An Chúirt Uachtarach

The Supreme Court

Denham CJ
Hardiman J
O'Donnell J
Clarke J
Charleton J

Record number: 2010/35JR

Appeal number: 22/2013

Cross appeal number: 24/2013

Between

Mark Nash

Applicant/Appellant

and

The Director of Public Prosecutions

Respondent

Judgment of Mr Justice Charleton delivered on the 29th day of January 2015

1. The applicant/appellant Mark Nash seeks to prohibit his trial on a charge of the murder of Sylvia Shiels and Mary Callinan on or about the 6th March, 1997. In what follows, this judgment can only reference evidence that may be adduced at that criminal trial. The Court is making no findings of fact. The appeal of Mark Nash is from the judgment of Moriarty J in the High Court in *Mark Nash v Director of Public Prosecutions* [2012] IEHC 359 refusing prohibition.

2. At the time of their death, both of the murder victims were living in sheltered accommodation called Orchard View near Grangegorman psychiatric hospital in Dublin. The remains of the victims showed that they had been repeatedly stabbed and that their bodies had also been mutilated. Another lady, Ann Mernagh, since deceased, shared the accommodation with the two victims. She, however, was in a separate bedroom. She, apparently, fell asleep while listening to her personal stereo on headphones and consequently heard nothing. She was unmolested by the intruder. She discovered the bodies, however, and was bound to have been very troubled by that.

3. On the discovery of the crimes, a murder enquiry was instigated. The particular fact most pertinent to this appeal is that apparent confession statements were made by two different and unconnected individuals who made no claim to have been acting with each other. Mark Nash, this appellant, is one of them. He is said to have confessed while being questioned by gardaí on another matter. The other is a man, deceased since 12th September 2000, called Dean Lyons. He confessed in a Garda station, perhaps in consequence of it being hinted to him while being questioned by gardaí that his fingerprints may have been found at the scene. They were not. With the passage of time, other witnesses to the murders have either died or become unavailable. Mark Nash seeks to cross examine the unavailable witnesses at his trial. He claims irremediable prejudice in consequence of their non-availability resulting from the delay in bringing this case to trial and argues that he has established that there is a real risk that should his trial take place it would be unfair. That trial is listed for hearing in the Central Criminal Court in the first term of 2015. In addition to those already mentioned, a lady called Vera Brady is also deceased. She may have given holy pictures related to a particular Christian sect to some of the inhabitants in Orchard View: images emanating from that sect, with warnings on the reverse of imminent cosmic catastrophe, were found on Dean Lyons when he was arrested. Some of the investigating gardaí in relation to both alleged confessions may also no longer be available. Detective Garda Patrick Lynagh is dead at this juncture. He is the officer who apparently obtained the consent of Mark Nash for the forensic examination of the jacket he was wearing upon his arrest. Professor John Frederick Austen Harbison, the distinguished forensic pathologist who examined the bodies of the victims, has, due to illness, been unavailable for some years to give evidence in murder cases. Apart from that, the circumstances leading to the death of these two victims were the subject of intense public interest. One of the main points of media discussion was how two unconnected people could confess to the same crime? Unlike in the ordinary reporting of vicious crimes, interest in what have been called the Grangegorman murders has continued because of the inconsistent double confessions and because of the public investigation and report into what some have regarded as the Garda mishandling of Dean Lyons' alleged confession. In the light of that publicity, and because of the overall treatment of him in the press, the appellant Mark Nash also claims that he will be unable to obtain a fair trial.

4. As between what might be regarded as the competing confessions of this appellant Mark Nash and the late Dean Lyons, the prosecution have finally sorted out the case which they wish to make. With the development of DNA profiling and its sensitivity in recent years to even very small samples and following on a cold case review by the gardaí and the Forensic Science Laboratory, the inside seam of a cuff and a button or button thread of the previously-mentioned jacket of this appellant Mark Nash apparently yielded a DNA samples which the prosecution wish to ascribe by evidence to Sylvia Shiels and another sample to Mary Callinan. The Director of Public Prosecutions argues that this piece of evidence makes the prosecution of Mark Nash a matter of compelling public interest. Unlike other cases, where upon being judicially reviewed trials have been prohibited, this case is not merely, the prosecution argue, the word of one person against another or of a confession uncorroborated by any other evidence but one where the burden of proof is capable of being discharged to the satisfaction of a jury notwithstanding the infirmities that have arisen in the decade and a half that has since elapsed. Mark Nash, on the other hand, contends that delay, public prejudice to him in the media, and the consequent impact of delay on the availability of evidence makes a fair trial impossible.

5. The arguments advanced are best seen within the context of a brief chronology. In turning to that, it is appropriate to recall that there are limitations to the extent to which a court hearing a judicial review application should engage with facts that are unnecessary to its decision. On an application is to prohibit a trial where, if it takes place, disputed facts will be decided by a jury, a

court should only decide such procedural matters as are essential to its decision and avoid any expression of view on matter touching on the strength or likelihood of the building blocks of either the prosecution or the defence cases.

Chronology

6. As indicated, the murders for which the Director of the Prosecutions seeks to try Mark Nash were discovered on the 7th March, 1997. On 26th July of that year Dean Lyons was invited to the Bridewell Garda station and while under interview he ostensibly confessed to these murders. He was immediately arrested and he was charged the next day. In August, as a result of other offences of murder in Roscommon, this appellant Mark Nash was arrested. While being questioned about those offences he made a statement about that double murder and he also, it is claimed, confessed to committing the Grangegorman murders. There was later a 5 day trial of the Roscommon murder cases and a conviction resulted. In consequence, he has been in custody ever since. As an Englishman, however, he has been making applications to serve out his sentence under transfer of prisoners legislation in Great Britain. During the investigation Mark Nash's jacket was taken from him by gardaí and brought to the Forensic Science Laboratory in Dublin. Apparently, the jacket had been dry-cleaned before his arrest and no results were then forthcoming. On the commission of any murder, the procedure is that the investigating team will write a report recommending action after the investigation is substantially complete and submit their file to the Director of the Prosecutions. This file prepared in relation to the Grangegorman murders appears to have concluded that Dean Lyons, and not Mark Nash, was the culprit. In September 1997, this appellant Mark Nash wrote a lengthy letter retracting his admissions. The following month, Dean Lyons also denied the murders. Then in November, in the course of an undated suicide note, it is claimed that Mark Nash further denied his involvement in the murders but claimed that he was innocently at the scene in consequence of seeing a man running from the house at 3am, prompting him to check out what had happened.

7. Moving into 1998, the murder charge against Dean Lyons was dropped by the prosecution. Later that year, in the Forensic Science Laboratory, a very small stain was found on the jacket of Mark Nash but it may then have represented too small a sample to test successfully. Testing also destroyed some samples. Some threads and buttons were forwarded for specialist DNA examination to a forensic science institute in the United Kingdom, but with no result. In October of that year, Mark Nash was tried with the other Roscommon murders and he was convicted, as indicated. This resulted in a lengthy sentence, nominally one of life imprisonment. It may be inescapable in the trial of this matter that mention is made of what is normally not revealed to a jury, namely that the accused has been convicted on another offence, but that will, no doubt, be accompanied by an appropriate warning that conviction on a prior offence is not evidence tending to show the guilt of Mark Nash or from which that guilt might in any way be inferred.

