THE HIGH COURT

JUDICIAL REVIEW

[2023 No.634 JR]

[2024] IEHC 155

BETWEEN

SIDNEY SUTTON

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS, AN GARDA SÍOCHÁNA, THE COMMISSIONER OF AN GARDA SÍOCHÁNA, THE DEPARTMENT OF JUSTICE, THE ATTORNEY GENERAL, IRELAND AND CIRCUIT COURT JUDGE CORMAC QUINN

RESPONDENTS

Judgment of Ms. Justice Mary Rose Gearty delivered on the 19th of March, 2024

1. Introduction

1.1 The Applicant seeks leave to prohibit a second criminal trial. He was convicted of assaulting his partner, his sentence was increased by the Court of Appeal and then the convictions were overturned. The Court of Appeal ordered a retrial. His application to the Supreme Court to overturn that decision was refused. Before the retrial could proceed, the Respondents were put on notice of this application for leave and have opposed it.

1.2 The Applicant submits: the case is a malicious prosecution and an abuse of process; he was not the assailant, rather, his partner was violent towards

him; a forensic report which supports this was supressed by the Respondents; no effort was made to prosecute his partner. The Applicant raises arguments about publicity, the alleged corruption of judges who have dealt with the case, the prosecution, the relevant gardaí and his legal teams.

1.3 The Respondents submit in reply that this Court cannot revisit a decision of the Court of Appeal, which the Supreme Court has already refused to overturn. They add that the law in respect of prohibition is clear: only those who face a real risk of an unfair trial will succeed in such an application as the trial judge is usually best placed to ensure fairness. The law requires that such an application be made to that judge in the first instance, not to this Court. They refute the allegations of corruption in each case, noting that they are unsupported assertions of malice with no evidential basis.

1.4 This judgment deals with whether there is jurisdiction to grant leave and, if so, whether there is even an arguable case that there is a real risk of an unfair trial that cannot be met by the trial judge. The Applicant has raised arguments about his correspondence with third parties, and about other cases in which he is involved. I will not consider employment or childcare cases, save insofar as they have a direct impact on the issue of a retrial.

1.5 I have reviewed the affidavits and the exhibits, including the transcripts of the first trial and transcripts of everything that occurred on each court date in the Court of Appeal and the Circuit Court. I have listened to the digital audio recording ("DAR") of relevant material in the first trial and of one

date in the Court of Appeal. There is no evidence to support this Applicant's assertions of corruption and no reason to anticipate that a trial judge cannot ensure a fair trial of these allegations.

1.6 More fundamentally, having assessed the procedural history of the case and the arguments made, this application is best characterised as an abuse of the process of the courts in that it is a clear effort to avoid the ruling of the Court of Appeal, and a subsequent Supreme Court determination, to the effect that the Applicant should be retried on these charges. I must refuse to grant leave and the retrial should proceed as soon as possible.

1.7 The citizen who complains of arbitrariness or *mala fides* on the part of a judge or prosecutor must provide evidence to support his case. This Applicant has failed to substantiate his allegations of malice. Moreover, he has failed to provide any evidence at all which might lead to the conclusion that the judges, lawyers or gardaí who have taken any part in the processing of this case were motivated by malice or acted arbitrarily in any of their decisions.

2. Investigation, Trial and Sentence

2.1 On the 6th of February, 2016 the partner of this Applicant made an allegation that he had assaulted her in a taxi after a wedding and again when they arrived home. Gardaí arrived at the family home, examined the scene and the complainant later made a statement. The taxi driver made a statement confirming the woman's account of the alleged assault in his cab.

2.2 The Applicant was interviewed and denied all offences. He told gardaí that he was the victim of abuse at his partner's hands. He disputed the account given by the taxi driver. He claimed that the complainant had self-harmed, thus explaining the fact that her blood was visible on his clothing.

2.3 The first trial ran from 31st October to 2nd November, 2017. The indictment contained counts of assault and assault causing harm on his then partner, and the production of a knife at the family home. These counts were based on witness statements in the Book of Evidence and all referred to the same date and, broadly speaking, the same prolonged incident.

2.4 During his trial the Applicant was represented by a solicitor and two counsel. The complainant and witnesses were cross-examined and edited memoranda of his interviews ("the memos") were put before the jury. It is significant that, although the Applicant is adamant that his legal team ignored his instructions, his Senior Counsel objected strongly to the edited memos being put before the jury, but the trial judge ruled against him. The Applicant called his two sisters as witnesses and did not give evidence himself. He was convicted on all counts.

2.5 Dealing with this first criticism of counsel in the case: while there was a reference to two junior counsel having agreed to the editing of the memos, any such agreement was overtaken by Senior Counsel's objection. The Trial Judge responded to the objections made and was, clearly, not bound by any agreement. The Judge ruled that the editing was fair; there had been an

agreement not to reveal previous allegations by the Applicant's ex-partner against the accused man. This being the case, the Judge ruled that it would be unfair to disclose that the accused made allegations about her, without disclosing both histories to the jury. Insofar as an "agreement" not to refer to her allegations was the stated basis of criticism of this legal team, it is completely contradicted by the transcripts of the trial. Insofar as there was any agreement to edit out the history between the parties, including allegations of previous assaults by this Applicant, this is why the matter should be retried, to allow a jury to consider the full history. There are no sustainable grounds to suspect corruption or malice in respect of a legal team on the basis that they negotiated to keep allegations of previous domestic violence by their client from a jury. That said, the defence clearly depends on a full history being revealed so the Applicant himself can choose to run the retrial in that way.

