Neutral Citation Number: [2009] IEHC 48

THE HIGH COURT

JUDICIAL REVIEW

[2008 No. 46 J.R.]

BETWEEN/

J. D.

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice John MacMenamin delivered on the 3rd day of February, 2009.

1. The applicant was formerly a priest of a rural parish. He is now laicised. He seeks an injunction restraining the respondent from the prosecution of one single count of indecent assault on a minor, M.S., in the Circuit Criminal Court, South Eastern Circuit.

2. The first ground upon which the applicant relies relates to a delay of 25 years, said to have taken place between the alleged event complained of (a date unknown between September, 1981 and September, 1982) and the initiation of proceedings in the Circuit Court by the laying of an indictment on 2nd October, 2007. The period of time which has now elapsed between the alleged event and the date of this judgment is some 26 or 27 years. The applicant asserts that the period of time which has elapsed since the initiation of the investigation gives rise to prejudice, and that the prosecuting authority has been guilty of inordinate delay.

3. Second, it is said that on the unusual circumstances of the case there is as a matter of probability a real risk of an unfair trial against a background of unwillingness on the part of the investigating gardaí and the prosecuting authorities to take steps in order to ensure complete investigation. Third, it is submitted that in the light of the history of events to date, and the conduct of the investigation and prosecution, there are issues of prejudice such as to raise an inference that there is a real risk of an unfair trial.

The general principles applicable to this case

4. The issue of prosecution delay and its consequences in this case falls to be analysed in accordance with decided authority: *P.M. v. Malone* [2002] 2 I.R. 560; *P.M. v. D.P.P.* [2006] 3 I.R. 172; and more recently *Cormack v. D.P.P.* (Unreported, Supreme Court, 2nd December, 2008, per Kearns J.). However, in conjunction with these well established principles it will be necessary also to consider the test applied by the Supreme Court in *J. M. v. D.P.P.* [2004] I.E.S.C. 47. In *J.M.* the circumstances were such that, although the delay taken by itself was not sufficiently blameworthy to prohibit the applicant's trial, nonetheless, when considered in conjunction with the totality of circumstances surrounding the proposed prosecution, it was considered a fair trial could not take place even though no single factor would have justified prohibiting the prosecution. The consistency of this test with those in later authorities such as *S.H. v. D.P.P.* [2006] 3 I.R. 575 is considered later. (See also *Noonan v. D.P.P.* [2008] 1 I.R. 445 where the issues of cumulative circumstances and proportionality were considered in the context of an application for prohibition on the grounds of delay in a case of fraud.)

5. It is necessary first to consider the background circumstances and set out a chronology of events.

The complainant M.S.

6. M.S. was born on 15th September, 1970. His younger brother J.S. who also figures prominently in this narrative was born on 8th April, 1973. M.S. is therefore three years older than J.S. The alleged single indecent assault by the applicant on M.S. is said to have occurred between the 1st September, 1981, and 30th September, 1982. It is said to have occurred in the sacristy of a parish church in the south-east of the country. J.S. also complained of not one, but multiple assaults by J.D. The investigation in relation to the complaints made by both brothers proceeded simultaneously until, ultimately, on the application of the accused (now the applicant in this case), the indictment was split and the counts in relation to J.S. only proceeded. The trial of the applicant on these 35 counts took place on 2nd and 3rd November, 2007. For convenience this will be referred to as the "J.S. trial". The applicant was acquitted by direction on all counts on the indictment. For reasons which will emerge hereafter in this complex case, there are close interconnections between the nature of the complaints, the complainants, and the issues which may foreseeably arise in any future prosecution against the applicant on the M.S. complaint.

The history of the investigation - not in itself grounds for review

7. It has been made clear in a number of decided authorities that the manner in which an investigation is carried out is not in itself an issue which gives rise to judicial review. In *Savage v. D.P.P.* [2008] I.E.S.C. 39, a missing evidence case, Denham J. observed:-

> "[T]he focus on this type of application to restrain a trial is on the fairness of the intended trial without the missing evidence, and not on the discovery of shortcomings in the investigative process." (para. 16)

It is necessary, nonetheless, to analyse the *sequence* and effect of events in the investigation and prosecution in order to determine whether there has been prosecution delay.

12th February 2003 – M.S. and J.S. make complaints

8. M.S. stated in the book of evidence that the incident of which he complained occurred in the summertime when he was aged either eleven or twelve years of age. He was not be sure of the exact year but placed the event between September, 1981 and September, 1982. He stated that he found a digital calculator watch in Wexford GAA Park. He brought the watch home, thinking he could keep it. However, his mother would not let him do so. She told him to hand it in to the local parish church. The complainant identified the day upon which he found the watch simply as having been a Sunday without any month being identified. The time of day was not specified. He says he went alone to the parish church with the watch. He went into the sacristy, as the door was open. He had seen the applicant's car outside and therefore he knew he was there. In the sacristy, he saw a long table-like counter on the left. The applicant was there. The complainant told the applicant that he had found the watch, and was handing it in to the church as his mother had told him to do. The applicant allegedly took the watch, told him he was a good boy, and that he could have it back if nobody claimed it. The applicant then put the watch away somewhere. The complainant described the applicant as wearing his clerical clothing at the time. He alleged the applicant placed his hand on the complainant's head, pulled out his shirt from under his jeans and sexually assaulted him. The complainant says that after the incident he remembered hiding in a porch at the back of the church waiting to hear the applicant's car going away.

9. The complainant said that some time afterwards on a Saturday afternoon, he was informed by the applicant that he could call up to the church and pick up the watch as no one had claimed it. He went back to the sacristy. The applicant handed him the watch and moved closer to him. The complainant said that he knew the applicant was going to "try things on again". He kept stepping back and thanked the applicant for the watch and left.

10. The circumstances of this allegation are very much in the category of "bare assertion and denial". There was no witness. There is little or no corroborative detail, save as to a description of the colour of the applicant's car. The complainant M.S. did not make any contemporaneous complaint to members of his family or to anyone else. There is no additional description of the sacristy, its furniture or any other matter which might identify time or circumstance. These features apply of course to many cases of this type. The only statement in the book of evidence tantamount in any way to corroboration is the complainant's mother's description of J.S. having told her that the applicant placed his hand on his knee on what was apparently a school boat trip to England. I make no comment on the admissibility in evidence or otherwise of this statement in the context of a prosecution of the M.S. complaint.

J.S.'s allegations of assault

11. In February 2003, at the same time as his elder brother, J.S. also furnished a statement to the gardaí in which he made allegations of a large number of assaults by the applicant. Some of these had allegedly taken place in the sacristy after Mass when he was an altar boy. But other assaults were said to have occurred at different locations. The brothers were both altar boys in the local parish church.

