Neutral Citation Number: [2007] IEHC 483

**THE HIGH COURT**

**JUDICIAL REVIEW**

**2006 No. 650 J.R.**

**BETWEEN**

**R.C.**

**APPLICANT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**Judgment of Mr. Justice MacMenamin delivered 31st July, 2007**

1. The applicant, now aged thirty-seven years, seeks prohibition of a criminal trial pending before the Circuit Court on five charges of sexual assault of a twelve year old girl. The grounds upon which the applicant seeks prohibition are delay and alleged failure on the part of the prosecution to seek out and preserve certain telephone records which, it is contended, would have been material to the applicant in his defence.

**Chronology**

2. The alleged sexual assaults are stated to have taken place in the applicant's apartment in a provincial town six years ago between May and September, 2001. A complaint was made by the complainant on 5th September, 2001. Further statements were taken from the complainant, and her mother, on 3rd October, 2001. The applicant was arrested and questioned on 25th October, 2001. At this point, he denied the allegations made against him.

3. Statements were taken from other witnesses on 20th November, 2001, and 12th December, 2001. A further statement was taken from the complainant on 15th January, 2002, and from her mother on 5th February, 2002. Another witness statement was taken on 13th February, 2002.

4. The file was sent to the Director of Public Prosecutions on 6th June, 2002. Issues were raised by the State Solicitor on the following week, that was 13th June, 2002, resulting in additional statements being taken on 18th and 19th August of that year. Further issues were raised by the State Solicitor in February, 2003. Further statements were taken on 25th and 28th April, 2003. The Director of Public Prosecutions gave directions to charge the applicant on 14th August, 2003, nearly two years after the initial complaint.

5. The applicant was not actually charged until January, 2004. One of the investigating gardaí, Garda Noelle Curran, states that the applicant was not contactable up to January, 2004. However, affidavits sworn on the part of the applicant and his mother would appear to indicate that at certain relevant times he was living in the general area (although he had moved house) and that no attempt had been made to contact him or his parents, by the gardaí. The applicant's mother indicates that during this period she was in contact with members of the Gardaí and that no inquiry was made of her as to her son's whereabouts. It is suggested that the applicant may have been attempting to evade the proceedings. However, the applicant says that he was the director of a firm not far distant from the place where he originally resided and that he was in ongoing contact with his parents and visited them regularly in the town where it is alleged these offences took place. He moved out of this town because of gossip from the events alleged.

**The alleged offences**

6. The alleged offences in question are those of sexual assault. It is alleged that each of the assaults took place in the applicant's apartment in the town in question. There is no eye witness evidence in the book of evidence. At the time, the complainant was a minor aged twelve years. Consequently, no issue as to whether the complainant consented or not arises as a defence.

7. However, the applicant asserts that there is a critical area where he has suffered prejudice and been deprived of the opportunity of pursuing what is suggested to be a reasonable line of defence, because of unavailable telephone records of the complainant. This line of defence is in testing of the credibility of the complainant, and, in particular, whether she initiated one or a number of mobile phone calls to the applicant.

8. There are two fundamental issues for the court to consider. The first of these relates to the question of prejudice, the second to the elapse of time between the original complaint and the date of charge.

**Alleged prejudice**

9. In statements made by the complainant in the book of evidence, she alleges that the applicant regularly telephoned her during the period in question in order to invite her to his apartment where assaults occurred.

10. In the book of evidence there are to be found the following statements made by the complainant referring to the management and end dates of the charges, that is, from May to September, 2001:-

> "Over the following few weeks, he rang me a couple of times a week on my mobile. He would ask me where I was, and if I would call down to him for while. …"
>
> "After that, for several weeks during July and August, he rang me a couple of times a week, maybe two or three, and would ask me to meet him, or he'd leave a text message. …"
>
> "He started sending me text messages at this time as well. He's send me a few a week. Usually, the messages were that he loved me, and he wanted to see me. Sometimes, if he was talking to me on the phone, he'd say over the phone that he loved me, that he was crazy about me, that he never felt like this before, that he wanted me. …"

11. In the course of interviews with the gardaí, the applicant has stated that any telephone calls made by him to the complainant were in response to a telephone call or a text message from the complainant. The general issue of telephone calls and text messages was clearly raised and discussed.

