Neutral Citation Number: [2011] IEHC 384

THE HIGH COURT

JUDICIAL REVIEW

2008 1386 JR

BETWEEN

K. D.

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice Dunne delivered the 30th day of June 2011

This is an application for an order of prohibition by way of application for judicial review prohibiting the respondent from taking any further steps in the criminal proceedings against the applicant herein in respect of the charges number 1 to 29 inclusive as set out in the book of evidence entitled the Director of Public Prosecutions v KD and MD returned for trial on 10 September 2008 then pending before the Central Criminal Court for trial on the 13th July, 2009. Further ancillary relief was sought. The leave to apply for judicial review was granted by the High Court (MacMenamin J) on 8 December 2008.

The grounds upon which the relief is sought can be summarised very briefly as follows:-

1. The lapse of time between the date of the alleged offences and the trial being a 50 to 40 year time range.

2. The lack of specificity in relation to the dates of the alleged offences. (The offences cover a nine year time range).

3. Prejudice. In this regard a number of points have been raised on behalf of the applicant being:

   (a) The unavailability or death of potential witnesses.

   (b) The unavailability of hospital records in relation to the applicant's admission to hospital around the year 1966.

   (c) The fact that the applicant has no knowledge of a child alleged to have been fathered by him with one of the complainants, M., and that as a consequence he may not be in a position to disprove his alleged parentage due to the passage of time.

   (d) The fact that the applicant may be unable to obtain medical reports in relation to the other complainants contention in respect of a miscarriage in 1967 due to the passage of time.

The applicant also contends that there has been prosecutorial delay of approximately two years and seven months in relation to this matter and that he is in the situation where he is effectively left only with his denial of the allegations by way of defence to the charges. Finally, he has referred to severe anxiety that has been exacerbated by the fact that the lapse of time will result in him being unable to adduce evidence of an exculpatory nature or to defend the proceedings appropriately which, if the offences had been prosecuted with expedition, could have been put before a court of trial. Accordingly, he has contended that he has been deprived of a trial in due course of law, with due expedition and will be unable to attain a fair trial.

The applicant was born in the mid 1940s. He has been charged with 29 counts of rape against two of his sisters. The alleged offences are stated to have occurred over a period commencing on the 23rd June, 1959 and ending on the 13th January, 1969. There are 15 counts of raping his sister M. on dates between the 31st August, 1966 and the 13th January, 1969 and 14 counts of raping C. on dates between the 23rd June, 1959 and February, 1967.

Complaint was first made by M. on the 11th November, 2005 and by C. on the 12th November, 2005. The applicant was arrested and interviewed on the 23rd May, 2006, at which time he denied the allegations. He was arrested and charged on the 4th June, 2008 and returned for trial in the Central Criminal Court on the 10th September, 2008.

I was advised at the outset of the hearing that the respondent was not opposing the application in relation to the charges in respect of M., that is, charges No. 1 to 15 inclusive on the Book of Evidence in relation to the offences alleged to have occurred between August 1966 and January 1969. Given that concession, the court is therefore concerned with the charges in relation to events alleged to have occurred between June 1959 and February 1967in respect of C. All of the offences are alleged to have taken place in or around the vicinity of the family home of the applicant and his sister.

There is some uncertainty as to the age of the applicant. His solicitor, Jason Teahon, in the affidavit grounding the applicant for judicial review referred to the applicant as having been born in November 1944. In a memorandum of interview with the applicant taken in May 2006, his date of birth is given as November 1946. Depending on the correct age of the applicant, the applicant would have been twelve at the earliest time of the alleged offences in June 1959 or if he was born in 1944 he would have been fourteen years of age. Nothing of significance turns on this question.

Submissions

Counsel on behalf of the applicant referred to the appropriate test to be applied in respect of delay cases in her submissions. In this

case, a trial, if not prohibited is now likely to take place in 2012. That means that 53 years will have elapsed from the earliest date of June 1959, in relation to offences alleged against the applicant and 45 years from the latest date in February 1967, in respect to the offences alleged. In considering the test to be applied by the court I was referred to *S.H. v. Director of Public Prosecutions* [2006] 3 I.R. 575 at 620, where Murray C.J. stated:-

> "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 and the law."

