See 'Statement by the Court' delivered by the Chief Justice on 19th October, 2016 below this judgment.

THE SUPREME COURT

[Appeal No: 22/2013 & 24/2013]

Denham C.J.
Hardiman J.
O'Donnell J.
Clarke J.
Charleton J.
Between/

MARK NASH

Applicant/Appellant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

JUDGMENT of Mr. Justice Hardiman delivered the 29th day of January, 2015.

1. On the 8th of December, 2014, the Court heard this appeal. The Court stated that it would give its decision shortly but reserve the reasons till a later date.

On the 10th December the Court later dismissed the appeal, thereby allowing Mr. Nash's trial to proceed. I now set out the reasons for my concurrence in that decision.

Factual background.

2. On the 6th March 1997, Sylvia Sheils and Mary Callinan were unlawfully killed in sheltered accommodation, "Orchard View", at Grangegorman Psychiatric Hospital, Dublin. They were brutally slain, Post mortem examination showed that they had each received multiple stab wounds and, additionally, their bodies had been gratuitously mutilated.

3. Thirteen and a half years later, on the 10th October, 2009, the present appellant, Mark Nash was charged with the murder of these ladies by direction of the respondent, the D.P.P.

4. Mark Nash claims that by reason of delay, death or unavailability of witnesses, and certain other matters, there is now a real risk of an unfair trial if the present case against him proceeds. This claim was resolved against him in the High Court (Moriarty J.) and he now appeals.

Another person charged.

5. This case is a most unusual one. Most of its peculiarities arise from a single factor. Seventeen years ago, on the 27th July, 1997, an entirely different person, Dean Lyons, was charged with the murder of Mary Callinan. Subsequently, directions were given to charge him with the murder of Sylvia Sheils as well. He was so charged largely on the basis of his own confession to killing the two ladies. This confession was volunteered by him to the gardaí and subsequently repeated to numerous other persons. His first confession to the gardaí was video taped but two subsequent confessions, which were more detailed, were not video taped but were recorded in handwriting by gardaí. I do not at all understand why the second and third confessions of Mr. Lyons were not video taped.

6. Dean Lyons was twenty-four years of age in 1997. He had a history of taking heroin for some years and at the time he confessed to the murders of Ms. Sheils and Ms. Callinan, he was sleeping rough.

7. On the 26th July, 1997, Mr. Lyons had voluntarily attended the Bridewell Garda Station in Dublin. While there he was interviewed for a total of six hours and thirty-five minutes over four interviews conducted by three different teams of gardaí, each team comprising two members. While Mr. Lyons was present in the garda station he was arrested pursuant to s.4 of the Criminal Justice Act of 1984. During the first, video recorded interview, Mr. Lyons freely admitted his involvement in the two murders. He engaged, apparently quite openly, with his interviewers and did not display signs of drug withdrawal or physical pain or discomfort. In a second interview he confessed to these murders in somewhat greater detail. In a third interview conducted between 10.10pm and midnight on the 26th July he signed a statement of admission which contained a great deal of detail relating to the nature of the wounds inflicted, the number and type of weapons used and the progress of the murderer through the house.

8. Dean Lyons was charged on the day after these interviews by direction of the Director of Public Prosecutions. This direction was given after a conversation between Detective Superintendent Cormac Gordon and an official of the Director of Public Prosecutions.

Mr. Nash becomes a suspect.

9. Within a few weeks, on the 16th August, 1997, a second and entirely new suspect for the Grangegorman murders, the present

applicant, emerged. He had been arrested in relation to separate serious offences in the West of Ireland and he volunteered a confession to the Grangegorman murders.

10. The gardaí who had been involved in the earlier investigation of these murders (that based in the Bridewell, Dublin) were convinced of the correctness of their evidence and were therefore very sceptical of the significance of the new, alternative suspect. A report was therefore submitted to Garda Headquarters which emphasised the strengths of the case against Mr. Lyons and which identified matters of detail in his admissions which corresponded to the known facts. The facts were known only to the killer and the authorities.

