Neutral Citation [2013] IEHC 269

**THE HIGH COURT**

**JUDICIAL REVIEW**

**Record No. 2012 348JR**

**Between/**

**SHARON CULLEN**

**Applicant**

**-and-**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**Respondent**

**Judgment of Ms. Justice Iseult O'Malley delivered the 17th June 2013**

**Introduction**

1. This is an application for injunctive and declaratory relief in respect of the intended prosecution of the applicant on two charges arising from a serious assault committed against her father in 1988. The applicant was arrested and charged with these offences in December, 2011. She claims that to prosecute her now after such a lapse of time since the alleged offences amounts to an unwarranted and disproportionate interference with her constitutional rights. The respondent denies any breach of her rights.

**Background**

2. The applicant was born on the 5th of December, 1972. She is the daughter of Christopher Payne Senior and Philomena Payne (now Philomena Coton). She has one younger brother, Christopher Junior. In 1988 the family lived in Crumlin in Dublin. Mr. Payne, who was 37 at the time, suffered from severe renal failure and attended hospital for dialysis three times a week.

3. On the evening of the 13th May, 1988 Mr. Payne went to hospital as usual. Mrs. Payne was out. The applicant was at home with Christopher Junior and a friend of hers named Jennifer O'Dwyer, the sister of the applicant's then boyfriend Jessie O'Dwyer. Late in the evening a number of men came into the house wearing balaclavas. These men were Jessie O'Dwyer (aged 18), Stephen McKeever (aged 19) and two others. It seems to be clear that these others played a peripheral role and it is not necessary to name them for the purposes of this judgment. All of them were recognised and subsequently named by Christopher Junior, then aged 13, who was threatened with a knife by McKeever.

4. The three youngsters were put in one of the bedrooms and tied up. Philomena Payne arrived home at about 11.30 pm and she too was tied up. Mr. Payne came home from the hospital some time after midnight. It appears that he was then subjected to a savage assault by O'Dwyer and McKeever, and suffered serious head injuries.

5. The injuries were not in themselves fatal. Mr. Payne was in a coma for some time, but returned home to his family in September, 1988. He does not appear to have made a full recovery. When he died on the 28th November, 1988 the causes of death were multiple but were stated to include "old head injury".

**The investigation**

6. The officer in charge of the investigation was Detective Garda Gerard O'Carroll. This officer was promoted twice before retirement so to avoid confusion he is referred to as Mr. O'Carroll throughout.

7. As already mentioned, Christopher Junior had recognised all of the men concerned and named them to the Gardaí that day. Later on the 14th May, they were arrested. All made incriminating admissions.

8. Jessie O'Dwyer initially denied being present but said that the applicant had asked him a few times since the previous March to have her father "done" because he was beating her and her mother. He said he found some men who were prepared to do it but they wanted to be paid. On Wednesday 11th May he was in the Payne's house and had a conversation with the applicant and her mother. Mrs. Payne said that she would pay the men out of the insurance proceeds from a burglary some weeks earlier. Mr. O'Dwyer said that he then arranged for the assault to be carried out on the Friday.

9. In a subsequent statement Mr. O'Dwyer admitted his own involvement on the night. He said he was there when the applicant, his sister Jenny and Christopher Junior were tied up and that he got the hammer from the tool-box. Mrs. Payne came home and he asked her "what's the story" and she said "Do it but make sure you get away".

10. In a further statement Mr. O'Dwyer admitted having hit Mr. Payne with the hammer.

11. Stephen McKeever said that about two months earlier he had been asked by the applicant to shoot her father, and that she had repeated this request over the following weeks. She said she would pay him for it. Jessie O'Dwyer told him that he had discussed it with Mrs. Payne and that they would be paid £3,000 out of the burglary insurance. It was agreed that they would do it on Friday 11th May.

12. Mr. McKeever said that when Mrs. Payne came home that night initially she said not to do it, that her husband was dying, but then changed her mind after talking to Jessie.

13. Also on the 14th May, 1988 the applicant went to Crumlin Garda Station, apparently to make a witness statement. According to Garda John Doyle, she made incriminating remarks and he therefore arrested her and had her detained pursuant to the provisions of s. 4 of the Criminal Justice Act, 1984. While in custody she was questioned, in the presence of her aunt Marie Carolan, and is alleged to have made a lengthy inculpatory statement. In it accusations of brutality are made against her father. She says that, initially, she

just wanted her father to be beaten up but she decided that this would not solve the problem. She and her mother decided that they wanted him to be killed and asked her boyfriend Jessie O'Dwyer and Stephen McKeever to do it. She also names the two other men who came to the house with them.

14. The applicant was released from custody on completion of the statement. Garda Doyle says he told her that a file would be sent to the DPP.

15. Jennifer O'Dwyer made a statement in which she said that the applicant had told her more than once over the previous weeks that she and her mother were going to get Mr. Payne killed. She alleged that on the 12th May the applicant told her that she and her mother had arranged to have him shot the following day. When they were in the house on the evening of the 13th May, the applicant said to her "they are doing my Da tonight".

16. Ms. O'Dwyer described the incident as involving four or five raiders. She said that she heard them refer to each other as "Harry", "Paddy One" and "Paddy Two".

She did not say that she recognised any of them.

17. Mrs. Philomena Payne made a statement in which she described the deterioration of the relationship between herself and her husband, who she claimed was sometimes violent to her but not to the children. She said that her daughter would not stay in the same room as him. She said that killing Mr. Payne was her daughter's idea and she went along with it. She said she had no money, and when Jessie O'Dwyer raised the subject on the night she told him so. His reaction, she claimed, was to wave his hand and to say "Forget about it".

18. The investigation file was submitted to the Director of Public Prosecutions on the 23rd June, 1988. However, it appears that directions to charge Mr. O'Dwyer and the other three men had already been given on the 15th May.

19. The four named men were charged and returned for trial to the Central Criminal Court, where the case was listed for trial on the 3rd July, 1989. The Book of Evidence in the case listed the applicant and her mother as prosecution witnesses and they were in attendance in court on that date. On that day the four entered pleas of guilty. The two with the least involvement pleaded to burglary charges. Jessie O'Dwyer and Stephen McKeever pleaded guilty to assault with intent to do grievous bodily harm. On the 27th July the two who pleaded to burglary received suspended sentences. Jessie O'Dwyer and Stephen McKeever each received sentences of over nine years.