Reference was also made to the decision in *P.O'C. v. Director of Public Prosecutions* [2003] I.R. 87 at p. 118 to 119. In his judgment in that case Hardiman J. commented as follows:-

> "A person in whose case there is such an island of fact is, perhaps ironically, both in a potentially better position to face a trial (because evidence may not, after all, prove irretrievable) and in a better position to demonstrate prejudice in a specific way. By contrast, a person in respect of whom the prosecution case as disclosed to him contains no such island of fact is in a very perilous position at a trial (because of the inherent risk of a pure contest of credibility) and is unable to avail at all of the third test. If he is to succeed in proceedings such as the present it must be on the basis that he can bring himself within the first situation envisaged by the Chief Justice in his judgement in *P.C. v. Director of Public Prosecutions* [1999] 2 I.R. 25, at p. 66. This is:
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> > 'Manifestly in cases where a court is asked to prohibit the continuance of a prosecution on the ground of unreasonable delay, the paramount concern of the court will be whether it is being established that there is a real and serious risk of an unfair trial: that, after all, is what is meant by the guarantee or a trial 'in due course of law'. The delay may be such that, depending on the nature of the charges, a trial should to be allowed to proceed, even though it has not been demonstrated that the capacity of the accused to defend himself or herself will be impaired.'
>
> I take this to mean that there may be a lapse of time so gross that, in the circumstances of a particular case, it is open to the court to conclude that the lapse of time of itself give rise to a real risk of an unfair trial. This situation may, of course, arise because it is the lapse of time coupled with the lack of specificity in the sense of which I have used that term which makes it impossible to demonstrate prejudice. As has been observed in a quite different context, absence of evidence (of prejudice) is not evidence of absence.
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> I do not feel compelled, or indeed able in the absence of argument on the topic, to suggest whether the lapse of time in this case would, apart from the demonstrated prejudice, bring it within this first test. What I say on the topic is therefore clearly *obiter*. But I would observe, first, that every effort must be made by both parties but particularly the prosecution, to try to avoid a situation where there is no island of fact, and where bare assertion can be countered only by bare denial. This must be done first in questioning the complainant: everything he or she says must be recorded, whether it forms part of the eventual formal statement or not, and whether it appears to assist the prosecution or not. The charges should be no vaguer in point of time, place or otherwise than they need to be, and any variation between an earlier and a later account must be fully noted and disclosed. Where, as here some island of fact emerges it seems extraordinary that it is not further in investigated. If upon further investigation the position transpires to be that the relevant matter is impossible to prove one way or another that fact should be clearly stated either in the Book of Evidence or in disclosure."

Ms. Kennedy S.C., on behalf of the applicant, relied on this passage to argue that the lapse of time in this case was so great as to be prejudicial. She pointed out that the allegations in this case span a period of over ten years and lack any specificity or reference to collateral facts and assertions which would allow the applicant the opportunity to test the reliability of witnesses. She emphasised that this is a case in which there is no such island of fact and that therefore there is simply a contest of credibility.

Counsel on behalf of the respondent emphasised the point made by Denham J. *in D.C. v. Director of Public Prosecutions* [2005] 4 I.R. 281 at p. 283, in which it was pointed out that applications such as this "may only succeed in exceptional circumstances". The test reiterated in that case was the requirement to establish a real risk that by reason of particular circumstances that have occurred an individual could not obtain a fair trial. The onus of proof rests on an applicant to establish that he is at risk of an unfair trial. Ms. Ní Chulachain also relied on *McFarlane v Director of Public Prosecutions (No. 1)* [2007] 1 I.R. 134 and she referred to the decision in *P.O'C. v. Director of Public Prosecutions* (Unreported, Supreme Court, 4th March, 2008) in this regard. She relied in particular on a passage from the judgment of Hardiman J. in the *McFarlane* decision at p. 144 where he stated:-

> "In order to demonstrate that risk there is obviously a need for an applicant to engage in a specific way with the evidence actually available so as to make the risk apparent."

