**THE COURT OF APPEAL**

**Record Nos: 106/2011**

**Edwards J.**
**McCarthy J.**
**Keane J.**

**BETWEEN**

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

**RESPONDENT**

**V**

**S. W.**

**APPELLANT**

**Judgment of the Court delivered on the 8th day of December, 2022 by Mr. Justice Edwards.**

**Introduction**

1. This judgment concerns an appeal by the appellant against his conviction by a jury before the Dublin Circuit Criminal Court (McCartan J. presiding) on the 21st of October 2010 on two counts of indecent assault, contrary to common law and as provided for by s.10 of the Criminal Law (Rape) Act, 1981. The relevant bill number in the proceedings before the Dublin Circuit Criminal Court was DU1172/08.

2. On the 18th of November 2010 the appellant was sentenced to three years imprisonment on both counts, the said sentences to run concurrently *inter se*, but consecutively to the sentences of 10 years imprisonment imposed on the 19th of February 2010 in the Central Criminal Court on Bill No. CC0091/2008.

3. The appellant has appealed against his conviction only.

**Background to the matter**

4. The prosecution case was that on two occasions between the 1st of May 1988 and the 30th of September 1988, at a specified address on the south side of Dublin City, the complainant was indecently assaulted by the appellant whilst at the appellant's home. The complainant was 7 years old at the time and she was attending the house as she was friendly with the appellant's daughter. The complainant was the only witness as to fact in the trial. The appellant represented himself at the trial. As none of the grounds of appeal are concerned with the evidence adduced at trial, or with the legal ingredients of the alleged offences, but rather are solely concerned with matters of criminal procedure, the

correctness or otherwise of rulings made by the trial judge on issues of procedure, and the fairness of the trial, it is not necessary for the purposes of this judgment to review the evidence adduced in support of the prosecution's case, or to further particularise the nature of the indecent assaults said to have been perpetrated on the complainant by the appellant.

**Grounds of Appeal**

5. The appellant's Notice of Appeal specified the following (which were not originally numbered but which we have numbered with roman numerals for convenience) as the grounds of appeal being relied upon:

   *(i) Judicial Bias;*

   *(ii) Adverse media coverage leading up to and on the day before the trial was due to begin;*

   *(iii) Court had no jurisdiction to try the case;*

   *(iv) Prosecutorial misconduct;*

   *(v) Constitutional right to due process deliberately and consciously impaired by denial of equality of arms and by the failure of former legal representatives to release my files pertaining to the case to me in advance of the trial and/or at all to the present date;*

   *(vi) And/or the failure of the State prosecutor to furnish me in advance of the trial a copy of all documentation pertaining to the case as requested by me in light of the difficulty in that regard with my former legal people's failure to release such files.*

6. The Notice of Appeal went on to indicate that the appellant wished to be present at the *hearing "subject to my being provided with the transcripts of the proceedings … to enable me to submit the further reasons to be offered as soon after I am furnished with the transcripts of the trial …"*.

**Submissions**

7. Although the appellant represented himself at trial, he was represented by a solicitor, and by senior and junior counsel, at the hearing of the appeal. In advance of the appeal both sides provided the Court with detailed written submissions, as well as copies of any authorities being relied upon, and the Court is grateful to have received this assistance.

8. In the appellant's written submissions grounds no.'s (i) and (ii), respectively, were dealt with separately and individually. Ground no. (iii) was then flagged as having been withdrawn, while grounds (iv), (v) and (vi) were dealt with together. For convenience, we propose to adopt the same approach.

**Ground of Appeal No. (i) – Judicial Bias**

9. This ground of appeal arises out of the refusal of the trial judge to recuse himself in response to an application by the appellant that he should do so, made on the 18th of

October 2010 following the appellant's arraignment, at which not guilty pleas were entered on his behalf. It is important to set out the background to this application and the context in which it came to be made.

10. The background and context were as follows. Earlier that day, and in advance of his arraignment and the selection of a jury, the judge in question had dealt with several preliminary issues which the appellant had sought to raise in connection with his impending trial. These issues included a complaint about an alleged failure on the part of the State to provide the appellant with the trial papers; a challenge to the Return for Trial; a challenge to the lawfulness of his production before the court; a complaint that the appellant was disadvantaged because a potential witness, a Mr Williams, was not on the Book of Evidence; a contention that he should be allowed to see the Garda file and that the Garda officer in charge of the file, and the State Solicitor should be made available to him as witnesses; a contention that there had been undue delay in bringing the matter on for trial; and a complaint about adverse pre-trial publicity involving articles in issues of the Sunday World, the Star and the News of the World newspapers which the appellant had been given to believe had been recently published.

