Neutral Citation Number: [2005] IEHC 204

THE HIGH COURT
JUDICIAL REVIEW

[Record No. 2003/128JR]

BETWEEN

M. M.

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Mrs. Justice Macken delivered on the 15th day of June, 2005

1. These are judicial review proceedings by which the applicant seeks orders of a type frequently sought in what have become known as "delay" cases that is to say in cases where the applicant seeks to restrain the respondent from taking any further steps in criminal proceedings because of alleged inordinate delay, such that the constitutional right of a defendant to an expeditious and fair trial can no longer be guaranteed. These cases often arise, as here, where an applicant has been charged with sexual assault and where a considerable period of time has elapsed from the dates when these alleged assaults took place and, in particular, the date when a complaint was first made about those assaults to the Gardaí.

2. In the present case a complaint was made against the applicant by one person in respect of whom the applicant faces nineteen counts of indecent assault and one charge of buggery, alleged to have occurred between May, 1976 and April, 1984, at a time when the applicant was an adult and the grand uncle by marriage of the complainant who was at the time a boy between seven and fifteen years of age.

3. On 24th February, 2003, by order of this court (O'Donovan J.) an order was made granting the applicant liberty to issue judicial review proceedings seeking an order of prohibition against the respondent in respect of the further prosecution of the applicant in the proceedings entitled "*The People at the Suit of the Director of Public Prosecutions v. M. M.*" at present pending before Dublin Circuit Criminal Court on Bill No. DU996/2002.

4. The grounds upon which such leave was granted are the following:

> 1. The lapse of time in itself of approximately 19 to 27 years between the date of commission of the alleged offences and the likely date of a trial of the applicant before the Dublin Circuit Criminal Court is so great as to constitute a denial to the applicant of his right to a trial with reasonable expedition and in accordance with law as guaranteed by the Constitution and Article 6 of the European Convention on Human Rights.
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> 2. The offences alleged are nineteen charges of indecent assault and one charge of buggery of the complainant covering a period from the 1st of May, 1976 to the 14th of April, 1984. The first sixteen offences cover time spans between the 1st of May to the 30th of September of years concerned and the remaining four charges cover two month periods thereafter to the complainant's 15th Birthday.
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> 3. The lack of specificity in relation to the dates upon which it is alleged the offences complained of took place having regard to the passage of time since the date of the commission of the alleged offences imposes an unfair and oppressive burden upon the applicant in the preparation and presentation of his defence, including the tendering of possible alibi evidence, such as to render any trial of the offences alleged unfair to the applicant and in breach of his constitutional right to fair procedures. The first sixteen offences cover time spans between the 1st of May to the 30th of September of the years concerned and the remaining four charges cover two month periods thereafter.
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> 4. The complainant who was born on the 14th of April, 1969 being under no dominion by the applicant since in or around the 14th of April, 1984 when he was 15 years of age made no complaint to the Gardaí until the 21st of January, 2001 when he was 31 years old having allegedly told somebody else in 1997.
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> 5. The circumstances of the alleged offences of indecent assault which are alleged to have occurred every week over the periods alleged in the applicant's house where other people resided including the applicant's wife.
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> 6. The applicant is prejudiced in the preparation and presentation of his defence by reason of the death of his wife, B. M. who died on the 6th day of November 2002. She would have been in a position to confirm the length of time and dates when the applicant was in Ireland on holidays from his work in London up until he retired when he moved to Ireland permanently in or about 1983. She could also have commented upon the possibility or likelihood of the incidents described having occurred in their home at the times alleged by the complainant.
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> 7. By reason of the passage of time the applicant who was born on the 18th of July, 1925 and who is now in his 78th year and suffers from poor hearing and ill health is left effectively only with his plea of "Not Guilty" by way of defence to the said charges.
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> 8. The failure of the Prosecution to properly investigate the offences and in particular their failure to interview and obtain statements from the other persons who were allegedly residing in the applicant's house at the time of the alleged incidents and who could be in a position to comment on same has severely prejudiced the applicant's ability to defend himself.
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> 9. The delay by the Prosecution from when a complain was first made to An Garda Síochána on the 21st of January, 2001 until the applicant was charged with these offences on the 6th of September, 2002.
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> 10. The complainant was under no disability that would have prevented him from complaining at any earlier time.

5. A notice of opposition was filed on 17th November, 2003. Essentially the notice of opposition pleads that there has not been any inordinate delay on the part of the complainant, but that if there had been such delay it was not of a nature to prevent the trial of the applicant proceeding, and that in the event there had been such delay, this was the responsibility of the applicant. The applicant had prevented the making of complaints by threats to and intimidation of the complainant. And it was pleaded that where, on the information available to him, the respondent does not have proper grounds for charging any person with an offence, lapse of time

before he is in a position to do so, does not give rise to an entitlement to prohibit a trial on the basis of defeat of a constitutional right to an expeditious trial.

6. The respondent also traversed the other pleas raised. Affidavits were also sworn by Detective Garda K. W., by the complainant, by a Mr. Michael O'Donoghue, a counsellor, and by Mr. Michael Dempsey, psychologist.

7. The applicant first attended the Garda Station in relation to these matters on 24th October, 2001 and was arrested and charged on 6th September, 2002, with a return for trial date of 4th October, 2002. Leave to apply for the judicial review, the subject of these proceedings was granted on 24th February, 2003.

8. Ms. Ring, Senior Counsel for the applicant, says that the main issues for consideration and the grounds for judicial review can be summarised as follows:

a) The lapse of time which occurred in making the original complaint between the dates of the alleged abuse and the date when the complainant first attended the Gardaí in January, 2001.

b) Prejudice due to the death of the wife of the applicant.

c) Prejudice due to the lack of specificity in the indictment against the applicant.

d) The delay in the investigation of the complaints and the charging of the applicant.

e) The age and poor health of the applicant.