She argued that the applicant in this case had failed so to engage.

There is, I think, little disagreement between the parties as to the applicable test to be applied in a case such as this. In order to prohibit a trial there must be a real or serious risk of an unfair trial. The onus of proof rests on the applicant. The applicant cannot merely rely on a general statement as to the effect of a lapse of time (See *McFarlane v. Director of Public Prosecutions*, Hardiman J. at p. 142). As Hardiman J. said in that case at p. 143: "An applicant in this position must address if it is possible the actual specific facts of his case and this present applicant has singularly failed to do".

Issues Amounting to Prejudice
I now want to deal with a number of specific issues raised on behalf of the applicant.

1. The absence of medical records in respect of the applicant.
The offences alleged in respect of C. are alleged to have occurred between June 1959 and February 1967. In the affidavit of Jason Teahan it was averred that the applicant when initially charged indicated that he was in hospital over the course of 1966 and on crutches for a period of approximately two years thereafter and that it would have been impossible for him to have committed the offences alleged. Mr. Teahan wrote to the HSE seeking hospital records in relation to the applicant's treatment in hospital and his subsequent attendances at hospital. He was told by way of response from the HSE that records are only kept for a period of eight years and therefore are not available to be provided. Accordingly, it will not be possible for the applicant to produce evidence to show that the applicant was unable to commit the offences alleged.

In response, Gda. Aisling Currams, in a replying affidavit sworn herein on the 27th October, 2009, says that she investigated that issue and found a newspaper report from the 8th November, 1969, which related to a judgment of the High Court in respect of a

personal injuries claim by the applicant in which he is described as having received leg fractures and other injuries. According to the newspaper report, the accident in question occurred on the 20th May, 1967. One presumes that this article was considered by the respondent in reaching the decision not to oppose the application for prohibition in respect of the charges relating to M.

C., in a further statement, recalled that the applicant's injury occurred after the death of her child which will be referred to in more detail below. Her child died in January 1967.

Obviously there is an issue as to when the applicant's injury occurred. His initial response to the gardaí was that it occurred in 1966. The newspaper, which it was pointed out, would be inadmissible in the course of a criminal trial, suggests that the accident occurred in 1967. The statement of C. suggests that it occurred after January 1967. Hospital records, if available, would be of assistance in clarifying this issue and would either support the view of the applicant or that of C.

2. The absence of medical records in relation to C.
It was alleged by C. that she had a miscarriage in January 1967. She stated that she was raped by the applicant some three weeks later at a time when she stated that she was still haemorrhaging as a result of the miscarriage. This allegation of rape is contained in Count No. 20 and is the only Count in respect of which a specific date has been given, i.e., a date in February 1967. There are no medical records available in relation to C. in respect of her miscarriage and its aftermath. It appears that, in fact, C. gave birth to a child on the 20th January, 1967 as opposed to having had a miscarriage. Unfortunately the child died on the 22nd January, 1967. It is not alleged that the baby was born as a result of any alleged offence by the applicant. It was submitted that the medical records in relation to C. might assist in showing the symptoms, complaints and treatment of C. subsequent to the birth. In any event, those records are not available.

3. Missing witnesses
A number of potential witnesses have died and the applicant relies on the absence of these potential witnesses as a ground of prejudice. The witnesses are (a) his mother, (b) one of his sisters, (c) two of his brothers and (d) a neighbour. It is contended that these potential witnesses including the applicant's neighbour would have been in the family home on a regular basis.