20. It appears that on the 25th of July, 1989, after the men pleaded but before they were sentenced, the DPP issued directions to charge the applicant and her mother. The directions in respect of the applicant were to charge her with assault causing grievous bodily harm with intent to murder contrary to s.11 of the Offences Against the Person Act, 1861and assault causing grievous bodily harm with intent to do grievous bodily harm contrary to s. 18 of the same Act. On the 16thAugust, 1989 Mr. O'Carroll obtained a warrant to arrest the applicant. The warrant refers to the applicant as being of "No Fixed Abode". It was not executed as in fact she and her mother had by then left the jurisdiction.

**The case review**

21. It appears that the Serious Crime Review Team undertook a review of the case in November, 2009. During the course of this exercise a number of people were interviewed. Jessie O'Dwyer made a fresh statement in which he repeated the assertion that he carried out the assault because the applicant asked him to kill her father. She told him that her father was beating her and sexually abusing her, and also beating her mother. He said that Mrs. Payne told him that she wanted him to get rid of her husband and promised him £3,000 which she would pay from the life insurance when he was dead. He discussed the proposition with Stephen McKeever, who he says had also been approached, and they made a plan to shoot Mr. Payne. They wanted money up front from Mrs. Payne but she said that she did not have any and that they should burgle the house and take what they wanted. They did as she suggested, not long before the 13th May.

22. Mr. O'Dwyer described, again, going to the house with the other men. He said that he spoke to Mrs. Payne before her husband came home and asked her if she still wanted the job done. Se said "Yeah but do it quickly no pain". He then described the assault.

23. Mr. O'Dwyer stated that he would never have done it if Philomena and Sharon Payne had not asked him.

24. Jessie O'Dwyer's sister Jennifer also made a fresh statement in May, 2010. She now concedes that she knew who the four men were at the time. She describes the events of the night in greater detail than her 1988 statement and includes an allegation that, at Mrs. Payne's request, Christopher Junior was knocked unconscious with the hammer so that he would not hear people addressing each other by name. (It should be noted that this was not said by Christopher and he does not appear to have received any medical treatment on the night.) She says that each of the four men were under the influence of drugs, that they tried to back out at one stage but that Mrs. Payne insisted that they carry on. She further says that each of the men was supposed to receive £10,000 from the life insurance on Mr. Payne.

25. Christopher Payne Junior was spoken to but said that he had put the whole incident behind him and did not want to have anything further to do with the case.

26. Meanwhile, in January, 2010 the Gardaí spoke to Christopher Payne's brother Geoffrey to notify him of the review. He told them that the applicant was married and living in Ireland.

27. In early 2010 the Gardaí located the applicant in Co. Cavan, where she has lived with her husband and children since 2004. She was not arrested or spoken to at this time.

28. An updated file was sent to the DPP in July, 2011. In December 2011 the DPP directed the Gardaí to proceed with the original charges. The applicant was arrested and charged on the 19thDecember, 2011.

**The evidence in the application**

29. Affidavits have been sworn by the applicant, her solicitor, her uncles Geoffrey Payne and Patrick Carolan, Mr. Gareth Henry, a Senior Prosecution Officer of the office of the Director of Public Prosecutions, Detective Superintendent Brian Sutton and Mr. Gerard O'Carroll. The Book of Evidence relating to the charges against the applicant has been exhibited. The Book from the original trial has also been made available.

**The applicant's case**
30. The applicant's original affidavit appears to have been sworn under the impression that a decision had been made at the time not to prosecute her, and that this decision had been changed in more recent times. That was not in fact the case.

31. The applicant says that she and her mother remained in Ireland after the events of the 13th/14thMay, 1988. They attended court for the trial of the four men on the 3rd July, 1989, ready to give evidence if required. After the pleas were entered they were told that they would not be required. The applicant says that she recalls her mother asking two Detective Gardaí, Cornelius Condon and Noel White, "Where should we go now?" and getting the response that they "could go home or wherever they wanted." She states that she remembers these words distinctly because they had been aware that they could not leave while the court case was pending.

32. She says that shortly after, probably in late July, her mother took herself and her brother to England "to start a new life". This, she says, was partly because of the painful memories in Dublin and partly because the family had been getting threats from relatives of the men who had been convicted and imprisoned. These threats took the form of causing fire-engines and ambulances to be sent to their address on Friday nights.

33. In England, her mother applied for accommodation and they were housed in Coventry, by Coventry City Council, in the name of Payne. In 1990 the applicant had a child by her then boyfriend, now husband, Con Cullen, and got her own accommodation and child benefit in the name of Payne. She says that she worked in various jobs and paid tax under the name Sharon Payne. She has exhibited documents indicating that she sat and passed her driving test and had a bank account in that name.

34. Philomena Payne remarried in 1991, to a cousin of her late husband named Geoffrey Coton, and took her new husband's name.

35. The applicant married Con Cullen in 1995 and has, for the most part, used the name Cullen since then. She says that she frequently travelled between Ireland and England for holidays and to see family members. She maintained contact with her uncle Geoffrey Payne, her father's brother, and he attended the christening of her first child.

36. The applicant says that she got her first passport in 2002/2003 and that, at her request, her maiden name was noted on it. This claim has been persistently denied by the Gardaí, who are in possession of the passport. The applicant's solicitor has exhibited a letter from the Passport Office of the Department of Foreign Affairs supporting the applicant's position. The passport was produced in court. It does indeed bear an annotation to the effect that the holder's birth name was Sharon Philomena Payne.

37. In 2004 she and her husband decided to move to Ireland with their two children. They eventually established themselves in Co. Cavan, where they both got employment. Both of them worked, legitimately and openly, until made redundant in the recent past. The applicant applied for a PPS number and for this purpose gave her maiden name and her last address in Ireland, which was the family home in Crumlin. She applied for Child Benefit in 2005 and this was, for some time, paid to her in the name of Sharon Payne until the surname was updated to Cullen in 2008.

38. In 2006 the applicant's paternal grandmother died and she attended the funeral in Dublin. She says that this was a small gathering of about thirty people and that she sat in the front row with the family.