12. In an interview of 25th October, 2001, it is recorded he was asked:

> Q: Did you every [sic] ring her?

A: She used to ring me.

In a further interview, the following exchange allegedly took place:

Q: How much phone contact would you have had with N – (the complainant)?

A: Not that much. I would have returned her calls.

Q: What would she be calling for?

A Not much. I was convinced she had a crush on me. She never made any advances.

Q: What would you think of that?

A: A passing phase.

Q: Did you encourage it?

A: No.

Q: Did you ever send or phone her unprompted by a call from her?

A: No, I didn't.

In a further interview:

Q: How much contact by test [sic] message would you have with N – (the complainant)?

A: I wouldn't have a lot. I can't remember how much but it wouldn't be a lot.

Q: Did you usually sent [sic] her a message yourself or would it be in reply to hers?

A: It would be in reply to her, if you are talking about over a three-month or so period, there probably could be a time I sent her one, just a general one, how are you, that type of thing.

13. In the book of evidence provided on 1st March, 2004, the applicant's telephone records were provided for the period 20th August to 31st August, 2001 only. But only outgoing calls were detailed. These would appear to indicate that on 26th August, the applicant sent the complainant ten text messages, and on 27th August, a further two text messages. No telephone records were provided in the book of evidence for any of the remainder of the period between May and September. Nor were any telephone records provided in relation to the complainant's mobile telephone.

14. According to a statement of Patricia Ryan of O2 Ireland, dated 12th October, 2004, in the book of evidence, (served as additional evidence on 9th November, 2004):

"I received Garda reference No. 157/04/02 requesting details of outgoing calls for the following Speakeasy number 086 351 9603 from 1st August, 2001, to 31st August, 2001, on 19th April, 2002." (This refers to one of the applicant's two mobile phone accounts).

**Records not obtained**

15. In her affidavit sworn on 9th October, 2006, Garda Noelle Curran states that in November, 2001, she requested telephone records as part of the investigation. At that time, N.D. (the complainant) was a customer of Vodafone. The applicant had two phone numbers, one serviced by Meteor and the other by O2. Garda Curran made this request via the Crime and Security Division of the gardaí based in Garda Headquarters. She originally had sought records relating to all three numbers from March, 2001, to September, 2001. However, she states that the Crime and Security Division of the Gardaí said a shorter timeframe would be easier to trace. Garda Curran concluded that it was unnecessary to request details pertaining to the complainant's phone as well as the applicant's phones. She thought that if she were in possession of the applicant's phone records, these would detail incoming and outgoing calls made to those numbers, including any made by the complainant. She erroneously concluded that it would be mere duplication to obtain the complainant's phone records as well as the applicants.

16. However, in a supplemental affidavit more recently sworn in these proceedings, Garda Curran accepts that the details provided in the book of evidence identify only the outgoing calls of the applicant. She states that "the Crime and Security Division of the Gardaí determined that such records would be sufficient for the purposes of the investigation".

17. The prosecution focus, ultimately, was therefore only upon the period of the applicant's phone records serviced by Meteor and by O2.

18. However, no request was made in 2002 for any records relating to the complainant's telephone number which had an 087 prefix and was held on a Vodafone account. It is the applicant's case that the authorities had, at that stage of the investigation, a duty to procure that evidence, following the authority of the Supreme Court decision in *Dunne v. The Director of Public Prosecutions* [2002] 2 I.L.R.M. 241. However, the fact no such request was made by the defence at that time for any category of phone records, is a relevant consideration.

19. Subsequent to the return for trial, the matter appeared in the Circuit Court Lists in 2005, when two counsel were assigned. Thereafter, the matter appeared in the Circuit Court on 28th June, 2005.

20. It was only on that date that counsel for the applicant then sought that the complainant's telephone records be made available by way of disclosure. This was on the advice of senior counsel who had been retained. The Circuit Judge adjourned the matter to the subsequent sessions, by which time disclosure was to be complete.

21. No disclosure was made prior to the November, 2005 sessions. At those sessions, the State Solicitor, Mr. Alan Millard,

representing the respondent, agreed that the records between 1st May, 2001, and 31st August, 2001, would be made available.

22. The matter was again adjourned to the January, 2006 sessions and subsequently to the March, 2006 sessions, in order that the State might comply with the agreement to make disclosure.