On the 27th August, 1997, the Commissioner of An Garda Síochána appointed a very senior officer, an Assistant Commissioner, to conduct an analysis of the various conflicting admissions and seek to establish where the truth lay. This officer, and the team assembled to assist him, conducted a detailed analysis of the strengths and weaknesses of the various admissions. It is notable that this analysis of the admissions made by Mr. Lyons took place only after the second suspect, Mark Nash, had emerged as such.

11. On the 10th October, 1997, the garda file in relation to the Grangegorman murders was submitted by the Bridewell investigation team to the office of the Chief State Solicitor. It is the normal procedure that such a file is submitted either before or after directions had been given by the Director of Public Prosecutions in a serious case.

This report concluded with the recommendation that the existing charge of murder should proceed against Dean Lyons and that an additional charge be laid against Lyons in respect of Sylvia Sheils.

Change of front.

12. About three months later, in January 1998 the Assistant Commissioner's team submitted a further report making it clear that the authors believed now that, quite contrary to their previous position, Dean Lyons had had no involvement in the Grangegorman murders at all.

This in turn led to the withdrawal of the allegation of murder against Dean Lyons.

Other admissions by Dean Lyons.

13. It transpires that, over and above the formal admissions to the investigating gardaí, Mr. Lyons confessed to the Grangegorman murders to various people, including a uniformed Sergeant engaged in routine duties in the Bridewell Garda Station, to each of his parents separately and to others. He persisted in these admissions even when challenged by his parents. In all, he continued to claim responsibility for the murders for several weeks to family members, fellow prisoners, prison officers, medical personnel and his own legal team.

Reservations.

14. The second and third interviews, which featured confessions by Dean Lyons, were conducted by a Detective Sergeant Robert McNulty and a Detective Garda Robert Cox. The latter, who was the junior interviewer at the interviews which were not video recorded, had misgivings about the degree to which reliance could be placed on what Dean Lyons was saying. He referred to Lyons as a "Walter Mitty". His colleague, the senior interviewer, did not share these reservations. Detective Garda Cox, however, expressed his reservations twice on the 26th January to other members of the investigation team. They were not recognised or acted upon by those present including the officers leading the inquiry.

15. In 2006, nine years after the Grangegorman murders, Mr. George Birmingham S.C. (now a Judge of the Court of Appeal) was appointed as the sole member of a Committee of Investigation into the Dean Lyons case. He found that "the decision to consult the D.P.P. and recommend a charge was extremely unfortunate", but that (despite this) "it was at the time a proper and conscientious one". He also found that the recommendation of the review team under the Assistant Commissioner that the charge against Mr. Lyons should proceed "is extremely difficult to understand and even harder to justify". He raised the possibility that interviewing gardaí had accidentally or unintentionally supplied the impressive detail in Dean Lyon's confessions, and corrected factual errors made by Mr. Lyons. I do not know if the gardaí admit this or not.

I express no views whatever on these topics but this judgment proceeds on the basis that all necessary and proper disclosure about these events and the various contradictions in them will be made to Mr. Nash's advisors, if requested.

16. On the 12th September, 2000, Dean Lyons died in England having been released from Strangeways Prison on the previous day. This, of course, was a tragedy for Mr. Lyons and his family. It was also a serious setback for the prospects of a prosecution for the Grangegorman murders.

17. On the 7th September, 2000, five days before his death, members of the gardaí visited Mr. Lyons in Strangeways Prison. This was to enlist his support in the prosecution that was then contemplated against the alternative suspect, Mr. Nash He appears to have agreed that he would indeed cooperate with a murder prosecution against Mr. Nash and that he would give evidence against him, presumably disavowing his own confession, and explaining how the matters of detail mentioned above came to be in it.

