Neutral Citation Number: [2005] IEHC 290

THE HIGH COURT

JUDICIAL REVIEW

[2003 No.495 JR]

BETWEEN

E.R.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Quirke J.delivered the 27th day of July, 2005.

1. By order of the High Court (Peart J.) dated 7th July, 2003, the applicant was granted leave to apply by way of judicial review for an order of prohibition restraining the respondent from proceeding further with the prosecution of the applicant on 93 counts alleging offences of unlawful sexual conduct between the applicant and his daughter A.R.

2. He was also granted leave to seek additional declaratory and other ancillary reliefs against the respondent.

3. The offences are alleged to have been committed between the 1st November, 1969, and the 31st October, 1982.They include indecent assault, buggery, incest and rape.

FACTUAL BACKGROUND

4. The applicant has been charged with 93 counts alleging sexual offences committed against his daughter A.R.The offences are alleged to have occurred between 1st November, 1973 and 31st October, 1982.

5. The applicant was born on the 12th July, 1945, and was aged between 28 years and 37 years at the time of the alleged offences.The complainant was born on 1st November, 1969.She was aged between four years and twelve years at the time of the alleged offences.

6. All of the offences are alleged to have occurred at the applicant's (then) family home in K., Dublin.There were three additional children of the marriage, namely, two girls, (younger than A.R.) and an elder boy who died in 1984 aged seventeen years.

7. In 1984 the applicant separated from his wife and left the family home.The applicant has averred in evidence that he had no contact *"of any meaningful nature"* with his late wife or with his children after that date.

8. His wife recently contracted a serious illness and is now deceased.

9. On 13th May, 1999, A.R.made a statement of complaint to Garda O'C.at B.Garda Station.She alleged that sexual offences had been committed against her by the applicant and by her two uncles, (the applicant's two brothers), between 1973 and 1982.In 1973 the applicant's brothers were aged eleven and fifteen years respectively.

10. Between the 15th June, 1999, and the 7th August, 1999, Detective Garda C.W.conducted interviews and took a number of statements in writing from A.R., her mother and her two sisters.The statements detailed facts relevant to the charges which have been preferred against the applicant.

11. On 18th September, 1999, the applicant was arrested and detained under s.4 of the Criminal Justice Act, 1984 at R.Garda Station.He was released on the same day.

12. Between the 18th October, 1999, and 21st January, 2000, further investigations were carried out by the Gardaí.They included interviews with the applicant's brothers and investigations involving the Rape Crisis Centre.

13. On 21st January, 2000, three Garda investigation files were forwarded to the Chief State Solicitors office.The files contained certain documents and written statements together with directions in relation to the detention and prosecution of three persons.

14. On 10th September, 2000, Detective Garda W.received directions in writing from the respondent.

15. On 16th October, she swore an information in the District Court for an arrest warrant in respect of the applicant.

16. On 22nd October, 2000, the applicant was arrested, conveyed to R.Garda Station and charged with the offences which are the subject of these proceedings.

17. On 30th March, 2001, the applicant was returned for trial to the Central Criminal Court.

18. A notice of motion dated 27th September, 2001, was lodged in the Central Criminal Court on 28th September, 2001, which notified that Court of the intention of the applicant to seek an order of prohibition and an order quashing the indictment of the applicant on the ground of delay.

19. In 2001 a practice was adopted by the courts which required applicants for relief of the kind which has been sought in these proceedings to seek such relief from the Central Criminal Court immediately prior to the trial of the offences.The Central Criminal Court treated those applications as motions to quash indictments on grounds of delay

20. On 27th January, 2003, the Court of Criminal Appeal delivered its judgment in the case of *Director of Public Prosecutions v.P.O'C.*In that case the court decided that the practice was inappropriate and that relief of the kind sought herein must be sought by way of judicial review.

21. On 16th July, 2003, a Notice of Motion seeking the relief sought herein was issued and served on behalf of the applicant upon the respondent.

22. In evidence the applicant averred that he has at all times denied the complaint made against him by the complainant.He stated that he was taken by surprise when arrested and interviewed in connection with the allegations in 1999.

23. He claims that he will be irrevocably prejudiced by the fact that his wife is now deceased and will, consequently, be unable to testify at his trial.