In dealing with this issue, counsel on behalf of the respondent questioned the extent to which those potential witnesses could have been of assistance to the applicant. It was submitted in this respect that the applicant had not sufficiently engaged with the evidence to explain how those witnesses could have assisted him had the trial taken place during their life time. In other words could they or any of them have given meaningful evidence in the course of the criminal trial on behalf of the applicant? The applicant had contended that part of the case made by C. against him was that the alleged rapes took place when she was left behind at times when her mother was at Mass. On that basis it was submitted that the mother would have been a potential witness for the applicant on this point. It would be useful to mention what was stated in C.'s statement on this point. She said:

> "What really stands out in my mind was Sunday mornings when mother and everyone else went to Mass, I was always left behind to cook the Sunday dinner, and [the applicant] would be around and he would abuse me. . . . My mother would get a lift at the end of our lane down to Mass, the boys would head off one by one but [the applicant] always stayed back to be the last to leave. He'd always have some excuse like polishing his shoes or he'd start to wash himself late, he'd always have an excuse."

She then described how when everyone else was gone he would rape her. She said it would last for about ten or fifteen minutes and he would then go and dress himself and go to Mass on his bicycle.

4. Lack of specificity.
Complaint was made on behalf of the applicant in relation to the way in which the various counts have been framed. Counts 16 to 24, with the exception of Count 20, cover a period between May 1963 to September 1966. Count 25 covers a period between June 1964 and June 1966. Counts 26 to 29 cover a period between 1959 and February 1967. Count 20 as mentioned previously is the only Count which relates to a very specific time frame namely February 1967.

Reliance was placed by the applicant on the decision in *D.D. v. Director of Public Prosecutions* (Unreported, Supreme Court, Finnegan J. 23rd July, 2008) to support the argument that the time frames involved in the Counts referred to above are too long to enable them to be dealt with by the applicant. By way of response, counsel on behalf of the respondent referred to the decision in the case of the *The People (DPP) v. E.D.* [2007] 1 I.R. 484. I would say in passing that that decision appears to me to deal with a somewhat different situation and does not provide much in the way of assistance on this particular issue. It was pointed out at para. 26 of the judgment of the Court of Criminal Appeal in that case that "As to times and dates, certain very definite parameters are discernable in the complaint". It was noted later on in that judgment at para. 39: "Each count in the indictment charged a single offence of indecent assault and a single offence of unlawful carnal knowledge committed on date unknown within a specified period of four months". That is quite a different situation as I have indicated from the position complained of by the applicant herein.

Reliance was also placed on the stress and anxiety of the applicant as a result of the initiation of these proceedings. It was submitted that the applicant stress and anxiety was exacerbated by the delay between the applicant's initial arrest and the charging of the applicant. In other words complaint was made in this context on prosecutorial delay. Reliance was placed on the decisions in *P.C. v. Director of Public Prosecutions* [1999] 2 I.R. 25, *J. O'C. v. Director of Public Prosecutions* [2000] 3 I.R. 478 and *P.O'C. v. Director of Public Prosecutions* [2000] 3 I.R. 87.

The respondent accepted that stress and anxiety in conjunction with unacceptable prosecutorial delay may be sufficient to prohibit a trial as was the case in *P.M. v. Malone* [2002] 2 I.R. 560, but it was contended the averments on behalf of the applicant did not go far enough to establish that the applicant had suffered more than the levels of stress and anxiety to be expected in the context of a pending prosecution for rape. It was also submitted on behalf of the respondent that the court had to be careful in relying on medical reports based on the uncontested statements of the applicant.

Delay
Having referred to the specific matters described above, counsel on behalf of the applicant went on to deal with the issue of complainant delay in general terms and the issue of prosecutorial delay. Reference was made on behalf of the applicant to the decision in the case of *J. O'C. v. Director of Public Prosecutions* referred to above and the comments of Hardiman J in that case at p. 504 where he stated:-

> "Apart from the effect of lapse of time on the memories of those principally involved, an interval of 20 or more years makes it difficult if not impossible to clarify the surroundings circumstances and to introduce any element at all of undoubted fact which the statements of the parties can be correlated and tested. The element of hazard or chance

> which this state of affairs introduces into a trial has been recognised for centuries. The more nearly a serious trial consists of mere assertion countered by bare denial, the less it resembles a forensic inquiry at all."

It is contended that this is such a case.