11. In raising these issues in advance of the trial the appellant made clear that he was not seeking to have his impending trial adjourned. In respect of certain complaints, he was requesting mandatory orders from the court that various persons should do various things. In respect of other complaints, he was asking the court to find that it was without jurisdiction. In respect of yet other complaints, he was asking the court to invoke its jurisdiction to punish alleged contemnors.

12. It requires to be stated that the transcript reveals that each of the appellant's said complaints were received courteously by the judge concerned, that the appellant's submissions were listened to without inappropriate interruptions or curtailment, and that each complaint was in due course individually addressed.

13. In the case of his complaint about the trial papers, he was seeking to be furnished with the necessary papers. It bears recording that the application was not opposed by the State who were concerned simply to make the point that the appellant had already been furnished with the required papers on no less than four previous occasions, a contention the appellant disputed. The judge dealt with it as follows:

> *"…Ms Burns has said that the State can have no difficulty in furnishing him with a further set of the papers at this point and I would invite the State to do that now - and, if there's any difficulty about it, I would direct them to do that - so that Mr W has in his possession, as has been indicated, a fourth set of the papers in the case. But it will be done here, in the presence of the Court, and there will be no ambiguity or difficulty whatsoever. That will facilitate then the trial proceeding."*

14. As regards the challenge to the validity of the Return for Trial, the appellant's point was that the court lacked any jurisdiction to try him because when he was charged with indecent assault before the District Court, the wording of the charges made no reference

to s.10 of the Criminal Law (Rape) Act 1981. However, he had been returned for trial to face charges of "indecent assault contrary to common law and as provided for in s.10 of the Criminal Law (Rape) Act 1981." A secondary point was that the original charges had been brought by *"The Director of Public Prosecutions at the suit of Detective Garda Barry Walsh v. [ S.W.]"* (redaction by this Court), whereas he had been returned for trial in proceedings entitled *"The People (at the suit of the Director of Public Prosecutions) v. [ S.W.]"* (redaction by this Court). The appellant's contention that the Return for Trial was therefore invalid on those bases was rejected by the judge, who gave as his reasons for doing so that:

> *"The original charge sheets have now been produced to the Court and it is clear that the words were appended to one of the charges in handwriting. I am advised that this was an amendment done on the application and was done appropriately. The book of documents that has been served - and Mr W now has a copy of it because he has my copy of it - indicate that both the charges are in compliance with what's on the summonses, as amended -- on the charges, as amended and correctly refer to the criminal -- the common law and section 10 of the Criminal Law (Rape) Act of 1981."*

And (re the difference in how the proceedings were titled),

> *"A second aspect of the complaint about the jurisdiction of the Court made by Mr W is that in the District Court the prosecutor was described as the Director of Public Prosecutions at the suit of Detective Garda Walsh -- Barry Walsh and that this is not the same title as now provided for on the indictment. Again, that is a matter of no substance and I'm satisfied that, as I say, the jurisdiction of this Court rests upon the return for trial order which, on the face of it, is a valid order directing this trial, at the suit of the Director of Public Prosecutions, to try the accused on the two charges set out in the book of documents, which are the two charges contained in the indictment."*

15. The challenge to the lawfulness of his production before the court was premised on the idea that the Return for Trial could not be relied upon as it had been to the *"next sittings"* of the relevant Circuit Court, which would have been the sittings beginning in October 2008, not the sittings in October 2010. Moreover, a separate order which had been made by the Circuit Court for his production before the court had been addressed to the Governor of Cloverhill Prison, whereas he was incarcerated in the Midlands Prison. The Court also rejected these challenges stating:

> *"The accused … is here, by and in answer to a valid return for trial order. He makes the observation that it was to the then next sittings, in September 2008. That was necessarily so because the Circuit Court doesn't sit in that … and it was referring to the sittings beginning in October 2008 and the trial has been adjourned, looking at the court record, appropriately and properly, from sittings to sittings thereafter. The accused is validly before this Court. He argues that there is no order available to him indicating that it -- there is an order directed to the*

*governor of the Midlands Prison. Mr W is here by reason of an order of his production, made by the Court for the purposes of his trial. It is not open to this Court, nor is it obliged to make enquiry into the actual orders made from day to day. He's here in person before the Court and, consequently, in the custody of this Court at this point and will remain so until the conclusion of his trial."*

16. The complaint concerning the failure to include the aforementioned Mr Williams in the Book of Evidence was also rejected, the judge stating:

> *"Mr W then makes reference to the require[ment] of having a Mr Williams as a witness, who has vital information. It is open to him to prepare and issue subpoena for all witnesses he considers to be appropriate and proper. He has an officer of the court in attendance to assist him and those subpoenas can be served and dealt with. Calling of a witness, in any event, whether it be in answer to a subpoena or otherwise, will be subject to Mr W satisfying the Court of the relevance of the testimony of that witness at the appropriate time and stage. He has raised the matter now and it is an issue that can only be dealt with in the currency of the trial, as the evidence emerges."*

