

**THE HIGH COURT**

**[2005 No. 1242 J.R.]**

**BETWEEN**

**C. O'B.**

**APPLICANT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**Judgment of Mr. Justice John MacMenamin delivered on the 30th day of March, 2007.**

1. This case was heard immediately after that of *J. A. and the Director of Public Prosecutions* [2005 No. 1344 J.R.], and should be read in conjunction with that judgment delivered on the same day. Both cases relate to a claim for Judicial Review by way of prohibition by reason of delay in a case of sexual assault.

As pointed out in the decision in *A. v. Director of Public Prosecutions* the two applications are, to a degree, connected, in that the prosecutions in question are initiated on the basis of allegations made by the same complainant, M.O'C. The cases of course should be considered separately. The observations, as to the legal principles now applicable outlined in *A.* are common to both cases.

**The Charges**

The charges in the instant case span the period from 18th August, 1985, to 7th August, 1987. The applicant faces a total of six charges of indecent assault and gross indecency against the applicant. The first four of these alleged offences are stated to have occurred at Address A in Dublin. The fifth and sixth offences are stated to have occurred at or near Address B.

**2. The Applicant**

The applicant was born on 2nd June, 1954. He is a company director and former joint owner of a public house in Dublin.

**3. The Complainant**

The complainant was a pupil in a Christian Brothers School. He was born on 8th August, 1971. He entered the school in September, 1984. During the time span in question in these judicial review proceedings he was not in regular attendance at the school.

4. The complainant alleges that as a young person he was abused by a number of persons between the age of eight years until the age of approximately fifteen years. He alleges that the applicant herein abused him on a number of occasions when he was in the region of thirteen to fourteen years.

**5. Evidence**

Four affidavits in total have been sworn by the applicant. A replying affidavit has been filed by the complainant, M.O'C., and affidavits have also been sworn by M.D., a psychologist retained by the Director of Public Prosecutions, Detective Sergeant J.M., and Detective Garda J.D. who had charge of the investigation. While the substance of the evidence will be dealt with in the course of consideration of the particular allegations of prejudice, for completeness this judgment sets out a chronology of events which although slightly adapted, closely reflects that in the case of *A. v. The DPP* as, it is contended, there was an inter-relationship between the two investigations. It is unfortunately necessary for context to repeat certain other elements of the background material also.

**6. Chronology**

4th April, 2002. The complainant met the members of Gardaí and made a complaint against a number of persons not including the applicant herein.

22nd July, 2002. The complainant made his first, more formal statement of complaint. In this statement he made allegations against two individuals named B.C. and W.R..

23rd July, 2002. The complainant made a second statement of complaint. In this statement he made complaints against W.R. and the first applicant, J.A. but not the applicant herein.

Date unknown between 23rd July and 13th November, 2002. The complainant made a third statement of complaint. In this statement he made complaints against J.A. and two other unnamed individuals. This statement (it is accepted) was wrongly dated the 22nd July, 2002.

13th November, 2002. The complainant made a fourth statement of complaint. In this statement he made allegations against a man from Northern Ireland called 'T.', and a man called 'S'.

27th November, 2002. The complainant made a fifth statement of complaint. In this statement he made allegations against C.O'B., the applicant herein and his co-accused of J.A.

27th November, 2002. The complainant made a sixth statement of complaint. In this statement he made complaints against the applicant, C.O'B. The complainant outlines witnesses, routes to locations, places, descriptions of locations where it is alleged abuse occurred and details of the motor vehicle in which the complainant allegedly travelled.

21st June, 2003 Detective Garda M. and Detective Garda G.C. took a further statement from the complainant. Together with the complainant they attended at a number of scenes where it was alleged that the complainant had been assaulted by J.A., and also scenes where it was alleged that the complainant had been assaulted by C.O'B..

27th June, 2003 The complainant made a seventh statement. In this statement he identified an address where he claims one of the incidents involving J.A. occurred.

22nd October, 2003. The complainant made an eighth statement. In this statement he identified the location where alleged assaults involving J.A. took place.