2.6 While a junior barrister may make a pragmatic arrangement with his opponent (the juniors are usually those who arrange memos for presentation to a jury), the senior barrister here, as sometimes happens, did not agree with the way the memos had been edited and, in line with the Applicant's own instructions, wanted references to the complainant's alleged violence to go to the jury. The Judge ruled against the defence, in a ruling that was explained and could be justified by reference to the law as it stood at the time, which was insufficiently clear. So unclear that the Court

of Appeal upheld the Trial Judge, and the Supreme Court overturned him. That final appeal vindicated the position of Senior Counsel, which mirrored that of the Applicant. To the extent that any lawyer prevented previous misconduct evidence on his part going to the jury, the Applicant can now ensure that both sides of the history of domestic violence are available to a jury at his retrial, not just his allegations but her historic allegations also.

2.7 In terms of his criticism of counsel, my conclusion is informed by the rationale of the Supreme Court in *The Director of Public Prosecution v. Buck*, [2020] IESC 16, where Charleton J. considered the position of a litigant who later queried decisions taken by his legal team. The Court concluded:-

> "*An advocate is not to be distinguished from the accused on whose behalf he or she acts... Situations can arise where there may be a lack of trust between an accused and his advisors. At all times, the accused has the choice of dismissing those representing him or her. The decision rests with the accused as must the responsibility, since advisors and accused in court speak as one*."

2.8 There were many delays before the sentencing hearing which finally took place in July of 2019. The Applicant was sentenced by the last-named Respondent to two years of imprisonment, with one year suspended on certain conditions. He appealed his convictions, and the Respondent appealed the sentence on the grounds that it was unduly lenient. The Applicant began serving his sentence and remained in prison awaiting a hearing date in the Court of Appeal.

3. Procedural and Evidential History in the Court of Appeal

3.1 The appeal against conviction was listed over 15 times before the Court of Appeal. On most of these occasions, the Applicant sought an adjournment. Unusually, the Director's appeal of sentence on the grounds of undue leniency was heard before the conviction appeal, in September of 2020, and succeeded, before the Applicant's conviction appeal was heard in 2021. His sentence was increased to two years and four months of imprisonment.

3.2 In 2020, the Supreme Court held in *Almasi v D.P.P.*, [2020] IESC 35, that interviews with an accused could not be edited on the basis that some of the questions did not suit the narrative put forward by the prosecution or were prejudicial to a prosecution garda. The *Almasi* case was flagged by counsel for the prosecution in the Applicant's case. The same counsel had been retained for the appeal hearings. In other words, as was his duty as prosecutor, he brought the attention of the Court of Appeal to the case as one that would constitute an arguable ground of appeal for this Applicant.

3.3 In 2021, the Court of Appeal overturned the Applicant's convictions on the basis of the *Almasi* case. The references in his interviews were, clearly, relevant to his defence, namely, that the complainant was the aggressor. In those circumstances, they should not have been edited out and he was entitled to a retrial in which the jury could consider the unedited interviews.

3.4 In overturning his conviction in the Court of Appeal, noting that his sentence had been increased before his successful appeal, the presiding Judge noted that the reason for this unusual sequence of events was "*persistent and repeated delays*" on the part of the Applicant in proceeding with his appeal against conviction. The main complaint by the Applicant regarding this hearing was that the Court confined him to the *Almasi* point about editing his memos when he wanted to raise more fundamental points about his lawyers and the gardaí. This argument is referred to in the next section, below, but in terms of the substance of the case, the Applicant could hardly have got a better result; all his convictions were quashed.

3.5 The Court of Appeal ordered a retrial. In response to the first contact from the prosecution after the ruling, in May of 2021, confirming that the Respondent would be proceeding with a retrial, the Applicant replied by email "*that is great news*", noting that he could demonstrate his innocence. He noted his intention to call the Taoiseach as a witness in the retrial.

4. Criticism of Solicitors and Counsel

4.1 The Applicant raises several grounds of complaint in respect of previous solicitors and counsel, including prosecutors, in the case. A prohibition application is usually forward-looking, asking, is there a real risk of an unfair trial in this case? However, this Applicant also argues that there has

been an abuse of process which requires consideration of the decision to prosecute the retrial and the conduct of those involved in the process.

4.2 Binchy J. conducted a comprehensive review of the tort of malicious prosecution in *Cully v Commissioner of An Garda Síochána*, [2022] IECA 185. The claim was dismissed, with this quotation from Halsbury's Laws of England repeated in the High Court and the Court of Appeal:

> *"It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action; his duty is not to ascertain whether there is a defence, but whether there is a reasonable and probable cause for a prosecution."*

4.3 In Salmond on the Law of Torts, 1977 edition Professor Heuston confirmed the essential elements of the tort as the initiation of proceedings maliciously and without probable cause, where proceedings are unsuccessful. Even if confined to the last essential, these proceedings plainly have not concluded.

4.4 The investigative and prosecutorial Respondents in this case acted on the statements of the complainant, the taxi driver, and the forensic expert. It appears to be accepted that the complainant, the Applicant and the bathroom were stained with the complainant's blood. These are reasonable grounds for a prosecution. Furthermore, the Applicant has not produced evidence of bad faith on the part of the investigators or prosecutors. He disputes their version of the facts, and they dispute his defence theory, but this does not establish malice on their part.

4.5 Moving to the later allegations, on the hearing date for the sentence appeal in the Court of Appeal, the Applicant was represented by three barristers (not those who had appeared at trial, but a new team). Again, Senior Counsel argued strongly on his behalf. His lawyer submitted that the case should not go on in the absence of the Applicant. Counsel referred to the details of the Applicant's email. The Applicant characterised this as his legal team ignoring his instructions. That is simply not true.