17. As regards the appellant's request that the court should order the prosecution to produce the Garda file for the appellant's inspection, and make the garda in charge of the file and the State Solicitor available to him as witnesses, the judge refused to do so at that point, ruling:

> *"Mr W, finally, says that he has a requirement to see the Garda file and that he requires the officer and the State Solicitor who dealt with those matters. Again, these are matters of witnesses to be called at the time, at the appropriate stage in the trial, if relevance can be established."*

18. In so far as the claim of inordinate delay was concerned, the judge refused to preclude the trial from proceeding and ruled instead that:

> *"Argument has been made that there has been inordinate delay. Normally speaking, issues of delay are matters taken in advance of a trial, by way of application to a higher jurisdiction to stay the jurisdiction. That hasn't been done here. The issue is, as has been submitted, and I accept, an issue that can be of concern and care to a judge at trial, such as myself. And we will review the evidence as it emerges and develops and, in the event that there is an issue of fundamental concern rendering the trial unfair and unsatisfactory emerging from the evidence on this issue, I will make the appropriate orders at the appropriate stage."*

19. In regard to the adverse pre-trial publicity issue the appellant, who was in prison at the time in connection with another matter, having been sentenced to 10 years imprisonment for rape on the 19th of February 2010, to date from the 18th of December 2009, did not have copies of the alleged articles in question, and was basing his application upon

hearsay information which he claimed to have received from a third party or third parties, both as to the fact of their supposed publication and as to their supposed contents. The appellant further alleged that a prior court order restraining publication of information potentially prejudicial to his impending trial had been breached, but did not produce a copy of any such alleged order or any details concerning when, where or by which court it was said to have been made. He stated (inter alia):

> *"The position is that there's an order about publicity. The position is this; the media has not complied with the order. Apparently, it was all over the Sunday World again yesterday and my previous convictions was mentioned. And it was a detailed interview. And I believe it was in the Star and it was in the News of the World also. There's three papers; I don't have the papers, Judge, because I hadn't got them. But I'm not in a position to put it before you, the papers or anything like that, but I'm of the understanding that [a named person] is the journalist in the Sunday World. But that's the position."*

20. Once again, the appellant made clear that he was not seeking to have his impending trial adjourned. Rather, his application was, in substance, that the court should hold an enquiry into what had occurred, that it should find the publishers of the offending publications to have been in contempt, and that it should punish them as contemnors.

21. The judge refused this application stating:

> *"Publicity surrounding the case has been argued with or mentioned to the Court on the basis of the hearsay of three articles appearing in the newspapers yesterday. I know nothing of them. Mr W knows very little of them, other than someone told him, and the prosecution know nothing of them. If the documents are produced and they, in any way, impact or implode upon the validity or propriety of this trial proceeding, the Court will, obviously, have regard to it and take the necessary and appropriate steps. Again, I emphasise that Mr W's application isn't to adjourn trial. It is, as I understand it, for the Court to act, in some way, in the holding of an enquiry and the pursuit of contempt or parties who might otherwise be in breach of some court order he has made. I know nothing of any court order. I do accept the Court has a duty to ensure that publicity outside does not adversely impact upon the holding of a fair trial. As I say, there is no proper material before the Court at this juncture and, therefore, I'm not in a position to do anything that has been asked of me in this respect."*

22. Following this series of rulings, the court then sought to arraign the appellant. In response to the first count on the indictment the appellant stated that, *"I don't wish to take any hand, act, or part in the arraignment because of the legality and the submissions I've made to the Court."* The trial judge then directed that a plea of "not guilty" should be entered on his behalf. When the second count on the indictment was put to him, the appellant stated, *"I don't wish to take any hand, act, or part in the proceedings. I'm just endorsing what I've already said, Judge, okay."* Once again, the trial judge directed that a plea of "not guilty" should be entered on his behalf.

23. Following all of this, it was indicated that the matter would be adjourned to the following day when it was envisaged that, in the normal way, a jury would be selected and put in charge to try the appellant.

24. The following exchanges then ensued between the appellant and the judge concerned:

> *"MR [W]: Am I to take it, Judge, that -- who -- will you be presiding over the trial?*
>
> *JUDGE: Yes. I'm the trial judge. Why --?*
>
> *MR [W]: Well, then, I have to object to you, Judge.*
>
> *JUDGE: That is why we're here, Mr W.*
>
> *MR [W]: I'm glad, sorry. Well, I just didn't know. I didn't know -- you see, you must understand I've been in the dark. I've written to the president of this court trying to seek disclosure as to who the judge was that was going to be presiding over the trial and I say to you, Judge, that I'll be objecting to you.*
>
> *JUDGE: Why is that?*
>
> *MR [W]: Well, first of all, my submissions -- my submissions is that you're biased towards me and I'll demonstrate that. But also -- I will also say to you that you are familiar with me, over the years, outside of you being a judge. And, I mean, in one particular area was the Prisoners' Rights Organisation, which you're familiar with. And the position is this, that I don't feel that you'd be proper impartial to me to preside over the trial.*
>
> *JUDGE: Yes?*
>
> *MR [W]: And the position is, Judge, the decisions you've come to in relation to my submissions insofar as, in particular, in respect of the publicity, when there's a court order which is to prevent media coverage, and you're not even bothered to take it up that they're in breach and contempt of the court and I'd pointed out to you that, with my -- the position I'm in in prison, I don't have access to papers, the way you have on the outside. And the position is this, there's a breach of the order made by this Court and, if you're not going to uphold the law in that regard, I fail to see how you're going to uphold it in regard to my trial. For that reason, I'd ask you to recuse yourself from the trial."*