23. On 30th March, 2006, a letter was sent by Mr. Millard to Mr. Lanigan, the applicant's solicitor.

24. In the course of that letter Mr. Millard stated:

> "We record that at --- Circuit Court on 1st November, 2005, it was agreed that telephone records would be disclosed in respect of the period 1st May – 31st August, 2001 (only), and upon which we confirm to have written and are currently awaiting instructions of the Gardaí.
>
> You will be aware from our letter of 8th August, 2005, that the records requested by you were not originally taken up, hence necessity of further enquiry, and where it may not be reasonable to expect that records as may be available would take slightly longer to access given date requested."

25. On 25th April, 2006, when the matter was listed before the Circuit Court, almost a year from the date of the original application, (and in circumstances where the additional evidence had not been procured), counsel for the State indicated to the court that a letter would be obtained from the telephone company in question, indicating that the records were no longer available. On 2nd May, 2006, when the matter was listed before the Circuit Court, counsel indicated that the letter from the telephone company would be provided to the solicitor for the defendant by the end of the week. No such letter was provided within that timescale.

26. However, on 9th May, 2006, the State Solicitor provided a letter dated 8th May, 2006, from Meteor Mobile Telephone Company, stating that they were unable to provide telephone records dating back to 2001. He also provided a letter from O2 Mobile Telephone Company, stating that they also were unable to provide telephone records dating back to 2001. But this was not what the accused was seeking.

27. As outlined earlier, the complainant's telephone number had an 087 prefix, indicating that she was a customer of Vodafone. No letter was provided then from Vodafone stating whether records were available from 2001, nor was a letter provided from any of the three companies stating whether they had records relating to the complainant's actual telephone. It is not suggested that what occurred was as a result of any *mala fides* on the part of the prosecution.

28. Ultimately, on 20th November, 2006, a letter emanated from Vodafone addressed to a member of the Security and Intelligence Division at Garda Headquarters. This was headed:

> "Various Queries
>
> Reference: 79/11/06
>
> Your query regarding records for 2001, these records are not available. These records would not have been available in June, 2005. In relation to the request by defence for records for [numbers provided], if the request was for 2001 records, they would not have been available. Vodafone only keep records for a maximum of three years."

29. This letter from Vodafone was written only after these judicial review proceedings were initiated. It does not state whether Vodafone had kept records dating back to 2001, nor whether they had records relating to the complainant's telephone. As may be seen, the letter also states that "Vodafone only keep records for a *maximum* of three years". (Emphasis added)

30. In the course of her affidavit, Garda Curran states that, "if the request from the defence had been made in a timely fashion, following the service of the book of evidence on 1st March, 2004, it may well be that the applicant would have been able to obtain these records". This proposition is not borne out evidentially, and would appear to be speculation. In fact, it would appear that there was a possibility only that the records in question might have been available in March, 2004. There was a further delay of seventeen months between the request for the records in June, 2005, to Vodafone's reply of November, 2006. Even if records had been requested in March, 2004, it is suggested by the applicant that the likelihood of a similar delay would have removed the possibility of the records still being in existence. These questions are considered below in the context of the legal authorities.

31. First, other allegations of prejudice are considered.

**Other prejudice**

**Business Records disposed of**
32. At the time of the alleged incidents, the applicant was running a public house where the complainant's mother and aunt were employed. The applicant states that certain difficulties arose concerning the accounts of this public house which led to the dismissal and resignation of the complainant's mother and aunt. It is stated that these records have now been disposed of and were already long gone in 2004. The public house was closed in August, 2001.

**E.W. and Deuces Wild**
33. It was said the defence was prejudiced by the absence of an essential witness, E.W., and also the unknown whereabouts of members of a band named "Deuces Wild" who, it is contended, might have been of assistance to the defence.

**The business records**
34. It is stated in general terms, that "certain difficulties arose concerning the accounts of the said public house and this led to dismissal and resignation". The grounding affidavit sworn by the applicant's solicitor adds, "records of these matters are no longer in existence and were no longer in existence when the charges were brought against the applicant in 2004. The public house was closed in August, 2001". No information is provided as to the nature of the records, when these records ceased to exist, or in what circumstances. No evidence is adduced as to how these might have been of assistance to the defendant. It is not possible for the court, in the face of these rather generalised allegations, to make any detailed finding or assessment as to the evidential value of this material, if any. Still less should the court speculate or theorise. Prejudice has not been established under this heading.