4.6 There is no evidence on the transcripts or on the DAR to support any allegation against any of the lawyers in this case. At every stage, the lawyers on his behalf made his case, were heard and rulings were given.

5. The Retrial Order: The Court of Appeal and the Supreme Court

5.1 The Applicant resisted the application of the Director for a retrial and the Court of Appeal ruled against him on the 10th of May, 2021. Much of the material canvassed before me was argued by the Applicant in his presentation to the Court of Appeal. He was, by then, representing himself. In his application to the Supreme Court, he added that he had not had a fair hearing in the Court of Appeal. He had been represented by seven different legal teams during his 16 appearances in the Court of Appeal.

5.2 It is clear from the transcripts and the DAR that the Applicant sought to criticise, in his appeal hearing, the lawyers who defended him at trial. He consistently told the Court of Appeal that no lawyer, of those he later hired,

would let him raise this issue. By this time, he was representing himself. The issue was never added to his grounds of appeal in the Court of Appeal.

5.3 It was the Applicant's appeal, and it was for him to raise all issues. He was advised by Birmingham P. and Edwards J., at separate hearings, that he must formally raise this issue. He was told, by both Judges, why the issue had to be put in writing: so that the lawyers could be notified of his allegations and could respond if they wished to do so. Edwards J. advised the Applicant on how to make his application from prison, using pen and paper, if necessary. He was told that even an unsworn letter could be accepted in court as he could take an oath as to the truth of its contents on the hearing date. This would have raised the issue that, the Applicant now claims, is an important part of his case. Not having raised inadequate legal representation then, he cannot do so now.

5.4 As a matter of common sense, even if one does not know the well settled law going back to *Henderson v Henderson* [1843] 3 Hare 100, it is obvious that a litigant cannot raise different parts of a case before different courts at different times. No litigation would ever end if this was permitted.

5.5 The Applicant never filed a motion to add this ground to his appeal. The Court of Appeal could not deal with his allegations against his legal team as a direct result of his decision. The Supreme Court could not deal with an issue that was not before the Court of Appeal. His submissions on on this issue had to be dismissed as he never added this as a ground in his appeal,

so the various lawyers were never given a chance to respond. The Supreme Court confirmed that his case raised no issue of general public importance.

5.6 Meanwhile, in the Circuit Court, the Applicant's retrial was listed for mention on the 18th of May, 2021. It too was adjourned more than 15 times across a period of two years. Most adjournments were at the request of the Applicant. On some occasions he raised medical grounds with a medical report, on other occasions, he made that argument without any such report.

5.7 In September of 2022, while his retrial was pending, the Applicant filed a miscarriage of justice application in the Court of Appeal. That application refers to his first trial and convictions which have now been quashed. The case has been adjourned from time to time and is awaiting the retrial. Contrary to what was submitted to the Circuit Court, the Court of Appeal has expressly ruled that the miscarriage of justice application should await the outcome of the retrial as that retrial may strengthen the Applicant's case or may render the whole case moot. Either way, it will influence the miscarriage of justice case which cannot proceed while a retrial is pending.

5.8 The Applicant points to decisions of the last-named Respondent and the Court of Appeal, effectively dictating the sequence of these two pending cases, as an example of malice and abuse of process, noting that the law does not require that a retrial proceed first. What the Applicant has not addressed is the fact that the law does not require that a miscarriage of justice application proceed first. The law is silent on the issue, but common

sense suggests, even to the non-lawyer, that if there are grounds for a retrial then a miscarriage of justice application about the same facts must await the decision of the jury in the retrial. Absent clear evidence of malicious prosecution, which has not been established here, it is not a matter for a court to exonerate this Applicant, if he is innocent, but for a jury.

6. Allegations of Court Corruption

6.1 It was submitted that this Court cannot give leave to the Applicant to prohibit his trial as this would effectively overturn the decision of the Court of Appeal on this point. This Court has considered the case as a whole to assess whether this is, in essence, an attempt to appeal final decisions of the appellate courts. I have considered the Applicant's arguments that the Court of Appeal and the Respondent Judge who dealt with the case were biased against him and colluded with lawyers and gardaí to convict him.

6.2 I have read the transcripts of every mention date and hearing date in both those Courts. No transcript was exhibited for the day on which the retrial was ordered, 10th May, 2021, so I obtained access to the DAR for that date and listened to it. The determination of the Supreme Court, refusing leave to appeal the retrial order, and submissions from both sides on the issue, are publicly available and I have read these documents.

6.3 These allegations of abuse of process are not only unfounded but are contradicted by the transcripts of what happened in each of these courts. The Applicant has made a very strong, and indeed, central argument based

on the allegation that various actors in the prosecution office and the judiciary have doctored one transcript in respect of his trial. He claims that lawyers colluded against him and acted against his instructions.

6.4 I have already addressed the argument in respect of collusion and corruption insofar as it refers to the editing of the memos at trial. The Applicant also states that he was surprised that the undue leniency hearing in the Court of Appeal went ahead without instructions from him. He told me that his email to his lawyers was not given to the Court. This is not reflected in the transcript of the hearing. It is also clear that he was repeatedly warned in case management lists that if he was not ready to proceed on his hearing dates, the case would proceed with, or without, him.

6.5 The Court refused to adjourn a case that had been in the list for over a year where the adjournment was sought on the morning of the hearing. The Court could not accommodate another hearing at such short notice and noted that this was a pattern repeated throughout the history of the Applicant's challenges to his trial and apparent efforts to avoid a retrial.

