Neutral Citation Number [2007] IEHC 309

THE HIGH COURT

[2005 No 774 JR]

BETWEEN

J. T.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Mr. Justice Hanna delivered on the 15th day of June, 2007

Background Facts

1. The applicant in this case is a former Christian Brother who was born on 15th April, 1942. He presently faces 104 charges of indecent assault, allegedly committed between September, 1969 and June, 1972. All of the complainants were students at National School. Three of the complainants were in fifth class between 1970 and 1971 when they were taught by the applicant. Eleven complainants were in fifth class between 1971 and 1972 and were also, they allege, taught by the applicant. One complainant was not taught by the applicant but alleges that he was indecently assaulted by the applicant on the school playing field. The applicant vehemently denies all of the charges. It goes without saying that these are charges of the most serious nature.

2. The applicant sought and obtained leave to bring these judicial review proceedings by order of McKechnie J. made on 18th July, 2005.

3. The applicant seeks permanently to injunct the prosecution of the offences. This prosecution has been stayed pending the determination of this application. The applicant also seeks a declaration that he is entitled to a presumption of innocence and that it should be declared that there should never be an assumption that the allegations made by any of the complainants are true. I observe in passing that, of course, there is no assumption in law as to the truth of the allegations made against the applicant. For the purposes of this case, the applicant is a man who enjoys the presumption of innocence and who is facing extremely serious charges relating to matters which allegedly occurred between thirty five and thirty eight years ago.

4. The applicant complains of inordinate delay in the prosecution of this matter with consequential compromise of his right to a fair and expeditious trial.

5. According to Detective Garda Eamon Maloney, the officer in charge of the investigation of this case, and who gave evidence both oral and on affidavit, allegations were first made by an individual on 16th July, 1998, involving not only the applicant but several others. In his oral testimony, Detective Garda Maloney did say that there had been an allegation some years earlier involving the applicant but this had not proceeded. In the course of his enquiries, the applicant was first spoken to by the gardaí in December, 1998 and on the 31st December, 1998, specific allegations made by the individual were put to the applicant and a memorandum was made of this interview. The applicant denied the allegations.

6. Matters then proceeded with Detective Garda Maloney being of the view, that it was necessary to interview as many of the past pupils of the school as possible. The school records were stored in Wheatfield Prison and were, apparently, incomplete. As the investigation continued, further allegations came to light and each of these in turn was investigated. Complainants continued to emerge up to April, 2003. On the 15th April, 2000 the applicant was again interviewed and another memorandum was taken of that interview. In September, 2001 Detective Garda Maloney again contacted the applicant in order to interview him again, but on that occasion was informed by the applicant's solicitor that he was too unwell to be interviewed. The applicant was next interviewed on the 24th April, 2002, his solicitor having indicated he was then well enough.

7. The Detective Garda says that this was an intensive, complex and highly sensitive investigation that involved trawling through school archives and trying to locate former pupils, many of whom were not at the addresses as appeared on the school books and some of whom had moved abroad. By way of demonstration of the delicacy involved, one of the persons whose name turned up during the course of the investigation and who was a pupil at the school was also member of An Garda Síochána superior in rank to the investigating garda.

8. The number of gardaí involved in the investigation was kept to a minimum. Garda Maloney took all of the statements himself bar one. He collated all of the statements, bound them together and prepared a report. This documentation comprised the file that was transmitted to the respondent in April, 2003. There were approximately sixty statements. There was no forensic evidence gathered. Neither were there any psychiatric or medical reports on the file. From this file, some sixteen complainants made statements which appear on the book of evidence.

9. The Garda investigation concluded in April, 2003 and Garda Maloney then forwarded the file to the respondent. The file remained in the Director's office without further communication from that quarter until a request for further information was thence transmitted in September, 2004. No explanation for this period of silence was tendered by the respondent at the hearing. There is no dispute that Garda Maloney responded promptly to this request. In November, 2004 directions to charge the applicant were received and he was charged on 19th January, 2005. The applicant was returned for trial on the 23rd March, 2005.

Applicant's Complaints

10. The applicant complains that he has been subjected to gross and inordinate delay by the State authorities identifying two periods of time in this respect. Firstly, a period between the 16th July, 1998 and April, 2003, almost five years, during which the investigation by An Garda Síochána was carried out. Secondly, that period between April, 2003 and September, 2004 during which the file was retained in the office of the Director of Public Prosecutions prior to the letter seeking further information.

11. When leave was first granted, the reasons for complainant delay were a material factor given that there were two strands of judicial opinion as to its materiality evident from the emerging jurisprudence involving what are colloquially referred to as sex delay cases. On that aspect, the law has been clarified by the Supreme Court. (See *H. v. Director of Public Prosecutions* [2006] I.E.S.C. 55) and we are no longer concerned to enquire into that issue.

12. The applicant complains that the delay in this case constitutes a breach of his constitutional rights:-

(a) To be tried on a criminal charge in due course of law,

(b) To be tried on a criminal charge with reasonable expedition,

(c) To fair procedures, and

(d) To fairness and justice

contrary to the provisions of Article 34, Article 38.1 and Article 40.3 of the Constitution.

