THE SUPREME COURT

[Supreme Court Record No: 25/2018]

Clarke C.J.

O'Donnell J.

MacMenamin J.

Charleton J.

O'Malley J.

BETWEEN:

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

RESPONDENT/PLAINTIFF

-AND-

C.C.

APPELLANT/DEFENDANT

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 19th day of December 2019.

Introduction

1. This appeal raises issues concerning the exercise by a judge presiding over a criminal trial of the jurisdiction identified by this Court in *The People (Director of Public Prosecutions) v P.O'C*. [2006] 3 I.R. 238 ("*P.O'C*") – that is, to prevent a trial from proceeding should matters arise which render the trial process unfair. *P.O'C* was, as this case is, concerned with the trial of historic allegations of sexual offences and therefore with a claim made on behalf of the defence that the right to a fair trial was infringed by reason of delay. However, it may be noted that the jurisdiction to prevent a trial from proceeding, or to stop it before it concludes, on grounds of unfairness is not confined to such cases – for example, a discussion will be found in the recent decision of this Court in *The People (Director of Public Prosecutions) v. Casey* [2019] IESC 007 of how such an issue might arise in respect of a defence claim of officially induced error. The underlying principle is that the task of the courts is to administer justice, but circumstances may arise where it transpires that it is not possible to achieve an outcome that will be just, and that the process is not therefore the administration of justice.

2. The case now before the Court involves what might be seen as a sub-category of the delay cases. The alleged offences occurred in 1971, and the trial was conducted 45 years later, in 2016. The defence contends that a woman named here as M.Cy., who died in 2008, was a person of central importance to the case and could have been of considerable material assistance to the defence. It was therefore argued in the trial, after the close of the prosecution case, that the judge should not permit the matter to proceed to the jury.

3. I agree with much of each of the judgments delivered by Clarke C.J. and O'Donnell J. Although they differ as to the correct result in this appeal, there are a number of specific propositions that appear to me to constitute common ground.

4. In summary, the Chief Justice has said that the task of the trial judge, when considering an application of this nature, will involve an assessment of the prosecution case. There must, of course, be sufficient evidence for a properly instructed jury to convict the accused, since otherwise he or she will be entitled to a direction in any event. Assuming that this threshold is met, the trial judge must next consider the evidence said to be missing. What is required here, if the accused is to succeed in the application, is a legitimate basis on which it can be said to be reasonable to infer that particular evidence, potentially favourable to the defence, might have been given had the trial taken place at an earlier stage. If the prosecution case is very strong, then the evidence said to be missing would need to be such that there was a real possibility that it could influence the decision of the jury notwithstanding the strength of the prosecution case. A theoretical possibility that the absence of some tangentially material piece of evidence might render the trial unfair is not enough. It is necessary to look at the case in the round, to have regard to the likelihood of evidence favourable to the defence being genuinely lost by reason of the lapse of time and also to have regard to the role which the evidence might reasonably have been expected to play at the trial, in the light of the prosecution case as it actually appeared at the trial. The issue to be determined is whether the accused has lost the real possibility of an obviously useful line of defence. The task of the trial judge is to determine whether the trial is fair, rather than whether the accused is guilty or innocent. The burden in such an application is on the accused, who may be able to make the case on the basis of the evidence already adduced by the prosecution or may need to adduce defence evidence. It may be necessary to call evidence in absence of jury.

5. Clarke C.J. sets out the process by which the trial judge should carry out the necessary assessment at paragraphs 9.2 to 9.5 of his judgment.

6. O'Donnell J. agrees that in certain circumstances a dispute about a past event may be beyond the reach of fair litigation, at which point any trial would not be the administration of justice. He refers to the judgment of Murray C.J. in *S.H. v Director of Public Prosecutions* [2006] 3 I.R. 575, where this Court concluded that the real issue in historic cases of sexual offences was whether or not there was a real or serious risk that the accused, by reason of the delay, would not obtain a fair trial, or that the trial would be unfair because of the delay. The test was to be applied in the light of the circumstances of the case.

7. O'Donnell J. stresses that the question is not whether the trial judge believes a guilty verdict to be appropriate, but whether any verdict of guilt, if arrived at, could be considered to have been achieved by a process which would be considered just. Where the issue is the absence of a witness or a piece of evidence, the judge must consider whether the evidence which is no longer available is "no more than a lost opportunity" or, by contrast, would have afforded "the real possibility of an obviously useful line of defence". O'Donnell J. sets out his view of the applicable principles in paragraph 46 of his judgment as follows:

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

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

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

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

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

8. I do not see any real disagreement as to how the trial judge determining an issue such as this should proceed, and I agree with all of the foregoing statements of principle. I also agree with the step-by-step process proposed by the Chief Justice.

