

**UNAPPROVED JUDGMENT
FOR ELECTRONIC DELIVERY**



THE COURT OF APPEAL

Record No: 276/2019

Neutral Citation Number: [2021] IECA 263

Birmingham P.

Woulfe J

Edwards J.

Between/

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

Respondent

V

J.W.

Appellant

**JUDGMENT of the Court delivered by Mr Justice Edwards on the 14th of October,
2021.**

Introduction

1. This is an appeal against the appellant's conviction by a jury on the 29th of November 2019 of forty counts of indecent assault/sexual assault following a three-day trial. The appellant was subsequently sentenced to concurrent sentences of imprisonment for three years and six months (i.e., 42 months) on each count.

The circumstances of the case

2. The complainant in this case was born in 1982 and was adopted by the appellant and his wife. She was the youngest of the couple's five children, and their only daughter. The family initially resided at an address in a Dublin suburb (address no 1) before moving in June 1997 to another address in the same postal area (address no 2).

3. The appellant had worked as a taxi driver, but at the time of his trial he was 84 years of age and retired.

4. The offences complained of related to a period of approximately ten years starting on 1st June 1990 until 30th April 2000, when the complainant aged between 8 and 18 years, and the appellant was aged between 55 and 65 years.

5. The complainant was a pupil in a primary school in the locality in which she lived during the earlier years of the period during which she alleged the appellant committed the offences of which he was convicted, and then moved to a secondary school within the same postal area of Dublin where she remained for the rest of that period.

6. The matters complained of were revealed in April 2000 when the complainant made relevant disclosures to a friend, who was also the girlfriend of one of her older brothers, on the night of the complainant's mother's funeral. She subsequently made a formal complaint to An Garda Síochána.

7. The Appellant was arrested on the 3rd August 2018 on suspicion of sexual assault and was detained at a Garda Station for the proper investigation of the offences for which he was

arrested. During his detention he was interviewed and in the course of being interviewed he was confronted with the complainant's allegations and denied them.

8. The accused maintained that position of denial all throughout the course of the trial until conviction.

The complainant's evidence before the jury

9. The complainant confirmed her date of birth and the identity of her birth mother, and further confirmed that she had been adopted by the appellant and his wife (she referred to them as "Mam and Dad"). She confirmed that she had lived initially at address No. 1 with her Mam, Dad, and brothers G, C, K and N, and that after some time they had moved to address No. 2. She identified the primary school she had attended from age 5 or 6, and the secondary school she had later attended after finishing primary school. She said that she had been in secondary school from 1995 to 2000. She testified that while growing up she had loved to participate in figure skating, swimming, gymnastics, and indeed any school sports.

10. She described for the jury the layout of the house at address No. 1, using a floor plan and photographs exhibited earlier by witnesses from the Garda Technical Bureau. She had her own upstairs bedroom. There were also other bedrooms upstairs, variously occupied by her Mam and Dad, and by her brothers, some of whom had their own rooms and some of whom were sharing.

11. She also described the layout of the house at address No. 2, again identifying for the benefit of the jury the bedrooms occupied by different family members with the assistance of a floor plan and photographs.

12. She described the first occasion on which she was abused as having occurred when she was 8 years old. She was in the bath. Her Dad was talking to her and he leaned over and gave her a lingering kiss. She was asked if she liked it, and said "Yes", although she didn't in fact like it. It had felt strange and uncomfortable.

13. A few weeks later, her Dad was in the bath and the complainant was in her bedroom. He called for her to bring him a towel, which she did leaving it on the toilet seat. As she was about to leave he asked her if she could get the soap at the end of the bath for him. She got the soap and went to hand it to him and he tipped it out of her hand so that it fell back into the bath. She reached in to retrieve it and in doing so "*touched off his willy*". The witness said that she jumped back straightaway and he told her not to tell her Mam, that she'd get into big trouble for that. She then left and went into her bedroom and was very upset because she didn't want to get in trouble. She was crying.

14. The witness testified that over the next while, her Dad started coming into her bedroom. He insisted on sitting on her bed and he would kiss her on the lips. He would rub her hair and rub her legs and tell her how much he loved her and that they had a special relationship. He instructed her not to tell her brothers because he loved her more than he loved them. She said that this continued on for a long time and happened quite a lot. She would be in the bedroom on her own whenever he came in and he'd close the door behind him.

15. When she was 9, her existing single bed was replaced with a double bed from her parents' room as they in turn had got a new bed. She recalled her Dad telling her that they now had more room for cuddles. She said that, "*his cuddles were where we'd lie down and he'd just rub my hair and he'd rub my legs and just kiss me on the lips.*" She stated that she had accepted this as normal. Asked about the frequency of these incidents, the witness said it was definitely weekly.

16. The witness described an incident which occurred in school when she was about 11 or 12. She had a teacher called Mrs. C who was doing sex education and the "Stay Safe Programme" with her class. She recalled that, "*they were talking about feeling uncomfortable, not letting people touching and making you feel uncomfortable.*" She

remembered listening really carefully to this because part of her knew that what her Dad was doing was wrong. It just felt wrong. At one point the teacher had said, *“Really, it could be anybody, it could be your uncle, it could be your brother, it could be your dad.”* At that moment in time she had felt physically sick and threw up on her books. The teacher had called for her Mam to collect her from school and she was sent home. When her Dad came home he came up to her bedroom with 7-Up. She told him what the teacher had said, i.e. that Dad’s weren’t supposed to kiss and touch the way he did. He suggested to her that she had misheard the teacher, that that’s what fathers and daughters do. She described being more confused than ever. Her father had got really upset and said to her that he couldn’t believe that she would think that of him, and he left the room.

17. The witness said that for a few weeks after that he didn’t come into her bedroom or come near her. However, some weeks later he returned to her bedroom and started kissing her again with lingering kisses. It was a bit different this time. He was a bit more aggressive and she was more fearful. He had put a lock on her bedroom door and he had told her to start locking the door so that her brothers wouldn’t walk in on her when she would be dressing. However, he would lock the door whenever he came to her room to abuse her. These incidents usually lasted 15 or 20 minutes.

18. The witness described a car journey in which her Mam and her brother N were in the front seats and she and her Dad were in the rear seats. They were going on a long journey. Her Dad had got a blanket and had put it over the two of them. He started rubbing her leg under the blanket. She had wanted to shout out but felt she couldn’t because her Mam was in the car. This incident had occurred after her Confirmation.

19. She described another occasion when her brother C, and his girlfriend NC, who were living in England, were home for a visit. They were out in the car and having a lovely day. They had been laughing because while she and her brother were singing along with a song on

the radio called “Aon Focal Eile”, NC, who was from England, had thought they were cursing. When they got home the complainant went up to her bedroom. Her Dad followed her up, came into the bedroom and locked the door after him. He laid down beside her and was rubbing her hair and kissing her. She had tried to distract him by saying there was somebody coming up the stairs but he persisted. At one point, however, they did hear somebody coming up the stairs and her Dad had jumped up. He shushed her and told her to fix herself and he went to the door, opened it up and found the witnesses brother C outside. The witness said she was crying at this point and that C had asked her why she was crying. Her Dad then had interjected to say that she was just upset because he (i.e., C) was going back to England and she would miss him.