24. In evidence A.R.averred that she lived in the family home until she was seventeen or eighteen years old.She said she lived in rental accommodation after that and spent a lot of time with her grandmother with whom she felt safe.

25. She described the abuse to which she was allegedly subjected in detail.She said that on some occasions the applicant had put his tongue into her mouth in front of people.She said that on other occasions he would surreptitiously abuse her in the presence of others.However, she said, most of the abuse occurred in private.

26. She said that she when she was twelve or thirteen years old in 1981 or 1982, she was suspended from school.She said that, at that time, she refused to allow the applicant to abuse her.She said that he never abused her again after that.

27. She said that the applicant was violent and had beaten her mother.That was the reason why they separated.The applicant had threatened to kill her if she told anyone of the abuse.She was frightened of him.

28. She said that she told her mother about the abuse in 1984.Her mother took her to the Rape Crisis Centre the following day.

29. She received some counselling but not much.She still goes back to the Rape Crisis Centre from time to time.

30. She said she complained to the Gardaí in 1999 because she was living in B.and was attending a Mental Health Clinic there.

31. She said that she wanted to have the applicant punished for what he had taken away from his family.She said that she didn't feel afraid anymore.She was then living in B.and she said that she knew that the applicant wouldn't know where she was and wouldn't be able to find her.

32. .Dr.M.D.testified.She stated that she had two meetings with the complainant A.R.(on the 4th, and 20th November, 2003).

33. She said that A.R.had been referred to her in September, 2003, by the respondent.She had been asked to report upon:

> (a) the reported and observed effects of the abuse upon A.R;
>
> (b) the reasons for her delay in reporting the abuse;
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> (c) her view as to whether the delay in reporting was reasonable in the light of her circumstances;
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> (d) her view as to the extent to which the effects of the alleged abuse could be said to have operated to inhibit disclosure and;
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> (e) her view as to whether there were other factors inhibiting A.R.from making a full disclosure until the time when it was made.

34. Dealing with the effects of the alleged offences, Dr.D.concluded that throughout her adult life A.R.had struggled with the effects of the alleged abuse.She had attended counselling for a number of years and had two treatment phases in psychiatric hospitals.In consequence she currently suffers from sleep disruption and takes medication to assist sleeping.She finds it difficult to trust people.

35. Dealing with the delay in reporting the alleged offences, Dr.D.said that it was reasonable that A.R.did not make an official report to the authorities whilst the applicant was living within the family home.

36. She said that after the applicant moved out of the family home A.R.and her immediate family remained terrified of the applicant.A.R.had been told by her late mother that an official report of the abuse would endanger the family's safety.

37. Dr.D.concluded that fear for her own safety and that of her immediate family prevented A.R .from making an "official" report to the authorities.Only after she received support from a psychiatric team and medication did she begin to explore the possibility of making a statement to the authorities.She was then able to confront her anxiety and the possible threat from her father.

38. In her report to the respondent and under the heading *"Conclusion"* Dr.D.stated:

> *"After reading the Book of Evidence and meeting with Ms.R.on two occasions it is my professional opinion that it was reasonable in the light of her circumstances and the negative impact of the alleged verbal physical and sexual abuse sustained by Ms.R.that she was not in a position to make a formal complaint to the authorities until 1999."*

39. In evidence she stated:

> *" I would directly link her failure to come forward with the actions of her father, both when he was in the home and because of the terror that she lived in after he left the home…….It was his behaviour when she was in the home that developed a sense of terror after he left the home.The fear was installed by (the applicant) by sexual, verbal and physical abuse.You can be terrorised by someone even after they've left…"*

40. She confirmed that it was her understanding that A.R.lived in terror of her father.Whilst A.R.was with her grandmother she *"felt safe".*Whilst she was living in B.A.R.did not live in fear of her father because he did not know where she was living at that time.

THE LAW

41. The general principles of law which apply to applications to prohibit, on grounds of delay, the prosecution of offences of a sexual nature allegedly committed against children (and reported only after substantial periods of time) are now well settled.

