility of a court on an application for judicial review, concluding that cumulative factors existed of such a wholly exceptional kind, such that it would be unjust to put the appellant on trial. She stated that looking at the factors in that case, she did not believe that any of the factors identified, taken alone, would bring the case into the kind of exceptional category envisaged in the *SH* case, so as to render a trial unjust or unfair. She went on to state as follows at para. 57:

"*…It is quite clear that old cases may be prosecuted, it is also clear and my firm view that age is no restriction, nor is ill-health, either mental or physical. But it is not only a question of the individual factors, it is also the cumulative impact of the various factors present. I do not find that any single period of delay would in and of itself require the trial to be prohibited, but when I look at the entire period, together with the other factors, I am driven to the inexorable conclusion that this is one of those rare cases, where the cumulative factors are such so as to bring this matter into the wholly exceptional category where it would be unjust to put the appellant on trial.*"

61. In *DPP v. BK*, [2022] IECA 119, the accused was facing a total of 270 charges involving six complainants in respect of offences that were alleged to have occurred in the period December 1978 to March 1993. Notwithstanding that the accused maintained that he had received extensive publicity arising out of his previous conviction for related sex offences, and the death of witnesses, whom he regarded as being highly relevant; together with the death of certain medical witnesses,

who had examined him in relation to the period after 1987; the court did not regard these factors cumulatively as meaning that he could not obtain a fair trial and accordingly they refused to prohibit the trial proceeding. Delivering the judgment of the court, Birmingham P. stated as follows:

> *"I do not believe that what has emerged would justify or prohibit a trial, rather, I think what has emerged has established that there are issues that can be addressed (and are best addressed) in the courtroom in the context of a criminal trial. I would, however, add that I do recognise that there has to be an end point and that a stage would be reached where a proposed further trial on the back of multiple trials would be oppressive and unacceptable."*

62. In *SOC v. DPP* [2023] IEHC 502, this court considered an application for prohibition of a trial relating to historic sexual abuse charges, in circumstances that were broadly similar to the present case. In that case the applicant was also 71 years of age. The offences were alleged to have taken place between 1st September 1974 and 31st December 1983. The applicant's trial was due to commence on 22nd January 2024.

63. One of the factors on which the applicant in that case relied was his alleged ill-health. In rejecting that assertion, the court noted that there was no medical evidence provided by the applicant to back up the assertion made by the applicant's solicitor, on instructions from the applicant, that he suffered from gastric issues, chronic lower back pain and had osteophytosis of L3/4 and L4/5. The court noted that there was no suggestion that the applicant was suffering from any cognitive impairment, or memory loss, either due to his age, or for any other reason. The court held that in the absence of any cogent medical evidence, the court could not hold that the applicant was in poor health (see paragraph 45). It should be noted that the decision in that case is under appeal to the Court of Appeal.

Conclusions.

64. In reaching a conclusion on the application brought by the applicant that the court should prohibit the trial, the court has to apply the principles that have been set down in the case law cited above. However, as has been pointed out by the courts on numerous occasions, each case must turn on its own facts. It is necessary for the court in deciding an application such as this, to look carefully at the circumstances surrounding the investigation of the complaint made by the complainant; examine any prejudice that is said to arise to the accused due to delay generally, or

due to any culpable prosecutorial delay; or due to the loss of relevant witnesses or documents; and, in particular, the court must have regard to the personal circumstances of the accused.

65. When one brings the issue down to its bare essentials, the key issue is whether it has been shown that there are "wholly exceptional circumstances" in the case which render it likely that there is a real risk that the accused may not receive a fair trial. This test was summarised by Heslin J. in *JJ v. DPP* in the following way:

> "*The central issue, regardless of the reason for delay, is whether the applicant will receive a fair trial, or whether there is a real or serious risk of an unfair trial*."

66. When one looks at the factors in this case that are said to give rise to the likelihood of the applicant not receiving a fair trial, the court is not satisfied that these factors, either individually, or taken cumulatively, establish that there is a real risk that he will not receive a fair trial in May 2024.