13. The applicant complains that both the gardaí's delay in investigating the case and the respondent's delay in commencing the criminal proceedings constitute an inordinate and inexcusable delay and have prejudiced him contrary to the said provisions of the Constitution. Further, the delay is contrary to the applicant's rights as comprised in Article 8 of the European Convention on Human Rights.

14. A particular feature of this case is the complaint by the applicant of the leaking of information by, he alleges, a member or members of An Garda Síochána to the print media. This gave rise to what the applicant contends as being lurid and sensationalist media coverage in what one would colloquially term the "tabloid press".

15. The effects of leaking the material were twofold, according to the applicant. Firstly, it caused him great stress and anxiety to such an extent as to amount to prejudice and to render impossible a fair trial. Secondly, the leaking of information fed and contributed to his vilification and, by itself, was unfair to him to such an extent, in conjunction with unjustified prosecutorial delay, as to mandate a halt to the criminal proceedings.

16. In an affidavit grounding the application the applicant sets out the allegations made by each of the complainants. The applicant argues that the passage of time in this case has affected both his and the complainants' memories. By way of example, he points to the fact that some of the complainants give varying accounts as to the number of pupils that were in the class taught by the applicant. He also refers to the fact that others whose names have been provided to his solicitors either have no recollection of any abuse or did not wish to make a statement. It appears he can only remember about four of the complainants.

17. As time has passed death has claimed two potential witnesses. One of the persons who made a statement, a Brother D. died on 8th September, 2006. Also deceased is Brother B. who was the principal of the school at the time of the matters complained and to whom matters of discipline such as allegations of abuse against a member of staff would have been made. Their relevance focuses on one incident involving an altercation between a lady and the applicant concerning abuse being allegedly perpetrated by him. This incident was allegedly witnessed by the late Brother D. In his statement in the book of evidence, Brother D. said that he has no recollection of any such confrontation or of any report by the lady in question and if he had received such information he is sure he would have passed the complaint on to the principal. Brother D. went on to say that he was not saying that this conversation with the lady in question did not occur. He stated that he simply did not recall it.

18. A further complaint is that potentially important documents are no longer available to him. The school rolls are incomplete. These were discovered in Wheatfield Prison by the gardaí in the course of the investigation.

19. Further, the leaking of material by An Garda Síochána with the resultant greatly increased the stress and anxiety felt by him particularly when coupled with the vilification which he has experienced. In his affidavit, the applicant says that he has had difficulties with chronic acute depression and anxiety and has been admitted on occasion into St. John of God Hospital in Stillorgan. He says that the fact that he has been questioned about allegations covering the period from 1969 to 1971 has caused him acute anxiety and depression which has been added to by the manner of his vilification in the media. Although he has been granted bail he does not believe he can function in the community with the charges hanging over him and remains in Arbour Hill Prison rather than trying to cope with matters outside. He fears that if he takes up bail he will be hounded by the media who will plant reporters and photographers outside wherever he is staying.

20. No issue arises as to any delay in seeking leave to bring judicial review proceedings.

The Law

21. As noted above, we are not concerned here with enquiring into any reasons that might lie behind possible complainant delay. Nor is there any evidence to suggest that the applicant in any way contributed to such delay as there might have been in this case. It would appear that he cooperated with An Garda Síochána during the course of their investigation except on one occasion when illness, arising from the stress which he said has been brought on by this investigation and by leaks to the media, rendered him unable to attend one planned interview.

22. The starting point for my consideration of the facts in this case is the position well described by Hardiman J. in his judgment in *J.B. v. the Director of Public Prosecutions* [2006] I.E.S.C. 66. Firstly, he refers to the judgment of the Supreme Court in *H. v. The Director of Public Prosecutions*

> "The starting point in any case of this nature henceforth must be the recent judgment of the Supreme Court in H. There are two passages in particular to which I wish to draw attention:
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> > "'The Court is satisfied that in general there is no necessity to hold an inquiry into, or to establish the reasons for, delay in making a complaint. The issue for a 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 does not exclude wholly exceptional circumstances where it would be unfair or unjust to put an accused on trial'.
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> The second passage is as follows:
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> > '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'.
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> I wholeheartedly welcome the approach to cases of this type mandated in the judgment of this Court in H. In *J.O'C v. DPP* [2000] 3 IR 480, I said at p.521:
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> > 'I believe that the sole issue in these proceedings is whether there is a real risk that the applicant will not receive a

fair trial, that is whether in all the circumstances including, principally, the lapse of time there is a risk that these allegations cannot fairly and safely be prosecuted'."