6.6 It is worth commenting at this stage in the narrative that the first time this case was listed before me, an adjournment application was made, as is set out below. This pattern of repeated adjournments is very clear and, having reviewed what occurred on every application date in the Court of Appeal, the Applicant should not have been surprised that the sentence hearing went ahead and certainly has no legitimate complaint against his legal team.

The Applicant is unable or unwilling to prepare for and run his own applications on the dates on which they are listed, whether he is represented or not. If this pattern continues unchecked, it will encourage the abuse of the process of the courts generally, and not just in the Court of Appeal.

6.7 In the Circuit Court, his retrial was finally fixed for hearing on 7th of June, 2023 with a section 4E application from the Applicant listed for the same day. "S. 4E" is shorthand for an application in which an accused argues that the documents served on him by the prosecution do not establish a statable case against him, capable of reaching the criminal standard of proof, and that the trial judge should dismiss the charges. It refers to s. 4 of the Criminal Procedure Act, 1967 (as inserted by the Criminal Justice Act, 1999).

6.8 The Applicant was concerned about the s. 4E being listed on same day as a retrial, saying that this was in breach of his rights. No specific right was identified but, in particular, he submitted that this would give him no time to prepare for his trial, should the s.4E be unsuccessful. This is a misunderstanding as to what is required in a court case. Any lawyer in that situation routinely prepares for the trial to take place immediately after a s.4E. There is no guarantee of success in a s.4E and, seeing as the Applicant has now successfully forestalled the date of commencement of the retrial for well over a year, he has had more than enough time to prepare for this trial.

6.9 No prohibition case could ever succeed on the basis that an accused was concerned about facing a legal argument on the same day as his trial; this is

commonplace in the courts. The criminal justice system could not function if lawyers and litigants in person were granted an adjournment whenever there was a ruling, in order to contemplate the consequences of that ruling.

6.10 The consequences of a s.4E are obvious and binary: either the trial will go on or it will not. Prepare as if it will, or you may find yourself running your trial without preparation. In the event that there is some unexpected feature in the s.4E, the trial judge is best placed to consider whether time should be given to consider it, but it is unusual to grant such an adjournment.

6.11 The Applicant submits that there was a lot of work to be done on both cases, the preparation for his retrial and for the miscarriage of justice application which was listed, initially, in July of 2023. The Applicant claims that the last-named Respondent interfered with his miscarriage of justice claim case by asking counsel and the Applicant to clarify, from the Court of Appeal, whether the retrial was to go first. This is not what the transcript records.

6.12 The last-named Respondent had already requested clarity as he had been told by the Applicant that the retrial was to await the result of the Court of Appeal proceedings. It is important to note that the retrial had been listed several times at that stage and when the miscarriage of justice case was first listed, it appeared likely, if not certain, that the retrial would be long over by July of 2023. This calculation did not anticipate the many adjournments that followed, some (though not all) of them sought by the Applicant.

6.13 The Applicant submits that his retrial was pulled from the list, by the Respondent Judge, and that this put the retrial back by a year and was in defiance of the independence of the Court of Appeal. His version of this was that the Judge went along with the State which had, he submitted, "*an awful effect on my case*." It took him months, he said, to get that early date for the miscarriage of justice case, in the hope that it might have prevented a retrial.

6.14 The claim, in summary, is that the President of the Court of Appeal and the Respondent Judge were trying to railroad the Applicant's retrial and frustrate his miscarriage of justice claim. This case against the Judge is based on what happened on the 25th of April, 2023. This was a case management list. It had been before the last-named Respondent on the 18th of April, but the Applicant had sought an adjournment on that date. On the 25th of April, he sought another adjournment, but the Director wanted to proceed with the application under s. 4E, which was listed that day. However, the last-named Respondent adjourned the matter to clarify the situation, at the Applicant's request. It is hard to see how the Judge, by acceding to the Applicant's request, was thereby frustrating him or siding with the State. He listened to the Applicant and required clarity as to what the Court of Appeal had ordered. He heard from both sides and was scrupulously fair.

6.15 On the 19th of May 2023, the last-named Respondent set a trial date having been advised, correctly, that the Court of Appeal had adjourned the

miscarriage of justice case to await the retrial. Any complaint about the last-named Respondent is misconceived and completely unfounded.

6.16 I was asked to remove the Judge's name from the title of these proceedings. O.84 rule 22(2A) of the Rules of the Superior Courts provides that in an application to quash proceedings in a court, "*the judge of the court concerned shall not be named in the title of the proceedings … unless the relief sought in those proceedings is grounded on an allegation of mala fides or other form of personal misconduct by that judge*. The stated ground for the Applicant's allegation was *mala fides*, although I have found it to be baseless. The rules do not permit me to remove the Judge's name. The Court of Appeal took the same view of the effect of O. 84 r.22(2A) in *M. v. M.*, [2019] 2 IR 402.

7. Applications to Adjourn and to Allow Further Argument

7.1 On the hearing date of this leave application in February 2024, the Applicant sought an adjournment on three grounds. His application was refused and reasons were given *ex tempore*. After the hearing, he emailed the Central Office seeking a second hearing date on other, albeit similar, grounds.

7.2 The first ground for an adjournment of the hearing date was to enable the Applicant to consider affidavits served just before the hearing. These were affidavits of service and were of no consequence in that they simply confirmed that the Applicant had received papers in the case. I refused the adjournment on the basis that no response to the affidavits was required.

7.3 The second ground was to allow the Applicant to reply to legal submissions made by the Respondent Judge. That Respondent did not swear an affidavit and, on that basis, the Applicant submitted that he had not expected legal submissions from him and wanted more time to reply. I refused this application as the oral hearing is the litigant's opportunity to reply to written submissions. This Applicant had received all submissions over two weeks before the hearing, which was plenty of time within which to prepare his oral submissions including replies to the written submissions.