**Absence of E.W.**
35. The nature of this witness' essential testimony was not disclosed in the grounding affidavit. At the time of the swearing of that

affidavit, Mr. W. was said to be residing in New Zealand. Whatever may have been the evidential deficit arising from the absence of this witness has now been removed because, the court has been informed, Mr. W. has now returned to this jurisdiction and is available to the applicant. No prejudice therefore arises.

**Deuces Wild**
36. The next element of prejudice alleged is that the members of the rock band named "Deuces Wild" might have provided alibi evidence. They are no longer in existence. They are not identified by name. Furthermore, it is not specified precisely in what circumstance such alibi evidence would have been available, or in relation to which of the charges, although the band is said to have been in the applicant's apartment at a time prior to one of the allegations. It is unclear that the band members would have had any value as witnesses to the alleged events in question to which there were no witnesses.

37. It is deposed on behalf of the applicant, that neither he nor his solicitor was aware of the whereabouts of the band. No evidence has been adduced as to any steps taken by the applicant to trace these potential witnesses or to identify where they may be. An accused person is not a passive bystander in the preparation of his own defence in this or any other aspect of the case. The applicant's case has not been made out under this heading.

38. It is now necessary to revert to the absent telephone records and the question of prejudice.

**Context and potential defences**
39. It has been observed that in the law, context is all. In the context of this case, one must focus upon the nature of the charges and the defences actually available to the accused. To reiterate, consent is not such a defence. In the allegations of assault relating to the applicant, then aged thirty-one years, and the complainant, then aged twelve years, it would be no defence for an applicant to contend that a complainant initiated a series of events which may have led to a sexual assault. There is no suggestion on the facts of the instant case that the applicant was in any way unaware of the complainant's age at the time the events in question are alleged to have occurred. It has not been submitted that the precise timing of any particular telephone call forms an integral part of any *res gestae*, or a core defence available to the applicant, whether by way of alibi or otherwise. The applicant has not suggested that the fact of any particular phone call forms an integral part of the ingredients of any other defence, whether relating to time or circumstance. The complainant, in the book of evidence, says that she made, on her own initiative, at least one phone call to the applicant. It is unclear whether she may accept having made more than one, or even a series of such calls. Whether being deprived of material which might (but not would) be the basis of a cross-examination as to credit constitutes specific prejudice must be assessed having regard to the duty of the prosecution and the time sequence and materiality.

40. During the conduct of this case, the following criticisms were made of the evidential-gathering process. First, only outgoing calls were detailed. Second, they are confined to the period 20th August to 31st August, 2001. Third, there is the absence of any telephone records in relation to the complainant's telephone. Particular emphasis was laid on the third issue as it was contended that the presence of such records would indicate the initiative had been taken by the complainant in making calls on a number of occasions. But to what extent would this assist the accused, especially where consent cannot be a defence? I have already made observations as to the potential value of such material even were it available. While the absence of these records may be a disadvantage, I am unable to hold that such detriment contributes specific prejudice. They are insufficiently central to a reasonable line of defence which would be lawfully available to the applicant – even if they established the proposition contended for – a hypothesis not otherwise supported by evidence.

One turns then to the duty of the prosecution

**Legal authorities**

**Finding, seeking and preserving evidence – Braddish and Dunne**
41. In *Braddish v. The Director of Public Prosecutions* [2001] 3 I.R. 127 and *Dunne v. The Director of Public Prosecutions* [2002] 2 I.R. 305, the issue of unavailable videotapes was considered by the Supreme Court in the context of the dates of the gardaí.

42. In the first, the gardaí viewed a videotape and identified a suspect from it. They interviewed the suspect and claimed to have got an admission from him: they then disposed of the videotape. In *Dunne*, the premises robbed were a filling station which was equipped with video surveillance focused on the area where the robbery took place, but the gardaí apparently did not attend to this aspect of the case and did not take the tape into their possession. Judicial review was granted prohibiting the trial because of the close link of the lost material to the offence itself and the reasons for its unavailability.