39. The applicant does not in her affidavits deal with the substantive allegations against her. She does to some extent dispute the contents of the statement attributed to her, stating that it does not reflect the language of a 15-year old. She further says that, although her memory is affected by the passage of time, she believes that she was questioned on her own for at least some period of time, in the absence of an appropriate adult. She points to certain ambiguities in the Custody Record in this regard. She states that she recalls a Garda spitting at her and blowing cigarette smoke in her face. Specific prejudice is asserted in relation to her position in challenging the statement in that her aunt, Marie Carolan, who is said by the prosecution to have been present throughout the interview, is now in poor health and unable to recall the occasion.

40. Geoffrey Payne, the brother of the late Christopher Payne, has deposed that he spoke to Mr. O'Carroll in September 1989 and was told that the investigation was still ongoing in respect of the involvement of his sister in law. He says that he told the detective that Philomena had moved to the United Kingdom with her children. He says that no reference was made by Mr. O'Carroll to Sharon at that time. He confirms that the applicant attended his mother's funeral, sat close to him and went with the family to a public house afterwards. He also confirms that he has maintained contact with her over the years, visiting her in both England and Ireland.

41. Mr. Payne says in his affidavit that he was contacted by the Cold Case Review team in 2009 and that they inquired after the applicant. He told them that she was married and living in Ireland. He maintains that he was not asked for her address and would have had no difficulty in providing it if it had been requested.

42. A statement made by Mr. Payne to the Gardaí on the 10th March, 2010 has been furnished. In it he makes it clear that he believed that the applicant and her mother were involved in the assault on his brother. He has no contact with his sister in law for that reason. However, he has kept in touch with his niece, the applicant, and with her brother, who he regards as another victim of the events in 1988. He relates the contact he has had over the years. He says that he was invited to the wedding of the applicant and Con Cullen (to whom he refers by name). He says that in 2005 the applicant rang him and told him she was now living in Ballyjamesduff in Co. Cavan. He refers to the fact that, at the time of making this statement, the applicant's daughter was living in a house owned by him while attending college in Dublin. He said that he spoke to the applicant every two or three days.

43. Patrick Carolan, the husband of the applicant's aunt Marie Carolan, says that he was contacted by Mr. O'Carroll in August or September of 1989. He told him that Philomena Payne and her family had moved to the United Kingdom. Mr. O'Carroll stated that he had been informed by a source that they were in Germany but Mr. Carolan told him that this was wrong. He says that he would have given the English address if asked. Mr. Carolan further says that he met the detective in December of 1993 at a social event. Mr. O'Carroll again said that he believed that the family were in Germany to which Mr. Carolan replied that they were in Coventry. He was not asked for the address.

44. Mr. Carolan also deposes that in 2005 his wife Marie, who had been present when the applicant was interviewed, suffered a series of seizures and mini strokes. She was diagnosed with Saggital Sinus Thrombosis and requires ongoing medical treatment. In 2011 she was contacted by the Cold Case team but declined to make a statement.

**The respondent's case**
45. Mr. Gareth Henry of the office of the Director of Public Prosecutions has sworn an affidavit based on his review of the file. He says that the file was received in late June of 1988 and that at that time consideration had to be given to the position of a number of

suspected parties - Mr. O'Dwyer, Mr. McKeever, the other two men, the applicant and her mother. Somewhat confusingly, he says that directions were given to charge the four men on the 15th May after consideration of the file. He further says that consideration was given to charging the applicant and her mother in 1988 and 1989 but queries were raised in late 1988/early 1989 in relation to "certain aspects" of the investigation into the applicant's involvement.

46. Mr. Henry says that Jessie O'Dwyer and Stephen McKeever were regarded as important witnesses as against the applicant and her mother but that they would not have been available during the course of their own prosecution. Once they had pleaded, and the queries had been clarified, directions were given to charge the applicant on the 25th July, 1989. However at that stage the applicant could not be located.

47. Mr. Henry says that an updated report was received by his office in or around May, 2006. The applicant had still not been located.

48. A further file was forwarded from the Gardaí to the office of the DPP in July 2011. That office raised queries which were responded to in October of that year. On the 3QthNovember, 2011 directions were issued to proceed with the charges originally directed.

49. Detective Superintendent Brian Sutton has sworn three affidavits in the proceedings. The first is sworn for the purpose of verifying the contents of the Statement of Opposition. In that document it is asserted that the applicant "fled" the jurisdiction to avoid being charged; that she had been told after questioning that a file would be sent to the DPP and must, therefore have known that she could very well be charged; that efforts were made throughout the period of time to located her; that an "extensive surveillance operation" was set up to watch the funeral in 2006 but without success; that the applicant's passport was in her married name and that the applicant used her married name in England and Ireland so as to avoid the possibility of arrest.

50. In his second affidavit the Superintendent refers to the claim that the applicant and her mother were told by Gardaí Condon and White that they were free to go where they wished. He says that Garda Condon has no recollection of the conversation. Detective Garda White similarly has no recollection but accepted that the words could have been said, given that no directions had been issued. In this regard, Superintendent Sutton says that the applicant's version is not reliable because it differs from the statement in a letter written by her mother's solicitor in England that Mrs. Payne "was informed by a police officer that her involvement in the enquiry had come to an end".

51. The Superintendent's affidavit also deals with Garda activity since the applicant and her mother left the jurisdiction in 1989. It is said that enquiries carried out locally at the time resulted in information that the family might be in either Germany or the UK but there was nothing definite. A request for assistance was put out through "FograTora" in December, 1989 and this was sent to, *inter alia*, the police forces of England, Scotland and Wales. Apart from that, the only evidence as to enquiries made comes from Mr. O'Carroll, who says that he remained in contact with Marie Carolan in the belief that she would contact him if she became aware of the whereabouts of the applicant. He also says that he "put out feelers with informants who were providing him with information on criminal activity". He continued to enquire from informants up to the time of his retirement in 2000. It is denied by him that Patrick Carolan told him that the family had not gone to Germany but was in Coventry. On the contrary, he says that Marie Carolan told him in the early 1990s that Philomena and Sharon Payne were in Germany but that she did not have an address for them.

52. There is no suggestion that any family member was ever told that arrest warrants were in existence for the applicant and her mother.