22nd October, 2003. The complainant made a ninth statement. In this statement he clarified the contents of previous

statements.

18th March, 2004. J.A. was arrested and detained. During the course of his detention he was interviewed and denies the allegations made against him by the complainant.

15th April, 2004 The complainant made a tenth statement. This statement related to the applicant herein, C.O'B.

19th April, 2004 The applicant C.O'B. is arrested. He is interviewed by Detective Garda G.C. in the presence of Detective Garda S.D.

31st May, 2004. J.A. furnished a statement to the Gardaí on a voluntary basis.

19th June, 2004. The complainant made an eleventh statement. In this statement he set out reasons why he did not complain earlier.

28th June, 2004. A file was submitted to the respondent.

15th November, 2004. The respondent issued directions although these were unspecified in these proceedings. On 15th November, 2004 Detective Garda J.D. attends at Address A, speaks to the occupants of the house and drafts on paper in sketch form the exterior and interior of the house.

27th November, 2004. The Gardaí met the complainant and put the statement of the applicant J.A. made on 31st May, 2004 to him.

30th November, 2004 Detective Garda D. called to Address D and meets Mr. M.M. of S. D. C Ltd. regarding his knowledge of apartments at Address B.

26th May, 2005. Directions received from the Director to charge both applicants.

27th June, 2005. The applicant C.O'B. was arrested, charged and cautioned. He was released to appear before District Court 46 on 11th July, 2005.

29th June, 2005. The applicant J.A. was arrested for the purposes of charge.

11th July, 2005. The applicant C.O'B. first appeared in Dublin District Court.

20th July, 2005. Evidence of arrest, charge and caution of the applicant, J.A., was given before District Court 46.

12th September, 2005. Book of Evidence served in case of the applicant C.O'B.

29th September, 2005. Book of Evidence served in the case of J.A. He was returned for trial.

10th October, 2005 The applicant, C.O'B., appears before Dublin Metropolitan District Court and returned for trial.

11th November, 2005 The case was first mentioned before the Circuit Criminal Court.

14th November, 2005. General disclosure was furnished to the solicitors of the applicant, J.A.

20th November, 2005 Death of Mr. B.B., partner of the applicant or the relevant person to the charges.

22nd November, 2005. A written request was made on behalf of the applicant, J.A., for specific disclosure. It was accepted that Detective Garda J.M. was unaware of the request until it was averred to by the applicant in these proceedings.

28th November, 2005 The applicant, C.O'B., was given leave to seek an order by way of judicial review.

12th December, 2005. The applicant, J.A., was granted leave for judicial review.

## **7. Co-accused**

While evidence regarding prosecutorial delay will be considered later in this judgment it is necessary now to make a number of observations regarding the manner in which the case came before this Court, again reflecting events in A.

It will be seen from the chronology that the applicant C.O'B. is co-accused with another man, J.A., who as applicant, has also brought judicial review proceedings. Counsel for the respondent has informed the court the reason why these two applications were listed together was because they concern a common complainant, and investigation. The complainant, in the course of statements to the Gardaí, made allegations against a number of persons. In terms of sequence it would appear that he states that the first incidents of alleged abuse related to one B.C. and one W.R. who lived close to his home. Thereafter it is alleged that while he was attending the Christian Brothers School, he was assaulted by the applicant J.A., although he ceased attending school on regular basis either by reason of suspensions, or for other reasons.

The complainant makes a number of allegations of then having been involved in sexual contact with a number of older men in the city of Dublin while still a minor. One of these older men is alleged to be the applicant herein, C.O'B. It has been accepted during the course of these proceedings, that apart from the identity of the complainant, and the overlap in the investigation, there is no other link between the issues the subject matter of these charges and those involving the applicant in the associated case, J.A. As observed in the judgment in *A. v. The DPP* neither in the course of the investigation, nor subsequently, has any new fact emerged linking the cases other than, as indicated earlier. While there is undoubtedly a degree of overlap, it is difficult to see why, this applicant was charged jointly with J.A. where the allegations come within quite a different framework of time and context. This is however a matter for the trial judge.

