

## THE HIGH COURT

## JUDICIAL REVIEW

[2017 No. 581 J.R.]

BETWEEN

P. H.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

**JUDGMENT of Mr. Justice McDermott delivered on the 1st day of June, 2018**

1. The applicant, a retired school teacher, was born on 9th January, 1942 and is aged 76. He was employed in a Dublin south city primary school and faces 16 charges of indecent assault involving nine complainants the subject matter of indictment Bill No. DUDP0464/2017 presently pending before Dublin Circuit Criminal Court. Eight of the complainants were pupils in the same class 3C in the school and each alleges an offence or offences alleged to have occurred between 1st September, 1968 and 1st June, 1969. The ninth complainant alleges indecent assault said to have occurred between 1st September, 1970 and 30th June, 1971 when a pupil in Class 5C at the same school.

2. The applicant accepts that he taught classes 3C and 5C during the relevant periods within which the offences are alleged to have been committed.

3. Leave to apply by way of judicial review was granted (Heneghan J.) on 17th July, 2017 for an order of prohibition or an injunction restraining the further prosecution of the offences or a declaration that the delay in instituting criminal proceedings against the applicant has prejudiced a fair trial and/or that exceptional circumstances exist which would render it unfair and unjust to allow the prosecution to proceed.

4. It is claimed on behalf of the applicant that the delay in commencing these criminal proceedings constitutes a breach of his constitutional rights to be tried on criminal charges in due course of law pursuant to Article 38.1 of the Constitution and in particular to be tried with reasonable expedition and due regard to his right to fair procedures under Article 40.3 thereof. In particular, it is claimed that exceptional and specific circumstances exist which would render it unfair to put the applicant on trial namely:-

- "(a) The charges relate to events which are alleged to have occurred 45 to 48 years ago,
- (b) save for one complaint the gardaí appear to have first approached the complainants,
- (c) the applicant is now 76 years of age and in bad health,
- (d) the applicant was previously charged with 25 counts of indecent assault and has not been convicted."

5. The eight complainants from Class 3C and the number of indecent assault charges laid in respect of each against the applicant are:-

**Name of Complainant No. of Charges**

T.C. 3

D.D. 2

L.W. 1

F.T. 1

T.O'B. 2

P.K. 1

K.B. 1

A.P. 3

The applicant is charged with two charges of indecent assault against the ninth complainant D.H which allegedly occurred when he was in Class 5C.

**The Investigation**

6. Detective Garda Garvan Ware received a file on 5th August, 2013 concerning an allegation of historical sexual and physical abuse from the Domestic Violence/Sexual Assault Unit of An Garda Síochána as a result of allegations made by T.C. On 29th August he took a statement of complaint from T.C in which he alleged that the applicant had sexually and physically abused him when he was teaching him in the school in 3rd and 5th classes during the school years 1968 to 1969 and 1970 to 1971. He described in his statement which was furnished to Garda Ware on 29th August, 2013 how the applicant had indecently assaulted him during the course of the school year in Class 3C and had also physically abused him when he was in classes 3C and 5C: he could not recall sexual abuse during his year in Class 5C.

7. Detective Garda Ware then commenced his investigation by contacting the acting principal of the national school on 15th October, 2013. He was given access to the school records as a result of which he confirmed that T.C. had been a pupil in the school from 1967 to 1972 and that the applicant had been a teacher during those years. It was also confirmed that T.C. had been in Class 3C from 1968 to 1969 and in Class 5C from 1970 to 1971. He was provided with the roll books for Class 5C for the relevant period and a roll book for Class 2C for the year preceding the year during which the offending occurred in Class 3C. The prosecution claim that most pupils from Class 2C went on to Class 3C and were the applicant's pupils for the school year 1968 to 1969. The roll book for Class 3C for 1968 to 1969 was not available as it was in the possession of another garda investigation team which had obtained it during the course of a previous investigation concerning alleged abuse by the applicant.

8. In addition Detective Garda Ware was given access to the Clárleabhar, a registration book which detailed the date of entry into the school of each pupil, the class in which a pupil was entered for each year thereafter and the date of his departure from the school. He identified 63 former pupils from Classes 3C and 5C including the complainant for the relevant period. He attempted to contact as many of them as he could. In total 47 pupils were contacted including the complainant.

9. Twenty-seven former pupils made statements in respect of the alleged offences. Ten of those also made allegations of abuse against the applicant. One of those complainants is now dead. In addition, nineteen former pupils were contacted from whom statements were not taken but the contact was documented. Detective Garda Ware did not succeed in contacting sixteen people – nine of whom had died and two of whom he believed to be abroad: five could not be traced. This process took until the end of 2014. All of these statements were disclosed to the applicant's solicitor.

10. In his affidavit Detective Garda Ware states that seventeen of those interviewed who provided statements are in a position to give evidence relating to the general atmosphere in the class and the layout of the classroom. Some state that they did not witness any inappropriate behaviour in the classroom. This may be of relevance to the defence having regard to the repeated and public nature of the allegations made.

11. A number of statements of complaint were taken from former pupils who were interviewed in the course of the investigation during 2014. Statements were taken from D.D. on 3rd April, L.W. on 4th June, F.T. on 3rd July, D.H. on 4th August, T.O'B. on 14th August, D.C. on 8th September (now deceased), P.K. on 10th September, K.B. on 22nd September and A.P. on 20th November, 2014. Detective Garda Ware also provided the details of nineteen other pupils who were contacted from whom statements were not taken. The contact, however, was recorded. Some or all of these it is claimed may also be able to assist the applicant in relation to any evidence he may wish to adduce regarding the layout of the classroom, visitors to the classroom or the atmosphere prevailing in class.

