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Neutral Citation Number: [2006] IEHC 135

**THE HIGH COURT**

**[2004 No. 915 J.R.]**

**BETWEEN**

**A.D.**

**APPLICANT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**Judgment of Mr. Justice John MacMenamin dated the 6th day of April, 2006.**

1. Arising for consideration in this judicial review application are the issues of a constitutional right to a trial with due expedition and an assertion of prosecutorial delay in a situation where the parties involved were at the time of the offences alleged young people under the age of eighteen years.

The applicant stands accused of 21 counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990 in that he did on various dates between 1st October, 1997 and 30th June, 1999 sexually assault one P.M. (hereinafter referred to as the "the complainant").

**The Ages of the Complainant and the Applicant**

2. It is alleged that the applicant committed these offences whilst the male complainant was a foster child in the applicant's parents home in a rural location. The applicant was born on 1st November, 1982. It has been stated he was accordingly aged fourteen years and nine months at the date of commencement of the period in which the alleged offences occurred. He was aged sixteen years and five months at the end date of the time at which the offences allegedly occurred.

3. The complainant is stated to have been born on 10th August, 1985. Accordingly, on that basis, he was twelve years and two months at the alleged date of commencement of the offences and thirteen years and nine months at the end of the period in question.

In view of the importance of absolute and relative age difference in this case it should be pointed out that, on the second page of his statement of evidence, the complainant identifies September 1997 as the time the alleged offences commenced when, he says, the applicant was "going on seventeen years of age". This would not appear to be in accord with the applicant's date of birth of 1st November, 1982. In September, 1997 the applicant was, on the evidence, aged fourteen years and nine months, not going on seventeen years. On the basis of the complainant's date of birth as set out in the respondents written submissions, in September 1997 he would have been aged twelve years and one month.

In the month of July 1999 the complainant was removed from the applicant's parents home and an investigation was launched by the relevant Health Board into whether the applicant had been engaged in alleged sexual offences against the complainant.

**Chronology**

4. At the outset of the case the following dates were identified as being relevant:

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| Medical examination | 15th June 1999 |
| Period of alleged offences | 1st October 1997 – 30th June 1999 |
| First disclosure of the alleged offences regarding the complainant made by another foster child, D O'L, to social worker | 13th July 1999 |
| Notification of suspected child abuse sent from Health Board to Superintendent of An Garda Siochána | 20th July 1999 |
| Parents of applicant told of allegations and removed from foster home immediately | 13th July 1999 |
| Parents of complainant told of allegations | 14th July 1999 |
| Doctor examines complainant and two other children from the foster home | 15th July 1999 |
| Health Board case conference with Garda M.W. in attendance | 17th October 2000 |
| Complainant calls to local Garda station requesting Gardaí to note the matter and indicating he would think about making a written statement | 29th March 2001 |
| Complainant makes written statement of complaint to Gardaí | 12th April 2001 |
| Sergeant M. attends meeting with a care | |
| Organisation within the relevant Health Board | 23rd April 2001 |
| Health Board provides names and addresses to the Gardaí | 25th May 2001 |
| Gardaí take statements from a number of witnesses | August 2001 – February 2002 |
| Applicant arrested and interviewed | 2nd April 2002 |
| Prosecution file being finalised | July 2002 – October 2002 |
| Communication received from D.P.P. regarding referral of the case to the National Juvenile Office | 12th March 2003 |
| File sent to the National Juvenile Office | April 2003 |
| State Solicitor informed applicant was not suitable for inclusion in the Juvenile Diversion programme | 19th June 2003 |
| Directions received from the D.P.P. to charge the applicant | 18th August 2003 |
| Applications for summons made | 14th October 2003 |

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| Summons returnable to | 26th November 2003 |
| Applicant returned for trial to Circuit Court | 28th July 2004 |
| Leave to issue judicial review granted | 18th October 2004 |

5. In response to the affidavit sworn by the applicant, affidavits have been filed by the State Solicitor Mr. Martin Linnane, Sergeant M. M. of An Garda Siochána, the complainant P.M. and by Garda M.W. However, no affidavit has been filed by an officer in the Office of the Director of Public Prosecutions charged with dealing with the file from October 2002 to the 12th March, 2003, and thereafter the book of evidence also contains statements from social workers in the employment of the relevant Health Board.

At the time relevant to these allegations the applicants' parents ran a foster home. They offered foster accommodation to children referred to them by the Health Board. P.M., the complainant was a foster child placed in the home from August 1997 until June of 1999.

Three months after the removal of the complainant and other children from the foster parents, on 16th November 1999 the relevant Health Board launched an investigation into the allegations. They wrote to the applicant's parents saying that they would be in touch with them when the investigation was complete. The applicant states that, thereafter nothing further was heard from the Health Board in relation to the investigation and nothing at all was heard from the prosecuting authorities. From July 1999 until he attained the age of 18 years the applicant he commenced a weekly course of counselling and of psychological assessments under the auspices of the Health Board. These took place every Wednesday after school and his mother drove him to a nearby town for this purpose. The applicant states that he attended each one of these counselling sessions. This continued for approximately 18 months.