18. On the 1st September, 1999, the then Director of Public Prosecutions, Mr. Eamon Barnes, had directed that Mr. Nash be charged with the Grangegorman murders. But on the 28th October, 1999, this direction was withdrawn by his successor, Mr. James Hamilton. It appears from the terms of the revocation that its purpose was to facilitate the invocation of s.42 of the Criminal Justice Act 1999, which permits that a person in custody for one offence may be arrested and questioned for another offence. No prosecution then proceeded.

Mr. Nash eventually charged.

19. As mentioned above, on the 10th October, 2009, on the direction of the Director of Public Prosecutions, Mr. Nash was charged with the two murders at Grangegorman. The Book of Evidence was served in that December.

20. Mr. Nash had been in custody ever since his original arrest for the West of Ireland offences of August 1997. This charge follows

thirteen years after that. The substantial reason, it is said, for the bringing of the charge at that time was that the case had never been let die. There were, it seems, pretty constant cold case reviews. In particular, new areas of DNA comparison were continuously explored. In July 2009 buttons and thread from the jacket of Mr. Nash apparently revealed material with a DNA profile matching one of the victims, Ms. Sheils. The jacket itself was re-examined and the seam of the right sleeve was opened. A DNA profile matching the other victim, Mr. Callinan, is said to have emerged from material found there on the 24th September, 2009.

Applicable law.

21. In this case, as in every criminal case, the public has a right to have any sustainable case which exists against a suspect pursued to trial. The suspect, equally, has a right to have a fair trial in accordance with law. Quite frequently it is alleged that, for one reason or another, the case has so developed that a fair trial is not possible. This happens, in particular, because for upwards of a decade now, the Courts have permitted trials, in sexual cases involving children, to proceed after periods of time since the alleged offence which would previously have been regarded as grossly unfair. In various cases, I have expressed great concern about this development, especially in cases where the evidence consists of bald uncorroborated assertion so that the defence can only be bare denial.

22. Thus, for example, in **PO'C v. D.P.P.** [2000] 3 I.R. 87, at p.110, I said:

> *"There has now been a considerable number of cases in which the High Court and this Court have dealt with attempts to restrain the continuance of prosecutions, in cases related to the alleged sexual abuse of children, on the ground of lapse of time. Cases up to the date of the High Court judgment in this matter are admirably surveyed by the learned trial judge in her judgment. To these must now be added JO'C v. D.P.P. [2000] 3 I.R. 480 a judgment which, coincidentally, was delivered the day after the hearing of this appeal.*
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> *In my judgment in the latter case I survey the authorities and express certain views of my own on them, and in relation to cases of this kind generally. I do not propose to repeat what I said there in this judgment, in particular about the approach to these applications mandated specifically in P.C. v. D.P.P. [1999] 2 I.R. 25.*
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> *In my judgment in JO'C v. D.P.P., cited above, I have set out in some detail the precise nature of the risks as I see them, which gross lapse of time causes in cases in such as this. In particular, I believe that the risks of a miscarriage of justice increase with the degree to which the trial approaches a situation of bare assertion countered by mere denial. If a defendant is put in a position in which there is little or no context of indisputable fact which can be used as a specific check on credibility, in my view, justice is 'put to the hazard' to use the phrase of Lord Diplock, approved by Ó Dálaigh C.J. in Dowd v. Kerry County Council [1970] I.R. 27. A person in that position has been 'deprived of a true opportunity of meeting the case', in the words of the Supreme Court in O'Keeffe v. Commissioners of Public Works (unreported, Supreme Court, 24th March, 1980, and the case itself is 'beyond the reach of fair litigation' (Sheehan v. Amond) [1982] I.R. 235."*

Elsewhere, in **JO'C v. D.P.P.** [2000] 3 I.R. 478 I said:

> *"The applicant's substantial complaint is a common one in cases of this nature. It is that (even leaving aside factors peculiar to this applicant) lapse of time between the alleged offences and the date of trial renders it very difficult to make any defence other than bare denial. He complains that this, together with the specific factors mentioned, creates a real risk of an unfair trial which would not be a trial in due course of law, as required by the Constitution."*