## 8. Legal Authorities

In the course of submissions counsel for the respondent referred to a number of authorities which have been outlined in more detail in my judgment delivered today in the case of *A. v. D.P.P.* These include *J.K. v. The D.P.P.* (Unreported, Supreme Court, 27th October, 2006) (McGuinness J.); *J.B. v. The D.P.P.* (Unreported, Supreme Court, 29th November, 2006 Denham J. and Hardiman J.); *D.T. v. The D.P.P.* (Unreported, Supreme Court, 25th January, 2007) (Denham J.); and *C.K. v. The DPP* (Unreported, Supreme Court 31st January, 2007) Kearns J. This judgment will seek to apply the principles of law therein outlined.

## 9. Notice to Cross-Examine: Evidence elicited

An application was made by those advising the applicant to cross-examine Detective Sergeant M. and Detective Garda D.

Detective Sergeant M. testified that the complainant first came to see him in April, 2002. At that point he did not seek an explanation as to why he had not come forward before. The purpose of the meeting was for the complainant to outline to him certain alleged events of abuse which had occurred. He did not take a full statement from the complainant and did not attempt to obtain specifics. During the course of the interview the complainant broke down. The Detective Sergeant stated that he allowed the complainant to make his own pace during the course of the interview. He said that he was not the initiator of events, and that the complainant was. Detective Sergeant M. referred to written notes of the interviews with the complainant which are reflected in affidavit.

On behalf of the applicant, Mr. D.McG. Senior Counsel, asked whether Detective Sergeant M. was aware of a letter from Messrs. H. Solicitors who acted on behalf of the applicant's uncle who had initiated sexual abuse proceedings. This was subsequently averred to by the complainant only in these proceedings. The Detective Sergeant indicated that he had been unaware of this letter up to learning of it in the course of this judicial review application.

10. An important aspect of Detective Sergeant M.'s evidence was that he stated that the investigation proper did not commence until after the applicant had furnished his last statement that is on 19th June, 2004. He said that he had not been in a position to commence the investigation earlier, as that, at any point, the complainant could have withdrawn his earlier statements and there would then have been no investigation. Until the complainant had furnished his full story the Gardaí did not know the full picture. The complainant might never have come back. The period of 4th April, 2002 up to 22nd July in that year, was of the complainant's choosing. He did not consider it appropriate to set his own timeframe. He considered that the making of the complaints had been a "huge move" on the part of the complainant and that consequently it was necessary to look at the matter from a therapeutic standpoint up to the time when the complainant made his final statement on 27th November, 2002.

11. The Detective Sergeant accepted that he did not "push" the complainant, but by 27th November, 2002 he considered he had a detailed account which was sufficient information to allow him to go further. While he became aware that Mr. C., one of the two persons identified earlier in the statement had died, he was not concerned that any issue of delay would arise, because of his concern for these "therapeutic aspects" of the case. The Detective Sergeant said that the picture he obtained of the complainant was that he was at the material time a young person without parental control, and it looked to him that he was being "shipped around" as a "rent boy".

The witness accepted that there were no notes of what transpired in the investigation between November 2002 and March 2003. He indicated that he not conducted any further investigation after November 2002, although he obtained certain information with regard to the applicant which, he stated "will not go to the benefit of Mr. O'B.". This matter was not pressed.

The Detective Sergeant accepted that he did not investigate the circumstances regarding of one of the early alleged "perpetrators", B.C. It was put to him specifically by Mr. McG. that he should have been aware that potentially, Mr. O'B. the applicant might have been at the loss of a witness as of the result of the death of Mr. C. The Detective Sergeant stated that he could not answer that. He was not in a position to deal with any statement which the complainant gave to Gardaí later in relation to a complaint and its relationship, if any, to money.

