THE COURT OF APPEAL

Edwards J.
Whelan J.
Kennedy J.

Neutral Citation Number: [2020] IECA 6

Record No: 2019/92

A.T.

APPLICANT/RESPONDENT

-AND-

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT/APPELLANT

JUDGMENT of Mr. Justice Edwards delivered on the 24th day of January 2020.

Introduction

1. For convenience, it is proposed to refer to Mr A.T. hereinafter simply as "the respondent", and to the Director of Public Prosecutions simply as "the appellant".

2. This is an appeal from the judgment and order of the High Court (Simons J.) of the 1st of February 2019 prohibiting the appellant, her servants or agents, from further prosecuting the criminal proceedings entitled *"The People (at the suit of the Director of Public Prosecutions) v A.T.* [full name redacted] , *Bill No CCDP 0035/2018*" currently pending before the Central Criminal Court and comprising thirty seven charges; and also from relevant ancillary orders.

Background to the matter

3. The respondent stood indicted in the Central Criminal Court with one count of rape and with thirty-six counts of sexual assault in respect of the complainant, which he is alleged to have committed over a three-year period between the 1st of March 1976 and the 28th of February 1979. The complainant, the younger sister of his wife, was aged nine years when the first incident is alleged to have occurred. The alleged offences were said to have occurred at a family home which consisted of a small three-bedroom house shared, inter alia, by the complainant and the respondent. Also resident at that address during the period in question were the respondent's wife "AB" (i.e., a sibling of the complainant); two other siblings of the complainant (a sister "CD", and a brother "EF" who is now deceased); two infant children of the respondent and his wife, "GH" and "IJ", respectively; the respondent's in-laws (Mr) "KL" and (Mrs) "MN" respectively (i.e., AB's parents, both of whom are now deceased), and "OP" a grandmother (also now deceased) of the complainant and her siblings, making a total of ten people.

4. The complainant made a statement to gardaí on the 8th of December 2016, alleging that she was sexually abused by the respondent in the said family home on an almost daily basis, certainly at least a couple of times a week, during the relevant period.

5. Following this complaint, the respondent was charged; and on the 29th of January 2018 he was sent forward to the Central Criminal Court for trial. He appeared there on the 12th of March 2018, and the 11th February 2019 was fixed as the date for the commencement of his trial. However, on the 25th of June 2018 he sought and was granted leave to seek to prohibit his trial by way of judicial review.

6. The Book of Evidence on foot of which the respondent was sent forward for trial contains the statements of four witnesses.

7. The statement of witness no 1 on the Book of Evidence represents a lengthy and detailed statement of the complainant describing how she was the victim of persistent sexual abuse by the respondent in the period at issue, as well as describing a single occasion on which she claims to have been raped by the respondent. The complainant's statement in the Book of Evidence is a composite of a number of separate and shorter statements made by the complainant to An Garda Síochána.

8. The statement of witness no 2 is from a medical practitioner to whom the complainant allegedly made a disclosure about being abused by the respondent.

9. The statement of witness no 3 is by the complainant's sibling CD. In her statement CD describes, inter alia, an incident in 1978 when the respondent is alleged to have grabbed her breasts on an occasion when she was walking from the kitchen to the front sitting room of the family home. CD maintains that on the evening of the same day she told her mother MN what the respondent had done to her. CD also relates, *inter alia*, that the complainant informed her, when she (i.e., the complainant) was 16, that the respondent had tried to sexually assault her on an occasion when she was babysitting; and further describes another occasion in 2014, when their mother (i.e., MN) was ill in hospital, during which the complainant disclosed to her that she had been sexually assaulted and raped by the respondent.

10. The fourth and final statement on the Book of Evidence is a statement of the principal investigating Garda, who was involved in the taking of the statements from the complainant which comprise her composite statement as included in the Book of Evidence. Her statement also covers the interviewing of the respondent and exhibits a memorandum of interview with him. In that interview the respondent denies all of the complainant's allegations, and specifically that he raped or sexually assaulted her at any time. He acknowledges one occasion on which he had sexual intercourse with the complainant in 1983 but maintains that that was consensual.

11. In seeking prohibition, the respondent alleged inordinate and inexcusable delay and contended that he has been generally and specifically prejudiced to the extent that his prosecution constituted an abuse of process and a breach of his right to be tried in due

course of law. He suggested that due to the deaths over the years of several family members, including both of his parents-in-law, the grandmother, and a brother of the complainant, who might otherwise have been available to give evidence on his behalf, and in that event, who may have had something pertinent to say, there was a real risk of an unfair trial occurring at this remove.

12. In particular, in an affidavit sworn by him on the 22nd of June 2018 grounding his application for prohibition he asserted the following (with names redacted for the purposes of this judgment):

"Ms. OP (my wife's grandmother)

17. I say that OP is now deceased, having passed away on 9 January 1983. I say that she was, at the relevant time, sharing a bedroom with the complainant and would have been a critical witness. OP had a very close relationship with the complainant and I believe that the complainant would have informed her if she had, in fact, been abused by me. She would also have been able to confirm that the complainant was in fact abused by her uncle QR and which abuse was disclosed and upon such disclosure, KL ordered him out of the house. OP would also have been able to confirm that I was never alone in the house of the complainant and certainly could not have abused the complainant as alleged with other people in the house and on a daily basis without such matters coming to her attention.

Mr. EF (my brother-in-law)

18. I say that EF is now deceased, having passed away on 29 August 1996. EF was an extremely violent criminal who suffered with a heroin addiction and once tried to kill his father. He died on the run for armed robbery. I say that the complainant also had a very close relationship with him and I am certain that if she was being abused as alleged, that she would have informed him so that he would 'sort me out'.

Mr. KL (my father-in-law)

19. I say that KL is now deceased, having passed away on 15 February 2006. KL would have been able to confirm that I, in fact, had a very good relationship with KL and MN and he would also have been able to confirm that I was never alone in the house with the complainant and certainly could not have abused the complainant as alleged with other people in the house and on a daily basis without such matters coming to his attention.

Mrs. MN (my mother-in-law)

20. I say that MN is now deceased, having passed away on one June 2015. I believe that she would have been the most important witness in this case who is not available to me. She would have been able to confirm that no allegation about me grabbing CDs breasts in 1978 ever occurred. She would have been able to confirm

that I was never alone in the house with the complainant and that same simply could not have arisen given the persons living there at the time and my own work schedule.

21. Further to the above, I say that as a result of the passage of time I am not able to rebut specific allegations by reference to my then work schedule at which point in time I was a barman in [a named pub]."

13. The appellant opposed the grant of prohibition, or any relief, submitting, *inter alia*, that prohibition was an "exceptional relief" and that the circumstances of the respondent's case did not warrant the High Court granting it; and that the issues raised by the respondent were more appropriate for the consideration, ruling and directions of the Judge of the High Court who might be assigned to preside over the respondent's trial in the Central Criminal Court. The appellant's opposition was grounded on an affidavit sworn by the principal investigating garda which joined issue with a number of factual assertions in the respondents grounding affidavit. The respondent subsequently filed a supplementary affidavit objecting to the contents of the appellant's replying affidavit as representing the recounting second hand of commentary on the respondent's principal affidavit by the complainant (in circumstances where the complainant had not sworn any affidavit herself), and asserting that the garda's affidavit contained *"a number of errors or misrepresentations"*.