8. In February 1999, Mark Nash applied to be transferred to serve out his life sentences for the Roscommon murders in England. In July of that year, Dean Lyons signed a formal statement denying any involvement in the Grangegorman murders. That September, the Director of Public Prosecutions decided that Mark Nash should be charged with the Grangegorman murders but that this should not happen until a book of evidence had been completed. That decision was revoked the following month. That December, Mark Nash was interviewed under a special procedure allowing for questions to be asked of serving prisoners.

9. Moving into the year 2000, Dean Lyons was visited by an officer of An Garda Síochána prominent in the investigation of the Grangegorman murders. Apparently as a result he was now willing to become a witness for the prosecution; presumably to rule out any credibility attaching to his apparent confession. Only a few weeks later, on 12th September, Dean Lyons died, apparently in consequence of his ongoing troubles with addiction. With developments in DNA profiling, a new extraction technique called low copy number ("LCN") profiling became available. When Mark Nash's first application for transfer to a prison in Britain had been refused, he initiated an unsuccessful judicial review application seeking to overturn that decision in July 2001. In May 2003 one of the buttons from the jacket mentioned earlier was tested as being a hopeful source of LCN profiling but, it seems, with negative or insufficient results. In March 2004 there was a cold case review involving An Garda Síochána and the Forensic Science Laboratory. Inherent in all of this was the view that Mark Nash could not be tried for these offences unless something was uncovered that would make a case weakened by what was considered by some gardaí to be the wrongful confession of Dean Lyons much stronger. In November 2004, a High Court judgment on the judicial review application refused to overturn the administrative decision by the prison authorities not to transfer Mark Nash to England. That judgment also noted that the excuse for not doing so, being that the cold case review was ongoing and that there was hope of a development, could not continue indefinitely. That same month, Mark Nash again applied for a transfer to serve out the remainder of his sentence across the Irish Sea.

10. From some time in 2005 an extraction technique that could yield better DNA profiling notwithstanding a very small sample was available for the first time in the Forensic Science Laboratory in Garda Headquarters. In January, February and April of that year, the cold case team met on a number of occasions. Mark Nash's jacket was resubmitted on the 19th of May for further testing. The jacket was returned, however, without any further test having been carried out. Meanwhile, a commission of investigation had been appointed following a report by a senior counsel, George Birmingham, as to how it happened that Dean Lyons had confessed to the Grangegorman murders. His report was published in September 2006. That month also saw a fresh application by Mark Nash to transfer to a prison in Britain. Perhaps in consequence, the cold case review team met on a number of occasions, the ostensible purpose of which was to see whether any potential further forensic testing might take place. A further kind of test, called short tandem repeat on the Y-chromosome ("YSTR") was suggested by one of the forensic scientists in relation to the samples. Nothing resulted, however; if this test was carried out at all.

11. In July 2007, the latest prisoner transfer application by Mark Nash was refused. Ann Mernagh, the patient who discovered the bodies of the two victims, also died that month. Then in August a further application was made by Mark Nash to transfer to a British jail. Again, it may emerge in the trial that multiple applications for transfer were made. No inference can be drawn from this and the trial judge may tell the jury that such applications are common from foreign prisoners, as indeed they are; or otherwise it will be dealt with appropriately at the trial. In February 2009, a meeting between gardaí and forensic scientists came to the view that all the forensic tests that were available in Ireland had been completed but that it might be possible to pursue the most up-to-date DNA comparison techniques in another jurisdiction. In March of that year, the Department of Justice in the course of correspondence, apparently over the prisoner transfer issue, stated that the investigation was continuing and that this new area of DNA comparison had been "identified and is being pursued." Mark Nash then initiated a further judicial review in relation to the refusal of his prison transfer application. Then in June a number of exhibits were brought back to the Forensic Science Laboratory for further investigation. That July, on the 16th, buttons and thread from the jacket of Mark Nash apparently developed a DNA profile matching the victim Sylvia Shiels. The jacket itself was re-examined and the seam of the right sleeve was opened. A DNA profile matching the victim Mary Callinan apparently emerged on the 24th of September. Matters moved swiftly on the receipt of the relevant scientific reports. That October members of the investigating team met. On the 10th October, on the direction of the Director of Public Prosecutions, Mark Nash was charged with the double murder at Grangegorman. The book of evidence was served that December. In the prisoner transfer application, opposition by the State was based upon the new developments.

12. Moving into 2010, on 26th March, the High Court granted leave to initiate these judicial review proceedings. This judicial review by Mark Nash has proceeded for the last 4 years and 9 months. Meanwhile, the prosecution was preparing for trial. The jobs books in this extensive investigation were all typed up and made available to the defence. With the charging of Mark Nash, lurid reports resulted in

some newspapers. The Director of Public Prosecutions took criminal contempt proceedings against a number of media groups. They ultimately gave an undertaking not to publish material that might interfere with the trial process. In consequence of interactions between the prosecution and defence, on the 17th October, 2011, the prosecution indicated that they had made all the discovery which they felt was available to them and invited the defence to make any further applications to the trial judge. As 2011 turned into 2012, two of the detectives involved in the investigation died. This judicial review application was then heard in the High Court by Moriarty J over five days in March 2012. A further contempt motion was issued by the Director of Public Prosecutions against another newspaper while the court was considering its judgment. Moriarty J refused the reliefs sought by judgment dated 10th August, 2012; [2012] IEHC 359. Further ancillary reliefs were sought by Mark Nash and the judgment on that was issued on these by Moriarty J on 17th December of that year; [2012] IEHC 598, which was principally concerned as to costs and has not yet been arguer before this Court. This appeal from those judgments was then brought by Mark Nash and a cross appeal was also brought by the Director of Public Prosecutions on the issue of the award of a small proportion of Mark Nash's costs contrary to the issue. The murder trial had been listed for 28th January, 2013 by Carney J, but this trial date was vacated due to the appeal to this Court.

Role of the courts

13. Where there is a real and substantial risk of an unfair trial due to either delay in prosecution or adverse publicity or the absence of witnesses or the loss of evidence, which defect or defects could not be made cured appropriate rulings and directions of the trial judge and by other actions to make the trial process fair, the trial should be prohibited; *Rattigan v DPP* [2008] 4 I.R. 639 and see the judgment of Finlay CJ in *Director of Public Prosecutions v Z* [1994] 2 IR 476 and *CD v Director of Public Prosecutions* [2009] IESC 70, particularly the judgment of Fennelly. In the Z case, the matter was properly qualified at page 507 thus:

> …where one speaks of an onus to establish a real risk of an unfair trial it necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk is a real one but the unfairness of trial must be an unavoidable unfairness of trial.