42. They have been stated by the courts within this jurisdiction and elsewhere on countless occasions.They are to be found in such cases as Barker v.Wingo 407 U.S.514 [1973*]; B v.Director of Public Prose*cutions [1977] 3 I.R.140; P.*C.v.Director of Public Prosecutions* [1999] 2 I.R.25, PO'C v.Director of Public Prosecutions [2000] 3 I.R.87; *J.L.v.Director of Public Prosecutions* [2000] 3 I.R.122; *JO'C v.Director of Public Prosecutions* [2000] 3 I.R.478 and, more recently *DO'R v.Director of Public Prosecutions* (Unreported Supreme Court 30th July, 2004); *T.W.v.Director of Public Prosecutions* (Unreported Supreme Court 28th July, 2004); *T.S.v Director of Public Prosecutions* (Unreported 22nd June 2005) and many others.

43. It is accordingly unnecessary to restate them herein.

THE APPLICANT'S CLAIM.
44. In this case it is contended that the delay (between 19 years and 26 years) by A.R.in reporting the offences was inordinate and of such duration that, of itself, it warrants the prohibition of the trial.The delay, it is inter alia argued, was not the result of any conduct referable to the applicant after 1984 because he left the family home in that year.Thereafter he could not and did not exercise any *"dominion"* (within the meaning ascribed to that term by the courts in cases such as this) over A.R..

45. It is argued that a further inordinate period in excess of eight months was allowed to elapse between 21st January, 2000, (when Garda investigation files were forwarded to the Chief State Solicitors office) and the 10th September, 2000, (when Detective Garda W.received directions in writing from the respondent requiring that the applicant be prosecuted in respect of the offences alleged).

46. The applicant claims that by reason of the delay in prosecuting him in respect of the offences, he has suffered both specific prejudice and presumptive prejudice in his capacity to defend himself in respect of the charges preferred against him.He says that accordingly there is a real and serious risk that he will not receive a fair trial.

THE RESPONSE
47. Mr Collins on behalf of the respondent contends that the applicant is in breach of the provisions of Order 84, rule 21 (1) of the Rules of the Superior Courts, 1986, because he has failed to apply for relief either promptly or within three months from the date when grounds for the relief first arose.

48. He argues that the grounds for the relief sought in these proceedings arose when the applicant was returned for trial to the Central Criminal Court on 30th March, 2001.

49. He says that he does not necessarily accept that the practice adopted by the courts in 2001 (referred to earlier) comprises a *"good reason"* why this court should extend the period limited by Order 84 of the Rules of the Superior Courts, 1986, within which the application can be made.

50. However, he says if it does comprise a valid reason the applicant failed to apply for relief *"promptly"* after the practice complained of was discontinued on 27th January, 2003.He did not seek relief until 16th July, 2003, almost six months later.

51. Alternatively Mr Collins S.C.argues that:

> (a) there has been no prosecutorial delay on the part of the authorities;
>
> (b) if there has been pre-complaint delay, then the same was referable to the conduct of the applicant and;
>
> (c) in any event the court must proceed to consider the overriding question of whether the delay will result in a real and serious risk of an unfair trial for the applicant and;
>
> (d) no prejudice either actual or presumed has resulted from any delay in prosecuting this applicant in respect of the offences with which he has been charged.

ORDER 84 RULE 21
52. Order 84, rule 21 of the Rules of the Superior Courts, 1986 provides as follows:

> *"An application for leave to apply for judicial review should be made promptly, and, in any event, within three months from the date when the grounds for the application first arose, or six months where the relief sought is certiorari, unless the court considers that there is a good reason to extend the period in which the application has been made."*

53. In this case I am satisfied that there is a good reason for extending the time within which the application may be made.

54. The grounds for the relief sought in these proceedings arose when the applicant was returned for trial to the Central Criminal Court on 30th March, 2001.

55. At that time a practice had been adopted in the Central Criminal Court whereby applications to prohibit trials on the grounds of delay were heard by the Central Criminal Court as applications to quash indictments on grounds of delay.

56. Such applications were made and heard prior to or during the course of the trial of the person accused.

57. The practice was followed by the applicant's legal advisors who issued a notice of motion dated 27th September, 2001.In the notice the applicant sought the relief which has been sought in these proceedings.The notice was lodged in the Central Criminal Court on 28th September, 2001.

58. Before the applicant was brought to trial the practice was discontinued consequent upon a judgment of the Court of Criminal Appeal delivered on the 27th January, 2003.