12. On 10th January, 2015 Detective Garda Ware spoke with the applicant at his home concerning the complaints with a view to arranging an interview. Subsequently, he dealt with the applicant through his solicitor. He became aware of the applicant's health issues from a letter received from Dr. Peter Quigley consultant cardiologist. Detective Garda Ware states that eight interviews were conducted with the applicant between 18th May and 5th December, 2015. The allegations were denied: various issues were addressed in the course of the interviews.

13. An investigation file was prepared and forwarded to the Office of the Director of Public Prosecutions in January 2016. Directions were given on 3rd August, 2016. It was agreed with the applicant's solicitor that the matter would proceed by the issuing of summonses which were applied for in November 2016. These were returnable before the Dublin District Court on 16th March, 2017 when the applicant first appeared in respect of the charges the subject matter of these proceedings. The Book of Evidence was subsequently served on 17th May, 2017 and the applicant was returned for trial. The case was first listed in the Circuit Court on 16th June, 2017 and was listed for trial in April 2019. A considerable amount of disclosure was made by the respondent on 8th August and 16th November, 2017. The court is satisfied that the investigation and the court proceedings to date have been conducted with reasonable expedition.

## **The Allegations**

### **T.C.**

14. Three charges of indecent assault were laid against the applicant in respect of T.C. These are representative charges one for each three month period between 1st September, 1968 and 30th June, 1969. The applicant was alleged to have interfered with T.C.'s private parts after calling him to the top of the class and putting his hand down his trousers. He stated that it happened on a weekly basis over two years when the applicant was his class master. His back was always to the class and he was placed sitting on the applicant's knee. He did not know if anybody in the class witnessed it. Though he witnessed the applicant being physically violent with other pupils, he did not remember him sexually interfering with them. He later became a catholic priest.

15. A witness B.G. said that he witnessed acts of sexual interference by the applicant with T.C and his brother J.C when in fifth class in front of the class. These were mostly committed on T.C. He also witnessed the sexual and physical abuse of another pupil T.M. who is not one of the complainant's in this case.

### **D.D.**

16. D.D. described how shortly after moving to Class 3C he observed the applicant "mauling" other members of the class at the side of his desk while they were sitting on his lap or between his legs: he put his hand down their trousers front and back. He alleged that he was interfered with in the same way and was again assaulted in the same way a few weeks after the first occasion. In the meantime, the applicant was doing the same thing to other boys. The abuse ended before Christmas of that year. D.D alleges that the applicant then became very violent towards him. After complaining to his mother about a beating and delivering a letter from her to the applicant he was beaten again. He did not complain again to his mother because he became afraid for her safety if he did. The applicant is charged with two counts of indecent assault on D.D.

### **L.W.**

17. L.W. recalled how in fourth or fifth class he was taught by the applicant. He stated that he was called up to discuss his homework and was interfered with in the same manner as described by the other complainants. One charge of indecent assault is laid in respect of L.W. between 1st September, 1968 and 30th June, 1969.

### **F.T.**

18. F.T. was also in Class 3C. He alleged that during the year he was beaten severely by the applicant. His parents decided to take him out of the school as a result of this. The complainant alleges that just before he left the applicant interfered with him by putting him on his knee and putting his hand inside the front of his trousers and interfering with his private parts. He also witnessed others being interfered with. This is the subject of one count of indecent assault against the applicant between 1st September, 1968 and

30th June, 1969.

**T.O'B.**

19. The applicant was his class teacher in third and fifth class. He described how he was assaulted by the applicant who put his hands down his trousers and touched his private parts twice or three times in third class. He said he told his parents who attended the school after which the interference stopped. He described how other pupils were brought up and interfered with on a regular basis at the top of the class. Two charges of indecent assault were laid against the applicant in respect of T. O'B within the period 1st September, 1968 and 30th June, 1969.

**P.K.**

20. P.K. recalled the applicant when approached by Detective Garda Ware in the course of the investigation. He described how the applicant placed his hands on him and groped his private parts a few times. He was frightened by this. The applicant called him up to his desk where he placed his hands around his waist and on his buttocks. He complained to his parents about what the applicant was doing to him and other pupils in the classroom. His father went to the principal and complained about this behaviour. Following this complaint P.K. states that the applicant never touched him again or said anything to him about the incidents. However, he alleges that he saw the applicant indecently assaulting other pupils. He dreaded that he might have the applicant as a teacher again while attending the school but this did not happen. The applicant was charged with one count of indecent assault committed upon P.K. between 1st September, 1968 and 30th June, 1969.

**K.B.**

21. K.B. was also a pupil in Class 3C and the applicant was his teacher. He described that the applicant would tell the pupils to put their "heads down" and would then call someone up to the top of the class to sit on his knee. The applicant sat him on his knee and put his hand down the back of his trousers and interfered with his private parts. He could remember it happening to him once. He claims that it happened to everyone in the class. He told his parents what had happened.

22. K.B.'s mother C.B. states that she went to the school and complained to the applicant in the staff room. Mrs. B. who is included as a witness in the Book of Evidence also gave a statement to Detective Garda Ware. One morning K.B. was upset and told his mother that the applicant had been putting his hands down his trousers and opening his zip. He told her that he was doing it with other boys as well. She attempted to speak with the applicant initially without success. After ten or eleven attempts she went to the school at lunchtime and knocked on the staff room door asking to see the applicant. Another teacher informed her that the applicant was busy. However, he left the door slightly open so she went in and confronted the applicant. He ushered her out of the room. She put the allegation to him. He denied it completely and said it never happened. She told him that if he did not stop she would ring up the Gay Byrne Show on the radio. She also complained to the principal as she was leaving who dismissed the matter. The applicant faces one charge of indecent assault on K.B. between 1st September, 1968 and 30th June, 1969.