14. As previously indicated, the High Court granted prohibition. The appellant now appeals against that decision.

The High Court's Judgment

15. Following introductory remarks the High Court judge considered the legal test governing an application to prohibit criminal proceedings on the grounds of delay. He noted that the parties were in broad agreement that the test was that laid down by the Supreme Court in *SH v Director of Public Prosecutions* [2006] 3 IR 575, namely:

> *"whether there is a real or serious risk that the applicant, by reason of 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."*

Further, that:

> *"…inquiry as to the reasons for the delay in making a complaint need no longer be made."*

Rather:

> *"The inquiry which should be made is whether the degree of prejudice is such as to give rise to a real or serious risk of an unfair trial. The factors of prejudice, if any, will depend upon the circumstances of the case."*

Further:

"The court does not exclude wholly exceptional circumstances where it would be unfair or unjust to put an accused on trial"

16. The High Court judge noted that with respect to the last dictum cited, Sheehan J in *B.S. v Director of Public Prosecutions* [2017] IECA 342, had cited with ostensible approval certain views of Professor Thomas O'Malley concerning it, namely that the Supreme Court's judgment may be interpreted as suggesting that if the circumstances are sufficiently exceptional and compelling, a trial may be prohibited even if the applicant is unable to point to any specific factors demonstrating or indicating the risk of an unfair trial. Sheehan J. had gone on to suggest that it might be instructive to consider how fair trial rights had been viewed on the civil side, citing *Cassidy v The Provincialate* [2015] IECA 74. The High Court's judgment records that counsel for the respondent had sought to develop this theme, but that the High Court judge had thought that the drawing of analogies with civil law judgments – such as *Cassidy* – carried more danger than benefit.

17. The High Court's judgment then refers to the fact that it had been referred to a number of authorities emphasising the importance of considering whether there is any objective evidence, i.e., so called "islands of fact", which might lessen the risk of a trial being reduced to a swearing match between an accused and his or her accuser. The High Court judge quoted well-known passages from the dissenting judgment of Hardiman J. in *J.O'C v Director of Public Prosecutions* [2000] 3 I.R. 478 (at 504 and 522 of the report, respectively), both with respect to the difficulties associated with defending an old criminal case in the absence of documentary, physical or forensic evidence; and also with respect to the practical difficulties which would arise from the fact that an important witness (in that case the wife of the accused) had since died. Simons J. further opined that *"these passages have a resonance with the present case in that it too concerns an allegation of child sexual abuse said to have occurred within a family home"*.

18. The judgment then proceeds to consider submissions by counsel for the appellant, and two judgments to which the court was referred by said counsel, namely *P.H. v Director of Public Prosecutions* [2018] IEHC 329 and *M.H. v Director of Public Prosecutions* [2018] IEHC 560. The High Court judge concluded that both were distinguishable on their facts.

19. The next section of the High Court's judgment is entitled "*THE ALLEGED OFFENCES*". It reviews the case against the respondent as presented in the Book of Evidence, and with respect to the statement of the complainant the High Court judge remarked that:

"23. It is sufficient for the purposes of these judicial review proceedings to note the following aspects of the statement.

(i). The complainant indicates that at the time of the alleged offences she had been sharing a bedroom with her grandmother.

(ii). The complainant alleges that the sexual abuse occurred on an almost daily basis, and at least a couple of times a week. The abuse ranged from the applicant grabbing the complainant's breast and vagina through her clothes,

to inserting his fingers into the complainant's vagina. It is alleged that the applicant raped the complainant on one occasion by penetrating her with his penis.

(iii). It is also indicated in the statement that, on occasions, the abuse took place when there were other family members present in the house. The complainant states that "[The Accused] had to be careful and clever because there were always people in the house", and that "If there was no one in the house the assaults were longer".

(iv). The alleged offences are all said to have taken place in the family home. (The complainant does make an allegation in relation to an event when she was older, and the applicant had moved out of the family home, but this event is not included in the Statement of Charges)."

20. The next section of the judgment was concerned with an application for an extension of time by the respondent for the purposes of Order 84 RSC. The High Court was ultimately disposed to grant the extension sought. While the appellant's Notice of Appeal indicated that the entirety of the decision of the court below was being appealed against, no arguments were advanced to us at the hearing of the appeal seeking to contest the correctness of the High Court's decision on this aspect of the matter.

21. The judgment then moves to consider the "PREJUDICE ALLEGED", and considers the affidavit evidence in that regard, including the averments of the respondent quoted earlier at paragraph 12 of this judgment, and the replying affidavit on behalf of the appellant, sworn by the principal investigating garda, previously alluded to at paragraph 13 above. The High Court judge comments that the structure of the replying affidavit is unsatisfactory in that it draws no distinction between matters of which the deponent has personal knowledge and matters received as hearsay from the complainant where *"the affidavit was simply rehearsing information provided by the complainant"*. In circumstances where the garda's affidavit appeared to be *"almost all hearsay"* he regarded it as unnecessary to have to engage with the issue of to what extent (given the presumption of innocence) should an accused person be required to give evidence in order to seek the prohibition of a criminal trial in the context of judicial review proceedings.

22. In the curial section of the High Court's judgment, entitled "DISCUSSION AND DECISION", Simons J. concluded:

"44. The alleged offences are said to have occurred some forty years ago. Whereas, of course, this length of time is not in itself a reason for granting an order of prohibition, it is something to be considered in assessing the question of prejudice, and, in particular, the likely recollection of any surviving witnesses.

45. The principal prejudice alleged by the Applicant is the loss of potential witnesses, namely the four members of the extended family who have since deceased. For

reasons similar to those outlined by Hardiman J. in his judgment in J. O'C. v. Director of Public Prosecutions (discussed at paragraphs 13 and 14 above), I think that the loss of these witnesses does give rise to a real risk of an unfair trial. There are several aspects of the alleged offences which indicate that the evidence from other members of the extended household could have had a significant bearing on the ultimate outcome of the criminal proceedings. The alleged offences are all said to have taken place within the family home; to have taken place on a very regular basis (at least a couple of times a week); and to have occurred at a time when the three-bedroom house was being lived in by ten people. The witnesses would have been in a position to give general evidence as to the day-to-day running of the household, and this would be relevant to the question of whether sexual abuse on the scale alleged by the Complainant could have taken place without their noticing.

46. *If the prosecution had been unable to lead evidence from the other members of the household to the effect that they had witnessed suspicious activity, then this is something which a jury might have attached weight to. Similarly, if the prosecution had been unable to establish that the Complainant had disclosed the ongoing sexual abuse to any other member of the household, then this too is something which might go to the credibility of the Complainant in the eyes of a jury. This is especially so where three of the deceased, namely the Complainant's grandmother, father and mother, are persons whom a jury might think the Complainant would have been likely to confide in.*

47. *As discussed above, the evidence of the father and mother would also potentially be relevant to the Complainant's sister's allegation that the Applicant made an inappropriate sexual advance towards her. The sister has stated that she reported this to her mother at the time.*

48. *Of course, it is possible that the witnesses would have given evidence to contrary effect and this would have been of assistance to the prosecution. The point is, however, that the death of these witnesses means that these matters cannot now be explored in evidence.*

49. *The unfortunate fact of the matter is that a trial of this type will ultimately reduce itself to a form of swearing match between the Applicant and the Complainant. The absence of corroborating witnesses, one way or the other, is a real difficulty. I do not think that a trial could fairly be held in the circumstances.*

50. *Given the fact that the alleged offences occurred exclusively within the family home, alibi evidence would also be extremely important. The Applicant may, for example, wish to establish that he was away from the family home at particular times of day or night when the alleged abuse is said to have occurred. Given the extreme lapse of time, it will be difficult if not impossible for the Applicant to adduce witnesses to this effect now. Moreover, there are unlikely to be any documentary evidence, e.g. in terms of, wage slips or employee records, which*

might otherwise confirm his presence or absence from the home. I think that there is a real risk of prejudice for this reason too."

23. Simons J. then added:

"51. It has been argued on behalf of the DPP that the fact that the criminal trial will take place before another judge of the High Court is something that I should bear in mind in the exercise of my discretion in judicial review. Of course, I have great reluctance to trespass upon a criminal prosecution before a court of co-ordinate jurisdiction. However, the fact remains that the application for prohibition has been made in the context of these judicial review proceedings. I must determine that application: I cannot simply wash my hands of the matter and leave it over to the trial judge.

52. As I read the authorities, it appears that what must be considered in determining an application for prohibition is whether the trial judge will be able to ameliorate any risk of an unfair trial by giving warnings to the jury. Whereas it is true, of course, that the trial judge might ultimately withdraw the issue from the jury or dismiss the case by way of a direction, I do not think that absolves me from my obligation in judicial review proceedings to seek to do what I can to ensure that there is a fair trial. On the facts of the present case, given the particular circumstances including the great length of delay, and the death of the four witnesses, I think that there is a real risk of an unfair trial. I do not think that there is any warning which the trial judge could formulate to ensure a fair trial. It would not be enough simply to warn on the danger of convicting on uncorroborated evidence. The trial would be reduced to a swearing match between the Complainant and the Applicant.