12. Detective Garda J.D. was also cross-examined on his affidavit sworn on 7th April, 2006. He stated that in April, 2003, Detective Sergeant M. handed him five statements made by the complainant. He previously had no prior involvement in the case. He referred to nine hand written pages of investigatory material and notes of interview made by the Gardaí. He accepted that neither W.R., nor B.C., (two earlier alleged perpetrators) had been taxed with the allegations. He testified that he had been unable to obtain details from the Tax Office regarding the type and make of car owned by the applicant C.O'B. in the period 1986. He had tried to obtain these from the local authority but had obtained no response. He was unable also to obtain information with regard to a further perpetrator named "T." on 1st December, 2003. He was unable also to obtain any information on another perpetrator named only by the complainant, "J.", alleged to be a member of the Gardaí. He was unable to identify that person, or another person allegedly engaged in sexual contact with the complainant, nicknamed "F.G.".

It is clear from this evidence that the 'investigation' did not become a reality in the true sense until 19th June, 2004.

## 13. The alleged sequence of events

Prior to dealing with the specific allegations with regard to this applicant it is necessary to deal with other alleged perpetrators who are mentioned by the complainant in the course of his statements. The first in sequence is alleged to have been B.C., the second W.R. The third in sequence was allegedly the applicant J.A. Thereafter, within apparently a quite different framework of time and context, the applicant mentions other men including the applicant C.O'B.

The complainant stated that within this later time frame he was brought to a number of men by a "fellow with red hair" on a once-off basis. He alleged that this red haired man would pick him up on a street in Dublin and bring him to a number of places where he was abused. Sometimes he would receive money from these men but not all the time. He stated he never received money from the red haired man who brought him to these places in the front passenger seat of his car. He furnished a description of this man to the Gardaí but has not identified him further by name or otherwise.

14. The complainant stated that he met the red haired man through another person who owned an old bicycle. He met this latter person walking up High Street in Dublin. He was brought to an address on the Northside of the City in the region of Mountjoy Prison where he was sexually assaulted having been shown pornographic photographs of children.

15. The Gardaí state they have been unable to identify any of these persons, or other persons mentioned in the course of statements. But none of those facts, in themselves constitute prejudice. It is not shown that the absence of any of those witnesses affects the charges against the applicant.

It is now necessary to further consider the charges faced by the applicant.

#### **16. Charges in relation to alleged incidents at Address A.**

As outlined, the applicant first faces four charges that on dates unknown between 8th April, 1985 and 7th April, 1987, he committed acts of indecent assault and gross indecency upon the complainant at Address A.

The applicant points to a number of matters as being instances of alleged actual prejudice. To place these in context, it is necessary to deal with the description given in the book of evidence of these alleged offences.

#### **Background to allegations**

The complainant states that he was introduced to the applicant herein by the "red haired man". He was driven by that man to a part of Dublin where they parked behind C.O'B.'s car, described as a Saab, silver or silvery grey in colour. The complainant stated that he was told to get into the car and did so. He was introduced to the applicant. He stated:

"C. asked me if I smoked and I said I did. He handed me a cigarette, a Marlboro cigarette I think."

The complainant thereafter describes being driven out by Sandymount to the alleged locus. Some background detail is described. He states that the sitting room carpet in the house to which he was brought by the applicant was beige or creamy in colour. The sofa was of a similar colour placed and in the middle of the room. He subsequently drew a plan of the locus for members of the Gardaí. He stated that the applicant put on a gay porn video, rolled a cannabis-joint and they smoked it while watching the video. They went upstairs. The complainant says he was given "poppers" to sniff from a small brown bottle. Thereafter oral sexual relations took place. He alleges the applicant paid him the sum of £10.00. The complainant states that on a second occasion in the same house a further sexual assault took place, not described in any greater detail.

17. The applicant contends that the only 'facts' isolated or identified in the complainant's statement are a description of himself, a reference to two cars, (these being a Saab and a Toyota) and a description of a house in Address A. and an apartment in Address B (the alleged scene of the other offences). He says that he is well known in Dublin due to his previous ownership of a public house known as "---", and that his own personal description and his cars would have been well known. He refers specifically to the fact that the complainant in the course of his statement alluded to a picture of the applicant which appeared in a newspaper some time ago.