9. In order to explain my concerns as to the manner in which the general principles are to be applied in this case it is necessary to first examine the state of the evidence at the stage when the defence application was made.

10. The background, very briefly, was that the appellant Mr. C. was charged with one count of rape and one count of indecent assault against his niece A.U., whose mother was a sister of Mr. C. Both allegations date from 1971, when A.U. was 11 years old, and were said to have occurred while she and her family were staying with the appellant. A.U. made a statement to the Gardaí in 2004, and the appellant was arrested and questioned that year. The complainant's account as put to him in interview included reference to a woman who had been his partner in or around 1971, M.Cy., as being present at or involved in the events surrounding the rape. Mr. C. denied the allegations and told the gardaí that M.Cy. would verify what he said. He asserted that A.U. and her family had never stayed in his house. He also denied having made admissions in later years to his son C.C.

11. Charges were directed by the Director of Public Prosecutions in 2006. M.Cy. died in 2008. Mr. C. was arrested for the purpose of being charged in 2013 and the trial was held in 2016.

12. In looking at the evidence, it should be borne in mind that the case made by the defence was that M.Cy. could have given evidence capable of materially affecting the jury's decision in relation to two aspects of the prosecution case. The first aspect was the particular and unusual role ascribed to M.Cy. by the complainant in her account of the

rape, raising the possibility that M.Cy.'s evidence could have had a direct impact on the credibility of the complainant. The second related to a more peripheral issue – the defence submitted that M.Cy. might have partially contradicted the account given by the complainant, the complainant's brother and C.C. of a particular incident. This, it is contended, might have undermined C.C.'s evidence that the children were in the house, and also his evidence that his father had admitted to sexually assaulting A.U.

The evidence in the trial

13. Before the case was opened to the jury counsel for the prosecution explained the state of affairs to the trial judge, noting that there was "an obvious deficit" in the lack of availability of M.Cy. as a potential witness for either party and that this could give rise to concern as to the fairness of the proceedings. After some discussion between counsel and the judge as to a possibility of dealing with the matter as a preliminary issue, it was agreed by counsel for the appellant that both counts would stand or fall with reference to the question of prejudice owing to the unavailability of M.Cy., and that the issue would be best dealt with after the evidence was heard.

14. In her evidence the complainant A.U., who was brought up in England, described frequent holidays in Ireland during which she, her siblings and her mother generally stayed in caravans owned by her uncle the appellant. She also recalled that they stayed in his house the year she turned 11. The children slept on two mattresses in a bedroom. There was apparently an idea being discussed between the adults that the appellant would build a pub in the area and it would be run by M.Cy. and the complainant's mother.

15. A.U. described a sexual assault alleged to have occurred when she accompanied the appellant, another man and a young boy when they were out shooting or hunting in open fields. She described the location of this incident. She did not tell any person about it at the time.

16. Moving to the second incident, the complainant said that the adults had gone out one evening. She and the other children had been in bed but were woken by a big row and went to see what was happening. There was an argument going on between M.Cy. and Mr. C. The complainant's older cousin, Mr. C.'s eldest son C.C., was at the top of the stairs with a gun. Mr. C. was in his bedroom. C.C. was threatening to shoot his father. Asked if she was able to discern what was being said, A.U. said no, it was an argument between C.C. and his father. She thought it was something to do with M.Cy., something that had started in the pub. C.C. locked himself in the bathroom for a while and then the other adults calmed him down. Everything quietened down and the children were ushered back to bed.

17. Later, while the complainant was still awake, M.Cy. came into the room where the children slept and took A.U. to her uncle's bedroom. He was in bed and was naked. M.Cy. undressed the complainant and put her in the bed, then brushed her own hair and left. The appellant then raped A.U. She then went back to the other room. She made no complaint at the time, for fear of what would happen to her brothers and sisters.

18. In cross-examination it was put to the complainant that the rape and sexual assault did not occur. It was also put that her family had never stayed in her uncle's house, but only in the caravans he owned, and that he had never taken her shooting or hunting.

19. A.U.'s brother, who was one year older than her, gave evidence that the family had stayed in the appellant's house. He recalled the row, and said he saw C.C. on the landing with the shotgun. He believed it was to do with something that happened in the pub. C.C. had been with his father in the latter's bedroom, with the door locked. The witness went on to say that that the complainant had been in that bedroom with C.C. and Mr. C., and had been taken out of it.