12. In total, 35 charges were ultimately proffered against the applicant in relation to J.S.'s allegations. In the first instance, these related to a period commencing on 8th April, 1981, and ending on 7th April, 1986. The terminal date of these alleged assaults was later identified in the indictment in the "J.S. trial" as being 1990. The reason for this expansion in the time scale is explained later in the judgment.

The circumstances of the complaints

13. No suggestion emerges from the book of evidence that the brothers discussed any issue of assault involving the applicant either before the interview or with anyone else prior to early February, 2003. They say that they then discussed the issue for the first time. As a result of this discussion they decided to go to the gardaí. There is no information as to what triggered this discussion or the subsequent complaints to An Garda Síochána. On 14th February, 2003, the complainants' mother furnished a relatively brief statement to An Garda Síochána. With the exception of the description of J.S. making the complaint about the school trip this did not add substantially to the material.

The applicant's record

14. In the context of this case it is important to point out that the applicant had by no means led a blameless life prior to 2003. His record is a reprehensible one. He had a criminal record of having assaulted a minor in 1990 for which he received a suspended sentence. This conviction was the subject of substantial publicity in the county. There are suggestions of other doubtful conduct, incompatible with clerical status which, though not of a criminal nature, apparently gave rise to public notice, concern and notoriety in the same locality where he was a curate up to 1990, the time of the assault giving rise to his conviction. Thereafter, he left the parish in disgrace, spent some time in England, including undergoing a course of treatment, and returned to Ireland in or about 1993. But none of this affects the right of an accused to a fair trial.

The information available to the gardaí in February 2003

15. By any standards, the matters presented to the gardaí in February 2003 were of significance. As well as M.S.'s single complaint, there were J.S.'s allegations of multiple sexual assaults. The applicant had the previous conviction described above. One would have thought such an investigation might have proceeded with some focus. The evolution of the investigation over the following years diminishes this impression.

The applicant – between 1990 and 2003

16. When the applicant went to England in 1990, he apparently received treatment at a centre but subsequently carried out some work as a priest for a time. There are indications but no evidence that his record in England as a priest continued to be an extremely chequered one.

17. The applicant returned to Ireland in 1993. Thereafter, he did not carry out any parish work. Instead he worked in a rehabilitation centre for alcoholics in Gardiner Street in Dublin. At some point, he was returned to lay status. There is no indication, however, that he was lying low, seeking to avoid arrest, or aware that complaints had been made against him in 2003.

18. By 2003, the applicant had also fallen under investigation by Mr. Justice Frank Murphy in the course of the Ferns Inquiry. He was in ongoing contact with that Inquiry. There is no suggestion that he failed to cooperate or that the Inquiry had any difficulty contacting him on an ongoing basis. There is no evidence as to whether the Ferns Inquiry investigation had any bearing on the brothers' complaints.

19. It is surprising, therefore, that having been furnished with this serious information in February, 2003, few meaningful steps were apparently taken by the gardaí to ascertain the applicant's whereabouts. It is not said that the diocese was contacted. It is not suggested his clerical colleagues or his family were interviewed. It is not said the Ferns Inquiry was asked as to J.D.'s whereabouts. The only evidence placed before the court on any search for the applicant was that when the complaints were received, J.D.'s last known address had been searched but that the local gardaí had been unable to establish his whereabouts. It is not suggested that the failures then or later were due to any particular complexity in the investigation, lack of garda resources, changes or unavailability of garda personnel, or staffing or resource problems elsewhere.

20. Detective Sergeant Sheehy, a deponent in this case, states that at some point in 2003, the gardaí may have formed the suspicion that the applicant was living at an address in the rehabilitation centre for alcoholics in Gardiner Street. This appears to have been information which would have been available from a number of sources for some time. The detective sergeant did not himself travel to Gardiner Street. Instead, he says that he made contact with gardaí in Store Street in Dublin. It is suggested (by way of hearsay) that gardaí from Store Street called to the rehabilitation centre and that "the person there" informed them that the applicant no longer lived there and where he had gone was unknown. This is hearsay evidence and I am unable to attach any weight to it. The source of the hearsay is not identified. The date of the alleged visit is not given. The person in the home who allegedly gave this information is not identified. No information is given as to what material was furnished to the Dublin gardaí in order to identify the applicant. No further action was taken in that year.

The investigation in 2004

21. There follows an unexplained lapse of time. Fifteen months later, on 18th May, 2004, Detective Sergeant Sheehy and a Garda Carey both from the county in question went to the centre in Gardiner Street in Dublin. No information is provided as to what, exactly, caused this visit by those gardaí, at least one of whom was in a position to identify the applicant from personal knowledge.

22. In the garda affidavits, the impression is conveyed that the applicant tried to deny his identity at the door of the centre. No such denial was recorded by the gardaí at the time in their notes although other quite trivial matters were. No notice to cross examine was served. The applicant denies that he made any effort to deny his identity. As the only evidence before the court is by way of affidavit, there is a conflict of evidence. The onus of proof of this issue lay on the respondent. In the circumstances, the court will decline to draw any inference or conclusion. It is said that the applicant also asked whether the matter would have to go to court and whether it could be kept out of the papers. It is not in dispute that the applicant told the gardaí at the time of this interview that he wished to talk to a solicitor.

23. Subsequently, on 4th June, 2004, the applicant went to a garda station in the locality where the events were alleged to have occurred. He was interviewed in a question and answer format which was not videotaped. He was not arrested at any time. In the course of this interview it was not put to the applicant that he had been evading arrest or lying low. The first time any such issue arose, even by implication, was in affidavits sworn in this application initiated in January 2008.

24. In the interview and in response to questions put by the gardaí, the applicant denied he had interfered with either complainant while they were under age. He did not accept that he had engaged in any impropriety at all with M.S., the complainant here.

25. But what he said about J.S. was quite different. The applicant in fact accepted he had engaged in a homosexual affair with J.S. but only at a time when the latter was an adult, between the years 1993 to 1994. This was when the applicant had returned from England. This relationship had not been disclosed at all by J.S. by this point in the investigation. The applicant admitted his previous conviction, and accepted that he was homosexual and an alcoholic, albeit non-drinking since 4th July, 1991.

26. By June 2004, sixteen months had elapsed after the original complaints. The gardaí had available to them the interview, the original statement of the two complainants, the statement of their mother, and information contained in the garda statements of evidence in the book of evidence. None of the garda statements is directly material to this application save as outlined earlier.

27. Four months then elapsed until, on 13th October, 2004, J.S. was interviewed on foot of the information given by the applicant in the question and answer session. The delay of four months is not explained. J.S. then accepted that he had in fact had a sexual relationship with the applicant after attaining the age of consent.