6. When the applicant became eighteen years of age, he no longer came within the remit of the Child Psychiatric Service of the Health Board. However he thereafter continued counselling and psychiatric treatment for of period of one year. He says that living with this regime was difficult. He found it difficult to concentrate properly in school. He completed his Leaving Certificate in June 2000 and passed all subjects bar one. He did not attain the academic level that he would have hoped for and consequently embarked on a CERT course as a trainee chef and thereafter completed one year of his studies at an Institute of Technology.

The applicant states that all through this time it appeared to him that, due to the young ages of himself and the alleged victim, the matter was being dealt with only by the Health Board. He says now he was too young to fully appreciate the mechanics of such a situation but he thinks the Health Board informed the prosecuting authorities of the situation at the time and that if any legal action was to be taken then it should have been commenced at the time when he was still a child rather than now when he is an adult.

Only in March 2001 did P.M. the complainant meet first with the Gardaí. The next month, in April he made a formal statement of complaint. One year later still, in April 2002, the Gardaí called to the applicant and took a statement. He then heard nothing further apart from one visit from a Juvenile Liaison Officer. Only in October 2003, some two and a half years after P.M. first met the Gardaí, and some four years and four months since the Health Board were informed about the allegations was a complaint made to the District Court and the summonses were issued.

During that period the applicants says that he had continued with his career and had done everything asked of him by the Health Board. He says that had he been dealt with expeditiously by the prosecuting authorities and thereby the courts he would, even if convicted, have been treated as a young person for alleged activities and conduct while he was a child and young person. Now, as an adult, he says he would be tried and judged as an adult for alleged activities and conduct carried out as a child. In consequence of the elapse of time which has occurred he may now, if convicted, be subject to the provisions of the Sex Offenders Act 2001. Had he been dealt with in 1999 he would not be subject to the provisions of that legislation regarding registration and restriction, and the label and opprobrium that such procedure attracts. It is pointed out that the matter is rendered somewhat more complex by a suggestion that the complainant P.M. himself engaged in sexual abuse of a fellow foster child who was aged five years at the time.

7.. The applicant's case therefore is that a period of four years and four months has elapsed between the Health Board's being informed of the allegations and the issuing of the summonses. He says this lapse of time irreparably prejudices his prospect of a trial with due expedition, and is in breach of his right to a fair trial in due course of law and with reasonable expedition. He adds that the delay which occurred led him to believe that he would not be prosecuted in respect of the allegations by P.M. He says he was partly induced to this belief by a visit from the Juvenile Liaison Officer who represented to him that probation might be available to him, which visit was subsequent to the complaint having been made by P.M.

8. The affidavit of Sergeant M. sets out further background detail. It states that the complainant alleged that the applicant had threatened him that if he made any issue about what allegedly occurred he would deny it and that it would be him who would get into trouble about it. The complainant states that A.D. was in a position of dominion over him while he was in the D. house. His residence there however ceased in July 1999. No allegation of dominion is made thereafter. No complaint of delay is alleged. While P.M. says he continued to be concerned he would not be believed, there is no evidence of any contact between the parties after July 1999. However P.M. states that for four years he was undergoing counselling from a psychologist Mr. D.C. It was at Mr. C's suggestion that the complainant eventually went to the Gardaí. The book of evidence also contains material describing sexual activities which allegedly took place between the applicant and the complainant including description of an incident which is alleged to have occurred with a pet dog in front of one of the applicant's sisters who was stated to be around eight years at the time. The prosecution case also includes statements in which the applicant allegedly made certain admissions of some sexual activity between himself and the complainant and the complainant's brother but not to the extent alleged by the complainant.

9. Sergeant M. contends that the investigation was not straightforward. He says it had to be conducted in a sensitive manner given the fact that the allegations related to alleged sexual abuse in the context of a foster home. Witnesses had to be traced to various addresses in which they resided. Some of them were in foster care in different homes throughout the region. This took some time notice to cross examine was served. During the course of cross examination the Sergeant accepted that all of the witnesses were within approximately thirty miles of where he is stationed. He added that Gardaí were not granted access to the Health Board investigation file, as he stated, such an authority would regard any information contained on the file as confidential. Such a duty of confidentiality could hardly stand in the way of the investigation of criminal offences however.