Reference was made, as I have said, to prosecutorial delay in this case; to consider that issue it is necessary to look at the affidavit of Aisling Currams referred to previously in some more detail. She indicated that the complaints were made on the 11th and 12th November, 2005. A further statement was taken from C. on the 1st April, 2006. The applicant was arrested on the 23rd May, 2006, when he was detained and questioned in relation to the allegations, which he denied. Garda Currams explained that she was responsible for administrative duties and day to day running of the Garda station which had two Gardaí assigned to it and had no assigned Garda sergeant. In August and September 2006, much of her work involved applications for firearms licences and renewals and the processing of same. In the latter part of 2006, she was the sole investigating member in two rape cases involving teenage girls. A number of issues including intimidation from non nationals, death threats against the Gardaí and attacks on Garda property required the installation of CCTV footage at the Garda station which also took up her time. Final statements were prepared in December 2006, and the file was completed and then sent to the State Solicitor for onward transmission to the respondent. Subsequently she was required to obtain a further statement and that was completed on the 22nd March, 2007. Other matters were dealt by Gda. Currams on the 5th March, 2007 and the 15th June, 2007. These matters were subsequently included in the Book of Evidence. Subsequent to that the applicant was arrested and charged on the 4th June, 2008. I think it is fair to say that there is no explanation for at least twelve months of the delay period. The Book of Evidence appears to have been substantially complete at the end of December 2006, although as mentioned certain other steps were taken by Gda. Currams in the meantime.

In regard to the issue of prosecutorial delay I was referred to the well known decision in the case of *P.M. v. Director of Public Prosecutions* [2006] 3 I.R. 172. It was held in that case by the Supreme Court that blameworthy prosecutorial delay of significance, if established, was not sufficient per se to prohibit the trial, but that one or more of the interests protected by the right to expeditious trial must also be shown to have been so interfered with such as would entitle the applicant to relief. It was also held that the trial judge was correct in determining that the unchallenged evidence of the applicant of significantly increased anxiety arising from the blameworthy prosecutorial delay was sufficient to outweigh the public interest in having the charges prosecuted. I was also referred to the case of *P.M. v. Malone* [2002] 1 I.R. 560 and to a number of passages from the judgment in that case. That was a case in which the applicant had made admissions in the course of an interview. The time frame in that case in relation to the forwarding of papers to the DPP was a ten month time frame. There is a longer delay in this case in charging the applicant following the submission of papers to the DPP. It was noted in that case that the delay in making a complaint was not the result of any dominion exercised over her by the applicant, a factor which is also the case in these proceedings. The complainant in this case C. left home at a very early age and there is no suggestion anywhere to the effect that she was under the dominion of the applicant. At p. 42 of the decision in that case, Keane C.J. identified the essential issue for resolution as being whether the stress and anxiety caused to the applicant as a result of the violation of his constitutional right to a reasonably expeditious trial justifies the prohibition of the trial proceeding at this stage. The judgment concluded with Keane C.J. stating:-

> "I am satisfied that, in this case, the nature of the offences with which the applicant is now charged coupled with the inordinate and wholly unjustifiable delay in bringing them to trial renders this a case in which the constitutional right of the applicant to a reasonably expeditious trial outweighs any conceivable public interest there might be in the prosecution of the alleged offences."

It is interesting to consider that decision in the light of the subsequent decision in the case of *P.M. v Director of Public Prosecutions* [2006] 3 I.R. 172. The decision in P.M. v. Malone was followed in the case of *P.M. v Director of Public Prosecutions*. It can be seen from those decisions that blameworthy prosecutorial delay of significance is not of itself sufficient to prohibit a trial but that one or more to the interest protected by the right to expeditious trial must also be shown to have been interfered with such as would entitle the application to relief. The rights guaranteed by the right to trial with reasonable expedition are those enshrined in the well known case of *Barker v. Wingo* [1972] 407 U.S. 514 and are

> (1) The right to prevent oppressive pre-trial incarceration,
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> (2) The right to minimise anxiety and concern to the accused and
>
> (3) The right to limit the possibility that the defence will be impaired.