14. In an application for judicial review that seeks an order to prohibit a judicial authority, or to injunct a non-judicial authority, from proceeding with a criminal trial, the burden of proof is on the applicant. For such an application to succeed, the applicant must demonstrate by appropriate proof that there is a real risk that there cannot be a fair trial. That burden of proof does not require the applicant to demonstrate certainty, or even probability, that an unfair trial will be the inevitable result from what is complained of. The test is met once a real risk of an unfair trial is established; *Scully v DPP* [2005] 1 IR 242 at paragraph 22 and *McFarlane v DPP* [2007] 1 IR 134 at paragraph 23. In this context, however, the stated test of a real risk of an unfair trial does not encompass any danger which is merely remote, fanciful or theoretical. The burden of proof on the applicant requires him or her to engage with the evidence in order to demonstrate how the circumstances complained of amount to a real risk of an unfair trial. Whether the issue is one of delay, missing evidence or allegedly prejudicial pre-trial publicity the test remains the same. Demonstrating merely a risk in a theoretical sense is not enough. This is because it is not only the rights of the accused that are being considered in prohibition of criminal trial applications. Victims have an entitlement in any ordered democratic society that is subject to the rule of law to a fair investigation of the wrong done to them. In addition, the community have a serious vested interest in the detection and prosecution of crime. Every crime is an attack on the social order of the community. Any ruling that a trial be prohibited is a matter of where the balance is found to be on judicial inquiry as to whether whatever defects are found to have occurred in the criminal process necessitate the extreme step of halting what otherwise would be a fair trial. In *B. v. DPP* [1997] 3 I.R. 140 Denham again emphasised the multiplicity of rights involved and at page 196 stated that:

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

15. A real risk of an unfair trial must be established by an applicant for prohibition within a context where the unfairness alleged cannot be avoided by appropriate rulings and directions on the part of the trial judge: in other words, that real risk must be demonstrated as unavoidable; *Z. v. DPP* [1994] 2 I.R. 476 at 506-507. The duty to prohibit such a trial attendant with the real and substantial risk of unfairness arises from the scrutiny which the High Court is obliged to exercise under Article 38.1 of the Constitution to ensure fairness of procedures for, as that Article states, no "person shall be tried on any criminal charge save in due course of law." Prohibition of a criminal trial nonetheless remains an exceptional remedy; *Devoy v DPP* [2008] 4 IR 235, *Z v DPP* cited above*, D v DPP* [1994] 2 IR 465. The duty of fairness in conducting a criminal trial is primarily cast on the trial judge. In the case of *Byrne v DPP* [2011] 1 IR 346, a missing closed circuit video case, O'Donnell J, on a review of the previous cases, summed up where the law stood at page 356:

> In my view, having considered the decided cases, the position has now been reached where it can be said that, other than perhaps the very straight forward type of case as in *Braddish v. Director of Public Prosecutions* [2001] 3 IR 127, it would now require something exceptional to persuade a court to prohibit a trial. This, in my view, is in accordance with principle. The point was made in *McFarlane v. Director of Public Prosecutions* [2006] IESC 11, [2007] 1 IR 134 that the fact that an applicant was unsuccessful in judicial review proceedings did not detract from the power and duty of a court of trial to assess the case as it developed at the trial. At p. 147 of his judgment Hardiman J., (with Murray CJ, Geoghegan and Fennelly JJ concurring) stated that the court of trial "[34] … will be able to assess whether there is indeed a prima facie case at the appropriate stage. More than that it will be able to assess, on the evidence as it actually develops, whether there is any unfairness to the applicant, incapable of remedy by the trial court, for which the prosecution is responsible. Its powers in this regard are wholly unaffected by the result of the present application."
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> This, in my view, is an important observation. The constitutional right, the infringement of which is alleged to ground an applicant's entitlement to prohibit a trial, is the right to fair trial on a criminal charge guaranteed by Articles 38 and 34 of the Constitution. The manner in which the Constitution contemplates that a fair trial is normally guaranteed is through the trial and, if necessary, appeal processes of the courts established under the Constitution. The primary onus of ensuring that that right is vindicated lies on the court of trial, which will itself be a court established under the Constitution and obliged to administer justice pursuant to Article 34. It is, in my view, therefore, entirely consistent with the constitutional order to observe that it will only be in exceptional cases that superior courts should intervene and prohibit a trial, particularly on the basis that evidence is sought to be adduced (in the case of video stills) or is not available (in the case of CCTV evidence itself).

16. As the text of the Article 38.1 of the Constitution indicates, the duty of ensuring substantial fairness is not limited to the High Court in exercising its judicial review mandate, or to appeals from any decision made at that level, but extends to an imperative directed at all of the courts established under the Constitution. Hence, the primary guarantor of a trial which has procedures and rulings designed to establish a result according to the burden of proof as a reflection of the true factual position is the court of trial. That position has been continually emphasised by this Court; as can be seen in the *Byrne v DPP* case and in the synthesis of the case

law provided by Fennelly J in *Savage v Director of Public Prosecutions* [2009] 1 IR 185. Most recently in a missing evidence case *James Wall v The DPP* [2013] IESC 56, the primary role of the trial judge in ensuring fairness in criminal cases was reiterated. At paragraph 7 of the judgment of O'Donnell J, the following occurs:

> Scrutiny by way of judicial review in anticipation of a trial has obvious practical and unhelpful consequences both in terms of the delay of any trial, and the consequential increase in burden upon the Superior Courts. It thus requires to be justified. However, even assuming a perfectly resourced system both in trial and appellate courts – and that is an ideal unlikely ever to be achieved in practice – there are other significant problems with the system of judicial review when used to determine issues relating to missing or lost evidence. Judicial review is a system designed, or at least intended, to provide a speedy determination of issues relating to the jurisdiction of inferior courts. It is well adapted to determine precise issues of law. It is poorly adapted for the resolution of factual matters, particularly when those issues are to be determined in advance of a trial and through the imperfect lens of affidavits necessarily drafted by professional advisers and which, perhaps understandably, seek to maximise that party's case while exercising caution about revealing testimony capable of being deployed against the party in the event that a trial might ensue. Looked at from the vantage point of function and efficiency, it might be thought that the examination of facts and the impact of the presence or absence of such facts upon the fairness of a trial should take place in the trial court with the possibility of review on appeal. However, currently, such claims are addressed by judicial review. If the Constitution or more general principles of fairness demands that this be so, then it must indeed be so. But it is a process which, at a minimum, requires justification.