9. The applicant in his affidavit having referred to the book of evidence and the counts of indecent assault and buggery on which he has been charged, draws attention to the dates upon which the alleged offences were committed as being between 1976 and 1984, a period covering eight years of his life and between nineteen to twenty seven years prior to the date when he swore the affidavit.

10. He says that he vehemently denies the allegations and intends to plead not guilty. The applicant says that he is prejudiced in the preparation and presentation of his defence by reason of the death of his wife, who died on 6th November, 2002, given the allegations that on several dates he indecently assaulted the complainant at their house in County Dublin. The applicant states that he worked over a period of years in the United Kingdom and returned to live permanently in Ireland only in or about 1983. In the intervening period he returned only for holidays and says his deceased wife would have been able to give evidence to confirm the length of time and the dates when he was in Ireland on holidays from his work in England, and when he was at his home.

11. In addition, he claims prejudice by reason of the passage of time because he now suffers from ill health and poor hearing and has been hospitalised for periods of time since he was charged. Because of these matters he says that he is left effectively only with a plea of "not guilty" by way of defence to the charges. He claims the prosecution failed to interview and obtain statements from all of the persons residing at the premises in Palmerston at the time of the alleged offences and who could have been in a position to comment on this matter, which has severely prejudiced his ability to defend himself.

12. At the request of the Gardaí he attended at R. Garda Station for interview in October, 2001, and was told that he could leave but he believed that if he did so he would have been arrested. He was not told that he had a right to consult with a solicitor or anybody else. Further he recalls a statement being taken down which he signed, but denies making any admissions in that statement and intends to contest them fully at his trial if that trial proceeds.

13. In the complainant's affidavit, dated the 7th November, 2003, he accepts that he made his first statement in January, 2001, a second one on 15th May, 2001, and a third one on 28th February, 2002, all at R. Garda Station to Garda K. W., and avers that the contents of those statements are true and accurate. He states that he was sexually assaulted by the applicant until he was fourteen or fifteen years of age when the abuse stopped. He lived with the trauma of what was done to him ever since and could not tell anyone about it. He says this inability to disclose what had happened led to mood swings and friction. He went to a Michael O'Donoghue, in 1997, a counsellor, concerning a relationship problem he was experiencing at the time, after several visits and a degree of trust had developed between them he felt able to disclose that he had been abused. Mr. O'Donoghue advised him he could contact the Gardaí and the Rape Crisis Centre, but he did not feel able to do this at the time because he did not feel confident enough or mentally strong enough. He was not prepared to make his abuse public knowledge and he knew that by going to the Gardaí his family would become aware of the abuse. Because the applicant was married to a great-aunt he did not want the family, and in particular his own parents, to be upset by the abuse.

14. In September, 2000, he was at his lowest point and after breaking down in a public house told his father about the abuse, who was the first person he had told about the abuse apart from Mr. O'Donoghue. His father wished him to go to the police but he himself did not wish to do so and was in turmoil over the Christmas period. In January, 2001, his father went to the Gardaí to seek advice about what the complainant could do, and as a result he made his initial statement to the Gardaí on 21st January, 2001, which he says was the first time he felt sufficiently strong mentally to make a complaint which was with the support of his family.

15. Mr. O'Donoghue avers in his affidavit that he was at the time he met the complainant in 1997, a counsellor in training for reality therapy. The complainant had attended him for five or six sessions and towards the end of this period he disclosed the sexual abuse to him. As part of the therapy process, he suggested that the complainant could make a complaint to the Gardaí and could attend the Rape Crisis Centre. Mr. O'Donoghue exhibited a series of counselling notes which he took during the sessions and says that the notes represent a true and accurate record of his meetings with the complainant and the opinions which Mr. O'Donoghue formed as a result.

16. Finally as to Mr. Dempsey, he swore an affidavit on the 6th November, 2003 prepared at the request of the respondent, the complainant having attended Mr. Dempsey also at the request of the respondent. He is employed by the Eastern Regional Health Authority and is a Senior Clinical Psychologist working at St. Brendan's Hospital in Dublin. He averred to his professional qualifications and his current academic positions, and to having had twenty three years of experience in the practice of clinical psychology in the health services in England and Ireland. He has experience in conducting psychological assessments in both criminal and civil cases. He has worked therapeutically with both victims and perpetrators of sexual abuse and has prepared psychological reports in relation to people who have been abused in residential institutions, as well as in relation to delay in reporting alleged sexual abuse in the past.

17. He met the complainant on 25th June, 2003. This was with a view to assessing the effect of the alleged offences on the complainant, the reasons for the delay in reporting the offences and whether the delay in doing so was reasonable.

18. For the purposes of this the respondent had provided Mr. Dempsey with the documents which he mentioned and he also had available to him the counselling notes of Mr. O'Donoghue, and had spoken to Mr. O'Donoghue. Mr. Dempsey prepared a report in which he sets out the results of his interview and assessment.

Legal Submissions
19. On behalf of the applicant Ms. Ring argues that there was very considerable delay in relation to the matter and she invoked Article 38.1 of the Constitution and the judgments in the case of *The State (Healey) v. Donoghue* [1976] I.R. 325 and *The State (O'Connell) v. Fawsitt* [1986] I.R. 362. She also invokes Article 6 of the European Convention on Human Rights concerning a right to a fair trial and a trial with due expedition.

20. As to the first delay in this matter, between the date of the alleged offences, and the date of the first statement, this is approximately seventeen years. She argued that the delay in making the complaint is both inordinate and inexcusable. She points in particular to the fact that the complainant made complaints to a counsellor in 1997. It was clear that since he was able to speak to the counsellor, it was reasonable to consider he would also have been able to make a complaint to the gardaí.

