Neutral Citation Number: [2009] IEHC 400

THE HIGH COURT

2008 914 JR

BETWEEN:

T. C.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Mr. Justice Hedigan, delivered on the 18th day of August, 2009

1. The applicant is an 84 year old man, who has been charged with a series of sexual offences against his niece ('the complainant') between the 1st of April 1973 and the 31st of December 1978.

2. The respondent is the authority responsible for the prosecution of criminal offences in Ireland. His statutory authority to carry out this function is derived from the Prosecution of Offences Act 1974.

3. The applicant is seeking an order of prohibition or in the alternative an injunction, by way of judicial review, enjoining the respondent from taking any further steps to prosecute him on the aforementioned charges.

I. Factual and Procedural Background

4. In January 1999, the complainant informed a counsellor that she had been abused by the applicant as a child. This complaint was made in direct response to a question from the counsellor and it appears to be the first time that any such allegations were made by the complainant. At that time, the complainant was suffering from depression arising from her mother's death and was being treated with specialist medication. Her treating psychiatrist has opined that the complainant may have had a number of suppressed memories from her youth, which only resurfaced once her mother had passed away.

5. In July 1999, the complainant attended a family gathering during which she informed a number of her relatives of the alleged abuse. She did this, somewhat unusually, by furnishing them with written therapeutic notes of conversations between her childhood and adult personas. The applicant was informed of the allegations by his brother shortly after this gathering and recalls a distinct change in the manner of certain friends, neighbours and relatives towards him. There is also a history of animosity between the applicant and the complainant's husband, with allegations of insulting remarks and harassment being made and refuted by both parties.

6. The complainant continued to receive psychiatric treatment for some time after informing her counsellor and family members of the alleged conduct of the applicant. On the 2nd of November 1999, her psychiatrist noted that the complainant had expressed concern as to the 'lies' that the applicant's sisters might tell if she were to take any further steps. Similar observations were noted on the 5th of December 1999 and on the 8th of December 1999 the complainant is recorded as being concerned that the applicant would deny everything and that his sisters would support him.

7. No formal action was taken in respect of the complaint for several years. It seems that the complainant may ultimately have been prompted to pursue the matter further by an incident which occurred on the 1st of February 2005, wherein the applicant was witnessed by a member of An Garda Síochána as making an offensive 'V' sign towards the complainant.

8. On the 8th of February 2005, the complainant visited her local Garda station and made a formal complaint in respect of the applicant's alleged sexual abuse of her. A criminal investigation was commenced and a full statement of the applicant's complaint was completed on the 7th of March 2005. The substance of the complaint is that the applicant did, on numerous occasions while the complainant was aged between 12 and 17 years, rape and sexually assault her. All the incidents, bar one, are said to have taken place in the applicant's home where he resided with his mother, his two sisters and his nephew who was aged between 4 and 9 years at the time. The dwelling in question is a small, three-bedroom terraced house in which the only bathroom containing the sole lavatory is located upstairs. The complainant maintains that she would often visit her grandmother on Sunday afternoons, while the applicant, his two sisters and his nephew were present in the house. It is on these occasions that she alleges that the applicant raped and sexually assaulted her, either in his own bedroom or in the attic of the house.

9. It must be noted that the applicant's mother, the complainant's grandmother, died in 1979. One of the applicant's sisters died in June 2001 and the other in November 2002. The latter of these two sisters made a remark during her final days to the parish priest, to the effect that the complainant's allegations were untrue and that the applicant would never have engaged in such conduct. In addition, the applicant has asserted that the garage at the rear of the house in which the incidents are alleged to have taken place was used by two particular gentlemen for the repair and maintenance of motor vehicles. Both of these individuals are also now deceased.

