Trials of Charges of Non-Recent Child Sexual Abuse and the Test to be Applied in Defence Applications to Halt the Trial on the Grounds of Pre-Complaint Delay: *People (DPP) v CC*

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Introduction

Since the middle of the 1990s, Ireland, like many other countries in the Global North, has reckoned with the question of how to acknowledge and do justice to the adult survivors of childhood sexual abuse.[1] Criminal prosecutions are arguably the most important form of legal response to non-recent child sexual abuse, both in terms of the vindication and accountability they offer survivors and the public recognition of the wrongfulness of sexual violence against children. What sets non-recent child sexual abuse apart from many other forms of interpersonal violence, including other forms of sexual violence, are the high rates of non-reporting and the significant interval between the alleged abuse and the survivor's decision to report to the gardaí. Almost 30 per cent of child sexual abuse victims never tell anyone at all,[2] and of those who do, most do not disclose the abuse until adulthood.[3] The Australian Royal Commission into Institutional Responses to Child Sexual Abuse into found that on average, a

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1. The focus of the public conversation about non-recent child sexual abuse has been on clerical child sexual abuse and institutional child sexual abuse, largely centring on the work of official commissions of inquiry. See, eg Commission to Inquire into Child Abuse, *Final Report* (Dublin: Government Publications, 2009), Francis D Murphy, Helen Buckley, Laraine Joyce, *The Ferns Report: presented to the Minister for Health and Children* (Dublin: Stationery Office 1995); Commission of Investigation, *Report in the Catholic Archdiocese of Dublin* (Stationery Office 2009); Commission of Investigation into Cloyne Archdiocese, *Report* (Department of Justice and Equality 2010).
2. Jorunn E. Halvorsen, Ellen Tvedt Solberg, Signe Hjelen Stige, 'To say it out loud is to kill your own childhood."– An exploration of the first-person perspective of barriers to disclosing child sexual abuse' (2020) 113 Children and Youth Services Review 104999 at 5.
3. Rosaleen McElvaney, 'Disclosure of child sexual abuse: Delays, non-disclosure and partial disclosure. What the research tells us and implications for practice' (2015) 24(3) Child Abuse Review 159.

person who has experienced childhood sexual abuse has taken 23.9 years to tell someone about it.[4] An established body of psychological and sociological research explains that delay in reporting childhood sexual abuse is a normal response, and that children in Ireland in the mid-late twentieth century faced a legal and social culture that was actively hostile to reports of sexual abuse.[5]

In coming to the criminal process, survivors are asking that the law (at least) acknowledge the legitimacy of their complaint by holding a trial. Over the course of the past three decades, the Irish courts have moved away from assuming that the impact of the interval of time between the alleged abuse and the reporting to the gardaí will inevitably mean the defendant is unfairly prejudiced, to becoming more willing to engage with the evidence and closely examine defendants' claims of unfairness. From the mid-1990s until recently, defendants asserting prejudice as a result of the 'delay' were directed to apply pre-trial to the High Court for an order prohibiting their trial. This produced a rich body of jurisprudence involving judicial exploration of a broad range of non-recent child sexual abuse and is important to survivors, scholars and the public as an (imperfect) archive of 'historical' child sexual abuse involving every corner of Irish society.[6]

In recent years the superior courts have stated that the person best suited to make the decision regarding the (un)fairness of the trial is the trial judge. In *People DPP v CC*[7] the Supreme Court clarified the approach to be taken by trial judges. The case is an important evolution in the Court's thinking about 'delay' and prejudice to the defence in non-recent child sexual abuse trials. This article explores the decision and its significance. Section I examines the evidential and practical challenges faced by defendants and the prosecution in non-recent child sexual abuse trials. Section II sets out the evolution of the jurisprudence on the defence applications to have the trial stopped on the grounds that the impact of the interval of time is such that the trial cannot be in accordance with constitutional fairness. Section III explores *CC*, dealing first with the facts and then exploring the principles identified in each judgment. Section IV provides a discussion of the judgment in its broader context

4. *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report), volume 4 at 9. The average period between childhood abuse and attending a rape crisis centre is 26 years: Rape Crisis Network Ireland, *National Rape Crisis Statistics and Annual Report* (Galway, 2015) at 23. Available at www.rcni.ie/wp-content/uploads/RCNI-RCC-StatsAR-2015.pdf.
5. For a review see Sinéad Ring, Kate Gleeson and Kim Stevenson, *Child Sexual Abuse Reported by Adult Survivors: Legal Responses in England and Wales, Ireland and Australia* (Routledge, forthcoming April 2022) chapter 6.
6. Sinéad Ring, 'The Victim of Historical Child Sexual Abuse in the Irish Courts 1999-2006' (2017) 26(5) Social and Legal Studies 562-580.The prosecutions involved priests and Christian Brothers, as well as fathers, uncles, brothers, neighbours, teachers, coaches, farm labourers and school bus drivers.
7. [2019] IESC 94.