**A.P.**

23. A.P. recalled occasions upon which the applicant sat pupils on his lap in the classroom and put his hands down their trousers and fondled their genitals. This happened to him on two to three occasions. He had a sense that the applicant put other people on his lap but he could not recall when or how often. The desk at which this happened was to his right in the classroom and he could see a door with glass on the left. Three charges of indecent assault were laid against the applicant in respect of A.P. during the period 1st September, 1968 to 30th June, 1969.

**D.H.**

**24. D.H. in his statement states that the applicant was his teacher in 5th class. He recalled him as a "fierce, violent man, fierce violent to me". He described repeated inappropriate touching of fellow pupils. He described a very violent assault upon a fellow pupil B.McG. and alleged that when the child's mother complained about it, the applicant told her that he had every right to do it. However, the boy was not assaulted again. He alleges that the applicant engaged in "grabbing, roughhousing people and then he dropped his hand and grabbed them by the testicles". He said this happened all the time. It happened to him on two occasions. He recalled that fellow pupils were brought up to sit on the applicant's lap behind a big desk two or three times a week. There was violence every day. Two charges of indecent assault alleged to have occurred between 1st September, 1970 and 30th June, 1971 were brought on the basis of D.H.'s complaints**

The Interviews

25. In interviews with the investigating gardaí the applicant accepted that he taught classes 3C and 5C in the primary school. Detective Garda Ware informed him that the roll for class 3C for 1968 – 1969 was unavailable due to a previous garda investigation but that he had obtained the roll for the same class for the previous year 2C covering the school year 1967 to 1968 and the Clárleabhar.

26. The applicant rejected the allegations made. He described how he taught class 3C in room 4. In the adjacent room 5 an elderly teacher Mr G who suffered from chronic respiratory problems taught a different class. Mr. G was absent a lot during the school year 1968 and 1969. When that happened the principal often took the class because he was unable to obtain a substitute for him. When the principal was unable to stand in and teach that class, the applicant took the two classes during the principal's absence. This was facilitated by the opening of a large partition which separated the two rooms. The partition therefore remained in the open position for most of the year 1968 to 1969 due to the absence of this teacher. In addition, the applicant claimed that he could identify over 52 categories of adult who had reason to call into the classroom during the day or from time to time and unannounced. The applicant named a number of people including school inspectors, other teachers and gardaí from Kevin Street who called to his class regularly. He might have three to four visitors to the classroom every day. He also maintained that he never used his desk except for stacking books and copies.

27. The applicant denied the allegations made by T.C. and described B.G.'s account as a deliberate lie.

28. He described D.D.'s allegations as a total fabrication. He believed the class would have "revolted in anger" at such conduct. He described similarities in his account to that of T.C.'s and suggested that it had "the makings of a vendetta".

29. The applicant also denied L.W.'s allegations.

30. F.T. stated that the applicant drove a Green Ford Cortina when he was teaching Class 3C. The applicant stated that he did not have a Green Ford Cortina at that time in 1968 to 1969. He denied all allegations of indecent assault made by F.T. who also stated that he had on one occasion kicked the applicant in the groin. The applicant denied this incident and the further suggestion that other pupils had pulled him off the boy. He denied mocking F.T. when his parents removed him from the school.

31. The applicant also denied T.O'B.'s allegations. T.O'B. had described him as wearing a cardigan or having black rimmed glasses. He said that this description was incorrect. He denied that the boy's parents ever spoke to him about the alleged conduct. He suggested that he was putting "a malicious construction on the normal interactions in a normal classroom".

32. The applicant described K.B.'s statement as a false recollection. K.B. also described the father of another pupil who was a garda attending the school and challenging the applicant about his behaviour with his son and shouting at him. He had no recollection of a garda attending the school or shouting at him. He regarded Mrs. C. B.'s narrative as an attempt to do her best to support her son. He denied that he could be approached in the school at lunchtime because he went out to a local café for lunch. There was no staff room operating at the time.

33. He had a vague recollection of P.K. He recalled his father who attended the school to complain about taunting by other pupils about his son's weight. He said that comments attributed to him by P.K. were concoctions.

34. The applicant denied all of the allegations made by A.P. He rejected the accusation that he called A.P. up to sit on his lap in the presence of other pupils or otherwise.

35. The applicant was also invited to address the allegations made by D.H. who is said to have been a pupil of his in 5th class concerning the indecent assaults allegedly committed between 1st September, 1970 and 30th June, 1971. He said that corporal punishment was the norm at the time. The applicant said that D.H. had difficulties including a difficulty in concentration and was the leader of a group that taunted other pupils. He noted that D.H. later permitted his children to attend the school which he would not have done had he any difficulties about the applicant's behaviour. He rejected the allegations concerning the alleged assault on B.McG. He suggested that D.H. had come to the attention of the gardaí when in his class and that his family were "more than grateful for hampers that I arranged that they get at Christmas time and his mother, his wife and the children were all very thankful and appreciative". He described his allegations as arbitrary and vindictive.

36. The applicant also furnished a prepared statement to Detective Garda Ware. It denied any wrongdoing as alleged by the complainants. He furnished a list of people who had regular access to the classroom throughout the school year. A number of these were now deceased or may not be able to provide statements to assist him. When the partition between the classes was open the two classes could contain up to 100 pupils. He believed that he had very positive relations and communication on a daily basis with parents, pupils and staff. He considered that the complaints were a concerted campaign against him. He cited what he believed to be the rather vague impressions of some of the complainants of what they now say happened. In relation to Mrs. C. B.'s suggestion that she might telephone the Gay Byrne show, a well-known radio programme, he believed that this show did not commence until 1973. The applicant described the layout of the classroom. There was no chair or table at the top and it was not accurately described. He believed T.C.'s complaint was bizarre and that he was someone who had some psychological issues and that financial gain seemed to be a priority for him. He also believed the gardaí and juvenile liaison office had a particular interest in many of the complainants and their families.