20. In cross-examination the differences between this account of the incident and that given by A.U. were highlighted. It was also put to the witness that the family never stayed in the house when Mr. C. was there.

21. The next witness was the appellant's son C.C. His evidence was the subject of submissions and a ruling in advance of his testimony. To put this in context, it is necessary to say that the indictment as originally preferred against Mr. C. had contained charges relating to a number of complainants and had been severed. C.C. had made a statement in which he said that he had confronted his father about allegations made by three complainants, including A.U., and that Mr. C. had admitted the behaviour although tending to blame the victims. The prosecution proposed that counsel would, if permitted by the trial judge, speak briefly to C.C. to indicate that the evidence in this regard should be confined to A.U.'s allegations. Counsel also informed the trial judge that C.C.'s witness statement contained an account of a violent assault by the appellant on M.Cy. that, according to C.C., was the reason for his taking up the shotgun on the night described by the U. children. Again, it was not intended to adduce details in relation to that assault. Clearly, however, the prosecution wished to establish, having regard to the content of A.U.'s account, that there had been an occasion when there was a row that featured C.C. producing his father's shotgun.

22. Counsel for the defence indicated, in respect of the alleged admissions, that the entire conversation alleged to have occurred between Mr. C. and his son was in dispute, and he therefore could not consent to the witness being led. He also submitted that the defence would be very much hampered in any attempt to test the credibility of C.C.'s account, without running the risk that the witness would refer to the other two complainants. Accordingly, he submitted that the prosecution should not be permitted to adduce the evidence. Separately, he objected to C.C. giving any evidence as to the shotgun incident, on the basis that the statement dealing with this aspect had only been made after the commencement of the trial. Further, it was submitted that the evidence was grossly prejudicial. Counsel did not accept that it could be led without reference to the assault. Again, the argument was that the presence of the U. family in the house was in dispute, but that it would be extremely difficult to cross-examine C.C. and test his credibility without the risk that very damaging evidence might emerge.

23. The trial judge directed that counsel for the prosecution could speak with C.C. to caution him as to the parameters of his evidence on both matters.

24. C.C. gave evidence that the U. family had stayed in his father's house for some weeks when he was about 17 or 18. He was working with his father at the time and was living in his house. M.Cy. was also living there. He recalled that there was what he described as a "pretty serious" row one night. He was at the top of the stairs and took the gun from his father's room and loaded it, with the idea that he could get his father to leave the house. Then he heard the young U. children behind him, so he told them that he was "only messing" and put the gun down.

25. C.C. said that in "more recent years" he had visited his cousin A.U. in England. As a result of what she said to him, he went to see his father when he came back to Ireland. He told him that A.U. had said that Mr. C. had been sexually abusive towards her. Asked what Mr. C.'s reaction had been, C.C. said:

> *"Well, I was very surprised because I – he didn't deny that any – anything, and more or less said that it was her own fault."*

26. Asked what had been said after that, the witness said that a lot had been said. Because he had children himself he had suggested that Mr. C. should "stay clear of children", be "careful" and maybe get "some help". Mr. C. said that was not a problem, that it was all "in the past", but at some later point he met again with his son and had a letter of appointment to see a psychologist or some person like that.

27. C.C. was cross-examined about the presence of the U. family in the house and maintained the position that they had stayed for several weeks, and had a bedroom with mattresses on the floor.

28. In relation to the night of the row, he was asked why he got the gun. C.C. said that the row was "getting out of hand" and he thought he could stop "things" from escalating. He was asked "What things?" and said "Well, threats and…". Counsel again asked why he had taken the gun, and C.C. said that he had foolishly thought that it might help to stop the situation from escalating because it was getting very serious. Asked whether he had tried to intervene in the row, C.C. said that it would not have been safe to interfere with his father because he was trained in judo and karate. He had put away the gun, and as far as he was aware his father would not have known that he had taken it up.

29. Counsel asked why, if the row was downstairs, C.C. had gone up to the bedroom. He eventually said that the row was "pretty serious". Counsel said "All right?" and the witness responded "It wasn't like a verbal row".