25. Having heard a submission from counsel for the respondent in reply, to the effect that there was no reason, in her view, for the judge to recuse himself, the judge then ruled:

> *"JUDGE: Right. Mr W's objection to me as the trial judge is based on two -- would seem to be broad grounds. Firstly, he suggests I am biased towards him and, secondly, that I'm familiar with him. In respect of the issue of being biased, firstly, it needs to be emphasised that I do not decide the case. I am the judge presiding*

*at the trial. A decision on the verdict, the guilt or innocence of the accused, is made by a jury, fortunately, 12 men and women who will be drawn tomorrow with the purpose of making that decision. The decision in this case is theirs, not mine. Mr W's concerns then ought to be allayed. He has instanced by [my] failure to act upon an order. I said that the Court knows of no such order being made in regards to publicity rulings and the disregard by this Court of that ruling. No such order has been made, as far as I am aware, nor has it been produced to the Court. But if it is in existence and is produced, of course I will have regard to it.*

*Secondly, Mr W says that I'm familiar with him. He's correct about that. I have known Mr W from my days as a student and early days as a solicitor. I have never acted on his behalf and I don't believe that the fact of knowing him is a bar to my acting as a judge at trial, emphasising yet again that, ultimately, this is a trial by jury. For those reasons, I don't propose to withdraw from the case … ."*

26. At this appeal, it has been submitted on behalf of the appellant that the trial judge was wrong not to have recused himself. We disagree, both in respect of the claim of actual bias and that of objective bias. There is no evidence whatever of actual bias. The mere fact that a judge has previously ruled against a litigant, whether in criminal proceedings or in civil proceedings, does not provide evidence of bias. The appellant's arguments were received courteously and were given due consideration but were rejected for cogent reasons. There is not a scintilla of evidence of bias and we therefore reject any claim of actual bias as being utterly without foundation.

27. As regards objective bias, both sides have cited relevant authorities. We have been referred to the well-known cases of *Goode Concrete v. CRH Plc* [2015] I.L.R.M. 289 and *Bula Ltd v. Tara Mines Ltd (No 6)* [2000] 4 I.R. 412. As stated in *Bula* the test is objective. It is whether a reasonable person with full knowledge of the facts would have a reasonable apprehension that the accused would not receive a fair trial from an impartial judge. In this case, the appellant points to the fact that he was previously known to the judge. There is a reference to the judge knowing him from having been involved, prior to judicial appointment, with the Prisoners' Rights Organisation (PRO). No particulars were provided as to why this should be considered as something that might cause the judge to harbour bias against the appellant. We infer that the appellant's subjective apprehension may have been that the judge would be aware from having encountered the appellant in the context of his activities with the PRO that the appellant had previous convictions and had served time in jail before. The appellant did not seek to rely upon any specific dealings with the judge.

28. We consider that a reasonable person with full knowledge of the facts would not apprehend that the judge would potentially be biased against the appellant merely because he had gained knowledge, in the context of involvement in activities with the PRO before judicial appointment, that the appellant had previous convictions and had been in prison before. Upon appointment judges make a solemn declaration in the manner required by Article 34.6.1 of the Constitution that they will adjudicate impartially

"without fear or favour" or "affection or ill-will." And that they will "uphold the Constitution and the laws". It is an everyday occurrence that a judge may have to try, or preside over the trial of, a person known to them as having previous criminal convictions. Most frequently this arises because the judge in question has dealt with earlier criminal proceedings involving the person in question, but the knowledge may also have been gained in other contexts. If the judge in question is a recent appointee, he or she may have acted for or against the person in question as a barrister or solicitor, or as in this case, he or she may have encountered the person in the context of some other extracurricular activity. The cases of *Bula*, and most recently, *Ulster Bank v. McDonagh*, [2022] IECA 180 make clear that more than the mere establishment of a prior relationship of the sorts mentioned is required in order to establish objective bias. The evidence adduced by the appellant does not demonstrate a relationship between the parties, the nature of which would give rise to concern. There was no close family, social or business relationship. There was no history of animus between the parties. The information concerning previous dealings suggests nothing other than a casual acquaintanceship with the appellant, acquired by the judge in the course of his involvement in the activities of the PRO. Merely establishing that the judge had become acquainted with the appellant in those circumstances does not even come close to what would be necessary to establish objective bias. In our view the trial judge was completely right not to recuse himself.