#### **Previous Charges and Judicial Review Proceedings**

37. The applicant was previously the subject of twenty-five charges of indecent assault from six complainants, five of whom attended the same Dublin southside school as the complainants in this case. The allegations made by the sixth complainant related to similar complaints of indecent assault against him while teaching in another school. The offences were alleged to have been committed in the school between 1967 and 1968. Each of the five complainants was in 6th class and aged twelve or thirteen years at the time. It was alleged that on occasions in the classroom of up to fifty pupils the applicant would bring a boy to the front of the class to a point behind his desk. He would then tell the class to keep quiet or keep their heads down while he put his hand down the pupil's trousers and fondled his genitals. These complaints were made in 1995 and 1996. Gardaí did not interview any of the other pupils in the class despite the public nature of the alleged offences. The applicant was returned for trial to the Circuit Court on 1st October, 1999. He was refused a stay on the proceedings by her Honour Judge Dunne (as she then was) on 3rd March, 2000 who indicated that appropriate relief should be sought by way of an order of prohibition by way of judicial review. In proceedings entitled "The High Court, Record No. 2000/610 J.R. Between *P. H., Applicant v. Her Honour Judge Elizabeth Dunne and the Director of Public Prosecutions*, Respondents" Kearns J. (as he then was) granted an application to prohibit the trial (unreported High Court *ex tempore* 30th April, 2004).

38. This judgment was delivered before the Supreme Court judgment in *S.H. v. Director of Public Prosecutions* [2006] 3 I.R. 575 in which it was held that it was no longer necessary to examine the reasons for a delay in making a complaint in historic cases of sexual abuse of child complainants concerning issues such as dominion, inhibition, disparity between the ages of the accused and the complainant. The Supreme Court was satisfied that the relevant issue was not the reason for the delay in making a complaint but rather whether the accused would receive a fair trial and whether there was a real or serious risk of an unfair trial. It held that it was no longer necessary to inquire into the reason for a delay in making a complaint by way of a preliminary issue on the basis for example, of expert psychiatric or psychological evidence. However, the decision of Kearns J. preceded that decision and much of its focus was on the inadequacy of the psychological evidence tendered in support of the reasons for the delay in making the complaints. Having heard the evidence of a psychologist, the learned judge concluded that he was not satisfied on the evidence that there was any psychological or other reasonable explanation for the failure of the complainants to come forward before they did.

39. The court also considered the alleged prejudice to a fair trial as advanced at that time on behalf of the applicant. It considered the extent to which the preparation of his defence was hampered by the fact that members of the teaching staff, school inspectors and other persons who might earlier have been available to him and who he contended were frequent visitors to the classroom in the normal course of their work had died. The court noted also the gardaí had failed to seek out fellow pupils of the five complainants in the school in the course of the investigation. It also had regard to the applicant's serious ill health from the early 1990s into the early 2000s. In those circumstances and for those reasons, the trial was prohibited. It is clear, however, that this case was determined to a large extent by the application of the test which applied prior to *S.H.* and that the present proceedings must be determined on their own facts in the light of the test as stated in *S.H.*

#### **Prejudice**

40. The applicant claims that there is a real risk of prejudice and an unfair trial arising from the very lengthy delay in bringing these charges to trial because:-

(a) there are a number of potential witnesses who may have been available to him at an earlier stage but are now deceased;

(b) the roll book for Class 3C is unavailable;

(c) the inability at this remove to refute properly the contention that complaints were made to the applicant or to other persons in authority at or about the time of the alleged assaults; and

(d) The applicant's age and health difficulties.

### **The Legal Test**

41. In *S.H. v. Director of Public Prosecutions* [2006] 3 I.R. 575 Murray C.J. (delivering the judgment of the court) adopted the following test in considering whether the further prosecution of an offence should be prohibited:-

"... The issue for the court is whether the delay has resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial. The court would thus restate the test as:-

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

Thus, the first inquiry as to the reasons for the delay in making a complaint need no longer be made. As a consequence any question of an assumption, which arose solely for the purpose of applications of this nature, of the truth of the complainants' complaints against an applicant no longer arises. The inquiry which should be made is whether the degree of prejudice is such as to give rise to a real or serious risk of an unfair trial. The factors of prejudice, if any, will depend upon the circumstances of the case. ...

In this case the developing jurisprudence as to delay in bringing a prosecution for offences of child sexual abuse was considered by the court. I am 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."

### **Potential Witnesses Now Deceased and the making of complaints: points (a) and (c)**

42. It is submitted on behalf of the applicant that there are a number of features of the evidence proposed to be given by each of the complainants in respect of which deceased persons might have been able to give evidence. He states that there was a retractable partition which remained open giving access to and from the adjoining classroom during the year 1968/1969 while he was teaching Class 3C. Thus there was usually a teacher, the late Mr. G or, if he were absent, the principal, who was within sight and sound of the pupils and teacher in the adjoining room. He observes that at that time a new curriculum was being introduced. As a result a number of school inspectors from the Department of Education and Science attended the school to monitor its introduction and visited his classroom on most days. He also states that there was significant interaction between the gardaí attached to Kevin Street Garda Station and the school. There were frequent visitors to the school to arrange sports for the pupils. Any excessive noise from the pupils would have resulted in the principal entering the classroom. There was a glass partition in the classroom door which provided a view of the top of the classroom to any passing observer where his desk was situated and through which any untoward activity could be viewed.