53. Accordingly, I propose to make an order prohibiting the Director of Public Prosecutions taking any further steps in the criminal proceedings."

The Grounds of Appeal

24. In her Notice of Appeal the appellant complains that:

(i) The High Court Judge erred in law in that he misinterpreted and/or misapplied established legal principles and precedent in prohibiting the appellant from taking any further steps in the criminal proceedings against the respondent.

(ii) Without prejudice to the foregoing, the High Court judge erred in law in his determination that the facts advanced by the respondent were sufficient to meet the threshold of exceptionality that is required as a matter of law to justify relief by way of prohibition.

(iii) Without prejudice to the foregoing, the High Court erred in granting relief by way of prohibition in circumstances where the respondent did not adequately or at all engage with the facts of the prosecution case and where the prejudice that he alleged was speculative.

(iv) The judge of the High Court further or otherwise erred in that he:

a) *failed or had inadequate regard to the extraordinary nature of relief by way of prohibition:* D v Director of Public Prosecutions *[1994] 2 IR 465 et al;*

b) *misinterpreted and or misapplied case law and precedent including, but not limited to, the decision of the Supreme Court in* SH v Director of Public Prosecutions *[2006] 3 IR 575;*

c) *Had insufficient regard to the majority decision of the Supreme Court in* J.O'C v Director of Public Prosecutions *[2000] 3 I.R. 478;*

d) *failed to adequately distinguish the decision of this Honourable Court in* B.S. v Director of Public Prosecutions *[2017] IECA 342;*

e) *incorrectly distinguish the decision of the High Court in* M.H. v Director of Public Prosecutions *[2018] IEHC 560.*

(v) The High Court judge failed to have proper regard to sentence legal principles that require applicants for judicial review, including those who seek to prohibit criminal trials, even where they are accused, to engage with the proceedings and to adduce appropriate evidence.

(vi) In his determination the judge of the High Court failed to take appropriate judicial notice of the frequently duplicitous and secretive nature of sexual assaults and the judge further failed to properly appreciate that such formed part of the complaint in this case and the fact that the complainant in this case herself specifically cited that as being an aspect of the abuse she suffered.

(vii) The High Court judge incorrectly considered, found and, in his decision to grant prohibition, attached significance to, the finding that the jury might attach weight to the inability of the prosecution to lead evidence from the other members of the household to the effect that they had witness suspicious activity and/or that the complainant had disclosed the ongoing sexual abuse to any other member of the household, and that this might go to the credibility of the complainant in the eyes of the jury.

(viii) Without prejudice to the foregoing, such a finding is contradictory and/or invites speculation and/or in any event is negated by the judge's further determination that the witnesses might have given evidence to contrary effect that would have been of assistance to the prosecution. By reason of the Order of Prohibition, these matters cannot now be explored in evidence at trial, the appropriate forum.

(ix) Although Simons J. adverted to the panoply of powers available to the trial judge in the Central Criminal Court, up to and including a power to withdraw the prosecution case from the jury and to direct an acquittal, he appears to have been unduly

influenced by his perception that he was obliged in the judicial review to seek to do what he could to ensure a fair trial. He then fell into legal error in preventing any trial by way of prohibition, either on the basis that the trial would become a "swearing match" between the complainant and the respondent, or at all.

25. The appellant further contends in her Notice of Appeal that the relevant legal principles include:

(i). The Director of Public Prosecutions has the primary role in initiating a prosecution and a court should be slow to intervene: *AP v Director of Public Prosecutions* [2011] 1 IR 279. Here the High Court intervened and grant prohibition against the DPP in circumstances where that relief was not warranted and where the trial court was the more appropriate venue to determine the issues.

(ii). Prohibition is an exceptional remedy to be granted only in extraordinary circumstances where there is a real risk of an unfair trial that cannot be cured by appropriate rulings and directions. An applicant, (the respondent herein) bears the onus of proving same. *D v Director of Public Prosecutions* [1994] 2 IR 465, *Z v Director of Public Prosecutions* [1994] 2 IR 476 and *D.C. v Director of Public Prosecutions* [2005] 4 IR 281, et al.

(iii). A hypothesis that evidence might have been available from a now unavailable source and that that evidence might have been useful in defence is not sufficient. *H v DPP* (Unrep. CA 8th February 2019). There must be a "real" link between the evidence that could have been given by the unavailable witness and the facts in issue, or likely to be in issue at trial.

(iv). The facts of this case are unexceptional, and the issues should have been left the trial judge.

Submissions

The Appellant's Submissions

26. In written submissions, amplified at the oral hearing, the appellant has submitted that as the applicant in the judicial review proceedings the respondent was obliged to "engage with the facts" and to put forward real issues of prejudice, failing which a court ought not injunct a trial. Furthermore, allegations of prejudice so advanced, have to be considered in the context of the proposed prosecution evidence at the trial. A trial should only be prohibited if the applicant seeking that relief has established a real risk of an unfair trial, i.e. a trial the fairness of which cannot be secured by appropriate rulings and directions by the trial judge.

27. It was submitted that the following relevant facts can be drawn from the complainant's statements (with direct quotations in italics):

(i). The abuse started before the complainant's tenth birthday.

(ii). The respondent is alleged to have warned the complainant "*you needn't tell your nanna she would disown you*", all the time laughing.

(iii). The respondent sexually assaulted the complainant on a regular, even daily, basis.

(iv). "*He was always careful that no-one saw him*".

(v). He would call the complainant into a room and close the door behind them.

(vi). He said the complainant's sister "AB" (his wife) would never believe her "*and that he controlled her*".

(vii). "*He also said that no-one in my family especially my nanna would ever believe me*".

(viii). The sexual assaults "lasted minutes. He had to be careful and clever because there were always people in the house".

(ix). It might only last seconds, depending on who was nearby. If there was no-one else in the house the assaults were longer.

(x). The complainant was raped in February 1979. The house was quiet and no-one apart from him was at home. The complainant did not tell anyone about the assaults or that the respondent had raped her (until November/ December 2014).

(xi). Later when the complainant was babysitting for her sister and the applicant, he sexually assaulted her. She grabbed a poker and hit him over the back. Over the following four days the complainant told her sister "AB" (wife of the applicant) that the respondent had made a pass at her and she told her that he had put his hand up her skirt and that she had hit him with a poker. "AB" had no reaction.

28. The point was also made in submissions that of the members of the household living in the family home in the late 1970s, the respondent, the complainant and her two sisters, "AB" and "CD", are still alive and available to give evidence.

29. The appellant asks us to note that the respondent in his affidavit has sought to identify material evidence of which he has been deprived in the time that has elapsed since the offending behaviour in the late 1970s. His allegations, accompanied by the appellant's observations, can be summarised as follows:

(i). OP, the complainant's grandmother: The complainant does not assert that she told her grandmother about the assaults. Nevertheless, the respondent claims the deceased "would have been a critical witness" and that he believes the complainant would have informed her grandmother if in fact she had been abused by him. The appellant says that this is entirely speculative on his part and is entirely inconsistent with the complainant's recollection and with the reasons advanced by her for not informing anybody at the time. The appellant maintains that it is pure speculation as to what the grandmother might have said if she was alive,

particularly where the available evidence points to her not even knowing about the assaults.

(ii). The respondent claims that the complainant was abused by her uncle and that when this was disclosed the uncle was ordered out of the house. The appellant suggests that if this occurred, then presumably the respondent's wife can corroborate this evidence and that it is difficult to believe that the grandmother would have been the crucial witness in this regard.

(iii). It is further claimed the grandmother would have been able to confirm that the respondent "was never alone in the house with the complainant". The appellant suggests that this is an extraordinary assertion. She contends that it is highly unlikely that any witness, after a lapse of 40 years, would be able to state that an individual had never been alone in a house with another individual. His contention in that regard could reasonably be described as fanciful. The complainant has described the secretive nature of the alleged abuse and the appellant maintains that the respondent's suggestion that the evidence of OP might have been to the effect that he "could not have abused the complainant as alleged", is far-fetched.

