

## THE HIGH COURT

2002 No. 189 JR

BETWEEN

D. (S.) C.

APPLICANT

AND  
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

**Judgment of Mr. Justice MacMenamin delivered on the 11th day of February 2005.**

1. The applicant in these proceedings was born on 13th November, 1934 and is now aged 70 years. He is a retired joiner and resides at an address in England. He had four children of his marriage of whom the eldest, St. C., is a complainant in these proceedings.

2. The general background of this application has already been set out in the judgment delivered today in *B.C. v. Judge Brian Kirby and the Director of Public Prosecutions*.

3. Facing the applicant there are four charges relating to alleged indecent assault on Je.C., the applicant's niece, on dates between May and September, 1974. The remaining charges relate to alleged indecent assaults and rape of Ms. St. C. (the applicant's only daughter) on dates between May, 1982 and November, 1988. Charges were preferred in Dun Laoghaire District Court in each of the cases and the applicant was returned for trial. No issue arises in this case on the validity of the return for trial, in distinction to the case of B.C.

**First complainant – Je.C.**

4. Je.C. was born on 4 October 1967. Her parents were M.C. and G.C. (Her father, M.C., in turn faces 27 charges of indecent assault and one case of buggery. He is not, however, an applicant in this series of proceedings.)

5. The indecent assaults are alleged to have taken place between May 1974 and September 1974, a period of six months. At this point Je.C. was aged seven years. The complaint on foot of which these charges proceeded was made to the Gardaí on 29 July 1999. The complaint relates to matters alleged to have taken place 25 years after the last allegation.

**Previous complaints:**

6. It is clear that Je.C. made earlier complaints to the Gardaí.

7. On 17 January 1987 she made a complaint to Garda Anita O'Leary relating to sexual abuse. This dealt mainly with abuse allegedly perpetrated by her father, M.C., but the statement also mentioned the applicant.

8. Je.C. made a further statement to Detective Sergeant Donal O'Neill on 9th January, 1989.

9. In the course of both of these statements she alleges that the applicant in these proceedings indecently assaulted her.

10. According to Detective Sergeant Byrne who testified in these proceedings; on 20 March 1989 the Director of Public Prosecutions directed that no charges were to be preferred on foot of either of these complaints due to the length of time since the offences were committed. It is difficult to see how this direction would, so far as time, relate to all the allegations, some of which were quite proximate to the dates of complaint. A further ground for this decision was, apparently, the absence of corroboration. No further evidence of any type is available as to the reasons for this decision. There appears no doubt that the direction was made and conveyed to the Gardaí then investigating the matter, who in turn communicated the decision to the applicant.

11. In a statement furnished on 2 October 2002, this complainant relates making a complaint regarding her father, M.C., and the applicant herein in 1986. The evidence did not show there was any such complaint. It may be that she had in mind here the complaint made on 17 January 1987. As far as she could remember the Gardaí called to her father. Thereafter nothing further happened until 1988 when she made a further statement. A year later she found nothing was going to be done on foot of this statement. The reason she says she was given was that she had no support (i.e. corroboration), and insufficient evidence.

12. In the earlier statement made on 17th January, 1987 to Garda O'Leary, Je.C. describes returning to her locality from England with her family at the age of two and a half. Her family had a caravan on her uncle F.C.'s property there. The applicant in these proceedings also resided there. Je.C. stated that the family lived there until she was seven years of age in 1974.

13. The vast preponderance of this statement relates to alleged abuse by her father, M.C.

14. However, she states that when she was six years old, her uncle D.C. started to touch her sexually when he came into their caravan. Je.C. stated this happened four or five times for the next year, until she was seven. She never told anyone about this because the applicant used to say it was all right and she was not doing wrong. At this point the evidence discloses that the applicant, D.C., moved to England.

15. The complainant started primary school in an area close to her home. Owing to an incident involving another family member her father moved to an area some miles away. In 1974 the family moved to where they now reside, again an area two or three miles from their point of origin.

16. Je.C. attended schools in suburban areas relatively close to her. At this stage she did not get on well with her father, M.C.

17. For the sake of completeness, I mention also that in the course of a statement given to Garda O'Leary on 9 January 1989, M.C. described an incident of abuse in August, 1983 involving her father. This statement comprised three pages. The vast preponderance of this material relates to allegations relating to her father, M.C. None of this is relevant to the applicant.

18. In a statement furnished to Detective Sergeant O'Neill in a garda station on 9th January, 1989, the applicant furnished further information as the basis for her complaints. The complainant made relatively brief allusions to alleged assaults upon her by the applicant in the spring and summer of 1974 wherein it is alleged that he pulled down her pants and touched her sexual organs on at least five occasions while she was alone. It is to be noted that in the latter statement made to Detective Sergeant O'Neill she refers back to the earlier statement given to Garda Anita O'Neill in January, 1987.

### **Complaints to the Gardai**

19. The statement which forms the true basis of the present complaints against the applicant was made on 29th July, 1999 at S-Garda station. The contents are confirmed in the complainant's affidavit. The four specific complaints regarding the applicant all relate to the year 1974. The complainant describes her uncle D.C., the applicant, and the applicant's wife, C.C. and family moving into a mobile home in a garden owned by the applicant's brother, F.C.