53. Detective Superintendent Sutton stresses that the Gardaí were looking for the applicant under the name Sharon Payne. He notes the fact of her marriage to Con Cullen and then specifically avers that "it is the belief held on the part of the investigation team that the Applicant's use of her married name hindered attempts to locate her and that the use of her married name was a device to assist her in her attempts to avoid arrest."

54. It is averred that in April 2006 the Gardaí expected the applicant to attend her grandmother's funeral and put in place what is described as an "extensive" surveillance operation at the church. The applicant was not identified at the funeral.

55. It is further averred that the Gardaí were unaware of the fact that the applicant was resident in the State until 2010. In that year Geoffrey Payne was spoken to and he said that she was in Ireland but not in the Dublin area. It is averred, despite the contents of the statement as summarised above, that he did not give the Gardaí her married name or her address. "Subsequent" enquiries located a Sharon Cullen in Co. Cavan and "further" enquiries established that she was Sharon Payne.

56. Detective Superintendent Sutton has in each of his affidavits specifically denied the applicant's claim that her maiden name is noted on her passport, going so far as to say that the Gardaí "can definitively state that there is no record of her maiden name Payne recorded on this passport".

57. As mentioned already, the passport has been produced in court and does record that the birth certificate name of the holder was Sharon Philomena Payne.

58. The explanation for not arresting and charging the applicant in 2010, despite the existence of the arrest warrant, is that it was necessary to review the case to ensure that the Gardaí still possessed the necessary proofs for a prosecution and consider whether any further evidence was available. An updated file was submitted to the DPP on the 11th July, 2011. After a request for further information had been responded to in October, 2011 directions were received in December of that year. A fresh warrant was then sought and duly executed.

**Evidence in relation to the applicant's admissions**

59. According to the statement of Garda John Doyle, the applicant was in Sundrive Road Garda Station on the 14th May, 1988 with her aunt Marie Carolan, to be interviewed as a witness. During the interview she made incriminating remarks and at 5.25 p.m. he arrested her for assault occasioning actual bodily harm. He says that he cautioned her and explained the caution to her and to Mrs. Carolan. He requested the member in charge, Sergeant Brendan Burke, to detain her under the provisions of s. 4 of the Criminal Justice Act, 1984 and this request was acceded to. It is noted on the Custody Record that the applicant's mother was contacted at 5.48 p.m. This note is followed by the name, in brackets, of a solicitor but there does not appear to have been any contact made with that or any other solicitor.

60. Garda Doyle then brought the applicant and Mrs. Carolan to an interview room, accompanied by Garda Mary Boyle. He says that the applicant had been given a copy of Form C. 75 (the notice of rights for people in Garda custody) and that he explained it. Both the applicant and Mrs. Carolan said that they understood.

61. Garda Doyle then took a cautioned written statement. As was the almost invariable practice in the days before the video-taping of Garda interviews with suspects, the memorandum consists of a statement which the applicant is said to have narrated. In this case it runs to six typed pages. Garda Doyle says that this process took from 5.50 p.m. to 9.05 p.m. The statement was read over and the applicant was invited to make any alterations or additions she deemed necessary. At 9.40 p.m. Sergeant Burke came into the interview room and offered to get refreshments. This was declined but Mrs. Carolan asked for a drink of water. According to the Gardaí they were then both informed of their rights, to which the applicant's response was "what do I want a solicitor for?" At 10.39 p.m. she was released without charge and Garda Doyle told her that a file would be sent to the Director of Public Prosecutions for directions.

62. There is no statement in the Book of Evidence from Sergeant Burke, presumably because he is no longer available as a witness.

**Submissions on behalf of the applicant**
63. On behalf of the applicant Mr. O'Higgins SC says that the delay in this case has been gross, unexplained and particularly blameworthy. He distinguishes it from the cases involving old sexual offences, where there is frequently a long delay before complaint is made to the Gardaí, and relies on the authorities relating to prosecutorial delay, delay in the execution of warrants and the duty to have regard to the early trial rights of a child offender. In particular he cites *B.F. v. DPP* [2001] 1 I.R. 656; *Donoghue v. DPP* (unrep., Birmingham J., February 2013), *Devoy v. DPP* [2008) 41.R. 235, *S.H. v. DPP* [2006] 3 I.R. 575, *Noonan v. DPP* [2007] IESC 34, *PT v. DPP* [2007] IESC 39 and *A.C. v. DPP*

64. Mr. O'Higgins stresses the fact that neither the applicant nor any member of the family knew that there was in existence a warrant for her arrest. He argues that the Gardaí effectively did nothing after the departure of the applicant and that there is no explanation for the failure to make proper contact with the police, tax or social welfare authorities in England. There was no effort made to keep contact with the family of Mr. Payne, in particular his brother Geoffrey.

65. It is contended that the applicant has suffered actual prejudice in that she would want to contest the admissibility of the alleged admissions. It is further submitted that prohibition may be granted notwithstanding the existence of admissions. In this regard reliance is placed on the case of *Braddish v. DPP* [2001] 3 IR 127.

66. Further, it is said that the applicant is prejudiced by the loss of the protections that would have been afforded to her as a child being tried for a criminal offence.

67. Mr. O'Higgins submits that if prejudice is not found to have been established this is, nonetheless, a wholly exceptional case whose facts warrant injunctive relief. He points to the life of the applicant- she is now 40 years old, is married with two children and has a good work history.

**Submissions on behalf of the respondent**
63. The respondent argues that the applicant has failed to discharge the onus of showing that there is a real risk of an unfair trial, which cannot be cured by appropriate rulings and directions from the trial judge. This is in part because she has failed to engage with the evidence actually available so as to make the risk apparent.

64. The case involves serious charges and there is a public interest in having them tried. It is for the trial judge to rule on admissibility of evidence, including the admissibility of the applicant's statement, to direct a verdict of not guilty where such is warranted and to prevent an abuse of the court's process should it appear that there is any unfairness incapable of remedy.

65. It is submitted that the respondent and the Gardaí were not at fault in relation to the lapse of time in the case but in the alternative, if there is a finding of blameworthy delay, that does not necessarily mean that the trial cannot proceed unless one of the interests protected by the right to an expeditious trial can be shown to have been interfered with.

66. The respondent does not accept that there is any prejudice arising from the fact that the applicant would have been tried as a minor if charged at an early stage and says that any sentencing implications can be taken into account if she is convicted.