10. On 20th July, 1999 that the "notification of suspected child abuse "was sent from the Health Board to the Superintendent at Kilrush. The notice in prescribed form referred to the D. family and gave their address. In fact it refers to the four children in the D. family (including the applicant), in the context of their having been possible *victims* of child sexual abuse. No steps were taken for a little more than a year. On foot of this notification. To this fact must be added another matter of particular importance. His affidavit the Sergeant deposes:

> *"… no mention was made of P.M. at any stage either in the notice received from the Health Board or at the subsequent conference. His name was never disclosed to the Gardaí as a victim nor was the extent nor seriousness of the abuse*. As far as the Gardaí were concerned this notice referred to the D. family, and subsequently at the case conference, A.D. (complainant). No formal statement was ever made to the Gardaí by P.M. (the complainant) until 12th April, 2001 at which stage an investigation began." (Emphasis added).

11. Later the Sergeant deposed:

> "… on 17th October, 2000 Garda M.W. of (-- Garda station) attended the case conference. The applicant and his mother attended. It appears that Garda W. was informed that the applicant had admitted to sexually assaulting two boys who were brothers and who were in foster care in the home of his parents. *Garda W. was not informed of the dates on which these incidents were alleged to have occurred or the names of the victims. Because the Health Board had not revealed to the Gardaí the names of the victims no Garda criminal investigation was initiated at this time".* (Emphasis added).

12. Garda W. was also cross examined. Both she and the Sergeant were truthful and fair witnesses.

13. Garda W. stated that she was directed to attend the case conference although she did not say when precisely. While the notification of suspected child abuse to the Superintendent's office was dated 20th July, 1999, it was agreed this actual case conference took place just more than a year later on 17th October, 2000 at the Health Board offices. A number of health authorities attended. The applicant himself and his mother were there. Garda W. was asked by her superiors to attend the case conference she did not have a great deal of information about the background. At the conference she discovered that children in the care of the D. family had been allegedly abused. The purpose of the conference was to help the applicant and his mother, and to arrange for counselling for him and his family.

In her affidavit she swore:

> "At the end of the conference I asked the chairperson who the victims were and were they making a formal complaint. The names of the victims were not disclosed to me and no complaint was made to me by the victims or their families."

14. In the course of cross examination however the actual minute of this case conference was shown to Garda W. On the second page of that document there is contained the following

> " … Reason for Assessment
>
> > In June 1999 it was alleged that A.D. had been simulating sexual intercourse with a fourteen year old boy, P.M. (full name set out in minute). P. was in foster care, and had been placed, with his twin brother E. with the D. family." The context of the entire minute however, makes it clear that what was in issue was more than mere simulation and involved allegations of sexual abuse and sexual offences.

15. It is stated therein that the applicant acknowledged that he was initially reluctant to engage with the assessment process. It was, and continued to be a worrying time for him. His worst fear is that he would go to jail. Mrs. D. (the applicant's mother who had provided a foster home for P.M. and other young people) stated that the whole process from disclosure to the assessment had been "a nightmare" for herself and her family.

16. The conference thereafter discussed the conclusions that the applicant A.D. represented a moderate risk of sexually re-offending and the implication therein for the protection of other similar aged children. It was the view of Mr. D.C. the Child Clinical Psychologist who counselled P.M. and who also attended the meeting that the applicant might by then (that is October 2000) be seen as being at "low risk" of re-offending given that he was no longer in contact with the age group in question. The fact that Mr. C. also counselled the complainant herein must be of significance.

17. The minute records the strong view of A.D.'s mother that her son should avail of therapy services. A fostering social worker Ms. M.P. said that she visited the D. home periodically and that in her opinion Ms. D. felt that she would like her life to get back to normality again, and that at the same time had fears that there may be repetition of what occurred. Mrs. D. is quoted as saying that she "didn't know what was going on in A.'s head" and "didn't see what was happening at the time of the abuse" but said that she was not "stupid" and that it was not going to end there. The minute record that a psychological assessment had been completed that the applicant had left school. He had moved on with his own life, and had a job. In a sense what had occurred, even at the time, was at "a historical time in his life". It is recorded that the D. family were devastated when the controversy occurred but it acknowledged that Mrs. D. had cooperated in every way possible to assist her son A.D. Furthermore it adds Mrs. D. was a foster carer whose job had been taken away from her as a result of what had allegedly occurred. The elapse of time, and the presence and recorded contribution of Mr. C. adds some weight to the applicant's contention that there were grounds for believing the matter would end there.

**The Role of the Garda representative at the conference**

18. Garda W. is quoted in the minute as saying that the role of Gardaí such meetings present was confined to noting the case conference proceedings. She said if however a complaint was subsequently made to them regarding A.D.'s behaviour, then it could be possibly be a case for referral to the D.P.P. (and the Garda preparation of a file).

19. It was decided at the conclusion of the meeting that A.D. should seriously consider availing of therapeutic services and counselling; that Mrs. F. the Child Protection Social Worker and Mr. C. the Clinical Psychologist should be available in an advisory capacity. Handover arrangements were also recorded, presumably in the context of A.D. reaching the age of eighteen years on 1st November, 2000 that is approximately a fortnight after the case conference.