I The evidential and practical challenges of non-recent child sexual abuse trials

Unlike tort law, criminal law does not generally impose statutory limitation periods beyond which a prosecution is time-barred. Where a limitation period is legislated for, this is usually for summary offences and not indictable offences. For sexual offences against children, the law historically provided for limitation periods but only for certain offences, usually those involving adolescent girls. The Criminal Law (Amendment) Act 1885 introduced a three-month time limit for prosecutions for unlawful carnal knowledge of girls aged between 13 and 16. A 12-month time limit for prosecutions for unlawful carnal knowledge of a girl aged between 15 and 17 years was introduced by the Criminal Law (Amendment) Act 1935. This was finally repealed in 2006.[8] Apart from this striking exception, which illustrates law's preoccupation with unlawful carnal knowledge rather than victimisation of children more generally, most other crimes of a sexual nature involving children did not engage any statutory time limit. Accordingly, prosecutions for non-recent child sexual abuse do not generally involve any statutory time limit. Instead, to claim that their trial would be unfair, defendants must argue that their fundamental right to a fair trial is irreparably threatened by the effects of the delay in reporting.

In a criminal trial, the defendant is entitled to certain robust legal protections to shield them from the state's enormous power. These include the right to due process and the protection of liberty, which are expressed in precepts such as the presumption of innocence and the burden and standard of proof, and in constitutional and human rights law. In Ireland, the defendant's right to a fair trial is expressly protected in the Constitution and the courts have robustly protected this right.[9] The interval of time between the alleged abuse and trial presents significant challenges to the defendant's ability to raise an effective defence. Certain evidence or witnesses may no longer be available. Witnesses' memories may have decayed. Documentary evidence such as institutional records and real evidence, such as the bed on which a person was sexually assaulted, may be destroyed or lost. Locations such as schools or homes may have been demolished. The defendant can argue that the trial should be halted because of unfair prejudice to their case flowing from the effects of delay.

Prosecutors also face significant evidential challenges caused by the passage of time. Victims may struggle to remember important details and there may be a paucity of other evidence to support the prosecution's case. Defence lawyers may try to portray the victim as unreliable or lying, vengeful or pathologically damaged. These tactics play into widespread rape myths and misconceptions about how a victim of sexual assault is likely to behave, both during and after the assault, and can lead jurors to form an unjustifiably negative view of their

8. See s 8 of the Criminal Law (Sexual Offences) Act 2006 and Schedule.
9. Article 38.1 Constitution of Ireland; *State (Healy) v Donoghue* [1976] 1 IR 325; *State (O'Connell) v Fawsitt* [1986] IR 362.

credibility. Appellate courts are increasingly alert to such risks of unfairness to the prosecution and changes in guidance for trial judges and juries reflect a broader understanding of the public interest in a fair trial, including the interests of the victim and the need for the jury to function as an impartial tribunal.

II The evolution of the superior courts' approach

In the past, the Irish courts traditionally took a very strict approach to the issue of 'delay'; in a 1992 case, an interval of one year precluded the prosecution of a child's complaint.[10] Faced with increasing numbers of cases, and then the 'torrent'[11] from the late-1990s onwards of non-recent child sexual abuse cases involving adults reporting childhood sexual abuse, the courts were forced to reckon with the fact that 'delayed' reporting is not unusual, but in fact typical of survivors of childhood sexual abuse.

Until recently, the primary avenue for NRCSA defendants seeking to halt their trial was a pre-trial application via judicial review to the High Court for an order prohibiting the trial (or the proceedings) or injuncting the DPP from continuing with the prosecution.[12] In such applications, the reviewing court must decide whether there is a real and serious risk of an unfair trial due to the lapse in time between the alleged abuse and the initiation of proceedings. There is a right of appeal for both the prosecution and the defence from the High Court's decision to the Supreme Court.

In the cases decided between the early 1990s and 2006, courts hearing prohibition applications focussed on the accused's role in allegedly causing the delay. The court would inquire into the reasons for the delay and (assuming the complaint to be true) ask whether they were referable to the accused's conduct.[13] The High Court's (and Supreme Court's, on appeal) inquiry centred on an evolving psycho-legal concept of 'dominion', which was defined as the relationship of domination between the abuser and the victim that prevented contemporaneous reporting to the police.[14] If dominion was found to have existed (following extensive psychological assessments and consideration of victims' affidavits, along with expert evidence from psychiatrists or

10. *People (DPP) v Synott* (Unreported Court of Criminal Appeal, 29 May 1992).
11. Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *JM Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2019) at 1155.
12. *People (DPP) v CC* [2019] IESC 94 per O'Donnell J [9]. An injunction would be sought if the case were to be tried by the Central Criminal Court eg if the charge was rape.
13. The *PC* test asked: (1) Whether, depending on the nature of the charges, the delay was such that despite the absence of actual prejudice the trial should be prohibited; (2) What were the reasons for the delay and whether, assuming the complaint to be true, the delay in making it was referable to the accused's conduct; (3) Whether the accused had suffered actual prejudice such that the trial should not be allowed to proceed. At this stage, the presumption of innocence would apply. *PC v DPP* [1999] 2 IR 25 at 68 per Keane CJ.
14. *PO'C v DPP* [1999] 2 IR 25.