30. After this counsel asked whether that was what made C.C. go to the bedroom for the gun, at which point the witness said "Well, the seriousness of it, yes, there was threats being made and there was someone being…" Counsel then said that he might as well "tell the jury" at that stage. C.C. asked the trial judge if he could answer, and she told him that

since he was being cross-examined he could. C.C. then said “They’re always pretty physical”, and that M.Cy. was on several occasions caught by the throat and pushed up against the wall; that she was trying to leave the house and that she was screaming. He had gone for the gun. Then M.Cy. and Mr. C. had moved beyond the glass partition in the hall, where C.C. could see only their silhouettes. The shouting continued. He noticed the children and put the gun down. C.C. again said that his father would not have been aware that he had had the gun.

31. Defence counsel pointed out the variations between this account of the shotgun incident and that of A.U. and her brother. C.C. accepted that they were different, and said that the other witnesses, or indeed he himself, could be mixing the night up with other events. There had been other nights when there were rows. However, he was clear that he was saying that he picked up a gun on a night when the U. children were there. It was put to him that the only time there had ever been an incident about a gun had been when his father arrived home on one occasion and had found his son messing with one of his guns. C.C. said that was totally incorrect.

32. Counsel subsequently moved on to the alleged admission by Mr. C., which was said to have been some 20 to 30 years later. Mr. C. married in or around 1991 and was living in a different location. It may be noted here that there was evidence that C.C. had helped to build his father’s new home, and he described fairly frequent contact between his own children and Mr. C.

33. Counsel asked C.C. whether he had been attracted to his father’s wife, to which there was a firmly negative response. He was then asked if there had been an occasion when he called to his father’s house and asked to have a private word with Mrs. C. He said that there had been a time when he called to the house and suggested to his father that Mrs. C. might need to know more about the accusation. His father said he had told her. C.C. asked if he objected to him explaining it himself. Mr. C. had said that he would go for a walk and come back when it was finished. C.C. said in evidence that he wanted to do this because he was not sure that his father had actually told his wife clearly about the accusation. He was worried that they might have been babysitting for friends.

34. Counsel then put it to the witness that while his father accepted that C.C. had once asked to have a private word with his wife, it had had nothing to do with sexual allegations because there had never been “any such discussion” between C.C. and Mr. C. The witness denied this. He said that Mrs. C. had been upset by the conversation. All he had been doing was making it clear that they should not be babysitting. He had been worried about this since the time Mr. C. had not denied the allegation. Counsel finished by formally repeating the assertion that there had been no such conversation.

35. The final witness in the prosecution case was the Garda officer who had interviewed Mr. C. in 2004. In summary, Mr. C. had denied having any contact with the U. children either in England or Ireland. When they came to Ireland they stayed with M.Cy., but he was living in a caravan at the time and was never in the house with them. He had never taken the children shooting. He denied that C.C. had ever threatened him with the gun. The

rape had not happened, and M.Cy. could verify that he was not in the house. He might have returned to M.Cy. in 1973 or 1975, to try to make things up with her. Asked if C.C. had confronted him with the accusation, he said that C.C. had visited and asked to have a private talk with his wife. C.C. subsequently said to him that he would have liked to have taken her home with him, but that his own wife might not like that. Mr. C. said he had not promised to stay away from children.

36. The *P.O'C* application was then moved. In the *voir dire*, the prosecution called some garda evidence as to the whereabouts of Mr. C. between 2004 and 2013, when he was arrested and charged. The defence called Mrs. C. on this aspect. A garda witness testified that he had made efforts to trace M.Cy., given that she was referred to in the witness statements. He said that he thought she had got married and changed her name, although he could not say when he discovered this. Eventually he had learned that she had died.

37. C.C. gave evidence that in the late 1990s he had gone to the United Kingdom and had met with the complainant's mother, another aunt and M.Cy. He told them that one of his sisters had made allegations against their father. Asked what guidance they had given, he said that the guidance was not to go to A.U. "They said it was all lies." With specific reference to M.Cy., he said that he believed that she was married and did not want her husband involved.

38. In submissions, counsel for the defence described M.Cy. as a person of central importance with particular reference to the rape allegation, in that she was named as a witness and seen to some extent as complicit in the rape. The only evidence that the court had as to her attitude was that Mr. C. had told the gardaí that she would verify his account, and that she had told C.C. that A.U.'s allegation was "all lies". Counsel submitted that evidence to this effect would undoubtedly have undermined the prosecution case and would have affected the credibility of A.U. to a significant extent in relation to the rape charge, with a significant collateral impact in relation to the indecent assault. Further, it was submitted that C.C. had placed M.Cy. at the heart of his account of the shotgun incident. In those circumstances the court was entitled to take the view that there was a reasonable possibility that M.Cy. would have contradicted his account. If so, that would have undermined his credibility in relation to the alleged verbal admission.