7.4 The final ground was repeated in a message sent by email to the Judicial Review section of the Central Office, contending that the Applicant had noted that the papers prepared for the hearing by the Respondent did not include all of his exhibits. He did not consent to filing joint pleadings. The problem with this argument is that this Applicant is the one who bears the burden of proving the case and filing the correct papers is part of that duty. It is his case to make. The onus is on him to prepare and he did not do so. He appeared to understand this ruling as it was given on the hearing date.

7.5 The Applicant had brought no papers with him as he appeared to expect that the case would not go on. As it became clear that the Court was prepared for the hearing, had read all the material filed, and intended to proceed, he agreed that if he could file the missing exhibits later, he would present his oral submissions. He also agreed to refer to the Respondent's copy of the pleadings to ensure that the hearing proceeded as planned.

7.6 Central to the resolution of the issue of how to proceed with the hearing was the fact that the Respondents had a spare copy of the papers to share with him and they did not object to him filing the missing exhibits within a week. I heard both sides regarding this time frame and, having heard submissions from Counsel and from the Applicant, and bearing in mind the Court's own schedule of hearings, I directed that the missing exhibits be filed on or before the 1st of March 2024, three weeks after the hearing.

7.7 The Applicant filed his exhibits on the 1st of March as directed. On the 4th of March I was advised that he requested, by email, an additional hearing date to address the material in these exhibits. I refused that request on the same basis as I had refused the request for an adjournment of the hearing. This was the Applicant's case to make. It was his duty to file papers and submissions in time and, if there was a difficulty obtaining or filing documents, the Court should have been told long before the hearing date.

7.8 It was a concession from the Respondent to permit the Applicant to file exhibits after the oral hearing. No court would re-open a case to allow further submissions from a litigant who filed papers too late for the hearing of his own application and then appears not to have considered his own exhibits in submissions, nor to have addressed all aspects of the exhibits to his own satisfaction. There was no good reason to allow further argument.

7.9 The Applicant had access to his own exhibits before he filed his written submissions and long before the oral hearing. There is no facility to allow

parties to make further arguments because they have examined their own case more closely and have thought of more to say. No case would ever end if this was permitted.

8. <u>Leave Applications for Prohibition of Criminal Trials</u>

8.1 The law in this respect is clear. The Applicant must establish that he has an arguable case that there is a real or serious risk of an unfair trial in his case in order to obtain leave to prohibit the Respondents and to proceed to a hearing on the merits of a prohibition order. To paraphrase O'Donnell C.J. in *O'Doherty v. Minister for Health* [2022] IESC 32, [2022] 1 ILRM 421, there must be a prospect of success. The Applicant for leave need not establish a reasonable prospect of success, merely an arguable prospect of success.

8.2 The law in relation to the prohibition trials, generally, is set out in *S.H. v. D.P.P.* [2006] 3 I.R. 575, *P.T. v. D.P.P.* [2008] 1 I.R. 701 and *D.P.P. v. C.C.* [2019] IESC 94, in which latter case, the primacy of the role of the trial judge was re-emphasised. The relevant principles in brief are: each case turns on its own facts; this is a wholly exceptional remedy; refusal of leave returns the case to the trial judge, anticipating that she will ensure a fair trial; the courts are slow to interfere with the Director Respondent's independent decision to prosecute; few cases can reproduce all the evidence that might once have been available; if it is a missing evidence case, the Applicant must establish that there is relevant evidence that was once available and then

point to a real possibility that the missing evidence would have assisted his defence; the Applicant must show manifest, unavoidable prejudice that cannot be cured at trial. If there is an allegation of corruption such as would prevent a fair trial, there must be an evidential basis for that claim.

9. Delay and Stress

9.1 The Applicant relies on the cases of *Devoy v. DPP* [2008] IESC 13 and *McFarlane* [2008] 4 IR 117 to argue that this case should be prohibited due to prosecutorial delay. Those cases have no application here. The only delays in this case were caused by the Applicant. He describes the distress and anxiety caused by the allegations and subsequent trial. He refers to the death of his father, which he attributes to these proceedings. There is no doubt that there has been a serious impact on his personal and working life.

9.2 While it is over 8 years since the events giving rise to this case, the delay, coupled with the evidence of stress and anxiety adduced by the Applicant does not give rise to the kind of prejudice that arose, for instance, in *D.P.P v M.S.* [2019] IECA where the accused could no longer give instructions.

9.3 It is this Applicant's position that he is innocent and did not commit any such offences. There is no question of delay causing loss of memory or uncertainty on his part. No case to prohibit the trial was taken until after the Court of Appeal ordered a retrial in 2021 and such a case could not have succeeded before then. Delays since 2021 were caused by this application.

9.4 There is no doubt that the Applicant has suffered ill effects in his personal life and in his employment. However, this is often the case when allegations of criminal offending are made. Whether admitted or not, and I note consistent denials in this case, the fact that allegations of offences are made and become known by family and colleagues of the accused, as they often do, is always difficult and stressful. However, there must be expert evidence of significant prejudicial effects on an applicant and on his pending trial before stress can constitute grounds for leave to prohibit a trial.

9.5 The fact that this will be a second trial has increased the difficulty for this Applicant. However, as the Supreme Court made clear in *A.P. v D.P.P.* [2011] 1 I.R. 729, the Director is entitled to direct a third and even a fourth trial. The fact that the only jury to consider this matter returned guilty verdicts is a matter which must be considered by the first Respondent. That being the case, it appears fair to both complainant and accused to ensure a retrial as the conflicts of fact arising are matters for a jury to resolve.