Why complaints were not made to the gardaí earlier

28. In his statement furnished to the gardaí on 12th February, 2003, M.S. said that he had never previously felt strong

enough to report the alleged incident to the gardaí. However he said only two weeks prior to his making the complaint, he and his brother had a conversation. Then J.S. disclosed to his elder brother M.S., that he had been abused by the applicant. In turn, M.S. told J.S. that he too had been abused by J. D. Both brothers said that it was as a result of this conversation that they decided to report the matter to the gardaí. Around this time, M.S. also disclosed the alleged abuse to his doctor who arranged counselling for him. These short, almost laconic accounts of what occurred between the brothers in 2003, show links in conduct, but would in no way convey an impression that the relationship between the brothers had been a troubled one, or that J.S. had had any previous sexual history prior even to his claimed encounters with the applicant. Equally, M.S. made no mention of whether he had had any sexual encounters with anyone prior to the alleged single encounter with the applicant.

29. On 13th October, 2004, J.S. furnished a second statement to the gardaí. On the same day, a report about the allegations appeared in one newspaper, the first of a series of reports to which reference will be made in greater detail later in the judgment.

2005

30. On 23rd February 2005, in response to garda requests, the psychiatric services in the south-east furnished material relating to J.S. Seven weeks later, on 18th April, 2005, the garda file was sent to the State Solicitor and the following day forwarded to the Director of Public Prosecutions. Three weeks later, on 4th May, 2005, the Director raised queries to the gardaí which were apparently received on 9th May, 2005. The nature of these enquiries has not been outlined, nor has the response thereto.

31. On 20th May, 2005, a further statement was obtained from J.S. But this third statement contained material which was presented in a rather different manner from his previous narratives. J.S. alleged a number of periods of abuse or sexual contact with the applicant, *inter alia* he alleged that he had been abused for a period from the age of eight years till approximately 10 years. But the abuser was not actually named or identified in this context. This absence of identification may be significant in the light of information, later described, which emerged in 2007.

32. J.S. also stated that the applicant would give him lifts home and that he indecently assaulted him then. He also said that the abuse did not stop at any point between the ages of thirteen to nineteen years.

33. On 31st May, 2005, the queries raised by the Director in early May were answered (but apparently only partly) by the gardaí. Then after a further period of four and a half months, the Director enquired when the remaining queries would be answered. A response was furnished by An Garda Síochána on 18th October, 2005. No explanation has been provided for the delay in seeking out this material.

34. The following week, 25th October, 2005, the Ferns Report was published. It referred extensively to the applicant. On 3rd November, 2005, the gardaí received a psychiatric report from Dr. Watters, a HSE psychiatrist. This was furnished to the office of the Director on 7th November, 2005.

35. Unfortunately, no action appears to have taken place in the office of the respondent for a period of many months. The official dealing with the matter is unidentified. There is no reference to any issue preventing the making of a decision as to whether or not to prosecute. After a period of nine months, on 12th July, 2006, a direction was ultimately furnished to the gardaí to the effect that a prosecution should take place. On 14th August, 2006, the applicant was charged in the local garda station in relation to the complaints.

36. The applicant appeared the following week in the District Court and was returned for trial. On 4th September, 2006, a book of evidence was furnished and some elements of disclosure were made. In the light of subsequent events it is clear that this disclosure was by no means complete.

37. By way of contrast to the progress of the investigation, the applicant's solicitors played a proactive role throughout the defence of this case. On 21st September, 2006, they wrote seeking disclosure of all relevant background material within the possession of the prosecution for an explanation of the delay and for further disclosure to include medical and psychiatric reports.

38. No explanation for the delay was ever provided. Later, on 2nd October, 2006, the defence again wrote, seeking the indictment, and also the views of the prosecution on the transfer of the trial of the accused to another town on the South Eastern Circuit.

39. If the investigation had been progressed in a normal fashion, one would have expected that it might have been completed in months not years after it began. The evidence, at least on its face, was not complex. But had a trial taken place in 2005 or 2006 it is clear that material relevant to the prosecution and defence might well not have been available – at least as a result of the investigation. The reason for this observation will be seen in light of what occurred in October, 2007.

2007

40. On 24th January, the applicant's solicitor wrote again, seeking information as to the prosecution's attitude to a transfer of the trial in the light of publicity. On 25th January, 2007, the State Solicitor replied to the effect that he was "unaware" of any publicity relating to the case in the relevant area. In the light of the media coverage outlined later it is difficult to understand precisely how this letter could have been written. In fact, the publicity given to the case locally and nationally had been extensive from 2004 to 2007.

41. On 29th January, 2007, the applicant's solicitors wrote, saying that an application to transfer the trial would be made. This application was based on an affidavit exhibiting this press coverage of the investigation which included photographs of the applicant and prominent headlines.

42. The application to transfer the trial to another venue within the same Circuit was resisted by the prosecution. Having heard the application on 31st January, 2007, Her Honour Judge Doyle apparently had little hesitation in ordering a change

of venue, ruling that it would have been extremely difficult for the accused to get a fair trial in Wexford. In the light of the previous coverage she prohibited pre-trial publicity. A trial on the basis of the book of evidence was fixed for Nenagh in October, 2007.

43. On 24th September, 2007, the defence again sought the indictment. On 25th September, 2007, the defence sought formal disclosure specifically with regard to J.S., and also the civil litigation which had taken place. I am satisfied that as of from 26th September, 2007, the defence had alerted the prosecution that it intended to apply for separate trials in relation to the M.S. and J.S. complaints and that it was understood the trial in relation only to the thirty-five J.S. complaints was to proceed in Nenagh. On 27th September, 2007, the Wexford State Solicitor replied, making disclosure in relation to the civil proceedings taken by J.S., but this disclosure did not include medical or psychiatric reports. Apparently, the solicitor acting for J.S. in the civil proceedings required a court order for such disclosure. On 2nd October, 2007, the indictment was laid, and the trial judge, His Honour Judge McDonagh, directed that J.S.'s psychiatric records should be released to the prosecution and defence, which records became available on the same day.

44. While there was material to indicate some linkage between the complainants and the complaints, the contents of these psychiatric reports can only have come as a considerable surprise to the prosecution and to the defence. For it only then came to light that J.S. had informed Dr. Paul McQuaid, the eminent child psychiatrist, that his elder brother M.S. had apparently abused him in his youth. The form or content of this disclosure had never previously been made available. It raised questions, still relevant, as to why this disclosure had not taken place. It took place after His Honour Judge McDonagh had embarked on the trial in relation to the J.S. complaints. The prosecution, the defence, and the trial judge did not have any opportunity of considering Dr. McQuaid's report prior to the trial or prior to the decision being made to apply for separate trials. This late disclosure should not have occurred. It should not have occurred if the investigation had been as thorough as it should have been in the time available since 2003. One is left to speculate as to the consequences if the report had never come to light and had the investigation and trial proceeded in 2006 as might well have occurred. It is strongly submitted that an issue arises as to whether there was some form of agreement between M.S. and J.S. and whether it led the brothers to act in the way they did, and if so what was the nature and motivation for such agreement if it existed. These issues remain unresolved. No additional evidence has been adduced on this point either in these proceedings or for the purpose of any trial of the applicant on the M.S. complaint. There has therefore been a material change of the circumstances surrounding any potential trial on the M.S. complaint as compared to the trial which actually took place. The true extent of this change of circumstances is shown by yet further subsequent developments.