psychologists), the delay was 'reasonable' and therefore excusable and the trial would be allowed to take place. Dominion was found in most cases and applications for prohibition were generally refused, although the case law contains some striking examples of successful applications, including *GG v DPP*, involving Irish swimming coach George Gibney.[15] The judicial development of 'dominion' was a significant and progressive moment for Irish law's engagement with the problem of non-recent sexual violence against children. It was an example of judicial creativity to effectively circumvent law's entrenched approach to historical crimes and ensure that sexual violence committed against children in the past would no longer go unprosecuted. However, the dominion jurisprudence was also deeply problematic for a number of reasons. The courts' frequent construction of the typical childhood sexual abuse victim as dominated, silenced and passive, meant that the experiences of certain victims, often those who displayed agency in adulthood, were discounted and prohibition more often granted in these cases.[16] The judicial review process became a battle of psychological/psychiatric experts on the dominion issue, potentially infringing the role of the jury as arbiter of guilt[17] and marginalising important evidence that victims reported to parents or teachers at the time of the abuse.[18] Most importantly, from the perspective of constitutional fairness, the focus on whether the victim's reasons for delayed reporting could be connected to the actions of the defendant, was in tension with the defendant's right to the presumption of innocence and distracted the court from the core question of whether the prospective trial could be fair.[19]

SH v DPP

In the 2006 case of *SH v DPP*[20] the Supreme Court ended the focus on the reasons for the delay. The Court held that its judicial knowledge of issues relating to why a complainant might delay were well established.[21] The test is now whether there is a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay.[22] The *SH* test restored the judicial spotlight to where it belonged; on the issue of whether the defendant risks an unfair trial was a welcome vindication of the constitutional due process.[23] Appellate courts provided some guidance on the tests to be applied in relation to assertions of prejudice. For example

15. *GG v DPP* [1994] 1 IR 374.
16. Sinéad Ring, 'The Victim of Historical Child Sexual Abuse in the Irish Courts 1999-2006' (2017) 26(5) Social and Legal Studies 562-580.
17. This point was made by Charleton J in *CC*.
18. Ring above n 16.
19. Sinéad Ring, 'Beyond the Reach of Justice? Victim Delay in Historic Child Sexual Abuse Cases and the Right to a Fair Trial' (2009) 2 Judicial Studies Institute Journal 162.
20. [2006] 3 IR 575. Murray CJ; Denham, Hardiman, Geoghegan and Fennelly JJ concurring.
21. *SH v DPP* [2006] 3 IR 575 at 618 per Murray CJ.
22. *SH v DPP* [2006] 3 IR 575 at 620 per Murray CJ.
23. See further Sinéad Ring, 'Beyond the Reach of Justice? Complainant Delay in Historic

MacMenamin J in the 2010 case of *MU* stated that there were two 'fundamental' tests: (i) whether the applicant has engaged with the facts and demonstrated the materiality of unavailable evidence; and (ii) whether the evidence can be obtained elsewhere, or can be dealt with by warnings from the trial judge.[24] In exceptional circumstances, regardless of whether the accused has established a risk of an unfair trial, the court may grant prohibition where it would be unfair or unjust to put an accused on trial, such as the defendant's age or severe ill health.[25] This is fact dependent, with the case law containing many examples of cases involving defendants of advanced age and complaints dating back many decades being allowed to proceed.[26]

From prohibition to mid-trial applications

In more recent years there has been a discernible shift in thinking in relation to the correct stage of proceedings at which an application to halt the trial on the grounds of delay should be made. The roots of this change lie in the High Court decision of *PB*[27] where O'Malley J noted:

> It is perfectly clear that a trial judge is not restricted to simply giving warnings to the jury but may, where necessary in exceptional cases, withdraw the case from the jury on the basis that the difficulties for the defence are such that it is not just to proceed. Such a decision, in the normal course of events, will often be better taken in the light of the evidence as actually given rather than as speculated about in judicial review proceedings.[28]

In recent years the Court of Appeal has affirmed O'Malley J's view that the trial court will often be in a position than the judge in judicial review proceedings to make an assessment of whether the accused has suffered irreparable prejudice giving rise to the real risk of an unfair trial.[29] The assessment is to be made following an application at the close of the prosecution case or the close of the evidence.[30] Defendants are expected to engage with the facts and show that the missing witness or evidence could have been of assistance to the defence.[31]

Child Sexual Abuse Cases and the Right to a Fair Trial' (2009) 2 Judicial Studies Institute Journal 162.

24. [2010] IEHC 156.
25. *PT v DPP* [2008] 1 IR 701. Trials may also be halted due to the 'totality of the circumstances': *JM v DPP* [2004] IESC 47, and *DD v DPP* [2008] IESC 47; *JD v DPP* [2009] IEHC 48; *PT v DPP* [2008] 1 IR 78; *MC v DPP* [2011] IEHC 378 [6.7].
26. *MS v DPP* [2015] IEHC 84; *PH v DPP* [2018] IEHC 329.
27. [2013] IEHC 401.
28. ibid [59].
29. *MS v DPP* [2015] IECA 309; *RB v DPP* [2019] IECA 48.
30. *NS v DPP* [2019] IEHC 671; *RB v DPP* [2019] IECA 48. This approach has also been approved out of the context of prosecutions for non-recent child sexual abuse, in a case involving culpable delay by the prosecuting authorities: *Nash v DPP* [2015] IESC 32.
31. *SO'C v DPP* [2014] IEHC 65.

The shift to applications to the trial judge after presentation of the evidence is to be welcomed, since it facilitates a fuller, more contextualised assessment of any defence assertions of prejudice in light of the evidence actually presented at trial. Instead of working primarily off affidavits, trial judges have the benefit of having observed the presentation of the prosecution's case and the defence presented, and have a better appreciation of the facts in issue. However, some lack of clarity remained around what exactly the assessment of unfairness by the trial judge involved, and the standard to be met by the defendant making an application to the trial judge. The Supreme Court's decision in *CC* (2019) is an important case in its clarification of how trial judges, and prosecution and defence counsel, should approach applications to halt the trial on the grounds of delay in non-recent child sexual abuse cases.