39. The defence also sought to rely, to a very much lesser extent, on the fact that A.U.'s mother was also deceased.

40. Counsel for the prosecution did not accept that the evidence established a view on M.Cy.'s part that A.U.'s allegations were lies. At the time when C.C. spoke to her and his aunts the only allegations that had been made came from the other complainants – A.U. had not yet come forward to the gardaí. Those other allegations had now been substantiated, in that Mr. C. had been convicted on the related charges, and were therefore not lies. More generally, it could not be said that M.Cy. would have given evidence that would have demonstrated that it was "impossible" or "improbable" that the offences had been committed. She might have denied that she had led A.U. into the bedroom, but that

would not have demonstrated that there was something "fanciful" about A.U.'s evidence. M.Cy.'s absence was "a mere lost opportunity", not the equivalent of lost records.

41. The trial judge agreed with the prosecution on the interpretation of the conversation between C.C. and the women. She ruled against the defence, holding that the absence of M.Cy. was "a lost opportunity", but that this was something that could happen in delayed or stale cases. She continued:

> *"We cannot speculate about what her evidence might have been, would it have been favourable to the prosecution or to the defence? And neither indeed can the jury speculate in relation to that. Whatever her evidence, I agree with the submission made by Mr Devally that it doesn't come close to the loss of a record which would show the improbability of the accused in the committing of the offence or the improbability, or similar to the improbability of a story that a nurse administering an injection when she had no authority to do so."*

The Court of Appeal

42. The Court observed that the absence of the complainant's mother could not possibly have provided a basis for stopping the trial. However, the situation in relation to M.Cy. was less clear-cut. She was relevant to the evidence about the argument that gave rise to the shotgun incident that provided the backdrop to the rape, and, more fundamentally, to the complainant's evidence about the rape.

43. The Court considered it unlikely that M.Cy. would have been called by the prosecution. There was a possibility that she would have been called by the defence but there must have been doubt as to whether she would have been a willing participant, given that she had married and made a new life for herself. The trial judge would have had to give her a self-incrimination warning. If she had contradicted the complainant's version she would have been cross-examined on the basis that she was, in effect, an accomplice. The judgment continues:

> *"Viewed in that light, the defence is seeking to halt the trial because of the unavailability of someone who was, on the complainant's account, an accomplice in this incident.*
>
> *"There is no doubt that at first sight the argument on behalf of the defence for stopping the trial is a powerful one. On A.U.'s account, M.C. was an eye witness to relevant matters and, in truth, much more than a bystander. If she gave evidence denying witnessing anything of the sort described and was convincing in that regard, that would be a very considerable assistance to the defence. However, if one considers what role she was likely to play at trial the significance of her absence is much less….*
>
> *The particular focus of attention has to be on the position of M.C. in trying to identify what role she could or would have played at trial. This question cannot be examined simply in the abstract but must rather be viewed holistically by reference to the evidence actually before the trial judge. To take the view that she would*

likely have been of significant assistance to the defence involves a number of major assumptions which appear unjustified having regard to the totality of the evidence."

44. In this latter regard the judgment refers to the evidence of the complainant's brother and of C.C., corroborating her testimony as to her family's stay in Mr. C.'s house and her account of the shotgun incident. There was also the evidence of the son as to his father's response when confronted with the allegations, which the Court saw as independent evidence which, if accepted, was strongly indicative of guilt. This, therefore, was not simply a case of an uncorroborated allegation. In the circumstances the absence of M.Cy. was a lost opportunity but not so gravely prejudicial as to have warranted halting the trial.

Discussion

45. It is important to bear in mind that the *P.O'C* jurisdiction differs from the standard consideration of an application for a direction. The whole point of the jurisdiction is that there will be cases where the prosecution has in fact presented evidence that should, by normal standards, go to the jury but where for some identified reason it is unfair to let the matter proceed. In the context of historic prosecutions, the unfairness may arise because the ability of the accused has been compromised by the lapse of time, to the point that he or she would not be receiving a fair trial.

46. In determining whether or not the defence has lost a useful line of defence, it seems to me to be essential to consider the whole of the case. That will include the prosecution case as actually made, where the application is made at the close of that case.

47. As I have said, I agree that the strength of the prosecution case is relevant to the decision as to whether the unavailability of particular evidence could be seen as rendering the trial unfair. There may be some cases, where the allegations concern events said to have happened in an institutional setting such as a hospital or a school, where the accused does not mount a direct challenge to the truthfulness of the complainant but says that, whatever happened, he or she was not involved. In that type of case, the defence may focus on an argument that missing staff records would have shown that, for example, the accused did not work nights, or carry out particular tasks, or work on a particular ward, or with a particular class, or that he or she was away on leave during the time covered by the allegations.