20. After this incident her Dad started to make threats to her. He told her that he would drive her into the Liffey if she told anyone, that she wasn't to tell her Mam or indeed anybody. She said she was fearful and described him as being “*such a bully*”. It had often been at the tip of her tongue to say to her mother but she never did because she feared what her Dad would do to her if she told the truth.

21. The witness said that when she had moved on to secondary school she dreaded Wednesdays. Her mother, who worked in a department store, worked Wednesdays and her father would collect her from school. There was half day on Wednesdays. She recalled the first day he picked her up on a Wednesday. When they got back to the house he took her by the hand and brought her down to his bedroom where he had laid her down on the bed, had rubbed her hair, kissed her, rubbed her legs and got on top of her. He had started gyrating on top of her and going up and down as if they were having sex. It lasted 15 to 20 minutes following which he got up and ran down to the bathroom. She just laid there not knowing what to do. When he came back he said, “*Look what you made me do*”, and told her to go and fix herself. He then went - and made a cup of tea as if everything was normal. After he

had had the tea he gave the complainant £15 and told her to “*buy yourself*” something nice. He then left and went back to work.

22. She said that similar incidents had happened on the majority of Wednesdays. The witness said she attempted to avoid them by leaving school early before he was there to collect her. She would go home ahead of him. She would lie down in her bedroom with the door locked and pretend she wasn't there. She was able to do this because it was her Dad's practice to lock all the bedroom doors when he was going out to work. Whenever the complainant engaged in this avoidance strategy her Dad, when she later encountered him, would be really annoyed. She said that he used to call her a slut and accuse her of being out with boys, not realising that she had been in her bedroom all the time.

23. The complainant testified that the family moved from address No. 1 to address No. 2 when she was about 16. By this stage her Dad had become very controlling and wanted to know where she was all the time. She stated that it was like he really believed he was in a relationship with her. Sometimes he would threaten her, saying “*Go on, tell your mam. Sure who'd believe you? You're just a little schoolgirl.*” On other occasions he would say to her, “*I'll just tell them you came on to me.*”

24. The witness stated that some nights when he came in from work he would go down to her room. She would pretend that she was asleep. She could hear him asking if she was awake but she would pretend to be in a deep sleep because she was afraid. After this had happened on a few occasions she decided to try sleeping with her Mam. She would say that she was sick, and he would sleep in her bed instead. Her brother N thought this was weird, she said, “*because I was that bit older and sleeping in with my Mam*”. The complainant testified that this stratagem had worked for a while until her Dad came home one night when she was still awake with her Mam. She asked him if he was going to sleep in her bed and he said, “*Not tonight*”. He then took off his trousers and got into the bed, prompting the

complainant to attempt to get up to leave. However she was unable to do so because he pulled on to her wrists to hold her down. She said that they were a few minutes watching television and then he started rubbing her leg, rubbing his hand up her thigh. At that stage she jumped up, stating that she was too hot, and went back into her own room. She stopped going into her parents' bed after that.

25. The witness described an incident which had occurred when she was about 17 and in sixth year. She had a part-time job working in a newsagent on Saturdays. On one particular Saturday morning she was in her work uniform and was preparing to go shopping with her Mam. It was their routine to go shopping together on Saturday mornings following which she would go straight to work. Her mother asked her to get a hairbrush off the dressing table in her parents' bedroom. She went down to the room and her Dad was still in bed. He called her over and she went over to him. He then pulled her on top of him. He started kissing her and she protested "*Mam will hear*". He kept holding onto her even when her Mam began to shout for her. He only let go when they could hear her Mam approaching the room. He let go of her at the last minute and pretended everything was normal.

26. The complainant also spoke about occasions when her Dad would bring her ice-skating. On one such occasion she had a row with her Dad in the car when they were in the middle of Dublin city, following which he had got really angry. He opened the car door and told her to get out which she did. He then drove off and left her. She had felt really scared. She was wearing her ice skates and ice-skating outfit. After a while he came back, opened the door and told her to get back in. He then drove her to the ice rink as if nothing had happened. On other occasions when he would drive her to ice-skating he would take back roads, and park on a side street. When the complainant would attempt to leave the vehicle he'd tell her to give him a kiss and she would have to French kiss. She was terrified that they would be

seen by one of her friends, or one of her Mam's friends. She recalled that this had definitely happened on three occasions.

27. The witness also related an incident that had occurred just before Christmas in her 6th year. Her mother had gone to a work Christmas party and her brother N, who was still living at home, was going out. She did not want to be in the house on her own with her Dad and begged N to stay with her. However, he still went out. She was in the sitting room watching television when her Dad sat down beside her. He started rubbing her leg, and rubbing his index finger around the outline of her lips and kissing her. He then got the cushions and a blanket off the couch and placed them on the floor, following which he took the complainant by the hand and laid her down on the cushions and blanket. He again was kissing her and rubbing her leg. Then he said, *"Let's go down to the bedroom where it'll be more comfortable."* The witness said she was petrified. He brought her down to the room just like most Wednesdays. He was chewing gum, took it out of his mouth and put it on the locker. He then pulled back the covers and she laid down on the bed. He got in beside her, lay on top of her, started rubbing her arms and her body and her boobs and was French kissing her. She stated that she feared he was going to rape her, and she tried to zone out and lock out what was happening. She said that thankfully, after a while, he jumped up and ran to the toilet. Availing of this opportunity she got up quickly and returned to the sitting room.

28. The complainant described losing her Mam to cancer in September 2000. There had been one incident since the Christmas incident and her mother passing away. The witness said she had been in bed. She recalled her Dad taking off his trousers. He had asked her to put her arms above her head and he had taken off her top. He then rubbed his hands up and down her body all over. He stated that he wanted to be with her properly and that he'd like to take her to a hotel. She had gone blank and couldn't remember anything after that. However, she testified that there was a repeat of the incident. On this occasion she had attempted to distract

him but to no avail. She then told the jury, *“So this time, I told him that I wanted to go to a hotel to be with him too”*, that *“I tried everything else. I thought maybe if I said something this might be different.”* His response was to get really angry, and she said it never happened ever again after that.

29. The complainant said that on the night of her Mam’s funeral tensions were building between her and her Dad. She had a big row with him that night. After she had calmed down a bit she went down to the bedroom of one of her brothers and sat on the bed. Her brother C’s girlfriend came down after her and asked her if she was okay. The complainant stated to the jury that *“I just couldn’t take it anymore. I just told her everything. I told her what my dad had done to me over all the years.”*

30. The witness gave evidence of confronting her Dad at his house some weeks after her mother’s death. He didn’t admit anything on that occasion but said to her that she was just angry and he would allow her to take her anger concerning her Mam’s death on him. She also testified that some years after that she confronted him a second time, again at his home. She was brought to his house by her brother G but G had remained in the car and so she was able to see her Dad on her own. On this occasion she said to him, *“There is just the two of us. I want you to admit what happened.”* He asked her if she was recording their conversation. She said that she was not and emptied out her pockets to demonstrate that. She said there was only the two of them there and that he could say anything. He then admitted to the first incident when she had been in the bath at 8 years of age. She told him it had been going on for years, and he just stuttered and said, *“I believe you”*, adding that all the charity work he was doing was to make up for his sins. She told him that he had ruined her life, at which he said that he was sorry but she couldn’t listen to any more. He went to shake her hand and she refused to shake his hand. That was the last contact she had with her Dad.