20. In cross examination by Mr. Hugh Hartnett S.C. for the applicant, the Sergeant accepted that he had never seen the case conference minute until it was put before him in court. Having described the sequence of events as he saw them he stated that he had no knowledge of the case conference or what had occurred there. He acknowledged quite properly that in fact the minute did set out the name of the alleged victim.

21. Garda W. also acknowledged that a set procedure existed whereby minutes of meetings of this type were always sent to the Garda station where the relevant member was stationed within a short period of time. However while she accepted that it was extremely probable that this was sent to one or other of two named Garda stations, (or perhaps to the Superintendent's office), she said that she herself had never before seen the minute. It is incontestable however that Garda W. was in fact present at the

meeting. Equally it cannot be denied that the name of the alleged victim and the nature of the alleged offences was clearly raised and recorded at the meeting.

The role of any Garda attending a meeting of this type is to ensure inter agency liaison following well known cases where there had been a lack of shared information. But there is surely a risk of confusion or conflict in the relaying of such information. First, there is a duty which devolves on all members of the Garda Siochána to investigate crime when it comes to their attention. A Garda attending such a meeting or conference may become aware of the commission of crime, the name of an alleged perpetrator and the alleged victim. As a general proposition if such member becomes aware in circumstances where credit can be given to information as to the alleged commission of a serious offence, it is the the duty of such Garda to investigate the offence themselves or to report it to a superior officer. Second, An Garda Siochána cannot thereafter disclaim knowledge of such information which comes to them in the course of duty at an official meeting. There, as here, the Health Board professionals did not take further steps in pursuance of the matter. But fourth, a member of An Garda Siochána may be put in the difficult position of having reasonable grounds for suspecting the commission of crime, while on the other hand being unclear as to what action if any to take on foot of such information. Sergeant M. fairly conceded that he was not aware of this minute. He consequently accepted that what was set out in his affidavit, and quoted earlier, as to the date upon which the Gardaí became aware of the matters in issue was incorrect. This was not due to culpable fault on the part of either Garda W. (who clearly did not recollect what was said) or Sergeant M. himself.

Garda W. has stated on affidavit that she was not informed of the dates upon which the incidents were alleged to have occurred, or the names of the victims. As it transpires this was partially incorrect also, at least insofar as concerns the name of the victims. The general time span in question was readily ascertainable. The date of the making of the allegations of June 1999 was identified.

**Knowledge available to An Garda Siochána**
While the matter was still being investigated by the Health Board, it is said the Board maintained confidentiality in relation to its file. But by October 17th, 2000 a member of the Garda Siochána acting in the course of duty was seised of a name an alleged perpetrator, of the alleged victim, a degree of information as to the circumstances, and certainly the means to investigate the matter further. While it may be assumed as a probability that this minute was sent out to the Garda Siochána within a short period after the case conference, neither Garda W. nor any other member of the Gardaí was directed to investigate the matter further by any superior officer. The issue only re-emerged on 29th March, 2001 when the complainant called to a Garda station in the nearest town informed Sergeant M. that he had allegedly been sexually assaulted while in foster care, that he wished to have the matter noted, and that he would think about making a written statement on the matter. The written statement was only made by the complainant only on 12th April, 2001.

22. After that date certain steps were taken by the Gardaí in investigation of the matter.

On 23rd April, 2001 Sergeant M. attended a meeting with a group operating under the aegis of the relevant Health Board which deals with children of troubled or deprived background in the context of foster care. At that meeting the Sergeant ascertained the names and addresses of the boys who were fostered in the D. family during the period P.M. was fostered there and who were mentioned in P.M.'s statement of 12th April, 2001. This information was ultimately forthcoming one month later. On 5th June, 2001 there was further correspondence between the organisation identified and the Gardaí regarding the availability for interview of potential witnesses. Two months then elapsed, at which point, on 14th August, 2001, medical records from the Regional Hospital regarding the complainant were sought. Statements were taken from three witnesses on 28th, 29th and 31st of the same month. Thereafter there was then a further elapse of time of six weeks when a further statement was taken on 14th November, 2001. Then, three months later, in February 2002 four further witness statements were taken.

23. On 2nd April, 2002 the applicant was arrested, interviewed and statements were taken in which he allegedly made certain admissions.

24. Two months later, on 5th July, 2002 a further statement from a witness was taken and on the 11th of that month a medical report was received from a local hospital and the Sergeant prepared a statement for the purpose of outlining his own role in the investigation. Statements were also taken from other members of An Garda Síochaná who had assisted in the investigation. Then for a period of three months between July 2002 and October 2002 Sergeant M. says the file was finalised which involved having all the handwritten witness statements typed out. The Gardaí carried out research on the charges and a report on the investigation was prepared.