It has been stated in some of the decisions referred to that once it has been established that there is serious blameworthy prosecutorial delay then a balancing exercise must be carried out by the court in deciding whether or not to prohibit a trial.

One of the factors to be borne in mind in this case is the affidavit of the applicant sworn herein on the 22nd January, 2010, in which he stated:-

> "The investigation and ultimate prosecution of this case has caused me significant anxiety and worry. In particular I have contemplated suicide as I no longer feel that life is worth living. On a day to day basis, the anxiety caused by these proceedings has interfered with my appetite and sleeping patterns. I already have a mobility issue due to osteoarthritis in my left knee and this anxiety and worry are only exacerbating matters for me. As a consequence of the foregoing I have been attending my general practitioner for hypertension, anxiety, depression and insomnia and have been prescribed the following medication. . . ."

A psychologist has also sworn an affidavit on behalf of the applicant herein. He exhibited in that affidavit a report based on an assessment of the applicant carried out on the 31st March, 2010. In the report it was noted that the applicant did not seem to have a thorough grasp of the charges being made against him. It was pointed out that the information regarding the charges was obtained from documentation provided by his solicitor. He knew the general outline of the charges but could not describe them in detail or the legal process involved. In the recommendation, Mr. Quinn stated that:-

> "[The applicant] is responding to the current situation with extreme psychological and emotional distress. He should be regarded as a danger to himself and a suicide risk. The client presents with a greater possibility for suicide completion as he feels that there is not a lot of live for if facing future incarceration.
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> The extent of Mr. ……. memory impairment due to the lapse in time between the proposed allegations and now should also be considered. It would not be feasible to recall the intricacies of adolescence/early adulthood for most individuals with a gap of over 40 years; this can be easily substantiated with reference to common psychological research and

literature.

> At present [the applicant] in my professional opinion, is experiencing extreme stress and is emotionally vulnerable, presenting with severe anxiety with co morbid depression. The client displays and experiences cognitive/intellectual impairments with memory deficits that may impede or impair the viability of his testimony."

There was a also a short affidavit from the applicant's GP referring to short reports furnished by him in relation to the health of the applicant. They support the conclusions of Mr. Quinn and set out the medication which has been prescribed for the applicant.

As mentioned previously counsel on behalf of the respondent cautioned against relying on medical reports based on the uncontested statements of the applicant.

Decision
The first issue I want to consider is the prejudice alleged by the applicant in relation to missing medical records.

This is a case which relates to event alleged to have occurred over 40 years ago and in some cases over 50 years ago. Facing a trial in relation to matters alleged to have occurred so long ago will inevitably pose difficulties both for the prosecution and the defence. It is in those circumstances that it is not surprising that the applicant has brought these proceedings with a view to prohibiting that trial. It has been said previously that a delay may be so gross as to require of itself a trial to be prohibited. It is difficult to prescribe precisely the circumstances in which the lapse of time between the alleged offence and the date of trial is in fact so gross as to prohibit a trial on that ground alone. However that is not something that needs to be determined by me in the context of this application. This is a case in which the application to prohibit the trial has been brought on very specific grounds. I now want to look at those grounds in the light of the submissions made and referred to above.

The absence of medical records of the applicant.
The applicant herein has been charged as indicated above with a significant number of offences which cover a period ending in December 1966. They include Count No. 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28 and 29. Count 20 relates to a date in February, 1967. The case has been made on behalf of the applicant that he was in hospital as a result of a serious injury to his legs in 1966 and that he was thereafter on crutches for a considerable period of time. The respondent has produced a newspaper article which states that the accident concerned occurred in May 1967. It was pointed out in the course of argument that the newspaper article would be inadmissible as evidence in the criminal trial. There is no doubt that if the applicant was in a position to establish that he had suffered the injuries in an accident in May 1966, (I should note that the applicant has made no suggestion as to the month in 1966 in which he suffered the injuries) that would be of major assistance to the applicant in mounting a defence to the charges contained in the Book of Evidence. I note the statement of C. to the effect that her recollection is that the injury occurred after the death of the baby born in January 1967 and further I note what is stated in the newspaper report. That report could, of course, be mistaken. The way to confirm one way or another the date of the accident is by reference to the hospital records. Those records are not now available. If the newspaper account was mistaken and the evidence of C. could be shown to be incorrect, that would be of considerable assistance to the applicant by way of defence. Those records are not available and for that reason alone I would be disposed to prohibit the trial.