29. We should also say that the timing of the appellant's application to the trial judge to recuse himself reinforces our view that the judge was right not to do so. The appellant only asked the judge to recuse himself, on the twin grounds of alleged actual bias and of objective bias, after he had ruled against the appellant in respect of the majority of the preliminary objections that the appellant had raised. If a party considers for cogent legal reasons that a judge ought to recuse himself/herself the application must be made at the earliest opportunity. Thus, in the *People (Director of Public Prosecutions) v. Martin Comney* (No 3) [2012] IECCA 75 the former Court of Criminal Appeal refused the Director's application for one of the judges of the Court to recuse himself in circumstances where the application could have been, but was not, made at an earlier stage in the proceedings. The respondent in the present case says, and we agree, that the principle exists precisely to avoid a situation where a party runs a legal argument and then, having lost, seeks to have the judge recuse themselves in order to get a second run at the same argument before a different judge. This cannot be allowed to happen. If the trial judge in this case could be said to have been either subjectively biased towards the appellant on some stateable basis, or objectively biased towards him due to having met him while he was a prisoner in the context of the judge's involvement with the PRO, then he was so biased, and known to be so biased by the appellant at the time of the making of his pre-trial applications and the application to recuse should have been made at that point. To allow otherwise would be to facilitate an abuse of process.

30. In conclusion, we are completely satisfied that no case of either subjective or objective bias has been made out. Ground of appeal No. (i) is accordingly rejected.

**Ground of Appeal No (ii) – Adverse media publicity on the eve of the trial**

31. We have already alluded to this issue as having been first raised during the preliminary objections heard by the trial judge on the 18th of October 2010, and have indicated how it was dealt with, with the trial judge stating, *"if the documents are produced and they, in any way, impact or implode upon the validity or propriety of this trial proceeding, the Court will, obviously, have regard to it and take the necessary and appropriate steps."* At the end of the prosecution case on the 20th of October 2010 (which represented the second day before the jury, and the third day of the hearing overall, the first day being taken up with the preliminary objections), the appellant made various applications, including an application for a direction, and in the course of doing so sought once again to raise the issue of adverse pre-trial publicity. On this occasion he was in a position to produce to the court copies of two newspaper articles published on the eve of the trial and which he contended had the potential to influence members of the jury if they had read them.

32. One of the articles in question was in the issue of the Sunday World of the 17th of October 2010. We have been provided with a (poor quality) photocopy. It was not a front-page article or an article referenced on the front page, but rather appeared internally within the newspaper. The article, under the by-line of Niall Donald, primarily concerned a person "A.D." who was said to be under investigation as a brothel keeper. It bore the main headline *"Confessions"*, below which were three sub-headlines: *"Vice king's brothels made €15k a week"*; *"He recruited girls with internet ads"*; *"Claims prostitution is a victimless crime"*. Within the body of the article, which took up most of a page, there were two specific references to the appellant. The first, about halfway down the first column stated *"[D] denies being an associate of pervert mobster [SW]."* The second reference was at the very end of the article where it stated:

> *"[D] claimed he was 'frightened' about being sent to prison after being linked with convicted pervert [SW].*
>
> *In February notorious crime lord [W] (52) was jailed for 10 years for a sickening sex attack on a nine year old girl.*
>
> *[W] who was a leading member of Martin 'the General' Cahill's gang previously acted as a barrack room lawyer for criminals.*
>
> *[D] said 'I feel I'm going to have to go on protection because I'm being linked with [SW]. He helped me out very briefly with my case but I knew nothing about child abuse."*

33. The text of the article was accompanied by three photographs. Two were of the individual, AD, who was the main subject of the story. However, towards the bottom of the page there was a third photograph, wrapped around by text, comprising a frontal head and shoulders image of the appellant, and captioned *"pervert SW"*.

34. The other article that was apparently handed in, is recorded in the transcript as also having been published on the 17th of October 2010. It was from "The News of the World" and is stated to have been under the by-line of Paul Williams. We have not been provided with a copy of this article, but its contents may be gleaned from the following extract from the transcript setting out the appellant's submission to the trial judge, on the 20th of October 2010, both in regard to this article and in regard to the article from the Sunday World previously referred to.