21. She submitted that the lapse of time involved is so extraordinary and extensive as to give rise to an unavoidable presumption that the applicant is prejudiced. In that regard she invokes the judgment of Hardiman J. in *P.O.C. v. The Director of Public Prosecutions* [2000] 3 I.R. 87 at 177 where the learned judge stated:-

> "It is sometimes said that cases in which prosecutions will be restrained will be rare and exceptions to the general rule. I believe it is premature to reach that conclusion in relation to old cases. In permitting such prosecutions, exceptionally, in child abuse cases the courts are acting on their perception that special considerations apply to such cases. It must be acknowledged that special problems arise in trying very brave and disturbing cases after very long intervals. There are real risks of miscarriages of justice. Already convictions have been set aside in very perturbing circumstances…"

22. In addition she cites Murray J. in the same case, where he stated:

> "I have already acknowledged above that the right of the State to proceed with the prosecution in cases where there has been a long delay since the time of the alleged commission of the offence is subject to the right of the accused to a fair and speedy trial. It may well be that where the delay is so extraordinary and extensive in the circumstances of a particular case it might be sufficient to call into question the possibility of the accused getting a fair trial."

23. And again in the case *P.C. v. D.P.P.* [1999] 2 I.R. 25 she relies on the judgment of Keane J. where he said:

> "The delay may be such that, depending on the nature of the charges, a trial should not be allowed to proceed, even though it has not been demonstrated that the capacity of the accused to defend himself or herself has been impaired."

24. And she further relies on the comments by Hardiman J. in *P.O.C. v. D.P.P., supra*, on this test, where he stated:-

> "I take this to mean that there may be a lapse of time so gross that in the circumstances of the particular case it is open to the court to conclude that the lapse of time itself gives rise to a real risk of an unfair trial. That situation may of course arise because it is the lapse of time coupled with a lack of specificity in the sense of which I have used that term which makes it impossible to demonstrate prejudice. As it has been observed in quite a different context absence of evidence (of prejudice) is not evidence of absence."

25. In this context, counsel for the applicant submits that the considerations which the court must take into account when applying the test found in the jurisprudence can be summarised as follows:-

> (a) Every effort must be made by both parties but particularly by the prosecution to try and avoid a situation where there is no island of fact, and where bare assertion can be countered only by bare denial.
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> (b) The court should not only consider the effect of lapse of time on the memories of the complainant and the defendant but of third parties as well.
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> (c) It must be borne in mind that the legal requirement for a fair trial to direct a jury that it is dangerous to convict in sexual cases in the absence of corroboration has been abolished.
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> (d) In the absence of any island of fact a trial of this sort is "in fact a trial of the credibility of the witnesses" and the risk of such a contest are easy to underestimate.

26. The lapses of time between the dates of the alleged offences and the date of the complaint are not, on the balance of probabilities, attributable to the actions of the applicant, which is what the jurisprudence requires should exist if the delay is to be considered excusable. In that regard Ms. Ring contended firstly that there was no possible dominion by the applicant over the complainant, but that if there was any such dominion, this ceased in or around April 1984, seventeen years prior to the complaint being formally made.

27. On the question of delay, the complainant was not cross-examined but the counsellor Mr. O'Donoghue and the psychologist, Mr. Dempsey, were both cross-examined on their affidavits.

28. As to the cross-examination of Mr. O'Donoghue, in response to questioning as to when the abuse had been disclosed to him, Mr. O'Donoghue said that from his notes this was "well into the sessions", between the complainant and him. The complainant had come to him in relation to the break-up of a relationship, not in relation to the abuse but that in the course of this he had disclosed some of the elements of the abuse. The complainant had indicated to him that he was afraid for his family and that it would have been very difficult for his family, if they found out about the abuse, to talk about it. As part of the process he had discussed with the complainant the complainant's desire to make public the abuse and encouraged the complainant to write a letter about it but not to send the letter. The complainant confirmed that the abuse had taken place at the hands of an "uncle type" figure.

29. In response to further questioning, Mr. O'Donoghue said that the complainant had been extremely distressed when disclosing the abuse, and his notes reflected this.

30. In the course of the cross-examination of Mr. Dempsey he gave as his opinion that the complainant's background, which included

the use of alcohol, confusion of sexual identity and the breakdown in relationships, all related to the abuse. There was heavy drinking pattern in the family. In response to a question as to whether the behaviour of the complainant could not have arisen from alcohol abuse alone, Mr. Dempsey did not accept this. He said that there were several factors all relating to the childhood sexual abuse including anger, explanations that drinking was caused by the abuse, and others.

31. Insofar as the period between 1997 and 2001 is concerned Mr. Dempsey said that this period had been discussed between him and the complainant, but that the complainant did not feel he would be believed by anybody, either the Gardaí or his family, and that he suffered from the shame of the sexual abuse even in that period. He confirmed that such feelings of not being believed or of shame, were quite common and usual in the case of child sexual abuse and were readily found in the literature, as were factors such as alcohol abuse, as an avoidance means for difficulties in relationships, etc.

32. He accepted that there was no complaint made by the complainant that in this period he had been inhibited by the applicant from complaining to the Gardaí. His view was that while there had been no direct threat in adulthood there were the continuing effects of the abuse on the complainant, and that it is easier to disclose abuse, usually over a period of time, in the course of therapy.

33. It was also put to Mr. Dempsey in cross examination, that in forming an assessment as here, he was totally reliant on what the complainant might say. Mr. Dempsey rejected this saying that it was not a question of being reliant on what the person says but rather on carrying out a proper analysis, together with the taking of a history. As to whether this was to find a fit, as he was asked, he said it was for the purposes of ensuring that there is an appropriate match in what the complainant is saying with the professional analysis of the situation. Asked whether a person could not give a totally incorrect history so that he, Dr. Dempsey would come up with the same result, Mr. Dempsey accepted it was always possible that a person might come up with a story, by lying, but that his analysis in the present case was that this had not occurred.

34. Examined by a Mr. McDermott, B.L. for the prosecution, Mr. Dempsey was asked if in his professional opinion the delay in making the complaint was due to the sexual abuse in question. He confirmed this to be definitely so in his opinion.