67. Firstly, the court is not satisfied that there was prosecutorial delay on the part of the gardaí investigating the complaint, when it was first made to them in May 2017. When that complaint was made, the gardaí had to investigate events that were said to have taken place between 1974 and 1976. It was reasonable for the gardaí to attempt to interview and obtain witness statements from as many of the men who had played on the soccer team with the complainant, as they possibly could. To that end the investigating gardaí contacted a number of men with a view to obtaining statements from them. At the end of the day, they obtained statements from two brothers, who had played on the same team as the complainant, which were used in the book of evidence. It was also reasonable for the gardaí to attempt to obtain the records from the soccer club and to obtain such records, as may be available, from the body that ran the relevant league in which the team participated. That both of these avenues of inquiry did not provide evidence, was not the fault of the gardaí.

68. The court accepts the evidence set out in the affidavit sworn by D/Garda Bambrick in relation to the conduct of the investigation. The court also accepts his evidence that during the time when he was investigating these complaints, he and the other gardaí in the station, were also taken up with the investigation of a number of murder investigations arising out of the Hutch/Kinahan feud. The work of the gardaí in any particular station will vary from time to time. There will be times where there are a number of serious crimes in a particular division, that have to be investigated as a matter of priority. It is unrealistic to expect that gardaí will not have to prioritise certain investigations over others from time to time.

69. Criticism was made of the fact that D/Garda Bambrick took what was alleged to have been an inordinate time to contact the applicant, to enquire whether he would make a voluntary statement. I accept the evidence of D/Garda Bambrick in relation to the enquiries that he made, first at the caravan site where the applicant had resided and in the following month, at another address where the applicant was thought to reside. That the Garda was incorrectly told that the applicant had moved from that second address and was possibly residing in the UK, was not the fault of the investigating garda. I accept that it took a period of some further months until December 2019, for the investigating Garda to learn that the applicant was still residing at the second property in Co. Meath.

70. Criticism was made of the fact that it took a further six months for the Garda to make contact by telephone with the applicant. I accept the evidence of D/Garda Bambrick that in the period March 2020 to June 2020, the resources of the gardaí were stretched due to the Covid 19 pandemic, when a number of gardaí must have been out sick at any one time, but more particularly, due to the fact that the gardaí were deployed to ensuring that the extensive regulations brought in to tackle the pandemic, were adhered to.

71. I accept the submission made by Mr Clarke BL on behalf of the respondent, that when looked at in the round, the Garda investigation in this case was not beset by culpable delay.

72. Turning to the issue of alleged prejudice suffered by the applicant due to both the alleged delay on the part of the complainant in making his first complaint to the gardaí in 2017, and the alleged prosecutorial delay thereafter; the applicant has submitted that due to this delay, he has been prejudiced due to the death of the complainant's parents and the loss, or unavailability of counselling records. I do not accept this submission as being well-founded. The applicant has not been able to point to relevant evidence on central issues that one could reasonably expect the complainant's parents to have given. The assaults in this case are alleged to have taken place at two locations, quite separate from the family home. It is not alleged that the complainant's parents witnessed, or knew of the assaults.

73. Insofar as they may have been able to give evidence in relation to the complainant's assertion that the applicant brought presents to him and that he used to visit the house and had tea with his parents, on which occasions he would praise the complainant; and they may have been able to give evidence to corroborate the assertion made by the independent witnesses, that the applicant used to stay over in the complainant's house on occasion; it does not seem to me that these issues are in any way pertinent to the matters that are likely to be central at the trial.

In addition, the assertions in relation to the applicant staying over in the complainant's house, can be established by the evidence which will be given by the two witnesses, who made those assertions in their witness statements.

74. In relation to the current unavailability of some of the counselling records, it has to be noted that some counselling records have been obtained and have been provided to the defence by way of disclosure; those that remain outstanding, will be provided by way of disclosure in the event that they are obtained. Even if they are not obtained, the applicant has not established that these counselling records are likely to be of relevance to the issues that are likely to arise at the trial.