59. Having regard to the acknowledgement of the existence of the practice and its adoption and ultimate discontinuance in the manner outlined above, I am satisfied that it was reasonable in the circumstances for the applicant to adopt that practice and to take the steps which he took up to the 27th January, 2003, when the practice was discontinued by order of the Court of Criminal Appeal.

60. Thereafter a period of over six months was permitted to elapse before the applicant sought the relief which has been sought in these proceedings.

61. Mr.Collins S.C.correctly points out that Order 84 of the Rules of the Superior Courts, 1986, provides that an application for relief of the type sought in these proceedings must be made *"promptly"* and in any event no later than three months after the date when the grounds for the relief first arose.

62. In these proceedings the applicant did not seek relief by way of judicial review within the three month period limited by Order 84.He did however seek relief relatively expeditiously and in a manner commensurate with a practice then considered appropriate by the courts within this jurisdiction.

63. It is true that when that practice was discontinued he allowed a period of six months to elapse before seeking the relief which has been sought.

64. However, I do not believe that the interests of justice will be served by precluding him from applying for relief.The failure of the applicant to comply strictly with the provisions applicable to relief by way of judicial review has been influenced by the adoption of a practice which had the effect of temporarily removing such applications from (at least), some of the tenets, principles and, perhaps, time limits which ordinarily apply to relief by way of judicial review.Some degree of confusion in the minds of litigants and practitioners alike can often result from such temporarily changed circumstances.

65. Accordingly, as I have indicated, I am satisfied that there is a *"good reason"* within the meaning ascribed to that term by Order 84 of the Rules of the Superior Courts, 1986, why this court should extend the time within which the applicant may seek the relief which he has sought in these proceedings and I will do so.

PROSECUTORIAL DELAY

66. It has been contended on behalf of the applicant that the period in excess of eight months which was allowed to elapse between 21st January, 2000, (when three Garda investigation files were forwarded to the Chief States Solicitors Office) and 10th September, 2000, (when directions were received in writing from the respondent) was excessive and inordinate in the circumstances and sufficient to justify the prohibition of the applicant's trial.

67. I do not accept that contention.

68. Between 13th May, 1999, when A.R.first complained of abuse to the prosecuting authorities, and 25th January, 2000, an efficient and expeditious investigation was undertaken and completed by the prosecuting authorities.The Gardaí were then investigating allegations of criminal conduct by three separate persons.

69. On 25th January, 2000, investigation files in relation to the three persons concerned were forwarded to the office of the Chief State Solicitors.The files contained evidence which was to be examined and considered in respect of potential prosecutions.

70. On 10th September, 2000, directions in writing were received by the Gardai from the respondent.The directions apparently resulted from an analysis of the evidence implicating the applicant including, and in particular, the evidence contained within the files.

71. Mr.O'Hanlon points out that no explanation has been offered by the respondent by way of evidence to account for the apparent inactivity by the respondent during the period in question.

72. It would have been helpful if evidence had been adduced on behalf of the respondent describing the steps which were apparently taken by the prosecuting authorities during that period.

73. Whilst the period in excess of eight months was substantial it was not, in my judgment, excessive.It certainly cannot be categorised as coming within the category of culpable or "blameworthy" prosecutorial delay of the kind identified by Geoghegan J.in *P.P.v.Director of Public Prosecutions* [2000] 1 I.R.403.

74. It is not the function of the court to conduct a supervisory review of the prosecution of offences by the respondent.

75. Care must be taken by prosecuting authorities when considering the prosecution of persons accused of the commission of criminal offences.

76. Evidence must be carefully considered and procedures adopted so that prosecutions may be properly brought when that is appropriate and that persons suspected of criminal activity will not face prosecution unless prosecuting authorities are in a position to adduce sufficient evidence to make out a prima facie case against the person accused.

77. As I have indicated I am satisfied, in the circumstances, that the period of eight months was not excessive.I am not satisfied either that any presumptive or other prejudice was caused to the applicant, or to his capacity to defend himself in respect of the allegations made against him by the passage of that period of time.

78. Mr.O'Hanlon says that it forms part of an overall fabric of delay in this case.That argument must await consideration of the issue of alleged pre-trial delay on the part of A.R.The prosecutorial delay alleged in this case is not, in my judgment, inordinate in character and it is not sufficient, of itself, to warrant intervention by this court.

