

**THE HIGH COURT  
JUDICIAL REVIEW**

[2002 No. 391 J.R.]

BETWEEN

W. M.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

**Judgment of Mr. Justice de Valera delivered on the 11th day of January 2006.**

1. This is an application by W. M. for an order of prohibition to prevent the respondent prosecuting the applicant in respects of counts 1 – 120, inclusive, on the indictment in proceedings entitled “Bill No. CC0029/02 the People at the suit of *the Director of Public Prosecutions v. W. M.*”, at present listed for trial before the Central Criminal Court but stayed pending the determination of this application.

2. The applicant is now aged 46 and is married. The charges allege various occasions of rape and indecent assault against two of his sisters M.H. and J.M., both younger than the applicant.

3. These offences are stated to have occurred on various dates (specifically unknown) between the 13th December, 1971, and the 9th May, 1981.

4. It is the applicant’s submission that excessive delay, or delays, in firstly laying a complaint against the applicant with An Garda Síochána and, subsequently, the processing of that complaint up to, and including the sending of the applicant for trial make it impossible for him to receive a fair trial.

5. The significant dates associated with charges against the applicant, and the arguments on which the applicant relies on in this application are as follows:

Date	Brief Description
31st January, 1958	Applicant’s date of birth.
13th December, 1960	Sister M.H.’s date of birth.
9th May, 1964	Sister J.M.’s date of birth.
13th December, 1971	First of the dates referred to in the charges (applicant then aged 13 years).
31st December, 1976	Last date referred to in charges concerning M.H.
9th May, 1981	Last date referred to in charges concerning J.M.
11th January, 1997	Death of applicant’s mother.
Date unknown subsequent to January, 1997	J.M. discussed allegations with brother A. and her father
Date unknown in 1997	M.H. discussed allegations with her brother A.
Date unknown between January and June 1997	M.H. discussed allegations with neighbour.
January, 1998 (exact date unknown)	A. discussed allegations with sister C.
January, 1998 (exact date unknown)	M.H. discussed allegations with sister C.
April, 1998 (exact date unknown)	M.H. discussed allegations with her husband.
21st July, 1998	Applicant became aware of allegations.
10th August, 1998	Solicitor’s letter from applicant to M.H.
13th July, 1999	Solicitor’s letter from M.H. and J.M. to applicant (indicating a complaint would be made to authorities).
27th July, 1999	M.H. made a formal complaint.
24th September, 1999	J.M. made a formal complaint.
9th January, 2002	Applicant charged.
27th February, 2002	Applicant sent forward for trial.
7th February, 2002	Death of applicant’s and complainants’ father.

6. The fundamental test, in an action such as this, is whether or not the accused would have a fair trial (*O’Flynn v. Clifford* [1988] I.R. 740). The right to an expeditious trial is a fundamental principle of law. In *P.C. v. The Director of Public Prosecutions* [1999] 2 I.R. 25 Keane J. stated at p. 65:

“The right of an accused person to a reasonably expeditious trial has been recognised as an essential feature of the Anglo American system of criminal justice for many centuries.”

7. In *J.O’C v. The Director of Public Prosecutions* [2000] 3 I.R. 478 Hardiman J. (at pp. 499-500) stated five principles which may be summarised as follows:

1. A lengthy delay between the event giving rise to litigation and the trial risks injustice.
2. Delay may deprive a defendant of his capacity to be effectively heard.

3. Delay may be so great as to be contrary to natural justice and an abuse of the process of the court in requiring a defendant to defeat an allegation ... that would have taken place years before the trial.
4. The court may dismiss a claim because a long lapse of time, whether culpable or not, will necessarily create an injustice, or amount to an absolute and obvious injustice.
5. Delay will be particularly undesirable where disputed facts would have to be ascertained from the oral testimony of witnesses recounting on what they recall of the past.

8. Hardiman J. went on to state at p. 500:

"It can scarcely be doubted that the principles summarised above are applicable to criminal cases as well. It would be strange indeed if the courts were less solicitous of a person in peril of his liberty and reputation by reason of having been charged with a criminal offence."

9. In *The State (O'Connell) v. Fawsitt* [1986] I.R. 362 Finlay C.J. stated at p. 379:

"I am satisfied that if a person's trial has been excessively delayed so as to prejudice his chance of obtaining a fair trial, then the appropriate remedy ... is by an order of prohibition."

10. In considering a question of prejudice I am satisfied in applying the principles of *J.O'C v. The Director of Public Prosecutions* to the findings in *The State (O'Connell) v. Fawsitt* that prejudice in matters of excessive delay in a criminal trial can be presumed in the absence of any specific prejudice.

11. In this application the delay complained of can conveniently be divided into two separate or discrete periods, firstly, from the date on which it is alleged the first offence took place, that is, the 13th December, 1971, to the date of complaint to the Gardaí on the 27th July, 1999, and secondly, from the 27th July, 1999, until the 27th February, 2002, being the date of the return for trial (the application for leave to apply for judicial review was made on the 8th July, 2002).