25. On 1st October, 2002 the investigation file was forwarded to the Superintendent to be sent onwards to the State Solicitor in the county.

On 2nd October, 2002 the State Solicitor Mr. Martin Linnane received the investigation file from the Gardaí. Six days afterwards he forwarded that file to the D.P.P. for directions. Then a further period of five months elapsed. It was not until 12th March, 2003 that the Office of the Director of Public Prosecutions indicated that the matter should be referred to the National Juvenile Office for their views. The five month elapse of time between 8th October, 2002 and 12th March, 2003 has not been in anyway explained, nor has any affidavit evidence been adduced in relation thereto. Then on 18th March, 2003 the directions of the Director of Public Prosecutions aforesaid were forwarded to the Superintendent in order for him to refer the case to the National Juvenile Office.

26. Six weeks later, on 7th May, 2003 the Superintendent wrote to the State Solicitor indicating that the National Juvenile Office required a background report on the applicant. On 8th May, 2003 this letter was sent to the D.P.P. by the State Solicitor, who at all stages acted appropriately and with due expedition in this matter.

27. On 19th May, 2003, seven months after the file had been forwarded to that office an unnamed Officer of the Director wrote to the State Solicitor indicating that once the views of the National Juvenile Office had become known, the matter should be referred back to the offices of the Director of Public Prosecutions so that a formal decision could be made for inclusion or otherwise of the applicant in the National Juvenile Scheme. Then, one month later, on 6th June, 2003 a Garda J.O'N. met the applicant in order to assess his suitability for consideration for the National Juvenile Office Scheme. By this time the applicant was aged nineteen years and was no longer a juvenile or young person. On 23rd June, 2003 the National Juvenile Office wrote to the State Solicitor indicating that the applicant was not suitable for inclusion in the scheme. This decision has not been explained. A further period of nearly two months thereafter, on 15th August, 2003 Officer of the Director furnished the State Solicitor with a direction to charge the applicant.

**Summary of Issues**
28. The time period of the alleged offences was from the 1st October, 1997 to 30th June, 1999. As and from 17th October, 2000 at least one member of An Garda Siochána was aware of the salient facts necessary to initiate an investigation of indictable offences. From that point onwards a period of three years elapsed until the application for the summons in question was made on 14th October,

2003 which summonses were returnable for the 26th November of that year. The issue for the court to determine is whether this elapse of time, in its factual context in this case, constitutes prosecution delay, having regard *inter alia* to the ages of the applicant and complainant at the time of the alleged offences, and at the time the summons were applied for and made returnable for in the District Court.

**The Law**

29. In *B.F. v. The Director of Public Prosecutions* [2001] 1 I.R. p. 656, the Supreme Court held that where there was culpable delay on the part of the State authorities, then, having regard to all the circumstances of the case, the delay itself could entitle the accused to an order preventing the trial, irrespective of whether there was actual or presumed prejudice. It held further that in view of the special circumstances of the age of the alleged offender, it was of the utmost importance that if it were decided to proceed to prosecute the appellant, there should be no delay so that a trial would have taken place while memories were fresh and while the appellant was reasonably close to the age at which he was alleged to have committed the offences.

*B.F.* was a case, where as Geoghegan J. pointed out on behalf of the court, the applicant/appellant was 14 years of age at the time of each of the alleged offences. Within a short time of the initial offences he was requested to visit the local Garda station for questioning in the company of his father and made a statement in which, he admitted certain sexual activity but claimed that nothing had been done under coercion, a factor which by reason of age would not afford any legal defence. Following this interview the Garda authorities put the appellant in touch with the North Eastern Health Board where he was interviewed by a senior clinical psychologist, the first interview being within two months of the alleged offences. His parents were interviewed in the same period of over a three month time span. No charges were brought at that time and thereafter he went to England.

On behalf of the respondent it has been pointed out by Mr. Micheál O'Higgins B.L. that *B.F.* is distinguishable on its facts from the instant case, in that a series of events as described by Geoghegan J. was tantamount to acquiescence on the part of the Gardaí and State authorities. One and a half years after the offence the applicant's family was informed that an application for extradition had been made to the local District Court. For a considerable time thereafter no further indication was given that the extradition application had been in fact made and the applicant and his family began to gain hope that during the period no such application would be made. The applicant B.F. left school in 1997 and began a course in college. In February 1998 he was arrested for the purposes of having him extradited to Ireland, the applicant having travelled to England during that period. He agreed to return voluntarily to Ireland when his college course finished. He arrived back in Ireland in 1998 and was returned for trial before the Central Criminal Court a little over three years after the date of the alleged offences. While there are may be certain distinguishable features (including time span of alleged offences) the observations of the Court are nonetheless apposite herein.