10. On the 18th of November 2005, the applicant was arrested and questioned by members of An Garda Síochána in respect of the alleged offences. On the 31st of March 2006, a file was sent to the respondent who directed on the 15th of February 2007 that charges should issue. On the 8th of March 2007, sample charges were sent to the office of the Chief Prosecution Solicitor and on the 20th of May 2007 the applicant was again arrested and charged with the following

offences:-

> (a) Twenty-five counts of indecent assault of the complainant at the applicant's home and one further count at the complainant's home on dates unknown between the 1st of April 1973 and the 31st of December 1978, contrary to common law and as provided for by section 6 of the Criminal Law (Amendment) Act 1935;
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> (b) One count of attempted rape of the complainant at the applicant's home on a date unknown between the 19th of April 1974 and the 18th of April 1976 contrary to common law; and
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> (c) Four counts of rape of the complainant at the applicant's home on dates unknown between the 19th of April 1974 and the 31st of December 1978, contrary to section 48 of the Offences Against the Person Act 1861.

11. The applicant's solicitor, who was assigned under the legal aid scheme on the date of charge, subsequently informed the applicant that on the 6th of June 2007, a judgment in civil proceedings had been awarded against him in the sum of €460,500 in favour of the complainant. The applicant had been aware of the proceedings and had accepted service of a plenary summons in July 2006. However, he maintains that he had difficulty in securing legal representation to defend the proceedings and did not ultimately participate in the litigation process which he did not fully understand. It is apparently the case that he was in fact present in the High Court when it assessed the damages above.

12. The book of evidence in respect of the criminal charges was served on the applicant on the 27th of July 2007 and he was returned for trial on the same day. Partial disclosure was made by the respondent during August 2007 and further and final disclosure was made on the 13th of February 2008. A trial date was assigned on the 3rd of June 2008, however the matter was removed from the list in order to enable tests to be conducted on the applicant to assess any cognitive impairment and his fitness to plead.

13. The applicant is in poor general health, as might be expected of a man of his age. He also suffers from vascular disease and chronic dizziness. He underwent prostate surgery in 1996 and has more recently suffered from bladder muscle failure. In January 2006, he had a catheter installed which needs to be replaced at least every two to three months.

14. The applicant was granted leave to apply by way of judicial review by O'Higgins J. on the 28th of July 2008.

II. The Submissions of the Parties

15. The applicant argues that the lapse of time between the dates of the alleged offences and the date on which the complainant first contacted the authorities has resulted in unavoidable and incurable prejudice. In this regard, he contends that a real and substantial risk of an unfair trial arises by virtue of the death of a number of key witnesses, his age and his present physical condition. He further submits that the delay on the part of the prosecution in advancing the proceedings has been oppressive and amounts to a violation of his right to a trial with due expedition and in due course of law.

16. The respondent asserts that the delay in bringing proceedings against the applicant is more than adequately justified on the evidence. He submits that the court is entitled to presume that the complainant was under a disability prior to the making of her official complaint and that thereafter the authorities have acted with due expedition. The respondent also contends that any prejudice which may have arisen as against the applicant in the preparation of his defence may be avoided by appropriate directions and rulings of the trial judge. Finally, the respondent submits that the applicant's physical condition is not atypical for someone of his age and argues that there is no special reason why he would be unfit to plead or in some other way unable to manage his defence.

III. The Applicable Law

17. In recent years, Irish jurisprudence has been replete with cases such as this one, in which the Court is required to consider an applicant's right to a trial in due course of law and also the community's right to see that serious crimes do not go unpunished. These rights can and do conflict with each other and the courts have been obliged upon occasion to resolve that conflict. In *D. v. D.P.P.* [1994] 2 I.R. 465, the Supreme Court considered the relative status of these two competing rights. Denham J. stated as follows at page 474:-

> "The applicant's right to a fair trial is one of the most fundamental constitutional rights afforded to persons. On a hierarchy of constitutional rights it is a superior right. A court must give some consideration to the community's right to have this alleged crime prosecuted in the usual way. However, on the hierarchy of constitutional rights there is no doubt that the applicant's right to fair procedures is superior to the community's right to prosecute. If there was a real risk that the accused would not receive a fair trial then there would be no question of the accused's right to a fair trial being balanced detrimentally against the community's right to have alleged crimes prosecuted."