67. Mr. Devally SC has, at the hearing, disavowed some of the more extreme positions taken in the Garda affidavits. He accepts that the applicant was still a minor when she was taken from the jurisdiction by her mother, who was lawfully entitled so to do. He further accepts that she has lived openly since and that no contrary inference can be drawn from the use of her married name. The fact of the annotation on her passport is, belatedly, accepted.

68. However, he makes the point that her departure was the primary event giving rise to delay and took place at or about the time the decision was made to prosecute her. If she had not left at that stage, the delay on the part of the prosecution authorities would have been in or around 14 months. That delay, he accepts, would in the case of a child of that age call for explanation but he says that a satisfactory explanation has been given by Mr. Henry from the office of the DPP- that the DPP wished to have Mr. O'Dwyer and Mr. McKeever available as witnesses. It is submitted, in reliance on *Kennedy v. DPP* (unrep., Supreme Court, 7th June, 2012), that this was a decision that the Director was entitled to make.

69. It is also urged on the court that the applicant must have been aware at the time she left that she might be charged, given the admissions she had made. The fact that she has not contested the substance of the statement, or addressed the proposed evidence of Jessie and Jennifer O'Dwyer, is also stressed.

70. As far as the delay after the applicant's departure is concerned, it is submitted that what was standard at the time was done. The Gardaí had no idea where she had gone and did not have available to them the modern methods used in such cases. Mr. Devally says that for a long period the Gardaí confined themselves to enquiries in the local area but then a "more sensible approach" located the applicant in Cavan.

71. It is suggested that this may be a case of "no-fault" delay.

72. If a balancing exercise is to be carried out it is submitted that the court must take into account the respondent's view that the applicant, at the age of 15, conceived of a plan to recruit people to kill her father. She expected him to be shot. As against that high level of criminality, the failure of the Gardaí to find her before now should not have great weight in the balancing exercise. The prejudice contended for, in relation to the admissibility of the statement, has not been established and in any event the issue, along with the issue of the fairness of the trial process, is properly a matter for the trial judge.

**Discussion**

73. The authorities in relation to delay in the prosecution of criminal offences start from the proposition that the constitutional right to a trial in due course of Jaw includes a right to an expeditious trial. The existence of this right is firmly established in Irish Jaw since the case of *State (O'Connell) v Fawsitt* [1986) I.R. 362 in which the analysis of the United States Supreme Court in *Barker v Wingo* [1972) 407 U.S. 514 was adopted. At its simplest, this concept means that blameworthy prosecution delay which results in actual prejudice to the defence such as to give rise to a real and serious risk of an unfair trial will always entitle the defence to injunctive relief.

74. The experience of the courts in dealing with child abuse cases, particularly from the 1990s onwards, brought about a greater understanding of the causes of delay in making complaints in sexual cases. The result was a shift in emphasis, away from the fact of delay, and the question whether there was a blameworthy reason for it, and towards a focus on the effect of delay on the rights of the defendant. The general principle in such cases, established by the Supreme Court in *S.H. v. The DPP* [2006) 3 IR 575 is that relief will only be granted where the applicant can show a real and serious risk of an unfair trial. The factors to be considered will always include the duty and power of a trial judge to give appropriate rulings, and if necessary a direction to acquit, to ensure the fairness of the trial process. The situation now is that the trial courts are, therefore, accustomed to dealing with allegations of sexual offences dating back many decades.

75. However, most of the cases dealing with allegations of non-sexual offences involve accusations of prosecutorial delay, where the concept of blameworthiness in relation to delay is still relevant, although not conclusive.

76. It seems to me that the significant features of this case are as follows:

a) The applicant was aged 15 at the time of the assault. b) She is charged with very serious offences.

c) There is evidence that she made admissions in relation to the offences.

d) The relative who was present while the admissions were made is unlikely to be able to give evidence.

e) The Director of Public Prosecutions made a decision not to charge her until after the trial of the men who actually carried out the assault.

f) The applicant was not aware that directions had been given to charge her. g) By the time the Gardaí applied for a warrant to arrest her for the purpose of charge she had left the country.

h) The applicant has lived an open and blameless life since then.

i) The Gardaí did not locate her for 21years.

j) The DPP did not give further directions to charge her for nearly two years after that.

77. I propose to consider the principles applicable to these features in turn.

The age of the applicant

78. The leading authority in relation to delay in prosecuting young persons is the Supreme court decision in *B.F. v. DPP* [2001] 11.R. 656. That case concerned a boy of 14 who was alleged to have committed very serious offences of a sexual nature against two little girls in 1995. When interviewed by the Gardaí not long afterwards he admitted the activity, although denying coercion - as noted in the judgment, this would have afforded him no defence. He was not charged at the time and his mother decided to take him to England. There was, apparently, a dispute in the evidence as to whether the Gardaí had given her any grounds to believe that her son would not be charged or that going to England was a good idea, but the finding of the Court was that she was not in any sense a fugitive. The Gardaí were kept aware of the family's whereabouts. In February, 1998 he was arrested for the purpose of extradition and he returned to Ireland voluntarily in August of that year. He was charged and returned for trial to the Central Criminal Court.

79. At issue in the case, therefore, was a delay of two years and nine months between the obtaining of the necessary evidence against the applicant and his arrest in February, 1998.

80. In giving the judgment of the Court Geoghegan J said at p. 663

> *"Before the question of prejudice is considered it is necessary to ask the question was the delay excessive and inexcusable? It is part of the submission of the appellant that in considering this issue the special circumstance of the age of the alleged offender must be taken into account. While there does not appear to be any authority on this precise point, I think that the argument is well-founded. This was a case where on all the evidence it appears to have been a somewhat marginal decision as to whether a prosecution should have been brought at all. While from the point of view of the parents of the victims, the offences understandably seemed horrific, it may well be that there was no serious criminal intent on the part of the appellant. It is obviously impossible to predict how the evidence would unfold at a trial, but even upon conviction it might well be a case where a custodial sentence would not be imposed. A case of this kind should be handled by the prosecuting authorities with the utmost sensitivity, and it is only fair to say that some sensitivity was shown in this case. But in one area there was default. It was of the utmost importance that if it was decided to proceed with charges, there should be no delay so that a trial would take place while memories were fresh and while the applicant was reasonably close to the age at which he is alleged to have committed the offences. A trial of an adult in respect of an offence which he committed as a child, and particularly a sexual offence, takes on a wholly different character from a trial of a child who has committed such offences while a child. This is true quite independently of the different penal provisions applicable to a child or young person a point also relied on by the appellant. There was, in my view, a special obligation of expedition in this case, but that obligation was not complied with in that the extradition proceedings were allowed to take an excessive length of time, and this delay appears to have been inexplicable."*

81. The judgment goes on to refer to the authorities dealing with the right to an expeditious trial. The Court took the view that neither actual nor presumed prejudice was in all cases essential to stop a prosecution and that culpable delay on the part of the State authorities might, having regard to all of the circumstances of the case, in itself entitle the accused to an order preventing the trial.

