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Neutral Citation Number: [2006] IEHC 264

THE HIGH COURT
JUDICIAL REVIEW

[2005 No 428 J.R.]

BETWEEN

C.M.

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Ms. Justice Dunne delivered on the 28 day of July 2006

1. The applicant herein faces trial in respect of four charges of gross indecency on one P.A. alleged to have been committed between 1st August, 1993 and 30th November, 1993 on a date or dates unknown at an address in Dublin. The trial is pending before the Dublin Circuit Criminal Court on foot of a bill of indictment bearing the record number 301/05. The applicant herein seeks an injunction restraining the respondent herein from continuing to prosecute the applicant in respect of the alleged offences. The basis upon which the injunction is sought is that there was a delay of almost nine years from the date of the first alleged offence to the date complaint was made. As a result, a lapse of time in excess of eleven years has occurred between the date of the alleged commission of the first alleged offence and the date of the return for trial, namely March, 2005, and it is contended that such delay is so great as to deny the applicant's right to trial with reasonable expedition and in accordance with law as guaranteed by the Constitution and as protected by Article 6 of the European Convention on Human Rights.

2. In addition to seeking to restrain the trial on the basis of delay between the date of the alleged commission of the alleged offences and the making of complaint it is also contended that there has been prosecutorial delay in this case between the time of making of the complaint on 1st May, 2002, and the return for trial in March, 2005 and it is thus contended that there is a duty on the State to move with particular expedition where there has already been considerable delay in making of the initial complaint.

3. The applicant in this case was born on 20th August, 1928. The complainant was born on 18th April. 1978. He was fifteen years of age at the time the offences are alleged to have been committed. The offences are alleged to have been committed at the applicant's then home. The applicant and the complainant were neighbours.

4. The complainant herein first complained of the matters alleged against the applicant herein, by way of formal statement of complaint made on 1st May, 2002. He made a further statement to the Gardaí on 15th July, 2002. Prior to that date, an incident had occurred at the home of the applicant on 14th/15th April, 2002. Without outlining in full the details of that incident it appeared that the complainant had broken a window in the home of the applicant. The complainant was drunk at the time. Gardaí who had been called to attend to that incident met the complainant and at that stage the complainant explained that he broke the window because he had been abused sexually by the applicant when he was younger. As a result of his contact with the Gardai, he came to make a first statement of complaint on 1st May, 2002.

5. As can be seen, a period of almost nine years elapsed between the date of the first alleged offence to the date of first complaint. The applicant complains of that delay. Subsequently the applicant was arrested and charged in respect of the alleged offences on 17th November, 2004. The matter was then sent forward for trial in March, 2005. Complaint is made therefore of the delay between the initial complaint made on 1st May, 2002, and the matter appearing before the District Court in November, 2004, an interval in excess of two years and six months.

6. A number of affidavits were filed in this matter, namely, an affidavit of Robert Eager solicitor on behalf of the applicant and on behalf of the respondent an affidavit of Detective Garda A.R., an affidavit of Michael Dempsey a clinical psychologist and an affidavit of the complainant. Notices of intention to cross examine were served in respect of Detective Garda T.R. and Mr. Michael Dempsey.

7. On behalf of the applicant herein, Shane Murphy SC made preliminary submissions prior to the cross examination of the witnesses. He acknowledged that cases of child sexual abuse have been considered a special category when considering delay. He pointed out that delay on a complainant's part may be attributed to the actions of the accused and he argued that a relationship of dominance will generally be required in such circumstances. He referred to the judgement of Hardiman J. in the case of *J. O'C. v DPP* [2003] I.R. 478.

8. He referred also to the case of *B. J. v. DPP* [2003] 4 I.R. 525 in which it was pointed out that in such cases although it is not uncommon to find delays of 15, 20 or 30 years, shorter periods of delay such as that in the present case are no less significant. In that case there had been nine years of complainant delay and an important Garda witness had completely forgotten questioning the applicant in relation to the alleged offences eight years before a formal complaint was made. Hardiman J. in that case pointed out as follows:

> "These facts graphically illustrate the acute dangers to the prospects of a trial in due course of law which are posed even by relatively moderate lapses of time. This case emphasises that, simply because we see not a few cases where the lapse of time is in the order of twenty or thirty years, we must not be led into thinking that ten years, or even a much shorter period, is less potent in its effects on memory."

9. He also referred to the judgment of McGuinness J. in that case where she held that there was no dominion in that case and gave reasons for that view. Counsel argued that the circumstances of the present case are quite similar and that the applicant held no position of authority over the complainant and was not a family member or friend. He pointed out that all of the incidents of abuse are alleged to have occurred in the applicant's home to which the complainant went voluntarily and uninvited. On that basis he argued that there were no circumstances giving rise to dominance.

10. In considering the delay, counsel also argued that the age of the complainant should be considered. It was pointed out by McGuinness J. in the case of *B.J. v. DPP* above as follows:

> "The scenario in the present case is different in almost every respect. The complainant was sixteen years of age when the alleged incidents took place; it is likely that a sixteen year old in 1989 had some degree of knowledge of the world."