The absence of records in relation to C.
An issue was also raised in relation to the absence of medical records in relation to C. following the death of her baby in January 1967. This relates as mentioned before to the incident which is comprised in Count 20 in the Book of Evidence. Reference has been made in the course of the submissions to the need for an applicant seeking to prohibit a trial to engage with the facts and evidence likely to be adduced in the trial in order to demonstrate that missing evidence could have a bearing on the outcome of the case. The difficulty is that whilst that exercise was done in relation to the personal records of the applicant as outlined above, a similar exercise does not appear to me to have been done in relation the medical records of C. I cannot see any basis upon which the medical records could assist the defence of the applicant in relation to Count No. 20. The point made in C.'s statement was that that incident occurred some three weeks or so after the birth of the baby in January, 1967 and that she was still haemorrhaging at that stage. There is nothing to indicate how the medical records could assist in that regard. For that reason I do not believe that this is a ground upon which the trial could be prohibited.

Missing witnesses.
Submissions were made in relation to a number of potential witnesses who have died since the events complained of herein. In truth, there was no attempt to engage with the facts of the case in relation to the missing sister, two brothers and neighbour. There was a general suggestion that those witnesses were regularly in the family home and may have been of assistance to the applicant. It is fair to say that a number of the offences allege that the incidents took place at the family home, but the nature of offences of this kind is that they occur in private. The presence or otherwise of these witnesses does not appear to me to be something that has been demonstrated to be essential in order to assist the applicant's defence in respect of the charges. For that reason I would not be inclined to prohibit the trial on the basis of the missing witnesses referred to.

I want to deal more specifically with the grounds relied on in relation to the other missing witness, the mother of the applicant. I have set out in some detail the statement of C. in relation to allegations made about rapes taking place after the rest of the family and in particular, their mother, had gone to Mass on Sundays. Mr Teahan in the affidavit sworn herein simply stated that the applicant was prejudiced by the death of the said witnesses. There is nothing stated other than "the applicant's mother and brothers would have been in the applicant's house on a very regular basis and so would have been material witnesses to the defence. I say and believe and am so instructed that Mr. C., a neighbour was a very regular visitor to the family home and called to the house on a almost nightly basis". So far as the position of his mother is concerned, presumably, all that she could have said was that the applicant always turned up late for Mass. The applicant was one of a family of eleven children. The family lived with their mother. Their father had left at an earlier stage. However, there are still a number of members of the family who, presumably, could give evidence in relation to this aspect of the matter. I see no basis for prohibiting the trial by reason of the death of a number of potential witnesses including the applicant's mother.

Lack of specificity.
One of the issues raised in this case relates to the time frame contained within specific counts. I have referred previously to the decision the Supreme Court in the case of *D.D. v. Director of Public Prosecutions* (Unreported, Finnegan J. 23rd July, 2008). At p. 18 of the judgment in that case reference is made to one of the complaints at issue in that case which is alleged to have occurred within a time span of seven years. Finnegan J. was satisfied that the time span in that case of a single complaint was such that it was open to the trial judge to conclude that it would be unsafe for a trial to proceed. In the present case, three of the counts, Counts 27, 28 and 29 cover a time frame ranging between June 1959 and December 1966. In my view it is appropriate that an order of prohibition be granted in relation to those counts. I have no hesitation in saying that such a time frame renders it unsafe for the trial to proceed in

respect of those counts. During the course of the decision in that case, it was observed by Finnegan J. at p. 17 as follows:-

> "Where specificity was raised by an applicant and offences were alleged to have been committed between two dates one year or two years apart lack of specificity has not resulted in the trial being prohibited. This consistent approach is appropriate in this case: I would dismiss the appeal on this ground in relation to Counts 9, 10, 12, 13, 16 and 17."