82. On the facts of the particular case, it was held that in the case of a criminal offence alleged to have been committed by a child or young person, there was a special duty on the State authorities over and above the normal duty of expedition to ensure a speedy trial.

83. It should be noted that this was a case where there was no allegation of prejudice on the part of the applicant.

84. In *Jackson v. DPP* and *Walsh v. DPP*, (both unrep., Quirke J., 8th December, 2004) the two applicants had been aged 15 and 16 respectively at the time of the (unrelated) offences of violent disorder alleged to have been committed by them. In the first case, the applicant Jackson had been arrested and made admissions about three weeks after the incident giving rise to the charges. An arrest warrant was not sought for another year and a half. Some months later the matter was struck out in the District Court for failure to serve a Book of Evidence. He was rearrested and recharged about 10 months later.

85. The explanation offered for the delay consisted of a combination of the prosecuting officer's inexperience, events in her personal life and the understaffing of the Chief State Solicitor's Office.

86. The second applicant, Walsh, was arrested about a year and a half after the incident giving rise to charges against him. His solicitor had, over a year earlier, written to seek the execution of any outstanding warrants and the applicant had, in the meantime, spent periods of time in custody.

87. The same Garda officer was involved in this case as in Jackson's.

88. The argument was made by the respondent that the principle identified in B.F. should be applied only to sexual offences committed by a child. It was submitted that violent disorder was in a different category and that the right of the community to bring the offenders to trial had greater weight. In rejecting this submission and in granting relief, Quirke J. said

> *"It is no secret that persons in their late teenage years have particular vulnerabilities. These vulnerabilities can be compounded by difficult or deprived family or social circumstances and by a variety of other causes. The interests of the community will not be served by subjecting such persons to substantial delay in confronting them with complaints of criminal activity made against them.*
>
> *The interests of the community will surely be better served by efficient action on the part of the State authorities designed to ensure that young persons acquitted of criminal offences may be enabled to resume normal life and those convicted may be dealt with in such a manner as to reduce the risk to the community of further criminal activity...*
>
> *...I take the view that where a criminal offence is alleged to have been committed by a child or young person there is always a special duty upon the State authorities (over and above its fundamental duty) to ensure the speedy trial of the child or young person in respect of the charges preferred."*

89. In both cases Quirke J. considered that the breach of that duty was sufficiently grave to warrant an order preventing the trial despite the absence of prejudice.

90. I have also been referred to a note of an ex tempore judgment of Birmingham J. delivered on an unspecified date in February, 2013 in a case entitled *Patrick Donoghue v. DPP.* The note is not approved, but Counsel for the Director in this case has not taken issue with it. The facts in the case involved a search of the applicant's home and the finding therein of a substantial amount of heroin, said to have been worth €7,560. The applicant, who was aged sixteen at the time, made admissions there and then, and, having been arrested, repeated those admissions at interview. However, he was not charged for about 16 months after the date of the search. The delay appears to have resulted from, firstly, the need to get directions from the National Juvenile Office and secondly, completion of the investigation file by obtaining statements from two Garda officers. When the file was finally submitted to the DPP directions were forthcoming almost immediately.

91. Birmingham J. said that he was in no doubt whatever that there had been significant, culpable prosecutorial delay. He referred to the judgments of Geoghegan J. and Quirke J. dealt with above as confirming the particular and special duty on state authorities to provide a speedy trial for a child or young person. He stressed the fact that it was very much in the interests of young people and indeed society as a whole that the Juvenile Liaison Officer Scheme should be explored and accepted that this could take some time. However, the unacceptable portion of delay related to the two Garda statements, which should not have delayed submission of the file.

92. Significantly, Birmingham J, approached the case on the basis that it would in all likelihood have been dealt with by way of a plea of guilty, having regard to the admissions made by the applicant. He considered that if, on the other hand, it were to be fully contested there was no reason to believe that the applicant would have experienced any specific prejudice in relation to defending a trial. However, had the applicant been charged within a realistic timeframe (which in that case was considered to be four to six months) and the case progressed in the usual way, he would have benefited from the various protective provisions of the Children's Act, 2001 and would have had a far greater chance of being dealt with in the District Court. Even if dealt with in the Circuit Court, the focus of a sentencing hearing would have been on the rehabilitation of the young offender. If two years or more were to be lost then the capacity of the court to intervene effectively would be greatly reduced.

93. An authority against the applicant is the case of *McArdle v. DPP* (unrep., Hedigan J., 5th July, 2012). The applicant had complained that a five year delay meant that he would be giving evidence as a man in his early twenties rather than as a 16- year old, and that if convicted he would no longer be subject to the sentencing regime for juveniles. Hedigan J. held that both of these matters could be properly dealt with by the trial judge - in the first instance, by appropriate warnings to the jury and in the second, by taking into account the applicant's age at the time of the offence. However, it is highly relevant that this was a case where Hedigan J. had found that there was no blameworthy delay on the part of the prosecution authorities. The applicant had been the subject of a referral to the Juvenile Liaison Scheme; there had been adjournments on his behalf to get reports and seven bench warrants had been issued for him over a period of fourteen months.

94. It is clear, therefore, that in the consideration of charges against the applicant the Respondent was under a particular duty to deal with her case expeditiously.