11. In this context he also referred to the judgment of Lynch J. in *P.C. v. DPP* [1999] 2 I.R. 25, to support the proposition that older children are worldlier and therefore less likely to be the subject of dominion. Counsel however accepted that it had been held that dominion is not the only reason that delay might be excused and in this regard he referred to the case of *D.D. v. DPP* [2002] 3 I.R. 172 in which Geoghegan J. had said:

> "Assuming that pre complaint lapse of time is relevant and that as a corollary that it becomes relevant as to whether the applicant has contributed to the lapse of time, it is certainly not the case on the authorities that the applicant can only be held responsible if there has been the element of dominance. The authorities certainly show that that is a main ground but it is not the only ground."

12. A similar view was expressed in the High Court in the case of *P.P. v. DPP* [2000] 1 I.R. 403. Counsel argued that the fact that a sexual offence is alleged is not enough on its own to justify delay. He went on to argue that there was no relationship of dominance between the applicant and the complainant. There was no exceptional circumstance giving rise to an inhibition. As such he argued that the delay on the part of the complaint cannot be attributed to the actions of the applicant and should therefore be considered to be an unnecessary delay.

13. Counsel for the applicant then dealt with the second limb of his complaint in relation to delay. He pointed out that where there has already been significant delay in making a complaint the courts have held that further unnecessary delays will result in the prohibition of a prosecution. In support of this contention he referred to the judgment of Finlay C.J. in the case of *DPP v. Byrne* [1994] 2 I.R. 236 and he also referred to a series of cases which dealt with the right of an accused to a trial with reasonable expedition. A number of authorities were cited to the effect that culpable delay on the part of the State may of itself entitle the accused to an order of prohibition irrespective of whether there is actual or presumed prejudice. The authorities cited by him in that regard included *B.F. v. DPP* [2001] 1 I.R. 656, *P.P. v. DPP* [2000] 1 I.R. 403 and *Blood v. DPP*, (Unreported, Supreme Court, 2nd March 2005) in which McGuinness J. stated:

> "The right to an expeditious trial is implied in the right to a fair trial. There is a danger that a lengthy delay in itself will, through its effect on the memory of potential witnesses and of the accused person himself render a trial unfair."

14. The court went on to add:

> "In the particular circumstances of this case taken as whole, it seems to me that the delay in the latter period of the prosecution of the applicant amount to a denial of his right to an expeditious trial." (At page 38.)

15. On the basis of that authority, counsel submitted that as there were two elements of delay in the present case it is all the more important that prosecutorial delay should be as minimal as possible. Consequently he argued that as a result of the delays there was a real risk in this case that the applicant would not be able to obtain a fair trial.

16. Following the submissions made by counsel on behalf of the applicant, Detective Garda T.R. was sworn in and cross examined by Mr. Murphy on behalf of the applicant. In the course of his cross examination he confirmed that he took a formal statement of complaint from the complainant on 1st May, 2002. The next witness gave a statement on 9th May, 2002, and no further statement was then taken until 2nd July, 2002, and a number of statements were taken between that date and the 4th July. A further statement was obtained from the complainant on 15th July, 2002. Thereafter a statement was taken from another potential witness in August, 2002 whose statement does not appear in the book of evidence. The applicant herein was arrested in September, 2002 and interviewed and thereafter two further statements were obtained on 18th December, 2002, and January, 2003. Those statements do not appear in the book of evidence. The latter two statements related to statements from schoolmasters of the complainant. One of those related to school records required by the Detective Garda. The same was not received until January. At that stage the investigation file was completed on 6th January, 2003, and was then forwarded in March, to the superintendent in the Garda Station. He accepted that in relation to the latter two witnesses it would have been possible to interview them earlier but there was a delay in relation to one of them who had to review old school records in order to deal with the Garda's enquiries. Following the submission of the file in March, 2003, the position was that directions were awaited from the DPP which directions were received on 1st September, 2003. It was accepted that the case would eventually revolve around the testimony of the complainant.

17. Following the receipt of directions, Garda R. attempted to make contact with the applicant herein. He then realised that the applicant had moved home and Garda R. had no address for where he was now living. Towards the end of September, 2003, following enquiries made by Garda R. he obtained a new address for the applicant. Having obtained that address he called there on a number of occasions but was unable to locate the applicant. He left a calling card with his details for the applicant to contact him on receipt of his message. Thereafter on 16th December, 2003, Garda R. received a hand written letter from the applicant which had been posted in Spain. That letter indicated that the applicant was going to be at a Spanish address for the next few months. Garda R. wrote to the applicant by letter dated 23rd December, 2003, to the address given on the hand written letter but the same was returned undelivered. He wrote again but without making contact with the applicant. Ultimately having called to his house on a number of occasions in early 2004, an information was sworn seeking an arrest warrant on 2nd March, 2004. Steps were then taken in relation to the possibility of seeking an extradition request. Further informations were sworn in order to obtain further arrest warrants in relation to all four charges and that was done on 17th May, 2004. Thereafter and before finalising arrangements in relation to an application for a European Arrest Warrant, Garda R. made further enquiries regarding the applicant's pension and was advised that his pension was paid to a bank account and that the bank account had active withdrawals in the Dublin area. As a consequence, eventually, having called again to the applicant's address on a number of occasions the detective Garda met with the applicant. It was indicated to the applicant that the DPP had given directions to charge him in late August or early September, 2004. Ultimately in fact, the applicant was charged in November, 2004. Finally Garda R. confirmed that he was dealing with other matters during the period of time concerned, including a number of murder investigations.