20. She described a sexual assault made upon her by the applicant in her family's mobile home. In the course of this it is alleged that he placed his right hand on her vagina and attempted to engage in sexual stimulation. When the applicant ceased doing this, the complainant alleged that he said that it was their secret; and if she told anybody they would not believe her; that he was an adult and that she, the complainant, was a child. She describes the applicant saying to her before she went outside that he was her godfather and that if anything happened to her parents he would end up looking after her. The complainant also described a sexual assault taking place in the same year at a time when the applicant was breaking red bricks, karate style, in the garden. She described the sexual assault taking place involving the applicant touching her with his fingers in a penetrative fashion and in such a manner as to cause him sexual stimulation. The incidents referred to in this statement occurred in the same year, and the alleged perpetrators were one and the same as those mentioned in the complaint of 1989. Both sets of complaints, therefore, appear to relate to assaults which took place in the year 1974.

### **Complaints to other persons**

21. The complainant states that the first person she told about the sexual assault by her father, M.C., and the applicant, D.C., was one A. C. (no relation), a close friend of hers. She told a number of other friends. She identifies cousins of hers reporting other incidents of sexual abuse in the family but these issues are not relevant to this application.

22. The complainant's friend, A. C. describes having formed a relationship with Je.C. This was at a time when she was working in a convalescent home. She found the complainant to be stand-offish. One day when she was working Je.C.'s father, M.C. and another man (whom she later found out was her uncle, D.(S)C. the applicant) came to see her. Je.C.'s father said that A. C. was too old for her daughter and that she was to stay away from her. Ms. C. stated that she was very intimidated and had a fear of him. Nonetheless, she continued to associate with Je.C. She recollected Je.C. telling her that her father had beaten her up. She formed the impression that this was because of the friendship that Je.C. had formed with Ms. C..

23. Some time in early 1986 Ms. C. describes the complainant arriving down to her house stating that she had run away from home. She describes her as being in "an awful state". Ms. C. and her mother persuaded the complainant to go back to her house and to talk to her mother and father. She was driven home. Ms. C. described her as being totally in fear. At this stage, Ms. C. did not realise why this was so. When the complainant, Je.C., returned home there was a row in the house.

24. A couple of weeks later Ms. Je.C. left the home and moved in with Ms. C.. In her statement Ms. C. describes the complainant telling her about her father's brother, that is the applicant in these proceedings, abusing her when she was very young.

25. There is also evidence of the complainant reporting these issues to others, including a former boyfriend, G.S.

26. It is important here to observe the sequence in which the information emerged. On 2 October 2002 Ms. Je.C. describes the assaults having allegedly occurred, her fear of the applicant and states that she reported the abuse by the applicant and her father in 1986 to the Gardai in B-Garda station. As far as she could remember she was told that the Gardai called to her father and he denied everything. She heard nothing until 1988 when, as she recollected, two Gardai contacted her from C. station. She called to see them and at that point made a second statement about the applicant. As described earlier, she found out a year later that no charges would be preferred. The complainant stated that her sister Ju.C. told her that the Gardai spoke to her about the sexual abuse in 1999. It was then that she contacted Detective Sergeant Byrne and furnished her statement to him.

27. In her affidavit sworn on 30 October 2003, Ms. Je.C. states that the reason she felt unable to report the abuse allegedly perpetrated upon her by the applicant was that she was only six or seven years old when it occurred. She stated she was terrified of the applicant and felt she would not be believed.

28. She also stated that her father, M.C., the applicant's brother, sexually abused her over a one-year period from the age of fifteen years, i.e. from 1982. She feared that her father would beat her up if she disclosed this abuse. She also said that her father had been violent to her throughout her childhood and she was terrified of him also.

29. As well as testifying that she was in constant fear of her father, the complainant recounted that the applicant was also her godfather. He stated that if her parents ever died he would continue to sexually abuse her. She said she was terrified in case her parents did die and she had to go and live with the applicant. She states she was terrified on all occasions when the abuse was happening. Part of her reason for finally reporting the abuse, she stated, was to protect her two younger sisters from being sexually abused by the applicant in these proceedings.

### **Second complainant – St.C.**

30. The second complainant herein is Ms. St.C., born on 1 July 1961. She is a daughter of the applicant. St.C. made a complaint to Garda Frances Fitzgerald in S. garda station on 26 November, 1988. For the purposes of consideration of these complaints, it is essential to point out at the outset that the *only* charges the applicant faces are those which relate to a period from 1982 to 1988. During this time, from her 22nd to her 28th year, St.C. was living in Ireland with her family. None of the charges in issue relate to an earlier period.

31. In her 1988 statement the complainant states that up until the year 1974 she had lived with her family in England. They returned to Ireland for two years until 1976. Thereafter, from 5 November 1976 they lived in England until 1982. From that year onwards they resided in Ireland. Clearly a criminal prosecution cannot proceed on the basis of facts that allegedly occurred in a different jurisdiction. However, this court may have regard to such alleged facts in the course of this judicial review application but only from the point of view of establishing evidence regarding the relationship between the complainant and the applicant and also so as to consider the conduct of the applicant in relation to the prosecution.

32. However, any alleged incident which occurred prior to the complainant's 21st year in 1982 is not relevant from the point of view of the prosecution brought and which is in issue herein.

33. These matters are relevant therefore, only as evidence *as to the relationship between the parties*

### **The 1988 statements**

34. In the course of her statement made 26th November, 1988 the complainant describes attempted anal sex upon her by the applicant when she, the complainant, was aged five years. This event, she alleges, happened regularly, practically every week.

35. She describes various sexual assaults occurring between the ages of seven and eight years. She alleges that the applicant attempted to have full sexual intercourse with her at this point.

36. She further contends that during the time period between the complainant's 8th and 11th year the applicant attempted to have full sexual intercourse with her at times when her brothers were sent out of the house. She alleges that her father, the applicant, used to tell her to relax and enjoy it because that was what she was there for and to stop screaming.