**Mere theoretical possibility insufficient**
43. In *Scully v. The D.P.P.* [2005] 1 I.R. 242, relief was refused as the application had been brought on the basis of a mere possibility that video evidence might have contained material either inculpatory or exculpatory of the accused.

44. In the course of Hardiman J.'s judgment there is the following passage:

> "The fact is that the rationale of this application vanished after the undisputed facts in relation to the video surveillance on the filling station at the time of the crime, were revealed. This did not happen until quite close to the trial because the applicant did not investigate the position any earlier. This, in turn, appears to me to indicate that the applicant was more interested in tripping the investigators than in discovery of evidence: certainly, he was constrained to continue his application on the basis of a theoretical possibility only. … Applications on this basis must be discountenanced in the interest of the right to prosecute, but also in the interests of the integrity of the jurisdiction, in a proper case, to restrain a prosecution on the basis that significant evidence has been ignored or destroyed."

(See also the judgments of Kearns J. in *Scully* in the High Court; and *Dunne v. D.P.P.* (Unreported, High Court, 23rd March, 2001); and *O'Callaghan v. Judges of Dublin Metropolitan District Court* (Unreported, High Court, 20th May, 2004).

45. All that has been established with regard to the telephone records is a mere theoretical possibility lately evolved, that is, they might show that the complainant made more than one, or a number of phone calls. This is unsupported by evidence. Its consequence is not established. It is difficult to avoid the conclusion that the applicant was more interested here in 'tripping' the investigation than in discovering evidence only very latterly a consideration near the eve of the trial.

**Common sense parameters**
46. It has been observed that:-

> "Common sense parameters of reasonable practicality must govern any determination of the scope of the duty on the Gardaí when seeking out or preserving evidence and remote possibilities arising from the loss of evidence should not be allowed to trip up the prosecution or justify stopping a trial from taking place." (c.f. judgment of Kearns J. in *McFarlane v D.P.P.*, Supreme Court, 7th March, 2006, unreported.)

47. I do not consider that it has been established that the records now sought came within any such commonsense parameters.

**Parting with or disposing of relevant evidence**
48. In *Bowes & McGrath v. D.P.P.* [2003] 2 I.R. 25, the Supreme Court prohibited a trial in the latter, McGrath, in circumstances where the applicant had established that the Gardaí had parted with a motorcycle which had actually been involved in an accident, and had thereby deprived the applicant of the possibility of an examination which might have offered the accused "the reasonable possibility" of rebutting the evidence proffered against her. The court, in so deciding, followed the decision of Lynch J. in *Murphy v. D.P.P.* [1989] I.L.R.M. 71, where relief was also granted on the applicant's assertion that the disposal of a motorcar had deprived his fingerprint expert of an opportunity of adducing possible scientific evidence which might have served a useful purpose. In that case, the gardaí had disposed of the vehicle without conducting a forensic examination although they knew the applicant wished to inspect the vehicle for that purpose. Lynch J. decided the case in favour of the applicant on fair procedure grounds but noted:

> "The authorities establish that evidence relevant to guilt or innocence must, so far as is necessary and practicable, be kept until the conclusion of the trial. These authorities also apply to the preservation of articles which may give rise to the reasonable possibility of securing relevant evidence."

49. But here the gardaí never had the evidence in question. Its materiality has not been demonstrated to the requisite standard.

**Application of legal principles to facts**

**Nature of duty asserted – a positive one**
50. Materiality, close linkage to the events, deprivation of opportunity and timely request by the defence, are all ingredients in the successful claims for judicial review. The following important features must be emphasised in the instant case. Here, the gardaí were only made aware in June 2005, that the applicant required these particular records. They had not engaged in any forensic examination of these records themselves, nor did they negligently lose or part with primary evidence.

51. The point made by the applicant in this case, comes into a different category. It is that the applicant should have *obtained* a particular category of evidence, that is, the complainant's telephone records for the period in question. In the course of his judgment in *Scully v. D.P.P.* [2005] 1 I.R. 242, Hardiman J. specifically approved the following statement of Kearns J., then of the High Court and trial judge in *Scully*:

> "Some sort of commonsense parameters of reasonable practicality must govern any determination of the scope of the duty on the gardaí when seeking out or preserving evidence. This must, of necessity, imply that some margin of appreciation be extended to gardaí when investigating crime to determine what they may reasonably consider to have some possible relevance in establishing guilt or innocence. What is the alternative? Is it for the accused person or his legal advisers to dictate the parameters? Alternatively, must the gardaí go on seeking out and preserving any and every possible piece of evidence which might, by the remotest chance, admit of being relevant in some fashion at a subsequent trial? I think not. To set the bar too high for the gardaí in seeking out and/or preserving evidence is more likely, in my opinion, to frustrate the administration of justice and due process than to uphold it."