A number of the Counts in the present case cover a period which is longer than the two years so described. Counts 16, 17, 18, 19, 21, 22, 23, 24, all cover the same time frame. The time span involved in each of those Counts is approximately three years and seven months. In considering this aspect of the case, one of the factors that I think is important to bear in mind is that cases such as this often involve a difficulty on the part of the complainant in giving precise dates and times for the commission of the various offences. This is a feature of the many sexual abuse cases that have come before the courts. It is not surprising that there should be some degree of uncertainty as to the time frame. A two year period in respect of individual counts has been found to be acceptable in the case of *D.D.*. Can it therefore be said that a period of three years and seven months is inappropriate? In considering this question one of the matters that concern me is the fact that the events complained of in this case took place so many years ago. By way of contrast the events in the case of *D.D.* were alleged to have commenced in March 1975 and ranged up to the 31st of December, 1984. It seems to me that the lapse of time between the dates of the allegations coupled with the breadth of the time frame of the specific counts is such that those counts which have a time frame ranging between May 1963 and December 1966 should be prohibited on the ground of lack of specificity.

I now want to deal with the issue of delay in general terms and more specifically in relation to the issue of blameworthy prosecutorial delay. This is a case which goes back many, many years. There is no reason or explanation given for the long delay in making the complaint in the first instance. This is not a case in which there is any question of dominion having arisen. Notwithstanding that, I would, in general, be slow to indicate that because a case has a certain vintage it should be prohibited. There is no statute of limitations in relation to criminal proceedings and it may well be that despite a very lengthy period of delay it is appropriate nonetheless to permit a trial to take place. I am reluctant to say that on the grounds of complainant delay alone the trial should be prohibited.

The issue of prosecutorial delay has to be considered. In this case there is a period of time post the making of complaint in relation to prosecutorial delay which has not been explained in any shape or form. I referred earlier to the affidavit of Gda. Currams. There is a period of at least twelve months delay which remains unexplained. I accept that prosecuting a case of this kind relating to events alleged to have occurred a long time ago presents difficulties. It also presents difficulties for the defence. For example, the prosecution might also have had to attempt to obtain medical records. These things take a certain amount of time particularly when one is dealing with an old case of this kind. To that extent, one can understand some element of delay. However, as I have said there is no real explanation for a period of the delay in this case after the complaint was made and to that extent I do believe there is blameworthy prosecutorial delay.

That brings the court on to the issue of the balancing exercise to be carried out in such circumstances. One principal issue has been relied on in this regard on behalf of the applicant. That is the issue of stress and anxiety. In this case it is my view that there is clear evidence before the court to show that the applicant has suffered from increased stress and anxiety as a result of the prosecution and one must add the length of time of the prosecution involved in this particular case. I have considered the authorities opened to the court on this particular issue and in particular I would refer again to the decision in the case of *P.M. v. Director of Public Prosecutions* [2006] 3 I.R. 172 and to a passage from the judgment of Kearns J. in that case at p. 185 and 186. I accept that blameworthy prosecutorial delay is not of itself a ground for prohibiting a trial but that if there is evidence of significantly increased anxiety on the part of the applicant arising form the delay then the court may make such an order. In my view this is a case where there is evidence of significantly increased anxiety on the part of the applicant arising from the delay. I think that the evidence put before the court in this regard is compelling. I have already referred in some detail to that evidence and for that reason it seems to me that the trial of the applicant in respect of all of the counts contained in the Book of Evidence herein should be prohibited.

In conclusion, it I will be seen that for a number of reasons, the absence of medical records in respect of the applicant's accident, the lack of specificity in respect of the time frame for individual counts and the effect of blameworthy prosecutorial delay on the applicant's state of stress and anxiety, I feel it is necessary to prohibit the trial of the applicant.

Accordingly, I propose to grant the relief sought by the applicant herein.