31. In the remainder of her testimony the complainant described her married life and current family circumstances. She also described reporting the matter to An Garda Síochána.

32. It was put to the complainant in relatively brief cross-examination that the appellant denied that he had abused her in any way, but the witness was unmoved from what she had said. It was suggested to the complainant that NC would suggest that rather than the witness rowing with her father in the leadup to her conversation with NC following the complainant's mother's funeral, it had been her brother N who was rowing with his father. It was suggested by counsel that N was very distraught and that *"he had a lot of pent up feelings against your dad."* The complainant responded, *"Well, [NC] wasn't in the room when I was having an argument with my dada I can't see how she would say I was having an argument (sic) if she hadn't witnessed it."* It was suggested to the complainant that her father had worked extremely hard to provide for his family, that there had been family holidays to the USA on two occasions, as well as to London, and that she had wanted for nothing as she had been growing up. Further, her father had also partaken in charity work, and in sports coaching. The complainant accepted all of that.

33. It was suggested Ireland was a different place in the 2000's from the 1990's and 1980's. Moreover, it was suggested to the complainant that she was a strong person. Accordingly, it was put, she had been free for 18 years or so to go to the gardaí, but had not done so until recently. The witness responded, *"That's correct. I could have gone at any time."*

34. It was put to the witness that she had only visited the appellant's house for the purpose of confronting him on one occasion, and not on two occasions as she had said. In addition, it was suggested that the appellant had made no admission that anything in the way of abuse had happened during the years in question. The complainant was adamant that there definitely had been two visits, and that the appellant had made an admission. She was asked

why, if he had done so, she had not gone to the gardaí at that point. She said, *“I was just happy to hear that he admitted it”* and that *“I just –yes, I wanted to leave it there.”*

35. The witness was not cross-examined in any way about the alleged incident in the school during the Stay Safe talk, nor was she cross-examined in any way about the incidents that she said had occurred in her own bedroom during which, she had claimed in her evidence in chief, the appellant had locked the door to stop others coming in, having fitted or having had a lock fitted for that purpose. She was also not cross-examined about her evidence concerning efforts at avoiding being collected by her father on Wednesdays, and her claim that her father routinely locked all bedroom doors before leaving the house. Moreover, it was not suggested to her that there had not been a lock on her bedroom door, and there was no probing of her concerning the time at which the lock was fitted, the circumstances in which it was fitted, concerning who had fitted it or concerning the type of lock being spoken about. There was also no cross-examination concerning the alleged incident that was said to have occurred in the parent’s bedroom while her mother was also in the bed.

Other evidence in the case

36. The trial court also heard evidence from a civilian cartographer who had prepared layout plans of the relevant houses; from a scenes of crime examiner who had taken photographs of the houses; from the complainant’s birth mother who produced and identified her birth certificate; from both her former primary school principal and her secondary school vice-principal confirming when the complainant had been a pupil in their respective schools; from a representative of the complainant’s late mother’s employer, to prove the dates of her employment; from NC; from the investigating garda; and finally from the appellant himself. It is not necessary for the purposes of this appeal to specifically review this evidence, beyond making some brief observations concerning the appellant’s testimony.

37. The appellant's testimony was exculpatory. He denied abusing the complainant in any way. He acknowledged an occasion in which, at the request of his wife, he had brought a towel in to the complainant who was then in the bath. He told the jury that when he gave her the towel he gave her a kiss and she had given him a big hug in return saying, *"I love you Daddy."* The suggestion that he had assaulted her was *"wrong, it's wrong"* and *"very, very wrong"*. He suggested that the investigating garda had said hurtful things to him, including saying *"That was a terrible thing you done to your daughter"*, and *"I suppose you hate cops?"*. He denied ever admitting to the complainant that he had abused her. He said that what the complainant had said in her evidence was *"wrong – it's all lies – it's all wrong what was said to me, all very, very bad lies with lots of hurt being said"* and that *"I done nothing to her, nothing."*

38. Under cross-examination the appellant said that the complainant's allegations had come as a shock to him. He was probed about the alleged incidents said to have taken place on Wednesdays and said, *"No, no offences took place. That's not right, that's wrong."* As regards the incident when the complainant was in the bath, he said, *"There was a hug and a kiss and that's what it was."* He was asked *"-- did you ever go into your daughter's bedroom? --"* and replied, *"No, and there was no locks ever put on her doors either. That's all wrong."* When asked specifically, *"Did you ever go into your daughter's bedroom with her on her own and lock the door?"*, he replied *"No, there was no locks on the door, there was nothing like that."* He denied ever kissing the complainant on the lips or rubbing her legs. He denied telling her that she would not be believed if she disclosed the abuse, and also denied threatening her. He denied the incident in the car where the complainant had said he was in the back seat with her and had assaulted her under a blanket. He said he wasn't in the back seat, that the complainant and N had been in the back seat. He also denied ever having thrown the complainant out of the car in Dublin city while she was in her shaking outfit,

saying that it was “*a lie*” and “*that’s wrong*”. He further denied the allegation that he had assaulted the complainant while his wife was at a Christmas party, and said that he was not alone with her that evening, that N had also been in the house. Indeed, the appellant denied all specific incidents put to him. When asked why his daughter would make these allegations against him if they were not true, he replied “*They’re not true, they weren’t true*”, adding, “*I’ve been wronged all down the line, I have.*”

Grounds of Appeal

39. The appellant makes a number of complaints in his grounds of appeal. He complains that:

- i. the trial judge in refusing to accede to an application by defence counsel for a directed acquittal failed to ensure a fair trial having regard to prejudice arising by reason of the lapse of time since the date of the alleged offences, the manner in which the investigation and prosecution had been conducted, and the absence of witnesses;
- ii. the trial judge failed to give an adequate delay warning to the jury and failed to properly re-charge the jury on delay following being requisitioned to do so;
- iii. the trial judge erred in refusing to give a corroboration warning to the jury;

The refusal to direct an acquittal / withdraw the case from the jury on P.O’C. grounds

40. The application for a directed acquittal was not one made on the basis of either leg of the celebrated statement of principle in *R v. Galbraith (1981) 73 Cr. App. R. 124*.

Accordingly, it was not suggested that there was an insufficiency of evidence to support the prosecution’s case, or that such evidence as existed was so infirm that no jury properly charged could safely convict on it. Rather, the trial judge was being asked to withdraw the case from the jury because of the existence of circumstances which, said the defendant’s

lawyers, had implications for the defendant's ability to receive a fair trial, that indeed they created a real risk of an unfair trial and a risk of injustice.