37. The complainant described an alleged incident in England when she was eleven years of age. By inference this would have been in or about the year 1972. She and her family were out for a walk with her father. She was leaning against a tree having been picking flowers. It was a small wooded area. The complainant alleges that her father came over, pushed her against the tree, and said "You know you want this, you are looking for it". She described an attempted sexual assault which was interrupted by the arrival of her brother.

38. This alleged series of incidents took place up to and including the year 1974, at which time the applicant was in her twelfth year and living in England.

39. After Easter 1974 the family returned to an address outside a large city in Ireland. They resided at a premises where the complainant's uncle owned caravans. There were three families living on the site related to the complainant. During this period the complainant describes a series of sexual assaults being attempted by the applicant. The applicant was jealous. She describes the applicant threatening to kill her before he would let her go to anyone else and that he would kill the person she went to also. She states that he was extremely violent although he did not hit her. However, he frightened her very much.

40. From 5th November, 1976 onwards the complainant and her family moved back to England. She describes a series of alleged sexual assaults committed upon her by the applicant. Sometimes, she says, she was protected by her brothers. When she states she threatened to tell her mother, the applicant allegedly laughed at her and said she (her mother) would never believe her. On occasions when she tried to fend off the applicant he allegedly twisted her arm and told her not to be stupid, that he was doing it for her own good. The complainant described alleged incidents of jealousy when it apparently appeared to the applicant that the complainant was affectionate to an uncle of hers, i.e. a brother of the applicant. (This uncle is described as 'John' which, it seems, is the second name of F.C. who is an applicant in another of these cases.) She described the applicant bringing her everywhere with him if she was not at school. If she was late home from school there were arguments as to where she had been and what she had been up to. She described incidents of oral sex as occurring as often as twice a week.

41. She alleges the applicant attempted full penetrative intercourse. On one occasion the complainant, St.C., missed her period for thirteen weeks and the applicant began to panic. St.C. herself was frightened that she might have become pregnant. She was medically examined. She denied having intercourse. She had difficulty with periods from the time she was fifteen. She describes incidents of sleepwalking. Using very strong language, she describes her father's attitude to the question of her pregnancy. It was extremely hostile and aggressive. He stated that he would deny any responsibility.

42. At the age of eighteen, while she was still in England, the complainant states that she was refused permission to go to school discos or to go out with friends. During this period the abuse was allegedly continuing on a regular basis. The complainant describes the applicant engaging in penetrative anal sex from the age of sixteen years onwards. This allegedly occurred on a regular basis as well as sexual assaults with implements. The complainant states that the applicant said to her that unless she let him do it, he would put her in a mental home.

43. When she was seventeen and a half years old and still living in England, the complainant alleges that the applicant tried to assault her but she refused and would not let him touch her. She alleges that he came up to her bedroom, kicked the door in, pulled her out of bed and slammed her against the bedroom wall. He continued to beat her and then left the room. When her mother queried what was going on the complainant said that she had said something to upset her father. After this she stated that she became so afraid of him that she allowed the abuse to continue.

44. She was too scared to fight him. It is to be noted that just three lines of the 1988 statement deal with the period after the complainant reached the age of 21 years. They read:

*"From the age of 21 years upwards he tried to penetrate me and almost succeeded, however I managed to fight him off. In April, 1988 the abuse stopped altogether. I gave him an ultimatum that he would either leave me alone or I would leave home."*

45. The complainant describes telling her mother about the alleged abuse. Her mother refused to believe her. The complainant decided to leave home, she says, on 21 November 1988.

#### **Statement of 30 July 1999**

46. The complainant had returned to Ireland with her family in 1982. At that point she was in her 21st year. In the statement of 30th July, 1999 she describes a series of sexual assaults taking place both before and after her 21st year. She was not allowed out on her own. She had no life of her own. When she was twenty-four or twenty-five years, residing in Ireland, she alleges that she became anorexic. She described her father allegedly having full penetrative sexual relations with her in the spring of 1986 and on numerous other occasions during the period in question. She describes him expressing the wish that she would become pregnant.

47. There is a substantial amount of detail furnished in her statement made on 30 July, 1999 describing experiences of her childhood including alleged physical beatings and sexual assaults committed upon the complainant by the applicant for the period of five years upwards. She also describes being given pornographic magazines, being compelled to have oral sex, and other incidents involving sexual assaults of a penetrative nature.

48. Ultimately St. C. describes leaving home in November, 1988. She moved in with friends, the J. family, in R-, a nearby suburb. During the course of a number of alleged visits, she describes her father and her two brothers on one occasion arriving at the house where she was staying, demanding to see her. On this occasion she was at work. It is alleged her father threatened Mrs. J. and her children with an axe. That afternoon, the complainant went to KO'G garda station with her boyfriend and made a written complaint against her father.

49. Having commenced a relationship, she was ultimately married on 20th April, 1990.

50. The respondent invites the court to infer that the direction by the Director of Public Prosecutions of 28th March, 1999 not to prosecute was made only on the basis of the offences actually allegedly disclosed in the statement then available. While this may be so, it must also be said that there is a very considerable overlap between the material in the statements and that little effort has been made to place matters in a chronological or clear sequence.

### **The applicant's grounds**

51. In a statement required to ground the application for judicial review, the applicant contends that the delay in the proceedings is; (a) oppressive, unjust and unfair, (b) violates his right to a trial with reasonable expedition and; (c) violates the right to trial in accordance with due process of law.