17. MacMenamin J at paragraph 20 made a similar point as to the leading role of the trial judge in the guarantee of a trial in due course of law and the objective nature of the enquiry that must be engaged in during judicial review before the exceptional remedy of prohibition can be engaged:

> At risk of dealing with matters that are obvious, I would wish to re-emphasise the distinction between the function of a court in judicial review, on the one hand, and that in criminal trial, on the other. This relates both to the onus and standard of proof. In judicial review proceedings, the focus will be on an objective assessment as to whether, as a matter of reality, the prejudice alleged is so truly exceptional as to warrant intervention by reason of the real likelihood of an unfair trial. This test is not subjective, based on the appellant's concerns, nor can it be based on mere bald assertion regarding the degree of prejudice allegedly suffered. I do not suggest that is the position here. But no criminal trial proceeds on the basis that the investigation beforehand has been such that every conceivable hypothesis can be explored at trial in the light of an infinite range of evidence gathered to meet every possible contingency or potential line of defence. Judicial review applications exist only to deal with exceptional cases; where the evidence of prejudice, that is the failure to obtain identifiably relevant evidence, is so plain as to warrant prohibition. The duty of this Court is to adjudicate on the basis of the now well established jurisprudence under which it is claimed the appellant's constitutional right to a fair trial is placed at real risk. No form of relief, other than prohibition, is sought.

18. However a case is characterised, whether as one of delay or prejudice due to the loss of or unavailability of witnesses, the ultimate test remains whether the accused can obtain a trial in accordance with fundamental constitutional guarantees. Of most concern on this appeal has been the death of witnesses or what are said to be potential witnesses. As to whether a trial in due course of law may be achieved is a matter of adjudicating on the impact of what has ostensibly been lost and the elements of case as it remains in the sense of whether a fair trial remains possible. Unlike many other cases, such as those mentioned in the judgment of Hardiman J, this does not appear to be a trial of opposing perceptions or one where the case essentially amounts to a contest between one prosecution witness and the denial of the accused; in other words assertion and denial that are otherwise essentially unsupported. The stark contrasting reality presented in this case is one that is all too real with advancements in science; a reality that may reoccur in other cold case reviews. Consequent upon the analysis of DNA samples retained from the clothes of deceased victims, or from the seal of envelopes left in motorcars, or from the clothing of alleged perpetrators, or otherwise, it has happened in recent years that suspects emerge for the first time in cases otherwise thought of as unsolved and unsolvable. It can also happen with these developments that those perhaps thought guilty may be exonerated while others may be identified by this circumstantial evidence as having such a close connection with a crime that, seen against the background of the salient facts of the case and perhaps other testimony, it can emerge that such evidence becomes consistent with inculpating an individual and, as the text for circumstantial evidence circumscribes it, inconsistent with any other rational hypothesis based on the same facts. Whether it is or not will inevitably be a matter for the court of trial. On the brief facts considered here no indication, much less finding, of any kind can be made.

19. In prior cases, this Court has prohibited trials from proceeding. A brief examination of some of the leading cases, and of those discussed in the judgment of Hardiman J on this appeal, will show that the balance there struck was essentially fact-dependent. There is no overall principle that the application of the fairness test results in a particular result in all cases.

20. In *D.P.P. v. Quilligan and O'Reilly* (No.3) [1993] 2 IR 305 the appellants had been convicted on charges of burglary in the Central Criminal Court. This Court held on appeal that the conviction of the appellant Quilligan for burglary should be reversed. He contended that he had been prejudiced over the several hearings of this matter before the Central Criminal Court by the death of a witness who had testified at the much earlier murder trial and who had since died. The quasi-alibi witness in question was a neighbour of Quilligan, who placed Quilligan at his apartment on the night of the burglary and murder at a time when it would have made it difficult for him to return by that hour from the scene of the murder and burglary at the home of the Willis brothers in County Cork. Counsel for Quilligan argued that if the evidence of the neighbour was accepted by a jury as being true, then it could persuasively be argued that it would not have been possible for him to have taken part in the vicious raid on the elderly deceased's house at the time it occurred, due to the distance between his house and the house of the victim. The only evidence of significance against the accused was the evidence of admissions alleged to have been made by him whilst in Garda custody. Finlay C.J. held that in the interests of justice the 1989 trial of Quilligan should have been prohibited upon, first, the principles outlined in *In re Paul Singer (No. 2)* (1960) 98 ILTR 112 and *The State (O'Connell) v. Fawsitt* [1986] IR 362 with regard to the general right of an accused person to a trial with reasonable expedition, and, secondly, having regard to the prejudice that potentially existed from the non-availability of the potential alibi witness. McCarthy and Egan JJ dissented, having regard to the fact that the evidence of the alibi witness given at the previous trial of the appellant in 1985 had been recorded and could have been admitted in evidence at the trial in 1989. In their view, the circumstances were "not such as to warrant declining to order a new trial". In *Dunne v DPP* [2002] 2 IR 305, the applicant was charged with the robbery a petrol station. The owner of the petrol station gave evidence that video camera surveillance was in operation at the filling station at the time and that the tapes had been acquired by the gardaí in relation to other investigations. He was unsure, however, whether the gardaí requested or obtained the tapes relevant to the charges against the applicant. The officer in charge of the investigation stated that no video tape of the events that occurred was given to or obtained by any member of the investigating team. No affidavit was sworn by the garda or gardaí who actually attended at the scene of the robbery. In those circumstances, there appeared to be no question of a failure to preserve that evidence. Rather, the prosecution was prohibited on the ground that the Garda Síochána failed in their duty, arising from their investigative role, to "seek out" evidence which had, employing the language

used in *Braddish v. Director of Public Prosecutions* [2001] 3 IR 127, "a bearing or potential bearing on the issue of guilt or innocence". Identification of the accused as the assailant, a matter where a mistake could easily be made, was at the heart of that case and the missing evidence would have been crucial in that regard. In *Bowes and McGrath v DPP* [2003] 2 IR 25, the Supreme Court allowed the appeal in respect of the second applicant and made an order of prohibition in respect of her trial. The second applicant was charged with dangerous driving causing death following a road traffic accident in which a motorcyclist had received fatal injuries. A summons had been issued to the second applicant a month after the motorcycle had been released to a motorcycle dealer for parts at the request of the deceased's family. Following receipt of the summons, the second applicant consulted her solicitor, who was advised by counsel to seek details of forensic reports and to have both vehicles examined by a professional. The solicitor contacted the gardaí in order to retrieve documents relating to the case, including a "motor forensic report". The solicitor was advised that the book of evidence was being prepared and that it would contain all the requested information. The information was not forthcoming and the solicitor made several requests over a number of months in an effort to have a forensic engineer examine the motorcycle. Eventually, the investigating gardaí faxed the solicitor, saying that the bike had been broken up for parts. Hardiman J at page 41 held that the applicant in the second appeal had "suffered the loss of a reasonable prospect of obtaining evidence to rebut the case made against her by reason of the gardaí having parted with the motorcycle". He did not consider that she had disentitled herself to relief by delay or other reason. In *McHugh v. DPP* [2009] IESC 15, the applicant had been charged with the theft of a jacket from a supermarket. The store manager and the security guard, and later the gardaí, observed the digital CCTV recording which showed the alleged theft taking place. Having watched the video, the gardaí requested that the recording be copied from the hard drive onto a disk. Five still photographs taken from the video were put on a compact disk, rather than the actual moving video image, and this was given to the gardaí. The respondent was charged with theft. The book of evidence contained statements referring to the copying of the CCTV footage for the gardaí. The respondent's solicitor requested disclosure of materials, specifically a copy of CCTV footage of the alleged incident. The State Solicitor notified the respondent's solicitor that the footage had been destroyed. The respondent contended that in the absence of any possibility of access to the original CCTV footage, there was a real risk that he would not have a fair trial. The Supreme Court, through Fennelly J, agreed that "the essence of the case against the Respondent [was] his identification on the CCTV footage" by the witnesses and that any other evidence available was "minor or peripheral and of no consequence" compared to the CCTV evidence. At paragraph 16, Fennelly J stated that the Court could:

> … only say whether there is a real risk to the fairness of the trial in circumstances where the original footage is not made available on an equal basis to prosecution and defence. It seems to me that there is such a risk in the very particular circumstances of this case. The defence is simply unable to test the identification evidence of the state witnesses. This does not mean that still photographs taken from a missing video are generally inadmissible. All depends on the particular facts.