The defence witnesses available to deal with J.S.'s complaints

45. In the J.S. trial which took place, a number of named and identified witnesses were available to the defence. These included priests of the parish where a number of the assaults were said to have occurred. It is relevant to this application that J.S. made allegations that certain of the assaults took place in the sacristy after Mass when he had been serving. Defence witnesses were directed and available to deal with the general routine in the church on Mass days, as well as in other locations where such assaults were alleged to have taken place. There is every indication that the defence was well marshalled on the premise as to who might potentially be relevant witnesses to deal with general church routine. While the allegations also concerned events alleged to have taken place elsewhere, the focus, for reasons now outlined, should be on the fact that a substantial number of incidents related to matters alleged to have taken place in the church and in the sacristy.

Prejudice through unavailability of a witness?

46. One of the issues raised in these judicial review proceedings is that of prejudice by reason of the unavailability of a witness, Mr. Tom Morris, the church sacristan. The matter is dealt with in more detail later in the judgment. But it is of some significance that Mr. Tom Morris was not mentioned in that list of witnesses for this trial nor did the question of his unavailability apparently arise at any point until after the conclusion of that trial.

47. Before Judge McDonagh an application was made by the defence for direction in the course of the first day. The trial judge indicated that he would keep the matter under review. Ultimately the defence went into evidence. A number of witnesses were called. On the second day the judge withdrew the case from the jury and directed the applicant's acquittal on the basis of the unsafe nature of J.S.'s testimony. It is common case that J.S.'s evidence was vague, self-contradictory and unsatisfactory. The consequences of the late provision of Dr. McQuaid's report (and other reports) is considered in greater detail later in the judgment.

The continued prosecution of M.S.'s complaint

48. On 5th October 2007, in the light of what had occurred, the solicitors for the applicant wrote to the State Solicitor seeking M.S.'s consent to the release of medical and psychiatric records concerning himself. On 9th October, 2007, the applicant's solicitors wrote to the D.P.P. claiming that to now proceed with any trial against J.D. on this single complaint would be unfair in the light of what had transpired in the J.S. case. On 15th October, 2007, the D.P.P. replied seeking time. One month later, on 15th November, 2007, the defendant's solicitors sent a reminder and again were met with a request for time. Ultimately, on 21st December, 2007, an officer of the Director wrote indicating that the prosecution in relation to this single M.S. allegation was to proceed. In all, the Director was permitted a period of ten weeks to respond, from 9th October, 2007, to 21st December, 2007. This elapse of time is relevant to an allegation made by the respondent of delay in bringing this application.

2008

49. On 21st January, 2008, leave to seek judicial review was granted by Peart J. This was one month after the letter from the Director of 21st December, 2007. The respondent (*i.e.* the Director) retained counsel. The counsel retained in these judicial review proceedings was not involved in the Circuit Court criminal prosecution and was in no way involved in the J.S. trial; any criticism made in no way lies at the door of counsel for the respondent in this judicial review application.

Further disclosure in 2008

50. The judicial review was adjourned on consent on a number of occasions. But it was seven months after the J.S. trial, only on 23rd May, 2008, that disclosure was made of two further psychiatric reports; from a Dr. Maher and from Dr. McQuaid. This (and more) disclosure must be seen in the context of these judicial review proceedings. One of the many unexplained features of this unfortunate saga is that the report from the same eminent psychiatrist, Dr. McQuaid, regarding J.S. had been furnished on 2nd October, 2007, more than half a year earlier. I find the delay in furnishing Dr. McQuaid's latter report regarding M.S. to be very surprising. The same psychiatrist was involved. The delay has not been explained. It is not said who was responsible for this delay. It is of relevance that the report on M.S. does not contain any admissions of his having abused his younger brother, J.S., although the report on J.S. clearly made such an allegation in relation to M.S.

51. The delay in the provision of this material is also noteworthy in the light of the fact that there is material contained in both reports as to the alleged effect of abuse on M.S. which might tend to be relevant to the prosecution's case as well as that of the defence.

52. Even later, on 1st July, 2008, yet a further report from Dr. Watters and counselling notes from the One In Four Group were provided. These referred to counselling obtained by M.S. in 2003, five years earlier. This delay in disclosure is not explained. Nor is the failure to obtain this material in a timely fashion earlier in the investigation.

53. Dr. Watters' report and the One In Four counselling notes contain material going back as far as 2003, dealing with advice given to the complainant. It is recorded that M.S. had received some upsetting news on 21st July, 2003, to the effect that the perpetrator of his childhood sexual abuse had died some weeks later. There are references later to the possible death of the abuser but that that was only hearsay. No note connects this reference to the applicant directly.

54. On 11th September, 2003, there is a note in the counselling records to the effect that the complainant had been in contact with the gardaí regarding dropping the charges if the perpetrator pleaded not guilty. This is an issue which Detective Sergeant Sheehy denies. There is a reference, also in September 2003, dealing with what was stated to be garda incompetence resulting in shoddy treatment in relation to reporting abuse and follow-up. The garda deponents state they have no record of this. These materials, provided as late as July, 2008, are relevant as issues of disclosure. The single and cumulative effect of these delays is considered later in this judgment.

The media coverage

55. It would be inappropriate to consider the question of prosecution delay in the absence of a brief outline of the media coverage which occurred. The publicity at many points moved in accordance with steps in the investigation. On 13th October, 2004, the date when J.S. furnished a second statement, a report appeared in the 'Wexford People' newspaper indicating that a file in relation to the matter was with the D.P.P. and that the investigation was then complete. This report was not entirely accurate. But others were entirely on point. The first was a substantial article in the 'Star on Sunday' of 14th October, 2004. There was coverage on local radio.

56. Two weeks later, on 24th October, 2004, a report appeared in 'Ireland on Sunday' about the investigation. The coverage was extensive. The gardaí say that it was on 21st November, 2004, that they finalised their investigation report and forwarded the file to more senior garda authorities. But no further garda interviews were conducted or placed on the file after 30th October, 2004.