18. It might be useful to sum up the evidence of Garda R. by pointing out the following chronology of events so far as he is concerned:

May 2002 to January 2003	Investigation
January 2003 to March 2003	report completed and file prepared for DPP
March 2003 to September 2003	awaiting DPP's instructions.
September 2003 to November 2004	following DPP's instructions, difficulty in locating applicant; applicant available from August 2004/September onwards for arrest and charge.

19. The next witness to be cross examined was Michael Dempsey. Mr. Dempsey is a clinical psychologist who was asked by the respondent to carry out an assessment in relation to the complainant. He received a letter of instructions on 24th June, 2005, saw the complainant on 16th September, 2005, and prepared a report dated 29th September, 2005. In the course of his report he outlined the nature of the relationship between the applicant and the complainant. He then described the effect of the alleged abuse upon the complainant. Finally he considered whether the failure by the complainant to make a formal complaint sooner is referable to the applicant. In that regard he came to the conclusion that the applicant was in a position of dominance over the complainant when the abuse occurred. He pointed out that this was because the complainant was an adolescent and the applicant was an adult. The dominance was continued and maintained by the applicant giving the complainant money and threatening him. He pointed out that the complainant developed a strong sense of anger in relation to the abuse. He developed symptoms of post traumatic stress of which avoidance is a major feature. He avoided dealing with the effects of the abuse. He did not disclose the abuse to anyone but drank alcohol in excess to deal with the consequences. Mr. Dempsey concluded as follows:

> "His anger and his symptoms of post traumatic stress are referable to the applicant. His sense of shame which further inhibited from contacting the Gardaí is also, in my opinion, referable to the applicant. In my opinion the delay in reporting the alleged sexual abuse was reasonable."

20. In the course of cross examination Mr. Dempsey agreed that he saw the complainant on one occasion for over two hours. He spoke to the complainant's girlfriend by phone.

21. In the course of his report he had stated that the complainant "appears to have been functioning reasonably well psychologically over the years" and Mr. Dempsey in cross examination confirmed that the complainant had completed his apprenticeship, that he had a history of regular employment and that he was in a long term relationship with his girlfriend. He was cross examined in relation to the tests carried out by him on the complainant which resulted in the finding of post traumatic stress disorder. He accepted that the severity of the symptoms he was experiencing at the time could have been due in part to discussing the issue with the witness but he emphasised that a key element in the finding was his avoidance of the issues involved.

22. He was asked about the question of alcohol abuse on the part of the complainant prior to the making of the complaint. He pointed out that the complainant had not gone to counselling and he stated that it was his view that this was part of his avoidance response. He himself recommended that the applicant should attend for counselling in relation to the alleged abuse. Although in fact the complainant had not done so he pointed out that the complainant would find it incredibly difficult to go for counselling, one of the reasons being that he has an extraordinarily bad stammer which would make it difficult for him to go to counselling. His way of dealing with the abuse was to drink and indeed to drink excessively although by the time Mr. Dempsey saw him he had stopped drinking excessively. He pointed out that the complainant found it very difficult to discuss the abuse because of his profound shame about it and his lack of understanding as to how he got into that situation.

23. Counsel then went on to deal with the issue of dominance and in that regard Mr. Dempsey accepted that the applicant and the complainant were not related. He was cross examined on the point noted in his report that the complainant was functioning reasonably well psychologically over the years. He said that a lot of people suffer psychologically while achieving high standards and having high career achievements in their lives. He didn't agree with the suggestion that he mentioned those items in relation to his work, employment and steady relationship because he would not have expected to find such a situation in a case of significant post-traumatic stress disorder. He made the comment that the fact that the complainant avoided thinking about the abuse the whole time had a positive side to it.

24. He made the point that he does not make any assumption as to the truthfulness or accuracy of what is said to him by a complainant in such circumstances.

25. The next issue that was dealt with relates to the question of dominance at the time of abuse. He said that he believed a relationship of dominance existed at the time the abuse occurred. He agreed that the dominance didn't physically continue into the complainant's adult life but that it did continue at a psychological level. He expressed the view that from a psychological point of view a person does not have to be physically present or in a controlling position over a person to have psychological dominance over that individual. He pointed out that a person could have psychological dominance over another individual long after the physical dominance has passed. He was of the view that from a psychological point of view there was evidence of dominance in this case. It is fair to say that he was cross-examined extensively on this point. Whilst he accepted that there was no evidence that money was given to the complainant or that threats were made to him after 1993 he was of the firm view that dominance as a psychological constraint can continue after the event. In this regard he referred to the fact that the complainant got very drunk on the night in April, 2002, that when he went to the applicant's house the abuse was clearly on his mind and that his defences were reduced when he was drunk that night and lost control. His view was that the applicant still played a role in the complainant's life in the sense that he was influencing him from a psychological point of view.