#### **18. Civil Proceedings**

The applicant says that the complainant has issued civil proceedings against him, dated 5th June, 2003, seeking damages for assault arising out of the same allegations that formed his complaint to the Gardaí. In that context he refers to a statement made by the complainant:

"If I got money I would obviously use some to enhance my life but I would give a lot away to a charity. I would use some of it to help other people."

#### **19. Prejudice Alleged**

Of particular importance, is the applicant's averment that when he resided in a house in Address A. he lived there with his then partner, B.B. He states that at the time of his swearing a grounding affidavit on 19th November, 2005, Mr. B. was very seriously ill with throat cancer, in palliative care and able to speak only with the aid of a computer. As a result, he says that he was unable to discuss these charges with the applicant. The applicant says that he lived in Address A. with Mr. B., that they travelled to work together and came home together. He would therefore have been an essential witness in his defence in respect of such matters as identifying his movements at the relevant time. Mr. B. ultimately died on 20th November, 2005.

It is contended that there is particular prejudice here because of the description given by the complainant of the interior of the house, the carpet, the applicant's habits and that he used cannabis and "poppers". Not only would Mr. B. have had potential relevance to issues of credibility but also in relation to the core defence issue of whether or not the incidents occurred at all, in the applicant's home in Address A.. Has the applicant established grave prejudice? Could this be cured by warnings or directions? It was not disputed that the death of a witness could in this context constitute prejudice.

#### **Consideration**

The house in Address A. house still stands. The complainant has furnished a sketch map illustrating its interior. Unlike the monastery premises described in *A. v. DPP*, what is in question here is a private house in which, inferentially, there were two residents at the material times. It is alleged that the incidents described took place both downstairs and upstairs. The undisputed evidence before the court is that B.B., as the applicant's partner, resided in the house at the times relevant to these complaints.

In the course of argument counsel on behalf of the respondent relied on the decision particularly of *J.B. v. Director of Public Prosecutions* (combined cases [2004] 1033 J.R. [2006] 81 J.R.) (see the decision in *A. v. D.P.P.*)

In that case Quirke J. declined prohibition in circumstances where a number of witnesses had died and where an apartment complex containing a residence where a number of the offences were alleged to have occurred had been demolished.

The distinction between the premises in the instant case and those in *B.*, is that the applicant in the latter case contended merely that he had friends who visited at evening times and it would now be difficult to contact such persons whose recollection would not be reliable. In *B.* the vast majority of a large number of offences were alleged to have occurred in the privacy of an apartment itself in a complex. It would not be possible to enter the apartment without the consent of the owner, who was the accused. No clear connection was established between the 'prejudice' alleged and the defence. Different considerations arise here.

20. The court must enquire whether the unlikelihood or impossibility of the offences having been committed in such a locus is a reasonable and foreseeable line of defence. Second, whether the absence of Mr. B., a co-resident and partner would, probably, have been of material assistance in dealing with these central issues to any defence.

While there are four charges facing the applicant in relation to incidents alleged to have occurred in Address A., in total the number of incidents was actually two. The complainant's statement in the book of evidence does not set out any further information to fix the times of the alleged offences other than within the general parameters of the charge. No time of day or night is identified. No dates are fixed, nor are there any specific incidents, circumstances, or witnesses outlined which might permit the accused to call other witnesses, or adduce evidence as to credit. The charges largely therefore come within the category of "bare assertion and denial".

## 21. Other potential witnesses or evidence

The unavailability of Mr. B. to give evidence must be seen also in the context of a number of other factors identified by the applicant.

(i) He states that his best friend J.McG. whom he visited very frequently in Wateford died in 1986. It is claimed that this witness would have been available to him in identifying his movements.

22. (ii) It is stated that F.McC., former manager of the Pub owned by the applicant at the time, died in 2003 and again would have been available for the same purpose.

23. (iii) J.N. was the applicant's business partner and friend. He died in 1988. It is claimed that he would have been able to assist the applicant in identifying his movements.

24. (iv) B.C. and W.R. are persons against whom the complainant makes separate allegations of abuse in statements provided to the Gardaí. These gentlemen died in 2002 and 2004 respectively. It is claimed they may have been able to assist in demonstrating the falsity of the allegations made by the complainant.