This is, perhaps, expanded at p.504 of the Report:

> *"Apart from the effect of lapse of time on the memories of those principally involved, an interval of twenty or more years makes it difficult if not impossible to clarify surrounding circumstances and to introduce any element at all of undoubted fact with which the statements of the parties can be correlated and tested. The element of hazard or chance which this state of affairs introduces into a trial has been recognised for centuries. The more nearly a serious trial consists of mere assertion countered by bare denial, the less it resembles a forensic inquiry at all."*

I wish to make it quite clear that I adhere to these statements and continue to be deeply concerned about the justice of trials after long periods of time, in cases which turn on "bald assertion versus bare denial".

But this case of Mr. Nash is not of that sort. On the contrary, if the prosecution version of events is accepted by the jury, this case has been brought forward many years after the event simply because new evidence of the appellant's guilt has come to light. I repeat, however, that the prosecution's case generally, and the circumstances of the new evidence coming to light, and its significance, are wholly a matter for the eventual jury if a trial is permitted to proceed, and I make no comment whatever about the weakness or strength of that case.

23. It has long been established that a defendant's right to a fair trial in due course of law is a superior right and it will prevail if the defendant can establish a real risk of an unfair trial. This means an *inescapably* unfair trial viz. a trial in which the unfairness cannot be avoided by appropriate rulings and directions on the part of the trial judge.

24. Where a trial is delayed for years or even decades, it is quite predictable that witnesses or potential witnesses, or persons of whose existence the prosecution would be obliged to make the defence aware, will have died or become unavailable. Surprisingly frequently, too, physical evidence will have become lost, degraded, or unavailable. It is peculiarity of this case that, on the contrary, vital evidence became available (allegedly for the first time) twelve or thirteen years after the crime. This, of course, is the DNA evidence of which is said to make a connection between the appellant and the deceased ladies, which is briefly discussed above.

The Test.

25. In **B. v. Director of Public Prosecutions** [1997] 3 I.R. 140, Denham J., as she then was, said at p.195:

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

I believe this pithy but complete statement correctly represents the test to be applied in deciding cases of this kind. I would add only that what the applicant must demonstrate is a "real risk" and not an absolute certainty, that he would not receive a fair trial. Equally, however, the "real risk" must be a risk which could not be avoided by an appropriate charge to the jury by the trial judge or other step that might be taken within the power of the Courts, such as a long adjournment to allow the effect of a prejudicial publication to fade, if the Court is satisfied that that would in fact take place.

As to the procedure whereby the defendant's right to a fair trial in due course of law is to be asserted, I consider that this question has been settled by the decision of Chief Justice Finlay (Walsh, Henchy, Griffin and McCarthy JJ concurring) in **The State (O'Connell) v. Fawsitt** [1986] I.R. 362, at 379. Finlay C.J. said:

> *"I am satisfied that if a person's trial has been excessively delayed so as to prejudice his chance of obtaining a fair trial, then the appropriate remedy by which the constitutional rights of such an individual can be defended and protected is by an order of prohibition. It may well be that an equal remedy or alternative remedy in summary cases is an application to the justice concerned to dismiss because of the delay. In the case of a trial on an indictable charge, however, I am not satisfied that it is correct to leave to the trial judge a discretion as to whether, as it were, to prohibit himself from letting the indictment go forward or whether to let the indictment go forward. A person charged with an indictable offence and whose chances of a fair trial have been prejudiced by excessive delay should not be put to the risk of being arraigned and pleading before the jury."*

26. This entrenchment of the right to seek prohibition by judicial review does not of course detract from the power and duty of the trial judge to stay the proceedings in the exercise of his or her inherent jurisdiction if convinced in the course of the trial that it cannot proceed without a real risk of unfairness.

Some conclusions.