26. Mr. Murphy then referred to parts of the book of evidence in which the complainant referred to killing the applicant and throwing stones at the applicant's house. Also outlined was an occasion when the complainant called to the door of the applicant's home to kill him and when the door was opened by the applicant the complainant grabbed him by the throat but another man came out and pushed him away. On that basis, Mr. Murphy posed the question that the state of mind described therein was inconsistent with a person under dominion. Mr. Dempsey disagreed with that contention and stated that he thought the dominion continued into adulthood. Far from agreeing with the contention of Mr. Murphy, Mr. Dempsey pointed out that the fact that the complainant was dealing with the issue inappropriately illustrates that from a psychological point of view the complainant was still under the dominion of the applicant. Finally, Mr. Dempsey disagreed with the suggestion that there was no evidence of dominion or dominance or post-traumatic stress disorder being caused as a result of the complaints made in this case. Mr. Dempsey pointed out that the complainant has been quite traumatised by the circumstances and he added that avoidance is a key characteristic of his post-traumatic response.

27. Counsel for the applicant then made submissions in relation to the evidence that had been given. Insofar as the evidence of Garda R. was concerned it was pointed out that this was not a complicated case. Although there are other witnesses all that they can add is that the complainant was in the applicant's house from time to time. Mr. Murphy pointed out that it took Garda R. seven months to take the seven statements in the book of evidence apart from those which are purely procedural. It was a straight forward case. Nonetheless it took from May, 2002 until March, 2003, to complete the file and he submitted that that part of the investigation was not expeditious. There was then the further delay between March, 2003 and September, 2003, whilst the matter awaited the directions of the D.P.P. He stated that there was no explanation for that delay. He pointed out the further delay until the 15th November, 2004, when the applicant was arrested. Thus he argued that there had to be a concern in this case about prosecutorial delay.

28. Counsel then referred to the evidence given by Mr. Dempsey. He noted that Mr. Dempsey did not see it as any part of his

function to test the evidence contained in the book of evidence. He accepted what was said to him by the complainant. Mr. Murphy contended that in considering the issue of dominion that there must be concrete evidence to back up that view. On the evidence in this case, there was evidence that there had been threats made to the complainant and money given during the course of the alleged abuse but that it is not alleged that that continued after the abuse ceased. Accordingly, he contended that there was no objective evidence upon which Mr. Dempsey could base his opinion.

29. He referred again to the decision of the Supreme Court in the case of *Blood v. D.P.P.* referred to above and quoted at length from that decision.

30. He reiterated that having regard to the age of the complainant there was no presumption of dominion and that there should be objective evidence as to dominance after 1993.

31. Finally, he made the point that the applicant herein is an elderly man and that due to the lapse of time he faces immense difficulty. No specific dates or times have been given in the offences alleged against him and that is a direct consequence of the delay. That delay leaves the applicant in a situation where he is left with merely a bare denial of the offences alleged. He noted the comments of Hardiman J. in the case of *J.O'C. v. D.P.P.* referred to above where Hardiman J. expressed his concern as to trials involving bare accusation and bare denial as is the case in this case.

32. Finally Mr. Murphy on behalf of the applicant also complained about the prosecution delay in furnishing opposition papers in this case and argued that where there has already been significant complainant delay any further delay by the prosecuting authorities is inexcusable. Accordingly, he argued that the applicant's right to trial with reasonable expedition has been breached. For all of the reasons given he argued that a trial of the applicant would be unsatisfactory and contrary to his rights under the Constitution and the principles of natural justice. Accordingly, the prosecution should be prohibited.

33. Ms. McDonagh appeared on behalf of the respondent. The first point she made related to the complaint about the delay in filing opposition papers on behalf of the respondent. She pointed out that the applicant had not sought leave to amend his statement of grounds to include this point and accordingly she objected to him relying on that ground. So far as that particular point is concerned I accept her submissions. If the applicant wished to rely on delay in the conduct of these proceedings, it would have been open to the applicant to amend the statement of grounds. He did not do so.

34. Counsel referred to the right to a fair trial. She noted that the onus is on an applicant to establish a real risk of an unfair trial. She noted the complaint of the applicant as to the lack of specificity in relation to the charges but pointed out that the courts have rejected that as a ground for prohibiting a trial. In support of that argument she referred to a number of decisions namely *D.P.P. v. E.F.* (Unreported, Supreme Court, 24th February, 1994), *D.O'R. v. D.P.P.* [1997] 2 I.R. 273 and *P.C. v. D.P.P.* [1999] 2 I.R. 25.

35. Ms. McDonagh then referred to the age of the applicant and the question of stress and anxiety on the part of the applicant caused by the delay in bringing charges against the applicant. She noted that Mr. Murphy in the course of his submissions referred to the difficulty faced by the applicant as an elderly man, and that reference was made in the statement of grounds to the fact that he was an individual of advanced age and had been caused anxiety and distress. She pointed out that advanced age is not a bar to prosecution.