41. The application was made relying on *The People (Director of Public Prosecutions) v. P. O'C* [2006] 3 I.R. 238 in which it was held, *inter alia*, that a trial court had an inherent power and jurisdiction, irrespective of whether or not judicial review had been sought, to prevent a trial from proceeding (or proceeding further) if matters arose, or evidence was given, in the course of the trial which rendered the trial unfair. The *P. O'C*. case was the only authority to which the trial judge was referred in support of the application.

42. What is now colloquially described as the *P.O'C* jurisprudence was developed in a line of cases including *D.C. v. Director of Public Prosecutions* [2005] 4 I.R. 281; *The People (Director of Public Prosecutions) v. P. O'C* [2006] 3 I.R. 238; and *S.B. v. Director of Public Prosecutions* [2006] IESC 67. We have been referred to all of these cases by the appellant in support of his appeal, as well as the further cases of *The People (Director of Public Prosecutions) v. K.D.* [2011] IEHC 384 and *The People (Director of Public Prosecutions) v. C. O'B.* [2010] IESC 41, which are proffered as affording specific examples of how the *P. O'C* jurisprudence has been applied in practice. Moreover, it is important to note that since the appellant's trial at first instance the Supreme Court has rendered its decision in *The People (Director of Public Prosecutions) v. C.C.* [2019] IESC 94 which offers yet further refinements of the *P. O'C* jurisprudence. The appellant further relies on the judgments in that case in support of his appeal.

43. In the *C.C.* case, which was heard by a five member bench of the Supreme Court, the court was concerned with 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. The decision on the merits was a majority one. However, there was broad agreement amongst the

members of the Supreme Court as to the applicable principles. The court had, however, divided on the proper application of those principles to the particular circumstances of the case.

44. Four members of the court delivered judgments in which they agreed that the proper approach the level of principle required was 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.

45. 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.”

46. There was express agreement in a number of the judgments with this step by step approach and no dissent from it. However, in circumstances where the court was divided on what should be the result of application of this approach in the particular circumstances of the case, O’Donnell J. had gone on towards at the end of his judgment to formulate five guiding principles which he considered would be of assistance in future cases. He said:

“It is, I think, apparent that there is a consensus in this court as to how a court of trial should approach an application such as this. The difference between us in this case involves the assessment of the facts in this particular and unusual case.

Insomuch as this case can be said to raise any distinct issue of law, rather than the application of general principles to particular, if unusual, facts, then I would suggest that the following principles might be identified:-

- (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.*

47. Again, no member of the court expressed disagreement with these principles, and two members of the court (specifically O'Malley J. and Charleton J.) expressed concurrence with the principles formulated by O'Donnell J..

48. Returning to the present case, the circumstances relied upon by the defence in the court below in support of the application to have the case withdrawn from the jury were:

- (i) the extent of the delay;
- (ii) specific prejudice arising from the delay, thereby depriving the accused of a

realistic opportunity of putting forward an obviously useful line of defence, including:

- a) the non-availability as a witness of the teacher who had been giving the Stay Safe talk, due to serious and irrecoverable illness, namely dementia;
 - b) the non-availability as a witness of the complainant's mother, due to her death;
- (iii) alleged bias and lack of fairness and impartiality in the police investigation.

49. In addition, in the course of submissions on this appeal, counsel for the appellant pointed to a further circumstance which, although he concedes it was not relied upon in the court below, featured in the evidence. He was referring to an asserted inability to resolve the conflict in the evidence as to whether a lock was put on the door of the complainant's bedroom, in circumstances where a physical examination of the door was never carried out (no specific criticism is being levelled at anybody in regard to this), and it is seemingly not possible to do so at this remove.

50. In his oral submissions before us, counsel for the appellant conceded that viewed individually none of the matters being relied upon represented "*killer punches*", as he put it. However, he maintained that cumulatively the effect of them is such as to cast sufficient doubt on the fairness of the appellant's trial as justify this court in setting aside the conviction. In his submission the trial judge had erred in not withdrawing the case from the jury and we are invited to correct that alleged error.

The trial judge's ruling

51. It is convenient at this point to set forth the trial judge's ruling. In doing it is appropriate to emphasise again that this ruling pre-dates the valuable guidance subsequently

provided by the Supreme Court in *The People (Director of Public Prosecutions) v. C.C.*, and now available to trial judges and indeed this Court. The ruling was as follows:

“JUDGE: Thank you. The Court has heard in the absence of the jury the testimony of Inspector Miley in this regard and a number of texts with [K] was opened to the Court and it is led that Inspector Miley did not carry out an impartial investigation by a) the manner of his communication with [K] as outlined in the texts and also in what he allegedly said to [the appellant] when he was being arrested. And the two allegations made are that he made comments about: "You don't have very much time for the guards" and: "It was a terrible thing that you did to your daughter" or words to that effect.

The Court has carefully considered the testimony and the replies to those allegations by Inspector Miley. He has said that his function at all times was to be impartial and to put all available evidence before the Court and to encourage [K] to come to Court or even give a statement so that all matters could be addressed and all matters could be addressed in Court. And the Court accepts his explanation in that regard. It also asked Inspector Miley to read out what he had written in his notebook on the day in question. It was early in the morning of the day, 7 o'clock in the morning and he said it was something that he would say to a person when he was arrested. And he noted various things in the house and had general conversation about football and Roy Keane. And obviously, addressed as to his rights. And the Court accepts and is satisfied of the accuracy of the recollection of Inspector Miley.

As regards then the P.O'C application as regards delay, the Court was asked to exercise its discretion and to halt the trial and not allow it to go to the jury because of

the delay in making the complaint. These allegations refer to matters that happened between 1990 and 2000 and that is 28 or 18 years ago. And that Mrs W is now deceased and her testimony would have been of great relevance in the case and the absence of the teacher ... when allegedly that sex education lecture took place and the reaction of the complainant in this case to that sex education. The law is clear on this as far as this Court is concerned, old cases or historic abuse cases can proceed but obviously with a warning. And the warning would be as set out in the relevant decisions about it's very difficult for a person to contradict allegations that occurred 28 or 18 years ago because they would not be able to refer. Now, "I remember that I was at something" or, "Know I was sick that day" or whatever. If allegations are vague, it's very hard to defend yourself against vague allegations. That's not to say that historic abuse cases cannot be tried but a warning would have to be given. A warning would also have to be given, the fact that we don't have the testimony of Mrs W and the absence of a teacher if the jury would consider that relevant.

So, I'm going to refuse your application to withdraw this case to the jury on the grounds of the delay because the testimony of [the complainant] will proceed and the Court in its charge to the jury will outline the dangers of conviction in a delay case."

Our intended approach to the issues

52. In the circumstances, bearing in mind the guidance provided by the Supreme Court's recent judgments in the C.C. case, we propose to examine the matters relied upon both individually and cumulatively, and then to form an overview of the case being made and as to the ruling made in the court below.

The extent of the delay

53. Evidence relevant to dates established that the complainant was born in mid-1982, and the alleged abuse of her was said to have begun in or about 1990, when she was aged 8 years, and to have continued until in or about 2000, when she was aged 18 years. The complainant reported the matter to An Garda Síochána in February 2018. The trial took place between the 26th and the 29th of November 2019.