27. The events leading to the charges in this case against Mr. Nash have been summarised above. The chronology leads one to believe:

(a)Four months after the Grangegorman murders, Dean Lyons confessed to them in a manner which was apparently convincing to the gardaí institutionally, a view confirmed again after a review by an Assistant Commissioner.

(b)Certain gardaí, however, were never quite convinced by the confessions and expressed reservations which were not however passed on to the prosecution service.

(c)Five months after the Grangegorman murders another, quite unconnected, man (the present appellant) also confessed to the Grangegorman murders. It was this led to the Assistant Commissioner's review, mentioned above.

(d)Each of these men maintained their confessions for some time but each subsequently withdrew his individual confession. A very short time before the death of Mr. Lyons after release from prison in England, it had been decided by the Director of Public Prosecutions to charge Mr. Nash with the Grangegorman murders. To that end, Mr. Lyons was interviewed by gardaí in Strangeways Prison. He apparently agreed to cooperate and to give evidence in the case against Mr. Nash. But he died a few days later.

(e)The decision to charge Mr. Nash was revoked by a new Director of Public Prosecutions a short time after it had been given. I am not clear as to whether the revocation was to allow Mr. Nash to be questioned under statutory power, or whether it related to the death and consequent unavailability of Mr. Lyons. Certainly, it would have been hoping for a great deal to think that Mr. Nash could have been prosecuted with much prospect of success before a jury who would know of Mr. Lyons's confession and would have no corroborating evidence against Mr. Nash.

The recent development.

28. What has now taken place is that new evidence against Mr. Nash of an allegedly dramatic sort has become available, in the form of the DNA connection. If this is reliable, and credible as to when and where it was found, then of course it transforms the case against Mr. Nash. I do not consider that this is unfair in itself, any more than it would be unfair that a vital witness had at last been discovered after a long interval.

29. I am quite aware that this evidence has become available after a long period of time during which the actions of the gardaí and the prosecution have been somewhat contradictory. Issues such as why Mr. Lyons confession was regarded by them as reliable; why it continued to be regarded as reliable after the Assistant Commissioner's review; what the former D.P.P. was told when he directed the charges against Mr. Lyons; how compelling material, not generally known, came to be mentioned in Mr. Lyons confession; why the charges against him were originally directed and subsequently withdrawn, and other issues manifestly arise and will no doubt be the subject of requests for disclosure if those defending think this helpful. It is hard to see how the case against Mr. Nash can be proved beyond reasonable doubt without thoroughly discrediting of the case against Mr. Lyons, given that it has never been alleged that they were jointly involved. Equally, the narrative as to the eventual discovery of the DNA connection must be fleshed out and the actual significance of the traces found on the jacket, and the material with which they were compared, thoroughly explored, with all necessary assistance from disclosure.

30. The first decision to charge Mr. Nash with the Grangegorman murders, more than fifteen years ago, was quickly revoked by a new Director of Public Prosecutions. He was not charged with these crimes until the emergence of the new DNA evidence in late 2009 and when this evidence did emerge, he was charged very promptly. From this it might be inferred that, in the view of the D.P.P., there was no sufficient case against Mr. Nash until the DNA evidence now relied upon emerged in 2009.

Unavailable evidence.

31. Where there has been a long delay in a prosecution, for good reason or bad, it is unsurprising that there will be missing witnesses. In this case Vera Brady, Detective Garda Patrick Lynagh, Dr. John Harbison, former State Pathologist, Tom Toomey, Dr. Angela Mohan and Ann Mernagh are now dead or (in the case of Dr. Harbison) unavailable.

32. I concur in the reasoning of my colleague Mr. Justice Charleton in thinking that none of these absences give rise to any specific ground for thinking that the trial will be unfair.