35. The appellant submitted (inter alia) to the trial judge:

> *"I did raise with you about the pre-publicity of the case and the position was, Judge, that I hadn't got anything to verify what was after been -- it was hearsay. I was informed when I was in the prison that I was all over the papers, in the Sunday papers, and the trial was beginning -- that was on the 17th of October and the trial was proceeding on the 18th. But last night when I returned, when I returned to prison last night, there was papers shoved under the door, some of the lads put them under the door to me. So, I have two papers, the Sunday World and The News of the World.*
>
> *…*
>
> *I hadn't seen these papers until I arrived back last night, but the position is, Judge, my photograph is all over the paper in the Sunday World. Now, what I'd like to point out to you is there is Niall Donald, who happens to be a very good friend of Paul Williams. Me and Mr Williams wouldn't see eye to eye...*
>
> *…*
>
> *The position is in this other paper, this is a Paul Williams exclusive, that's Niall Donald, that's his friend. But it makes reference now at the end of it, '[D] flew into a ...' -- he was interviewing this -- he was trying to, this chap [D], but the only relationship I have with the lad is that he came to me and asked for advice and that's the extent of my -- with the chap. But anyway, he goes in to say, '[D] flew into a rage when we asked him about his friendship with notorious crime boss. At first he claimed he didn't know the man who we can't name for legal reasons but then we informed him that an undercover News of the World team had photographed the two pals. [D] replied, "It's a free country, I can be friends with whoever I want. You better stop following me or you'll regret it."' Well, the position is this: [D] is in this paper as well, it's the same man, so the connection is made that obviously they're speaking about me. But the position is this: I can't say whether the jury has seen these papers or not.*
>
> *…*
>
> *So, the magnitude -- now there has been, prior to this, there's after being all this stuff, not the same things, but in the papers as well in regard to all this as well but*

*the situation is this: the Sunday World, the magnitude of the publicity, Judge, it's impossible for anybody reading that paper to come into this court and give me a fair trial. Now, as I say, I couldn't raise this with you because I hadn't got this paperwork, this newspaper article, I've only learnt of it on Sunday evening before I came here on the Monday, but I couldn't access the papers, the lads had the papers, they pay for them and you have to wait until they're finished and then they give them to you. That's my position. I wasn't in a position to give you this because of that reason and I think I outlined that to you on the previous occasion when I was raising the issue about publicity. As I say, I only got it last night. But that's my position, Judge.*

*Now, the direction issue is a different thing, I would ask you for a direction on that, but I am asking in light of this material here that, whatever way you want to do it, I don't know, but the position is this: if you're refusing, then so be it, but I'm asking for the trial to be aborted and for the jury to be discharged until there's a fade factor in respect of the newspapers, Judge."*

36. It should be recorded for completeness that some other matters were alluded to by the appellant in the course of his submission on publicity, which we have not seen fit to reproduce as they would not appear to be relevant to the issues raised on this appeal. In broad outline, however, they concerned certain dealings by the appellant with and concerning the journalist Paul Williams, whom the appellant claims bears an animus against him ; and further they concerned other matters alleged to have been published concerning the appellant in certain other newspaper publications in the past (which the appellant was not in a position to produce to the trial judge), and actions allegedly taken by other courts in respect of them.

37. The application for the trial to be aborted, and for any re-trial to await onset of a "fade factor", was trenchantly opposed by counsel for the respondent, who submitted *inter alia* that a warning given by the court to the jury on the previous day provided sufficient protection of the appellant's right to a fair trial. When sending the jury away on the previous day, the trial judge had warned them:

*"Now, we live in the age of technology and telecommunications and communications and my understanding is I'm not terribly I use a computer here, I keep a record of the evidence and that, and I'm somewhat conversant of it, but if any of you are wizards or if you have in your family people who are clever with the computer, stay away from Google, please, and not be looking for any information or background information or detail about this, or any aspect of this case; is that understood? You're under oath, you're duty bound to decide this case based on the evidence that you hear in the courtroom and it is crucial that we confine ourselves to that, all right?"*

38. The appellant's application for the trial then underway to be aborted, and for any possible re-trial to be postponed for a time to allow for the fade factor to operate was refused by the trial judge, who ruled as follows:

*"… the issue has been raised by Mr W that there is again grounds for the discharge of the jury at this stage, the trial to be aborted so that a fade factor may be relied upon. He was doing so based on the pre-trial publicity which he alleges has occurred in this case. This is a matter which Mr [W] raised at the outset of his trial as a preliminary issue, at a time when he was acting upon the say-so of others and did not have to hand the documentation, the actual publications. Whilst he was aware of the general content, namely that newspapers on the Sunday prior to the trial beginning here last Monday had carried articles with reference to him. His application wasn't for the trial not to proceed; in fact, he expressed at that stage a desire that the trial would proceed because he wished to have the matter disposed of. To some degree now, he, at this juncture, has changed tack. He is asking for the jury to be discharged so that a fade factor and elapse of time will occur. He has come to court armed with a copy of the News of the World and the Sunday World newspapers of last Sunday. In the latter newspaper, the Sunday World, it appears there is reference to him by name and there is a photograph of him, but the article is in relation to other persons entirely, and reference to Mr [W] is by the way. There is no reference to Mr [W] whatever in the News of the World, but Mr [W] suggests that if both papers are read together and both articles are read together, the only conclusion of a person reading them would be to come to the conclusion that a person referred to as a senior crime figure in the News of the World article is, in fact, himself. I don't believe that these two articles, taken together or apart, represent an unwarranted invasion into the conduct of this trial. There is no doubt there is reference made to Mr [W]. He himself indicates and accepts that he carries a certain degree of notoriety; fade may have no benefit to him at any point with a jury if there is such a factor. In any event, the two articles do not refer to him directly and in no way make reference to these proceedings and do not constitute, in my mind, an unwarranted intervention or interruption or prejudice upon the conduct of these proceedings. The jury have been told from beginning to end that they must act only upon the evidence that they've heard in court, that they ought not to discuss the case with anyone outside the court, and because of the admitted notoriety that Mr [W] feels he carries and has made mention of during the course of this trial, I warned the jury yesterday that they ought not to make reference to the internet or to any other search station with a view to seeking out information with regard to background or otherwise in respect of Mr [W] or this trial. We can only at this juncture, as at all stages, place our trust in the robust nature of juries and act upon the belief and presumption that they will pursue their duties in accordance with the oath they've taken, namely that this case be tried exclusively upon the evidence and on that alone. For all of these reasons, I don't propose to accede to the application to either discharge the jury, on the one hand, or direct a not guilty acquittal of Mr [W] in respect of these two charges on the other. I believe it is a matter which eminently ought to be left in the hands of a jury for them to decide upon the weight and quality of the evidence that has been adduced to them, coupled with the warnings that they must be given for the reasons I have explained and for them to decide whether or not they can be satisfied beyond a reasonable*

*doubt that what Ms [K] contents [contends] occurred on two occasions in 1988 did, in fact, occur. Thank you."*

39. In his submissions on this appeal, counsel for the respondent has sought to stand over the correctness of the trial judge's ruling. He does so firstly on the basis that there had been what he characterises as "only a passing reference to the appellant" in the material complained of. Secondly, he says the trial judge approached the matter in a considered fashion, assessed the risk to the appellant, had regard to previous instructions and warnings that he had given to the jury, and ruled on the matter appropriately and in a proper exercise of his discretion. Thirdly he makes the point that, in any event, the appellant himself opted to tell the jury in his closing speech that he had been in custody for 17 years of his life. This, of course, was subsequent to the trial judge's refusal to abort the trial and postpone any possible re-trial to allow the fade factor to operate. At any rate, the point was made that any certainty in terms of the jury's knowledge of the bad character of the appellant came emphatically from his own mouth.

40. We have no doubt that the trial judge's ruling on the 18th of October 2010 concerning the adverse publicity issue was justified, in circumstances where the material being complained of was not produced to the court and the appellant was only able to provide a hearsay account to the court concerning what it was said to contain. However, that having been said, it seems to us that it is not possible to stand over the later ruling made by the trial judge on the 20th of October 2010. With all due respect to counsel, there was much more than a passing reference to the appellant. He wasn't simply portrayed as a person of bad character, or as a person with previous convictions who was serving a sentence. This was a trial for the sexual assault of a seven-year old girl, and on the eve of his trial the appellant was portrayed, *inter alia*, as a convicted sex offender. He was characterised as a *"pervert mobster"* and as a *"convicted pervert"*. The Sunday World article, accompanied by a photograph of the appellant captioned *"pervert [SW]", referred to him in terms as having been "jailed for 10 years for a sickening sex attack on a nine-year-old girl."* It also referred to him as having been *"a leading member of Martin 'the General' Cahill's gang."* Accordingly, the trial judge's characterisation of the position, with reference to the Sunday World article, in terms that *"the article is in relation to other persons entirely, and reference to Mr [W] is by the way"* was simply unfair and represented a failure to engage properly with what was by any measure a serious, substantive and substantial complaint.

41. As far as the Sunday World article is concerned, this was the publication of material about the appellant in a national newspaper with a very substantial circulation on the very eve of the appellant's trial, which in terms of its potential to prejudice a jury was highly egregious. In saying that, we want to make clear that we do not consider that the mere fact that there was such publicity automatically entitled the appellant to a discharge of the jury, and for any re-trial not to take place for some time, to allow the so-called "fade factor" to operate.

42. In our view the issue was perfectly capable of being dealt with in another way in the circumstances of this case, namely by the trial judge giving an appropriate further warning and further instructions to the jury concerning the need to ignore and disregard any press coverage or media commentary that they might have encountered, or might yet encounter, concerning either the accused or his case.