(iv). According to the respondent EF, the respondent's brother-in-law, was a serious criminal whom he claims had a close relationship with the complainant and he is "certain" that if she was being abused as alleged that she would have informed him so that he would 'sort out' the respondent. The appellant submits that this is pure guesswork on his part and is inconsistent with the known dynamics of sexual abuse. The complainant has clearly stated that she did not inform anybody and that would include EF. The appellant maintains that in those circumstances it is difficult to see how EF could have 'sorted out' the respondent.

(v). KL (respondent's father-in-law). The respondent claims that he had a good relationship with KL and his wife MN, and that KL's non-availability means that he could not establish this. The appellant says that nobody is suggesting he did not have such a good relationship. On that account, therefore, the absence of KL is irrelevant. The respondent also suggests that KL and MN would have been able to confirm that he was never alone in the house with the complainant. Again, the appellant maintains that it is difficult to accept this contention, even at face value. The appellant says nobody could make that assertion at this remove. In any event, the assaults primarily took place (with the exception of the rape) when there were other people in the house. According to the appellant, why he would want to establish, therefore, that he had never been alone in the house with the complainant insofar as concerns the sexual assaults, is difficult to understand.

[It bears commenting upon that in so far as it is suggested by the appellant that no one is suggesting that the respondent did not have a good relationship with KL and MN (his in-laws), that is ostensibly not correct. The complainant suggests in terms that the respondent did not have a good relationship with her parents. In her statement in the

Book of Evidence she states, at one point, that her mother disliked the respondent, and at another point, that her parents "couldn't stand him".]

(vi). MN (mother-in-law). The respondent claims that MN would have been able to confirm that she had was not aware of any allegation that he grabbed the complainant's sister's breasts in 1978. The appellant suggests that this is a very curious statement for him to make. The complainant's sister "CD" claims that she was assaulted by him, and that she told her mother what had happened. The respondent claims, at paragraph 20 of his affidavit, that if MN were available to him, she would be able to confirm that no such allegation had been reported to her. The appellant maintains that the only basis of being able to make this assertion would be if MN had spoken to him about this prior to her death and had told him that she had received no such allegation. There is no suggestion that that happened and, the appellant submits, to assert that her evidence would be to the effect that no allegation had been made in circumstances where the respondent has no basis for making that assertion, seems fanciful. The appellant maintains that the very fact that without any supporting evidence the respondent claims his late mother-in-law would have confirmed a state of affairs in circumstances where he has no evidential basis for that assertion is a classic example of failing to engage with the facts.

(vii). The respondent also asserts that MN would be able to confirm that he had never been alone in the house with the complainant. However, the appellant suggests, in circumstances where the assaults allegedly took place when there were other people in the house, it is difficult to understand why he goes to such trouble to make out the assertion and to say that he is prejudiced when such alleged prejudice has little or no bearing on the circumstances in which the sexual assaults took place.

(viii). Although theoretically relevant to the allegation of rape, the appellant says it stretches credibility to suggest that over a period of several years there was simply no occasion when the complainant was in the house alone with the respondent. No witness at this remove could possibly corroborate that.

(ix). The respondent also talks about not being able to refer to his work schedule as a barman in a particular pub. The appellant observes, however, that it is difficult to see how that is relevant in the context of the allegations and the circumstances in which the alleged assaults were said to have taken place.

30. The appellant, in the course of her submissions, has referred us to various passages from *D v Director of Public Prosecutions* [1994] 2 IR 465;, *Z v Director of Public Prosecutions* [1994] 2 IR 476; *D.C. v Director of Public Prosecutions* [2005] 4 IR 281; *McFarlane v DPP* [2008] 4 IR 117; *AP v Director of Public Prosecutions* [2011] 1 IR 729; *Byrne v Director of Public Prosecutions* [2010] IESC 54; *Wall v Director of Public Prosecutions* [2013] 4 IR 309; and *Kearns v Director of Public Prosecutions* [2015] IESC 23, in support of the principles identified in her Notice of Appeal as being apposite.

31. We were also referred to *S.H. v Director of Public Prosecutions* [2006] 3 IR 575; *PT v Director of Public Prosecutions* [2008] 1 IR 701; *J.T. v Director of Public Prosecutions* [2008] IESC 20; *M.S. v. Director of Public Prosecutions* [2015] IEHC 84 and [2015] IECA 309, as illustrations of the application of appropriate test and the correct approach to be taken.

32. The appellant's submissions refer in detail to both *P.H. v Director of Public Prosecutions* [2018] IEHC 329 and *M.H. v Director of Public Prosecutions* [2018] IEHC 560, which the High Court judge had felt were distinguishable on their facts from the present case with the result that he did not find them to be of assistance. The appellant has submitted that these two cases contain all the relevant law, precedent and analysis necessary to determine the issued raised by the respondent herein, and that the analysis conducted and the conclusions reached in those cases should have been followed. Whilst it is true there were nine complainants in the *PH* case and there is only one complainant here, there are many offences alleged here rather than one specific occasion in the far distant past. It was submitted that while in *MH*, as Simons J. correctly pointed out, there was a generalised plea of prejudice in respect of deceased witnesses, such plea was however rejected by McGrath J. and, the appellant submits, the present situation is not any different. In the present case, the claimed dependency upon deceased witnesses is, the appellant contends, a weak one.

33. The appellant's submissions further take issue with the correctness of views attributed to Professor Thomas O' Malley, which were quoted with approval by Sheehan J. in *BS v Director of Public Prosecutions*, in considering what the Supreme Court had had to say concerning wholly exceptional circumstances in *SH v Director of Public Prosecutions*. These views were referenced by the trial judge as noted earlier in this judgment, as being relied upon by the respondent. The appellant's submission is noted. However, to the extent that there may be a controversy it does not seem to me to be central to any issue that has to be decided in this appeal.

34. The appellant also draws our attention to certain remarks from the judgments of Keane C.J., and of Murphy J., in *J O'C v Director of Public Prosecutions*, who represented the majority on the Supreme Court, in circumstances where she suggests that undue reliance was placed by the trial judge on the dissenting judgment of Hardiman J.

35. Finally, the appellant joins issue with the findings of Simons J., particularly those relating to prejudice. In particular, it is contended (inter alia) that:

> "At the beginning of paragraph 45 of his judgement, Simons J. outlines his findings in respect of prejudice, however, these are fairly general in nature and do not relate to any specific prejudice suffered by the Respondent. At paragraphs 45 and 46, he does not refer to the fact that the vast majority of the assaults are alleged to have taken place while other members of the household were in the house. When Simons J. postulates that witnesses might have been able to give evidence as to whether they could have been present in the house whilst sexual abuse of the scale alleged was taking place, without their knowledge, he fails to take judicial

notice that it has been long since accepted by the courts that sexual assaults such as those complained of here are frequently duplicitous and secretive in nature and/or the judge failed to have regard to the fact that the complainant herself specifically stated that to be an aspect of the abuse she suffered.

Simons J. further states at paragraph 46:

> "Similarly, if the prosecution had been unable to establish that the complainant had disclosed the ongoing sexual abuse to any other member of the household, then this too is something which might go to the credibility of the complainant in the eyes of the jury."
>
> The rationale for this observation is not very clear. The complainant states that she did not disclose the ongoing sexual abuse to any other members of the household at the time. Accordingly, the prosecution should have little difficulty establishing on a prima facie basis that the complainant had not done so and it is difficult to follow the judge's observations in that regard. The judge then engages in somewhat curious speculation stating that the complainant's grandmother, father and mother are "persons whom a jury might think the complainant would have been likely to confide in". The complainant does not claim to have confided in them and a trial judge could hardly be advising a jury to speculate that the complainant was lying because she would have been likely to confide in individuals in circumstances where she has said that she was so distressed and upset that she had not confided in those individuals."