52. It is further contended that the delay herein has been excessive and prejudicial in that it prejudices the applicant's chance of obtaining a fair trial and also his preparation and presentation of a defence. As well as contending that it would be unfair and unjust to cause the applicant to be tried, it is further submitted that the lapse of time between the dates the offences were allegedly committed and the date of trial is now so great as to give rise to an unavoidable and incurable presumption of prejudice against the accused. It is contended that the lack of specificity and detail in the complaints reduces the defence in the proceedings to a simple matter of denial of the allegations. The applicant claims he has suffered anxiety and concern such as to render his trial on the offences oppressive, and further contends that the prosecution is in breach of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which entitles the applicant to a fair hearing of criminal charges laid against him within reasonable time.

### **Statement of opposition**

53. The respondent traverses the allegations made by the applicant and states that where the Director, on the information available to him, has not got proper grounds for charging any person with an offence, his failure to do so and any elapse of time before he is in a position so to do, cannot give to an accused person a right to prohibit a trial on the basis of the defeat of his constitutional rights to expedition. It is further contended that if there has been a delay it is not of such duration as, by reason of that delay alone, should indicate that the trial should not proceed.

54. The respondent contends that if there has been delay the applicant has been responsible for it. It is claimed that the applicant at the time of the offences was in a position of dominion over the complainants. It is contended that the applicant prevented the making of complaints by threats and intimidation. The respondent also denies the right of the applicant to prohibit his trial merely because of the lapse of time since the cause of complaints referred to first arose.

55. The applicant has sworn an affidavit herein on 2 April, 2002. A further affidavit dated 15 April of the same year is sworn by the applicant's solicitor.

56. In support of the grounds of opposition affidavits have been sworn by Je.C. on 3 October 2003; S.C. on 24 October 2003; K. J. on 25 September 2003; R. J. on 25 September 2003; Michael Dempsey, Consultant Psychologist, on 12 August 2003; Catherine Finn, solicitor, exhibiting an outline family tree of the applicant including the respondents; Detective Sergeant Byrne on 17 November 2003; and a supplemental affidavit of Mr. Dempsey, psychologist, on 26 February 2004.

57. In the course of his affidavit, Detective Sergeant Byrne deposes as to the nature of the alleged assaults, the climate of abuse in the 'C' family, and the allegations of a series of violent assaults upon the complainant stretching over a number of years. To illustrate the domineering nature of the applicant he adverts to the violent manner in which the applicant allegedly sought to force the return of St. C. to the family home described earlier. He draws attention to a question asked during the course of interrogation wherein the applicant apparently stated that he carried a razor sometimes, that it was handy for work or for setting out things. This was in response to a question from the Gardaí as to whether or not the applicant had a habit of wearing a razor blade around his neck.

58. In a statement in the Book of Evidence, J.G.C., a cousin of the complainant, describes the complainant, St. C., stating that she was sick and tired of the applicant hovering over her. K.N.C., also a cousin, and a complainant in the case of B.C., recalled that every time she saw St. C. going to the toilet her father would wait outside. He would always be holding her hand or touching her leg or with his arm around her shoulder. She said,

*"To me, if you weren't a member of our family you would think they had a husband and wife relationship rather than a father and daughter relationship. You could see that she was terrified to do anything against her father ..."*

### **The investigation of 1999**

59. Detective Sergeant Byrne describes receiving allegations from twelve members of the extended family who spoke of their fear of the applicants and that certain threats would be carried out should they report the matters to the Gardaí or anyone else or persist in their complaints. He states that it appeared that some members of the family who had claimed that they were sexually abused had, out of fear, declined to make a formal statement of complaint.

60. Seven investigation files and an overall report were forwarded in March, 2000 by the Chief State Solicitor's Office to the Director of Public Prosecutions. Following directions, six members of the C family, including the applicant, were arrested in July, 2000 and taken to a garda station. The applicant to these proceedings was first arrested and charged on 14 July, 2000. He is the subject of further charges on 12 March, 2001. Ultimately, on 11 January 2002 he was sent forward for trial, which was listed for 2003.

### **Je.C. – the psychological evidence**

61. Regarding Je.C., Mr. Dempsey stated that she alleged she had been sexually abused by her uncle, the applicant, on a number of occasions between the ages of six and seven years. This abuse ceased when he moved back to live in England. She also alleged abuse on the part of her father, M.C., for a one-year period from the age of fifteen years.

62. She stated she was unable to tell anyone about the abuse by her uncle, the applicant, as she felt she would not be believed. He used to say to her that the behaviour he engaged in with her was their secret and no-one would believe it if she disclosed it. She stated that she felt unable to complain about the abuse to her mother as she felt she would not be believed. It is important, however, that Mr. Dempsey considered it unlikely that a six or seven year old child would have been able to make a judgment about being believed or not being believed. He considers it is more likely that the complainant was attributing older cognition to herself as a young child.

63. The complainant stated that she suffered from fear by virtue of the fact that the applicant was her godfather, that he used to tell her that if her parents died he would continue to sexually abuse her and that the alleged abuse by her uncle and her father made her feel angry, dirty and ashamed. She also blamed herself about its occurrence.

64. In Mr. Dempsey's opinion, it was not possible to separate the effects on her psychological functioning of the alleged abuse by her father and uncle. Je.C. reported that she was first motivated to complain to the Gardaí about her alleged abuse by her uncle and father in order to protect her two younger sisters.

65. When she first left home at the age of eighteen she used to have nightmares of being sexually abused. Mr. Dempsey states that people often have traumatic nightmares after traumatic events.