23. Hardiman J. then goes on to deal with two issues of vital importance which should inform the approach of this Court to this case:-

> "The approach mandated at as a result of the decision in H. must be seen against the background of two earlier and very significant developments in procedural justice. The first relates to delay, and the second to the special position of persons alleging that they were sexually abused as children.
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> The Courts have always been sensitive to the fact that a long delay in litigating, whether the case is civil or criminal, can gravely interfere with the prospects of being able to do justice in the particular case. Examples of this concern could be cited from a very remote period but, perhaps due to an increase in the volume of litigation and of litigants' consciousness of the potential for legal action, this problem seems to have become acute in Ireland from the 1970s onwards. In my judgment in *JO'C v. DPP* [2000] 3 IR 480 I surveyed a considerable number of cases from that period. Having referred to this survey, it is unnecessary to repeat it here. I would instance, by way of example, *O'Keeffe v. Commissioners of Public Works* (unreported, Supreme Court, 24th March, 1980) where an attempt to litigate an industrial accident case after 23 years was described as giving rise to "a parody of justice". On the criminal side, a delay of four years in the prosecution of an assault case was described in this Court in *O'Connell v. Fawcitt* [1986] IR 362 as 'extreme'. The disadvantages to defendants, civil or criminal, were fully acknowledged in this substantial line of jurisprudence and our courts endorsed an insight of Lord Diplock 'The chances of the Court being able to find out what really happened are progressively reduced as time goes on.'
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> The second new departure dates at least from the judgment of Finlay C.J. in *G. v. DPP* [1994] 1 IR 347. This is based on a realisation that cases involving the alleged sexual abuse of young children may be long delayed by reason of inhibitions which may sometimes affect the making of a complaint, perhaps preventing it for a period of many years. The working out of the consequences, procedural and otherwise, of this insight and been the subject of a great deal of recent jurisprudence and that process of working out is not, in my view, yet complete. Its first stage was the bringing of prosecutions after periods of time which would have precluded prosecution had the complaint been of any other nature. This, in turn, led defendants to protest, sometimes with obvious truth, that they were hugely and unfairly disadvantaged in meeting such prosecutions. The proper approach for the Courts to take in dealing with such applications was first laid down in the very comprehensive judgments in *P.C. v. DPP* [1999] 2 IR 25. This approach has now been replaced by that mandated by the recent H. decision which lays down the test encapsulated in the citations already given."

24. Accordingly I must first satisfy myself that there has been delay on the part of the prosecution, that that delay has been blameworthy and that, as a consequence of that delay, the applicant would not obtain a fair trial or that a trial would be unfair as a consequence of the delay.

25. Proof of blameworthy delay on the part of the prosecution is not, per se, enough. In *P.M. v. The Director of Public Prosecutions* [2006] 2 I.L.R.M. 361 Kearns J. stated at p. 373:-

> "I believe that the balancing exercise referred to by Keane C.J. in P.M. v. Malone is the appropriate mechanism to be adopted by a court in determining whether blameworthy prosecutorial delay should result in an order of prohibition. It means that an applicant for such relief must put something more into the balance where prosecutorial delay arises to outweigh the public interest in having serious charges proceed to trial. In most cases, pre-trial incarceration will not be an element as an applicant will probably have obtained bail pending his trial. Secondly, while he may assert increased levels of stress and anxiety arising from prosecutorial delay, any balancing exercise will have to take into account the length of such blameworthy delay, because if it is a short delay rather than one of years, the mere fact that some blameworthy delay took place should not of itself justify the prohibition of a trial."

26. A trial can only be prohibited in exceptional circumstances. In *D.C. v. The Director of Public Prosecutions* [2006] 1 I.L.R.M. 348, at pp. 350 to 351, Denham J. says:-

> "Such an application [for the prohibition of a trial] may only succeed in exceptional circumstances. The Constitution and the State through legislation have given to the Director of Public Prosecutions an independent role in determining whether or not a prosecution should be brought on behalf of the People of Ireland. The Director having taken such a decision the courts are slow to intervene. Under the Constitution it is for a jury of twelve peers of the applicant to determine whether he is guilty or innocent. However, bearing in mind the duty of the courts to protect the constitutional rights of all persons, in exceptional circumstances the court will intervene and prohibit a trial.
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> In general such a step is not necessary as the trial judge maintains at all times the duty to ensure due process and a fair trial. The basic assumption to apply in relation to all pending trials is that they will be conducted fairly, under the presiding judge. However, in circumstances where there is a real or serious risk of an unfair trial the courts will intervene so that a defendant may not be exposed to the commencement of the process, it being the assumption that should such a trial commence it will be stopped by the direction of the trial judge because of the real or serious risk of an unfair trial.
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> It is this exceptional jurisdiction which the applicant wishes to invoke. Such a jurisdiction to intervene does not apply where the applicant has minutely parsed and analysed the proposed evidence and sought to identify an area merely of difficulty or complexity. The test for this court is whether there is a real risk that by reason of the particular circumstances that the applicant could not obtain a fair trial."