III People (DPP) v CC: The facts

The case concerned an appeal from conviction by the appellant who had been found guilty of raping and indecently assaulting his niece, AU, when she was 11 years old, on dates between 1 August 1971 and 30 April 1972. AU reported the crimes to the gardaí in April 2004. AU alleged that the offences occurred when her family stayed with the defendant, C,[32] in Clare. AU alleged that she had been indecently assaulted by the defendant on an occasion when he had taken her hunting and that he raped her during the same holiday. AU referred to a row between the defendant, his partner at the time, MCy and the defendant's son, in the course of which the son produced a shotgun. She further stated that later that evening, MCy had led AU from her bed to the bedroom where the defendant was, undressed her and placed her naked in the bed alongside him. The alleged rape was said to have taken place after MCy had left the room.

In December of that year the defendant was arrested, detained and interviewed. He denied the allegations and told the gardaí that MCy could 'verify' what he said. He also asserted that AU and her family had never stayed in his house. He also denied having made admissions in later years to his son. The Director of Public Prosecutions (DPP) issued a direction to prosecute in February 2006, by which time the defendant had left Ireland, living in several different countries until his extradition from the United Kingdom in 2013. In the meantime, MCy had died, as had AU's mother. The trial was held in 2016. There was no finding of culpability in any delay, whether on the part of the gardai or in relation to C's changes of address. The issues turned solely on the question of the lapse of time and prejudice to the fairness of the trial.

32. The defendant's son is mentioned throughout the judgment. He is given the acronym CC in the judgment, which is adopted here. In this article, the defendant is referred to as 'C' and his son is referred to as 'CC'.

Evidence presented at the trial

At the trial AU testified that she and her siblings and her mother frequently holidayed in Ireland, generally staying in caravans owned by her uncle. She also recalled that they stayed in his house the year she turned 11. She described a sexual assault when she accompanied C and another man and a young boy hunting in open fields. She described the location and stated that she did not tell anyone about it at the time. She also testified as to the circumstances of the rape. She described how it happened after a row between C, MCy and his eldest son, CC, during which the son produced a shotgun. Later that evening, MCy came into the room where the children slept and took AU to her uncles' bedroom, undressed her and placed her naked in the bed alongside C who was also naked. C then raped AU. She made no complaint at the time for fear of what would happen to her siblings.

AU was cross-examined and it was put to her that the offences did not occurred and that her family had never stayed at C's house, and that he had never taken her hunting.

At trial AU's brother testified that the family had stayed at their uncle's house. He also recalled the row described by AU, stating that AU had been in the bedroom with CC (the son) and C and had been taken out of it.

C's son, CC also gave evidence. His evidence had been the subject of submissions and a ruling in advance of his testimony because he had made a statement that referred to allegations made by AU and two other complainants. Because the trial of those charges had been severed, CC was directed by the trial judge not to mention the other allegations. CC testified that the complainant's family had stayed in his father's house for some weeks at the relevant time. He also recalled a serious row one night during which he got a shotgun to try and get his father to leave the house. He described a physical assault by C on MCy. CC also said that in more recent years he put AU's allegation to his father. he said:

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

He also stated that at a later point he met his father again and he had a letter to see a psychologist or someone like that.

The prosecution also called a garda officer who had interviewed the defendant in 2004. C had denied any contact with AU, denied ever taking the children shooting, and denied that his son had ever threatened him with the gun. He also said that MCy could verify that he was not in the house. He also denied making any admission to his son.

At the trial defence applied at the conclusion of the prosecution case for the trial to be halted on the ground of unfairness caused by the absence of the two potential witnesses. The unfairness was said to flow from the absence of one witness in particular, MCy, who counsel submitted was a person of 'central importance' in the allegation, as a witness to the alleged events, particularly

given that when the allegation was first put to the defendant by gardaí in 2004 he stated that MCy would be able to verify his denial. At the voir dire the defendant's son CC testified that in the late 1990s he had gone to the UK and had met with AU's mother, another aunt and MCy. He told them that one of his sisters had made allegations against their father. At the time, CC had no idea of AU's allegations. He said he was advised by the women not to go to AU, 'they said it was all lies.' He said that he believed MCy was married and did not want her husband involved.

Defence counsel stated that it was 'beyond debate' that, if MCy was going to give evidence that AU's evidence in respect of the alleged rape was untrue, this would have significantly undermined the prosecution and affected AU's credibility. This would also have had a considerable collateral impact on AU's credibility in relation to the indecent assault charge. Counsel also argued that there was a reasonable possibility that MCy would have contradicted the evidence of the accused's son, CC.

In relation to the second missing witness, AU's mother, defence counsel stated that she might have been in a position to have given evidence as to whether C was living in the house at the time she stayed there with her family or as to her recollection of the incident involving the shotgun on the night of the alleged rape.

Prosecution counsel opposed the application to halt the trial, arguing that MCy's evidence could not have rendered AU's account an impossibility and that it was speculation to say that her absence mean that C had lost the real possibility of an obviously useful line of defence. Instead, it was more properly characterised as a lost opportunity for the defence. Counsel also argued that C had contributed to the delay and any potential prejudice by moving away from Clare.