36. In the course of her submissions counsel for the respondent pointed out that the applicant did not claim a specific prejudice which would give rise to a real and serious risk of an unfair trial. She also pointed out that the applicant could not rely on presumptive prejudice in circumstances where the failure of the complainant to make complaint sooner was due to the consequences of the abuse. In that regard she referred to the judgment in the case of *P.O'C v. D.P.P.* [2000] 3 I.R. 87 in which Keane J. stated as follows:

> "In the present case, the applicant cannot successfully rely on the general prejudice which undoubtedly affects any person who faces a trial on a serious criminal charge many years after the happening of the offence, because of the nature of the particular offence on the evidence of the psychologist as to the probable effect it would have had in terms of the making of a complaint. Nor could he rely, in a case such as this on a bald assertion that some specific prejudice has resulted to him which would give rise to a real and serious risk of an unfair trial. In the present case the solicitor placed before the High Court material which went beyond such a bald assertion. Had the trial taken place within a reasonable time of the commission of the alleged offence there should have been little difficulty in testing the accuracy of the complainant's version of events as to the locking of the room. It was open to the respondents, once this matter had been raised, to avail of their resources to investigate the matter further and place before the High Court material which might or might not have shown that there was no substance in the difficulties on which the applicants sought to rely. There was, however, in my view, no obligation on the applicant to go further than he did in indicating to the court the nature of the defence which he would have hoped to make, the materials on which it was based and the difficulties which, on his behalf it was alleged now arose in presenting that defence to a jury."

37. Relying on that authority she asserted that there was no specific prejudice alleged and that the passage of time in this case was not so great as to raise an inference that there had been presumptive prejudice. Even if there had been presumptive prejudice she said that the applicant could not rely on same because the failure to make a complaint earlier was due to the effects of the abuse.

38. Ms. McDonagh then dealt with the right to an expeditious trial. In that regard a number of authorities have considered the issue of an accused's right to a speedy trial. In particular she referred to *P.C. v. D.P.P.* [1999] 2 I.R. 25, the well known U.S. case of *Barker v. Wingo* [1972] 407 U.S. 514, *United States v. Marion* [1971] 404 U.S. 307, *The State (Healy) v. Donoghue* [1976] I.R. 325 amongst others. She pointed out that cases involving childhood sexual abuse comprise a special category. In those cases it has been considered that different considerations apply. She pointed out that the complainant in this case has sworn an affidavit in relation to his failure to make a complaint earlier than he did. In that affidavit the complainant referred to the report of Michael Dempsey and said that the report set out accurately the effects the abuse had on him and the reasons why he failed to come forward sooner. He added that he thought no one would believe him if he made a complaint. He said that the applicant told him that he was not to tell anybody or "he would find me and hurt me". He believed that that was a genuine threat at the time. He explained that although he tried to get on with his life he was never able to get the abuse out of his head. Matters then came to a head on the 14th April, 2002. He explained that that was the first time he had told anybody about the abuse including members of his own family. He had not had the strength to tell anybody about the abuse prior to that and even when he told the Gardaí what had happened he was unsure as to whether or not he could go through with making a formal complaint.

39. Ms. McDonagh pointed out that the evidence contained in the sworn affidavit of the complainant herein was not challenged in any way. Further she argued that it was not necessary for her to establish that dominion was the reason for non-disclosure and she pointed out that many other factors could be relevant. She argued that in this case the delay on the part of the complainant in

making complaint had been fully explained and justified. She added that in this case the applicant had sought to have the complaint psychologically examined on his own behalf and that this was agreed but the applicant chose not to take up the opportunity to psychologically examine the complainant.

40. She also referred to the decision in the case of *D.W. v. D.P.P* (Unreported, Supreme Court, 31st October, 2003) in which McGuinness J. discussed and considered the role of psychological evidence in such cases:

> "In some cases however, the reasons for the delay are less clear and less readily ascertainable. In such cases evidence in greater depth may be required and further evidence may be considered appropriate. All such evidence is open to challenge in cross-examination. It must, however, be borne in mind that it is not the task of the expert witness to assess the credibility of the complainant or the guilt or innocence of the applicant. The truth or otherwise of the complaints is to be tested at the trial of the applicant."

41. Counsel also referred to the judgment of the Supreme Court in the case of *D.O'R. v. D.P.P.* (Unreported, Supreme Court, 30th July, 2004) in which a number of matters were set out at p. 7 of the judgment of McGuinness J. to be taken into consideration in considering the reasons for delay.

42. Finally she made the point that in considering the question of prosecutorial delay, it was inappropriate to consider the period before the 1st September, 2003, which was the date upon which the D.P.P. gave his directions as prosecutorial delay should only be considered from the time a decision to charge was made.