43. In his affidavit the applicant listed a number of persons whom he believed could have been of assistance to him but are now deceased. They were:-

- (a) Mr. G. the teacher in Class 3B with the respiratory illness in the adjoining classroom;
- (b) B.P.N. a divisional inspector with the Department of Education and Science;
- (c) P.O.M. a regional inspector with the Department of Education and Science;
- (d) C.D. the principal;
- (e) J.R. a substitute teacher;
- (f) M.O'N. a physical education teacher;
- (g) K.L. (the vice-principal);
- (h) P.L. and M.L. teachers;
- (i) N.D. a caretaker;
- (j) A.D. an assistant caretaker;
- (k) M.O.S. a chief inspector with the Department of Education and Science;
- (l) S.O.C. an inspector with the Department of Education and Science;
- (m) M.O.D. and F. school managers;
- (n) Gardaí Garvey, McLoughlin and Doherty;
- (o) M.B. (a dancing teacher); and
- (p) Sergeant P. O'Driscoll.

The applicant claims that these persons would have been regular visitors to his classroom and in a position to describe its physical

layout and comment on the disposition of the class. Inspectors from the Department of Education and Science could have given evidence of observing his teaching and given an account of their and his interaction: they would have spoken to the pupils. They could have given evidence as to the unlikelihood that the abuse could have occurred as alleged or at all. The teachers and principal could also have confirmed that there was no staff room in the school in the year 1968 to 1969 in the context of the statement made by Mrs. C.B. that she confronted the applicant in the staff room concerning the allegation made by K.B.

44. It is claimed that B.P.N., a divisional inspector with the Department of Education and Science at the time when these offences were committed was a frequent visitor to the applicant's classroom. It would have been obvious to him if any of the applicant's classes were dysfunctional. No complaint was ever made to him about the applicant's conduct. He worked with B.P. N. closely in the implementation of a new mathematics programme for the new curriculum. B.P.N. visited his class on a regular basis to watch the implementation of the new curriculum.

45. A similar claim is made in respect of P.O.M. who also paid frequent visits to the applicant's classroom and had the same opportunities as B.P. N. to assess his teaching abilities and the general mood of the class.

46. The principal C.D. was a regular visitor to his classroom and the person to whom any complaints would be made. The applicant states he was aware of no such complaints. He claims that his work was monitored closely by the principal who would have been aware if there were any causes for concern about the pupils' welfare. The principal often took Mr.G's class when he was absent due to illness. He would also be in a position to refute the allegation that P.K.'s father or Mrs C.B. complained to him about the applicant's behaviour.

47. J.R. was a substitute teacher in the school for the year 1967 to 1968. He gave the applicant a leather strap in early 1968 to administer punishment. The applicant claims that he did not have one before this but sent pupils to the principal for punishment. Shortly after he received it he states that it went missing and was found years later behind a blackboard.

48. M.O'N. was the physical education teacher who served for many years at the school and would have been in a position to observe any injury or bruising on the pupils.

49. K.L. was vice-principal in the 1960s and allocated classes to the teachers. He had a very good knowledge of all the pupils and their parents and would have been aware of any complaints made in respect of the applicant.

50. P.L. taught in the classroom beside the applicant. If there was any disturbance, he would have known about it. He regularly passed by the applicant's classroom which could be viewed through the window and the door.

51. M.L. was a teacher in the school who lived two doors away from the applicant and knew him well.

52. It is clear that only one surviving witness to whom a complaint was made and to whom a complaint is said to have been made by any of the complainants is contained in the book of evidence namely Mrs C.B. D.D., F.T., T.O'B.P.K and K.B. state that they complained to one or both of their parents about the sexual abuse suffered by them and that one or both parents complained to the applicant. It is said P.K's father and K.B.'s mother Mrs C.B. complained to the applicant and the principal. The principal is now deceased and cannot give evidence in that regard. There is no written record of any complaint by the complainants or their parents.

53. Counsel for the respondent notes that in the earlier judicial review proceedings the applicant claimed the same prejudice alleged in these proceedings in respect of B.P.N., P. O'M., C.D., J.R., M.O'N., K.L., P.L. and M.L. Kearns J. stated that he was extremely conscious of the general as distinct from specific prejudice to the accused where there was a small group of accusers on the one side and an inability to call on teachers, inspectors or pupils who are dead or untraceable, on the other. He also noted that the applicant had set out comprehensively the extent to which the then teaching staff and inspectors and other persons might have been available to him who had either passed away or could not be found. The respondent submits that the investigation carried out in this case was more comprehensive and wide ranging. It involved the taking of statements from past pupils and the identification and location of teachers who worked at the school at the time. It is submitted that the claim of prejudice is therefore weaker in this context where other witnesses are available whose statements are contained in the disclosure made.

54. Detective Garda Ware deposes that the applicant now has the means of identifying former pupils who declined to make statements to ascertain whether they could assist his case. Furthermore, there are pupils who do not allege that abuse took place and these witnesses are available to the applicant. He notes that he took a statement from H.B. a teacher in the school from 1968 to 1972, on 6th October, 2017. In that statement, H.B. describes the partition between the two classrooms and states that in his experience the partition was always closed. P.F. taught in the school from 1964 until 2000. However, efforts to obtain a statement from P.F. were unsuccessful though Detective Garda Ware met with him. In interview, P.F. is said to have corroborated the applicant's statement during the course of his interviews that the purpose of the retraction of the partition was to assist the applicant when he had to teach both classes when Mr. G. was absent. The garda also spoke to M.W. a teacher between 1965 to 1975 who also declined to give a statement. Furthermore, the respondent claims that what is advanced by the applicant in respect of missing witnesses is no more than a hypothesis that witnesses might have contradicted the accounts given by the numerous complainants.