48. However, many cases involve a domestic setting. In such cases, it is likely that the purpose of most of the other evidence called by the prosecution will be to support the evidence of the complainant, by establishing consistency in respect of details that may be relevant but not central to the allegation. In such cases, the defence is far more likely to be asserting that the complainant is not telling the truth, and that a missing witness could have given evidence to support this position. Assessment of a claim of this nature has to involve consideration of the complainant's evidence.

49. I differ from both Clarke C.J. and O'Donnell J. in relation to their analysis of the treatment of the evidence in the instant case. In particular, I would largely, but not entirely, agree

with Clarke C.J (and thus disagree with O'Donnell J.) in relation to the consequences of the unavailability of M.Cy. However, I would attribute far greater significance than Clarke C.J. to the evidence of the admission of guilt.

The unavailability of M.C.

50. There can be no doubt about the proposition that if M.Cy. had been available to give evidence in the trial of Mr. C. her evidence would have been highly material in relation to the rape charge, whether she was called for the prosecution or the defence. The question here is whether there was a reasonable possibility that her absence amounted to the loss of a useful line of defence. It is accepted that any argument that it did must not be based on speculation. To borrow from the language generally used to explain the concept of reasonable doubt, a finding of a "reasonable" possibility must be based on reason. It will, therefore, require at least some evidential basis.

51. The defence relies for this purpose on C.C.'s evidence of his conversation with his aunts and M.Cy., and the view that he should not go to see A.U. because it was "all lies". The trial judge found that this comment could not have referred to A.U.'s allegations, because A.U. had not, at that stage, made any allegations. O'Donnell J. agrees with this analysis, and proceeds to suggest that even if it might be inferred that M.Cy. was concerned that A.U. would support the other complaints, the evidence was insufficiently clear-cut.

52. It seems to me that the evidence does indeed indicate a view on the part of M.Cy. that A.U. should not be believed in relation to allegations of sexual assaults made against Mr. C., and I would be inclined to consider that there was a reasonable possibility that she might have been of material assistance to the defence in respect of the rape charge. I would accept that other judges might well differ in relation to a piece of evidence that is somewhat sparse. It might be difficult to quarrel with a conclusion that the evidence was insufficiently unambiguous to support a finding that there was a reasonable possibility of a useful line of defence, provided that such a finding has that test as its focus. The fact is that the trial judge did not consider the matter in terms of a reasonable possibility, or a useful line of defence, but rather asked whether there was something to indicate that the absent witness could have shown that the guilt of the accused was "improbable". A ruling based on that incorrect analysis cannot, in my view, be bolstered by speculation as to the likely motivation for M.Cy.'s comments, or as to the likelihood that she would not want to give evidence or would have been exposed as an accomplice. Speculation cannot ground a finding that she would have assisted the defence, but nor is it legitimate to use speculative theories to defeat the defence argument.

53. However, in my view there is no basis for the argument that M.Cy. might have been of assistance in undermining the credibility of C.C. This submission was based on the possibility that she would deny that Mr. C. had ever been violent to her, giving rise to the possibility that the jury would therefore disbelieve him in relation to the admissions. This, I think, is pure speculation. There is simply no evidence to support it. Furthermore, it is entirely clear from the way that the trial ran, as summarised above, that the assault on M.Cy. was not part of the prosecution case. Nor was the evidence about it something that

was blurted out by the witness – if it had been, the trial judge might have found it appropriate to exercise her discretion to discharge the jury. What happened was that it was brought out in the course of cross-examination. I do not think that it is open to the defence to bring damaging evidence to light in cross-examination and to then claim that the trial is unfair because a missing witness might have rebutted it.

The evidence of the admission

54. The Chief Justice has referred to the judgment of Hardiman J. in *S.A. v. Director of Public Prosecutions* [2007] IESC 43. In that case, the Court was considering an application for an order of prohibition in respect of charges of buggery, attempted buggery and indecent assault, involving six male complainants and one female, that dated back to between 46 and 38 years earlier. The High Court had found that there was inordinate and unreasonable delay, but that on the evidence there was no particular prejudice to the defence.