18. It is well-established that the right to a fair trial, as guaranteed by Article 38.1 of Bunreacht na hÉireann and Article 6 of the European Convention on Human Rights, imports a right to a trial with reasonable expedition and without undue delay. In *D.P.P. v. Byrne* [1994] 2 I.R. 236, Finlay C.J. acknowledged the historical foundations of this aspect of the concept of due process. He stated at page 245:-

> "The right to reasonable expedition in the trial of a criminal charge would appear clearly to precede, as a natural right, not only the Constitution of Ireland, but the Constitution of the United States as well, and from an historical point of view would appear to derive directly from *Magna Carta* and to be part of the Common Law."

19. In seeking to uphold the right to a fair trial, however, it is clear that the remedy of prohibition must not simply be resorted to as a matter of course, in all cases in which an infringement of that right is alleged. In *Z. v. D.P.P.* [1994] 2 I.R. 476, the Supreme Court addressed the requirements for an order of prohibition. Finlay C.J. stated as follows at page 506:-

> "[T]he onus of proof which is on an accused person, who seeks an order prohibiting his trial on the ground that circumstances have occurred which would render it unfair, is that he should establish that there is a real risk that by reason of those circumstances… he could not obtain a fair trial. […] [W]here one speaks of an onus to establish a real risk of an unfair trial it necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk is a real one but the unfairness of trial must be an unavoidable unfairness of trial."

20. More recently, in *Devoy v. D.P.P.* [2008] IESC 13, Kearns J. made the following remarks in relation to the remedy:-

> "In the context of prohibition […] an Irish court must [not] readily or too easily resort to prohibition, whatever about other remedies, when vindicating rights under Article 38.1. Under our jurisprudence, as noted by Denham J. in *D.C. v. D.P.P.* [2006] 1 I.L.R.M. 348, prohibition is a remedy to be granted only in exceptional circumstances. The Court does not adopt a punitive or disciplinary role in this context. Further, any court called upon to prohibit a trial must give due weight to the gravity and seriousness of the offence when exercising this jurisdiction. It must analyse the causes for delay with great care, weighing up and balancing the role of both the prosecution and the applicant and their respective contributions to delay."

21. In considering the period which has elapsed since the dates of the alleged offences, the Court is required to consider separately the years prior to the complainant's formal notification of the Gardaí, and those which have passed subsequently. Different considerations arise in respect of these periods of time and distinct consideration must be afforded to any prejudice arising therefrom.

(a) Prosecutorial Delay

22. The issue of prosecutorial delay, that is delay following the making of a formal complaint, has received considerable curial attention in this jurisdiction. In the decision of *Devoy v. DPP* [2008] IESC 13, Kearns J. engaged in a lengthy and informative analysis of the applicable principles. He stated as follows:-

> "The principles governing prosecutorial delay in Irish Law have been laid down in a number of Irish cases including *P.M. v. Malone* [2002] 2 I.R. 560 and *P.M. v. DPP* [2006] 3 I.R. 172 and may be summarised as follows:-
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> (a) Inordinate, blameworthy or unexplained prosecutorial delay may breach an applicant's constitutional entitlement to a trial with reasonable expedition.
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> (b) Prosecutorial delay of this nature may be of such a degree that a court will presume prejudice and uphold the right to an expeditious trial by directing prohibition.
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> (c) Where there is a period of significant blameworthy prosecutorial delay less than that envisaged at (b), and no actual prejudice is demonstrated, the court will engage in a balancing exercise between the community's entitlement to see crimes prosecuted and the applicant's right to an expeditious trial, but will not direct prohibition unless one or more of the elements referred to in *P.M. v. Malone* [2002] 2 I.R. 560 and *P.M. v. DPP* [2006] 3 I.R. 172 are demonstrated.
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> (d) Actual prejudice caused by delay which is such as to preclude a fair trial will always entitle an applicant to prohibition.
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> Much of the Irish Law on this topic has been derived from the seminal decision on prosecutorial delay delivered by the U.S. Supreme Court *in Barker v. Wingo* 407 US 514 (1972). The principles laid down by the U.S. Supreme Court were referenced to the constitutional guarantee of a "*speedy*" trial contained in the Sixth Amendment of the U.S. Constitution.
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> That case emphasised that in considering the right to a speedy trial there could be no inflexible rule and that every case must be met on an *ad hoc* basis in which the conduct of the prosecution and that of the defendant are weighed. In that context, the U.S. Supreme Court identified four factors which should be assessed in determining whether a particular defendant has been deprived of his constitutional right to a speedy trial:-
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> (a) The Length of the Delay
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> Unless there is a delay which is presumptively prejudicial, there is no necessity for an enquiry into the other factors that go into the balance. The length of delay which will demand an enquiry is necessarily dependent upon the particular circumstances of the case. Thus the delay which can be tolerated for an ordinary street crime is considerably less than for a complex conspiracy case.
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> (b) Reasons for Delay
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> Different weights should be assigned to different reasons. A deliberate prosecution attempt to delay the trial in order to hamper the defence should weigh heavily against the prosecution; more neutral reasons such as negligence or over-crowded court rooms might weigh less heavily but must nonetheless be