21. *Ludlow v. Director of Public Prosecutions* [2009] 1 IR 640 was a case where the applicant had been charged with a number of road traffic offences, including the offence of dangerous driving causing death, using his employer's vehicle. There was an allegation that the applicant had been driving with excessively worn tyres. These were examined by the gardaí and returned to the applicant's employer, who disposed of the tyres. After the charges were brought against the applicant, they could not be inspected for the defence by a consultant forensic engineer. The applicant sought judicial review to restrain the respondent from prosecuting him. The High Court granted the prohibition. The Director of Public Prosecutions appealed to the Supreme Court which upheld the decision of the trial judge.

22. Denham J set out the following principles at page 649 of the report:

> …(i) each case requires to be determined on its own particular circumstances; (ii) it is the duty of the court to protect due process; (iii) it is the duty of An Garda Síochána to preserve and disclose material evidence having a potential bearing on the issue of guilt or innocence, as far as is necessary and practicable; (iv) the duty to preserve and disclose, as qualified by Lynch J. in *Murphy v. Director of Public Prosecutions* [1989] I.L.R.M. 71, cannot be defined precisely as it is dependent on all the circumstances of the case; (v) the duty does not require An Garda Síochána to engage in disproportionate commitment of manpower and resources and must be interpreted in a fair and reasonable manner on the facts of the particular case; (vi) in the alternative to keeping large physical objects as evidence, such as motor vehicles, it may be reasonable in certain circumstances for the garda to have a forensic report on the object; (vii) however, an accused should, in general, be given an opportunity to examine or have examined such evidence; (viii) if the evidence no longer exists, the reason for its destruction is part of the matrix of the facts, but it is not a determinative factor in the test to be applied by the court; (ix) these principles are subject to the fundamental test to be applied by the court, that being whether there is a real risk of an unavoidable unfair trial, as described by Finlay CJ in *Z. v. Director of Public Prosecutions* [1994] 2 I.R. 476 at p. 506:-
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> > "This Court in the recent case of *D. v. The Director of Public Prosecutions* [1994] 2 IR 465 unanimously laid down the general principle that the onus of proof which is on an accused person who seeks an order prohibiting his trial on the ground that circumstances have occurred which would render it unfair is that he should establish that there is a real risk that by reason of those circumstances … he could not obtain a fair trial."

Applications to the court of trial

23. It will be noticed that the law has moved on since those decisions. The trial judge now has the primary role in decisions of this kind and judicial review is rarely appropriate. An application to the trial judge is an alternative to judicial review. As Clarke J states in his judgment on this appeal, if the case is one that there has been a diminishment in the availability of a trial that would be otherwise complete in every respect due to the factors complained of, then this judgment would concur that since the appropriate balance may best be seen by the trial judge in the context of a complete analysis of the facts of the case, it is preferable that an application to halt the trial be made to that forum. Where however, as Clarke J states, the case is one of a clear denial of justice resultant upon the factors found to be culpably wanting, prohibition by the High Court should be granted. An application to stop a trial before the trial judge may best be decided upon a consideration of all of the evidence and how the alleged defect, be it delay or missing evidence or unavailable witnesses, impacts on the overall case. Whether the real risk of an unfair trial that cannot otherwise be avoided then exists is, in such cases of an argument that justice has been diminished, often best seen in the context of such live evidence as has been presented and not through the contest on affidavit that characterises these cases on judicial review seeking prohibition in the High Court or on appeal. As a matter of factual analysis, however, the nature of the prosecution case and the effect of the missing evidence in the selection of cases previously outlined is demonstrated as central to the issue of the safety of the trials prohibited. Of importance, also, in prior cases has been the fact that an accused is alleged to have made an admission. In this case, the admission may be weighed with the alleged admissions of Dean Lyons. But this case seems to have moved on considerably from that point. Whether admissible in evidence or not and whether it proves convincing to a jury or not, we are dealing here with a very definite form of scientific proof that ostensibly exists in relation to both deceased victims and their apparent connection to Mark Nash. There may be other countervailing factors, such as innocent involvement. It is impossible now to make a definitive judgment. The public interest in the reception and testing of such evidence has not been proven to have been displaced by the concerns raised on behalf of Mark

Nash to the level that there must invariably be a denial of justice.

The apparent factors in this case

24. Here it is appropriate, without finding any facts, to briefly list the factors primarily complained of, noting the thousands of pages with which the Court has been engaged, and ask as to the risk of each, both individually and cumulatively, to the fairness of the proposed trial. Essentially, delay is claimed to have caused irremediable prejudice and with delay has come the passing from the scope of scrutiny of testimony asserted to be essential to the defence. It should, firstly, be commented that the delay on this investigation is not demonstrated on behalf of Mark Nash to have been inexcusable. The prosecution moved quickly to charge him once the enhanced testing DNA evidence apparently emerged. That was right. A particular duty of moving swiftly came about through the circumstances of delay that have been detailed. This judicial review has also taken time, almost 5 years, initiated as it was by Mark Nash. In substance, it has been prejudice to the right to fairly test the prosecution case or to present an alternative defence on the instructions of the accused that has been central to the arguments on behalf of Mark Nash.

25. Firstly, it is said that the death of Dean Lyons represents an insurmountable obstacle for the defence. That is not demonstrated on this appeal. The fact that someone confessed to a crime, a person who is now dead, is not invariably an insurmountable obstacle in the defence of Mark Nash. As the brief recitation of facts indicates, it is unlikely that Dean Lyons would have come to court at any stage and accepted that his confession was the voluntary emanation of a rational mind; much less that he had any part in the Grangegorman murders. He is presumed to be innocent, as is the accused and any other person who may be pointed to by circumstances rationally or on the express instructions of the accused as possibly committing these crimes. The reality is inescapable, however, that it is a fact that Dean Lyons confessed to these murders. What he says, in that regard, is not evidence of the facts therein stated; but his written statements and the video recording of his confession are facts which must weigh in the balance as are the directly relevant attendant circumstances and the fact of withdrawal from culpability by Dean Lyons. What is original evidence, evidence which is a fact in itself, may be admitted in testimony under the rules of evidence. It is said that there are some convincing aspects of the confession of Dean Lyons, including that he found €25 in a secret hiding place at the murder scene. That may or may not be an over-statement. As it turns out, what was described as a secret hiding place may be no more than a tear in a carpet and as for the €25, there may have been no independent confirmation either that Dean Lyons was in or near Grangegorman on the night of the murder or that he ever had €25 from that source. Again, the fact of the tear in the carpet, which is not a secret hiding place, and the relevant text in the supposed confessional statement of Dean Lyons are matters which can be explored as original evidence should the defence wish to pursue them as facts by questioning relevant investigating officers. These decisions, however, are matters for the trial judge.