The trial judge agreed that MCy's absence was a lost opportunity, noting that 'this is what can happen in delayed or stale cases. We cannot speculate about what her evidence might have been, would it have been favourable to the prosecution or to the defence? And neither indeed can the jury speculate in relation to that…' MCy's absence was not akin to the absence of objectively reliable evidence such as records, which could demonstrate the improbability of AU's allegations. The trial judge further stated that she would give the full 'Haugh warning' to the jury in relation to the difficulties that arise by reason of delay and the absence of evidence. The trial judge refused the application, characterising the missing evidence as no more than a 'lost opportunity.'

Following his conviction on both charges, C appealed on multiple grounds, including the trial judge's refusal to hold that the trial had been rendered unfair on grounds of delay.

The Court of Appeal's decision

On appeal the Court of Appeal[33] considered that the significance of MCy's absence should be viewed holistically, by reference to the evidence actually before the trial judge. The Court concluded that the argument that MCy would likely have been of significant assistance to the defence 'involved a number of major assumptions which appear unjustified having regard to the totality of the evidence.'[34] These included the fact that AU's account had implicated MCy as an accomplice to the rape, which meant she would have had to have been interviewed under caution, and if she had given evidence for the defence, the trial judge would have had to warn her that she need not answer questions if by doing so she might incriminate herself. If she had given evidence in support of C, prosecuting counsel in cross-examination would have suggested she was denying that the incident occurred because she was an accomplice.

The Court of Appeal also reviewed the prosecution evidence which it considered was corroborative of AU's allegations, including the evidence of AU's brother and of CC, in relation to the family staying in the defendant's house, and her account of the shotgun incident. There was also CC's evidence of his father's admission when confronted with the allegation. The Court concluded that there 'when viewed in the light of the totality of the evidence, it cannot be said that her absence was so gravely prejudice in the circumstances such as would necessarily have warranted halting the trial'.[35] In relation to the unavailability of AU's mother, the Court held that it was 'speculative in the extreme' to suggest that she would have contradicted AU's evidence and that of her brother. The Court dismissed the appeal on all grounds. C was granted leave to appeal to the Supreme Court on the basis that he had raised an issue of general public importance for determination, namely:

> [T]he extent of the burden on an accused person, tried on historic allegations, who argues that his trial is unfair because the lapse of time has resulted in the death of a witness who might have been of assistance to him.

The framing of the issue for determination by the Supreme Court allowed it to definitively set out the preferred approach (prohibition or application to the trial judge) to when unfairness allegedly caused by lapse of time should be raise, and the threshold to be met by a defendant in seeking to have the trial halted on this basis. The Chief Justice, with whom MacMenamin J agreed, identified the elements of the assessment to be carried out by the trial judge:

> 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

33. *People (DPP) v CCe* [2017] IECA 326, per Birmingham, Hogan and Mahon JJ.
34. ibid [25] per Birmingham J.
35. ibid [33].

> 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.
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> 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.
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> 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 *SB* 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.[36]

This approach was expressly agreed with by O'Malley[37] and O'Donnell JJ. O'Donnell J also set out the principles to be applied by a trial court in determining how such an application should proceed. These are:[38]

(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.

36. Clarke CJ noted that in cases involving culpable prosecutorial failure or wrongdoing when assessing whether a degree of prejudice renders the trial unfair: at [9.5].
37. [8].
38. [46] of O'Donnell J's judgment.

O'Malley J also agreed with these principles, as did Charleton J. As explained in the 'statement' published alongside the judgments, then, these two sets of principles identified by Clarke CJ and O'Donnell J set out the approach trial judges should adopt in all cases involving alleged prejudice caused by lapse of time between the alleged offences and the eventual trial.

A number of points can be made about these principles, and the details of each judgment. First, the court is clearly stating that assessments of the unfairness faced by an accused as a result of the lapse of time, are best made by the trial judge rather than pre-trial on an application for prohibition. In her judgment O'Malley J highlighted that the trial judge is in a better position to make a judgement on the fairness of the process than a judicial review judge 'furnished only with predictions about the trial.'[39] Second, the court is clear that a trial judge must identify the evidence said to be missing by reason of the passage of time. Clarke CJ noted that it was inevitable that this task would involve 'some level of speculation' but that it was clear that what is required is 'a legitimate basis on which it can be said to be reasonable to infer that particular evidence, potentially favourable to the accused might have been given had the trial taken place at an earlier stage.'[40] Clarke CJ provided examples of this: where a potential witness who has died has made a formal statement to the gardaí or gave evidence under oath in other proceedings about facts relevant to the trial.

Third, the court sought to clarify the threshold to be met by a defendant on an application to the trial judge. Clarke CJ noted, correctly, that the threshold to be met on an application to halt the trial 'is stated in differing terms across the case law'[41] and that most of the jurisprudence dealt with prohibition applications. This is where the real value of this judgment lies, in its clarification of the threshold to be met and in its identification of when the defence application should be heard. O'Malley J and Clarke CJ were clear that the assessment should involve a consideration of the 'whole of the case'[42] and that the prosecution case as actually made, is relevant to deciding whether the unavailability of particular evidence could render the trial unfair. Clarke CJ noted that defendants could rely on the evidence led by the prosecution or on that evidence together with additional evidence tendered in the absence of the jury, via a voir dire, to persuade the trial judge of this.[43] He also suggested that there might be circumstances where an application to halt a trial might be made after some or all of the defence evidence had been given, but that timing was a matter that the trial judge was uniquely placed to determine. Clarke CJ also suggested that there might be circumstances where an application to

39. [59].
40. [5.19].
41. [5.10].
42. O'Malley J at [46].
43. Clarke CJ noted that a lesser degree of prejudice may suffice to render a trial unfair where the prejudice concerned flows from culpable acts or omissions of the investigating or prosecuting authorities.

halt a trial might be made after some or all of the defence evidence had been given., but that timing was a matter that the trial judge was uniquely placed to determine.