considered, given that the ultimate responsibility for such circumstances rests with the State rather than the defendant. A valid reason, such as a missing witness, might serve to justify delay.

(c) Role of the Applicant

An applicant's assertion of his right to a speedy trial is entitled to strong evidentiary weight in determining whether he is being deprived of his constitutional right; a failure to assert the right may make it more difficult for an applicant to prove that he wanted or was denied a speedy trial. In this context the U.S. Supreme Court noted that delay may sometimes operate to the advantage of a defendant.

(d) Prejudice

Among the interests of defendants which the speedy trial right is designed to protect are: (i) the prevention of oppressive pre-trial incarceration; (ii) the reduction of anxiety and concern of the accused and (iii) most importantly, the limitation of any possibility that the defence will be impaired.

I do not regard this statement of principles as being different in any significant way from those contained in the Irish decisions on prosecutorial delay. In my view these principles apply with equal force where systemic delay is under consideration. Both forms of delay affect an accused person in the same way. Furthermore, the template or framework outlined in *Barker v Wingo* setting out how these principles should be applied strikes me as both logical and practical for courts or judges when assessing individual cases. I have separately indicated these views in *McFarlane v Director of Public Prosecutions* (Unreported, Supreme Court, 5th March, 2008)."

(b) Complainant Delay

23. The issue of complainant delay, that is prior to the commencement of any criminal investigation, was afforded extensive treatment in the decision of *H. v. D.P.P.* [2006] IESC 55. Murray C.J. considered the position as follows:-

"Over the last decade the courts have had extensive experience of cases where complaints are made of alleged sexual abuse which is stated to have taken place many, many years ago. It is an unfortunate truth that such cases are routinely part of the list in criminal courts today.

At issue in each case is the constitutional right to a fair trial. The Court has found that in reality the core inquiry is not so much the reason for a delay in making a complaint by a complainant but rather whether the accused will receive a fair trial or whether there is a real or serious risk of an unfair trial. In practice this has invariably been the essential and ultimate question for the Court. In other words it is the consequences of delay rather than delay itself which has concerned the Court.

The Court approaches such cases with knowledge incrementally assimilated over the last decade in some of which different views were expressed as to how these issues should be approached. In such cases when information was presented concerning the reasons for the delay it was invariably a preliminary point to the ultimate and critical issue as to whether the accused could obtain a fair trial. In all events, having regard to the Court's knowledge and insight into these cases it considers that there is no longer a necessity to inquire into the reason for a delay in making a complaint. In all the circumstances now prevailing such a preliminary issue is no longer necessary. […]

The issue for the Court is whether 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 Court would thus restate the test as:

> *"The test is whether there is a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay. The test is to be applied in light of the circumstances of the case."*

Thus, the first inquiry as to the reasons for the delay in making a complaint need no longer be made. As a consequence any question of an assumption, which arose solely for the purpose of applications of this nature, of the truth of the complainants" complaints against an applicant no longer arises. The inquiry which should be made 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, if any, will depend upon the circumstances of the case.