PRE-COMPLAINT DELAY.

79. The right of an accused person to a trial with reasonable expedition is well settled.It has been recognised by the courts within this jurisdiction (repeatedly) - see *The State (Healy) v.Donoghue* [1976] 1 I.R.325; *The State (O'Connell) v.Fawsitt* [1986] I.R.362 and many other cases.

80. The right derives from Article 38.1 of Bunreacht na hEireann.It is also protected by Article 6 of the European Convention on Human Rights.

81. I am satisfied on the evidence and on the balance of probabilities that the applicant occupied a position of dominion over A.R.at the time of the commission of the alleged offences.I make this finding assuming, as I must for the purposes of this exercise, that the complaints of A.R.are true.

82. The applicant left his family home in 1984.It is claimed on his behalf that he never exercised "dominion" over A.R.after that time.

83. Mr.O'Hanlon SC on behalf of the applicant contends that the evidence adduced on behalf of the respondent cannot be relied upon in support of a finding or inference that the failure by A.R.to report the abuse complained of was caused or influenced by any dominion exercised by the applicant over A.R.or by any other conduct referable to him.

84. He says that the evidence of Dr.D.cannot support such a finding or inference inter alia because Dr.D.applied an incorrect test when conducting her assessments of A.R.He says, correctly, that it is not the function of Dr.D.to determine whether the delay by A.R.in reporting the abuse complained of was "reasonable" in the circumstances.He says that the evidence of Dr.D.in these proceedings can assist the court if it can connect (or fail to connect) the delay with some psychiatric or psychological condition suffered by AR at a relevant time.

85. I do not disagree with that contention.

86. *In D.O'R v.Director of Public Prosecutions* (Unreported, Supreme Court, 30th July, 2004) the Supreme Court (McGuinness J.) referred with approval to the following extract from judgment of the Supreme Court (McGuiness J.) in *D.W.v.Director of Public Prosecutions* (Unreported, Supreme Court, 31st October, 2003) dealing with what was described as "cases of delay in the reporting of sexual offences"

87. The court observed that;

> *"It seems to me that there are two ways in which expert psychological evidence can be of assistance to the Court in these cases.*
>
> *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.[1997] I.R.14D 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 in these cases.The numbered list of factors set out by the expert witness in the case of K.v.Judge Groarke and D.P.P.at p.3 -4 of the judgment of Denham J.in that case is a good example.*
>
> *It will then befall the Court to form its own opinion of the influence of these factors within the parimeters of the other evidence in the particular case.*
>
> *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."*

88. In the instant case there was a delay of 15 years between the date, in 1984, when A.R.disclosed the abuse to her mother, (and to the Rape Crisis Centre), and the date, in 1998, when she complained to the Gardai.

89. The applicant had left the family home in 1984 in circumstances of marital disharmony which included allegations made by his wife that she had been the victim of physical abuse at his hands.

90. Those allegations were repeated in a statement made for the purposes of the applicant's trial by the applicant's (now deceased) wife.

91. It has been established in evidence that, immediately after the applicant left the family home in 1984, A.R.told her mother of the sexual abuse.With her mother's assistance, the applicant then undertook counselling in the Rape Crisis Centre.She has attended counselling at the Rape Crisis Centre intermittently throughout the entire of the period between 1984 and 1998.When she made that disclosure she was 14 years old.

92. When she was 15 years old she was admitted to a psychiatric ward.She had apparently attempted suicide.She has required treatment in a psychiatric hospital on another occasion.In 1998 she was suffering from panic attacks and anxiety of sufficient intensity to require her attendance at a Mental Health Clinic in B.Prescription of medication was necessary to assist in dealing with her symptoms.

93. She told Dr.D.that her mother asked her not to report the incidents of abuse to the authorities because to do so would be to place her family at risk of physical assault by the applicant.She has averred in evidence that she had feared for own safety and for that of her family if she complained to the authorities.

94. She described living in terror of the applicant after the date when the abuse ceased because of his relative physical proximity to her until 1999 when she had been living for a year in B.and felt that he could no longer locate her.

95. She went to live in B.with her fiancé in 1998.She still needed some treatment at that location but a year later finally felt free to make a complaint to the prosecuting authorities.