35. I asked Mr. Dempsey to explain the use by him of the phrase "reasonable in light of the complainant's circumstances", in his affidavit. Mr. Dempsey explained that this was a phrase used on the basis of an assessment of the complainant's own account, the family circumstances, the complainant's developmental history, when the abuse occurred, the circumstances which arose later such as drug or alcohol abuse, relationship problems or other matters, and having regard to an analysis of all the foregoing he had to decide whether the delay was reasonable which is what he is asked in such cases.

36. Arising out of these cross-examinations Ms. Ring submitted that it was perfectly possible that the difficulties which the complainant had encountered and which he invoked as rendering the delay in complaining excusable, were ones not directly related to the abuse but rather arose from other sources such as drugs or alcohol or difficulties in family relationships, and she drew the court's attention to the importance of a correct psychological analysis from the jurisprudence, including *M.F. v. Director of Public Prosecutions* [2000] 3 I.R. 122, and cases in similar terms. In particular Ms. Ring said that there is an obligation on a professional witness to make inquiries of other persons for the purposes of verifying the accounts which have been given, and in that regard relied on a judgment of McCracken J. in the decision *M.S. v. Director of Public Prosecutions*, unreported 5th December, 1997 where the learned judge stated:-

> "It is my strongly held view that where a witness purports to give evidence in a professional capacity as an expert witness, he owes a duty to ascertain all the surrounding facts and give that evidence in the context of those facts, whether they support the proposition he is being asked to put forward or not."

37. In the present case Dr. Dempsey had confirmed in cross examination that he did not speak to others (apart from Mr. O'Donoghue) because he said he did not consider it appropriate for him to seek to validate the history of the events as described by the complainant in the present case, or his own assessment.

38. I propose to deal with this aspect of the case made by the applicant first, before dealing with the issue of prosecutorial delay which is also complained of. I do so because if the delay in the complainant making his complaint to the Gardaí is considered to be inexcusable then the case can go no further.

39. For the respondent, the following are the arguments presented. The key factors Mr. McDermott says are that the alleged abuse occurred when the applicant was an adult and the complainant a child between seven and fifteen years of age. The evidence in the statements made by the complainant, which the court is to take as being a truthful account of the matter at this stage, shows that the applicant was careful to ensure that the alleged abuse occurred when only the applicant and the complainant were present. He further says that when requested, the applicant made a detailed statement of admission in which he admitted a sexual relationship with the complainant but says that this occurred only on two occasions.

40. According to Mr. McDermott the statement of admissions reveals that the applicant has an excellent memory of the events in question. The applicant having abused and intimidated the complainant, is responsible for the delay in reporting the complaints. As to the psychological evidence tendered on the reasons for delay, there is ample evidence before the court for it to be satisfied that any delay in complaining can in fact be laid at the door of the applicant himself. In that regard the court had the benefit of the complainant's own explanation of the difficulties encountered and of the effects of the abuse on his life, and not being cross examined on his affidavit, that evidence has not been challenged. By way of example of the effects which the matter had on the complainant the respondent refers to an extract from the statement taken on 21st January, 2001 in which he stated that:-

> "I remember that he used to say to me regularly after he had forced me, this secret, take this to the grave. I felt at the time when I was younger that this happens to all young lads so there is nothing wrong with it."

41. Further, the notes attached to the affidavit of Mr. O'Donoghue, counsellor, made clear the distress which the complainant underwent when revealing the abuse even in 1997. Insofar as the affidavit of Mr. Dempsey is concerned it was submitted on behalf of the respondent that the report exhibited to his affidavit also provides compelling reason for refusing the applicant the relief which he seeks. Without having to quote from it, the report indicates in particular that Dr. Dempsey identified that the complainant suffered ongoing post-traumatic stress disorder symptoms, even as late as 2003. In cross-examination the report had not been seriously challenged and *D. v. D.'s* evidence, when tested, has stood up. The respondent invokes the decision of the Supreme Court *in V.W. v. D.P.P.* (Unreported, Supreme Court, 31st October, 2003), in which McGuinness J. considers the role of such evidence in these types of cases and concluded that:-

> "All such evidence is open to challenge in cross-examination. It must however be borne in mind that it is not the task of

the expert witness to assess the credibility of the complainant or the guilt or innocence of the applicant. The truth or otherwise of the complaints is to be tested at the trial."

42. In addition she added the following in relation to this type of evidence:-

> "It seems to me that there are two ways in which expert psychological evidence can be of assistance to the court in these cases.
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> In certain cases there is ample ordinary evidence which would assist the court in understanding from its own common sense and general experience of life why for example a child did not immediately report sexual abuse by an adult. The case of *B. v. D.P.P.* is one example. In such cases it seems to me any expert evidence could be limited to a general exposition of the reasons for delay in reporting these cases. The numbered list of fact is set out by the expert witness in the case of *K. v. Judge Groarke and the D.P.P.* at p. 3-4 of the judgment of Denham J. in that case is a good example.
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> It would then be for the courts to form its own opinion of the influence of these factors within the parameters of the other evidence in the particular case.
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> In some cases however, the reasons for the delay are less clear and less readily ascertainable. In such cases expert evidence in greater depth may be required and further evidence may be considered appropriate".

43. It is argued on behalf of the respondent that having regard to the foregoing evidence and materials, there is sufficient explanation for the delay in reporting the alleged abuse.

Conclusions

44. As in all cases such as the present, the applicant is fully entitled to employ expert witnesses. No expert witnesses was called for the applicant, either to counter the allegations made by the complainant as to reasons for delay nor to undermine the methodology adopted or the conclusions reached by Mr. Dempsey nor, insofar as they are relevant, the notes or the evidence of Mr. O'Donoghue.