There is no doubt that difficulties arise in defending a case many years after an event. However, the courts may not legislate, the courts may not take a policy decision that after a stated number of years an offence may not be prosecuted. Also, as the legislature has not itself established a statute of limitations that itself may be viewed as a policy of the representatives of the People. Thus each case falls to be considered on its own circumstances."

24. It is thus clear that each case of complainant delay will come to be considered on its own facts. That is not to say, however, that caveats of a general nature may not be applied. In *P.H. v. D.P.P.* [2007] IESC 3, for example, Hardiman J. suggested that prejudice arising from lost evidence or missing witnesses might be insufficient to prohibit a trial in circumstances where the relevant aspects of a given defence could be proven by alternate means. He stated:-

"It seems to me that the Director has been able to point to the probable availability from other sources of at least the essence of the […] evidence, and that this is sufficient to avoid the inference that there is a real or serious risk of an unfair trial."

(c) The Omnibus Test

25. In addition to the foregoing specific principles relating to the different strands of delay, it is now clear that as a general rule the Court is entitled to consider the cumulative effect of all factors in the case, in deciding whether or not to grant an order of prohibition. This is sometimes referred to as the 'omnibus' test. In *J.M. v. D.P.P.* [2004] IESC 47, McCracken J. affirmed that a court must have regard to "the totality of the circumstances surrounding the proposed prosecution" and affirmed that prohibition could still be granted "even though no single factor would justify [such a remedy]". In *P.T. v. D.P.P.* [2007] IESC 39, the Supreme Court applied this principal in prohibiting the applicant's trial. Denham J. considered the issues in the case as follows:-

> "In this case the factors relevant to the applicant's position are: (i) it is an old case, while this is not unusual in such a prosecution, it is a factor, (ii) the applicant is elderly, in his 87th year, and, (iii) the ill-health of the applicant.
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> On the other hand, the factors relevant to the prosecution require to be considered. There is the public nature of criminal law. Prosecutions are taken on behalf of the People of Ireland by the Director of Public Prosecutions. The court does not interfere lightly with a decision of the Director.
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> Factors may exist, or may develop after a decision has been made by the Director of Public Prosecutions, which would render a trial unjust. The issue in this case is whether such an exception has occurred. In this balancing exercise the court must give consideration to the right of the public to have crimes prosecuted. This is not an absolute, for prosecutions are taken when they are in the public interest. It is part of a justice system which is for the common good, which includes consideration of the constitutional requirement of due process. A prosecution is not an exercise in vengeance. While a court should give careful regard to the position of victims, it must protect the integrity of the justice system as a whole.
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> No single factor renders this case an exception. This decision does not mean that a person may not be prosecuted for a crime committed many years ago, nor that a person in their eighties may not be prosecuted, nor that a person with ill-health may not be prosecuted. It is the cumulative effect of all the factors which bring this case within the category of an exception requiring a balancing exercise to be conducted by the court. Of specific importance is that it is an old case, that the prosecution took some time to mount (I am not finding that there was prosecutorial delay but merely recording the fact of the time lapse), that the applicant is an elderly man, in his 87th year, and that he is in bad health.
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> It demeans a system of justice if its process is one of vengeance, or has such a perception. It evokes concepts of primitive jurisprudence. The People of Ireland under the Constitution require that there be due process in the justice system. The courts are required to protect the integrity of that system, which may mean that in exceptional circumstances a prosecution should be restrained. It is a question of proportionality."

IV. The Decision of the Court

26. It falls to the Court, therefore, to apply the principles which have been outlined above to the circumstances of this particular case. Turning first to the issue of prosecutorial delay, I am not satisfied that the period of some 27 months between the original complaint and the arrest of the applicant is sufficient, of itself, to presume irreparable prejudice and direct the prohibition of the trial. I am also unable to accept that any prejudice arising from this delay in itself, such as the deterioration in the applicant's health, is sufficient to outweigh the public interest that crimes of the utmost gravity should be prosecuted. While the time taken by the Gardaí in the present case to arrest and charge the applicant could be described as less than ideal, the majority of the impediments to his defence had arisen several years prior to the complainant's first formal allegations. The delay to which the court must particularly direct its attention in this case is the precommencement delay *i.e.* the delay prior to the complainant's making her complaint to the Gardaí.