The crucial issue of what is meant by 'the materiality of the evidence', in other words, what is standard to be applied by the trial judge was examined by both Clarke CJ and O'Malley J.

What standard should be applied by the trial judge in deciding whether a trial is unfair as result of the impact of missing evidence?

Clarke CJ noted that assessment is to be made in conjunction with an assessment of the prosecution case, so that if the prosecution is very strong, then the missing evidence would need such that there was a 'real possibility that it could influence the decision of the jury notwithstanding the strength of the prosecution's case.' He also stated that the standard to be met by an applicant is that the accused has 'lost the real possibility of an obviously useful line of defence.' This is the test identified by Hardiman J in *SB v DPP*,[44] a prohibition case.

O'Malley J noted that the strength of the prosecution case is relevant to deciding as to whether the unavailability of certain evidence could render the trial possibly unfair. She gave the example of allegations of non-recent child sexual abuse in an institutional setting, where the accused does not challenge the complainant's credibility, but says that he or she was not involved. O'Malley J stated in such a case the defence may argue that missing staff records would have contradicted the account of the complainant, and show, for example that he or she was simply not working on the particular ward or with a particular class, or that he or she was on leave. Conversely, in cases involving a domestic setting, like this one, O'Malley J considered it more likely that the complainant is much more likely to challenge the truth of the complainant's account and assessment of such an assertion of prejudice has to involve consideration of the complainant's evidence:

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

44. [2006] IESC 67.

> uncorroborated evidence of a complainant and there is a reasonable possibility that the missing witness would have been able to give evidence that could have had a material impact on the credibility of that evidence.

This is a welcome explanation of what is meant by 'materiality of the evidence'.

Clarke CJ also clarified that the question is not whether or not the defence might or might not have persuaded the jury to acquit is not the question. Rather, the trial judge's task is to determine whether the trial is fair. This key point was echoed by O'Donnell J who said that the test is 'whether any question of guilt, if arrived at, could be considered to have been achieved by a process which would be considered just. The trial judge is not asked to second-guess or anticipate the decision of the jury, but rather whether the process meets the standard required to permit a jury to deliver its verdict.'[45]

O'Donnell J was also keen to state that trial judges should set out the relevant factors involved, their assessment of them and the reasons for arriving at their conclusion, in order to permit an as assessment of the matter on appeal. This is essential to allow convicted persons to effectively argue about the trial judge's decision to refuse to the application to halt the trial.

Applying these principles to the facts

Although there was consensus about how trial judges should approach applications to halt the trial on the grounds of unfairness caused by delay, the court split 3:2 on the question of whether the trial in this case should have been stopped.

Clarke CJ considered that the trial was unfair and should have been halted. He acknowledged that the balance was a narrow one.[46] For Clarke CJ, it came down to the fact that MCy was a potentially central witness to the alleged rape. This was so, notwithstanding that, as an alleged accomplice, there were questions over the evidence she might have given, over whether she would have been a willing witness and as to her credibility if she gave evidence favourable to the accused. Clarke CJ considered the defendant's admission to his son was not sufficient to override the problems caused by MCy's absence. MacMenamin J agreed with Clarke CJ but did not issue a written judgment.

O'Donnell J was not as exercised by MCy's unavailability. He noted that the case was not one of simple allegation and bare denial, referring to C's statement to the gardaí, the statements of AU, her brother and CC and the admission by the defendant to CC.[47] He also considered that the reference to 'all lies' was in reference to an allegation which did not involve either MCy or AU at all. He was not satisfied that it was a formal statement challenging a specific account.

45. At [14] per O'Donnell J.
46. [9.6].
47. [35].

O'Donnell J also made the more general point that , the assessment of the impact on the trial of the absence of a witness is best made at the trial, 'has some continuing validity here' and that an appellate court reviewing such a decision 'should have good reason to disturb the finding of the trial court, having regard to the limitations of the material available to the appellate court in respect of the adjudication which the tail court was obliged to make.'[48]

O'Malley J differed from both Clarke and O'Donnell J in relation to their analysis of the evidence. O'Malley J largely agreed with Clarke CJ in relation to the consequences of MCy's unavailability but attributed far greater significance than Clarke CJ to the evidence of the defendant's admission of guilt to CC. O'Malley J considered that this evidence was capable of being strong corroboration of the complainant's account and so such evidence was sufficient to dispose of the claim that the appellant was unable to defend himself against the charges.[49] Agreeing with O'Malley J, Charleton J also focussed on the accused's spontaneous admission, saying it was reliable and admissible, and distinguishing it from confessions in police custody where particular safeguards are required.[50] As regards MCy's unavailability, Charleton J noted that it 'could be regarded as inherently likely to be denied by [MCy], had she been still alive.' Nonetheless, her denial would have been important. He also noted the accused's denial, that any of the family or the complainant herself had stayed in his home, and against that the multiple pieces of evidence indicating the contrary.[51] Charleton J considered that the judge rightly left the case for the consideration of the jury.