75. In *SÓ'C v. DPP* [2014] IEHC 65, the applicant complained that two sets of doctors' notes and a relevant witness, were no longer available and therefore he was that risk of an unfair trial. In refusing the application, O'Malley J. (then sitting as a Judge of the High Court) stated:

> "*67. The question is, I consider, whether there is a real possibility that the missing material would reveal a material inconsistency which would be of benefit to the applicant. In my view, there is nothing in the evidence to suggest that this is a realistic possibility as might be the case if, for example, it was shown that she had given materially inconsistent accounts in other instances. I do not consider that the presumption of innocence requires the court to assume, in the absence of any supporting evidence, that it did happen in relation to Dr. O'Carroll.*
>
> *68. This is not to suggest that the applicant bears an onus of proving his innocence it is simply that the establishment of a "real risk" must involve establishing a "real possibility" that evidence did exist, which could have been helpful, but is no longer available*."

76. A similar decision was reached in *T(S)T v. President of the Circuit Court* [2015] IESC 25, which also dealt with missing counselling records and certain counsellors who were no longer available, Denham C.J. stated that each case had to be considered on its own facts and that while the absence of documents in that case did not warrant a grant of prohibition, it was a matter which could be opened to the trial judge, who would be best placed to determine the matter. A similar decision was reached in *B'OS v. DPP* [2017] IEHC 687, where Ní Raifeartaigh J. held that it could not be assumed that a complainant may have made inconsistent statements to a counsellor or social worker, in the absence of any evidence. In addition, the judge held that that was not a case where the role of records appeared to be necessary to establish a matter that was central to the issues that would arise at the trial. She concluded by stating that she was not persuaded that

the absence of the records from the trial, meant that there was inevitably a real risk of an unfair trial. She stated that that was a matter which could be kept carefully under review by the trial judge.

77. In relation to the applicant's alleged health difficulties, while the applicant has set out in considerable detail the various treatments that he has received for his heart complaints, his COPD, the polyp in his nose, his kidney complaints, and his mental health issues; there is no medical evidence before the court that these difficulties have been exacerbated as a result of the investigation into the criminal complaints, or due to any delay that there may have been in relation to the prosecution of the matter.

78. In its decision in the *SO'C v. DPP* case, this court pointed out that there should be some medical evidence before it, in relation to assertions of ill-health that are made by an applicant. The court would not expect an applicant to go to each of the specialists who dealt with him for his various complaints for the purposes of obtaining reports from them. However, where a person receives treatment from a consultant, it is the invariable practice of consultants to write to the person's GP to inform them of the outcome of the surgery or treatment. Thus, the GP is the person who receives all the information from the various treating consultants. The GP would be in a position to write a short report outlining the various complaints that his patient has and to state how these have been exacerbated by the prosecution of the patient for the historic offences. Of critical importance, the GP could state whether in his professional opinion, the accused is in a position to adequately arrange for his defence at the trial.

79. In the present case there is no evidence from any doctor that the applicant's health difficulties were either caused, or exacerbated, by the criminal prosecution that has been brought against him, or by the delay in bringing the matter to trial. There is no evidence before the court that the applicant suffers from any cognitive impairment. More importantly, there is no evidence before the court that due to his health difficulties, he is unable to give instructions to his legal team to mount whatever defence may be appropriate for him at the trial.

80. Insofar as the applicant points to the fact that he is 71 years of age at the present time, the court would again point out, as it did in the *SO'C* case, that it is commonplace for people to work until 70 years of age. Therefore, being of that age, is not, of itself, indicative of an inability to adequately defend oneself at a criminal trial. However, as was pointed out in the *SO'C* case, everything will turn on the particular circumstances of the accused, rather than on their age

simpliciter. For the reasons set out above, the court is not satisfied that due to the applicant's age and health difficulties, he will not be able to get a fair trial in May 2024.

81. Finally, in refusing the reliefs sought by the applicant in his notice of motion, this court is satisfied that his right to a fair trial will be fully preserved, because any issues that he wishes to raise in relation to prejudice due to delay, or due to other matters, such as his ill health, or the absence of witnesses or documents, can be raised before the trial judge, who will be best placed to deal with these issues in a just and appropriate manner, having regard to the run of the evidence that has come out at the trial up to that point.

82. Accordingly, the final order of the court will provide that the reliefs sought by the applicant in his notice of motion dated 28th January 2022 are refused.

83. As this judgment is being delivered electronically, the parties shall have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

84. The matter will be re-listed for mention for the purpose of making final orders at 10.30 hours on 12th December 2023.