52. It hardly requires reiteration that the facts of this case do not give rise to a consideration of whether the gardaí wrongly exercised a judgment in *disposing* of evidence. It is true, however, that they have made a choice as to what evidence to obtain so far as relates to the period of the telephone records.

53. The fact that Garda Curran may have made an error (as is accepted implicitly in this case) in her belief that the records would show both incoming and outgoing calls, does not detract from the fact that the applicant, on the facts of the present case, is now seeking to impose a duty on the gardaí of obtaining additional evidence which had not been obtained or sought previously. I do not consider such duty exists on the facts and circumstances of this case. It is not shown evidentially that the choice or selection of the records is a matter of specific, identified prejudice.

**Function of the Director**
54. In *Blood v. The Director of Public Prosecutions* (the Supreme Court, 7th March, 2005, Unreported) McGuinness J. observed:

> "The learned trial judge in this case held that it was a matter for the Director to decide upon what evidence he would prosecute any particular charge, and that it was not the function of the court to substitute its view for that of the Director who was charged at law with the decision who, when, with what charge and on what evidence to prosecute in any case. In my view, the learned trial judge was correct in so holding."

Subject to the parameters bound by fairness, these are matters for the prosecution. But there is a further element here.

**Timing of request**
55. The book of evidence was provided on 1st March, 2004. At that point, no criticism was made regarding the nature and quality of the material provided, regarding telephone records. This issue was raised only on 28th June, 2005, in the Circuit Court soon after senior counsel was retained. One would have thought that any examination of the book of evidence prior to that time would have demonstrated that what had been provided was a record of the applicant's own telephone calls. No evidence has been furnished as to what steps, if any, were taken by the defence between the time the book of evidence was provided (1st March, 2004) and the time in which the issue of the complainant's phone records was raised. Nor, indeed, as to why the issue of these records emerged only at that time and not before, and when a trial was reasonably imminent. It does not show either that the issue was seen as a main plank or any part of the defence prior to June, 2005.

**No timely requirement for material**
56. In at least one of the interviews – the content of which was not disputed – with the applicant on 25th October, 2001, the existence and content of telephone calls, and particularly, the content of text messages, was dealt with in detail at a time when the applicant had already received legal advice. No request was made at that time that the complainant's telephone records be obtained, either by the applicant or by his solicitor. No suggestion was made that then they were of high relevance to the defence of the case.

57. In *Scully v. D.P.P.* the Supreme Court, 16th March, 2005, Hardiman J. stated with regard to the applicant therein:

> "He took no steps to ascertain the position about video surveillance for some seven months. This period of time is wholly unexplained and appears to contravene the duty (identified in the cases) which lies on an accused or his advisers with their special knowledge of the case from the defendant's point of view to seek the evidence they require to sustain the defence."

These observations are apposite here. The elapse of time is unexplained. The specific records did not arise as an issue on 28th June, 2005, after two counsel were assigned.

58. Furthermore, the applicant was served with the book of evidence on 1st March, 2004. At that point, he was aware of the prosecution's evidence against him. While he may not have had access to the complainant's telephone records, the absence of the alleged missing evidence could then have been gleaned from his own telephone records in relation to incoming phone calls – if relevant.

59. Garda Curran, in the course of her evidence, states that O2 hold records for a three-year rolling period. Had the applicant, therefore, himself sought details of his own incoming phone records in a timely fashion, as enjoined to do by the principles applicable to missing evidence cases, such evidence would have been available to him as that three-year ruling period would not have expired until September, 2004.