36. The appellant's submissions conclude with the contentions that Prohibition is an exceptional remedy to be granted only in extraordinary circumstances where there is a real risk of an unfair trial, that cannot be cured by appropriate rulings and directions. The central issue in this case, per the appellant, is whether the respondent established a real risk of an unfair trial, i.e. a trial the unfairness of which cannot be avoided by appropriate rulings and directions on the part of the trial judge. In that regard, notwithstanding his observation that the trial judge might ultimately withdraw the issue from the jury or dismiss the case by way of a direction, Simons J. felt compelled to intervene on the basis that in the judicial review proceedings he was obliged *"to seek to do what I can to ensure that there is a fair trial"* and, in that respect he was further unduly influenced by his concern that the trial might be reduced to a *"swearing match"* between the complainant and the respondent. In the appellant's submission the respondent did not discharge the onus that rested upon him and he did not and he has not demonstrated the exceptional circumstances required to warrant the prohibition of his trial. All of the issues raised by him can be adequately addressed by the trial judge, and the High Court erred in its determination.

The Respondent's Submissions

37. The respondent has submitted that in a case of the antiquity of this one, where the respondent's only defence can be one of bare denial, and the case being absent islands of fact upon which the complainant's allegation can be tested, there exists a very real and

substantial risk that the respondent would not receive a fair trial. It was therefore submitted that on the facts of this case, the delay is so excessive as to deprive the respondent of the ability to defend himself. It was submitted that the prejudice which has arisen is not such as can be properly dealt with by the trial judge as the lacunae in evidence could only lead to speculation. Accordingly, the respondent contends, the prejudice suffered by him is unavoidable and incurable.

38. The respondent points out that at the time of the alleged abuse there were ten people residing in the house, five of whom were children (the complainant, her sister, her brother and the respondent's two children) and five adults (the respondent, his wife, his wife's mother and the respondent's wife's grandmother). The respondent has averred that upon his return from London in early 1976, he moved in with his wife's family who were living in a small three-bedroom house with a small sitting room, in which conditions were extremely cramped. The respondent has averred that by moving his own family in with his wife's family, this caused significant resentment from his wife's sister (the complainant) and her other sister. This rift is apparent on the book of evidence - the complainant saying that her mother disliked the respondent and that her parents "couldn't stand him".

39. The further point is made that this is a case in which the allegations arose more than 40 years ago. As already stated the offences are said to have occurred in the family home on a very regular basis and at a time when the property in question, a small three-bedroom house, was being lived in by ten people. This evidence would have been relevant to the question of whether "sexual abuse on the scale alleged by the complainant could have taken place without their noticing". The offences alleged against the appellant span a period of three years, the oldest dating back some forty-three years. It is contended that most of the allegations lack any specificity and almost all lack any reference to collateral facts, the absence of which denies the respondent the opportunity to test the credibility or reliability of the complainant's account.

40. We were referred passages from the judgment of Hardiman J. in *P. O'C v Director of Public Prosecutions* [2000] 3 IR 87 at 118, and again to his dissenting judgment in *J. O'C v Director of Public Prosecutions* (cited earlier), and to *M.U. v Director of Public Prosecutions* [2010] IEHC 156, to emphasise the importance of "islands of fact", of which there are said to be none in this case.

41. We were also referred to *B.S. v Director of Public Prosecutions* (also cited earlier) where, having noted the injunction of Hardiman J in *McFarlane v DPP* [2006] IESC 11 that

> *"In order to demonstrate that risk (of an unfair trial) there is obviously a need for an applicant to engage in a specific way with the evidence actually available so as to make the risk apparent… This is not a burdensome onus of proof: what is in question, after all, is the demonstration of a real risk, as opposed to an established certainty, or even probability of an unfair trial"*

Sheehan J. remarked:

"17. Whether or not the appellant has sufficiently engaged with the evidence and established prejudice in accordance with the dicta of O' Malley J. in S.O'C v. The Director of Public Prosecutions & Ors., the fact remains that the appellant is undoubtedly disadvantaged by not having the three deceased men available as potential witnesses to support his defence. This is particularly important in a case where credibility is likely to be the deciding factor. Again, while the complainant does not say she was present when the appellant ceased working for her father, a clear inference to be drawn from her statement is that the appellant was immediately dismissed because of what she had told her mother. The absence therefore of the complainant's father also disadvantages the appellant."

Sheehan J went to say:

"18. This is a case in which a trial, if it proceeds, will now take place 47 years after the alleged events. This is not a situation in which statements were taken at or near the time of the alleged offence nor is it a situation in which the defendant is responsible for the delay. In I.I. v J.J. [2012] IEHC. Hogan J giving judgement stated that in cases where, by reason of the passage of time, the evidence available has become eroded to the point that a jury is left to choose between two different narratives advanced by a plaintiff and the defendant, there is a real risk that justice will be put to the hazard."

42. Other cases to which we were referred by the respondent included *P.H. v Director of Public Prosecutions* (previously cited) and *M.C. v Director of Public Prosecutions* [2011] IEHC 378 and we have also had regard to these.

43. The respondent says that it should be noted that in the present case, on the complainant's statement, she says that she was abused in her own family home for a period of some 9 years (or some 3 years on the charges on the Book of Evidence). The alleged abuse occurred in circumstances where there were no witnesses to the alleged abuse and in circumstances where family members were often present in the house at the time. The appellant asserts that the trial judge failed to take judicial notice of the often duplicitous and secretive nature of sexual abuse. As has often been identified, there is nothing unusual in allegations of sexual abuse having occurred in private, and this fact simply shifts the focus of the defence to the testing of the complainant's credibility in respect of collateral matters. However the respondent says, in this case, unlike the cases to which the respondent has referred the court, he is unable to challenge the complainant in relation to any 'islands of fact' because there are none. He is therefore not only in a position where his only defence is a bare denial but one where he is deprived any meaningful ability to attack the credibility of the complainant on matters collateral.

44. The respondent submits that he is undoubtedly facing a trial in which justice is being 'put on the hazard' and says that the trial judge was correct in determining that this case was one which ought to be stopped.

45. The respondent has submitted that the facts of the present case were strikingly unusual, to a point where the "exceptionality" threshold is more than amply met. Apart from the unusually lengthy delay (between 40-43 years ago) the loss through death of four witnesses is certainly unusual. Moreover, there is another feature which is particularly unusual, and which re-enforces the relevance and impact of the loss of the four witnesses concerned, namely the whole context whereby the complainant's allegation is that on a virtually daily basis the abuse occurred in a small three bedroom family home that was cramped and lived in by ten people. The respondent says that, as the High Court judge found, the evidence of the four missing witnesses would have been relevant to the critical question of whether sexual abuse on the scale alleged by the complainant could have taken place without their noticing.

46. Finally, the respondent observes that a further unusual feature of the case is the fact that the prosecution has chosen to proffer charges in respect only three of the approximately eight years during which abuses alleged by the complainant in the book of evidence were said to have occurred. The appellant has not shed any light on why this is so. It is accepted that the appellant is not under any legal obligation to disclose the reasons for prosecuting some allegations but not others. However, the respondent says, while the respondent is under no obligation in law to do so, the fact that she has declined to do so undoubtedly has consequences. One such consequence is that the court and the applicant are left in the dark as to why a decision has been taken not to proceed with charges with respect to more than half of the period during which it is alleged abuses occurred. At a minimum, this is an unusual feature which together with the other unusual features of the case, mark the present case out as being in an exceptional category.

Discussion and Decision

47. The first thing to be said, although it is not a ground of appeal and the point has not been raised by either of the parties, is that Simons J.'s judgment and Order is ostensibly irregular in that both documents refer to "prohibiting" the Director of Public Prosecutions from taking any further steps in the criminal proceedings. However, while the High Court may have been disposed in principle to grant appropriate relief to the respondent, what should have been granted was an injunction and not prohibition in circumstances where the respondent is returned for trial to the Central Criminal Court. The High Court sits as the Central Criminal Court when exercising its criminal jurisdiction, and proceedings in the High Court are not amenable to judicial review. Prohibition is a relief that can only be granted by way of judicial review. The appropriate relief to grant in a case such as this which is returned for trial to the Central Criminal Court is an injunction restraining the DPP from further prosecuting the case, rather than an order of prohibition – see the remarks of O'Donnell J. in this regard in his recent judgment in *The People (Director of Public Prosecutions) v C.C.* [2019] IESC 94 at paragraph 9.