45. Further, although a proposition was put forward in cross-examination to Mr. Dempsey that the problems which the complainant acknowledged he faced and was found to have faced, such as alcohol or drugs abuse or difficulty with relationships, might be equally attributable to other factors such as, inter alia, a family history of alcohol, Mr. Dempsey was firm in his view that the symptoms in the present case were in fact associated with the child sexual abuse. Further, while accepting that a person could recite a history of this nature and claim it to be associated with child sexual abuse, because the expert is relying on the credibility of the witness, and therefore it would not necessarily follow that delay was attributable to the alleged abuse, Mr. Dempsey, did not consider, having analysed the position and assessed the complainant in the present case, that that was applicable here. While Ms. Ring drew the court's attention to the remarks of The Supreme Court concerning the obligation to see that expert evidence is scrutinised carefully to ensure that it has been properly prepared, in the present case, Dr. Dempsey had carried out appropriate examination and analysis of the person being interviewed, and there was nothing disclosed in the course of the hearing which would suggest that the expert evidence tendered in this case should be criticised on any basis or that it was prepared on the basis which gave rise to criticism in the case of *M.S. v D.P.P., supra*.

46. I have previously indicated that in these cases involving allegations of sexual abuse against children which are not reported for a very considerable period of time, the jurisprudence both of this court and of the Supreme Court has been evolving in nature, but that this court has the benefit of a number of very helpful decisions of the Supreme Court in the field. I propose to adopt the same approach in this case, namely, rather than analysing each and every case invoked by one or other of the parties, and there have been many such cases, I will be guided by the unanimous decision of the Supreme Court delivered in the recent case of *T.S. v. The Director of Public Prosecutions* (Unreported, 28th July, 2004), in which the Court stated:-

> "In a succession of judgments this Court has set out the principles of law which should be applied in deciding whether, in the circumstances of a particular case, a trial of the accused should be permitted to proceed. These judgments acknowledge that there is a balance to be struck between the public interest in seeing that persons are tried for serious offences where it has been found that there is sufficient evidence to warrant that person being put on trial and the constitutional right of a citizen to a trial in accordance with law, that is to say a fair and expeditious trial."

47. The Supreme Court then referred to the case of *Hogan v. President of the District Court* [1984] 2 I.R. 513 at 521 and the judgment of Finlay C.J. It then continued in its exposition of the applicable principles as follows:-

> "The kind of considerations which may fall to be considered were referred to again by Finlay C.J. in *G. v Director of Public Prosecutions* (1994) 1 I.R. 374 when he stated at p.380:
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> > 'The Court asked to prohibit the trial of a person on such offences, even after a very long time, might well be satisfied and justified in reaching a conclusion that the extent to which the applicant had contributed to the delay in the revealing of the offences and their subsequent reporting to the prosecution authorities meant that as a matter of justice he should not be entitled to the order.'

48. The Supreme Court then continued:

> "These issues have tended to arise mainly in the context of persons who have been charged and sent for trial for sexual offences against young children. The considerations which arise in such cases were further dealt with by Keane J (as he then was) in *P.C. v Director of Public Prosecutions* (1990) 2 I.R. 25 at 67:
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> > 'The approach that must be adopted by a court asked to prohibit the trial of a person charged with such offences was dealt with comprehensively by Denham J., speaking for this court in *B. v Director of Public Prosecutions* (1997) 3 I.R. 140, and has been considered by her again today. Clearly, the fact that the offence charged is of a sexual nature is not of itself a factor which would justify the court in disregarding the delay, however inordinate, and allowing the trial to proceed …. There are cases, however, of which this is one, where the disparity in age between the complainant and the person accused is such that the possibility arises that the failure to report the offence is explicable, having regard to the reluctance of young children to accuse adults of improper behaviour and feelings of guilt and shame experienced by the child because of his or her participation, albeit unwillingly, in what he or she sees as wrongdoing.

> In addition of course, in individual cases there may be threats, actual or implied, or punishment if the alleged offences are reported. The delay may also be more readily explicable in cases where, not merely is the person concerned significantly older than the complainant at the time of the alleged offences, but occupies a particular role in relation to him or her e.g. as parent, step parent, teacher or religious. In such cases, dominion by the alleged perpetrator over the child and a degree of trust on the part of the child may be more readily inferred. This is not to say that the court in dealing with applications of this nature must disregard the presumption of innocence to which the accused person is entitled. But the issue is not whether the court is satisfied to any degree of proof that the accused person committed the crimes with which he is charged. The issue in every such case is whether the court is satisfied as a matter of probability that the circumstances were such as to render explicable the inaction of the alleged victim from the time of the offence until the initiation of the prosecution. It is necessary to stress again that it is not simply the nature of the offence which discharges the onus. All the circumstances of the particular case must be considered before that issue can be resolved.
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> Manifestly, in cases where the 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 has been established that there is a real and serious risk of an unfair trial; that, after all, is what is meant by the guarantee of a trial "in due course of law."
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> The delay may be such that, depending on the nature of the charges, a trial should not be allowed to proceed, even though it has not been demonstrated that the capacity of an accused to defend himself or herself will be impaired. In other cases, the first inquiry must be as to what the reasons for the delay are and, in a case such as the present where no blame can be attached to the prosecuting authorities, whether the Court is satisfied as a matter of probability that, assuming the complaint to be truthful, the delay in making it was referable to the accused's own action.
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> If that stage has been reached, the final issue to be determined will be whether the degree to which the accused's ability to defend himself has been impaired is such that the trial should not be allowed to proceed. That is a necessary inquiry, in my view, in every such case, because, given the finding that the delay is explicable by reference to the conduct of the accused is necessarily grounded on an assumption as to the truth of the complaint, it follows that, in the light of the presumption of innocence to which he is entitled, the court asked to halt the trial must still consider whether the degree of prejudice is such as to give rise to a real and serious risk of an unfair trial.'"

49. I propose to adopt and apply these very helpful principles or criteria, and the guidance found in that judgment, to the facts in the present case.