30 In the factual context where although the necessary evidence had been obtained by May 1995, the prosecution was not initiated until two years and nine months later, Geoghegan J. observed:

> "… before the question of prejudice is considered it is necessary to ask the question was the delay excessive and inexcusable. It is part of the submission of the applicant that in considering this issue the special circumstance of the age of the alleged offender must be taken into account. While there does not appear to be any authority on this precise point, I think the argument is well founded. This was a case where on all the evidence it appears to have been a somewhat marginal decision as to whether a prosecution should have been brought at all. While from the point of view of the parents of the victims, the offences understandably seemed horrific, it may well be that there was no serious criminal intent on the part of the appellant. It is obviously impossible to predict how the evidence would unfold at a trial, but even upon conviction it might well be a case where a custodial sentence would not be imposed. A case of this kind should be handled by the prosecuting authorities with the utmost sensitivity, and it is only fair to say that some sensitivity was shown in this case. But in one area there was default. *It was of the utmost importance that if it was decided to proceed with the charges there should be no delay so that a trial would take place while memories were fresh and while the appellant was reasonably close to the age at which he is alleged to have committed the offences. A trial of an adult in respect of an offence which he committed as a child, and particularly a sexual offence, takes on a wholly different character from a trial of a child who has committed such offences while a child. This is true quite independently of the different penal provisions applicable to a child or young person, a point also relied on by the applicant. There was in my view, a special obligation of expedition in this case but that obligation was not complied with in that the extradition proceedings were allowed to take an excessive length of time and this delay appears to be inexplicable.*" (on page 633). (Emphasis added).

31. The first question to be asked here therefore is whether there was excessive and inexcusable delay on the part of the prosecuting authorities. In the course of his evidence Sergeant M. candidly accepted that in certain cases which are deemed important by the Gardaí there would be an allocation of resources which would ensure that the investigation is accelerated and that within the shortest possible time all relevant witness statements and other background information will have been obtained by the Gardaí. Certainly in the instant case this process could have been completed in a matter of a few months. While perhaps in this sense no "responsibility" should be attached to either Garda W. or to Sergeant M. individually, there was in the instant case an elapse of time of almost precisely three years between the case conference on 17th October, 2000 and the application for summonses which was made on 14th October, 2003. No action took place at all between the case conference on 17th October, 2000 and the time when the complainant called to the Garda station in his local town on the first occasion which was the 29th March, 2001 followed by the making of a written statement on 12th April of that year. No action at all was apparently taken on the notification of suspected child abuse of 20th July, 1999.

The book of evidence contains statements from eleven civilian witnesses. Of those, only that of the complainant P.M. is as much as four pages in length. Two of the other witness statements occupy one page. The remainder of the "civilian" witness statements are two pages in length. None of the Garda statements is any longer than two pages.

Both the sequence in which the statements were gathered, and the information therein, show that the totality of the subsisting material necessary, related to matters which were all in existence at the time the investigation started. One can only conclude that the investigation could have proceeded with very significantly greater speed if there had been a different allocation either collectively or individually of additional resources personnel or time to this case. But this did not occur. As a consequence the investigation took a period even longer than that which arose in the context of *B.F.*, and with the same consequence to the applicant therein, that is he attained the age of eighteen years.

This court cannot conclude then that any trial of the applicant would take place while "memories were fresh" or while the appellant was reasonably close to the age at which he was alleged to have committed the offences particularly now having regard to the different character which arises in the case of the trial of an adult. Other similar special circumstances arise here as in *B.F.* There is some evidence that the decision to prosecute, when taken was a marginal one. The Court cannot express a view in relation to the

question of intent or the possibility were the applicant connected of a custodial sentence. Those issues must remain open.

The matter was handled with some sensitivity as was the case in *B.F.* But here there was delay. It was inordinate inexcusable and culpable. And the circumstances were such where it was not unreasonable for the applicant to have concluded that, after the elapse of three years, no prosecution would take place thereafter.

32. It is now necessary to turn to the issue of actual or presumed prejudice. The evidence in this case is that the applicant had to undergo counselling and therapy for a period of two years after the matters in question came to light. The case conference on 17th October, 2000 touched on these issues. The applicant attributes his lack of success in his examinations to having had the entire matter hanging over him. Ultimately he became a trainee chef. It can therefore be said that even as of the time of the case conference on 17th October, 2000 and certainly by the time of the application for the summons on 14th October, 2003 the applicant had moved onto a different phase of his life and had a reasonable and well settled hope that nothing further would arise. Were he to be tried and actually convicted he would thereafter become subject to the provisions of the Sex Offenders Act 2001. While no evidence was adduced on the question of flexibility in entry age as to eligibility for the Juvenile Liaison Scheme, the applicant clearly can no longer be dealt with as a child or young person in law. If convicted he would be under an obligation to notify the Gardaí of his presence in any area and to make a declaration in relation to change of residence. There would undoubted be other potential effects in the applicant's personal and employment life.