66. Mr. Dempsey also refers to Ms. Je.C.'s previous complaints which he says occurred in 1987 and 1989. He considered that there was a consistency about them. He does not appear to have been made aware of complaints made in 1988.

67. Ms. Je.C. told Mr. Dempsey that she attended counselling in relation to the alleged abuse by her uncle and her father for eighteen months from October, 1999 onwards. He stated that it would be helpful to obtain a report from the counsellor she attended. She had made the complaint to the Gardaí before attending this counsellor. She recounted that she had told her friend, A. C., about the alleged abuse before complaining to the Gardaí about it in 1999.

68. In conclusion, Mr. Dempsey stated that in his opinion it was not possible to separate out the psychological affects of the alleged abuse by the complainant's uncle and father. In his opinion the account was consistent with sexual abuse in childhood. He further stated that in his opinion, from her account, she had made consistent attempts on three occasions in eighteen years to report the alleged abuse.

### **St. C. – the psychological evidence**

69. At the time Mr. Dempsey interviewed S.C. she was aged 41 years, having been born on 1 July 1961. She stated to him that she had been sexually abused by her father, the applicant, from the age of four years until she finally left home at the age of twenty-seven years. She stated that the alleged abuse had stopped when she had *"got strong enough to stop it, to say no and mean no"*. She still lived in fear of her father and refused to give Mr. Dempsey her address in case it was disclosed to the applicant. She stated that when her father abused her she used to think about being somewhere else; *"if you are not there then you cannot feel anything"*.

70. She reported that a long-term consequence of the abuse was that she feared people might judge her as being dirty for allowing it to happen. She was apprehensive that people might consider her as being a prostitute for allowing the abuse to occur. She felt ashamed of herself because of the alleged abuse. She also blamed herself. She stated that she suffered from alopecia, that is hair loss. She first suffered this at the age of eleven years. She now wears a wig. She also suffered from stomach problems and three years ago was diagnosed as suffering from irritable bowel syndrome.

71. The complainant stated that she had not complained to her mother about the alleged abuse as she feared she would not be believed. One factor which led her to delay in reporting the abuse was that she stated her father had often told her that nobody would believe her. She also stated that her father had told her that if she informed her mother about it she would be *"put in a home"*. She alleged that her father had said to her that all fathers engage in this behaviour. She also stated that her father had threatened to kill her younger brother who was born at the time she was seven years old, if she did not consent to him engaging in sexual conduct with her.

72. She stated that on occasion he used to hold her younger brother up by his ankles and threaten to drop him unless she performed sexual acts upon him. She confirmed she lived in relative isolation with her family when they were in England. She was not allowed to have friends call to the family home. This isolation further inhibited her from complaining about the alleged abuse. She did not attend school for approximately eighteen months when she had returned to Ireland at the age of thirteen years. As a child and adult her father had *"complete power over me"*. She stated that her father had a sense of ownership of her. She alleged that he used to say that *"I gave you life, I can take it away"*.

73. Mr. Dempsey says that after the father's alleged sexual advances at the age of seventeen years and the alleged assaults, the complainant went to the local general practitioner. This general practitioner had a child protection officer sent to the house who reportedly enquired about her welfare in front of the parents but she was too afraid to say anything to him. This incident occurred while the family was living in England.

74. The complainant also attended a counsellor at the Rape Crisis Centre in Leeson Street for approximately one year, ten years ago, and also attended another counsellor in a counselling service for one session in 2002.

75. She reported that she had a breakdown two years ago because of the stress she was experiencing in relation to the case. She continues to attend the psychiatric services. Mr. Dempsey used the FOA post-traumatic stress scale test. This is a self-report scale. It indicated that the complainant was then experiencing symptoms of post-traumatic stress to a severe degree in relation to the alleged abuse.

76. Mr. Dempsey also used the Beck Depression Inventory. This is a self-report measure of depression. It indicated the complainant was continuing to experience symptoms of depression to a moderate degree.

77. The complainant stated that in 1999, she became aware that the Gardaí were investigating allegations of sexual abuse within her extended family. She contacted them only reluctantly as her first complaint had not been proceeded with. She was referring to the complaint of 26th November, 1988. She reported that she was finally motivated to complain about her father as she was afraid that her own children might contact the applicant in the future as adults and she feared he might abuse them or their children if they had any. She also reported that she was motivated to complain to the Gardaí out of revenge.

78. Mr. Dempsey indicated that, in his opinion, the reasons for her delay in reporting the alleged abuse were understandable in terms of her life circumstances. He concluded that as a child and adult, St. C. was dominated by her father who threatened her, was violent towards her and sexually abused her from an early age. Her father's dominance, coupled with her own shame, fear and self-blame were all factors that inhibited her from making a complaint until she was in her late twenties. She did not complain a second time until relatively recently as nothing had come of her first complaint.