43. However, we are also of the view that the warning on the 19th of October 2010 would not have sufficed to protect the appellant from the possibility of an unfair trial. It was not tailored to recent press coverage, rather it was directed to the possibility that there might be background material on the internet and it was aimed at discouraging the jury from doing Google searches, or internet searches using other search engines, concerning the background to the trial, and persons involved in the trial. It did not refer at all to newspaper coverage. It made no allowance for the possibility that a jury member or members might have read in the Sunday World newspaper, only a day or two before the trial opened, or might have had it drawn to their attention by someone else who had read that newspaper, that the appellant was a convicted sex offender who was already serving a sentence for having abused a nine-year-old girl.

44. In our view the warning given to the jury on the 19th of October 2010, which was given on the day before copies of the publications being complained of had been handed in to the court, was insufficiently specific to meet the concerns that had been raised. It did not address the issue of how the jury should approach material published on the eve of the trial of the sort complained of by the appellant, if they had encountered it, or might yet encounter it. It was the trial judge's function to take all appropriate reasonable steps to ensure that the accused received a fair trial. Once a copy of the offending publication had been provided to the trial judge then, if there was any real risk that a member or members of the jury might have read it, or have had it drawn to their attention, and we are satisfied that there was no basis for discounting the existence of such a risk given the significant circulation of the Sunday World newspaper, it was incumbent on the trial judge to give a renewed, and context specific warning on extrinsic influences. Regrettably he did not do so.

45. Accordingly, we consider that, firstly because of the egregious nature of the Sunday World's publication, and, secondly, because of the trial judge's failure, having been provided with a copy of the offending publication, to revisit with the jury the need to decide the case on the evidence and the evidence alone and to eschew extrinsic material that might influence them (and in doing so to tailor that further warning and those further instructions specifically to any newspaper and print media references to the appellant and/or the trial at hearing which they might have encountered or might yet encounter), it cannot be concluded that the accused's trial was satisfactory and that his conviction is safe. In the circumstances we must allow the appeal on ground no. (ii).

46. For completeness, we should say that if the only material that had been before the court of trial had been "The News of the World" article, we would have upheld the conviction. We find it unnecessary to express a definite view on the appellant's contention that if both

the Sunday World article and the News of the World article were read together that the reader would conclude that the "notorious crime boss" referred to in the News of the World article was the appellant. In circumstances where we have concluded that there is a real risk that the appellant may have received an unfair trial in light of the publication of the Sunday World's article, due to an insufficient level of instruction to, and warning of, the jury concerning the need to avoid extrinsic influences, further consideration of this issue is unnecessary.

**Grounds of Appeal (iv), (v) and (vi)**

*(i) Prosecutorial misconduct;*

*(ii) Constitutional right to due process deliberately and consciously impaired by denial of equality of arms and by the failure of former legal representatives to release my files pertaining to the case to me in advance of the trial and/or at all to the present date;*

*(iii) And/or the failure of the State prosecutor to furnish me in advance of the trial a copy of all documentation pertaining to the case as requested by me in light of the difficulty in that regard with my former legal people failure to release such files.*

47. These grounds can be dealt with very briefly. In our view there is not a scintilla of evidence of prosecutorial misconduct. The complaint is premised on the alleged failure by the prosecution to disclose relevant documents and materials. As the submissions for the respondent point out, the trial judge noted in that regard that the appellant had been furnished with the trial documentation on four occasions and found as a fact that the appellant's objections were simply an attempt to frustrate the court process. All relevant documentation was served on the appellant initially on his return for trial and on his solicitors and thereafter on the appellant personally on two occasions – once some ten months prior to the trial and again some two months prior to the trial.

48. The prosecution went as far as to obtain a statement from a prison officer in relation to such service, noting that the appellant had previously sought to frustrate service in an unrelated prosecution.

49. The appellant had discharged a number of his previous solicitors, yet one of these previous solicitors was present in court at the appellant's behest taking notes for him.

50. Notwithstanding his protestations, the appellant made clear to the trial Judge that he was **not** seeking an adjournment.

51. The appellant was furnished with a further set of papers, the fourth such set to be furnished to him, and was given a further adjournment to the next day and thereafter afforded the further accommodation of the evidence not starting until 2pm.

52. Counsel for the respondent has submitted, and we agree with him, that it is apparent from the appellant's cross examination of the complainant and, indeed, the garda witnesses that he had a complete understanding and knowledge of the case against him and was able to clearly differentiate between allegations which were the subject of charges and allegations which were not, and, indeed, to advance quite detailed technical points as regards his detention and the progress of the case through the courts. This clearly indicated a full and advanced level of preparedness, in contradiction of the grounds of appeal advanced here and, indeed, in contradiction of the assertion in the appellant's submissions that he was "very confused and mixed up".

53. We find no error in how the trial judge dealt with the complaints the subject matter of these grounds of appeal and have no hesitation in rejecting them.

**Conclusion**

54. The appeal must be allowed on ground no (ii) only.