57. Clearly, the progress of the investigation was not known to the accused. It was not known to any court authority in the locality. Regrettably, I can only find there was one potential source, that is, members of An Garda Síochána.

58. Turning to 2006, a similar unfortunate pattern can be discerned. The applicant was charged on 14th August, 2006, in relation to the complaints. There was extensive detailed coverage about the applicant in the Wexford and Enniscorthy 'Echo' newspapers. The following week, 4th September, 2006, he appeared in the District Court and was returned for trial. All these steps had been entirely accurately presaged in a prominent report in the 'Wexford People' on 30th August, 2006. There was extensive national newspaper coverage also. The coverage contained details as to progress in the investigation which could only have emanated from garda sources. It is not said that any of this newspaper coverage was countenanced or sanctioned by senior gardaí as a necessary part of an investigation. It is difficult to see how it could have been.

59. This media coverage is, of course, to be seen in the context of the fact that both M.S. and J.S. gave information to the Ferns Inquiry as did the applicant. In the course of the Inquiry coverage, the applicant was identified by name. The manner in which the applicant had been dealt with by the diocese in the light of his history was extensively considered in the course of the Report.

60. The issue of publicity was ultimately dealt with by order of Judge Doyle in Wexford in the course of the application on 31st January, 2007. It is not in itself a basis for this judicial review application. It is normally an appropriate issue to be dealt with by a trial judge. It should be seen in the same context only as background for the next issue briefly dealt with, that is the stance of the prosecution to the application to transfer the trial venue.

The stance of the prosecution on the application to transfer the trial

61. Not the least unusual feature of this case is that, even in the face of high profile media material which had been exhibited for the purposes of making an application for transfer, counsel for the prosecution (who is not identified) was instructed to object to any transfer of the trial, even to some other town on the circuit. This opposition could only have been on the basis of a contention that a fair trial could in fact have taken place in Wexford, despite all the publicity, and prior events which might give rise to prejudice and the notoriety of the applicant. This stance has been heavily criticised by senior counsel for the applicant, who has stated baldly that in objecting to such a transfer of venue in the light of the adverse pre-trial publicity, the prosecution had put itself in the position of any other adversarial litigant and had forsworn any requirement of objectivity or detachment.

62. The position adopted by the prosecution in relation to the application for transfer heard on 31st January, 2007, is at minimum, puzzling. The prosecution had prior notice of the nature of the application and its evidential basis; it is difficult to understand how a person could have replied that he was "unaware" of publicity regarding the case in the Wexford area. In her ruling, Judge Doyle stated that it would be extremely difficult for the accused to get a fair trial in Wexford having regard to the history of events and the persons who had been involved and affected. No explanation for the stance adopted by the prosecution is available in this case. Again this was a matter appropriately dealt with by Her Honour Judge Doyle. It is not a judicial review issue. But whether or not it is a ground for judicial review, the absence of any reasonable explanation for the stand taken in the light of extensive pre-trial publicity is surprising.

Consideration and finding of prosecution delay

63. The total delay which occurred was between 12th February, 2003, and the laying of the indictment on 2nd October, 2007. There are a number of periods of delay which are simply unaccounted for or unexplained. The first of these is the apparent absence of any significant step between the making of the complaints on 12th February, 2003, and the visit to the rehabilitation centre on 18th May, 2004, a period of fifteen months. I am unable to attach any evidential weight to the hearsay material alluded to earlier.

64. A further significant gap appears between June, 2004, when the applicant furnished his interview, and 13th October, 2004, the date of the second interview with J.S. No explanation for that elapse of time has been provided either. A third substantial period of delay is that between the response to queries on 31st May, 2005, and a fuller response of four and a half months later until these were properly responded to on 18th October, 2005. Finally, no explanation has been provided for the period of nine months when, apparently, the papers were with an officer of the respondent prior to any direction being made to the effect that a prosecution should take place. Again, this delay is unexplained.

65. The delays cannot be seen in isolation. In the first place, they must be seen in light of the fact that, quite clearly, there were substantial areas where, quite simply, the garda investigation fell down. The late provision of Dr. McQuaid's report on 2nd October, 2007, and the other reports are illustrative.

66. However, the fact that even in the course of these judicial review proceedings yet further disclosure had to be made is noteworthy. While leave was granted on 21st January, 2008, further disclosure was provided seven months after the J.S. trial, on 23rd May, 2008 (Dr. Maher and Dr. McQuaid) and 1st July, 2008 (Dr. Watters and One In Four Counselling). A court sometimes hears evidence that delays are explicable due to garda absence on leave, pressure of work or reallocation of gardaí or officials. No such excuses have been entered for the delays here.

67. The slow progress and the failures in investigation and disclosure are, it might be thought, in rather strong contrast with the leaked media coverage. I find that the detailed information which was disclosed in the media reports could only have emanated from the gardaí. Some of the material in the coverage set out detail which was then unknown to any other source.

68. I do not wish to be taken as seeking to blame any individual garda for leaks. I must have regard to the contents of Detective Sergeant Sheehy's affidavit. He says that he asked members of the Wexford gardaí about the leaks and they denied any involvement. But this is hearsay evidence, and I regret I am unable to attach any weight to it.

69. However a court must recollect first that a flawed investigation is not, in itself, a recognised basis for granting relief. The probative test for judicial review must be forward looking but placed in an evidential context which, of course, may relate to past events still material to the application such as the manner and content of the disclosure. It is necessary to segregate the issues which remain relevant from those which lie in the past, albeit forming part of the overall circumstances. The leaks and the stance of the prosecution fall into the latter category and would not justify relief.

70. Having considered that relevant evidence as a whole (and the absence of explanation for the delays), I find that I have no alternative but to conclude that there has been culpable investigation and prosecution delay. The disclosures which took place from 2nd October, 2007, indicate that if the investigation had been pursued with reasonable diligence, such evidence would have been available in 2003, and not four or five years later.

The balancing procedure

71. Having established that there was culpable prosecution delay, the next area for enquiry is the carrying out of a balancing exercise between on the one hand the public interest in having charges prosecuted, and on the other the applicant's right to an expeditious trial, (see *P.M. v. Malone* [2002] 2 I.R. 560, *P.M. v. D.P.P.* [2006] 3 I.R. 172, *Cormack v. D.P.P.* (Unreported, Supreme Court, 2nd December, 2008), and *Barker v. Wingo* 407 U.S. 514 [1972]). The issue of stress and anxiety falls to be considered in this balance as does the question of prejudice in a number of ways.

Stress and anxiety

72. In order to establish stress and anxiety in a case of this kind, an applicant must demonstrate something more than predictable levels of anxiety that any citizen would feel in the face of an impending trial. Fennelly J. in delivering the majority judgment of the Supreme Court in *M. O'H. v. D.P.P.* [2007] 3 I.R. 299, stated:

> "There must be evidence of something more than normal, something extra caused by the alleged prosecutorial delay."