96. Dr.D.accepted that this was consistent with her psychological profile at that time.

97. In evidence A.R.made it clear that her fears for her safety (and that of her family) related to the applicant's capacity for violence.He used threats at the time of abuse that if A.R.disclosed the abuse he would kill her

98. In these proceedings the applicant averred that;

> *"I never told anyone about the sexual abuse when it was going on because I thought people would not believe me at that time.I also believed the applicant when he told that he would kill me if I told anybody.I was very frightened of him.He used to hit me more than others.He used to say he would kill us all anyway and growing up I always knew that he had threatened my mother that he would burn us down when were all asleep.When growing up I had seen how violent he was and that he had beaten my mother on a regular basis and he also beat me up and my brother as well … between 1982 and 1999 I could not tell the Gardaí.I was just too afraid and I did not think anyone would believe me.In 1999 I realised that the abuse was wrong and not my fault and I didn't want any of my children to be hurt".*

99. When interviewed by Dr.D.she disclosed that:

> *"After (the applicant) moved out of the family home (she) and her immediate family were terrified of (the applicant's) physical threats of harm to them.The family lived in fear of (the applicant).(AR's) mother encouraged her daughter not to make any official report to the authorities for fear of the family's safety.(She) stated that it was a fear for her and her immediate family's safety that made her feel that she could not come forward to make an official report to the authority.It was not until(she) gained the support of the psychiatric team and medication that she began to explore the possibility of making an official statement to the authorities.She began to confront her anxiety of the possible threat of her father".*

100. In response to cross-examination Dr.D.said (in relation to A.R.):

> *" … I would directly link her failure to come forward with the actions of her father, both when he was in the home and because of the terror that she lived in after he left the home … the fear was installed by (the applicant) by sexual, verbal and physical abuse.You can be terrorised by someone even after they have left …".*

101. It is true to say, as Mr.O'Hanlon SC has, that Dr D.'s testimony did not comprise expert professional evidence confirming or suggesting the presence of a psychological illness or condition suffered by the A.R.which explained the delay on her part in reporting the abuse.It was an expression of opinion by Dr D.However, it is an opinion which follows logically and pragmatically from the history provided by A.R.to Dr D.

102. That history has been provided by way of evidence to the court in these proceedings and the court, having carefully considered that evidence, is satisfied that it adequately explains the delay by A.R.in reporting the abuse until the time when she did so.

103. In *Barry v.The D.P.P.and Others* (Unreported, 17th December, 2003) The Supreme Court (Keane C.J.) observed that:

> *"Whether the adduction of such evidence is a necessary precondition to a finding that the failure to make a complaint at the relevant time was explicable and excusable must depend on the particular circumstances.As the authorities demonstrate, it may undoubtedly play an important part in inquiries of this nature, where the alleged victims failed to make any complaint in respect and patently criminal conduct even at a stage when they had become adults and might be presumed to be fully aware of the wrongful nature of the offending conduct.It is true to say that in S.v.D.P.P., which was also a case in which a medical practitioner was alleged to have committed a sexual assault upon young patients, there were expert reports from psychologists dealing with each of the complainants and offering an explanation for the delay.However, the fact that it was thought necessary, or at least desirable, to adduce such evidence in that case is not a ground for considering that it is essential in every such case.*
>
> *I have no doubt that the trial judge was correct in the approach he adopted, i.e.of considering the admissible evidence, attaching such weight to it as it deserved and drawing such inferences from the evidence as it seemed to him necessary or reasonable".*

104. A.R.disclosed the abuse to her mother in 1984 and to the Rape Crisis Centre at the same time.Mr.O'Hanlon S.C.argues that if she was able to disclose the abuse to the Rape Crisis Centre then she was able to disclose to the prosecuting authorities but did not.In *P.C.v.Director of Public Prosecutions* [1999] 2 I.R.25 Keane J.observed that in cases such as this:

> *"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 that onus.All the circumstances of the particular case must be considered before that issue can be resolved".*

105. In *P.L.v.Her Honour Judge Buttimer and the D.P.P.*(Unreported, Supreme Court, 20th December, 2004) the Supreme Court (Fennelly J.) summarised the principles applicable to such cases in the following terms:-