**The seriousness of the offences**

95. Where it is necessary to carry out a balancing exercise (that is, in cases where it has not been established by the applicant that there is a real risk of an unfair trial) the applicant's rights are to be balanced against the community's right to prosecute and convict

those guilty of criminal offences. The principle contended for by the respondent here is that the more serious the offence, the greater the public interest in having the charges brought to trial. The authority cited is the judgment of Kearns J. in *Devoy v. DPP* [2008] 4 I.R. 235 and in particular a passage at p. 255:

> *"Under our jurisprudence, as noted by Denham]. in D.C. v. Director of Public Prosecutions [2005] IESC 77, [2005] 4/.R. 281 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."*

96. The charges against the applicant in the instant case are undoubtedly serious. So too, however, were the charges of rape against the applicant in *B.F.* and, albeit on a lower level, the offence in *Donoghue*. It seems to me, therefore, that the weight to be given to this factor is of a lesser magnitude in cases involving young offenders.

**The evidence of admissions and the unavailability of the applicant's aunt**
97. The authorities show a clear divergence, in relation to the weight to be given to admissions, between the delay cases involving adults and those involving children and young persons. In a number of cases involving adult applicants, it has been stressed that admissions are a highly relevant factor. In *S.A. v. DPP* [2007] IESC 43 Hardiman J. remarked that

> *"...It would in my opinion be extraordinary to prohibit a trial in circumstances where the defendant admits a significant amount of behaviour of a criminal nature.*
>
> *While this confession may be challenged and perhaps even ruled out in the criminal trial itself, no challenge of any sort has been made to its admissibility and accuracy up to the present time. The applicant merely asserts, without more, that he is not guilty of the offence. It must therefore be seen as a factor of relevance to be taken into account in the balancing exercise."*

98. This passage was referred to in *Devoy*, where a full confession had been made. However, in the cases of *B.F.*, *Jackson* and *Donoghue*, referred to above, admissions had been made and indeed Birmingham J. in Donoghue expressly dealt with the case on the assumption that the applicant would have followed through on his admissions and would have pleaded guilty.

99. The applicant in this case has not directly engaged with the substance of the admissions attributed to her but, rather, asserts matters going to their admissibility. She claims to be prejudiced in this regard because, she says, her aunt Marie Carolan has a medical condition which would prevent her from giving evidence. No medical evidence has been adduced in this regard such as might enable the court to make a finding as to her unavailability, and it is in any event a matter of speculation what her evidence might be.

100. It is clear from the authorities in general that it is not appropriate to embark upon consideration of the admissibility of evidence in an application of this nature. I should therefore treat this as a case where admissions have been made.

101. However, it may be that different considerations apply where the prejudice asserted is a handicap in challenging the admissibility of evidence because of the unavailability of a witness whose testimony would be directed to that issue. I do not wish to be taken as deciding that question and I would in any event hold that it has not been established that Mrs. Carolan's unavailability is a cause of prejudice. If entitled to consider the potential evidence as to admissibility, I would make the comment that, as the evidence stands, there are frailties in relation to the proof of the legality of the applicant's detention under the provisions of s. 4 of the Criminal Justice Act, 1984. If that is so, it is nothing to do with any potential evidence that Mrs. Carolan might give. Having regard to this fact and to the uncertainty as to what her potential evidence would be I do not consider that the applicant has discharged the burden of showing prejudice on this aspect.

**The decision of the Director not to charge the applicant until after the trial of the men**
102. Mr. Henry, having reviewed the file in the Director's office, has averred that the question of charging the applicant was under consideration for some time. He has specifically averred that an important factor was the desirability of having Jessie O'Dwyer and Stephen McKeever available as witnesses against the applicant, which, it was considered, would not be possible until their own proceedings had concluded. The direction to charge her was therefore not given until after they had pleaded guilty.

103. In *Kennedy v. DPP* (unrep., Supreme Court, 7th June,2012) the applicant had been charged on the 22nd October, 2010 with offences of corruption alleged to have been committed on dates in 1992 and 1997. The alleged offences concerned planning decisions which were the subject of investigation by the Tribunal of Inquiry into Certain Planning Matters and Payments. The Director had given directions in the applicant's case in June, 2010. A major part of the justification for the delay was that the prosecution wished to have available to it the evidence of Frank Dunlop, which was not possible until Mr. Dunlop's engagement with the Tribunal had concluded and he himself had been prosecuted. Mr. Dunlop pleaded guilty in his own case in January, 2009 and was sentenced in May, 2009.

104. A majority of the Supreme Court considered that the DPP was entitled to await the conclusion of Mr. Dunlop's trial, on the basis that, if he had been called as a witness against the applicant before his own case had been dealt with, there could have been a perception that his evidence was affected by the desire to gain some benefit for himself.

105. In the instant case, it is easy to understand why Mr.O'Dwyer and Mr.McKeever were charged more or less immediately, when they had made admissions as to their role - there was nothing complex about the nature of the charges against them, given the evidence. The question of whether to charge the applicant, and if so what charges to prefer, was obviously more complicated given that she took no physical role in the incident. In the event, she was charged as a principal.

106. I think that it is implicit in the reasoning of the Director in this case that the prosecution wanted to call the applicant as a witness in the trial of the four men and did not, therefore, want to charge her until that trial was concluded. That means that a decision was made as to which trial took priority. That is understandable, given that Mr. O'Dwyer and Mr. McKeever were the persons who actually carried out the attack.

107. However, the difficulty that presents itself is that the applicant was 15 at the time, while Mr. O'Dwyer and Mr. McKeever were, respectively, 18 and 19 years old. The choice that the Director made at the time therefore involved a conscious decision to delay the prosecution of a young person until the conclusion of proceedings against persons who were, in law, adults.

**Events after the decision to charge the applicant**
108. It is clear on the evidence that neither the applicant nor her mother were told that a decision had been made, or even that it

was likely or possible that a decision would be made, to charge them in relation to the assault. Mrs. Payne took her two children and left the country at a time when this was perfectly lawful. The efforts by the Gardai, on affidavit, to portray this as the applicant fleeing the country to avoid prosecution, are to my mind misguided. She was 16 at the time and still subject to her mother's control.