## 25. Records

(v) The applicant points also to the unavailability of his desk diaries and other records for the periods 1985 to 1987 which would have assisted him in identifying his movements and whereabouts in the relevant period. He states that he burned these documents routinely once every seven years in accordance with tax requirements. Finally it is alleged that the absence of the "guy with the red hair" is prejudicial that person having allegedly brought the complainant to meet the applicant.

## 26. Consideration

With the exception of the absence of B.B. it has not been demonstrated as a matter of probability that the absence of the persons named or identified, or records are of central importance to the charges relating to Address A. Such evidence might, be potentially relevant. But the connection is too remote and not established. It has not been demonstrated that, as a matter of probability such evidence would have been relevant to a core defence or line of defences available to the applicant that is to say a denial that the alleged incidents occurred as and where alleged. It cannot be gainsaid however that if a trial had taken place in a timely manner the applicant might well have seen in a better position to address the charges. (See judgment of Hardiman J. in *J.B. v. D.P.P.*).

27. The applicant says that in the course of the complainant's statement it is alleged he asked the complainant if he smoked and that he gave him a cigarette.

The applicant states that he himself never smoked. However it was not stated in the Book of Evidence that the applicant had smoked a cigarette, but rather that he had given a cigarette to the complainant. It is, however, stated that the applicant and the complainant smoked cannabis together in the house in Address A.

28. The applicant says that he lived in a house in Address A. up to the Autumn of 1986. He states that there are almost 40 houses there, they are all identical in design and in layout. I find these are matters of credit or inconsistency to be dealt with by the trial judge.

A number of further factors are identified as also allegedly coming into play. The complainant describes the cars which he recalls as having been in the possession of the applicant at the time of the alleged offences. It is to be noted that the applicant, in cautioned interviews with investigating Gardaí agrees that he owned cars of these types during the period when the allegations are said to have taken place.

The absence of the witness with red hair is not attributable to the elapse of time. The complainant informed the Gardaí he was not aware of the identity of that person. It must follow from this that the unavailability of this potential witness is not due to the age of the charges against the applicant and therefore does not derive from any delay on the part of either the complainant or the respondent.

It is contended by Detective Garda D. that the applicant's own knowledge and recollection as to his movements and acquaintance and as to which cars would have been parked outside the Pub are as good as any recollection Mr. McC., the former manager would have been able to offer. Similar observations are made in relation to Mr. N. It is pointed out that the applicant, although he contends he has a bad memory, has demonstrated that this is not so, and that when asked in April 2004 about his previous ownership (at times material) of a white Toyota, he was in a position to reply that he had owned such a car. He was able also to give details of the fact that it was a demonstration model, was three to six months old, and was also able to give the date as to its purchase. This was recalled from memory, over a period of approximately eighteen years.

29. The applicant has not demonstrated on the balance of probabilities that B.C. or W.R. would have been in a position to offer evidence either relevant or *beneficial* to the defence, or damaging to the prosecution, or indeed whether they would have been witnesses at all. It is not shown by the applicant that these men or the other persons would as a matter of probability have assisted in his defence. Not every changed circumstance constitutes prejudice.

## 30. B.B. – A Central Issue?

But the absence of B.B., in the context of the other issues I find comes within a different category. The denial that these incidents occurred as alleged is central. So too is the question of location and opportunity. Mr. B. was a partner of the applicant. He lived in the same house as him, at a time when the offences were alleged to have occurred. It is not controverted that he travelled to and from work with the applicant. It has not been established, or even asserted, that Mr. B. would have been in any less control of, or had less access to, the premises in Address A. than the applicant.

Unlike the case of *A. v. The Director of Public Prosecutions*, where other persons jointly lived with that applicant at Address C., it is not suggested that any other person resided with the applicant. Thus, on the evidence adduced the central, sole, co-habitant of a private house – (the alleged *locus in quo*) is deceased.