27. It is clear that the greatest part of the prejudice alleged by the applicant was occasioned during the course of the complainant's delay in contacting the authorities. In this period, the applicant's mother and two sisters, each of whom would have been present in the house when the alleged offences took place, have passed away. There is at least some evidence to suggest that they might have supported his version of events and, in any case, they would certainly have been capable of giving testimony of a highly probative value. In addition to these crucial witnesses, it has not been contradicted that two further individuals, who regularly worked at the rear of the house throughout the period of the alleged offences, are also deceased. It is open to doubt how much they could have added to the applicant's defence but their unavailability is nonetheless something to be weighed in the balance. In addition to the death of witnesses, it is equally apparent that the applicant's health has deteriorated considerably throughout the latter portion of the complainant's delay. While I reject out of hand the suggestion that the complainant was guilty of deliberate stalling between the date on which she first made the allegations to her immediate family and the date of her formal complaint, it is undoubtedly the case that the applicant's defence has been significantly prejudiced during that period.

28. The applicant has engaged with the evidence in seeking to illustrate the level of prejudice which arises against him. I am unable to agree with the respondent's suggestion that the applicant might be able to prove his case by alternative means, in the manner envisaged by Hardiman J. in *P.H.*. The sole surviving member of the applicant's household, apart from the applicant himself, is his nephew who was a very small child at the time of the alleged offences. As such, he is unlikely to be capable of giving evidence which would adequately compensate for the loss of several key witnesses who were adults at all material times. Finally, I am unable to conclude that the demonstrable prejudice which has arisen as against the applicant could in some way be avoided or ameliorated by appropriate warnings and directions of the trial judge.

V. Conclusion

29. As observed by Denham J in *D. v. D.P.P.* (cited above) "the applicant's right to a fair trial is one of the most fundamental constitutional rights afforded to persons." It is the mark of a civilized society governed by the rule of law. It requires and it receives the most careful protection not only in the Constitution of Ireland but also in the European

Convention on Human Rights and in constitutions throughout the world. It requires the courts to ensure the maintenance of the highest standards in criminal trials even, indeed especially, in storms of controversy or the hardest of cases. The courts do not lightly interfere with the decision of the Director of Public Prosecutions to bring a prosecution. However, it is ultimately the courts that must decide where lies the balance between society's undoubted interest in the prosecution of serious offences and an accused's right to a fair trial which itself is something in which society also has an undoubted interest. The test to be applied by the Court in determining whether it must intervene where delay is alleged is as set out above in *H. v. D.P.P.* - is there a real and serious risk that the applicant by reason of the delay would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay? The test is to be applied in light of the circumstances of the case.

30. Turning therefore to the facts of this case, the charges made are of the most serious abuse of an innocent child. They relate to a period of time between 31 and 36 years ago. The complainant credibly states that she sublimated terrible memories of these events until 1999. She states that after revealing these events to her family, she was afraid to bring charges because her two aunts, the sisters of the applicant who lived with the applicant in the house in which it is alleged the assaults occurred, would deny the abuse and support their brother. She did not make her complaint to the Gardaí until 5th of February 2005. In the period between 1999 and 2005, these two sisters died – in June 2001 and November 2002. The evidence of these two women would undoubtedly have been of central importance in any prosecution of the applicant on the charges brought in February 2005. No court or jury will now ever have the benefit of any evidence they might have given and any cross examination in respect thereof. There is evidence before this court from both the applicant and the respondent that both women denied the abuse alleged. The loss of this evidence in my view has irretrievably damaged the ability of the applicant to defend himself and must therefore give rise to a real and serious risk of an unfair trial.

31. Taking this finding into account together with the overall delay including the 27 months between original complaint and the arrest of the applicant, his age (now 84 years) and state of health, I am confirmed in my view that the Court's duty is clear. In defence of the integrity of the criminal process and the right of the applicant to a fair trial which, upon the evidence, I find is no longer possible, I must grant the relief sought prohibiting the continuance of the prosecution herein.