IV Discussion

The Supreme Court's decision in *CCe* brings welcome clarity for trial judges faced with applications to halt the trial on the grounds of complainant delay and the standard to be applied. It also brings Ireland closer to the approach taken to delay in other common law countries including England and Wales.[52] However, unlike in England and Wales, where the trial judge should usually make the

48. [45].
49. A key point of difference between O'Malley and O'Donnell JJ was the importance of CC's evidence of his conversation with his aunts and MCy and the advice that he should visit Au because it was 'all lies'. The trial judge, and O'Donnell J found that this comment could not have referred to Au, because she had not made any allegations at that stage, and that anyway the evidence was insufficiently clear-cut. O'Malley J on the other hand thought that the evidence suggested that MCy thought Au should not be believed.
50. [14].
51. ibid.
52. *R v F(S)* [2011] EWCA Crim 1844. And Australia: *Jago* (1989) 168 CLR 23. In other common law jurisdictions such England and Wales and Australia, 'delay' has received much less judicial analysis. Conversely, the issue of cross-admissibility of multiple victims' evidence has received more extensive judicial treatment in England and Wales, and Australia, than in Ireland. See further Ring et al op cit forthcoming 2022.

assessment at the outset of the case,[53] the assessment takes place after the presentation of the evidence. This approach is preferable, since it allows judges to better assess arguments of unfairness as they relate to the trial as it has developed. Clarke CJ and O'Malley J's guidance about relating the argument in respect of materiality to the strength or otherwise of the prosecution case are especially helpful. O'Malley J's observation of the differences between cases where identity is a fact in issue, versus cases where the fact of the abuse is at issue, is also illuminating.

The differences between the two groups of judges then, one in favour of dismissing the appeal (O'Malley, O'Donnell and Charleton JJ), the other in favour of granting an appeal (Clarke CJ and MacMenamin J), came down to the view taken of the impact of the unavailability of MCy on the defence. For the majority, her unavailability was offset by the matrix of evidence presented by the prosecution and the defence. This is not to say that the missing evidence was not important, but that it was not so important as to make the trial unfair, given the other evidence in the case. For the minority, the missing evidence meant that the trail was not fair and the jury should never have been permitted to deliberate and reach a verdict. This difference points up the scale of the task facing trial judges on such applications.

The issues of materiality of the missing evidence, and the powers of the trial judge to ensure a fair trial through issuing directions to the jury continue to be important considerations for trial judges. A key way a judge can seek to ensure a fair trial is through warnings to the jury. In *CCe*, Clarke CJ , O'Donnell and Charleton J all mentioned this, but did not give it any sustained consideration. They each referred to the 'Haugh' warning, given in the case of *People (DPP) v RB*[54] and later endorsed in *People (DPP) v PJ*[55] and *People (DPP) v EC*.[56] It states:

> But how can a person be expected to attack the allegation, to contest the allegation with any subtlety, with any detail, with any forensic form of attack if all you are told about it is that you did it about fifteen years ago on some date unknown over a period of eighteen months? That, I suggest to you, makes it far harder to defend it than it is to prosecute it. In fact, to prosecute it is easier if you do not nail your colours to the mast because there is less you can be cross-examined on. But the law does not say that stale cases, old cases, cannot be tried. But what I must tell you is that an accused person cannot in your minds or in your consideration be disadvantaged because the case is old, because the complaint is related to events from a long time ago. You have to be all the more careful and it should be much harder to satisfy you in relation to an event that is phrased in a vague and general way, rather than an event which carries details or particulars.

53. Supreme Court [Senior Courts] Act 1981, s 19(3); *R v DPP ex p Kebilene* [2002] 2 AC 326.
54. Approved by the Court of Criminal Appeal in *People (DPP) v RB* (Unreported, Court of Criminal Appeal, 12 February 2003).
55. [2003] 3 IR 440.
56. [2007] 1 IR 749.

The appellate courts have jealously protected fairness to the accused, even in circumstances where the need was not necessarily apparent; in the 2020 case of *TG* the Court of Appeal held that a warning's impact was fatally undermined by a judge's comments that the prosecution case was not lacking in detail.[57]

In addition to an effectively mandatory delay warning, trial judges may also give a discretionary warning on corroboration. Although a corroboration warning is no longer mandatory in sexual offences trials, there is a continued judicial attachment to giving them.[58] It is far from clear that they are only rarely given in non-recent child sexual abuse trials,[59] which is worrying because so-called 'delay warnings' also refer to credibility issues relating to the victim's evidence. There is a risk that the trial judge's charge in a non-recent child sexual abuse trial will unduly focus on the victim's credibility.