43. In his replies, counsel for the applicant disagreed with the contention that the D.P.P. did not have to explain delay prior to charge being brought and in that regard he referred again to the decision in the case of Blood v. D.P.P. referred to above. He pointed out that in that case the principal solicitor in the office of the Chief State Solicitor was cross-examined as to the circumstances of delay including the pre-charge period. Accordingly he argued that the pre-charge situation was relevant. He said that there had been no explanation offered as to the six month period of delay in the considering of the file. He emphasised that these issues were important together with the delay on the part of the Gardaí in relation to the taking of statements from witnesses while he conceded that it was a matter for the Gardaí to decide who and when to take statements from, he pointed out that there wasn't a full explanation in regard to the delays involved in that process. On this point he added that all of the authorities demonstrate the need to move expeditiously.

44. In relation to the psychological evidence he made the point that it was not necessary to produce rebuttal evidence in respect of the evidence furnished by Mr. Dempsey. The question he posed was whether or not the court could rely on his evidence. Insofar as Mr. Dempsey spoke of a psychological dominance this was based on what was described as a psychological construct in the evidence of Mr. Dempsey. Counsel for the applicant posed the question as to whether there was any empirical evidence to support that view. Finally, counsel said that the issue of a lack of specificity had been raised by him in the context of an elderly applicant. He submitted that there was a real risk of an unfair trial in the circumstances of this case. Finally, he dealt with the issue of the applicant's travel to Spain and pointed out that there was no onus on the applicant to make contact with the Gardaí. Finally he added that the defendant was an elderly defendant facing a trial after a relatively long period of time which was of significance. In that context given the excessive period of time he said that the question for the court to consider was whether there was a real risk of an unfair trial.

45. Subsequent to the completion of the oral submissions in this case the Supreme Court delivered judgment in the case of *P.M. v. D.P.P.* (Unreported, Supreme Court, 5th April, 2006). An application was made by the respondent for leave to furnish further submissions in relation to that decision. As a consequence, further written submissions were filed by both parties herein. Neither party sought to make any oral submissions in relation to that decision.

46. In the additional legal submissions filed on behalf of the respondent, counsel for the respondent referred to the judgment of Kearns J. in which it was reiterated that the principles set out in *Barker v. Wingo* applied to cases of alleged prosecutorial delay. Kearns J. contrasted the approach of the High Court in the case of *P.P. v. D.P.P.* with the approach of the Supreme Court in P.M. v. Malone. Having done so Kearns. J. stated as follows:

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

47. He went on at p. 9 to state as follows:

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

48. Geoghegan J. also furnished a short judgment referring to his judgment in P.P v. DPP in which he accepted that blameworthy prosecutorial delay does not automatically give rise to a right to an injunction. At p. 4 of his judgment he made the following comment:

> "What I intended to convey was that in a case where there was very serious blameworthy delay on the part of the Gardaí, prosecuting authority should not necessarily be allowed to say that the extra delay caused no provable actual prejudice."

49. Having referred to those passages, counsel submitted that this court in considering whether or not to grant an injunction restraining the further prosecution of the applicant should hold that the public right to prosecute the serious offences outweighs any alleged stress and anxiety to the applicant. She pointed out that while the applicant was entitled to leave the country he would have been charged in September, 2003, had he not left the country. She argued that the period of time involved was not such as to justify an injunction being granted. She added that it was inappropriate to place any great weight on the assertion of the applicant's solicitor

to the effect that the applicant has suffered stress and anxiety. She pointed out that there was no affidavit from the applicant.

50. Counsel on behalf of the applicant furnished his submissions in reply to those filed on behalf of the respondent. He accepted that insofar as the respondent submitted that the effect of *P.M.v DPP* is to require an applicant to show something more than mere prosecutorial delay this proposition is accepted as correct by the applicant. However he did not accept the suggestion that there was no prejudice, anxiety or distress caused to the applicant herein. He said that the contrary position was what was contended for by the applicant. He referred to a passage from the judgment as follows:

> "It is perfectly obvious that a person who is told that he is on suspicion of having committed a sexual offence and who is innocent of the offence (and applying the presumption of innocence, this must be assumed by the court) will suffer a high degree of anxiety. The size of the anxiety will be determined by the length of time rather than on any qualitative basis."

51. He noted therefore, that it would appear the court is entitled to infer anxiety as a natural consequence of being made aware that he is the subject of an investigation. He argued that it was unnecessary to make any particular averment on affidavit in that regard. He notes that the respondent made the point that the applicant had not sworn an affidavit but pointed out that no application was made to cross examine Mr. Eager in relation to his assertion and nor was it contradicted.

52. Secondly he made the point that insofar as the court considers the extent of the anxiety it should be done from an objective basis rather than on the basis of the level of anxiety specifically complained of by the applicant. He argued that there was evidence demonstrating that the applicant is an elderly person from which the court would be entitled to draw a reasonable inference of the distress and anxiety experienced by the applicant in a manner with is similar to the approach adopted by the Supreme Court in *P.M. v. DPP*.