#### **Complainant's Delay**

12. I have been referred by applicant's counsel to two reported recent cases which deal specifically with matters arising out of sexual contact with young children. In *P.C. v. The Director of Public Prosecutions* [1999] 2 I.R. 25 at a three part test in relation to delay is stated, in summary, to be

1. Is the delay between the defence and the trial so excessive as to preclude the possibility of a fair trial without evidence of specific prejudice.
2. Is the accused's ability to defend himself specifically impaired to such an extent that there is a real and serious risk of an unfair trial.
3. Is there prosecutorial delay and, if there is complainant delay, is this due to any action of the accused.

13. I have also been referred to *P.M. v. The Director of Public Prosecutions* [2002] 2 I.R. 560 in this matter which though not identical with the instant case does have some striking similarities such as the reluctance of young children to accuse adults of improper behaviour, significant difference in age and the fact that the offender might be in a particular position of authority in relation to the complainant, these were set down as being matters for consideration.

14. The complainant delay in this matter is a minimum of 18 years which is on its face very considerable. I am satisfied on the evidence adduced in this matter both on affidavit and particularly in the cross-examination of the complainants on their affidavits that the applicant, who is two years older than his sister M.H. and 6 years older than his sister J.M. may have in the case of M.H. until approximately 1984 and in a case of J.M. until approximately 1970 been in a position to exercise some form of authority or control over his sisters but that such authority or control, if it did exist, did not continue in the period up to the making of the complaints in July and September, 1999. I should point out, in particular, that I do not accept that the principal motivation for M.H.'s emigration to the United Kingdom was fear of the applicant but, on the balance of probabilities was principally associated with her economic circumstances and her desire to better herself socially and economically.

15. The complainants were, in my view, for a period of at least 18 years in a position to make complaints against the applicant but freely chose not to do so for the reasons enumerated in their evidence and chose, rather, to discuss it within the family and to keep it, insofar as was possible, a family secret.

16. This delay has had the effect, *inter alia*, of preventing the applicant and complainants' mother and father from giving evidence or making statements. The locus of the alleged events is also now changed and out of family control; had complaints been made within a reasonable period from 1971, then the parents, and the family home and environs would have been available to assist in the necessary investigations and if appropriate, prosecution.

17. I have considered the evidence of the psychologist, which, in my view does not establish any compelling reason or reasons that prevented the complainants from going to the authorities and I feel there may be some merit in the criticism of the relatively short period of face to face investigation and reliance on the notes of another psychologist who did not give evidence.

18. The family doctors, also, might have been in a position to clarify the puzzle of the lost, if such they were, common notes in relation to J.M. and it is inevitable that his recollection in respect of M.H.'s records would be better if activated at an earlier time.

19. For these reasons on the basis of the delay by the complainants I am satisfied that I should make the order as sought by the applicant prohibiting the trial as aforesaid.

#### **Prosecutorial Delay**

20. M.H. made a formal complaint concerning the applicant to Sergeant D. M. by way of a statement on the 27th July, 1999.

21. J.M. then made a statement to Sergeant M. on the 24th September, 1999.

22. Between the 27th July, 1999, and the 9th March, 2000, the Sergeant carried out various investigations which included the taking

of statements and the file prepared by him was sent to his Superintendent who in turn sent it to the office of The Director of Public Prosecutions, probably within a week or two of the 9th March, 2000.

23. On April 26th, 2000, a request was received from the Director of Public Prosecution's office to carry out further investigations which were completed by the following July, 2000, and referred back to that office.

24. No further action occurred until June, 2001, when Sergeant M. was asked to carry out further investigations, which he did and forwarded the results to the office of the Director of Public Prosecutions in August, 2001. On the 11th October, 2001, directions were received by the Gardaí from the office of the Director of Public Prosecutions to charge the applicant with a number of charges of rape and sexual assault which charges were preferred on the 9th January, 2002.

25. In respect of the periods of delay between the 26th April, 2000, to the 22nd July, 2000, the delay is three months.

26. In respect of the periods of delay between August, 2001 and the 11th October, 2001, the delay is two months.

27. In respect of the periods of delay between 3rd October, 2001 and 9th January, 2001, the delay is three months.

28. I am satisfied with Sergeant M.'s evidence and explanations which, in the circumstances of this particular matter, disclose procedures which do not constitute excessive delay but rather show reasonable expedition given the nature of the complaints made.

29. The delay between July, 2000, and June, 2001, almost a year is on its face and in the circumstances excessive, and unexplained.

30. It may be that there is some good reason, or reasons, for this delay and it is possible to speculate what such reasons may be but there is no explanation whatsoever for this period.

31. As I have already stated there may well be reasonable explanations for such a delay but in the absence of such explanation a period in excess of 11 months must be considered excessive.

32. On the 31st December, 2003, the European Convention on Human Rights was incorporated into Irish law by the enactment of the European Convention on Human Rights Act 2003. Article 6(1) of the Convention states

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time ..."

33. The definition of a "reasonable time" must, to some extent at least, depend on the circumstances of each individual case. In the present proceedings, as already noted, no explanations for delay have been advanced. In the matter of *McMullen v. Ireland* application no. 42297/98 (29/07/04), the European Court of Human Rights held that delay constituted a failure to proceed within a reasonable time and found that there had, therefore, been a breach of Article 6(1) of the Convention. (In this matter, also, the delay was unexplained) although this was a case concerning a civil wrong the principle, just as in *J.O'C v. The Director of Public Prosecutions*, supra, must also apply to criminal trials. I am satisfied therefore that on this ground, also, I should grant an order of prohibition.