79. No application was made to cross-examine the complainants, each of whom had sworn affidavits.

### **The applicant's case**

80. The applicant submits:

- (1) He was first interviewed in or about 1988/89 but no further step was taken until he was arrested on 13th July, 2000, a delay of thirteen years from the initial complaint and statement made by Je.C. and twelve years from the complaint and statement made by St.C.
- (2) There was no explanation apparent for the failure on the part of the respondent to commence proceedings in 1987, 1988 or 1989. The applicant could not be said to have caused or contributed to this prosecutorial delay.
- (3) The delay in excess of 23 years which elapsed between the earliest alleged incidents in relation to Je.C. and the charges being preferred against the applicant was inordinate and seriously prejudiced the defence of the proceedings.
- (4) The applicant had not contributed in any way to the delay. He was not in a position of dominance and control over the complainant. The complainant made her original complaint and statement in excess of thirteen years before the applicant was charged.
- (5) A period of eighteen years had elapsed between the earlier alleged incidents in relation to St. C. and the charges being preferred against the applicant. The complainant, St. C., left home in 1988. The delay was inordinate and had prejudiced the defence to the proceedings. He denies being in a position of dominion and control over St. C.
- (6) The applicant's mother, B.C., had died in the year 2000. The applicant himself had resided with his mother and father from May, 1982 to September, 1982. Both are since deceased and unavailable to him as witnesses.
- (7) The applicant had been deprived of the chance to establish his movements or seek out prospective witnesses or to defend the case in any way other than by bare denial. Potential witnesses such as A.L., R. L., J. H. and M. K. were deceased; property had been demolished or developed. Employees at a firm which had employed S.C. from 1980 to 1982, known as Dixon Dobson & Carver, who could have given valuable evidence for the defence were either deceased or could not be traced or could not remember. Medical evidence which could have been available to the applicant might not now be available because of lapse of time.

### **Legal authorities relevant to the applicant's case**

81. The applicant seeks to restrain the respondent from further prosecuting these offences on the grounds of; (1) prosecutorial delay and; (2) prejudice. His counsel draws specific attention to the relevant legal principles applicable in cases of this nature by Keane C.J. in *P.C. v. Director of Public Prosecutions* [1999] 2 I.R. 67. They also draw attention to the authority of *P.M. v. Malone* [2002] 2 I.R. 560 at pp. 580 to 581 where Keane C.J. states:

*"The essential issue for resolution is accordingly as to whether the stress and anxiety caused to the applicant as a result of the violation of his constitutional right to a reasonably expeditious trial justifies the prohibition of the trial proceedings at this stage ... where ... the violation of the right has not jeopardised the right to a fair trial but has caused unnecessary stress and anxiety to the applicant, the court must engage in a balancing process. On the one side of the scales there is the right of the accused to be protected from stress and anxiety caused by an unnecessary and inordinate delay. On the other side there is the public interest in the prosecution and conviction of those guilty of criminal offences."*

82. The applicant also draws attention to the authorities of *B.F. v. D.P.P.* [2001] 1 I.R. 656, Geoghegan J. and *P.P. v. D.P.P.* [2001] 1 I.R. 403 at p. 409. In both of those judgments specific reference is made as to a test for prosecutorial delay. The test is as follows:

- (a) was the delay culpable having regard to the circumstances of the case;
- (b) was it such as may entitle the accused to an order preventing the trial irrespective of whether there is actual or presumed prejudice;
- (c) was there evidence of "a lackadaisical manner and slovenly fashion" in the conduct of the prosecution.

### **Extension of time**

83. The affidavit sworn by the applicant's solicitor, Mr. Lynam, is dated 15 April 2002. However, the court was informed that the matter was mentioned before McKechnie J. on 12 April 2002 late in the afternoon and that McKechnie J. stated that for the purposes of making the application and any extension of time if necessary, the fact that the matter had been mentioned on 12 April would be a relevant factor. I accept this contention on the issue of extension of time and I believe that the applicant is entitled to rely thereon.

### **Consideration of the evidence and application of legal principles**

84. The applicant relies in this case on prosecutorial delay in respect of both complainants. No significant case is made in relation to complainant delay in respect of Je.C. In this context it will be helpful to consider the two cases separately.

### **Je.C. – Prosecutorial delay?**

85. In relation to J.C. the following dates are relevant:

- 17.1.87: complaint made to Garda Anita O'Leary. This complaint was not withdrawn. There is no significant evidence as to what occurred thereafter.
- 9.1.89: second complaint made to Detective Sergeant Donal O'Neill.
- 20.3.89: directions from the D.P.P. not to prosecute.

86. The following points are relevant and of importance in distinguishing this case from others:

- (a) At no stage did the complainant withdraw her complaints.
- (b) She made the complaints regarding alleged assaults upon herself, not other members of the family.
- (c) There is no evidence of lack of capacity or dominion at the time of the making of the complaints or thereafter.
- (d) The complaint being made was not fully explored or investigated, it was made and not withdrawn. No explanation has been furnished for this.
- (e) Additionally the court must have regard to the direction issued by the Director of Public Prosecutions Office in March, 1989 that no prosecution should take place.

87. Counsel for the respondent submits that it is "*probably*" incorrect to draw the inference from the applicant's affidavit that J.C. made two complaints, one in 1987 and one in 1989. It is contended that these related to the one complaint. It is suggested that Je.C. tried to clarify matters and that she reported the abuse by the applicant and her father in 1986. This would appear to be a reference to the statement made to Garda Anita O'Leary on 17th January, 1987. This was followed by the applicant's father being interviewed, but "*he denied everything*". Je.C. heard nothing until "*I think 1988 when two gardaí contacted from C—and I called to see them. I made a second statement then about (S) (the applicant's nickname). I found out a year later that nothing was going to be done as I had no support and there wasn't enough evidence.*"

88. The applicant accepts in his affidavit that he was interviewed in or around 1988. He does not say whether this took place in respect of allegations made by Je.C. or his daughter St.C. or both. Je.C.'s recollection is that it was her father, M.C., who was interviewed. The respondent is forced to speculate that perhaps they both were interviewed but in respect of the allegations made by their respective daughters. Be that as it may, the respondent contends, it is clear that they could only have been interviewed in relation to the allegations actually made and as they were known to the Gardaí at the time. Counsel for the respondent submits that since the court must assume that all the complainants have said about their abuse is true for the purpose of looking at dominion, it is clear that the (in this context false) denials of M.C. and D.(S)C. at the time only served to prolong the lapse of time.