9.6 The level of stress and anxiety outlined by this Applicant does not constitute an arguable ground to prohibit this trial. Further, no evidence under this heading was raised before the Court of Appeal during the hearing to consider a retrial so there is no evidential or procedural basis on which I can revisit this decision. The Applicant had time to prepare arguments before that hearing and did not refer to delay or stress as grounds to refuse a retrial.

10. Prejudicial Pre-trial Publicity

10.1 After the first trial, there were newspaper and online reports about the events at the trial. The Applicant has exhibited these. He argues that the publicity attaching to his case means that there is a real risk that he cannot receive a fair trial. Related to this argument is the oral submission, in response to this Court's query about "the fade factor", that a jury will inevitably search for his name if he is tried again.

10.2 In *Rattigan v. DPP* [2008] IESC 34 there was a gang-related murder. Prohibition of the trial was sought due to adverse media coverage. The Supreme Court held that a lapse of time between the publicity and the trial together with appropriate directions could render a trial fair which would otherwise be unfair. If this is not possible, prohibition is appropriate.

10.3 The bad publicity in *Rattigan* was at a level far higher than that in this case, in terms of adverse commentary and media saturation. The publicity attaching to the Applicant's case will certainly be affected by "the fade factor", in that most people do not retain details of reported cases for more than a few days and all that is required for a fair trial is a jury of twelve people who do not know anything about the alleged events.

10.4 In *Nash v DPP* [2015] IESC 32, the Supreme Court confirmed that there is no evidence to indicate that jurors do not take their oath seriously, even when exposed to media reports of a particular case. It was emphasised that "*a forensic examination is by nature careful and logical*" and therefore the

reasonable person does not confuse evidence in a trial with whatever matters the media may report on as if they are facts.

10.5 Commenting on the routine instruction to juries warning them not to search for material relevant to the case on the internet or do any research outside of what is presented in court, the Court in *Nash* held that it is a matter for the trial judge to direct a jury in this regard, if she deems it necessary.

10.6 The Applicant has not produced any argument or evidence that persuades me that he has an arguable case for prohibition on this ground. He has not established an arguable case that he runs the risk of an unfair trial. These are all matters for a trial judge to assess and manage to ensure the fairness of the proceedings. Unlike the issue of delay in and of itself, this issue was raised by the Applicant in the Court of Appeal who considered, and rejected, this argument. The Applicant has not raised later evidence that persuades me to revisit that decision; leave cannot be granted on this basis.

11. Missing Witnesses

11.1 The Applicant relies on *Braddish* [2001] IESC 45 and *Dunne* [2002] IESC 27, the so-called missing evidence cases, to support his argument for prohibition. He submits that several witnesses, most notably his sisters and his neighbour, are no longer available. This is not correct. While his sisters are still available, the Applicant confirms that they are no longer willing to

give evidence in support of him. These are two entirely different matters. Having heard their evidence at his trial, the Applicant is entitled to ask for a *subpoena* and call them as witnesses. He can apply to treat them as hostile witnesses if the foundation for that application is made during their evidence and, if that succeeds, he can then cross-examine them as to their previous evidence. No failure on the part of the prosecution, nor on the part of the investigators, arises here.

11.2 The second witness issue refers to a neighbour who told the Applicant that there were many gardaí, wearing forensic garb, in his house on the day of the alleged incident. This, he submits, is relevant to the suppressed evidence ground, considered further below. He has not identified this neighbour and has confirmed that the man is not willing to give evidence. Again, this is very different to the circumstances in which a witness who was once available is no longer available due to delay or incompetence.

11.3 This witness was never available. His evidence therefore is hearsay and not admissible as it cannot be tested. It is not possible for the Applicant to demonstrate that this is reliable evidence, and his report of hearsay evidence does not constitute an arguable basis that there is a real risk of unfairness in the retrial. If the Applicant is convinced of the accuracy of this assertion involving his neighbour, it can be put to the various witnesses in the retrial. More importantly, this kind of hearsay averment could never constitute grounds to prevent a retrial. If the law permitted this, any

accused could prevent his trial by simply swearing an affidavit in which he asserts that an unnamed source has informed him about a fact that suggests his trial will be unfair. This is considered further, below.

11.4 As with most of the grounds argued in this Court, this is also a matter that could have been raised before the Court of Appeal, but wasn't. Insofar as any of the information available to the Applicant was available to him in May of 2021, I have no jurisdiction to grant leave on this basis. Insofar as it may have arisen since then, the absence of these witnesses could not form an arguable ground to prohibit a retrial.

12 Withheld Evidence

12.1 The Applicant refers to medical evidence which was not added to the Book of Evidence in his case. The trial proceeded without reference to this evidence, all of which was referred to in his most recent affidavit for this case, but many of the exhibits themselves were filed after the hearing.

12.2 I reviewed the medical records including hospital records relating to the Applicant and notes from the Applicant's local doctors' clinic. The Applicant submits that the records support his narrative of a relationship in which the complainant in the case was the aggressor and he was the victim of domestic violence. The medical records show that the Applicant had some injuries on certain dates.

12.3 The complaint in this regard is misconceived. The Applicant is under the mistaken impression that the prosecution is obliged to call all evidence gathered in an investigation, including that gathered by the accused. This is not so. The prosecution is required to be fair and to present all relevant evidence to the jury. If an accused acquires evidence that he argues could exonerate him, he can share this with the prosecution who may decide to call the evidence but if not, he adduces the evidence himself in his defence.