> *"1. Long delay by a complainant in making a complaint of sexual abuse may be explained by the fact that the accused, by reason of disparity of age, combined with the tenure by the accused as a position of trust or authority over the complainant;*
>
> *2. For the purposes of the inquiry as to whether the delay is explicable, but not further, it will be assumed that the allegations of sexual abuse are true;*
>
> *3. Delay, even after the end of the period when the accused is in a position to exercise dominion, may be explained by showing that the alleged sexual abuse continued to affect the complainant in the sense that he or she was psychologically inhibited from complaining.In deciding this issue, psychological or psychiatric evidence may be relevant, but is not essential.All the relevant circumstances in the particular case must be considered.The question is not simply whether the complainant continues to be affected by the alleged abuse, but whether such effect constitutes a reasonable explanation for the delay in complaining.*
>
> *4. The burden of proving that the trial should be prohibited lies on the applicant.However where the delay is prima facie such as to give rise to a presumption that the applicant's right to a fair speedy trial is infringed, the Court will have regard to the adequacy of any explanation offered by the complainant".Assuming (as the court is obliged to) that the abuse occurred and was accompanied by the threats averred to by A.R., the Court is satisfied that, having regard to all of the evidence adduced in these proceedings, the delay by A.R.in making a complaint to the prosecuting authorities was both explicable and excusable in the circumstances.*

106. Accordingly the trial of the applicant will not be prohibited on the ground of A.R.'s delay in reporting the abuse since that delay was referable to the applicant's conduct.

SPECIFIC PREJUDICE AND THE RISK OF AN UNFAIR TRIAL

107. It is claimed on behalf of the applicant that he will suffer prejudice in his capacity to defend himself because his estranged wife A.R.has died recently and is not now available to testify at his trial.

108. It is contended that her unavailability has given rise to a real and serious risk that the applicant will not receive a fair trial.

109. Mr.O'Hanlon S.C.argues that, since she was the person in closest physical proximity to the applicant and his daughter at all material times, the evidence of the applicant's wife would have been central and relevant to the events complained of.

110. He contends that, if the applicant's wife was now available to testify at the trial, her credibility, and the credibility of A.R., could be undermined by way of cross-examination.

111. Mr O'Hanlon is unable to identify any relevant testimony which the applicant's late wife would have been in a position to adduce by way of direct evidence.

112. The written statement made by the applicant's late wife (in support of the charges) was wholly supportive of the account given by the applicant's daughter A.R.of the events surrounding the alleged offences.

113. Testimony which it is hoped will result from cross-examination comes within the category of evidence which has been identified repeatedly by the courts as evidence which so uncertain and speculative in nature that its absence, through the unavailability of a witness, will not amount to specific prejudice sufficient to warrant the prohibition of a trial.I am satisfied, therefore, that the applicant's trial should not be prohibited on that ground.

114. Mr.O'Hanlon also argues that, on the evidence of A.R.there were occasions when the applicant behaved inappropriately in the presence of other persons.

115. He contends that, having regard to the passage of time between the date of the alleged offences and the likely date of trial, it will now be impossible to identify or locate persons who would have been present in the home from time to time during the period when these incidents are alleged to have occurred.It is claimed that the testimony of such witnesses might have helped the applicant to undermine A.R.'s credibility.

116. Since these unidentified witnesses will not be available to testify at the applicant's trial, Mr O'Hanlon says that there is real and serious risk that the applicant will not receive a fair trial.I do not accept that contention.

117. The potential evidence referred to by Mr O'Hanlon also comes within the category of evidence identified repeatedly by the courts as being so uncertain and speculative in nature that its absence, through unavailability of witnesses, will not amount to specific prejudice sufficient to warrant the prohibition of a trial.

118. In summary, I am not satisfied that the absence, through decease, of the applicant's late wife and the fact that the applicant may have difficulty in identifying persons who would have been present at the time when these offences are alleged to have occurred will cause any risk to him of prejudice of the kind which could give rise to the risk of an unfair trial.They are matters which can be dealt with by his legal advisors at the trial and by the trial judge by way of direction to the jury.

119. Additionally, of course, the Court has determined that the applicant has, by his conduct, caused the delay which has resulted in the absence of the evidence which he now says he wishes to adduce.

120. It follows that I am satisfied that the applicant is not entitled to the relief which he seeks.