55. The absence of adult witnesses at the time of the alleged events may in certain circumstances give rise to prejudice to an applicant's proposed defence sufficient to establish a serious risk of an unfair trial. The applicant has attempted at this remove to outline what he considers to be the possible evidence that might have been offered by those who are now deceased as set out above. This is said to be particularly relevant because the assaults on multiple complainants are said to have occurred in full view of other pupils and anyone coming into the classroom. The applicant maintains that if that happened (which he denies) it would also have occurred in the sight and hearing of the teacher and pupils in the adjoining room. As indicated by the respondent there are other adult witnesses available from that period who were teaching in the school and other pupils who did not see anything untoward happening in the classroom. In addition, this is not a case of a single isolated allegation but one in which there are multiple allegations by several complainants of similar type behaviour. This factor was considered to be an important feature in *J.T. v. The Director of Public Prosecutions* [2008] IESC 20 in which potential witnesses who were teaching in a school in which a teacher was alleged to have committed indecent assaults on pupils had died, one after the initiation of the judicial review proceedings. In that case the evidence to be given by one was found to be neutral and by the other to be "feeble and most unlikely to bear heavily, if at all, on the thrust of the trial". Their absence was found not to be a factor so prejudicial to the applicant as to warrant an injunction of his trial. (at para.16).

56. In this case there are other witnesses who can give evidence as to their experience of the applicant as a teacher in Class 3C during the relevant period. The complainants propose to give evidence of the alleged assaults said to have occurred when the

applicant was the sole adult present in class with them. The absence of the inspectors from the Department of Education and Science and the other teachers and caretakers from the school must be considered in that context. The generalised nature of the possible evidence outlined in respect of most of the named individuals does not address a specific identifiable prejudice. Though this is a difficulty that arises because the applicant has obviously not had the opportunity to contact each of them to ascertain what each might say, it results in a situation in which the court can only speculate as to what they might have said for or against the applicant. The court is not satisfied that in the circumstances a sufficient or any particular or specific prejudice has been demonstrated in the materials that gives rise to a real or serious risk of an unfair trial arising from the death of:- Mr.G., B.P.N., P.O.M.,J.R., M.O'N., K.L., P.L., M.L., N.D., A.D., M.O'S., S.O'C., M.O'D., F., Gardai Garvey, McLoughlin or Doherty, M.B., or Sgt. P.O'Driscoll.

57. The applicant claims that a specific prejudice arises from the circumstances in which complaints were made by the young complainants to their parents two of whom in the cases of P.K. and K.B., then made complaints to the principal, C.D. Mrs C.B., K.B.'s mother is available to give evidence of the complaint made and what she did about it. She states that she brought the complaint to the principal after her encounter with the applicant but he dismissed it. P.K. states that he informed his father who complained to the principal. Other parents to whom complaints were made are not available. Evidence of recent complaint is admissible in a criminal trial but only in respect of the credibility of the applicant: it is not corroborative of the complainant's testimony.

58. The death or unavailability of a potential witness in any criminal trial even if it is held within a reasonable time may also give rise to difficulty for either side but this may not of itself render the trial unfair (see e.g. *The People (Attorney General) v. Byrne* [1974] I.R. 1 at p. 9). This is one of the difficulties in delay cases that is now normally dealt with in the legal directions to be given by the trial judge to a jury in respect of the consequences of delay for the accused: the conduct of the trial is also subject always to the overriding obligation of the trial judge in the course of the trial to ensure its fairness (see *The People (DPP) v R.B.* (Unreported Court of Criminal Appeal, 12th February 2003), *The People (DPP) v E.C.* [2007] 1 I.R. 749, *The People (DPP) v P.J.* [2003] 3 I.R. 550 at pp 568-571 and *M.S. v. Director of Public Prosecutions & Ors* [2015] IECA 309 at paras. 34 - 50). In this instance Mrs C.B. is available to give evidence and the complainants may be cross-examined. The difficulties caused to the accused by the absence of these or any other witnesses will be addressed fully in the trial judge's charge. The warning to be given to juries in such cases must be contextualised and the strength of that warning in a case involving multiple complainants must reflect the extra difficulties for the defence caused by such cases which includes the absence of witnesses due to the efflux of time (*The People (DPP) v CC* [2006] 4 I.R. 287 at p. 296).

59. The court is therefore satisfied in the circumstances of this case that the deaths of the named persons over the years does not give rise to a real or serious risk of an unfair trial.

### **The Roll Book for Class 3C**

60. The roll book containing the names of all of the pupils present in the classroom respect of Class 3C for the period 1968 to 1969 is unavailable. The court was informed that it was in the possession of An Garda Síochána during the course of the earlier investigation in this matter. Detective Garda Ware, in the course of his investigation obtained the class roll book in respect of Class 2C for the preceding year from which most of the pupils for Class 3C in the relevant year would have come. It was submitted on behalf of the applicant that additional pupils may have entered the class in that year but would not appear on the roll book for Class 2C and might have provided useful information or evidence. The record of the attendance of the pupils would have been a good indication of whether they had any problems in class and confirmed the dates upon which any pupil left the class for whatever reason.

61. The court is satisfied that in the course of the investigation, Detective Garda Ware interviewed all pupils whom he could identify as pupils of Class 3C for the year 1968 to 1969. He retrieved the roll book for Class 2C and assembled a series of facts which, arguably, as a matter of logic and probability indicate that he has interviewed most of the pupils of that class for the relevant year whom it was possible to identify. In addition, he retrieved the Clárleabhar which contained a history of all pupils from the date they entered the school until they left and the class in which each pupil was enrolled. This was acknowledged by the applicant in interviews.

62. The court is, therefore, satisfied that the applicant has not established that the absence of a roll book for Class 3C gives rise to a real or serious risk of an unfair trial.