54. Accordingly, the incidents complained of took place during a period beginning 28 years, and ending 18 years, before the appellant's trial.

55. The delay was substantial and was capable of creating both general and specific prejudice. However, on the issue of general prejudice many cases involving even greater delay have been safely tried in circumstances where the jury were given a suitable and appropriate delay warning by the trial judge. The trial judge in this case gave the jury a delay warning, albeit that its adequacy is now the subject of criticism by the appellant. The adequacy of the delay warning will be considered under a separate heading later in this judgment. On the issue of alleged specific prejudices, these will be examined under the next sub-heading below.

The alleged specific prejudices

56. The first specific prejudice alleged is the non-availability, due to illness with dementia, of the teacher who gave the Stay Safe talk to the complainant's class. The appellant complains that "*it would have been of assistance to the jury if she were available to give evidence had she remembered it*", and it is put no higher than that.

57. It is not suggested that this witness would have anything specific to say that might contradict, or cast doubt on the reliability of, the evidence of the complainant concerning becoming sick during the Stay Safe talk and being allowed to go home. The teacher in question might or might not have remembered the occasion on which she gave such a talk, and even if she did she might or might not have remembered whether the complainant had

exhibited illness during that talk. There is, however, nothing to suggest a likelihood of a positive recollection. As one of our bench observed during the appeal hearing, it is hardly an unusual thing for a child to become sick in school and to be sent home and unless there had been something else that was unusual about the occasion and/or the alleged occurrence the prospect of the teacher having a sufficiently clear recollection to have been of assistance to the jury, one way or the other, seems to us to be remote.

58. While an accused should not be deprived by reason of delay of pursuing a realistic opportunity of an obviously useful line of defence, we cannot say that the opportunity allegedly lost here was either realistic or that it constituted an obviously useful line of defence. The appellant can only speculate as to what such a witness might have said. She might have supported what the complainant had said, she might have sought to contradict it, or she might have simply been unable to remember. The appellant has offered no evidence to suggest he could have any confidence that she was in a position to give evidence that might assist him. The best he could hope for would be that the witness might be able to say categorically from positive memory that no such incident had occurred. However, we see nothing in the evidence to suggest that this was a realistic prospect. It seems to us far more likely that the witness, if she was available, would have been damaging to the defence case or at best that she would have been of no assistance to the defence. In the circumstances, we would characterise the non-availability of the teacher in question to testify as nothing more than a lost opportunity to explore an issue with her that might have been explored. However, her non-availability did not deprive the appellant of a realistic opportunity of an obviously useful line of defence.

59. The second alleged prejudice is the non-availability of the complainant's mother to give evidence at the trial, due to her untimely death from cancer. Again, it is necessary to consider whether, if this witness had been available, she could have provided the appellant

with a realistic opportunity of pursuing an obviously useful line of defence. The appellant's submissions are unclear as to what exactly he considers that this witness might have been able to say that would have been of assistance to him, but certain issues that might have been explored with her are capable of being inferred.

60. The first such area that might have been explored arises from the complainant's testimony that it was her mother who collected her from school after she had become indisposed during the "Stay Safe" talk. Undoubtedly the mother could have been asked questions about that, but the difficulty in that regard from the appellant's perspective is that there is no evidence pointing to whether she would support the complainant's claim, or would seek to contradict it, or whether she would even be able to recall the occasion. It seems to us that the non-availability of the mother to address this aspect of the evidence amounted to no more than a lost opportunity. On this aspect of the matter, which in any event was essentially collateral, it once again could not be said the appellant was deprived of a realistic opportunity of pursuing an obviously useful line of defence. We characterise evidence concerning the school incident as being collateral because it did not concern any specific incident of alleged abuse. Rather it concerned a collateral incident involving the complainant which, the prosecution maintained, was consistent with the complainant having been the victim of abuse on other occasions.

61. The second such area that might have been explored is whether the mother could assist with respect to the reliability, or otherwise, of the complainant's account of being in bed with her in the bed in her parent's room, it being understood that the appellant was to sleep in the complainant's room, when her father also got into the parental bed beside the complainant. It will be recalled that the complainant's evidence was that she attempted to get up after he got into the bed but that he had held her by the wrists to prevent her from doing so. She further testified that they were then watching television while in the bed, and that

during this the appellant had sexually assaulted her by rubbing or feeling her leg under the bedclothes. The complainant's evidence was that in response to this she had jumped up, saying she was "too hot", and left the bed.

62. Clearly, the complainant's mother would have been of potential assistance to the defence if she was in a position to say that such an incident had never happened, or that it could not have happened as described. However, we do not know what she might or might not have said. The evidence was silent as to whether the complainant's mother was awake or asleep during the alleged incident; or concerning any claimed reaction by the complainant, either to the appellant getting into the bed, or to the complainant jumping up and saying she was too hot. There was equally no suggestion by the complainant that her mother had witnessed or was conscious of her being held by the wrists. Undoubtedly, there was scope for defence counsel to explore with the mother, had she given evidence, whether, as a matter of reality, an incident such as that described by the complainant could have occurred without her mother being conscious or aware of it. However, one can only speculate as to what the mother might have said in response to such probing.

63. O'Donnell J. made important observations concerning the possible impact of a missing potential witness in the course of his judgment in *The People (Director of Public Prosecutions) v. C.C.* (cited above). In that case, as in the present, the missing witness, was deceased. He said (at para 28):

"There is also no doubt that the unusual facts of this case mean that M.Cy. was a potential witness of considerable importance. Again, however, on its own, I do not think that the absence of M.Cy., at least without culpability on the part of the prosecution, can be said to be decisive in this case. She or any other witness could have been unavailable, whether through her own decision, or possibly death, even if the trial had occurred within a very short period after the events concerned. That

possibility arises in any case, and trials are not rendered unfair or unjust simply because of the absence of a witness whose evidence, although relevant, is not an essential proof. If it were otherwise, then the absence of a single witness, or even a co-accused or accomplice, would mean that any trial was impossible. Generally speaking, the trial process should be robust enough to handle the absence of witnesses or real evidence that occurs without fault, unless and until the cumulative impact is such as to render the trial either impossible or unfair. Once again, however, the significance of the role of M.Cy. in the complainant's account, and her absence (for whatever reason), coupled with the lengthy lapse of time, are substantial factors in any consideration of whether it was just to let the case proceed."

64. The essential facts in the C.C. case are set out in paragraphs 3.1 and 3.2 of the judgment of Clarke C.J., as follows:

"3.1 The complainant, whom I will refer to as A.U., made allegations against Mr. C., A.U.'s uncle, in relation to events which were said to have taken place on dates unknown between August 1971 and April 1972, when A.U. and her family stayed with Mr. C. in Clare. It was A.U.'s account that she had been indecently assaulted by Mr. C. on an occasion when he had taken her hunting. She also gave evidence of a second incident, where she alleged that she had been raped by Mr. C. during the same holiday. In this regard, she referred to the background to the rape, involving a row between Mr. C., Mr. C.'s partner at the time, M.Cy., and his son, C.C., in the course of which the latter was said to have produced a shotgun. She further stated that later that evening, M.Cy. had led A.U. from her bed to the bedroom where Mr. C. was, undressed her, and placed her naked in the bed alongside Mr. C. After M.Cy. left the room, Mr. C. was alleged to have raped A.U.