109. It seems to me that the evidence thereafter speaks for itself. There was no real effort to find the applicant, who was living openly in England under her own name and engaging with public authorities on a day-to-day basis. The assertion that, after her marriage in 1995, she used her married name as a device to evade detection is quite rightly disowned by Counsel. The persistent denial of her truthful claim to have had her maiden name marked on her passport is, to my mind, a matter of real concern. The fact that she moved back to Ireland in 2004, worked and paid taxes with the same PPS number as she had had all along is another indication of failure on the part of the Gardai to keep investigative channels open.

110. It must be remembered that this is a case where there was a warrant issued by a court to arrest the applicant in existence since 1989. Cases involving warrants are subject to the particular requirement that the warrants be executed promptly.

111. In *Cormack v. DPP* [2009] 2 I.R. 209 the Supreme Court considered two cases involving delay in the execution of bench warrants, issued in court on foot of the applicants' failure to appear. In the first case there was a delay of approximately two years attributable to non-execution and the second a lapse of about two and a half years. Giving the judgment of the court Kearns J. said at p. 221

> *"The law unambiguously requires Gardaí to execute bench warrants without delay and within a reasonable timeframe. In this context the courts must ensure that court processes and orders are given due respect by the relevant State authorities and the execution of a bench warrant is not something to be simply left to the relevant State authority as a matter of discretion.*
>
> *In Dunne v. Director of Public Prosecutions [Unrep., High Court, Carney]., 6th June, 1996) Carney]. described the status of a warrant in the following terms:-*
>
> > *'A warrant of apprehension is a command issued to the Gardaí by a court established under the Constitution to bring a named person before that court to be dealt with according to law. It is not a document which merely vests a discretion in the guards to apprehend the person named in it; it is a command to arrest that person immediately and bring him or her before the court which issued it."'*

112. The judgment of Kearns J. goes on to consider other cases of delay involving bench warrants. At p. 223 the learned judge says:-

> *"I am satisfied that the judgments of the various High Court judges to which I have referred emphasise the obligation on the Gardaí to execute bench warrants promptly. By way of example it is not open to the Gardaí to take no active steps or simply wait for the wanted person to fall gratuitously into their laps by being arrested for some other offence. Equally, the issuing of a warrant need not trigger a national manhunt, nor need it involve the deployment of totally disproportionate time and resources in an effort to execute the warrant. Nor should an applicant be granted relief where he himself has contribute to the delay in executing the warrant by furnishing false particulars of his identity or address or by engaging in other forms of deceit and evasion to frustrate the Gardaí in the execution of their duties.*
>
> *...In the context of delay therefore, the legal position in relation to the execution of bench warrants may be simply stated. There is an obligation on An Garda Siochna to execute same promptly or within a reasonable time. A failure to do so may amount to blameworthy prosecutorial delay. However, members of the Gardaí cannot automatically be assumed to be in default where immediate execution of warrants does not occur, bearing in mind the multiple other duties and obligations requiring to be performed by them. They may encounter all sorts of difficulties when endeavouring to execute bench warrants which are brought about by deceit and false information given to them. Nonetheless, it must be the case that a point in time will arise where the continuing failure to execute a bench warrant will amount to blameworthy prosecutorial delay sufficient to trigger an inquiry into whether an applicant's right to an expeditious trial has been compromised to such a degree as to warrant prohibition. It is impossible to be more specific as to what timeframe for the execution of a warrant should obtain other than to stress that warrants must be executed promptly or at least within a reasonable time."*

113. In the instant case, the court is dealing, not with a bench warrant issued on foot of failure to appear, where the onus would in the first place be on the applicant to explain such failure, but with a warrant to arrest of which the applicant was never aware. I am satisfied that the lapse of over 20 years amounts to significant, blameworthy delay, which has not been adequately explained and which triggers an inquiry as to whether the applicant's rights have been compromised.

114. While the case might not have warranted "a national manhunt", it certainly required more than waiting for the applicant to fall gratuitously into the laps of the Gardaí. In effect, the latter was the stance adopted. After the initial circulation of the notice, nothing seems to have been done other than the ongoing contact of Mr. O'Carroll with his criminal informants in the Crumlin area. This was, in the circumstances of the case, never likely to bear fruit. I cannot in these proceedings resolve the conflict of evidence between Mr. O'Carroll and Mr. Carolan but it is obvious that contact with other relatives of the applicant such as Mr. Payne would have yielded information as to her whereabouts.

115. There was a further, largely unexplained, delay after the applicant was located in Co. Cavan in early 2010. She was not then charged until November, 2011. This is not a case where new evidence of an independent or compelling nature came to light. The Director argues that the fresh statements of Jessie O'Dwyer and his sister Jennifer provide new information from a prosecution point of view. However, it seems to me that much of what is new in them consists of retrospective speculation and hearsay as to the events of 1988. In any event, there is no explanation why it took so long to forward these statements to the DPP.

**Conclusion**

116. Having considered the relevant factors identified in the case, it seems to me that the matters to be given the most weight in favour of the applicant are: her age at the time of the alleged offences; the making of a decision by the Director at or about that time not to charge her until the other trial had concluded; the wholly exceptional lapse of time since then; the absence of blameworthy responsibility on the part of the applicant for that lapse of time; the presence of blameworthy dilatoriness on the part of the prosecution authorities and the absence of any feature such as newly-obtained evidence of a significant nature.

117. In favour of the respondent I must bear in mind the seriousness of the charges and the concomitant public interest in

prosecuting them, along with the finding that the applicant is not prejudiced in any real sense by the unavailability of Mrs. Carolan.

118. It seems to me that the overwhelming consideration is that the special duty to deal with young offenders as closely as possible to the time of their offences has been seriously breached to the extent that what is now proposed is to try a 40- year old in relation to the words and intentions (not actions) of a 15-year old in circumstances where she is not to blame for the delay. Such a trial would, as described by the Supreme Court in *B.F. v. DPP*, take on a "wholly different character" to any trial that would have been embarked upon when she was at or near the age of 15. Were she to be convicted, the purpose of the sentencing process would also be radically altered. Although many of the protections afforded to young offenders under current legislation did not exist at the time there were certain significant features such as the fact that she could have been imprisoned only in very limited circumstances. Sentencing of a girl of her age would have focussed very largely on the issue of rehabilitation, which is at this stage manifestly irrelevant.

119. Having regard to the importance of the special duty in relation to young persons and the breach of that duty which has been established in this case, I consider the proposed process to be unfair to the point that it should not be permitted to proceed.