Against these issues counsel for the Director, Mr. O'Higgins B.L. submits that no question was raised as to the admissibility of the statement furnished by the applicant which he says is inculpatory in nature and furthermore there is no assertion of his innocence. However in the first of these two points there does not appear to be a significant factual distinction between the instant case and the position of the Supreme Court in *B.F.*, a decision delivered on 22nd February, 2001. As to the second, this court should proceed on the basis of the applicant's entitlement to a presumption of innocence.

It is interesting and significant that Sergeant M. indicated that he was unaware of any new guidance to members of An Garda Siochána as to expedition in cases of this category after the *B.F.* decision.

33. As was pointed out by Geoghegan J. in the course of his judgment on behalf of the Supreme Court in *B.F.* neither actual nor presumed prejudice is in all cases essential to stop a criminal prosecution. The judgment refers to the earlier findings of Finlay C.J. in the case of *Director of Public Prosecutions v. Byrne* [1994] 2 I.R. 236 and also the observations of Keane J. as he then was in *P.C. v. Director of Public Prosecutions* [1999] 2 I.R. 25 at p. 68 to similar effect.

34. Having referred to his decision as a High Court judge in the case of P.P. v. Director of Public Prosecutions [2000] 1 I.R. 403 wherein he held that where there was quite clearly culpable delay on the part of the Garda authorities in relation to the prosecution of sexual offences which had occurred a long time previously the trial ought to be prohibited even if prejudice was not proved, Geoghegan J. added:-

> "To some extent some analogy I also take the view that in the case of a criminal offence alleged to have been committed by a child of a young person as in this case, there is a special duty on the State authorities over and above the normal duty of expedition to ensure a speedy trial, having regard to the obvious sensitivities involved."

That judge added

> "Given the history of this particular case, I think that irrespective of who is telling the truth as to what was said or not said, there would have been at all material times a well founded hope on the part of the appellant that he might not be brought to trial. That period of two years and nine months ought not to have been allowed to elapse. There was altogether unnecessary delay in relation to the expedition. In all the circumstances I will allow the appeal …"

Similar considerations arise in the instant case with regard to the well founded hopes of the applicant, the conduct of the prosecution authorities, the Health Board and the professionals involved and the elapse of time.

35. More generally, the right to a trial with reasonable expedition was also considered by Murphy J. in *The State (O'Connell) v. Fawsitt* [1986] I.R. at p. 371:

> "It seems to me, therefore, that the authorities have established that the Constitution guarantees to every citizen that the trial of a person charged with a criminal offence will not be delayed excessively or, to express the same proposition in positive terms, that the trial will be heard "with reasonable expedition".

As Denham J. stated in the course of her judgment in the Supreme Court in the *D.P.P. v. Byrne* [1994] 2 I.R. (at p. 260):

> "Where as there is no specific constitutional right to a speedy trial, there is an implied right to reasonable expedition under the due process clause."

Particularly having regard to the specific circumstances which arise, this constitutional right has been denied to the applicant.

However such a finding does not necessarily establish that the applicant is entitled to the relief sought herein.

In *D.C. v. The Director of Public Prosecutions* (Supreme Court, Unreported, 21st November, 2005) Denham J. stated on behalf of the court:-

> "The Constitution and the State, through legislation, have given to the Director of Public Prosecutions an independent role in determining whether or not a prosecution should be brought on behalf of the People of Ireland. The Director having taken such a decision, the courts are slow to intervene. Under the Constitution it is for a jury of 12 peers of the applicant to determine whether he is guilty or innocent. However bearing in mind the duty of the court to protect the constitutional rights of all persons, in exceptional circumstances, the court will intervene and prohibit a trial."
>
> Are there here such exceptional circumstances?

36. However as was pointed out Keane J. in the case of *P.M. v. Malone* [2002] 2 I.R. (at p. 572):

> "It does not follow that the impairment of his ability to defend himself is a necessary pre-condition to the successful

invocation by him of the discrete constitutional right to a speedy trial".

37. Finlay C.J. held in the course of his judgment in *D.P.P. v. Byrne* [1994] 2 I.R. (at p. 236):

> "Having reached that conclusion I am driven to the further conclusion that of necessity, instances may occur in which a delay between the date of the alleged commission of an offence and the date of a proposed trial identified as unreasonable could give rise to the necessity for a court to protect the constitutional right of the accused by preventing a trial, even where it could not be established either that the delay involved an oppressive pre-trial detention, or that it created a risk or a probability that the accused's capacity to defend himself would be impaired. This must lead of course to a conclusion that, on an application to prohibit a trial on the basis of unreasonable delay, or lapse of time, failure to establish actual or presumptive prejudice may not conclude the issues which have to be determined."