3.2 *The allegations against Mr. C. were made to the Gardaí by A.U. in April 2004. In December 2004, Mr. C. was arrested, detained and interviewed. The direction to prosecute Mr. C. on these charges was issued by the D.P.P. in February 2006. In 2005, Mr. C. had left the jurisdiction, living in several different countries until his arrest and extradition from the United Kingdom in July 2013. It transpired that M.Cy., and also B.C., A.U.'s mother, had both passed away in 2008.*

65. There are a number of important points of fact of which the situation with respect to the missing witness M.Cy in the C.C. case, and that of the missing witness in the present case, may be distinguished:

- (a) Firstly, in the C.C. case there had been a garda investigation underway for approximately two years before the death of the witness, although the witness was not interviewed during this time. In the present case the complainant had not disclosed her alleged abuse to anybody before her mother died, and accordingly there had been no garda investigation in the course of which the witness might have been interviewed before her death;
- (b) Secondly, the accused in the C.C. case had been interviewed while the witness M.Cy. was still alive and had suggested to gardaí that M.Cy would confirm his account. However, in the present case, the appellant's wife was already dead when he was interviewed. Moreover, he never suggested to gardaí at any time that his wife, had she been alive, could have supported his account in any material way.
- (c) Thirdly, the deceased potential witness M.Cy. in the C.C. case was alleged to have played a significant role as an active participant in the events leading to the rape of the victim in that case, namely by taking the victim to the Mr C's bedroom, removing her nightdress and leaving her naked on the bed. In

contrast, the deceased potential witness in the present case had arguably played a much more limited and largely passive role. Her active involvement was confined to allegedly having collected the complainant from school after she had become ill during the “Stay Safe” talk; and she was passively involved to the extent of having allegedly been present in the parental bed at a time when the appellant was said to have sexually assaulted the complainant in the same bed by feeling her leg under the covers. There was however no evidence as to the potential witness’s state of consciousness at the time (i.e., as to whether she was awake or asleep), nor as to her state of awareness at the time (i.e., as to whether she had discerned or perceived anything whether untoward, or otherwise, involving her husband and the complainant, that might have taken place in the parental bed on the occasion in question.

- (d) Fourthly, the missing potential witness, M.Cy, in the *C.C.* case was aware of the allegations against Mr C before she died and had told three people who had been present at a meeting in Holyhead which she had also attended, and at which the allegations were discussed, that “*it was all lies*”. The defence were therefore in a position to suggest that it was a reasonable possibility that she would have maintained that position had she been available to testify at the trial. In contrast, in the present case there was no evidence at all to suggest what the complainant’s mother might have said in evidence had she been available to testify.

66. We think that the issue with respect to whether the appellant was deprived of a realistic opportunity of pursuing an obviously useful line of defence is more finely balanced in the case of the bedroom incident, and the charge based on that, than in the case of the occasion on which it is suggested the mother collected the complainant from school.

However, we have ultimately concluded that once again it amounts to no more than a missed opportunity. The appellant can point to no evidence tending to suggest that his late wife would have testified in his favour in any respect. It is true that in theory she might have supported him by directly contradicting the complainant's testimony, or indirectly by suggesting or conceding limited opportunity on the part of the appellant to commit such an offence without her becoming aware of it. However, she might also have testified in a manner supportive of, or which at least did not undermine, the complainant's testimony. A third possibility is that she might have claimed that she had been asleep and had no knowledge of what might or might not have occurred one way or the other. The truth is we simply do not know what she might have said, and unlike in the *C.C.* case there is no extrinsic evidence to suggest that any of the possibilities that we have identified is more likely than another of the others.

67. It is of significance in that regard that the complainant, who was available to be cross-examined and was cross-examined, was asked absolutely no questions by the defence that might have served to query or cast doubt on the reliability of her account of what happened on this occasion in the parental bedroom. She was not asked one question in cross-examination about her mother's role, if any, on this occasion. The transcript reveals that having been asked in her evidence in chief why she had sought to sleep in the parental bed on the pretext of being sick, the complainant had provided a twelve-line narrative answer. None of this was probed in cross-examination. She was not asked if her mother was awake or asleep. She was not asked if her mother had reacted to her jumping up. In circumstances where she had sought to sleep with her mother on the pretext that she was sick, and had said that she had jumped up claiming to be too hot, she was not asked whether her mother had exhibited concern about that, in circumstances where her mother might reasonably have been concerned that the complainant could have a temperature. Indeed, it is possible to envisage

many other questions that might have been pursued by the defence relating to the mother's presence and possible involvement with a view to probing and challenging the reliability and consistency of the account, and which depending on how they were responded to might well have suggested that the non-availability of the mother as a witness at the trial represented a prejudice that went beyond a mere missed opportunity. However, the specifics of the allegation concerning the incident involving alleged abuse of the complainant in the parental bed, in the physical presence of the mother went completely un-probed. Indeed, the allegation was unchallenged save on the rolled up basis that the appellant was denying all of the complainant's allegations, and nothing was elicited to suggest what, if anything, the mother might have been able to contribute, one way or the other in regard to the parental bedroom incident if she had been available. In the circumstances we are also not persuaded that the non-availability of the complainant's mother as a witness deprived the appellant of a realistic opportunity of pursuing an obviously useful line of defence in respect of the parental bedroom incident.

68. Yet another aspect of the specific prejudice being relied upon is the claimed inability to resolve the conflict in the evidence as to whether a lock was put on the door of the complainant's bedroom, in circumstances where a physical examination of the door was never carried out, and it is seemingly not possible to do so at this remove.

69. However, the point is made on behalf of the respondent and conceded by counsel for the appellant that this was not a matter that was relied upon in the court below. Further, it was never put to the complainant that there had been no lock on the door, or that the appellant had not placed a lock on her door as she had claimed, or that he had not locked the door as she had said. Despite it not having been put, the appellant when giving evidence in his defence volunteered that "*there was no locks ever put on her doors.*"

70. We have no hesitation in the circumstances that it is not now open to the appellant, to contend that on this account he was deprived of a realistic opportunity of pursuing an obviously useful line of defence.

Alleged unfairness in the police investigation

71. There were two pieces of evidence relied upon at first instance in support of the P. O'C complaint.

72. The first was the appellant's evidence that the investigating Garda, Inspector Jason Miley, made comments to him in the course of his dealings with him, which were indicative of prejudice or bias. Inspector Miley was said to have said to him: "*You don't have very much time for the guards*" and that: "*It was a terrible thing that you did to your daughter*" or words to that effect.

73. The second was certain texts sent by Inspector Miley to K, the complainant's son and a sibling of the complainant, who was out of the country and exhibiting a reluctance to make a statement and possibly make himself available as a witness. In one such text Inspector Miley had written:

"That truly is a shame, [K]. I know [the complainant] has her reasons and she should have discussed it with you. This is very hard on the whole family. If you want to talk it out, just let me know.