55. Hardiman J. laid emphasis on the fact that lapse of time can cause acute prejudice to a person accused of a serious crime, and also stressed the principle that the right to a fair trial was superior to the community's right to prosecute. Having said that, he turned to the evidence that the applicant, when interviewed by the gardaí, had admitted to actions amounting to indecent assault while firmly denying buggery. Some of the admissions related to two specific complainants, while others were at least open to the interpretation that he conceded conduct of a similar nature with unnamed boys. There was no admission in relation to the female complainant.

56. With reference to this evidence, Hardiman J. said the admissions were a significant factor "in the present case". He went on:

> *"16. Admissions, depending on their context, may vary greatly in their significance on an application like this. An unrecorded and disputed allegation may be of little or no significance unless its terms or context make it very compelling. A disputed allegation of admissions to Gardai will normally be verified by recording: an omission to record will call for explanation. However, in the present case the admissions do not appear to have been denied or glossed in any way so that it seems reasonable to take them at face value.*
>
> *17. On that basis, there are admissions to misbehaviour with two specified boys and with others unnamed. There are also admissions to a propensity to behave in a particular way "in moments of weakness".*
>
> *18. In that context, I would not regard the inability to recall specific children by name as gravely prejudicial to the applicant's prospects of a fair trial. It is perfectly clear from the undisputed verbal admissions that the applicant has positive memories of behaving in the manner indicated, to the point at which he indicated that he was prepared to accept the truth of the allegations made. Equally, of course, he may be in a position to rely on the admissions made by him to support the credibility of his*

denial of buggery. The very vehemence of these denials is indicative of a strong subjective memory for what did and did not occur.

19. To look at these admissions from another point of view, it would in my opinion be extraordinary to prohibit a trial in circumstances where the defendant admits a significant amount of behaviour of a criminal nature…

20. In the circumstances of this case there is no need to consider what the position would be in the absence of the admissions referred to, and I expressly refrain from doing so. I hope it is clear from what is said that long lapse of time has the potential to cause great injustice and that this is a matter calling for the serious attention of the Courts when the judicial review jurisdiction is invoked. I also wish to make it clear that this is a case of ***undisputed*** *admissions and cannot be regarded as a useful precedent in circumstances where alleged admissions are hotly disputed and not independently verified."*

57. It seems to me that there are several features of this case that require to be emphasised. Firstly, the matter before the court was an application for prohibition, dealt with on affidavit. A decision in proceedings of this nature is quite different to the decision that the trial judge is asked to make in a *P.O'C* application, made after the evidence in the case has been heard. Secondly, it seems to me clear that the references to "unrecorded" or "unverified" admissions are made in the context of the obligation of investigating gardaí to record everything said by a suspect in interview. I am not convinced that the Court had in mind admissions made to a family member, where no such obligation arises. I am still less convinced that it was intended to import into the *trial* context a general distinction between "verified" and "unverified" admissions. Such a distinction might well go to the weight or even admissibility of the evidence in a particular case, especially if the admissions are alleged to have been made to gardaí and were not duly recorded. However, there is no legal principle according to which an admission made by one person to another, not recorded or witnessed by any third person, has a different legal status. (This observation is not, of course, intended to affect the situation that might arise in respect of a prosecution that depends upon an uncorroborated confession.)

58. Next, despite the emphasis on the undisputed nature of the admissions, the Court in *S.A.* clearly did not consider that it should differentiate between charges in respect of which there were specific admissions, charges in respect of which there were ambiguous admissions and charges in respect of which there were no admissions at all. The point of principle was that if there was evidence that the accused had actually admitted "a significant amount of behaviour of a criminal nature", it would be extraordinary to say that he could not be fairly tried for such behaviour. I agree with this proposition. It is almost self-evident that the argument that a trial would be unfair, because the accused cannot properly defend himself on a plea of "Not Guilty", loses all force if he has in fact admitted his guilt to a significant extent.

59. It is of course the case that alleged admissions can be successfully disputed at trial. In *S.A.*, Hardiman J. was dealing with evidence of admissions that had not been denied in

the affidavits, and he left open the question of what should happen in different circumstances. Again, however, it is necessary to stress that the Court in that case was dealing with an application for prohibition, heard on affidavit. By contrast, the point made in the judgments of this Court in relation to the jurisdiction to halt a trial on grounds of unfairness is that the trial judge, who has heard the evidence in the case as actually run, is in a better position to make a judgment on the fairness of the process than a judicial review judge furnished only with predictions about the trial.