27. A possibly significant factor is that this is a case involving multiple complainants. That is something which too, can be taken into account. In *H. v. Director of Public Prosecutions* at pp. 27 to 28 of his judgment, Murray C.J. says:

> "The issue of the multiplicity of the complaints was also an aspect of the applicant's case. It was submitted on behalf of the applicant that the multiplicity of complainants, and complaints, was significant in determining whether the relief should be granted. The courts have referred previously to instances where there was a single complainant or a single complaint in such a manner as to give the benefit to an accused because of the sole nature of the complaint. While it would always be a matter for consideration in all the circumstances of a case, the converse would also be a relevant factor on an application for judicial review. If there were multiple complaints that too may be a factor. The learned trial judge distinguished this case from a situation where there was an isolated event alleged. He stated:

> 'The complaints in this case, as had been indicated, relate to habitual sexual abuse, generally taking place in the classroom, although in the case of one of the complainants it seems to have related to simply two events. But it is not a situation of one isolated event. It is quite clear that the applicant was in a position of authority and dominion over the complainants. It is very clear that the effect of the alleged abuse has been of a very long-term nature.'
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> The Court is satisfied that in the same way as the fact that there is one complaint is a relevant factor, so too is the fact that there are a multiplicity of complaints a relevant factor for consideration by the court in determining whether to grant the relief sought."

28. Prejudice, as such, may be either specific or general. In *A.W. v. Director of Public Prosecutions* (Unreported, High Court, 21st November, 2001) Kearns J. said at p. 26:-

> "Prejudice may be specific or general, and at times both may be present. It may be possible to identify a specific prejudice or some 'island of fact' which would enable the applicant to establish a real risk of an unfair trial. This specificity might lie in the death of a particular witness or the destruction, absence or removal of physical objects or locations where the offences are alleged to have taken place.
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> The significance however of what may be described as general prejudice should not be underestimated. It strikes me … that lapse of time of itself can give rise to a real risk of an unfair trial as most criminal and personal injury practitioners would know only too well."

Decision
Convention Rights
29. Although a claim was advanced in the pleadings that the length of proceedings against the applicant in relation to the charges was incompatible with the "reasonable time" requirement of Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, this issue was not pressed at the hearing. In the light of the judgment of the European Court of Human Rights in *Barry v. Ireland* [2005] ECHR 18273/04 and the observations of Fennelly J. in *T.H. v. Director of Public Prosecutions* [2006] I.E.S.C. 48, the parties accepted that the jurisprudence of the European Court pointed towards a monetary awarded rather than intervention to the extent of halting the trial. At all times the applicant's objective has been to prevent his trial from proceeding

Delay
30. I accept the evidence of Detective Garda Maloney that this was indeed a most complex, detailed and methodical investigation. As the investigation proceeded more allegations of abuse against the applicant came to light. These, in turn, had to be investigated and the total investigations were not complete until April, 2003.

31. It is imperative that investigations such as this must proceed with due dispatch. The right of an accused person to an expeditious trial is of immense importance. One must respect the independence of An Garda Síochána in the carrying out of their respective functions subject, of course, to the law. The duty of An Garda Síochána is to engage its expertise and available resources in the collation and analysis of evidence. Inevitably, the period of time which this takes will vary from case to case. I am sure that it is not unknown that an ongoing investigation in cases of this type might throw up more allegations of wrongdoing involving the same alleged wrongdoer in the same environment thereby greatly extending the period of investigation. It is desirable, were a prosecution to ensue, that these various matters be dealt with together.

32. The courts must, in my view, have due regard the professionalism and integrity of An Garda Síochána in exercising their judgment and carrying out their duty. They are the experts on the ground. Of course, there can be instances, whether due to active wrong doing, unwarranted or unexplained tardiness or outright incompetence leading to the undue prolongation of an investigation, where a court may find investigative delay. Where an investigation on its face appears to be overlong and no or no sufficient explanation is offered culpable delay may well be found. The courts can only approach these matters on a case by case basis and one of the features which must be taken into account is that some investigations can roll on over a period of years where new evidence and new allegations come to light. While ensuring the vindication of an accused's right to due expedition in the processing of criminal enquiries a careful balance must be struck to ensure the gardaí be given sufficient latitude to exercise their own professional judgment as to when an investigation begins and ends subject to the structures which I have mentioned.

33. One cannot out-rule the possibility of an investigation taking such a prolonged period of time that a decision might have to be taken to call a halt and to prosecute (should this be directed) on the basis of the information already to hand. Perhaps further charges could be brought in a second tranche with a second trial resulting. I am however, satisfied from the evidence of Detective Garda Maloney that notwithstanding that the investigation in this case lasted nearly five years, any delay was the inevitable result, firstly, of identifying other boys who were on the school books at the time of the matters complained of, locating these people, interviewing them and, where complaints were made, processing the matter including confronting the applicant with allegations. In the particular circumstances of this case, I am satisfied that An Garda Síochána carried out their investigative functions with reasonable despatch and any blameworthy delay cannot be attributed to them.

34. The same, however, cannot be said for the office of the Director of Public Prosecutions. No attempt has been made to explain why the file rested in the Director's office between April, 2003 and September, 2004. The courts have made plain the need for reasonable dispatch both on the part of the investigative authorities and the prosecution authorities, in particular in cases involving sexual abuse allegedly perpetrated many years before. Given that the investigation of these alleged offences took nearly five years, it was all the more incumbent upon the respondent to move matters along.