26. Yet another argument emerged. Martin Stafford is, apparently, a prisoner serving a sentence in England. On the night of the murder, he went on what was described in submissions before this Court as a rampage and hijacked a car from the man called Tom Twomey, who is by this stage deceased. The defence say that they wished to ask Tom Twomey as to what Martin Stafford's state of mind was, as presented in his demeanour, when he hijacked the car. There appears to be more than ample evidence as to what his state of mind was. That evening, and whether coincidentally or not is a matter for the jury, Martin Stafford drove in that car to a place very close to Grangegorman where he apparently picked up a sex worker and is said to have assaulted her in a place that is close to Orchard View. But what is there to link Martin Stafford to this crime? It is apparently a fact that Detective Inspector Fitzpatrick in May 1997, a member of the Garda investigating team, sought to bring Martin Stafford back from England, where he was then serving a sentence, in order to interview him concerning the murders. This application did not get off the ground. These are facts, not mere hearsay. Early on in the investigation, the gardaí came to the view that the killer was not a connected person, such as a husband or partner or brother, who committed the murders. They then proposed that they should draw up a list of persons of interest. Whether they were right or wrong in this cannot now be said. Apparently 267 of these suspects were identified on the basis of some kind of profiling. That is a lot of suspects. The commission of past crimes and proximity to the scene made Martin Stafford one. Dean Lyons, however, had no known connection with Martin Stafford. Apparently, when Dean Lyons was in prison and was being berated about the crime to which he had ostensibly confessed by a family member, he is said to have indicated that he did not act alone. As an accomplice, however, he named another person, perhaps a made-up name, and not Martin Stafford.

27. Then there is another person who is also presumed to be innocent of crime but who is dead. This is Ann Mernagh, the lady sleeping with headphones on in another room in Orchard View, who discovered the remains of the victims. Is very hard to see how she could be regarded as a suspect but that, apparently, is included in the defence plan as presented to this Court. The only circumstances which might point to her include her proximity to the crime scene, the fact that she herself was not murdered or molested, and the nature of the psychiatric illness from which she suffered. This included self-harming. Perhaps there is a similarity in the nature of that self-harming to the harm done to the victims and that is the case, apparently, which the defence would wish to make by calling her in evidence. Absent that they claim that they would wish to call her psychiatrist, Dr Angela Mohan, who is now also deceased. That psychiatrist took a strong view, possibly wisely, that patients should not be interviewed by members of the gardaí unless members of the staff of the hospital were also present. They were, after all, very ill and this was, to put it mildly, very upsetting. It is argued on behalf of Mark Nash that the late Ann Mernagh may have said something about the murders to Dr Angela Mohan. There is nothing to indicate, however, that this is in any way probative. The fact that either of these deceased persons said or did something, or whatever particular inquiry was made of them and that they made particular answers, may be a fact in itself; again, original evidence.

28. Of the substance of the many points argued, the last matter of claimed prejudice relates to the death of certain members of the gardaí who either interviewed Dean Lyons or who were involved in the investigation in relation to Mark Nash. It appears that the prejudice substantially argued for here relates to the death of Detective Garda Patrick Lynagh who took the jacket which Mark Nash was wearing when he was arrested, apparently the prosecution wish to say with his consent. Whether, as a matter of law, that consent is needed or not is a matter for the trial judge. The prosecution propose to supplant the absence of this officer by that of the officer who accompanied him, namely Detective Garda Dillon. Whether this is possible or not is a matter for the judge at trial.

29. There is also the absence of Professor Harbison. This was not pressed on this appeal, and rightly so. His unfortunate illness after decades of brilliant work on behalf of Ireland has nonetheless left a rich legacy. Many remember his honesty, good sense and scientific reasoning as a model for expert evidence. His reports on this case are detailed but perhaps can be supplanted by the evidence of another forensic pathologist. It is actually also hard to know the precise relevance of anything in terms of forensic pathology beyond the fact of the death of these murdered victims and the condition of their remains. That is obvious from Professor Harbison's report.

30. In the High Court, Moriarty J dealt in concise form with these series of arguments that irremediable prejudice had been caused to the defence at paragraphs 35 and 36 of his judgment:

> 35. I turn then to the instances of actual prejudice contended to have been occasioned to the applicant by reason of delay, and take first the matter of lost or missing witnesses. As already mentioned, those persons most relied upon by the

applicant in this regard are Prof. James Harbison, the former State Pathologist, Mr. Dean Lyons and Ms. Ann Mernagh. With regard to Prof. Harbison, it is agreed that there is no realistic possibility of his condition of health enabling him to testify, and apart from his report in relation to the Grangegorman victims, he was involved in devising a suspect profile, and was also involved in his said capacity in the investigation of the Roscommon murders. Whilst the absence so eminent and highly regarded a practitioner is undoubtedly a loss to both sides in a trial, it appears to me that statutory provision now exists enabling his statements to be utilised, and his successor as State Pathologist, Dr. Cassidy has sought to fill the breach, a state of things that I understand from Mr. Grehan, S.C., for the applicant, occurred in the Rattigan case referred to earlier. The applicant also contends for irreparable prejudice arising from the premature death of Mr. Dean Lyons, contending that he would greatly wish to cross-examine him, anticipating he would revert to his admissions of guilt, and thereby contrive to blow the prosecution case substantially out of the water. To this the respondent counters by saying that he would greatly wish to be able to call Mr. Lyons, to confirm that his admissions were untrue. One must naturally be wary of speculation but, having regard to the views of his family and the two psychiatrists who dealt with Mr. Lyons, the dealings had by Detective Inspector Byrne in England with Mr. Lyons and his solicitor, and even, although after his death, the nature and terms of the public apology extended to his family, it might on the face of matters seem somewhat implausible that he would, if alive, take the witness box to reiterate his disowned admissions. However, what he would have said will never be known for certain and while I appreciate how the applicant's advisers would have wanted his testimony, I am not disposed to view his absence as grounds to prohibit the trial, a view I am similarly disposed to in regard to Dr. Harbison. As with the views of involved garda members as to which suspect was the more probable murderer, such speculation seems somewhat remote from concepts of best evidence. Matters of admissibility and latitude on these aspects will of course be utterly to be determined by the trial judge, but it may well be that he or she will take a view that there may be a limit to the number of conjectural sub-plots that may properly be canvassed at the trial. The third witness upon whose absence emphasis was placed on behalf of the applicant was Ms. Ann [Mernagh]. She, like Mr. Lyons, was at one stage a suspect in respect of the Grangegorman murders, was in the house on the night in question, and claimed to have awoken to discover the murder of Sylvia Sheils before seeking assistance. She had a history of some violence, and an apparent tendency towards self-harm. Other matters in relation to her are alluded to in the course of submissions, but I find it difficult to see how her death will significantly inhibit the presentation of the defence's case. It is to be remembered that, subject to all rulings made by the trial judge, the prosecution will in all reasonable probability stand or fall on the two issues of the applicant's alleged admissions, and the DNA identification evidence intended to be tendered. None of the witnesses referred to in argument, or indeed the few others whose roles were lightly touched upon purported to provide an alibi for the applicant on the night of the murders, an aspect viewed as important in the Rattigan decision in the Supreme Court, although it could be argued that, had Mr. Lyons testified in relation to being the sole assailant, it could be tantamount to an alibi.