60. Turning to the instant case, the first observation I would make is that while there was a challenge to the admissibility of the evidence of the admission, it was not made on the basis of any lack of recording, or the absence of an "independent" witness, but on the assertion that it would be unfair because of the risk that cross-examination would bring out the fact that other persons had made allegations. That submission was unsuccessful, and is not the subject of this appeal. I do not wish to be taken as critical of counsel in this regard – the defence case was both carefully and skilfully made. The fact is that an admissibility argument based on the lack of recording or independent verification could not have succeeded. Admissions against interest have always been admissible in principle as an exception to the hearsay rule, and there has never been requirement for more than one witness to such admissions.

61. Secondly, it is a fact that while the defence formally maintained the position that the alleged admissions were denied, there was no evidence in the trial to contradict that of C.C. This is not a question of drawing improper inferences from the fact that the accused did not give evidence – I am simply pointing out that uncontradicted evidence is more likely to be accepted by a jury. Furthermore, I think that it is highly significant that while the only suggested explanation for fabrication on the part of C.C. was to do with some alleged attraction on his part to Mr. C.'s wife, she was not called to deny his account of telling her about the accusations. She was certainly available, given that she was called in the *voir dire* to deal with a different issue.

62. Once the evidence was admitted, it was part of the case. In this particular case, it clearly could not have grounded a conviction on its own, given the highly non-specific nature of the words attributed to the appellant. However, equally clearly, it could be seen as strong corroboration of the complainant's account. Evidence of an unforced admission of sexual abuse, made to a family member a very long time after the time of the alleged offences, is likely to have a powerful impact if the jury believes it. Ordinarily its acceptance would be a matter entirely reserved for the jury, and any comment from the trial judge indicating a view as to its credibility would generally be seen as highly undesirable. The question then is whether the trial judge should take a different perspective when considering whether the trial is unfair.

63. In my view, the evaluation of the strength of the prosecution case as part of this assessment does not mean that the trial judge should categorise evidence in a particular fashion that does not apply to any other aspect of the trial process. There is no legal principle that admissions made by one private individual to another are to be categorised

as of lesser value or credibility than a statement made in front of several witnesses – this can only go to weight. The central issue to be considered is the potential impact of the missing witness or evidence – firstly, is there a reasonable evidential basis for thinking that the witness (or the documents or object, as the case may be) would have provided or supported a useful line of defence? Secondly, what might the effect of the evidence reasonably be thought to be, having regard to the prosecution evidence? That is where the consideration of the strength of the prosecution case comes in.

64. If the *P.O'C* application is made, as in this case, after the close of the prosecution case then all of the evidence adduced by the prosecution and admitted by the trial judge will, unless the application is successful, be before the jury in the normal way. In charging the jury, the trial judge will not normally tell them that some evidence is strong or weak. The assessment of strength and weakness, as far as the issue now before the Court is concerned, must therefore be correlated to the assessment of the potential impact of the missing evidence.

65. A case may be considered to be strong if, for example, the missing evidence could have no impact on the evidence given by the complainant. It may still be considered strong if the missing evidence might be thought to affect some part of the complainant's evidence but there is corroboration in the technical sense – that is, evidence independent of the evidence of the complainant that implicates the accused in the commission of the offence – where there is no reasonable possibility that such corroborative evidence would be affected by anything that the missing witness might have said. The case may be less strong if there is no corroboration, but merely evidence that supports the complainant in relation to details that are not central to the issue of guilt, and there is some reason to suppose that the missing witness might have affected some material part of the evidence. A case may be considered weak if it depends entirely on the uncorroborated evidence of a complainant and there is a reasonable possibility that the missing witness would have been able to give evidence that could have had a material impact on the credibility of that evidence.

66. Again, I stress that this analysis is not the same as that required in an application for a direction.

67. In carrying out this assessment, however, the trial judge is not, in my view, called upon or entitled to form any view as to whether or not a particular piece of admissible evidence already given in the case should be believed by the jury. If, in the normal course of events, particular evidence of admissions would go to the jury without any suggestion of infirmity, and if that evidence was capable of being seen as corroborative of the complainant's testimony, I can see no basis for the proposition that it should be seen in a different light for the purposes of the *P.O'C* exercise.

68. In the instant case, there was supportive evidence on a range of issues raised in cross-examination, such as the presence of the complainant and her siblings in the house, and the occurrence of a row during which C.C. produced the shotgun. More significantly, in my view, there was corroboration in the form of clear and effectively unchallenged evidence

of an admission of criminal behaviour against the complainant. Such evidence is sufficient to dispose of the claim that the appellant was unable to defend himself against the charges.

69. In the circumstances I would dismiss the appeal.