### **The Applicant's Health**

63. The applicant claims that he is in bad health. He is now 76 years old. He says that he has no doubt that his recall and memory retention have deteriorated. He states that sometimes he forgets where he is going and finds it difficult to concentrate. As noted in the previous judgment of Kearns J. he previously suffered from ill health. In his grounding affidavit the applicant exhibited a report from his Consultant Cardiologist, Dr. Peter Quigley dated 15th June, 2017. This report prepared for his solicitors stated that:-

"Mr. H. suffers from severe extensive arteriopathy, evidenced by the fact that he suffered myocardial infarction initially in 1992 subsequently requiring coronary artery by-pass surgery. He also required angioplasty stenting on several occasions in the past. His last coronary angiogram dated 2014 showed a significant residual ischaemic vulnerability confirmed by CMR scanning. In addition to his cardiac problems he has undergone right carotid endarterectomy and has significant risk factor profile including Type 2 Diabetes, hyperlipidaemia and hypertension. Considering all these issues and despite the fact that symptomatically he remains reasonably well on current medication (Bisoprolol, Atorvastatin, Aspirin, Amlodipine, Ramipril, Imdur, Indapimide, Glicazide, Metformin and Pantoprazole) there is no doubt that the stress related to upcoming legal proceedings is likely to have a significant adverse effect on his prognosis and significantly raises the risk of acute coronary syndrome/myocardial infarction."

64. Objection was taken to the admissibility of the letter furnished by Mr. Quigley. He subsequently swore an affidavit on 4th April, 2018, stating that it was still his view that the stress related to the upcoming legal proceedings may have a significant adverse effect on the applicant's prognosis and raises the risk of acute coronary syndrome/myocardial infarction. He was aware that breaks may be afforded to an accused who can also attend court with family members or assistants or indeed healthcare professionals if required. It is noteworthy that the letter furnished at that stage contains an amendment which reduces the probability furnished in the first letter of adverse medical consequences for the applicant to the level of a possibility. The doctor's conclusion in the second letter is stated in the following way:-

"...there is no doubt that the stress related to upcoming legal proceedings may have a significant adverse effect on his prognosis and raises the risk of acute coronary syndrome/myocardial infarction." (emphasis added)

The risk is no longer described as being "significantly" raised.

65. The letter issued on 4th April, 2018. Neither letter indicated a recent attendance by the applicant with Dr. Quigley.

66. There is no medical evidence to suggest that the applicant's mental faculties or memory are in any way inhibited by reason of his age or any particular illness. In the absence of medical evidence, the court is not satisfied on the basis of the statement of the applicant that there is any cogent evidence to support the proposition that the applicant's recollection of matters is so inhibited as to give rise to a real or serious risk of an unfair trial. The applicant was interviewed extensively and was able to offer a view on many issues in respect of matters of fact alleged in the complainants' statements when put to him. In addition, the trial judge has a duty to ensure fairness of procedures which extends to matters raised in respect of the capacity or competence of the applicant to participate meaningfully in the criminal process.

67. The court is not satisfied on the evidence adduced having regard to his age or ill health that there is a real and serious risk of an unfair trial (*J.T. v. Director of Public Prosecutions* [2008] IESC 20).

#### **Cumulative effect of factors**

68. Approximately 50 years have now passed since these alleged events occurred and that in itself, it is submitted, is a relevant factor to be considered in determining whether there is a real and serious risk of an unfair trial. It is submitted that while in general there is no necessity to hold an inquiry or to establish the reasons for delay in making a complaint and that the period of time is not usually determinative of the issue, this is a case in which the passage of 50 years should be regarded as an exceptional matter. Further, it is submitted that the court should consider all of the circumstances outlined above and the length of time that has passed as cumulatively amounting to "wholly exceptional circumstances where it would be unfair or unjust to put an accused on trial" (per Murray C.J. in *S.H.*).

69. The complaints in this case originate from the original complaint made by T.C. In his statement he gives an account as to why he delayed in making a complaint which of itself since the decision in *S.H.* is not a basis upon which to prohibit a trial. The other complainants were approached as potential witnesses to T.C.'s alleged abuse and in each case Detective Garda Ware states that without identifying the applicant as the teacher involved when he met with the pupils, each made allegations in respect of the applicant. It is not a unique occurrence that in the course of an investigation other complainants emerge with similar complaints against an alleged culprit. I do not regard these as wholly exceptional factors in the case. It is clear from *S.H.* that such factors are not central to the court's consideration and that the test is whether by reason of the delay there was a real or serious risk of an unfair trial in respect of which the applicant is expected to engage with the facts and the specific prejudice said to arise.

70. It is clearly the case that delay of this nature poses a considerable difficulty for accused persons. As stated by Hogan J. in *M.S.* (cited above):-

"There is no question at all but that lengthy delays of this kind present difficulties for the courts in their endeavours to administer justice, not least where the accused has been falsely accused. Memories fade or are liable to be distorted, witnesses die or become unavailable and the capacity of the parties to test the credibility of the opposing party by reference to past known events is often completely undermined by the passage of time. This poses a considerable difficulty for accused persons. How, it might be asked, could an accused hope to defend himself if faced with an allegation after such a very long lapse of time? In reality, quite often the only defence will be to counter the allegation by a denial which demonstrates that he was not the kind of person who could or did commit this type of offence. It has to be acknowledged that this is not altogether satisfactory and that the position of the person accused in such circumstances after such a lapse of time may well be regarded as "perilous": see the comments of Hardiman J. in *S.B. v. Director of Public Prosecutions* [2006] IESC 67."