53. He said that the court must give the applicant the benefit of the presumption of innocence when considering prosecutorial delay. He suggested that another way of considering the issue of prosecutorial delay is to ask whether it is acceptable that an innocent party should have an allegation of this nature hanging over them for such a period of time. Insofar as the respondent sought to suggest that the applicant's distress was as a result of the nature of the offences rather than the passage of time this would appear to run contrary to the presumptions of innocence which should underline the courts approach when considering the anxiety and distress caused to an elderly person such as the applicant as a result of the delay which forms the subject matter of this judicial review.

Conclusions

54. The first issue to be considered in this case is whether by reason of the delay in making complaint the applicant has suffered a real risk that he will face an unfair trial such that the trial of the applicant in respect of the alleged offences should be prohibited. Reference was made by counsel on both sides to the many decisions dealing with the question of complainant delay. It was accepted by counsel for the applicant and the respondent that cases of child sexual abuse fall into a special category when considering the question of delay.

55. The delay in this case is a delay of some eight and a half years between the date of the first alleged offence and the making of complaint. Although this is a relatively short period of delay in the context of some of the cases that have come before the courts, nonetheless it seems to me to be a delay which can be described as excessive and consequently a delay which demands an explanation. Nonetheless it is noteworthy that in this case no specific prejudice is alleged on behalf of the applicant.

56. In considering the question of whether there has been an unreasonable delay the courts have as already referred to above consider that cases of child sexual abuse fall into a special category. If the inability to make a complaint arose as a consequence of sexual abuse then an applicant will not be entitled to prohibit a trial on the basis of delay. Counsel for the respondent in her submissions referred to the decision of Keane J. in *P.C. v. DPP* in which he set out the test applicable as follows at p. 68:

> "Manifestly, in cases where the court is asked to prohibit the continuance of the prosecution on the ground of unreasonable delay, the paramount concern of the court will be whether it has been established that there is a real and serious risk of an unfair trial: that, after all, is what is meant by the guarantee of a trial 'in due course of law'. The delay may be such that, depending on the nature of the charges, the trial should not be allowed to proceed, even though it has not been demonstrated that the capacity of the accused to defend himself or herself would be impaired. In other cases the first inquiry must be as to what are the reasons for the delay and, in a case such as the present where no blame can be attached to the prosecuting authorities, whether the court is satisfied that the matter of probability that, assuming the complaint to be truthful, the delay in making it was referable to the accused's own actions.
>
> If that stage has been reached, the final issue to be determined would be whether the degree to which the accused's ability to defend himself has been impaired as such that the trial should not be allowed to proceed."

57. Applying that test it seems to me that it is necessary to look at the evidence in this case to determine whether or not the delay in making complaint as a matter of probability, assuming the complainant to be truthful was referable to the accused's own actions. That being so it is necessary to consider the evidence of Michael Dempsey the clinical psychologist together with his report and the affidavit of the complainant sworn herein. I have already referred to the relevant portions of the affidavit of the complainant sworn herein. He referred to the fact that he thought no one would believe him if he made a complaint. He referred to the threats made at the time of abuse. He referred to the fact that although he tried to get on with his life he was never able to get the abuse out of his head. He also referred to the report of Michael Dempsey.

58. Michael Dempsey in his report referred to what he described as the applicant's continued dominance over the complainant into adulthood, he referred to the shame of the complainant and the complainant's fear that his parents and neighbours would find out about the abuse if he made a complaint about it. I have already outlined some of the conclusions expressed by Mr. Dempsey in his report. In the course of his evidence he was cross examined extensively as to the concept of dominance or dominion that he referred to in his report. In particular the question of dominance was challenged on the basis that a person has to be physically present or in a controlling position over a person to exercise dominance over them. Mr. Dempsey categorically rejected the suggestion that dominance arises in circumstances where there is an ongoing relationship of physical proximity and control of one person over another. Notwithstanding vigorous cross examination, Mr. Dempsey was not shaken in his view as to the nature of the psychological dominance exercised by an individual over another in circumstances such as those alleged in this case. I accept his evidence in this regard. It might well be thought at first glance that dominance could not continue in the absence of physical proximity and control but I am satisfied having regard to the evidence in this case that dominance was a factor in the delay in making complaint in this case.

59. Aside from the issue of dominance, it is also clear that the sense of shame felt by the complainant was such that it led to a fear on his part that his neighbours and his parents would find out about the abuse if he made a complaint. The other factor was his view that he would not be believed if he made a complaint. These factors also in my view had a significant part to play in the failure of the complainant to make a complaint. Those factors are in my view directly referable to the alleged abuse.

60. I think that in regard to the question of whether or not the failure to report the abuse was due to the effects of the abuse itself, it seems to be that two other matters should be considered. Mr. Dempsey described how the complainant had developed a sense of anger in relation to the abuse. He also described the symptoms of post traumatic stress on the part of the complainant and the avoidance which is a feature of that. He referred to the manner in which the complainant began to abuse alcohol in order to deal with his anger and Mr. Dempsey attributes his anger and symptoms of post traumatic stress to the alleged abuse by the applicant. In the circumstances I am satisfied that the complainant's anger and symptoms of post traumatic stress are referable to the applicant as is the sense of shame he described, all of which inhibited the complainant from reporting the alleged abuse. In other words, dominance is not the sole factor leading to the failure to make a complaint at an earlier stage.