35. The Director must, of course, be allowed reasonable time within which to consider a file but he does not have carte blanche. The time taken to review a case and to decide whether or not to direct a prosecution would be determined by the volume, nature and complexity of the matter under consideration.

36. Although this was undoubtedly a bulky file containing some three hundred pages of testimony, the preponderance if not all of the evidence comprised allegations of fact being made against the applicant and his response thereto. There was no forensic evidence, no psychologists, no psychiatrists or other medical or expert personnel involved. Accordingly, although undoubtedly detailed work would have to be done on the file, nevertheless, giving every latitude to the prosecuting authorities, the delay, in question seems to be wholly excessive and calls for explanation. No explanation is forthcoming. Accordingly, on this aspect of the applicant's case, I am satisfied that he has established blameworthy delay on the part of the prosecuting authorities.

Prejudice
Death of witnesses

37. It is an unfortunate reality of life that in criminal cases and in particular criminal cases of this type and antiquity witnesses do die. That of itself does not automatically give rise to the halting of a trial. It may amount to a misfortune either for the prosecution or the defence. In the case of the prosecution, it may, in effect, prevent the trial proceeding altogether if a deceased witness is of central importance. To an accused person the death of a vital witness may be of such crushing significance, taken in conjunction, *inter alia*, with blameworthy prosecutorial delay and the fact that, absent such delay, that evidence would have been available to the accused, that a court might be moved to prohibit the prosecution because of the resultant prejudice.

38. The applicant argues that he is prejudiced by not having available to him the evidence of the two deceased Christian Brothers, Brother D. and Brother B. As regards Brother B., he died as long ago as 1990 and, therefore, his evidence would never have been available to either party. In any event, the only manner in which he would have been a material witness on the evidence that was tendered to me was in connection with the altercation involving the mother of a pupil and the applicant. He was not present and his materiality arose from the fact that he was the principal and in charge of discipline and any matters such as those complained of would have been referred to him. The applicant does not specify in any real sense, what assistance Brother B.'s evidence would have been to him nor does he identify in any real and particular sense the precise nature of the impairment of his rights visited upon him by the demise. The deceased's testimony might have been helpful to him. It may have been of assistance to the prosecution. We simply don't know.

39. Brother D. died in the recent past. He did make a statement which is incorporated in the book of evidence. However, for two reasons it seems to me that the absence of his evidence as therein set out should not impact heavily on my consideration. In the first instance, the evidence is to some extent neutral in that, whereas he does not recollect the altercation, on the other hand Brother D. does not say that what the lady in question says happened did not happen. He simply cannot remember it. Secondly, this is a case in which there are sixteen complainants. This somewhat feeble evidence would be most unlikely to bear heavily, if at all, on the thrust of the trial, at least not to the extent of trumping the right of the public to have the charges prosecuted.

40. In any event, the applicant does not seek adequately to address himself to the existence of a number of witnesses including some Christian Brothers whose names and whereabouts are made known to him. He does not state that these witnesses cannot provide evidence in support of his defence. Neither does he say that they can or cannot make up any evidential shortfall consequent to the deaths of the two Brothers.

41. I should observe that it was only in the very recent past that enquiries were made about Brothers D. and B. by the applicant. The applicant has been legally represented since the very outset of this investigation. This does not suggest any urgency on the part of the applicant or his legal advisors in ascertaining the whereabouts and/or wellbeing of the two Brothers. One might reasonably have expected an earlier and more pressing enquiry, were real significance to be attached to their evidence by the applicant and his advisors.

Documents
42. Next the applicant refers to the unavailability of necessary documentation referring specifically to the school rolls which were in Wheatfield Prison and which, in his affidavit evidence, Detective Garda Maloney says were not complete. This is, of course, unsatisfactory from the applicant's point of view. Nevertheless, the fact that such records are incomplete is not the fault of the respondent. There is no suggestion that any information which came into the hands of An Garda Síochána was withheld wrongfully from the defence team. On the contrary, an extensive list of persons who are on the relevant part of the school roll to such extent as was available to the prosecuting authorities was made available to the defence including all necessary information about the names and addresses of those former students who either had no complaint to make about the applicant or no awareness of any complaints about him.

43. The applicant does not persuade me that he has addressed to any or any sufficient degree the extent to which his ability to defend himself has been encumbered by the incompleteness of the documentation. It is not the fault of the prosecution that it was so rendered. It seems to me that the absence of documents was as much a hindrance to the prosecution as it was to anyone else. The fact of the deficit only became apparent during the course of the garda investigation, in other words during that part of the investigation to which I see no reason to attribute blame to the prosecution. I am of the view that the applicant has not demonstrated prejudice on this aspect of the case.

Memory
44. Next the applicant relies on his poor memory and that of other persons. He points to the fact that in his affidavit, for example, that various former students give different accounts of the class size. Some put it about thirty, some about thirty two and some about forty. Others say over twenty.