71. This difficulty was also acknowledged in the High Court decision in *M.S.* (*M.S. v. Director of Public Prosecutions* [2015] IEHC 84). *M.S.* was an 82 year old retired consultant surgeon in respect of whom complaints of indecent assault were made by 22 complainants the oldest of which dated from 48 years before the applicant was charged. The trial was allowed to proceed. O'Malley J. stated:-

"77. It is true that some of the charges are exceedingly old, even by the standards of some of the trials that have come before the courts in the last fifteen or twenty years. It is also true that the applicant, having regard to his profession, can be expected to have particular difficulty in recollecting individual patients over such a lengthy period of time. However, the same problem has arisen in many cases involving teachers and it is clear that it is not considered to be a bar to proceeding with a prosecution. ... To prevent a trial from getting off the ground, however, there is a clear onus on the applicant to demonstrate that the passage of time has caused identifiable prejudice. It is not sufficient to claim that a particular witness, now unavailable, might have had something helpful to say on behalf of the applicant without some indication as to why that should be so."

72. In the Court of Appeal Hogan J. did not accept the appellant's case that the lapse of time was simply too great. There was no *ex ante* limit to prosecutions of that kind unlike civil cases which are governed by a statute of limitations. It is clear that the Court of Appeal and the Supreme Court have consistently determined that such a case falls to be considered on the basis of its own facts and that the matter is not to be determined by a policy decision that after a stated number of years an offence may not be prosecuted.

73. In applying the test in *S.H.* the Supreme Court has also acknowledged that there are cases in which the court may consider an accumulation of factors which though individually did not justify prohibition, nevertheless when considered cumulatively give rise to the basis for such relief (*J.T. v. Director of Public Prosecutions* [2008] IESC 20 and *D.K. v. Director of Public Prosecutions* [2006] IESC 40).

74. The applicant relies in particular on *P.T. v. Director of Public Prosecutions* [2008] 1 I.R. 701. In *P.T.* the applicant was returned for trial on indecent assault charges between 34 and 39 years after the dates of the alleged offences. He was 87 at the time of the Supreme Court decision. The High Court had found unexplained delays in the steps taken by the respondent in the prosecution of the applicant and granted the reliefs sought. It was submitted that the High Court had erred in holding that blameworthy prosecutorial delay alone could entitle the applicant to relief. The applicant submitted that the case was exceptional and that it would be unfair to put him on trial given his old age and the fact that the charges were alleged to have occurred between 37 and 42 years previously. Medical evidence was also adduced that the stress associated with criminal trial could have a major effect on the appellant's health. It was held by the Supreme Court that blameworthy prosecutorial delay of significance was not sufficient of itself to prohibit a trial and that the applicant had to show that one or more of the interests protected by his right to an expeditious trial had been interfered with such as would entitle him to relief. If such interference was shown the court would balance the right of the accused to be protected from such interference caused by unnecessary and inordinate delay against the public interest in the prosecution and conviction of those guilty of criminal offences. However, the court also held that where an applicant failed to satisfy this test the court might nonetheless restrain any further steps in the proceedings "where it found that there were wholly exceptionally circumstances which made it unfair or unjust to put the accused on trial": such an exceptional circumstance might already have existed or might develop after the institution of proceedings. Furthermore, the cumulative effect of a number of factors might bring a



case within the exceptional category of cases in which it is unfair or unjust to put the accused on trial. Denham J. delivering the judgment of the court emphasised that the case was one in which the applicant claimed to fall within the terms of "wholly exceptional circumstances where it would be unfair or unjust to put the accused on trial". This was essentially a fact based issue and therefore previously decided cases were of limited value. The court considered the relevant factors in *P.T.* were that there was a long interval between the authorities being informed of the allegations, the formal complaint, the charging of the applicant and the return for trial, the applicant was very old and the charges would have a detrimental effect on the life of the applicant because of their nature. The claim of ill health was supported by medical evidence. The trial was prohibited. Denham J. stated:

"27 Factors may exist, or may develop after a decision has been made by the respondent, which would render a trial unjust. The issue in this case is whether such an exception has occurred. In this balancing exercise the court must give consideration to the right of the public to have crimes prosecuted. This is not an absolute, for prosecutions are taken when they are in the public interest. It is part of a justice system which is for the common good, which includes consideration of the constitutional requirement of due process. A prosecution is not an exercise in vengeance. While a court should give careful regard to the position of victims, it must protect the integrity of the justice system as a whole.

28. No single factor renders this case an exception. This decision does not mean that a person may not be prosecuted for a crime committed many years ago, nor that a person in their eighties may not be prosecuted, nor that a person with ill health may not be prosecuted. It is the cumulative effect of all the factors which bring this case within the category of an exception requiring a balancing exercise to be conducted by the court. Of specific importance is that it is an old case, that the prosecution took some time to mount (I am not finding that there was prosecutorial delay but merely recording the fact of the time lapse), that the applicant is an elderly man, in his 87th year, and that he *is in bad health*.

29. It demeans a system of justice if its process is one of vengeance, or has such a perception. It evokes concepts of primitive jurisprudence. The People of Ireland under the Constitution require that there be due process in the justice system. The courts are required to protect the integrity of that system, which may mean that in exceptional circumstances a prosecution should be restrained. It is a question of proportionality".

75. The court was therefore satisfied that the case constituted one of exceptional circumstances and restrained the trial.

76. In this case the court has considered all of the factors referred to above separately and cumulatively including the fact that the charges laid against the applicant are 50 years old. He is an elderly man of 76 years. He has an illness that stretches back to the 1990s which may give rise to the qualified difficulties described if the trial is to proceed. The court is not satisfied that whether on the basis of the suggested cumulative factors including all of the circumstances considered in the earlier part of the judgment or otherwise that the case is "wholly exceptional". It is clear from the authorities that cases of a similar nature have been allowed to proceed but of course each case must be determined on its own facts. The court is therefore not satisfied that relief should be granted on the basis of "wholly exceptional circumstances" based on cumulative factors as considered and applied in *P.T.*

### **Conclusion**

77. For all of the above reasons the application is refused.