12.4 In this case, there are two competing narratives, as outlined above. The narratives are in stark conflict with each other, and the Respondent Director is entitled to decide, as she has done, that the narrative of the complainant is more credible and that the Applicant should be prosecuted. It is a matter for her whether she decides, through the prosecutor, to adduce evidence in respect of injuries to the Applicant. The exhibits do not, contrary to his submission, prove that the Applicant was probably the victim of domestic violence. There can be no criticism of any Respondent for not seeking or adducing this evidence but the Applicant may, of course, rely on it.

12.5 The Applicant is entitled to call a doctor, or to rely on medical reports if properly certified, so as to persuade a jury that the complainant's account is not true. He is not entitled to insist that the prosecution call this evidence while making their case. That being so, this argument cannot succeed as a ground to prohibit this trial. The medical evidence was not withheld, it is still available and may be relevant to the Applicant's defence, though that

is a matter for the trial judge. It is for the Applicant to adduce relevant evidence and it will be for a jury to decide on its reliability and weight.

12.6 Insofar as this evidence was available to the Applicant before May of 2021, I do not have jurisdiction to prohibit the trial on this basis as it could have been raised before the Court of Appeal, but was not. In this regard, I note that the Applicant did refer to 9 years of violence in his first argument opposing a retrial, but he did not refer that Court to any evidence in that regard. Insofar as I have now seen the evidence upon which he relies, it does not constitute an arguable ground to prevent the retrial but can be adduced in the usual way by him, in his defence, at the retrial.

13. Suppressed Evidence

13.1 A key issue in this prohibition application is the claim, already noted, that there were forensic experts at the Applicant's home on the date of the alleged assaults, that a report was prepared, and that it was later suppressed. The Applicant emphasised this issue strongly, relying again on *Braddish* and *Dunne*, and noted the list of Respondents who must have combined their efforts to hide or destroy evidence of this nature.

13.2 Crucially, he noted that the reports were referred to during his trial but that the transcript did not record the verbal references. This is an important submission as the Applicant notes that this verbal exchange confirmed his suspicion that forensic reports had been deliberately withheld. He assured

me that the exchange, which is not on the transcript, would be on the DAR. He recalls his then lawyer asking the prosecution barrister for the forensic report as the main prosecuting garda began her evidence and being told by that prosecutor, "*you know we don't have that*", or words to that effect. He submits that it was clearly audible; both he and his parents heard the words.

13.3 Even if said, this might have been open to interpretation and, as noted, no lawyer was given the opportunity to address this allegation of corruption against them. I have retrieved the DAR of this trial and listened, not just to the opening of this witness's evidence, but to all of her evidence. There is no reference to a forensic report, no reference to not having anything and no exchange between counsel even resembling the one described.

13.4 It is not possible that the DAR did not pick up what the Applicant says he and his parents heard. Every other word of the witness's evidence and all questions and comments, by both counsel, are clearly audible. It is not possible that the comments were made but the DAR did not record them as, if they were loud enough to be overheard, then they would remain on that system to this day. It is clear that no such words were spoken.

13.5 This is the final aspect of the complaints directed at the lawyers. It formed the most substantial basis of his criticism of the Applicant's first legal team and of the first three Respondents. It is not only unfounded, but contradicted by a recording that could not have been tampered with. The DAR is out of the reach of any of the actors in the criminal process, whether

judges or lawyers, or gardaí. It was equally unlikely that a transcript had been altered, but I checked the DAR, nonetheless. Court transcripts are prepared by a body independent of the courts who must tender for the work on a regular basis, satisfying requirements of governance and probity. This argument involved the unwarranted criticism of numerous actors without any foundation.

14. Conflicts of Fact

14.1 The Applicant has asserted that he is the victim of this offence and should not be prosecuted. Rather, he argues, his ex-partner should be on trial. When confronted with these allegations, he immediately made this case, accusing her of assault. This is a conflict of fact for a jury to determine.

14.2 The Applicant has also argued that evidence about the complainant's medical history and accusations against her should be matters which persuade me to prohibit his trial. These are matters for a trial judge to rule on, if the Applicant chooses to raise them. If relevant to the trial, he will be permitted to adduce evidence or to ask questions in this regard. There is no basis in this submission for an arguable ground that a retrial may be unfair.

14.3 Moreover, none of this has arisen since May of 2021 and these were matters which the Court of Appeal considered. Prosecution Counsel, who is criticised by the Applicant without an evidential basis for that criticism, was

the one who brought the issue of the complainant's medical history to the attention of that Court. I have no jurisdiction to revisit that decision.

14.4 The Applicant has pointed to what he described as malice and unfairness on the part of the prosecuting gardaí. Any unfairness or inaccuracy can be put to the relevant garda witnesses in the retrial and their evidence can be challenged in front of the jury. There is no evidence of malice on the part of any garda involved. There is a difference between a witness, whether a garda or not, giving evidence against a person and a witness acting with malice. To prove malice, an applicant must establish an improper motive, not just evidence that a person has acted for the prosecution or given evidence for the prosecution against him. The circular argument deployed by the Applicant would, if followed to its logical conclusion, mean that every criminal trial would contain evidence of prosecutorial malice against the accused. I have already commented on the legal term "malicious prosecution", a specific tort which has not been established here.

14.5 The Applicant points to forensic evidence in the house and has, unsuccessfully, argued that a report was created which was not given to him. There was a forensic report in this case, it has been disclosed to him and that witness, Dr. Dowd, gave evidence at his trial. Her report is available and there are many photographs of the scene, including his own, which create ample material for the Applicant to put forward his defence theory, should he wish to do so. These photographs were exhibited by the

Applicant but, again, these were all available to him in May 2021, when the Court of Appeal was considering the Respondent's application for a retrial. I have no jurisdiction to review that decision.