89. As regards Je.C., however, it is clear that there was a substantial degree of evidence available in the 1986-88 period which would have been sufficient to at least be the basis of initiating an investigation. It is difficult to understand precisely the circumstances of the direction from the Office of the Director of Public Prosecutions in March 1989. It would not be fair to criticise, however, without being fully seized of such facts as were then known to that office.

90. There is significant evidence which discharges the *onus of proof* that there was prosecutorial delay. This delay has not been explained regarding Je. C. In relation to that complainant it was sufficient to institute an investigation and to place the Gardaí on notice of the alleged commission of offences regarding upon Je. C. The statements available to the Gardaí and to the Director of Public Prosecutions office were not terse. The complaints regarding the applicant, made by the complainant, were not confined to a line or two. It is true that the statement to Garda Anita O'Leary on 17 January 1987 did deal mainly with abuse perpetrated allegedly by the complainant's father, M.C. However, the second statement, furnished to Detective Sergeant Donal O'Neill on 9 January 1989, does indeed refer to the applicant in sufficient detail to warrant investigation and, even on the respondent's *own* case, it appears that there was a further statement made in 1988 to the Gardaí in B- station. This evidence has not been controverted.

#### **Decision re Je.C.:**

91. On these facts relating to Je.C., there is no option but to find prosecutorial delay. Not only is there evidence of such delay but there would also appear to be clear evidence of a conscious and deliberate decision by the Director of Public Prosecutions office not to proceed with the complaints before them. This decision was made on 20th March, 1989. No evidence has been adduced that such a direction might or ought to be reviewed (See *Eviston v. D.P.P.* [2003] 1 I.L.R.M. 178).

92. In the light of the sequence of events, it has not been shown that the reason for delay was as a result of misconduct or dominion by the applicant with regard to Je.C. She was of full capacity and was in a position to make a number of complaints without inhibition. These were not withdrawn. There is no evidence of her being pressurised or intimidated in this respect. Rather the evidence is that complaints were made which were not acted upon. In the circumstances, therefore, the court is of the view that with regard to the complaints made by Je. C. and the charges based thereon, the applicant is entitled to prohibition on the basis of prosecutorial delay. (No such finding is made in relation to the investigation conducted by Detective Sergeant Byrne from 1999 onwards. While there undoubtedly has been an unusual elapse of time in the course of this investigation, I do not think that there is any evidence of culpable or blameworthy delay of the type identified in the authorities cited earlier.)

93. Having established prosecutorial delay it is not, in my view, necessary for the applicant to identify prejudice. See Keane C.J. in *P.O'C. v. D.P.P.* [2000] 3 I.R. 87 at 93:

*"I think that when there has been a long lapse of time, as in these prosecutions for sexual offences, between the alleged offences and the date of complaint to the Guards it is of paramount importance if the accused's rights are to be protected that there is no blameworthy delay on the part of either the Guards or the Director of Public Prosecutions. If there is such delay, the court should not allow the case to proceed and additional actual prejudice need not be proved."*

94. It will be recollected that the dates complained of in relation to J.C. went back to the year 1974.

#### **St.C. – prosecutorial delay?**

95. The following factors are relevant. First, S.C. was born on 1st July, 1961. The offences in question relate to the period she resided in Ireland between 1982 and 1988. She furnished a statement to the Garda Síochána on 26th November, 1988. But this statement, with one brief exception, related to alleged abuse which occurred in England.

96. Secondly, just three lines of the 1988 statement refer to incidents alleged to have taken place when she was aged 21 years and onwards, i.e. from 1982 onwards. This was in the context of a substantial amount of alleged material relating to matters and incidents earlier than 1982. A distinction must be drawn between a complaint which sets out the main substance of the matters in issue and one which deals with an issue only in a very peripheral way. I do not consider that the matters which are alleged to have occurred in these three lines regarding 1988 to St. C. are captured by the Director of Public Prosecution's direction made 20 March 1989 in the same way as those related to Je.C. The statement made on 26 November 1988 to Ban Garda Fitzgerald states:

*"From the age of 21 years and upwards he tried to penetrate me and almost succeeded, however I managed to fight him off. In April, 1988 the abuse stopped altogether ..."*

97. I do not consider that this terse reference in the statement is in itself sufficient to give rise to the principles set out in *Eviston v. D.P.P.* [2003] 1 I.L.R.M. 178 and *J.C. v. D.P.P.* (unreported, Supreme Court, 19 December 2003), which was cited in the case of B.C. My reasons for this are as follows:

- (i) The time span is relatively limited from the beginning of 1988 to April of that year.
- (ii) It is not clear that the three lines in question contain any evidence of serious criminal offences. It is doubtful whether they would constitute sufficient evidence to prosecute.
- (iii) I do not consider that the direction of the Office of the Director of Public Prosecutions of 20 March 1989 could be said to encompass this statement in such a manner as to bar a further decision to prosecute based on much more substantive evidence.

98. I now turn to consider complainant delay.

#### **St.C – the psychological evidence**

99. I have already expressed my views regarding the psychological evidence and the criterion used by Mr. Dempsey in the case of B.C. However, for the reasons that were outlined in the case of B.C., I believe that the court is entitled to have regard not only to relevant factual material adduced in a psychologist's report but also to *other* factual material which is adduced in affidavit form and sworn by the complainants, other family members and friends. Such material is of assistance in identifying the precise nature of the relationship between the complainants and the applicant.