48. As has been repeatedly stated by the Supreme Court, in *SH v Director of Public Prosecutions* and a succession of cases thereafter, where it is sought to prohibit or injunct a trial on the grounds of delay the inquiry which should be made is whether the degree of

prejudice arising from the delay is such as to give rise to a real or serious risk of an unfair trial. The factors of prejudice, if any, will depend upon the circumstances of the case.

49. While comparisons with how other cases may have been dealt with are of limited assistance in this area, given that the inquiry must be fact specific in each individual case, it can nonetheless be legitimately observed that this case falls loosely into the category of what might be called 'missing or deceased witness' cases, as indeed did the other case seeking to prohibit a trial on the grounds of prejudicial delay leading to a real or serious risk of an unfair trial that was heard by this court on the same day as this case, namely *H.S. v Director of Public Prosecutions* [2019] IECA 266, in which Whelan J. gave judgment on the 22nd of October 2019 and with which judgment both I, and Kennedy J., concurred.

50. In her judgment in the H.S. case, Whelan J. cited with approval certain remarks of O'Malley J. in *S.Ó'C v Director of Public Prosecutions* [2014] IEHC 65 as constituting a correct exposition of the standard applicable where it is contended that the unavailability of a witness through death or incapacity otherwise establishes a real possibility that the ensuing trial will be unfair.

51. O'Malley J said (at paras 65 to 68):

> *"… it seems to me that when an applicant seeks to establish that the absence of a specific witness or piece of evidence has caused prejudice, he or she must be in a position to point to, at least, a real possibility that the witness or evidence would have been of assistance to the defence. In other words, I do not believe that it is sufficient to point to a theoretical possibility that an unavailable witness might have had something to say that would contradict the complainant's account and that of other witnesses.*
>
> *66. In this case, it is theoretically possible that C. gave an account to Dr. O'Carroll which was wholly at variance with that given to others and consistent with the innocence of the applicant, or which, at least, was materially inconsistent with her other accounts. On the basis of the evidence, however, that is not a real possibility.*
>
> *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."*

52. Whelan J. further noted that in *J.(S)T. v. The President of the Circuit Court and the DPP* [2015] I.E.S.C. 25 Denham J. in addressing an issue of missing records observed as follows at para. 27: -

> *"In all the circumstances, the missing records are not a basis upon which to prohibit the trial. In a recent case of Ó'C. v. D.P.P [2014], O'Malley J. rejected the argument that missing records from a health centre and the death of a doctor, to whom the complainant had spoken to about alleged sexual abuse, were matters which should persuade the Court to grant prohibition. Each case has to be considered on its own facts. The alleged absence of documents in this case does not appear to be such upon which to prohibit a trial. That said, it is an issue which may be opened to the trial judge, who will be best placed to determine the matter."*

53. Whelan J. further observed that:

> *"One of the most succinct expositions on the desirability of the issue of prejudice being dealt with at the trial is to be found in the judgment of Coffey J. in R.B. v. DPP [2018] I.E.H.C. 326 which judgment was upheld on appeal by Baker J. in this court in R.B. v. DPP [2019] I.E.C.A. 48 where the trial judge stated at para. 15: -*
>
> > *'It seems to me that the effect of the modern jurisprudence relating to allegations of undue delay in historic sexual abuse cases is to postpone the issue of prejudice to the trial itself so that it can be assessed by the trial judge having regard to the granular detail of the actual evidence that is to go to the jury with the result that prohibition should only be granted in advance of a trial where the prejudice complained of is manifest, unavoidable and of such significance as to give rise to a real or serious risk of an unfair trial.' "*

54. Whelan J. concluded that that represented a correct statement of the current state of jurisprudence particularly emanating from the Supreme Court and that it is incumbent on an applicant who seeks to prohibit a criminal trial to demonstrate that the prejudice contended for is manifestly unavoidable and of such significance as to demonstrably give rise to a real or serious risk of an unfair trial.

55. It is also important to record that since judgment was reserved in this matter, and subsequent to the delivery of this Court's judgment in the H.S. case, the Supreme Court has given judgment in *The People (Director of Public Prosecutions) v C.C.* [2019] IESC 94, yet another case in which it was claimed that delay created alleged unfairness at a level sufficient to justify not proceeding further with a trial. The context was not an application for prohibition, but rather an appeal by the accused against his conviction in circumstances where, by reason of matters arising in the course of the trial but related to long standing delay between the alleged offence and the trial, he had applied unsuccessfully to the trial judge on so-called "*P.O'C*" grounds to have the case withdrawn from the jury on the basis that it would be unfair to him to him to allow the trial to continue. The request to withdraw the case from the jury was made on the basis that it was one of those cases where, notwithstanding that there had been evidence adduced

upon which a jury properly directed could convict the accused, the difficulties for the defence were such that it was not just to proceed.

56. The particular difficulty arose in circumstances where the complainant in the CC case had alleged that she had been sexually abused on two occasions by her uncle in 1971/72 in his bedroom at his house in County Clare, where she was staying at the time when she was 11 years of age. She contended that on one of those occasions she had been raped by the uncle, Mr C. The complainant gave evidence that Mr. C. had had a serious row with his then partner, M.Cy., which had resulted in a dispute between Mr. C. and his son, leading to a confrontation in which the son had produced a shotgun. Later on this evening, it is alleged that M.Cy. took the complainant to Mr. C.'s bedroom and took her nightdress off and left her on the bed, and that the rape occurred thereafter. For reasons which it is not necessary to delve into, Mr C. was not charged for many years. Indeed, charges were only directed in 2006. M.Cy died in 2008, and had not been interviewed at that stage. At his trial, in 2016, it was contended on behalf of Mr C that had M.Cy been available to him as a witness she might, in the light of how the case had unfolded, have been in a position to give evidence highly favourable to the defence. The P. O'C application was based on the fact that he was significantly prejudiced in his defence by the lapse of time between the alleged rape offence and the trial, particularly in circumstances where M.Cy was no longer available to him as a witness because of her demise in 2008.

57. The appeal was ultimately dismissed by a 3:2 majority of the Supreme Court, with separate judgments being delivered by Clarke C.J. (with whom MacMenamin J. agreed), O'Donnell J., Charleton J. and O'Malley J. What is of significance is that while the Supreme Court was split 3:2 as to the result, all of the judges were essentially *ad idem* as to the applicable legal principles, and the split result which arose resulted from differences of opinion as to the proper application of the agreed principles to the particular circumstances of the case rather than from any disagreement as to the principles themselves.

58. What is of interest therefore in the present appeal is the Supreme Court's agreement as to the applicable legal principles. These are summarised in a "statement" issued exceptionally by the Chief Justice on behalf of the Supreme Court immediately following the delivery by the Supreme Court of its four judgments. It is instructive to quote directly from this statement:

> *"The Supreme Court has given judgment today in this appeal, which concerned the proper approach which should be taken by a trial judge in a case where an accused applies to have a trial halted on the grounds of alleged unfairness arising out of a significant lapse of time between the alleged offence and the trial.*
>
> *Four of the judges have delivered judgments in which they agreed that the proper approach at the level of principle requires an assessment by the trial judge as to whether a trial is fair and just in light of the lapse of time complained of and whether the accused had thereby been deprived of a realistic opportunity of an*

obviously useful line of defence. In the judgment delivered by the Chief Justice, with whom MacMenamin J. agreed, the elements of that assessment were set out from paras. 9.2 to 9.5:-

'9.2 In that regard, the trial judge must (a) first consider the prosecution case as it has actually developed at the trial. Thereafter, the trial judge must (b) consider whatever evidence is available as to the testimony which might or could have been given but which is said to be no longer available. That exercise will generally involve two principal considerations; first, the court must (c) consider the available evidence about what might have been said by the missing witness or what might have been contained in missing physical evidence, such as documents or objects. The trial judge will be required to have regard to the degree of confidence with which it can be predicted that the particular evidence would have been available, while recognising that the very fact that the evidence is not available means that that exercise must necessarily be speculative at least to some extent.