There is no medical evidence in this case. In *P.M. v. D.P.P.* [2006] 3 I.R. 172, Geoghegan J. observed at p. 176:

> "I do not think that the courts should normally concern themselves with the degree of anxiety in a quantitive sense requiring proof thereof…. The size of the anxiety will be determined by the length of time rather than on any qualitative basis."

I also have regard to the further principle identified by Kearns J. in *M.O'H. v. D.P.P.* [2007] 3 I.R. 299, where he held that where the stress and anxiety suffered by the accused were glaringly obvious from the facts before the court, it would not be necessary to obtain a medical report to verify them. The anxiety and stress therefore must involve something extra than that which is to be expected from involvement in a criminal prosecution but may be less than the degree of stress or anxiety which impinges on the applicant's bodily integrity or physical health.

73. The court is entitled to bear in mind the stress caused by the substantial degree of coverage in the national and local newspapers. The applicant states his daily life in Dublin was disrupted. He was recognised as somebody against whom serious allegations had been made. He experienced lack of friendship from people such as local shopkeepers. His sister received unpleasant correspondence. The coverage had a significant effect on his relationship with his family. He was prevented from using the telephone and computer in the rehabilitation centre. A petition was raised there asking for his removal. He says that this contributed to ongoing distress and sleeplessness. He says the effect upon him of the publicity regarding this case greatly exceeded that from the publicity about him from the publication of the Ferns Report in October 2005. He states that every time he appeared in court to meet his bail there was renewed publicity, until 31st January, 2007, when Her Honour Judge Alice Doyle imposed media restrictions for fear that the coverage might prejudice any criminal trial.

74. The applicant states that he ceased to receive a sum of €300 a week which he had previously been paid in the rehabilitation centre after the visit made by the gardaí in 2004. He says that now he is in receipt of only €200 a week, even though, as appears from his affidavit sworn in July, 2008, he can travel far outside this country to Asia.

75. But against all these factors one must have regard to the fact he was acquitted in relation to the 35 counts on the J.S. indictment. He is entitled to the presumption of innocence in the instant case.

76. The difficulty in proof arises from other issues. There is the applicant's previous record. He had pleaded guilty in Wexford District Court in November 1990 to indecent assault. He was the subject of considerable coverage in the Ferns Report in 2005. The interview in the Centre, ostensibly one of the trigger factors for stress, took place in 2004 prior to the publication of the Ferns Inquiry. He was one of three living priests referred to in the Report by name, the others were identified with Greek letters. All of these questions were mingled in the press coverage. The criminal proceedings were but one factor in this.

77. I find that the applicant was subjected to significant stress and anxiety. This was exacerbated by the media coverage. The stress must have been considerable. Essentially the evidence shows that the applicant was ostracised and shunned. But the sole symptoms he describes are depression and anxiety. He received no psychological counselling. The stress does not appear to have manifested itself in any marked physical way. It is difficult therefore to find that the stress and anxiety are "glaringly obvious". I can find no evidence of the "something extra" over and above the stress one would expect – albeit in the context of that significant media coverage. The stress and anxiety are insufficiently related in time and circumstances to any delay, or as to how a trial would now be at risk of unfairness. I find there is a break in the nexus between the delay, stress and the alleged risk of unfairness. Additionally I find it impossible to identify or isolate the stress with the delay in prosecution – as opposed to the other issues in the applicant's background, and manifested in the Ferns Report in 2005. While the stress must have been significant, I am unable to find that in itself it is sufficient to order prohibition on the grounds that it would place the right to a fair trial at risk.

Prejudice

78. The issue of prejudice in this case may conveniently be considered under two headings. The first is specific prejudice caused by the absence of a witness. The second arises from delay in disclosure attributable to the long incomplete investigation.

Prejudice by reason of witness unavailability

79. The case advanced by the applicant is that there is a witness who is no longer available, that is the sacristan of the church, Tom Morris.

80. The obligation of the applicant in establishing prejudice is, as is well established, to engage with the facts.

81. The test to be applied is that outlined by Murray C. J. in *S.H. v. D.P.P.*[2006] 3 I.R. 575, that is, whether having regard to all the circumstances the delay has resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial. The applicant takes on the onus of establishing this on the balance of probabilities.

82. Mr. Tom Morris served as sacristan of the church and it is said had ongoing duties, throughout the day on Sundays. It is claimed he kept an eye on everybody who came to the church grounds and into the church and, in particular, he would have been aware of people who wanted to have anniversary prayers said and who would come to the church for that purpose. It is claimed that he was always based in the sacristy and dealt with any lost property found in or brought to the church. He was always last to leave the sacristy and locked the door in the evenings. Is this sufficient to establish prejudice?

83. There is little doubt that Mr. Morris is now unavailable as a witness. He is aged eighty-six years. He is apparently completely deaf, emotionally fragile, and unable to deal with any stress. There is a medical report to this effect. It is said that his condition is stated to have deteriorated over the past three to four years, that he would now be unable to give evidence and that without this evidence a jury would be asked to choose between the oral evidence of the complainant and the testimony of the applicant on an issue of a single assault now some twenty-seven years old.

84. The test to be applied, however, is that of materiality. One would expect that if there were a truly relevant witness, the applicant or his solicitors would refer the gardaí to him at an early date. However, the applicant did not mention Mr. Morris at all to the gardaí in the course of his interview. He does not say now if he ever spoke to Mr. Morris about the allegations and if so, what evidence he might have given.

85. It will be noted that there were a wide range of complaints made by J.S., some of which were said to have occurred in the sacristy. Clearly, the single count alleged here is said to have taken place in the same location.

86. There was clear evidence before this court in relation to the witnesses who were identified by name and who *inter alia* were in a position to give evidence in relation to the applicant's duties in the church and schools in relation to the J.S. case. A further clerical witness was identified who was the curate of the parish who was able to give evidence as to the date upon which baptisms took place. Other witnesses were also available to disprove elements of J.S.'s evidence.

87. What is noteworthy is that Tom Morris was not named in that list. Nor was the issue of any prejudice relating to Tom Morris mentioned at all in the context of the J.S. case. The question appears only to have emerged afterwards, early in 2008, and only in the context of the complaint made by M.S. It does not appear to have arisen at any earlier point in relation to the J.S. complaints, many of which took place in the church sacristy. This is not explained.

88. As a balance, it must be observed that in the book of evidence the sequence of events and position in time in relation to the single M.S. complaint are unclear. While it is said to have taken place one summer Sunday, the time of day is not identified. It must be borne in mind that the case is one of bare assertion and denial. It may be said that the circumstances of this case differ from those of the J.S. complaints where many of the events in or around the church were alleged to have taken place after Mass when there were other priests, servers and church attendants in the location.