50. I do not have to decide whether or not dominion in the formal sense of that word existed between the applicant and the complainant. I consider that it did operate at least until 1984, given the family relationship between the applicant as the grand uncle of the complainant, and the age of the complainant and of the applicant at the time. I have however previously found that most cases on this issue concern not dominion in the formal sense of the word, but rather the issue whether the delay in making the complaint as soon as possible was due to an applicant's own behaviour towards the complainant and the consequences of such behaviour on the complainant which is sometimes also called dominion in the case law.

51. This latter type of influence has been interpreted in the jurisprudence in the sense that if the alleged sexual abuse has prevented the complainant from making a complaint at the earliest possible date, because of the trauma or other adverse psychological consequences to the complainant resulting from the abuse, then that may be attributable to the applicant's own behaviour, and if there is sufficient evidence to support this it will in general render the delay in making the complaint explicable and the delay may therefore be excused.

52. In the present case the complainant refers openly in the various statements made by him, as well as in his affidavit, to the trauma and the adverse consequences which the sexual abuse caused to him. The complainant was not cross-examined on his affidavit. I note also that even in 1997 when the complainant first disclosed, some of the details of the abuse, and sometime after the commencement of counselling sessions with Mr. O'Donoghue, the notes taken contemporaneously by Mr. O'Donoghue and as described by him in cross examination would indicate clearly that, even at that stage, the trauma to the complainant even in discussing the alleged sexual abuse was not only evident, but was disturbing.

53. In the report prepared by Mr. Dempsey dated 17th September, 2003, which is a detailed report, he noted having carried out a complete analysis of the complainant, having taken all appropriate histories and applying the methodology which he refers in his report. He administered recognised psychological tests and analysed the responses secured from the complainant, and found the existence of post-traumatic stress disorder arising from the symptoms of abuse at that time. Although he was cross examined on behalf of the applicant he did not resile from his conclusions, as well as his methodology, in any way, and indeed confirmed his opinion that in the present case the inability of the complainant to complain up to 2001 was in his view definitely caused by the adverse sequelae arising from the abuse.

54. I am satisfied from the evidence before me that up to the time close to Christmas 2000, when the complainant first told his father of the abuse and shortly thereafter in January 2001 made a formal complaint to the Gardaí, such delay in making a complaint was due the adverse consequences of the alleged sexual abuse. I am not satisfied that the applicant established, on any reasonable basis, that the same sequelae arose or were likely to have arisen due to other reasons. It has been contended for on behalf of the applicant that, if the complainant was in a position to complain to his counsellor in 1997, he ought to have been able to make a formal complaint to the gardaí at the time. I do not think the evidence, either of the complainant or of the counsellor or of Mr. Dempsey is capable of being construed so as to suggest that this would have been possible, notwithstanding that Mr. O'Donoghue during the course of the sessions told the complainant of the possibility of making a complaint. He gave evidence however that this was not advice to the complainant but merely an exposure of one of the possible routes which the complainant had available to him.

55. In the foregoing circumstances, on the assumption of the truth of the allegations made by the complainant, the failure to make the complaint until January 2001 was excusable, and should not be taken as a failure to complain at the first available opportunity. In particular, I am satisfied also that both on the evidence of Mr. O'Donoghue and his notes which were read into the evidence, suggest that the complainant was not in a position to make a formal complaint in 1997.

56. Having found that the delay in making the complaint in the particular circumstances of the present case is excusable I now must consider the second delay alleged, namely delay between the period after the complainant made the formal complaint referred to, and when the applicant was charged. In the present case the manner in which the complaint was dealt with is set out in the affidavit

sworn on 7th November, 2003 by Garda K. W.

57. The sequence of events is the following. The first statement of complaint was taken in late January 2001 and concerned events in County Dublin and an incident in County Cork as well as a reference to an incident which occurred in England when the complainant was about eight or nine years old. The complainant was advised to make further statements to include exact details of the abuse and it was agreed that the complainant would need time to be in a position to make these additional necessary statements.

58. In mid May 2001 the complainant made his second statement to Sergeant W.. Apart from the third statement which was made on 28th February, 2002, other matters were occurring in relation to the enquiries. These may be summarised as follows:-

(a) On 3rd May, 2001 a statement was made by the father of the complainant and a separate statement by his mother;

(b) In addition the complainant's grandmother and the complainant's grand-aunt (now deceased but who was the applicant's wife) were interviewed.

(c) The applicant's wife made a statement on the 3rd October, 2001 and the complainant's grandmother made a statement on the same day. So far as can be ascertained the interviews and statements took place more or less contemporaneously.

(d) Also in October, 2001 Mr. O'Donoghue, counsellor, was interviewed.

(e) An investigation file, together with the usual overall report was forwarded to the respondent on 31st January, 2002.

(f) Directions concerning the case were received from the respondent on 11th June, 2002.

(g) The applicant was arrested on 6th September, 2002, the applicant having been requested by members of An Garda Síochána to attend and having attended R. Garda Station on 24th October, 2001 in connection with the investigation.

59. Garda K. W. was cross examined on his affidavit. In the course of this, Counsel for the applicant put to him that the progress of the investigation had been inordinately slow. He said that prior to taking statements from the grandmother of the complainant and her sister, the wife of the applicant, who was a grandaunt of the complainant, he knew that both ladies were elderly and in some ill health. He therefore considered it was necessary and proper to allow time for family members to explain some details of the complaint to them, because of the nature of the complaint, and to ensure that the health of both of them was sufficient for the taking of the statements. He accepted that because of this, this part of the investigation moved more slowly than would otherwise have been the case.

60. As to the suggestion that not all persons who could have given evidence in relation to the matters were interviewed in the course of the investigation, he had stated in his affidavit that there were no other persons who could be interviewed. In cross-examination he said that the only other person who resided permanently at the same address where the applicant on his visits home from England to see his wife, lived, and where he subsequently lived when he returned permanently, was the son of the applicant's wife. He had suffered a stroke and was not in a position to be interviewed as a witness as this would not have been appropriate or suitable. He is at present residing in a care home on a residential basis.