9.3 If the trial judge is satisfied that it has been established that there was a real prospect that the evidence concerned could have been tendered, next, he or she will be required to (d) assess the materiality of any such evidence. The materiality of that evidence will need to be considered in the light of the prosecution case as it evolved at the trial.

9.4 In the light of all of those factors, the court must finally (e) reach an assessment as to whether the trial is fair. The assessment of whether the trial is fair involves a conscientious determination by the trial judge whether, on the basis of all of the materials before the court, it can be said that the test identified by Hardiman J. in S.B. has been met, being that the absence of the missing evidence has deprived the accused of a realistic opportunity of an obviously useful line of defence.

9.5 Although not relevant on the facts of this case, it should also be noted that culpable prosecutorial failure or wrongdoing can be taken into account in assessing the degree of prejudice which renders a trial unfair. As noted earlier, no trial is perfect. However, the degree of departure from a theoretically perfect trial which will render the proceedings unfair can be less where it can be said that culpable action on the part of investigating or prosecuting authorities have contributed to the prejudice. A lesser departure from what might be considered to be a theoretically perfect trial will render the proceedings unfair if that departure is caused or significantly contributed to by culpable action on the part of investigating or prosecuting authorities. A greater degree of departure from the theoretically perfect trial will need to be demonstrated in cases where there is no such culpable activity.'

This step-by-step approach was expressly agreed with by O'Malley J. at para. 8 of her judgment. In that paragraph, she also agreed with the principles set out in the judgment of O'Donnell J. regarding the correct approach to be taken by a trial judge in this context, and stated that she did not see any real disagreement between the members of the Court as to how the trial judge determining such an application should proceed. These principles were set out at para. 46 of O'Donnell J.'s 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.'

O'Donnell J. similarly agreed that there was consensus in the Court as to how the trial judge should approach an application such as this, and stated that the differences between the members of the Court in this case involved the application of general principles to the particular facts of this case. O'Donnell J. further expressly agreed with paras 9.2 to 9.4 of the judgment of the Chief Justice. At para. 15 of his judgment, Charleton J. concurred with the principles which were set out by O'Donnell J., and reiterated in the judgment of O'Malley J.

It follows that the proper approach to be adopted by a trial judge in all cases involving such applications is as set out in those judgments."

The specific prejudices claimed in the present case.

59. The first thing to be observed is that OP died in 1983, four years after the date of the latest offence charged. Even if a criminal prosecution had taken place very much earlier the likelihood is that the grandmother's evidence would not have been available.

60. Be that as it may, having carefully considered the curial remarks of the trial judge based on his assessment of the potential prejudice to the respondent of not having EF, KL, MN and OP available to him as witnesses, I am satisfied that in the following respect the trial judge's analysis was erroneous. Speaking of these witnesses, he said:

> *"There are several aspects of the alleged offences which indicate that the evidence from other members of the extended household could have had a significant bearing on the ultimate outcome of the criminal proceedings. The alleged offences are all said to have taken place within the family home; to have taken place on a very regular basis (at least a couple of times a week); and to have occurred at a time when the three-bedroom house was being lived in by ten people. The witnesses would have been in a position to give general evidence as to the day-to-day running of the household, and this would be relevant to the question of whether sexual abuse on the scale alleged by the Complainant could have taken place without their noticing."*

61. The difficulty with this finding, and what renders it erroneous in my view, is that general evidence as to the day to day running of the household could still be elicited from and given, either through direct evidence or through cross-examination, by at least four of those of the ten who lived there and who are still alive, namely the respondent himself, the complainant, the respondent's wife "AB", and the complainant's other sister "CD". Also still alive are "GH" and "IJ", but it has to be acknowledged that as they were infants, or at least very young children, at the material time their recollections may not be as clear as that of the others. Be that as it may, it cannot be said that the respondent is now deprived of the type of evidence in question. It may not be available from as many sources as he might have liked, but it is still potentially available to him.

62. I am also in agreement with the submission on behalf of the appellant that it was entirely speculative to characterise the complainant's father, mother and grandmother as being potentially persons whom a jury might think the complainant would have been likely to confide in. Quite apart from the fact that it has long been the experience of the criminal courts, and it is a matter of which judicial notice can be taken, that frequently complainants in sexual assault cases do not in fact confide in persons with whom they are close for a whole variety of reasons and sometimes no stated reason - see the remarks of Murray CJ in *P.O'C v Director of Public Prosecutions* [2000] 3 IR 87 at p.105, also those of O'Donnell J more recently at paragraphs 2 and 5 of his judgment in *The People (Director of Public Prosecutions) v C.C.* (cited above) - it ignores the fact that the complainant in this particular case says that she did not confide in any of the deceased potential witnesses. The defence will have the opportunity at trial of suggesting to the complainant in cross-examination that opportunities existed for her to confide in those with whom she was close, including the deceased witnesses, and that she failed to do so. It would, of course, be different if the complainant had said that she had confided in any of the deceased witnesses. In such circumstances the defendant could argue that the absence of the person who received the complaint would deprive him of the opportunity of possibly probing with the recipient the terms of the complaint, whether the recipient regarded it as

credible, what the recipient did about it, if anything, or if nothing was done why was nothing done, amongst many other possible lines of enquiry with potential implications for the credibility of the complainant. However, the complainant herself says she never confided in any of the deceased. She remains available to be cross-examined as to why that was the case, and so the respondent is not prejudiced on that account.

63. In the light of the observation just made, it is difficult to understand the basis on which the High Court judge offered the following remarks in the curial section of his judgment. He said:

> *"46. If the prosecution had been unable to lead evidence from the other members of the household to the effect that they had witnessed suspicious activity, then this is something which a jury might have attached weight to."*

It requires to be immediately observed that there is nothing on the Book of Evidence to suggest that the prosecution harboured any hope of leading such evidence. There is no suggestion by the complainant in her statement in the Book of Evidence that any incident in which she had been sexually assaulted, including the single incident of rape, was witnessed by anybody or that anybody had witnessed "suspicious activity". On the contrary, the complainant herself says in her statement on the Book of Evidence that *"he was always careful that no-one saw him"* and that the incidents were very brief lasting only minutes and that *"[h]e had to be careful and clever because there were always people in the house"*.

64. The High Court Judge continued:

> *"Similarly, if the prosecution had been unable to establish that the Complainant had disclosed the ongoing sexual abuse to any other member of the household, then this too is something which might go to the credibility of the Complainant in the eyes of a jury. This is especially so where three of the deceased, namely the Complainant's grandmother, father and mother, are persons whom a jury might think the Complainant would have been likely to confide in."*

65. The difficulty with this is that it has always been the prosecution's case that the complainant did disclose the ongoing abuse to her sister CD, following the occasion where the respondent visited his mother in law MN in hospital. It is also part of the prosecution's case that there was a separate disclosure to AB when the complainant was 16 that the respondent tried to sexually assault her on an occasion when she was babysitting. To have suggested otherwise was to fail to engage with the known facts in terms of what the prosecution case was, and still is. Both the complainant and CD say in their respective statements that the first disclosure occurred, and the complaint in her statement indicates that she made the second disclosure (i.e., the one to AB). There was no reason whatever to believe that they would not give this evidence at trial. It is theoretically possible of course that either or both might change their account in the witness box but there is no basis for any expectation that they would do so. Any suggestion that they might do so is

entirely speculative. AB is not a witness on the Book of Evidence, and it is not known what she might say if called. However, she is available to the respondent.

66. As things stand the complainant does claim to have confided in her sister CD, and CD remains available to both prosecution and defence as a witness. It is true that CD is on the Book of Evidence as a prosecution witness, but she will be available to the respondent for cross-examination, as will the complainant herself, with respect to the substance and circumstances of the complaint said to have been received by her from the complainant.

67. In so far as CD contends to have been a victim of abuse herself on a single occasion at the hands of the respondent, and to have confided in her deceased mother MN, two issues immediately arise bearing on whether the respondent would be prejudiced by not having MN available to him as a witness.