15. <u>Judicial Review: Disguised Appeal of Decisions of the Appellate Courts?</u>

15.1 I have canvassed every argument made by the Applicant so that the full picture is clear before addressing the overarching jurisdictional argument made by the Respondent, namely, that this case amounts to an attempt to judicially review the decision of the Court of Appeal to order a retrial.

15.2 The Superior Courts are not subject to review. This is clear from the Supreme Court decision of *Blackhall v Grehan* [1995] 3 I.R. 208, relied upon by the Respondents to support their argument in this regard. The essence of this application, they submit, is an attempt to subvert both the decision of the Court of Appeal to order a retrial, and the Supreme Court's determination not to allow an appeal against that decision.

15.3 The Applicant has relied heavily, in this Court, on the arguments that he failed to make in the Court of Appeal based on unfounded allegations that his various legal teams failed him. He has also traversed the well-trodden terrain of prohibition cases, namely delay, unfair publicity, missing witnesses, withheld and suppressed evidence. He has failed to provide evidence sufficient to ground even an arguable case on any of these bases.

15.4 There is no issue raised here that could not have been raised before the Court of Appeal and I have already noted the long delays involved in that Court, created by multiple adjournments sought by the Applicant on many and varied grounds. He repeatedly submitted that he had not been permitted by the Court of Appeal to criticise his previous counsel, citing lawyers who refused to take his case. This argument is grossly misleading.

15.5 The Court of Appeal, through the President and its most senior ordinary Judge, made it clear to the Applicant that he could criticise any of his lawyers but that he had to put his arguments in writing so that the lawyers could be notified of his allegations and respond to them. In other words, that they might have the fair procedures he himself demands and has received. He chose not to do so and cannot revisit that argument now.

15.6 Conscious that this Court must review the entirety of the proceedings in order to ensure that justice is done and to correctly identify the real nature of this case, I am persuaded by the overall picture painted very clearly by the affidavits, exhibits, transcripts, and submissions, that this is a collateral attack on the decisions of the Court of Appeal and the Supreme Court respectively. My conclusion is confirmed by the Applicant's approach to this prohibition hearing, which began with an untenable adjournment argument on the hearing date, mirroring numerous such applications, which caused years of delay, in the Circuit Court and the Court of Appeal.

15.7 Only one argument raised in this case may have arisen since the decision of the Court of Appeal that there should be a retrial. That refers to the fact that his sisters appear to have changed their views on the Applicant. The Applicant had the opportunity to advance all other grounds he now raises at the application for a retrial in May of 2021. At that application, he referred to the complainant's violence against him, to his good name having been destroyed, to people who had given false evidence, to the agreement of counsel not to *"bring forward"* his evidence. These arguments have all been repeated here but could not form a basis to prohibit this trial.

15.8 More importantly, this review of the arguments, now augmented by the arguments he was invited to make but did not and his sisters' change of heart which could not form the basis for a leave application, persuade me that this application is one that must be refused due to the decision in *Blackhall v Grehan*. I cannot prohibit a retrial that has been ordered by the Court of Appeal. Further, the Supreme Court has refused to hear an appeal of that order. I cannot review that determination.

15.9 This is the appropriate basis for my Order refusing leave to prohibit his trial. The Applicant has only raised one argument that may have arisen since the retrial was ordered, and that could not possibly form the basis for prohibition. He had the opportunity to address all the other issues now raised before the Court of Appeal. That Court ruled against him and those

arguments he decided not to raise cannot now form the basis for a new review of that Court's decision, disguised as a prohibition application.

16. <u>Conclusions</u>

16.1 This is a case in which the Applicant has been before the Circuit Court and the Court of Appeal on over 30 occasions for the same allegations which arose in 2016. He has been convicted, sentenced, and resentenced. His convictions have been overturned. Instead of embracing the opportunity to clear his name, he has used every opportunity to delay the retrial ordered by the Court of Appeal. He tried to appeal the retrial order, unsuccessfully, to the Supreme Court. He cannot use prohibition proceedings to circumvent the effects of those orders and leave is refused on that basis.

16.2 The Applicant has made many allegations of *mala fides* against gardaí, lawyers and judges. He has not produced evidence to support these allegations. The most significant support he expected to obtain was confirmation of his position from a DAR of the trial, but the record does not support him, it contradicts his account of events.

16.3 There was no blameworthy delay on the part of the Respondent. There has been publicity attending the previous court hearings arising out of these events but not such that a trial judge could not ensure a fair trial. The other matters raised by the Applicant include witnesses who have declined to support him or do not want to be identified; these could never be grounds

on which to prohibit a trial. The conflicts of facts to which he refers are matters for a jury to resolve, not matters for this Court.

16.4 The list of factors relied upon would not combine, cumulatively, to persuade me that there is an arguable case that this Applicant faces a real risk of an unfair trial. He has no prospect of success in his application and leave to apply for prohibition would have been refused even if I was not obliged to refuse leave as I cannot review decisions of the appellate courts.

17. Costs

17.1 My provisional view is that the Applicant must pay the costs of this hearing as the law provides that costs follow the event. If there is to be any other order, the Court must set out reasons explaining why the successful party should pay the costs of the litigation, rather than the unsuccessful party.

17.2 Submissions on costs were sought by email to the Registrar. None were received from the Applicant. The second named Respondent made no application for costs. The Court awarded costs to the first named Respondent.