33. I am of the same view about the absence of Mr. Lyons. Mr. Lyons confessed to these murders and that confession satisfied those

in charge of the investigation (though not, it seems, all of those involved in it) and stood up to precisely focussed and critical scrutiny on a review conducted by the Assistant Commissioner who knew that Nash had already confessed. This is an inescapable problem for the prosecution. It appears to me, based on the Birmingham report, that the factual components of the Lyons confession will not be disputed and neither will the fact that the confession passed muster with the garda authorities be controverted. Equally, it is beyond dispute that charges were directed against Mr. Lyons, based on his confession. The video tape of the first confession will be available to be played, if thought desirable by either party and the notes of the subsequent confessions, together with the later reports emphasising the significance of certain details in those confessions.

34. I am assuming that the defence at the trial of Mr. Nash, if permitted to proceed, will have available to it all requested disclosure about the Lyons confession and the official adoption of it, followed by its rejection. This is important for many reasons, not only the fairness of the trial of Mr. Nash but the reliability of the finding and analysis of DNA material and evidence which is of considerable general significance.

35. If this disclosure is available it does not seem to me that Mr. Nash has been shown to be disadvantaged by the death of Mr. Lyons. In saying this I am assuming that no technical objection, on the grounds of hearsay or otherwise, is taken to Mr. Lyons confession or any of them. In the circumstances of this case it would be very prejudicial to public confidence in the administration of justice if it were not open to Mr. Nash's representatives fully to explore the existence and reliability of the several separate confessions by Mr. Lyons which were at one stage regarded as convincing by the prosecuting authorities.

36. If Mr. Lyons were still alive, an important decision for those defending Mr. Nash would be whether or not to seek to require that he be called by the prosecution, or whether to call him themselves. No doubt they would thoroughly explore insofar as they could, the question of Mr. Lyons current attitudes and dispositions before addressing that decision. Since Mr. Lyons is dead anything that one says on this question would be mere speculation and I shall say nothing about it. But it is not manifest that, as a matter of probability, Mr. Nash's defence is prejudiced. For the purpose of the present application it is not necessary to go further.

37. I am not, therefore, satisfied on the facts that the trial of Mr. Nash will necessarily be unfair by reason of the unavailability of the evidence mentioned. Another major consideration, and perhaps a dominant one, is the DNA evidence. I make no comment whatever on the substance of this evidence or on whether it could have been obtained earlier, or on any question of contamination or inherent unreliability because these may be features at the trial. But it appears to me, from the chronology given above, that this is in fact the principal engine of the case against Mr. Nash. I do not consider it has been significantly engaged with by the applicant in the present case. I am not critical of this: it may well have been thought best or even necessary to keep this issue for the trial, if trial there is to be.

38. The grounds on which I would refuse relief in the present case are entirely factual in nature. I do not believe that the law can be changed in this case from what is expressed in the extracts given above, notably from **B. v. D.P.P.** [1997] 3 I.R. 140 and **The State (O'Connell) v. Fawsitt** [1986] I.R. 362. Nor am I to be taken as agreeing with any statement that applications of this sort by way of judicial review are now rare or exceptional. As the law stands, such applications will be as rare or exceptional as circumstances giving rise to a real risk of an unfair trial are rare or exceptional: neither more or less.

Nor do I entirely agree with the citation, in one of my colleague's judgments, of the judgment of Henchy J. in **Ó Domhnaill v. Merrick** [1984] IR 151 "to the effect that justice delayed does not always mean justice denied but can often mean justice diminished".

This matter is to some extent a question of nuance and emphasis. But I think it important to put the relevant reference in its whole context. At p.158 of the Report in **Ó Domhnaill** Mr. Justice Henchy said:

> *"While justice delayed may not always be justice denied, it usually means justice diminished. In a case such as this, it puts justice to the hazard to such an extent that there would be an abrogation of basic fairness to allow the case to proceed to trial".*

For reasons which are entirely factual in nature, primarily the availability (subject to whatever may be said about it by the defence at the trial) of the DNA evidence, I do not consider that it would be an abrogation of basic fairness to allow this case to proceed to trial.

39. I would dismiss the appeal.