61. Detective Garda W. also confirmed the above sequence of events during cross examination. The file which was sent to the Director of Public Prosecutions included nine witness statements and a full statement of the background and the events leading up to the furnishing of the file. He received a direction on 11th June 2002 that the applicant was to be arrested and he was arrested on 2nd September, 2002. During that period Detective Garda W. was himself on holidays for five weeks annual leave.

62. In response to the suggestion that there were periods during which there were very little activity, in some cases amounting to three months, Detective Garda W. accepted this, but reiterated his concerns about the elderly and related, members of the family who had to be interviewed. He also confirmed that Mrs. M., the wife of the applicant, had confirmed his own understanding of the applicant's work outside Ireland until 1983 and as to the fact that the applicant returned to Ireland on several occasions during each year from his work in the United Kingdom. He also said that it is not unusual for a complainant to make several statements, particularly in sexual abuse cases.

63. On this aspect of the delay claim, the applicant submitted that the lapse of time between the making of an initial complaint in relation to the offences and the applicant's interview is ten months. Since he was at all times residing at his long standing address and was readily amenable to arrest, detention and interview, the delay in moving against the applicant was unreasonable and unnecessary. Moreover, after the applicant was interviewed in October, 2001 a further period of approximately eleven months passed before he was arrested and charged and it was submitted that this additional delay was also unreasonable and unnecessary. In the circumstances it was unfair to the applicant that such excessive and inexcusable prosecutorial delay on the part of the prosecuting authorities, added to a trial already delayed by the lengthy period which had already elapsed. Ms. Ring invoked the findings of Keane C.J. in *P.O.C. v. The Director of Public Prosecutions, supra*, at 93, in that regard and also an extract from the decision of Geoghegan J. in *P.P. v. Director of Public Prosecutions* [2000] 1 I.R. 403 at 409.

64. For the respondent it was contended that Detective Garda W.'s affidavit sets out the chronology of the investigation, and submitted by Mr. McDermott, B.L., that although there was some delay, it was not a very lengthy delay vis à vis many other cases. While accepting there had been some delay, Detective Garda W. had been very frank in describing the steps which had been taken and had offered reasons for the slightly slower pace which was taken, in particular, the sensitivity and delicacy necessary in the matter. It was, Mr. McDermott submitted, not an inordinate length of time between the sending of the file to the respondent and the instructions back from the respondent, particularly in the case of allegations about events which occurred a very long time ago, which, he submitted, would have to be considered with great scrutiny by the respondent. As between the instructions to arrest the defendant which were received on 11th June 2002 and the actual arrest on 6th September, 2002, bearing in mind the annual leave period in between and the fact that the charges would have to be drafted within that time, this period of time was not inordinate nor was there any suggestion that the delay was intentional or deliberate and therefore, culpable, as was the position in at least some of the cases relied on by the applicant.

65. In response to this, Ms. Ring fairly indicated that some explanations had been proffered by Detective Garda W., but that what had to be looked at were the rights of the applicant in the proceedings, and not the rights of the other possible witnesses or other parties, even in their peculiar circumstances.

66. A second argument put forward on behalf of the respondent on the question of prosecutorial delay was that even assuming that there was some delay, which was not accepted, the applicant had failed entirely to identify any possible prejudice relevant to the period during which the allegations were being investigated. It was argued that the failure of the applicant to identify any prejudice whatsoever or any reason as to why there might be a risk of an unfair trial was fatal to his application.

67. In reply to this contention, Ms. Ring argued that the prosecutorial delay cannot be considered in isolation, but rather must be considered having regard to the already very lengthy delay which had occurred in the pre-complaint stage. In that regard there is an onus on the complainant to complain as soon as is reasonably possible, and therefore, if there is a delay in doing so, little or no prosecutorial delay should be countenanced in this case for the reason that it would add to an already inordinately long period of time which had elapsed.

68. On this aspect of the claim, namely, that there was prosecutorial delay, I am satisfied that the investigation could have been carried out over a shorter period of time. I accept of course the remarks by Detective Garda W. that the investigation took into account the sensitivities of the family and that there was delay arising from the fact that two elderly ladies had to have the position explained to them and that he relied on the family to assure him when that had been done. Nevertheless in the case of an application to prohibit the continuation of a trial on the grounds of prosecutorial delay, it is necessary, when considering whether or not such delay lead to or is likely to lead to a real and serious risk of an unfair trial, to scrutinise any further delay against the background of any earlier significant or substantial delay, even if that earlier delay can be considered excusable.

69. However, while accepting that there was additional delay, certainly in the period during which the investigation was being carried and before the materials were submitted to the respondent, nevertheless I am not satisfied that the applicant has established that that delay was of such a nature as to be likely to interfere with his constitutional right to a speedy trial, as that is understood in the jurisprudence.

70. The applicant's constitutional rights to a fair trial, is also predicated on the basis that there will be prejudice, either real or presumed. What is required in this regard, again according to a long line of well established jurisprudence, is that the applicant must establish, not that there is some possibility of an unfair trial, but rather that there is a real and serious risk that a fair trial cannot be guaranteed. I deal with this from the point of view of actual prejudice and also from the point of view of presumed prejudice although in cases which are very old, as here, it is often difficult to segregate one from the other with any degree of logic or ease.

71. As to actual prejudice, the primary case made by the applicant is that given the allegations are spread over a lengthy number of years and are alleged to have occurred while he was at home on holidays from England where he lived for in excess of twenty years, the death of his wife is highly prejudicial to him as she would have been able to give evidence as to when the applicant was in Ireland on holidays from his work in London or as to the possibility or likelihood of incidents described by the complainant as having occurred in their home at the dates alleged by him.