38. While there is no prejudice in the instant case in the sense of unavailability of witnesses, or the destruction of evidence, it is clear that by the time any trial would take place some seven years would have elapsed between the date of such trial and the terminal date of the alleged offences. In addition to the other factors identified earlier, this case must be seen in the context of the age of both the applicant and the respondent. At the alleged point of commencement of the offences the applicant was aged fourteen years and nine months. The complainant was aged twelve years. At the alleged date of the last offence the applicant was aged sixteen years and five months and the complainant thirteen years and eight months. Thus the applicant, now aged twenty three years, would be required to face a trial in which he would be made answerable for alleged offences committed between the time he was aged fourteen and sixteen and a half years. He has proceeded with his life and career. On the facts as now established a delay of three years has occurred in a case where the Supreme Court has found there should be special consideration and a special duty to avoid delay *and* in the consideration of whether to prosecute. For the reasons identified there was unnecessary delay in the investigation of the prosecution. The applicant was entitled to a well founded hope that he might not be brought to trial particularly having regard to the elapse of time, the counselling and therapy which he had undergone and the manner in which he was treated by the Health Board which undertook the arrangement for his counselling and therapy. It was not unreasonable to assume that but for the decision of the complainant to make a statement that on 12th April, 2001 such a hope would have been fulfilled.

While procedures within that office are of course a matter for the Director of Public Prosecutions, it will be recollected that an Officer of the Director thought it right to have the question of whether the applicant could be dealt with under the Juvenile Liaison Scheme considered. The court has not been told why this course of action was not followed. If the issue of a "marginal decision" to prosecute appropriately arises, then this would appear also to be a factor here. However the fact that issues arose in this way is a further indicator that the hope of the applicant, based on the events described, and the elapse of time, was not an unreasonable one.

More directly, is there was an unexplained delay of five months after the file was sent to the office of the Director. It was submitted that the decision to consider the Juvenile Liaison Scheme was a humanitarian one, and that the respondent should not therefore be criticised for any delay. But this point would have more validity if the question of referral of the applicant to that Scheme had not taken an unexplained period of five months. There is no evidence in fact as to what considerations arose in the mind of the officer of the Director who dealt with the file. No evidence has been adduced either as to any steps taken to raise awareness or produce guidelines as to the special duty of prosecution and State authorities in a case of this type (after the decision in *B.F.* on 22nd February, 2001) or why such a referral was five months in its making. The process of referral itself took two months. Thereafter another two months lapsed before the decision to prosecute was made. In all the decision to prosecute took a total of ten months.

39. The Court must recognise and always have in mind that a decision to intervene is to be taken in exceptional circumstances only (see *D.C. v. D.P.P.* cited earlier). As Gannon J. pointed out in *O'Flynn v. Clifford* [1988] I.R. 740:

> "....it is no part of the function of the courts to participate either in the investigation of criminal offences, or the supervisory direction of those charged with that work."

40 The Court should have regard too to the existence of certain admissions which may not be contested. A further factor to be weighed in the balance is whether any issue of delay can be dealt with by a trial judge administering appropriate warnings (see judgments of Hamilton C.J. in *Z. v. D.P.P.* [1994] 1 I.L.R.M. 481 at p. 495; and McGuinness J. in *D.W. v. D.P.P.*, Supreme Court, Unreported, 31st October, 2003).

41. But against these features must be weighed the prejudice caused by a three year delay, still partially unaccounted for. The fact that unexplained delay took place by an Officer of the Director is itself exceptional circumstance. The applicant now aged twenty three years would be required to face issues which occurred seven or more years earlier in circumstances where he was entitled to hope that matters had been put to rest. These and the other features arise in circumstances where there is established authority that a special duty and special considerations arise with regard to the expeditious investigation and prosecution of offences alleged against minors which were not observed or complied with here. I consider these specific factors must be given special weight and thus supervene over the more general issues identified which arise in many delay cases involving persons at all times of full age as applicants. Taken together, these exceptional circumstances justify intervention by way of judicial review.

42. The applicant is entitled to a declaration that the delay in the institution of criminal proceedings charging him with the charges set forth in the indictment entitled "The People at the Suit of the Public Prosecutions v. Austin Daly, which said offences were alleged to have occurred on dates unknown between the 1st October, 1997 and the 30th June, 1999 and presently pending before the Circuit Criminal Court has irreparably prejudiced the prospect of the applicant herein obtaining a fair trial and is in breach of the applicant's right to a trial in due course of law and to a trial in reasonable expedition and is further entitled to

> (ii) a declaration that the failure on the part of the prosecuting authorities to institute criminal proceedings earlier than the 14th day of October, 2003 in circumstances where the Gardaí had been on notice of the alleged offences since 17th October, 2000 is in breach of the applicant's right to a trial with due expedition and to a fair trial and
>
> (iii) a declaration that the continued prosecution of the applicant is in breach of Article 38.1 of the Constitution of Ireland and the European Convention on Human Rights and
>
> (iv) an injunction restraining the respondent from taking any further steps in the prosecution of the applicant.