Jason."

74. On a subsequent occasion, Inspector Miley, wrote in another text message to K:

"I feel the devastation of the whole sorry incident for and your family but as you know, one person set this course in motion and that was your dad and his actions all those years ago. [The complainant] is suffering really badly and struggling to cope. The evidence you were willing to give could make a massive difference. I'm asking you to reconsider before I cancel the flights until 10 ..."

75. It was put to Inspector Miley that these text, and the comments he was said to have made to the appellant, were indicative that he was not conducting an impartial investigation, that he was taking sides in the investigation. Inspector Miley denied any lack of impartiality and further denied that he had made the alleged comments complained of to the appellant, stating, *“It was allegedly said and I'm denying it and I wouldn't say it. It's just not in my nature to do so but it just didn't happen.”* The witness nevertheless accepted that he had had some general conversation with the appellant on the morning of his arrest which he had not recorded, explaining that, *“we effected the arrest and gave him an opportunity to dress himself and, you know, prepare himself to come with us. We would have talked about things that were neutral as in he was into refereeing. There was trophies for football, he had a picture of Roy Keane on his mantelpiece. We had general conversations about that which I did not note”*, adding that he had noted anything that was material to the arrest and what the appellant had said after the arrest. The appellant had said, upon being arrested and cautioned, *“I have my own allegations”*, and he had noted that. Pressed on his failure to record the general conversation that he had had with the appellant while the appellant was dressing and preparing to accompany the arresting party to the garda station, he stated, *“This is no different to any other arrest where you would talk about general things, the weather, the family, whatever the case may be. So, no, I didn't record it.”*

76. On the issue of the text messages he again rejected any suggestion that they were indicative of a lack of impartiality. He said,

“I completely disagree with that. It's -- the effort is to get the evidence before the Court and allow the Court to test the evidence, that's what we do. We don't take sides and we try our best to be as neutral as we can in a prosecutorial system.”

77. The trial judge was best placed to assess the reliability and credibility of the relevant witnesses and the evidence given by them. She carefully considered the testimony of

Inspector Miley and his responses to the allegations of lack of impartiality that had been levelled against him. Inspector Miley had said that his function at all times was to be impartial, and to seek to put all available evidence before the court including by encouraging [K] to come to court or at least to give a statement. He claimed to have done no more than that and the trial judge had accepted his explanation in that regard. Moreover, in regard to what had occurred on the morning of the arrest, the trial judge was satisfied as to the accuracy of the recollection of Inspector Miley. We can see no error on the part of the trial judge. Her ruling rejecting any lack of impartiality in the garda investigation was one that was open to her on the evidence before her.

Cumulative impact on the fairness of the trial

78. In circumstances where we have not been disposed to uphold any of the individual complaints made by the appellant as impacting significantly on the fairness of his trial, it remains for us to consider whether cumulatively the matters complained of could have rendered his trial unfair. We accept that there was significant delay. We accept that there was the general prejudice that goes with delay, and indeed that there was some specific prejudice albeit that it was in the nature of missed opportunities rather than the deprivation of a realistic opportunity or opportunities for the appellant to pursue an obviously useful line, or lines, of defence. In our judgment, however, the negative cumulative impact of the matters complained of was not such that it could not be adequately addressed by means of an appropriate delay warning to the jury. A delay warning was given in this case, and we will consider its adequacy under the next heading.

The adequacy of the delay warning.

79. The trial judge warned the jury as follows:

“Now, these allegations go back to 1990 to 2000, all right? And it's what's called an old complaint and it's events that occurred now 19 years or going back to 1990 which

is 28 years ago. So, you have to consider that when you're considering the evidence in the case. And it is all the more difficult to decide the evidence or to regard the evidence in the case because all these cases are basically, "He did", "I didn't", that sort of basis. If a complaint happened last week, for example, it's capable of analysis and questioning and somebody could say: "No, I wasn't, I was out last week. I was definitely not there last week." So, there's difficulties here when we're dealing with complaints that go back 28 years or 18 years, right, and you have to take that into detail. If a complaint is made very, very quickly after an alleged event, guards would take very, very particularised complaints about where you were. You'd be able to check it in your diary, check with other people about what would happen. It's the kind of detail that can be refuted by an accused person calling evidence or giving evidence on his behalf. So, you can't allow those difficulties to make the prosecution's case any easier and you have to approach the case on the basis of the evidence and bear in mind the various warnings I have given you and bear in mind that the onus is on the prosecution to prove the case beyond reasonable doubt. So, just bear in mind the difficulties for a person facing these allegations after such a period of time but it doesn't mean that old cases cannot be tried. And assess the evidence. The law says that stale cases can be tried, old cases can be tried, but it's up to you to assess the evidence in the case.

So, bearing in mind those matters, consider each and every count separately as if you were considering 40 different allegations. The only basis upon which for present purpose you can decide this case is the basis of a unanimous verdict. Also as regards this case, I've commented on the fact that these allegations and these events are alleged to have happened 18 years ago or longer, 28 years ago, that [the complainant's] mother and [the accused's] wife is not here to give evidence in the

case and her school teacher isn't here but maybe you consider that completely irrelevant in the case."

80. The written submissions for the appellant complain that the trial judge did not address the issues of substance in this aspect of her charge to the jury. It is said that the trial judge adverted to the crucial facts that the teacher and the complainant's mother were not available, but did not point out the relevance of this; and then undermined the warning by immediately stating that "*maybe you consider that completely irrelevant in the case.*"

81. In a defence requisition following the charge, the trial was asked to read to the jury in full, with necessary modifications, the celebrated and so called "Haugh direction" on delay, being a direction of the trial judge, His Honour Judge Kevin Haugh as he then was, in *The People (Director of Public Prosecutions v R.B.* (unreported, Court of Criminal Appeal, 12th February, 2003), which was endorsed and approved by the Court of Criminal Appeal as a model direction as to how a jury might be instructed on delay.

82. The trial judge declined to do so because she felt the case before her was distinguishable from the *R.B.* case in the following respect. In the *R.B.* case the allegations were vague and had lacked detail. The same was not true in this case. She said, "*Unfortunately, right, for the defence, a lot of this does go into detail so, you know, that's why I didn't go through the whole warning, all right?*" There were then the following further exchanges between the trial judge and defence counsel:

"JUDGE: All right? I think I've adequately covered it because there's a condensed version as well in an unreported case of the Court of Appeal and I've given the condensed version and I don't think I've left anything out of Judge Haugh's (sic) warning.

MS LEADER: I accept you've given a condensed version of it, Judge. I think what I'm trying to emphasise to the jury and you may accept this or not that Judge Haugh

(sic) gave that warning very many years ago. It's the experience of the courts that it's difficult in old cases and it's not something that just occurs in this old case, Judge.

And I think it helps to emphasise that to a jury when the entirety of the Judge Haugh

(sic) warning is given."