60. More fundamentally, if the evidence of the complainant's records was critical, it is remarkable that the issue was not raised in any way in a time when the issue was clearly discussed in garda interviews when the applicant was legally advised. Similar observations apply in relation to the applicant's state of knowledge after the service of the book of evidence. As observed in *Scully* by Hardiman J.:

> "Delay is significant not so much for its bare length (in this case, for instance, it was considerably less than the unexplained delay in commencing the prosecution) but for the indication that it provides that the case is based on a 'remote fanciful or theoretical' possibility, rather than a real desire to obtain evidence believed to be potentially exculpatory." (At p. 16)

61. Applying the principles and tests outlined in these authorities and as summarised as to materiality, proximity, deprivation of opportunity and timely request, I do not consider the applicant's case has been established.

**Prosecutorial delay**

62. The applicant also alleges that there has been inordinate delay in the prosecution of these offences. The general chronology of events has been outlined earlier.

63. A summarised chronology of events, as seen from the standpoint of Garda Curran (as opposed to the applicant), is as follows:

> 5th September, 2001 - complaint made by the complainant
>
> 3rd October, 2001 - more detailed statement taken from the complainant and her mother
>
> 25th October, 2001 - applicant arrested and interviewed
>
> 20th November, 2001 - statements taken from witnesses J.O'N. and M.O'N.
>
> November, 2001 - Telephone records requested
>
> 12th December, 2001 - statement obtained from witness E.W.
>
> 15th January, 2002 - further statement taken from the complainant
>
> 5th February, 2002 - statement taken from the complainant's mother
>
> 13th February, 2002 - statement taken from E.W. arising out of an allegation made by the complainant's mother made on 5th February, 2002. Other statements from the gardaí set out in the book of evidence were also taken during this period
>
> 6th June, 2002 - initial file completed and forwarded to the Director
>
> 13th June, 2002 - further queries raised by State Solicitor regarding file
>
> 18th August, 2002 - additional statements taken from family members and others of the complainant.
>
> Between August, 2002 and February, 2003 – further matters are stated to have acquired clarification.
>
> 25th April, 2003 - additional statements taken from the complainant and her mother
>
> 14th August, 2003 - Gardaí received directions from the respondent to charge the applicant.

64. I have already commented on the claim by the gardaí that the applicant was no longer residing at his original address; that he had not notified the gardaí of any change; on the further claim that he was not at his family home. I do not consider he was evading arrest. He may have been keeping a 'low profile', another matter altogether.

65. Ultimately, later in 2003, the gardaí apparently became aware that the applicant had another address in another neighbouring town. The gardaí called to this house which was stated to have been rented by the applicant, but did not find him there. During the time, the gardaí in three separate towns in the county were seeking to locate the applicant as they all had documents which they required to serve upon him. Garda Curran also circulated a report via local stations for members to contact her if the applicant was encountered at his current address. She also received information at that time that the applicant might have travelled to England. In late September, 2003, the gardaí became aware where the applicant was living and he was subsequently charged on 5th January, 2004, the book of evidence being served on 1st March of that year. This must be seen in the context of the applicant's mother's affidavit previously referred to.

66. No application was made to cross-examine Garda Curran, the only State deponent. Consequently, on the basis of the chronology now outlined, a determination must be made whether there has been delay on the part of the respondent or on the part of the gardaí.

67. There is no doubt that there was a significant elapse of time between the initial complaint in September, 2001, and the date of the applicant's arrest in January, 2004. However, on the basis of the respondent's evidence as now adduced, which went unchallenged, I am unable to conclude that there was unconscionable or blameworthy delay on the part of the prosecuting authorities. Clearly, there was a significant elapse of time between the date of the original complaint and the ultimate arrest of the applicant. The book of evidence contains twenty-two witnesses. It appears that the telephone records did not become available until September, 2002. Matters might well have proceeded faster. However, I do not consider it can be said on the facts, as they stand before the court, that the delay has been inordinate.

68. While the applicant complains as to an elapse of time from 5th September, 2001 (date of complaint), to the sending of the file to the respondent, a period of five months, this time has been accounted for in Garda Curran's affidavit evidence. The further six-month period between August 2002 and February 2003, has also been dealt with as outlined earlier. While it is contended that there was a delay amounting to twenty-three months prior to the decision to charge the applicant, I consider that sufficient uncontested evidence has been adduced to justify this delay.

69. It is now necessary to deal with other aspects which arise in prosecutorial delay, stress, or anxiety, and potential prejudice.