61. Having reached that conclusion it is then necessary to consider whether there is blameworthy prosecutorial delay in this case and if so is there some degree of prejudice referable to the breach of the applicant's right to an expeditious trial which would entitle him to prohibit his trial. In this case there was undoubtedly post complaint delay. Complaint was made on 1st May, 2002, and the applicant was not charged until 17th November, 2004, a period of almost two and a half years. The issue of post complaint delay has been considered in detail in the judgment referred to in the additional written submissions of the parties furnished subsequent to the oral hearing of this case. In his judgment in that case Kearns J. concluded as follows:

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

62. This is a case in which there does appear to have been some degree of what could be described as blameworthy delay. From the making of the complaint in May, 2002, it was not until March, 2003 that the papers were sent to the DPP. There is some explanation for the delay in obtaining all of the statements required by the Gardaí and Detective Garda R. in his evidence outlined the steps he took in relation to this investigation and the other duties that he had. There is no explanation for the fact that it took from March until September of that year to obtain the directions of the DPP. Obviously, the DPP is entitled to take some reasonable time to consider a file but in a case such as this which was after all a straightforward case, one would have thought a decision would be forthcoming more speedily given the fact that it was a child sexual abuse case which already involved pre complaint delay. However I cannot accept that there was prosecutorial delay of significance during the period after directions were received and before late August, September, 2004. I accept the evidence of Garda R. in relation to the steps taken to locate the applicant herein. Whilst there may have been no onus on the part of the applicant to make his whereabouts known to Garda R. it is nonetheless the case that Garda R. made numerous efforts to locate the applicant as described in his Affidavit and in his evidence which I accept and at one stage contemplated the possibility of applying for a European Arrest Warrant in respect of the applicant. For that reason I do not think that there is any blameworthy prosecutorial delay in respect of that period. Nonetheless it is somewhat difficult to understand in the context of the existing delays in this case why, once the applicant was contacted towards the end of August/September, 2004, he was in fact not charged until November. Looking at the period of delay between complaint and charge overall, it appears that a period of twelve months approximately could be attributed to the difficulty of the Gardaí in locating the applicant. Having regard to the evidence in this case, I do not think one could be critical of the Gardaí for not having located the applicant sooner. In those circumstances one must look at the period of delay apart from the period of twelve months I have referred to above. Although I think some part of the delay could be criticised, my overall view of the delay in this case is that it is not the case that one could describe the prosecutorial delay as being of significance.

63. Assuming that I am wrong in coming to the conclusion that the prosecutorial delay in this case is not of significance such that it should be described as blameworthy, then it seems to me that I should consider whether or not the applicant has shown that one or more of the interests protected by the right to expeditious trial has been established to have been interfered with such as would entitle the applicant to relief. The speedy trial rights are those identified in the case of *Barker v. Wingo*. This is not a case in which there has been pre trial incarceration. The question then arises has the applicant suffered any increase in the stress and anxiety which someone in the position of the applicant would undoubtedly have by virtue of any prosecutorial delay. The only evidence in this regard is that contained in the affidavit of Robert Eager, solicitor for the applicant herein. Paragraph 9 of his affidavit dealt with the issue of delay in general and the effect that such delay had. At paragraph 10 he stated as follows:

> "The applicant was born on 20th August, 1928. At the date the case was returned for trial he was seventy seven years of age. The circumstances and length of the delay, taken together with his advanced age, have been such as to cause the applicant considerable anxiety and distress, and a continuance of the prosecution would further exacerbate his suffering to an undue degree."

64. Mr. Eager then went on to complain of prosecutorial delay in the case and he went on to add that he has been subjected to anxiety and distress by virtue the various categories of delay set out in the affidavit. The other issue raised in *Barker v. Wingo* was the extent to which the defence would be impaired as a result of the prosecutorial delay.

65. It does not seem to me having regard to the affidavit of Mr. Eager that there is any evidence of any kind before the court to demonstrate that one or more of the interest to protected by the right of expeditious trial has been so interfered with such as would entitle the applicant to relief. Equally I do not think that it can be inferred by reason of the age of the applicant or the circumstances of the case. In the case of P.M. itself the applicant had deposed in his grounding affidavit as follows:

> "The preferring of the charges initially laid against me and the preferring of the statement of charges has had a profoundly adverse effect on me. My anxiety and worry in respect of the matters alleged have been significantly exacerbated by my apprehension and fear that the lapse of time outlined above has rendered me unable to adduce evidence of an exculpatory nature that, if these offences had been prosecuted with expedition, could have been put before the court of trial."

66. In the present case there is nothing in Mr. Eager's affidavit to suggest that there has been either a significant increase in the stress and anxiety suffered by the applicant or that his defence of these proceedings has been impaired by reason of the prosecutorial delay. Accordingly even if I were wrong in my view that where there was no blameworthy prosecutorial delay of significance, I am not satisfied that the facts of this case meet the test set out by Kearns J. in his judgment in *P.M. v. DPP*.

67. Accordingly I am refusing the relief claimed herein.