83. Ultimately, the trial judge was disposed to re-charging the jury in a limited way, and did so as follows:

"JUDGE: All right, thank you. You have 40 counts on the indictment. I've said that you have to consider each and every count separately and consider the evidence in this case as regards each and every count separately, all right, because the allegations here are from 1990 to 2000. So, you have to be satisfied beyond a reasonable doubt that the prosecution has proved the case against the accused beyond reasonable doubt on each and every count before you could bring in a verdict of guilty. And bear in mind, while the evidence here as regards counts that occurred at three monthly periods and bear in mind what I've said about the difficulty for an accused to defend a charge of such an offence since 1990 and since 2000. If it happened last week, you'd be able to say -- well, he's a taxi man -- "I remember taking up a fare in Rathgar and I had to go to the airport. I went to the airport so you'd be able to give details and be able to give evidence. In these cases that go back a long way, that sort of detail is not available to an accused man to consider the allegations made against him. As I said, the law says that stale, old cases can go to trial but just bear in mind the difficulties that an accused person has in amounting a defence. Although they don't have to say anything but even questioning such an allegation, all right? Okay, thank you."

Decision on the delay issue

84. We have carefully considered the instruction given to the jury by the trial judge concerning the issue of delay, both in the main charge and in the re-charge, and are satisfied that it was adequate to focus the minds of the jury on the potential difficulties presented on account of delay. This had been a reasonably short case. There had been just two days of evidence and the evidence, and issues relating to it, would have been fresh in the jury's mind. Her charge on delay, although much shorter than that given by the late Mr Justice Haugh in the *R.B* case, was sufficient in our view to alert the jury to the difficulties in defending one's self against a charge or allegations after the passage of a considerable period of time. She adverted to the extent of the delay in the case, she pointed out that the difficulties presented by delay were all the more difficult in cases where it is alleged "He did", and the response is "I didn't". She contrasted how much easier it would be to address a more recent charge or allegation, say that, "*If a complaint happened last week, for example, it's capable of analysis and questioning and somebody could say: 'No, I wasn't, I was out last week. I was definitely not there last week.'*" She made the point that a recent complaint would very likely be better particularised, making it easier to possibly refute. Importantly, she told the jury "*you can't allow those difficulties to make the prosecution's case any easier.*" She emphasised that the onus was always on the prosecution to prove the case. They should therefore be aware of and bear in mind the difficulties for a person facing such allegations after such a period of time, but went on to say that that did not mean that old cases could not be tried. It was up to them, the jury, to assess the evidence. The trial judge then specifically drew the jury's attention to, and sought to remind them of, the fact that neither the teacher in question, nor the appellant's mother, had been available to them as witnesses. This was in the context of the charge following on immediately from defence counsel's closing speech.

85. In her relatively short closing speech (running to just three pages of transcript), which the jury had heard only moments earlier, defence counsel had said to them:

“So, is there anything else to help you in this trial come to a conclusion other than what one person said and what another person said? And I'm suggesting to you, ladies and gentlemen, that there isn't. There is nobody else here to substantiate what [the complainant's mother] has said to you in the witness box. We haven't heard from her mum for very, very obvious reasons but that might be something that you might think about because her mum was there if you accept -- which I'm suggesting you don't -- what [the complainant] says in relation to what happened in the bed. We have nothing and that's nobody's fault, nobody's fault at all. We've no forensic evidence. Nobody's fault again. And we've heard the guard in relation to that, what he said about old cases. They're harder, they're more difficult to establish what happened back in the past. We've heard of [the teacher who gave the Stay Safe talk]. We've nothing to help us in relation to that in relation to [the complainant] receiving sex education and getting violently ill in the middle of it. We've heard the guards -- they must have thought it was significant if they went to the trouble of trying to interview [the teacher] but there was no joy there, she couldn't remember that far back.”

86. While the reference in the judge's charge to the jury not having had the benefit of evidence from the teacher and the complainant's mother was a relatively brief one, it sufficed in our view to contextualise for the jury the potential application and relevance of the generic instructions that she had been giving them concerning the difficulties associated with defending old cases. They were expressly reminded that there were these two potential witnesses from whom they had not heard. As this followed immediately from the defence speech which had placed reliance, *inter alia*, on the fact that the jury had not heard evidence from either the teacher or the complainant's mother, we are satisfied that the jury would have been fully alive to this particular aspect of the matter and the difficulties presented thereby.

We do not consider that any further contextualisation was required in the circumstances of the case.

87. We do not accept that the trial judge's comment that, "*maybe you consider that completely irrelevant in the case*" served to undermine the warning given. The judge was not getting down into the arena and urging the jury to regard the fact that those witnesses had been unavailable as being irrelevant. On any fair reading of the trial judge's said remark in the context in which it was made, a person hearing it would have understood that she was urging on the jury that on the one hand they might take the view that the circumstances she had identified were relevant to whether they could accept the complainant's evidence as being credible and reliable, but that on the other hand it was also open to them to take the view that they were irrelevant to that issue, and that whether they were relevant or irrelevant was ultimately a matter for the jury to assess on the basis of all of the evidence that they had heard.

88. In conclusion on this issue, we find no error in the manner in which the trial judge instructed the jury on the issue of delay, and are satisfied that her instructions were sufficient and adequate in the circumstances of the case. We therefore dismiss this ground of appeal.

The failure to give a corroboration warning

89. This was not a case of an issue being overlooked. The trial judge was asked to give a corroboration warning and decided in the exercise of her discretion not to give one. In that regard, the transcript reveals the following exchanges:

"MS LEADER: -- in relation to the matter. And I don't know if the Court would consider giving a corroboration warning in circumstances where there is no corroboration in the case and it is simply one word against another at the end of the day in circumstances where the jury has heard no other evidence from other people in relation to the matter.

MS LEECH: In relation to the delay warning, I accept that but in relation to the corroboration, Judge, I say it's not a case where corroboration is appropriate because there has been nothing untruthful or unsafe in relation to the evidence. There's no controversy attaching to the evidence of -[the complainant].

JUDGE: Okay, I've actually considered that --

MS LEECH: Yes.

JUDGE: -- and while I've indicated I'm giving a delay warning, I don't think it's appropriate here to give a corroboration warning --

MS LEECH: May it please the Court.

JUDGE: -- given the age of the complainant when she says that these offences took place, she was right up to nearly 18 years of age and it's just not a matter for a corroboration warning. It would be different if it was different circumstances but given the nature of the allegations, the age of the complainant and the evidence in the case, I'm declining to give a corroboration warning, okay?

90. In our assessment there is nothing to suggest that the trial judge's discretion was improperly or inappropriately exercised. We can see no justifiable basis for intervening following a discretionary decision which we are satisfied was properly made. The Oireachtas had vested a discretion in her and it is clear that she gave due consideration to the issue. Her decision was anchored in the evidence and based on cogent reasons.

91. We therefore dismiss this ground of appeal.

Conclusion

92. In circumstances where we have not seen fit to uphold any of the complaints made by the appellant in his grounds of appeal, we are satisfied that his trial was satisfactory and that the verdict is safe. We therefore dismiss the appellant's appeal against his conviction.