45. It is undoubtedly the case that memories fade with the passage of time. However, I do not find it particularly surprising that complainants who were boys in fifth class between 1969 and 1972 might vary in their recollection as to the number of children in class with them. Indeed, it might be unusual were it otherwise.

46. The applicant states that his memory of events is poor. It is true to say that his interviews with An Garda Síochána are littered with references to his inability to remember persons and circumstances. At the same time, the applicant also demonstrates a clear recollection during the course of certain persons and events. Further, he strenuously denies the allegations made against him.

47. Insofar as allegations of wrongdoing involve only the applicant and one complainant, given his stout refutation of the charges, any memory deficit on the applicant's part does not weigh heavily in the balance. Where alleged events have been witnessed by others and where there are multiple complainants, problems with memory, though undoubtedly problematic, could not, by themselves, amount to prejudice. In either or both circumstances, it seems to me that one would have to demonstrate comprehensively that the purported difficulties in recollection are to such a degree that the possibility of a fair trial cannot reasonably be entertained. Of this the applicant has failed to persuade me. He clearly remembers his time at the school. He has a detailed recall of some places and persons. He remembers a few of the complainants. He has been utterly unshakeable in his denial of what is alleged.

48. The passage of time, of course, is a bitter enemy of justice and fair procedure in litigation, both civil and criminal. Given the passage of time in this case the applicant will almost inevitably suffer some disadvantage as a consequence. However, I am of the view that he has not shown prejudice to such a degree as would overpower the right of the public to have the charges prosecuted.

Stress
49. The applicant seeks to rely on the fact that he has suffered stress and anxiety over and above that which might understandably be suffered by a person bearing the presumption of innocence in facing such serious charges relating to the sexual abuse of young boys. The applicant points, firstly, to stress and anxiety brought about by the delay in this case. Secondly additional stress and

anxiety has been caused as a result of the applicant's vilification at the hands of the print media which the applicant contends was sustained by leaks from An Garda Síochána to journalists.

50. The issue of stress in the context of sex delay cases was again visited recently by the Supreme Court. Hardiman J. puts it thus in *J.B. v. Director of Public Prosecutions* [2006] IESC 66:-

> "I agree with the finding of Mrs. Justice Denham that this prosecution after so long a delay has caused a great deal of unnecessary stress and anxiety to the defendant. It appeared to be un-contradicted that he suffered an acute stress reaction after being interrogated (perhaps inconsiderately) by the gardaí, leading to his admission to hospital for a period of ten days. I am, however, bound to agree with Mrs. Justice Denham that this feature was simply not put far enough on the applicant's evidence to justify granting him relief. There was talk during the District Court proceedings, and in the affidavits in these proceedings, of comprehensive medical reports from named specialist doctors, but they were simply not put before the Court.
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> I am far from belittling the stressing effect on a man of seventy, previously of good character, of the sudden production against him of allegations relating to a period up to half a lifetime ago. I am equally aware of the exacerbating effect, in terms of stress and anxiety, of the gradual realisation that, by reason of the lapse of time, there is little enough one can do to rebut these allegations except to deny them. The experience of anyone who has defended or prosecuted such cases leads to the conclusion that there is a practical necessity for the defendant to do more than that, positively to undermine the complainant's account, but this will often be impossible or barely possible. The defendant's position is a perilous one, even if he is entirely innocent.
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> However, as Mrs. Justice Denham observes, there is an element of stress and anxiety inherent in any criminal charge and its mere existence cannot be a ground for preventing a trial. There is an absence in this case, as in many other such cases, of evidence, carrying an allegation of unnecessary stress and anxiety beyond the level of generality and beyond the time of the 1996 hospitalisation. Just how stressful is a criminal trial, compared with other well known stressors? What, if any, is the exacerbating effect of a defendant's age and state of general health, or of the particular difficulties which beset the defence of an old allegation? In what circumstances, if any, can the stress and anxiety prejudice the defence by undermining the capacity, or the affect, of the defendant? These are all factors wholly unexplored in general or on the particular facts of this case. It is by reason of this lack of specificity, lack of engagement to the actual facts, that I would refuse relief."

51. In the same case Denham J. stated:-

> "Secondly, following his charge in June of 1999 the applicant obtained a number of adjournments in the District Court owing to health concerns. In the initial affidavit by Michael O'Connor deposed to on 13th December, 2001, in paragraph 13, following a consultation with the applicant and counsel, arrangements were made to have the applicant seen by Professor Patricia Casey. Following Professor Casey's preliminary opinion drafted on 19th January, 2001, it was felt that a further assessment was required on the applicant and the State solicitor was informed. Thus while there are references to adjournments for the purpose of medical reasons, the medical evidence presented to the Court is scant and does not bring it within that envisaged to prohibit a trial. It is axiomatic that there will be a level of stress and anxiety on learning of a pending prosecution for sexual abuse of children. However, this is not the test set out in *P.M. v. Malone*."