In a welcome attempt to recalibrate the scales of justice, Supreme Court judge Peter Charleton has canvassed the possibility of a limited warning by the trial judge to highlight that the legitimate reasons why a victim's account in a sexual offence trial may not be as fulsome as a juror might expect. The warning would highlight victims are at a disadvantage in reciting the details of what they claim has occurred to them, and that in every case a witness is likely to have made errors in prior statements which can be compounded by embarrassment.[60] This would bring Irish law more into alignment with developments in England and Wales and Australia.[61]

In the 2020 case of *X* the Court of Appeal refused an injunction of the prosecution of the appellant in respect of 105 charges of indecent assault against a younger relative over the course of twelve years.[62] There was a delay of 37 years but the defendant was not elderly and was capable of remembering highly relevant issues when interviewed by gardaí. Donnelly J found that the defendant's complaint was a mere assertion of prejudice and warned:

> Following on from [*CC*], those who wish to challenge their prosecution on the grounds of delay may be well advised to think twice before proceeding to judicial review.[63]

57. *DPP v TG* [2020] IECA 26.
58. Susan Leahy, 'The corroboration warning in sexual offence trials: final vestige of the historic suspicion of sexual offence victims or a necessary protection for defendants?' (2014) 18(1) International Journal of Evidence and Proof 41.
59. See *DPP v TOD* [2017] IECA 160.
60. Peter Charleton and Stephen Byrne, 'Sexual Violence Witnesses and Suspects: A Debating Document' (2010) 1 Irish Journal of Legal Studies13, 24.
61. See Sinéad Ring, Kate Gleeson and Kim Stevenson, *Child Sexual Abuse Reported by Adult Survivors: Legal Responses in England and Wales, Ireland and Australia* (Routledge forthcoming 2022).
62. *X v DPP* [2020] IECA 4.
63. ibid at [40].

This sentiment was echoed by Heslin J in the 2021 case of *JJ*.[64] However, the Supreme Court has not (indeed, cannot) abolished the defendant's right to apply for prohibition, and their right to seek to appeal to the Supreme Court from any refusal. It is not clear whether the approach of preferring pre-trial applications is actually deterring defendants from making prohibition applications; after all, such applications were unlikely to be granted,[65] especially after *SH*. Applications for prohibition/injunctions restraining prosecution add years to an already fraught and slow criminal process, heightening the stress involved for the parties and exacerbating existing evidential issues. One possible way forward would be for the Court of Appeal to indicate that, given the extensive guidance from it and the Supreme Court, trial judges hearing applications to halt the trial will be entitled to take into account any attempts to obtain an order of prohibition[66] including the impact the further delay may have on the evidence at the trial.

Conclusion

Non-recent child sexual abuse prosecutions present a variety of challenges to the criminal process. As well as the issues canvassed here, a range of other issues arise including: the drafting of indictments, the decision to prosecute, timely disclosure, directions to the jury on the possibility that a witness may be honestly mistaken, the role of expert psychological evidence in non-recent child sexual abuse trials, the treatment of witnesses, the admissibility of evidence relating to the defendant's character and sentencing.

The Supreme Court's confirmation in *CC* that the trial process is the appropriate venue to determine questions of fairness avoids the crystal ball gazing involved in many prohibition applications[67] which rely on 'affidavits professionally drafted and speculation as to what might transpire at a trial'.[68] It better reflects the trial judge's unique competence to determine issues of fairness having heard the evidence and taking into account factors such as the presumption of innocence and the ability to make evidential rulings and give appropriate warnings and directions to the jury. It is a nuanced approach that recognises both the importance of the constitutional guarantee of due process, and the need to fully contextualize defence arguments in light of the importance of NRCSA prosecutions for victims and for the public more generally. The challenges facing trial judges should not be underestimated; in

64. [2021] IEHC 564.
65. eg *AT v DPP* [2020] IECA 6. The Court of Appeal was unwilling to prohibit a trial, despite the absence of many potential witnesses, because it had no reason to believe that the absent witnesses were aware of the alleged abuse, and because there was scope for testing the credibility and reliability of the victim's testimony through other avenues.
66. Or injunction restraining the proceedings.
67. Gemma McLoughlin-Burke, 'The Effect of Delay in Cases of Historic Child Sexual Abuse' (2019) 29(2) Irish Criminal Law Journal 26.
68. *CC* [2019] per O'Donnell J at [44].

CC itself two of the five Supreme Court judges thought the unavailability of a witness meant that the trial should have been halted. Nevertheless, the *CC* approach is a welcome confirmation that the courts recognise the significance of non-recent child sexual abuse trials for individual victims and the importance of making sure that defence arguments are properly scrutinized so that only cases which truly would be unfair to try are halted before they reach the jury.

Finally, the significance of the trial judge's decision as to unfairness points up the importance of two things: first that the trial judge is alert to possible arguments made by defence counsel about the 'delay' being indicative of the complainant's weakened credibility. As the experience of the Irish courts on prohibition applications and a wide body of international research has conclusively shown,[69] delay in reporting is in fact indicative of enhanced credibility in the context of non-recent childhood sexual abuse. In order to ensure trial judges are fully equipped to wrestle with perhaps unfounded arguments in this respect from defence counsel, they should be given specific training on the research on delayed reporting. Second, is O'Donnell J's point regarding the importance of reasons as to any decision to grant or refuse a defence application on delay. This is important to allow convicted persons to effectively appeal, as is their right. In respect of prosecution counsel, it appears that these reasons may not be appealed by the prosecution. Given that the prosecution could (can still) appeal the High Court's granting of an order of prohibition, and given that there is legislative provision for prosecution appeals from directions to acquit,[70] denying the right of appeal to the prosecution seems unjustified. Legislative intervention to address this imbalance would be welcome.

69. See Ring et al forthcoming 2022.
70. And where evidence was wrongly excluded: see s 23 of the Criminal Procedure Act 2010.