89. Even having regard to these vague features, however, I find on balance it has not been shown to a significant degree of probability that Tom Morris was a material or relevant witness such that in itself his absence now poses a real risk of an unfair trial. Even having regard to the evidential context, I find that the evidence on this issue falls short of that required in order to establish specific prejudice. I turn then to the further issue of prejudice in the late identification of relevant evidence.

Prejudice caused by the late disclosure of psychiatric reports

90. Clearly, the material contained in the psychiatric reports could have been ascertained much earlier, in the year 2003 or soon thereafter. There was substantial delay on the part of the gardaí in going back to J.S. in relation to his second and third statements. His third statement contains material which might appear inconsistent with his earlier accounts.

91. It has been strongly urged on behalf of the applicant that it is a reasonable inference from these undisputed facts that the complainant and his brother had for some reason resolved not to divulge the information regarding their prior sexual histories to anyone. This was undoubtedly information material to the defence of the applicant in relation to both complainants. There is no evidence that the gardaí or prosecution had made themselves aware of this history – but they could have if Dr. McQuaid's report had been obtained and provided.

92. The question which must be considered is whether the sequence of disclosure is such in itself as to give rise to prejudice and a real risk of an unfair trial. The circumstances are now markedly different from those obtaining at the time of the trial and quoted in the J.S. allegations.

93. It is outside the remit of this court to engage in a detailed analysis of the various ways in which this disclosed evidence might play out at a further trial. Rulings and the charge to a jury are matters for the trial judge. But what is clear is that a material part of the defence would be possible interlinkage between the two complainants' narratives. The demonstration in evidence of this potential interlinkage would in turn carry with it a real risk of the inhibition of the defence in cross examination of prosecution witnesses by a necessary concern that other extraneous inadmissible and non-probative material not be elicited.

94. A further alternative contingency is that a jury may be presented with evidence divorced of its true content or context and therefore unsatisfactory and devalued. The respondents have not made any submissions as to how this now relevant material could properly be placed before a jury, and on whom the onus of proof of these events would fall in a trial. On these unique facts there comes a point when the evidential burden on the respondent goes beyond a mere acceptance that trial judges frequently face difficulties of this type. The facts of this case lie well outside the normal. If the fundamental question as to how these points could in fact be addressed in a trial cannot be answered in a specific way a court is entitled to take this fact into account.

95. The ease with which inadmissible evidence impinging on the presumption of innocence might emerge, despite rulings of a trial judge, is neatly illustrated in this case. In order to demonstrate that the absence of Tom Morris was not material, Detective Sergeant Sheehy had recourse to relating back to an account of the assault which the applicant committed in 1990, which apparently took place within a very short time and in the victim's house. This evidence (otherwise prejudicial rather than probative) is illustrative of the formidable challenges that might face the defence and a trial judge in seeking to ring-fence or segregate evidential issues.

96. How is the complainant to be fairly cross examined on the issue of his relationship with his brother, and the possible connection of those issues with the charge? On whom does the onus lie to adduce the evidence with regard to Dr. McQuaid? It is not said that he will become a prosecution witness. Will the onus of establishing J.S.'s complaint about M.S. then lie on the defence in a trial? The question remains unresolved.

97. It is not the task of this court to trespass into the realm of a trial judge who would be charged with dealing with the admissibility or non admissibility of evidence and directing and charging the jury in matters such as credibility and the effect of passage of time. Disclosure should be a matter for a trial judge. But, ironically, the converse has arisen here. Late and delayed disclosure has been made an issue in this case by the respondent. Suffice it to say that to seek to segregate out each of these issues to place them in context, and to identify a sequence of events all of which might have a bearing on the question of credibility of the complainant would present formidable challenges.

98. The test is whether the prejudice is remediable by the directions and charge of a trial judge.

99. This test must be seen in its context, that the fundamental issue in any potential trial here would be the credibility of the complainant M.S. How would his credibility properly be challenged? It is at least probable this would necessitate a

rehearsal of the evidence on disclosure in this judicial review. This would raise the risk of confusion in the eyes of a jury. There would be an ongoing risk of stifling the defence in cross-examination, with a risk of the presumption of innocence being placed at hazard. I am unable to conceive how a trial judge could remediate these problems, now fundamental, in a trial. I consider that prejudice has been established which could not be addressed by rulings of a trial judge, or by a charge on the material issues which now seem inextricably interwoven with evidence, both in the J.S. trial and in this judicial review.

100. I consider that a real risk of unfairness has been established and this in itself is sufficient to order prohibition in accordance with the principles in S.H. If I am incorrect in this conclusion, or if the evidence were to fall short of the requisite standard for prejudice, a further test comes into play, that in J. M., and more recent judgments, such as Noonan, cited earlier, although the later does not come within the special category of what are called "sex delay" cases.

Consideration of "all the circumstances"

101. In the instant case, there has been established culpable investigatory and prosecutorial delay. This may provide a basis for judicial review by way of prohibition in the event that other matters are demonstrated, that is to say stress or anxiety, or prejudice sufficient to present a real risk of unfairness. I have indicated that I do not consider that the evidence as to stress and anxiety is sufficient, or sufficiently linked to the delay in prosecution in order to demonstrate these to the requisite degree necessary to grant relief. Equally, but also only on balance, I consider that the applicant has not demonstrated prejudice to a sufficient degree in the case of Mr. Morris's absence. The stance adopted by the prosecution in relation to the transfer does not in itself give rise to judicial review. It has, in any case, been dealt with by the order of Her Honour Judge Doyle. Similar considerations apply in relation to the media coverage, again the subject of Her Honour Judge Doyle's order on 31st January.

102. But taken together, do all the circumstances of the case (in particular the absence of disclosure until 2007/2008) probably demonstrate that there is a real risk of an unfair trial whether as a matter of inference, deduction or direct proof?

103. An accused person is entitled to a fair trial on the charge which is before the court. That fair trial involves the accused standing before a judge and jury entitled to the presumption of innocence and to have evidence tested in its context. Part of that context here must, of necessity, be the issue of disclosure, both as to its content and time sequence. The delay was not of the applicant's making nor were the defects in disclosure. The decision to grant separate trials appears not to have been resisted by the prosecution. The detriment to the applicant was discernible only from 2nd October, 2007, onwards. Clearly the relationship, and any arrangement between the brothers would be at the centre of any defence.