52. The applicant asserts anxiety and stress in his affidavit. However, no actual medical evidence is provided, even in report form. It is not entirely clear whether the applicant was hospitalised in St. John of God's as a result of the stress and anxiety caused by the delay or vilification attendant upon the processing of this matter, or whether his mental health problems predate or are independent of the prosecution of this case. As someone who is under medical care, one would have thought that it would not have been difficult to obtain a medical report detailing the mental anguish of which the applicant complains and relating it to the criminal proceedings and the media reporting.

53. A striking feature of this case is that the applicant has refused to take up the bail which he was granted, preferring to remain in custody rather than face what he regards as harassment and vilification from the media were he to return to the outside world where, he says, he can no longer function. This self imposed protective custody certainly manifests something that is out of the ordinary.

54. It is therefore all the more unusual that the increased level of stress and anxiety which he seeks to assert is not supported by expert medical evidence. I do not understand the law to require that the level of stress and anxiety required to prohibit a trial in conjunction with inordinate prosecutorial delay need necessarily amount to an established psychiatric illness. It would be well within the competence of a psychologist to assess and measure and thereby assist the court in identifying the level of stress and anxiety involved. But here we have an applicant who, in fact, does assert that he suffers from the condition of depression which has required his hospitalisation. He implies (which is about as strongly as I can put it) that this is related to these proceedings but does not expressly say so. I am bound to say that I find somewhat unconvincing the manner in which he tries to drop the issue of depression and hospitalisation into the affidavit in what would seem to be a somewhat disconnected way. If, therefore, I am not in a position to be satisfied as to whether his level of stress and anxiety overshoots that which would ordinarily be experienced by a person facing such serious charges, by the same token how can I then assess the contribution of the alleged campaign of vilification?

55. Given the circumstances of this case, the paucity of supportive expert medical evidence is highly regrettable from the applicant's viewpoint. One would require something more than what is "on offer" in the applicant's affidavit in order to evaluate if his stress and anxiety is of an order contemplated in *Barker v. Wingo* (1972) 407 U.S. 514. As someone who tells us that he is not only under medical care but has been hospitalised in a psychiatric hospital for same, it is remarkable that there is no medical report available to guide the Court in assessing the scope and nature of the stress and anxiety. The bare assertion of the stress and anxiety is, in my view, simply not sufficient of itself. Accordingly, this aspect of alleged prejudice is not established.

56. The applicant also relies upon the fact of the alleged leaks coming from a garda source in circumstances of apparent impropriety as constituting a stand alone basis for preventing the trial. Examples of the journalistic fruit born of this alleged wrongdoing are exhibited in the applicant's affidavit. The applicant was clearly identified including by photograph and referred to, *inter alia*, as "sick", a "pervert" and "Brother Bender". The features occasionally identify the applicant's brother, a well known personality in the public domain and refer to the applicant's since deceased mother including a description of the area in which her dwelling house was situated and its proximity to local schools. The newspaper articles of which the applicant complains span a period of roughly three years.

57. Much of the oral evidence of Detective Garda Maloney was taken up with cross examination of him by Mr. Shane Murphy S.C. for

the applicant as to the source of leaks to the press, if leaks there were. Although much of the information contained in the articles was within the knowledge of the complainants whom the gardaí kept "up to speed" on developments in the investigation, it is fair to say that Detective Garda Maloney conceded that some of the material had the appearance of being leaked by An Garda Síochána.

58. This was an appropriate concession by him. Some of the reporting displayed a level of intimate knowledge of the progress of the prosecution, in my opinion, as can only have been fed by a garda source. The article of April, 2004 is a case in point. Detective Garda Maloney strenuously denied that he was the source of any leak although he did admit to an arrangement to meet one of the journalists involved in writing one of the articles and, indeed, expressed his concern about the publication of any article which might disrupt the investigation or prejudice a trial. Such material as exhibited in the applicant's affidavit, at the very least, had the potential to cause a significant postponement to allow the fade factor to set in or indeed the prohibition of the trial itself.

59. Having heard his evidence and observed him I am not disposed to conclude that Detective Garda Maloney was personally responsible for passing information of the calibre complained of to the print media. Nonetheless, I am satisfied that some part of it at least was sourced from a member or members of An Garda Síochána. It is unfortunate that I must come to this conclusion given the limited nature of the enquiry in which I have engaged. It is to my mind most regrettable that, after all of these articles had appeared, including material about which Detective Garda Maloney expressed grave reservations, only the most lacklustre and informal enquiry resulted. Given the possibility of the derailment of a trial I cannot accept that this was an appropriate response to what was, potentially, a significant disciplinary matter.

60. In my view, no member of An Garda Síochána, particularly one involved in the investigation of such sensitive matters as in this case could be unaware of the danger of sensationalist newspaper coverage and the effect it might have on a trial. Given the nature of the coverage that these matters received and the possibility of disrupting the applicant's criminal trial as a consequence, it seems to me that the member or members of the gardaí who leaked the information was or were guilty of acts of gross irresponsibility. As submitted by the applicant's counsel, this involved possible criminality as a consequence of a breach of the Official Secrets Act.

61. This demonstrated a disregard for the law and also for the rights, not only of the applicant but also of the complainants, the prosecuting authorities and the public at large to bring this matter before the courts.