36. On the forensic DNA evidence aspect, delay is again relied upon by the applicant, and this is expressed in the context that, either the applicant's jacket was not examined with proper or appropriate professional care at the outset in the Forensic Science Laboratory, or that during its long period of possession by the gardaí it was stored in an inefficient manner that gave rise to possibilities of cross-contamination or other evidential infirmity. It is to be remembered, and this is no small factor in influencing my overall view of the case, that it has never been contended that the forensic evidence was "planted" or dishonestly concocted or that the applicant's many verbal admissions were fabricated, or influenced by improper inducements or threats; no affidavit in this or any other regard has been sworn by the applicant in person. I can understand the frustration of the applicant and his advisers that the important discoveries in question came to light to belatedly but I nonetheless am firmly of the view that matters of admissibility should rightly fall to be determined by the Trial Judge, subject to which matters of weight or inferences to be drawn will be the preserve of the jury.

31. This judgment of Moriarty J constitutes a full and reasoned consideration of all the relevant factors following upon a five-day hearing in the High Court. There is nothing to indicate that Moriarty J erred in any way in his overall analysis.

Disclosure and sedevacantists

32. It has also been argued that the trial of Mark Nash should be stopped because of a failure of disclosure by the prosecuting authorities. The matter of alleged lack of disclosure has been argued extensively on this appeal. The judge now designated to hear the trial, Hunt J, has already made particular rulings in relation to disclosure. From what has been heard in relation to his approach it seems eminently sensible in attempting to ensure that what is truly relevant to any potential defence of Mark Nash is available to him while not imposing absurd burdens on the prosecution. The more this case is analysed, furthermore, the more it seems to draw down into the consideration of whether the new DNA evidence, if admitted, coupled with the confession statement of Mark Nash, constitute a sufficient discharge of the burden of proof by the prosecution and, thus, as to whether a jury could be satisfied beyond reasonable doubt of his guilt in relation to the murders by reason of the competing alleged confession of Dean Lyons and the argued-for existence of other reasonably possible scenarios. This, however, is no more than a bird’s eye view on the facts as presented to this Court. The judge presiding over the criminal trial will have the opportunity for a better and more extensive review as, no doubt, will the jury.

33. There was argued to be dramatic new evidence that would link what the defence claim is the alternative suspect Dean Lyons to the commission of these murders at Grangegorman. It will be, again, a matter for the jury to take a view on the evidence before them. Shortly stated, however, it may appear that a lady called Vera Brady, now deceased, who also lived in Orchard View, and who was a patient at St Brendan’s Mental Hospital, and was either associated with or simply knew, or perhaps just met, a group of religious people of a particular disposition. Those people believe that Pope Francis was not validly elected to the Holy See in Rome. Instead, these religious believers look to a place in Spain where they considered, at the relevant time, that Pope Gregory XVII presided over what they consider to be the one true church. Apparently the presiding hierarch died in 2005 and has been replaced by Pope Peter II. Article 44.2.1º of the Constitution provides:

> Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.

34. The point here, however, is not so much conscience. It is that the followers of Pope Gregory XVII produced distinctive religious imagery. This, apparently, they distributed, perhaps widely. The late Vera Brady made a number of statements to gardaí but was not found, apparently because of her mental illness, to be in a position to make a formal statement. Dean Lyons, however, had some pictures that were associated with this faith group. While talking to a member of the gardaí, the late Vera Brady said that it was possible that she gave similar pictures to other patients at Orchard View. Asked to look at the pictures found in the possession of Dean Lyons she thought that these included the Catholic saint Padre Pio of Pietrelcina, which they did not, and that they were “exactly the same type of pictures I have and get from the Palmarian Church”. The reverse of one of these cards reads:

> The Eternal Father: “My children, in the terrible days that will befall mankind, the Sacred Face of My Divine Son will be

> truly a clause of tears, because my true sons will hide behind It. The Holy Face will be a true offering to mitigate the punishments that I will send mankind. In the houses where it is found, there will be light to free oneself from the power of darkness. I will give orders to My angels to mark the family home is where the Sacred Face of My Son is, so that My children may be preserved from the evils that will befall ungrateful humanity. My children, make yourselves all true apostles of the Holy Face and spread It everywhere. The more extended Is is, less will be the catastrophe."

35. Perhaps something can be responsibly made of this that is consistent with the instructions of the accused. Perhaps it is no more to it than that this kind of belief appeals to those who are especially troubled. There is, however, perhaps nothing beyond the bare possibility that the victims of the Grangegorman murders may have had cards similar to these ones and it is an even more remote possibility that Dean Lyons, the person now apparently alleged on the instructions of Mark Nash to be responsible, may have taken the pictures found on him from that source, as opposed to any other source, and that the cards he is speculated to have taken were not stained at this especially bloody scene. This is, again, if it is a point at all, a point to be made to the jury.

Emerging unfairness

36. Whether as to the factors complained of, or on the basis of difficulties that may or may not emerge in the trial process, the duty cast on the trial judge remains the ensuring of a trial that accords with the constitutional norm guaranteed in Article 38.1, one "in due course of law." Should insuperable difficulties emerge whereby there cannot be a reasonable exploration of any rational line of defence enquiry into facts that may be relevant in a practical sense to what may reasonably be regarded as a potential reasonable doubt on behalf of the accused, there may come a time when the trial judge should declare that a fair trial is impossible. In making such an adjudication, a trial judge ought to take into account the rights of the community and the entitlement of victims to have the wrong done to them appropriately scrutinised in the context of a criminal trial. But if the risk of unfairness which emerges is real and is not merely a series of conjured-up hypotheses and is such that no direction or appropriate ruling may overcome it, the judicial duty may exceptionally emerge to stop the trial. That will be a matter for the trial judge.

Publicity and the risk to criminal cases

37. Public scrutiny of the functioning of the branches of government and of their organs is in large part conducted by newspaper, radio and television on behalf of the public as a whole. There is an entitlement in the media to enquire into and to comment on matters of public moment. Many journalists would see this as their professional duty. Whether a murder occurs, or whether a public representative is found to be apparently askance of proper ethical standards, there is an entitlement to communicate known facts. In court proceedings, the public is, in large part, represented under Article 34.1 of the Constitution through the presence of media representatives who are enjoined on behalf of the community as a whole, and by their own ethical standards, to provide a fair and balanced account of the proceedings. In any consideration as to the nature of publicity and as to whether it interferes with the trial process, this central function of the media in a democratic country is an important factor. Outside the courtroom, the media are entitled to report matters of public moment, be they criminal, party political, administrative, judicial or of human interest more generally. The wrong done to the victims of murders may be both reported upon and commented upon. There is a serious public interest in the fact of the commission of crimes such as these.