72. On the contrary, the respondent argued that the statement made by the wife of the applicant is one which is more advantageous to the respondent than it could ever be considered to be from the point of view of the applicant. The statement, assuming to be true at present, indicated, *inter alia*, that the witness had found the complainant in bed with the applicant in their home on one occasion during which she inquired as to why he was there and was told by the applicant that he was ill, but the witness in her statement said that she knew the complainant was not ill at the time. No other specific prejudice is claimed, apart from general alibi evidence due to the elapse of time.

73. On the question of presumed prejudice, Ms. Ring relies on the fact that the alleged offences occurred a very long time ago, and are of such age as to give rise to a definite likelihood of prejudice. Mr. McDermott argues that it is not possible to hold that such prejudice is likely in the absence of some specific fact or matter which would make such a conclusion reasonable.

74. On the basis of the evidence put forward by the applicant that his wife is no longer available to give evidence, I do not find that the applicant has established a real and serious risk of actual prejudice such that her absence would likely lead to an unfair trial based on her no longer being available as a witness. It is nowhere clear to me how her statement, assuming the witness had been available to give evidence on the basis of its content, would be of real assistance to the applicant. It is true of course that she would be in a position to say when, during each year, the applicant would normally be in Dublin, but that evidence can also be garnered from other witnesses, and complainant does not seek to suggest the applicant was not in England during parts of the period in question, only that after the applicant returned, the pattern and frequency of abuse was different. I rely on the judgment of McGuinness, J. in the case of *D.W. v. D.P.P.*, (citation) supra., where she stated:

> "The applicant's case in this regard is that school records and time tables and general evidence about, for example, the usage of the medical room, will no longer be available. This may well be so, but these matters can be drawn to the attention of the jury by the trial judge."

75. as affording sufficient guidance for a trial judge to direct a jury on the question of the layout of the home, how it appeared, or even as to the question of likely dates or times in any given year during which the applicant was on holiday from London, where they become relevant in the course of the trial, if the trial takes place.

76. I do not find, on the grounds contended for, a real and serious risk of an unfair trial arising from the absence of the applicant's late wife or the absence of alibi evidence.

77. As to presumed prejudice based on the lengthy period of time which has elapsed, this is always a very difficult issue to resolve in the context of an applicant's plea that, by reason of delay, simpliciter, he cannot be guaranteed a fair trial. It is true, undoubtedly, that length of time may, if it is of so long a duration that it is clear a fair trial could not be assured or guaranteed, gives rise to presumed prejudice. However mere lapse of time, even if inordinate, does not automatically equate to presumed prejudice. In the present circumstances, the delay between the commission of the offences, the latest of which occurred in 1984 and January 2001 when he applicant first complained is indeed long, even inordinate. But I do not accept that, without more, that length of time is to be considered automatically as supporting a finding of prejudice. The applicant does not point to anything further upon which the court could reasonably find that the period of time in question would constitute a real and serious risk of an unfair trial, or rather to a trial which, in all the circumstances, cannot be as fair as can be expected, being the test found in the jurisprudence.

78. The applicant points to two other matters which he says should be taken into account in the assessment of whether or not the respondent should be prohibited from taking any further steps in the proceedings. The first of these concerns the age and the health of the applicant. It is true the applicant is now almost 80, and it is the case that he is not in robust health. I am not persuaded that there should be an order made of the type sought on the basis of the applicant's age or general declining health. As to whether, on

the basis of age alone, or age combined with the delays which have occurred, the applicant should be entitled to the relief sought, in fairness to Ms. Ring she did not suggest that age alone should be a ground for prohibiting further proceedings. She did however argue that the applicant's age, combined with the earlier delays should be sufficient to constitute a good ground for prohibiting any further steps.

79. I am not satisfied that the addition of the foregoing factors of the applicant's age, or his declining health, to the time which has expired since the offences allegedly occurred renders it more likely that the applicant's right to a fair trial cannot be guaranteed. Indeed the applicant retains, even at this time, the possibility of making appropriate applications to the trial judge arising from his age or his health during the course of the trial if these become such as to render it unlikely that a fair trial cannot be guaranteed. I am satisfied that, in the normal course of events, a trial judge will be alert to such matters if they are brought to his attention, and retains at all times the right to make orders appropriate to the occasion.

80. Finally, the applicant pleads that the charges which have been drawn are so non specific as to the place in which the offences occurred as to render it improper and invalid that the proceedings should continue against him. In that regard, the information is to the effect that the charges as originally drafted included a specific location or address at which the offences allegedly took place. It is submitted by Ms. Ring that these are now so unspecific as not to permit the defendant to know what he is being charged with. On behalf of the respondent, it is argued that this is a matter for the trial judge, that in the context of the history of the proceedings to date, and including the charges made, the applicant well knows the details of the charges against him.

81. While it is true that, as between the charges as originally drawn and the charges in the returns for trial, there is a change. In the former the charges are specific as to the place or location in Dublin, on unspecified dates between certain years and later years, where the offences are alleged to have occurred. As to the latter they allege that the offences occurred in "Dublin", on unspecified dates between certain years and later years. But there is no suggestion that, in light of this, the charges are now unclear or have in any way been enlarged. I am satisfied that this is a matter to be dealt with by the trial judge, and is not a ground upon which I should make an order of prohibition staying all further proceedings in the matter. No authority was opened to me such as to suggest I am obliged, in such circumstances, to grant an order.

82. I have made no mention in this judgment of the alleged admissions of the applicant in the course of his statements. He has indicated that he made no such admissions, and they will be the subject of debate before the trial judge, if the trial proceeds. In the circumstances I deem it not appropriate to base any of my findings on the content of that statement. But I have not considered it necessary to refer to it in any way, and in that regard I have borne in mind the jurisprudence, including that found in the case *of T.S. v D.P.P., supra*, in that regard.

83. In the foregoing circumstances, I find that the applicant has not established, for any of the reasons invoked, either considered separately or together, that there is a real and serious likelihood that the constitutional right to a fair trial cannot be guaranteed. I find also that the delay in the matter is such as to not deprive the applicant of his right to an expeditious trial. I therefore reject the reliefs sought.