62. In a case such as this it is, in principle, appropriate that contact be maintained with complainants and that they be kept reasonably up to date with the developments in an investigation and prosecution. Even so, An Garda Síochána must exercise appropriate discretion in this process because such information might make its way from complainants to the newspapers. Certain organs of the printed media may well treat material in a lurid and sensationalist way. A garda who leaks sensitive material to a tabloid newspaper cannot be said to be blameless should that information be treated in a sensationalist manner.

63. Of course, one must take care to respect the rights of journalists to source material and to write responsibly on same in the style and manner which is appropriate to their medium. The contribution to society, for example, of journalists covering crime and criminality in many respects has been immense and beyond commendation. It is undoubtedly part of the journalist's trade that good relations are fostered with persons such as An Garda Síochána as a ready source of "copy". But in such dealings gardaí must act at all times with care and discretion. Most importantly, they must stay squarely within the law and their disciplinary code. Where the release of information would be in breach of the law it simply should not occur.

64. In the circumstances of this case I am not persuaded that the leaking of information to the press by a member or members of An Garda Síochána constitutes sufficient reason for stopping the trial. What occurred was reprehensible. But, although undoubtedly sustained by the feeding of information to the newspapers, it is possible that the graphic and, at times, tasteless and abusive references to the applicant may have occurred in any event.

65. Further, the evidence before me indicates that any vilification referable to the leaks ceased over three years ago. Any residual trial prejudice could be assessed and dealt with if appropriate by the trial judge. Although reliance was placed by the applicant on *C.O'T. v. The President of the Circuit Court of Criminal Appeal and the Director of Public Prosecutions* (Unreported, High Court, Smyth J., 26th July, 2005) the circumstances of the applicant in this case are quite different. In this case the applicant has always known that he was facing charges. He was never under any illusion that this matter was going to proceed from the time he was charged unless, of course, prohibited by this court. This contrasts markedly with the position in C.O'T. where not only did the applicant believe that any charges against him were not proceeding but had in fact moved on with his life and invested heavily in a new enterprise before he was confronted both with the prosecution and the leaks of confidential information including proceedings before an *in camera* court.

Conclusions

66. For the reasons above stated I am satisfied that there has been blameworthy prosecutorial delay in processing these criminal proceedings. That, of itself, is not sufficient to halt this criminal trial. The applicant must bring something more to the overall picture to give rise to those most exceptional circumstances which could prohibit it and he seeks, *inter alia*, to introduce prejudice to meet this requirement. I am not persuaded that prejudice has been established.

67. Although I am not satisfied that any of the grounds of prejudice raised of themselves constitute a sufficient basis upon which to prohibit this trial nevertheless I must step back, as it were, and survey the composite vista applying what is referred to as the omnibus principle. In the words of McCracken J.:

> "It may well be that none of these matters individually would justify prohibiting the trial, but the court must view the matter with regard to the cumulative effect of these concerns."(See *D.K. v. Director of Public Prosecutions* (Unreported, Supreme Court, 3rd July, 2006 at p. 9).

68. This approach was since endorsed by Hardiman J. in *S.B. v. Director of Public Prosecutions* (Unreported, Supreme Court, 21st December, 2006)).

69. This is a case with a multiplicity of complainants. They complain of acts of sexual abuse perpetrated on them by the applicant. Some allege that they witnessed him do likewise to others. These are allegations of considerable antiquity. There is no doubt but that the passage of time will have a significant impact in this case. Necessarily memories will be dimmed. Were this trial to proceed it would , no doubt, be a complex and difficult one for the applicant, the complainants, the lawyers involved and ultimately the trial judge who must ensure that the matter is put with utter fairness before the jury.

70. But the fact that a trial of this nature presents a great challenge to all concerned is not a ground to prohibit. The applicant has not convinced me, as a matter of probability, that he would be exposed to an unfair trial. One must presume (and I believe properly

so) that any such trial would be conducted with impeccable fairness by the trial judge. The applicant has at all times maintained his innocence and it is a matter for a jury to judge whether they believe him or the complainants.

71. Is it fair that the applicant be put on trial? The delay, both excusable and inexcusable, allied to the vilification to which the applicant was exposed by the printed media was undoubtedly highly unpleasant and distressing to a man presumed by law to be innocent. However, the vilification, such as it was, stopped in 2004. Such is the evidence before me. If it is repeated subsequent to this judgment but prior to the trial presumably further questions may arise for this Court or the trial judge.

72. The applicant has available to him all of the witnesses who were discovered in the course of the detailed investigation. The passage of time has seen the deaths of witnesses of at best peripheral significance in the context of the complaints brought by multiple complainants.

73. Insofar as the applicant's rights have to some extent been compromised in this matter such regrettable circumstance does not, in my view, overpower the public's right to have these multiple, serious charges prosecuted. On balance I am not satisfied that it is either unfair that this trial should proceed or that it is unfair that the applicant meet the charges laid against him.

74. I refuse the relief sought.