104. The test which is applicable in cases of this type is not to demonstrate that a fair trial is improbable. It is to demonstrate on the balance of probabilities that there is a real risk of an unfair trial. In *McFarlane v. D.P.P.* [2007] 1 I.R. 134, Hardiman J. observed at p. 144 - 145:-

"In order to demonstrate that risk there is obviously a need for an applicant to engage in a specific way with the evidence actually available so as to make the risk apparent. A failure to do this was the basis of the failure of the applicant in *Scully v. D.P.P.* [2005] 1 I.R. 242. This is not a burdensome onus of proof: what is in question, after all, is the demonstration of a real risk, as opposed to an established certainty, or even probability of an unfair trial…."

105. The respondent submits that the adducing of this material, even so late, has had the effect of being of benefit to the applicant in order to allow him to explore issues in defence which he would not otherwise have been able to do. One must be forgiven for reservations on that score. The difficulty arises not just from the delay and the content of the material – but the manner in which it has emerged. What occurred begs yet further questions – such as whether it is intended to serve notice of additional evidence? One might be forgiven for commenting that the "benefit" which has lately been given to the applicant is rather redolent of a Greek gift. I have already found, on balance, that prejudice has been established by the late disclosure which cannot now be remediated so as to avoid a real risk of an unfair trial.

106. In *J. M. v. D.P.P.* [2004] I.E.S.C. 47, the Supreme Court had to deal with a situation where the court had regard to a totality of circumstances surrounding a proposed prosecution where no single factor would justify granting prohibition. It must be said that in J.M. the applicant was a religious person working in a religious institution – not a parish as here. The issue of identification does not arise in this case as it did in that authority. The other factors taken into account by the court in J.M. were:-

(i) the totality of delays which took place in the prosecution;

(ii) inconsistencies in statements by the complainant;

(iii) the risk that a complainant had been influenced in his recollection by another person;

(iv) an unreliable co-complainant, and

(v) an absence of records.

One cannot say that the facts of J.M. are on all fours with the instant case. All cases differ. But there are sufficient similarities for it to afford some guidance. A number of the categories of circumstance that arose in J.M. do apply here. These have been discussed in this section of the judgment. Against these may be weighed proportionality, and the public interest in having trials prosecuted.

Proportionality

107. Thus insofar as it may be appropriate to have regard to the matter in this category of case, the issue of proportionality presents considerable difficulty. Sexual assault is a serious offence. The consequences, even of a single event, can be long term and devastating. The allegation against the applicant is a single charge of non penetrative sexual

assault on a twelve year old boy. If established this would be a serious matter. Were the charge to be proved there might be evidence of a long term impact. I am unable to put the allegation made on the "lower end" of some scale, although the nature of the offence may be less serious than other even more grave sexual assaults. This factor may be taken into account either as an issue in itself, or under the heading of the public interest.

The public interest

108. In *B. v. D.P.P.* [1997] 3 I.R. 140, Denham J. observed at p. 195 - 196:-

> "It is not the applicant's interests only which have to be considered. It is necessary to balance the applicant's right to reasonable expedition in the prosecution of the offences with the community's right to have criminal offences prosecuted."

109. The respondent submits that the applicant stands charged with an allegation of indecently assaulting a child. This is a serious offence. The public interest in seeing that allegation tested before a jury is, it is said, self evident. It is quite clear that the court must have regard to the issue of the public interest in the prosecution of serious crime. However, as has been repeatedly pointed out, in the event of there being an imbalance between the rights of an accused to a fair trial and that of the public interest in the prosecution of crime the former right must take precedence over the latter.

110. Even taking these countervailing factors into account, one cannot consider this case with its so many troubling features, without observing that the consequence of permitting a trial to proceed would be that the issue facing a jury would be essentially one of simple assertion and denial. Credibility is central. The gathering and manner of presentation of material whereby credibility might be tested has been prejudiced by prosecution delay. The reason why this crux has arisen is, unfortunately, because there was a delay in the investigation. This fell down in such a way that relevant material, which ought to have been disclosed in a timely way to all the parties, was made available only on the day of the trial in relation to the J.S. complaints. Yet further material has been disclosed even during the course of these proceedings. And these circumstances would undoubtedly come into play in a trial. I have found that this gives rise to prejudice.

111. But these are also circumstances to which this court may have particular regard in assessing the risk of unfairness, even though the stress and anxiety which has been established falls short of that necessary to grant judicial review. I am conscious that it is not possible to establish a direct connection of cause and effect and that, to a degree, a conclusion in this case relies on inference.

112. In J. M., the Supreme Court concluded that the public interest in ensuring a fair trial must, where conflict arises, take precedence over the unquestionable public interest in the prosecution and punishment of crime. McCracken J. concluded:

> "In considering cases of this nature, the Court should have regard to the totality of the circumstances surrounding the proposed prosecution, even though no single factor would justify prohibiting the prosecution."

113. Whether the main issue in this case is categorised as prejudice or as a mere 'circumstance' is, I think, immaterial. Under one or other definition it is sufficient, taken in conjunction with all the other relevant factors to justify an order of prohibition on the grounds of delay.

114. It is true that J. M. has not been a subject of any detailed consideration in the more recent judgments of the Supreme Court from *S. H. v. D.P.P.* onwards. I have not been persuaded there is anything in any of those later important authorities which is at variance from the test applied by the Supreme Court in J. M. The inquiry is, as it always is, whether the degree of prejudice is such as to give rise to a real or serious risk of an unfair trial. The factors of prejudice or circumstances will depend upon the facts of the case. Had I not concluded that the prejudice established was in itself sufficient to order prohibition, I would nonetheless have concluded that, taken together, the circumstances demonstrate a real risk of an unfair trial – even if it were found that no single factor would justify judicial review.

Applications out of time?

115. A final point which must be considered is whether the applicant has been guilty of delay. As has been indicated in the course of this judgment, the true detriment to the applicant, now giving rise to this judicial review application began to come to light only on or after 2nd October, 2007, and not before. But this was in the "J.S." trial. I have specifically found that the unavailability of the potential witness (which might have been ascertained earlier) does not discharge the evidential burden sufficiently.

116. Clearly, the time could not have run during the period when the D.P.P. sought time for deliberation from the applicant's solicitors. Thus, I consider that the application which was ultimately brought on 21st January was brought within time. In the light of the fact that the disclosure process (which, after all, is the main issue) continued up until 1st July, 2008, any time point relied on by the respondent would appear frail in the circumstances.

117. Furthermore, even were it thought that the applicant had been in delay, I consider that the court is bound by the decision in *C. C. v. Ireland & Ors*. [2006] 4 I.R. 1 where Geoghegan J. observed that the time would commence to run only from the service of the indictment. To this principle Denham J., Fennelly J., Hardiman and McCracken JJ. assented. An indictment laid in the J.S. case would not serve to commence time running in this judicial review concerning the M.S. allegation. For these reasons, I do not consider this point has merit.

118. I will therefore grant judicial review.