**Stress or anxiety**
70. It is noteworthy that nowhere in his affidavit does the applicant himself complain of stress or anxiety.

71. In *P.M. v. The D.P.P.* (Supreme Court, Unreported, 5th April, 2006), the court considered whether prosecutorial delay was sufficient in itself in order to justify an order of prohibition.

72. Three crucial interests are identified as protected by the right to trial with reasonable expedition in *Barker v. Wingo* 407 U.S. 514 (1972) being:

> "I. The right to prevent oppressive pre-trial incarceration;
>
> II. the right to minimise anxiety and concern for the accused; and
>
> III. the right to limit the possibility that the defence will be impaired.

73. In the course of his judgment in *P.M.* Kearns J. stated with regard to the third:-

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

74. Later in the same judgment that judge stated:

> "In conclusion, however, on this issue, I am satisfied that where blameworthy prosecutorial delay of significance has been established by the applicant, then that is not sufficient *per se* to prohibit the trial, but that one or more of the interests protected by the right to expeditious trial must also be shown to have been so interfered with such as would entitle the applicant to relief."

75. I do not consider that the applicant in the instant case has discharged the onus of proof in establishing that he has suffered stress and anxiety. This has not been specifically established on the basis of any averment in the affidavit of his solicitor or in any evidence adduced by the applicant himself. It should not be inferred on vague assertion. Moreover, it is doubtful whether this particular case is open to the applicant in the light of his ascribed belief that he had put the matter behind him and that it had only re-emerged three years later. It can hardly be said in those circumstances that he had suffered continuing stress and anxiety.

**Further conclusions**
76. I have found that the applicant has not established prejudice such as would place his right to a fair trial at risk. The prejudice issue raised is collateral to the central feature of the case. It is speculative. The establishment of the truth of the assertion made by the applicant would not go to the issue of guilt or innocence but rather might, *potentially*, affect the issue of the creditworthiness of the complainant. But even this has not been established to a sufficient degree of probability. Even if it were demonstrated that the complainant had initiated a series of phone calls to the applicant, this would not necessarily be probative in value on any essential issue.

77. I do not consider that the effect of these observations is diminished by the fact that what is alleged is a series of sexual offences which are said to have occurred in private. On the facts, the point of alleged prejudice is not an island of fact, but an evidential *cul-de-sac*. The applicant is confined to asserting that he has belatedly lost the opportunity of cross-examining as to credit on a collateral issue on the basis of material of theoretical value. This is not a case where a very substantial elapse of years has occurred between date of alleged offence and complaint or, indeed, between complaint and charge.

**The role of the trial judge**
78. One further factor requires to be addressed. On the history of events, the telephone records was an issue which had been raised, albeit at a late stage, during the course of procedural hearings and where disclosure became an issue. As pointed out by Fennelly J. in his judgment in *P.G. v. Director of Public Prosecutions* the Supreme Court, 29th March, 2006, matters of disclosure are within the province of the trial judge. They are not matters for judicial review except to the extent that an accused person can show that, having taken all reasonable steps to obtain disclosure, necessary material is being withheld from him to such an extent as to give rise to a real risk of an unfair trial. The particular issue which is addressed in this, as in many other judicial reviews, is that the question of prejudice and its extent are raised in a manner divorced from the body of evidence in the trial itself. On the particular facts of this case, I consider that judicial review was the appropriate remedy in that the trial had not commenced. Obviously, had the applicant been put in charge of a jury, it would not have been appropriate for this Court to seek to address the issue in such circumstances. In

*D.C. v. The Director of Prosecutions* [2006] 1 I.E.S.C. 54, Denham J. stated:

> "Whether an application for judicial review is made or not, the trial court retains at all times its inherent and constitutional duty to ensure that there is due process in a fair trial. Thus, in the course of the trial, matters may arise, evidence may be given, which renders the trial unfair or the process unfair. In these circumstances, the trial judge retains the jurisdiction of preventing the trial from proceeding."

But this jurisdiction is exercised in the course of a trial and does not permit a preliminary hearing in the Circuit Court on the issue of delay. Accordingly, if the trial judge considers that any of the issues raised in the course of this judgment requires directions within the range identified by Denham J., such jurisdiction could, and should, be exercised.

79. For the reasons outlined, the court will decline this application for judicial review.