100. On balance, I consider that there is sufficient evidence of dominion in respect of St.C. Therefore, I now turn to consider the question of prejudice.

#### **St.C – allegations of prejudice**

101. The applicant's submissions regarding prejudice have been outlined earlier. Regarding the alleged assaults on St.C. the evidence is that they took place when she was alone with her father. There is no suggestion that any person witnessed an assault upon her. Most of the alleged assaults took place at night when other members of the family were in bed. The complainant states that she was too scared to tell any other person regarding what allegedly occurred. It is difficult to see what relevant or material evidence the applicant's parents, B.C. and J.C., could offer in respect to this matter were they still alive. No *specific* case has been made at all as to the type of evidence they might have given, or any disposition or attitude on their part regarding the allegations which might have been relevant or material to the respondent's case.

102. Further, St. C.'s *maternal* grandparents died when she was aged 14 and 18 respectively. The only offences they might conceivably be in a position to give evidence about would have been those committed in England, which were not part of the 1999 investigation or statement. The charges in question all refer to the time when St. C. was aged 21 years and upwards.

103. With regard to the deprivation of opportunity to establish movements, places and points of location, Detective Sergeant Byrne states that the applicant has been given an opportunity to establish his movements and seek out prospective witnesses. He has not provided any to date.

104. A. and R. L. are the parents of the applicant's wife. They are both deceased. Their absence is identified by the applicant as being prejudicial. The basis of this contention is not made clear. It is not specified. St. C. on affidavit has stated that they never visited the 'C' family in Ireland. This assertion has not been contradicted. There is insufficient evidence to establish prejudice therefore.

105. J. H., deceased, is a nephew of St. C. She has stated that he has never visited the family in Ireland. This has not been contradicted. Therefore, the only offences wherein he may be in a position to give evidence would be those allegedly committed in England, which were not part of the investigation.

106. M. K. is an aunt of St. C.'s. She is deceased also. According to St. C. she never met M. K. in Ireland. Thus, M. K. would only be in a position to give evidence regarding matters which allegedly occurred in England which again are not part of the investigation. No evidence has been adduced that her evidence would be relevant or material.

107. It is baldly asserted by the applicant that property has been demolished or developed. It is entirely unclear as to what is in question here.

108. The garda investigation demonstrates that the locations where the assaults are alleged to have occurred are still intact. There is no evidence that they have been developed or altered. No submission of any type is made under any specific or identifiable heading regarding changed external or internal characteristics of buildings, furniture or layout.

109. The applicant alleges prejudice by reason of the absence of employees of Dixon Dobson & Carver. St. C. worked for this company between 1980 and 1982. This was in England. The applicant does not specify what relevant or material evidence such employees would be in a position to give. In any case the only allegations where such employees might be in a position to give relevant evidence would be those committed in the United Kingdom which again are not part of the investigation.

110. The applicant asserts prejudice regarding the absence of medical evidence. A number of medical records were submitted with the garda investigation file relating to St. C.'s period of living in Ireland. No records were sought from the United Kingdom as they were not relevant to the consideration of the offences which are the subject matter of the charges here. Again the alleged prejudice is not specified.

111. The applicant also expresses concern about what he alleges is the non-disclosure of statements or memos made by him and his wife in 1989.

112. It appears that in that year they were interviewed by the investigating gardaí. The applicant declined to make a written statement after caution by Detective Sergeant Donal O'Neill. No memos or interviews or statements have been taken. C.C., the applicant's wife, was also interviewed by Detective Sergeant Donal O'Neill but she declined to make a written statement. There are, therefore, no memos or statements that have been withheld.

113. With regard to absence of memory, Detective Sergeant Byrne draws specific attention to the circumstances wherein the



applicant appears to have a particular recollection of incidents which may be relevant including the possession of a belt with studs in the shape of the sun, moon and stars, the reference to pornographic magazines and an incident where he was involved in taking specific medication for a medical complaint.

114. I do not consider that the efflux of time, which has occurred in itself, relating to the charges remaining is such as to create circumstances where the accused would not obtain a fair trial. Nor do I accept that in the circumstances of the case the delay relating to these particular matters of itself constitutes a breach of the applicant's right to trial with reasonable expedition.

115. Counsel for the applicant submits that the applicant has a right to an expeditious trial independent of circumstance. I do not consider that such a right to trial with reasonable expedition can exist independently of any other right attaching to a trial in due course of law. I rely on the authorities cited in the case of B.C. in relation to this matter. On the basis of the High Court authority (*O'Flynn v. Clifford* [1988] I.R. 740 per Gannon J.), specifically approved by McCracken J. in the Supreme Court in the case of his judgment in *M.(J.) v. D.P.P.* (unreported, Supreme Court, 2004) as recently as last year, it has shown that a right to a trial with reasonable expedition must be read within the constraints outlined in that decision. I consider this authority binding on this court.

**Decision – re St.C.**

116. In the circumstances therefore I am not persuaded that prohibition should issue in relation to the allegations made relating to the year 1988. Therefore I will decline to grant prohibition regarding charges 95/2000, 96/2000, 97/2000, 98/2000, 29/2001, 30/2001, 31/2001, 32/2001 and 33/2001 all of which refer to the year 1988. This is upon the basis that the matters contained in these charges were not properly the subject matter of a full consideration nor were they encompassed in the direction of the Director of Public Prosecutions Office of 20 March, 1989.

117. However, I will grant prohibition in relation to all the other charges relating to the complainant St.C.

118. These are: 89/2000 – 94/2000 inclusive; 19/01 – 28/01 inclusive; and 73/01.