38. It is best not to repeat the lurid headlines and comments in relation to the controversy surrounding the charging of Mark Nash, or the public controversy over the confession statement of Dean Lyons or the presentation of the horrifying facts of these murders. As the brief description of events above will convey, on more than one occasion the Director of Public Prosecutions has seen fit to initiate proceedings against media companies and to extract appropriate undertakings from them. It is an entitlement of the accused to have a fair trial. There is, as well, an expectation vested in the people of Ireland that the solemn procedures whereby the contention of the prosecution that the accused is guilty of a crime will not be sullied or derailed by intrusion by the media or anyone else. In *Rattigan v. DPP* [2008] 4 I.R. 639 at page 648 Hardiman J stated:

> The basis upon which such material is not permitted to be published is that it interferes with the right of every citizen to a fair trial before a jury unaffected by loud unreasoned assertions of the defendant's guilt. The applicant, and every citizen, is entitled to have the evidence against him, if any, presented in court in his presence and that of his representatives so that no improper evidence is admitted against him and he is able to make an immediate answer to any proper evidence adduced against him. Publishing one sided statements to the effect that the applicant is guilty of the crime in question, or that the defendant is an associate, or a leader, of other persons who are guilty of the crime, or of similar crimes, destroys the citizen's right to a fair trial. Since Ireland is committed, both by its Constitution and by the European Convention on Human Rights which it has incorporated into its law, to provide a fair trial, it must of necessity inhibit publications which are inconsistent with such a fair trial. There are, in particular, two types of publications that tend to prejudice the right to a fair trial. The first is a publication of a sort which will make it difficult for the jury or other tribunal of fact to approach the case with an open mind for example because it suggests information which is not proven in evidence or strongly proclaims the guilt (or the innocence) of a defendant. The second and quite different type of contempt which interferes with the constitutional right to a fair trial is published material of a sort which, by repetition or otherwise, so affects the person about whom it is written as to hamper his ability properly to conduct his defence.

39. Hardiman J, while not in the majority on the ultimate issue, was not dissented from in relation to these remarks. Indeed, Geoghegan J, at page 666 of the report, stated:

> It follows that a newspaper may be guilty of a flagrant contempt of court on the basis of potentially prejudicing a fair trial and yet it may be inappropriate at the end of the day to stop the trial for any one of a number of reasons but especially if a considerable lapse of time has ensued in the meantime. The law is quite simple and newspapers and other organs of the media should not have all that much difficulty in ensuring compliance with it. If a person has been charged with a crime, that has an immediate effect on the manner in which the crime can be reported. It must not be reported or discussed in a way in which it could potentially prejudice jurors in a trial. While the fade factor may be relevant and indeed is relevant in considering whether a trial should be injuncted altogether, it is not a relevant matter which a newspaper or other organ of the media is entitled to take into account in its reporting of the crime. It simply must adopt the long established rules of protection of the person charged with the crime to which I have referred. These rules are quite different from those applicable in, say the United States of America.

40. The fundamental factor at issue on pre-trial publications of media speculation or apparent fact was stated by Denham J in *D v DPP* [1994] 2 IR 465 at 473 thus:

> Fair procedures incorporate the requirement of a trial by jury unprejudiced by pre-trial publicity. The applicant is entitled to a jury capable of concluding a fair determination of facts on the facts as presented at the trial.

41. To paraphrase Denham J later in the judgment, at 475, what the applicant in this case Mark Nash needs to show here to prohibit

his trial is that there is a juror, or are jurors, who read the relevant articles that are claimed to be adverse to him, will remember the articles, will connect them to him, will be prejudiced in consequence, will not comply with their oath as jurors and will not comply with the direction of the trial judge to try the case only on the evidence heard in court. In the result of *Z v DPP* [1994] 2 IR 476 even media saturation may not be enough to deflect a jury from the duty to bring an impartial mind to the issues that have to be decided before them and to confine themselves in the consideration of their verdict to only the material produced in evidence. Sometimes, it may be necessary to allow for an adjournment of the trial to the following term but that has not been shown to be necessary here, as in other cases; *Re Zoe developments* (Unreported, High Court, Geoghegan J, March 3rd, 1999) and *DPP v Haugh (No 2)* [2001] 1 IR 162, which was the only case where there was an indefinite adjournment of a criminal trial. These adjournments should not add unnecessarily to delay in the trial process.

42. There is a further factor, however. There is nothing to indicate that jurors do not take seriously their oath to try the case and give a "true verdict in accordance with the evidence." The trial of criminal cases by citizens is a judicial function. The seriousness of approach brought to that task by jurors is not to be diverted simply because a juror is aware of what is going on in the country, or has seen television reports or read newspaper reports. Many judges find themselves in the same position as jurors who already may have read something about a case. It happens often. A matter of public controversy arises and then, having read media commentary and taken in reports of what radio, newspaper or television sources say are the facts, a bundle of papers arrives in relation to precisely that issue or a trial commences involving those same parties or those same issues. The first reaction of any judge is the same as that of any reasonable person. It is to wonder: what really are the facts here? The reaction of jurors is not likely to be different. Absent extreme circumstances, it is difficult to know why the kind of allegation of deep-rooted prejudice arising from media reports argued for in this case is likely to remain or in any way to influence jury or judicial deliberations. As people know, paper does not refuse ink. People realise the limitations on what journalists can do and they also recognise the sense of the ancestral adage: *Scéal a théann ó bhéal go cluas téann sé ó Samhain go Bealtaine*. Facts, in other words, are different to gossip or comment. Facts can be relied on; chit-chat just cannot. A forensic examination is by nature careful and logical. Consequently, no reasonable person confuses prior knowledge of a case with mere acquaintance with whatever matters the media are in a position to report as if they are facts. Furthermore, any juror who finds himself or herself unable to try the case because they already have a fixed view on the matter and which they do not feel can be overcome by hearing the actual evidence can reveal that fact to the judge swearing the jury and should thereby be excused from service. As to the appropriate form of warning before the jury sworn in, this will be a matter for the good sense of the trial judge. As to avoiding the internet or doing any research outside court into a case, it will be a matter for the good sense of the trial judge as to what if any direction she or he gives to the jury.

Result

43. In the result, there is no basis upon which it can be argued that Mark Nash will not obtain a fair trial. Any reference to evidence in this judgment is not a finding of fact but merely an indication of the limited issues that have been referenced by affidavit and in argument. Questions of the admissibility of evidence, the overall fairness of the trial, the adequacy of disclosure, the proper selection of jurors and what warnings may need to be given to the jury are now matters for the trial judge.