68. The first is that it is by no means a foregone conclusion that the evidence of CD regarding having also been abused by the respondent would be admitted at all. The evidence relates to misconduct not the subject matter of any charge on the indictment, and in principle it is objectionable on the basis that the jury might view it as evidence of propensity. However, there are various bases on foot of which the prosecution might contend that it ought to be admitted nonetheless e.g., as system evidence pursuant to *The People (Director of Public Prosecutions) v. B.K.* [2000] 2 IR 199 line of jurisprudence, or perhaps on the basis of striking similarities as discussed in *B v Director of Public Prosecutions* [1997] 3 IR 140, or possibly as background evidence pursuant to *The People (Director of Public Prosecutions) v McNeill* [2011] 2 IR 699. It is reasonable to anticipate, without expressing any view on it, that any such application would very likely be vigorously contested on grounds of an insufficient evidential foundation. Additionally, no doubt a case could also be argued by the respondent, and again I am to be taken as expressing no view on how a court of trial might receive it, that even if there was a sufficient evidential foundation for so admitting it the prejudicial effect of such evidence would far outweigh its probative value, and that it ought to be excluded.

69. Secondly, it is only in the event of CD's evidence of having been abused herself being ruled admissible that any question of the further admissibility of the complaint to MN would arise for consideration. Once again, if the matter goes to trial there is likely to be considerable legal controversy over whether evidence of such a complaint could be admitted. Evidence by a complainant that he or she told a third party about having been abused is in principle objectionable as being in breach of the Rule against Narrative/Self-corroboration. Moreover, such evidence coming from the recipient of the complaint would clearly be hearsay if it was intended to rely upon it as testimonial evidence, i.e., as evidence that the complaint was true. Of course, it would not be hearsay if the intention was simply to rely on it as original evidence, proving merely that a complaint was made in certain terms but not speaking one way or the other as to the truth of that complaint. However, it may be assumed that if the prosecution do seek to rely on CD's contention that she was also abused, either on the basis that it represents evidence of system, or on some other basis, they will be necessarily be contending that her complaint was true.

Notwithstanding these rules, the law of evidence provides, exceptionally, that evidence of recent complaint by the complainant in a criminal case may nonetheless be admitted and received both from the complainant and the recipient of the complaint, for the limited purpose of demonstrating consistency on the part of the complainant. However, CD is not the complainant in the present case. She is a collateral witness. Arguably the recent complaint exceptions to the Rule against Narrative/Self Corroboration and the Rule Against Hearsay would not apply to her intended testimony, and that of MN, on this aspect of matters.

70. In the circumstances it seems to me that there must be significant doubt, without putting it any higher, as to the admissibility of any intended evidence with respect to CD having been abused by the respondent, and in relation to evidence of CD having informed MN about that abuse. It seems to me that in the circumstances, for the respondent to contend that he is potentially prejudiced in seeking to address the suggestion that CD was also abused by him because MN is now deceased is, to say the least of it, premature.

71. The potential issues that I have flagged are matters for the judge presiding at the respondent's trial. The issue of potential prejudice to the defence by virtue of not having the deceased witness MN would only fall for consideration if the controversial evidence were in fact to be ruled admissible. Prejudice does not follow inexorably at this point in time. If relevant admissibility rulings were to go against him at the trial, any case then arising based on a perceived real or serious risk of unfairness to the accused in continuing with the trial in the absence of MN, could be articulated to the trial judge whose duty would be to consider whether the concerns raised were capable of being addressed by rulings or directions to the jury or in some other way. If not and providing he or she was satisfied that the degree of apprehended prejudice was indeed such as to create a real or serious risk of an unfair trial, he or she would be obliged to abandon the trial, but only as a last resort. In considering such issues he or she would be obliged to follow the approach commended by the Supreme Court in *The People (Director of Public Prosecutions) v C.C.*.

72. However, the High Court judge's analysis does not advert to, or engage with, any of these potential issues notwithstanding that prohibition or, in the circumstances of a return for trial to the Central Criminal Court, an injunction should only be granted in advance of a trial where the prejudice complained of is manifest, unavoidable and of such significance as to give rise to a real or serious risk of an unfair trial. In fairness to the High Court judge, he is not to be greatly criticised for this in circumstances where there was no engagement by either party, but by the respondent in particular who bore the primary obligation in that regard, during the hearing in the High Court, with whether admissible evidence could in fact be elicited from MN in the context of the claim in CD's statement that she too was abused and had told MN about it. Be that as it may, the prematurity, for the reasons stated, of the claim of prejudice with respect to the non-availability of MN means that at this point in time it cannot be said that the prejudice apprehended is manifest, unavoidable and of such significance as to give rise to a real or serious risk of an unfair trial.

73. I further find myself in agreement with the submission on behalf of the appellant that the contentions of the respondent that OP would be able to confirm that he *"was never alone with the complainant"* and that he *"could not have abused the complainant as alleged"* are extraordinary assertions, and that they are to be regarded with considerable scepticism. The point is well made that it is inherently unlikely that any witness, after a lapse of 40 years, would be able to state that an individual had never been alone in a house with another individual. Equally, the most it seems to me that OP could have said by way of assistance to the respondent is that his opportunities to commit the alleged offences would have been limited on account of the small size of the house and the number of people living there. The respondent can still make that point himself and seek support in that regard from other witnesses who are still alive and available to him either to give evidence in chief at his behest, or to be cross-examined.

74. I also agree with the submission of the appellant that the respondent's contention with respect to evidence that might have been given by his deceased brother in law (EF) is entirely speculative. It is premised on the notion that because he might have testified (correctly) that the complainant never complained to him of having been abused by the respondent, that the jury would be obliged to infer that the abuse never happened. This is advanced on the basis that EF and the complainant were close and that EF would confirm that, that because of their closeness the complainant would certainly have informed EF of her abuse, and that because of his criminal and violent disposition he would have been sure to "sort out" the respondent had he learned of it. The weakness in the logic of this is that it utterly forecloses on any possibility that the complainant might not have revealed her abuse to EF, a conclusion that is simply not justified on the evidence either by inference or deduction. As already alluded to, it has long been the experience of the criminal courts that for all sorts of reasons victims may not be able to bring themselves to disclose their abuse even to persons to whom they are close for a very considerable time.

75. Neither am I impressed with the respondent's claimed inability at this remove to possibly provide an alibi from the pub where he worked. There has clearly been no engagement with the known facts in putting such a claim forward. The nature of the allegations made, and in particular their non specificity with respect to dates and times, render it inherently unlikely that recourse could have been had to an alibi even if the matter had been subject of charges and trial with reasonable expedition.

76. All of that having been said, there is no gain saying that after a delay of more than forty years that if the matter were permitted to be tried the respondent would face challenges in defending the charges that have been brought against him. There are, it has to be conceded, few islands of fact in the sense of independently verifiable facts to assist in a forensic testing of the complainant's evidence. However, notwithstanding this it is not the case that the complainant's evidence is incapable of being tested at all. For example, there is scope for suggesting, as the respondent has done in his affidavit, that there was limited opportunity for him to have committed the alleged offending given the size of the family home and the high density of its occupation with ten persons living there including a grandparent, parents, children and infants, with some persons working and others not

working and needing to be supervised and cared for (e.g. the infants). There is also scope for exploring why numerous opportunities to complain to different person at different stages were not availed of. There is scope to explore inter-personal relationships within the house, and the general family dynamics. These are just some of the issues that are still capable of being addressed for the purpose of seeking to challenge the reliability and credibility of the complainant. I am satisfied that the absence of the potential witnesses who have died, while perhaps inconvenient, will not prevent these issues from being explored.

77. In my judgment, the High Court was in error for all the reasons stated above in prohibiting the continuation of this prosecution. It ought not to be prohibited or, more correctly, injuncted from proceeding. However, given the antiquity of the case the trial judge must exercise heightened vigilance to ensure that the respondent receives a fair trial. It will be open to the respondent to make a *P.O'C* type application at any stage during the trial and if he does so it will be for the trial judge to deal with it appropriately adopting the approach commended by the Supreme Court in *The People (Director of Public Prosecutions) v C.C.*

78. I would allow the appeal. --