31. The offences which allegedly occurred took place in private and during a relatively short period. It is not alleged that other persons were in the house at the time. But what distinguishes the instant case from the circumstances in a private house in *A. v. The Director of Public Prosecutions* is the relationship of the deceased witness to the applicant. Perhaps an appropriate analogy in the

instant case may be to the absence through death of a spouse who could have testified in the defence of allegations of crime alleged to have taken place in a family home on two occasions, at times and days unspecified and indeterminate. While factual distinctions as to context may sometimes pose difficulty they must be seen in the ambit of the overall potential, and relevant evidence. Here what is asserted is the absence of a core witness on an issue central to the defence. In other circumstances it might be claimed that an applicant should go further, and establish by way of affidavit, declaration, or statement, what the evidence of B.B. deceased would have been. But reference to the chronology of events bears out the undisputed evidence as to his ill health at the time the matter came before the courts. The date of service of the Book of Evidence (12th September, 2005), Mr. B's death on 20th November, 2005, demonstrate the difficulty the respondent faces in meeting this aspect of the case, either within in the context of actual prejudice not remediable by warnings, or in the context of prosecutorial delay.

I consider that to a sufficient degree of probability the applicant has adduced sufficient evidence to establish prejudice by reason of the death of B.B. which could not be dealt with by warnings or directions by a trial judge. While it may be objected that findings of this nature are, speculative, predictive or reliant upon supposition, the test in each case must be the *degree* of prejudice established, not apprehended. There is here sufficient gravity and proximity to discharge the onus of proof in circumstances where warnings or directions could be of little assistance in obviating the risk of an unfair trial.

The court will grant an order of judicial review by way of prohibition in relation to these charges, by reasons of prejudice having been established, to the requisite degree of proximity and probability which cannot be otherwise remedied.

### **32. Alleged Offences at Address B**

The applicant faces two further charges in relation to a locus stated to be Address B. He is charged that between 1st January, 1986 and 7th August, 1987 he indecently assaulted the complainant, and committed an act of gross indecency with him. Each category of the alleged offences, must be treated separately, and those relating to Milltown Grove in isolation from those allegedly connected to Address A.

#### **Background**

The complainant describes an encounter in early 1986. At that time he states the applicant drove a white Toyota, with some part of the registration number "--". The red haired person referred to earlier called him up to this car (by implication the red haired man was allegedly in the car with the applicant). The complainant accepted the invitation and travelled in the car a two-seater to an apartment which he alleges was in the region of Address B.

The complainant describes there being lavish gardens surrounding the apartment block which was either four or five floors in height. The applicant and the complainant allegedly went to a corner apartment on the fourth floor. He was shown a balcony. He recollects that there was a cat sitting on the balcony wall. He states he also remembered a vase in the apartment by its contents, floral decorations. Thereafter, he says he was taken to the bedroom through one of the doors off the hall and engaged in non-penetrative sexual conduct with the applicant.

The complainant states that he received no money after this encounter although he did receive £10 prior to the other incident earlier outlined. He dates this incident as having occurred early in 1986.

#### **Alleged Prejudice**

In response to this statement the applicant states in affidavit that he "never owned or rented an apartment in the region of Address B.". He points to and relies on the same factors as those outlined earlier, as to deceased friends, acquaintances, and absent records now destroyed.

It is not the function of the court in applications such as this to make findings of fact. But suffice it to say that the averment of the applicant that he never "owned or rented an apartment in the region of Address B." is somewhat delphic. No averment is made as to whether he ever had access to such apartment. No further information is vouchsafed as to his knowledge of any such apartment. It may of course be observed on behalf of the applicant, there is no obligation upon him to provide any further information. He is entitled to rely on his right to silence and other rights. But this evidence certainly does not assist in discharging the onus of proof which devolves on the applicant in this application.

In general, the areas of prejudice relied upon by the applicant have been outlined earlier. The observations made earlier in general are as apposite and relevant to the incidents alleged to have occurred in Address B. as Address A.

The exception, identified however, was the effect of the absence of the late Mr. B.B. It is not open to the applicant in the circumstances of *these* specific allegations to rely, at least to the same degree, on the absence of Mr. B. Clearly the applicant is entitled to state that Mr. B. could have been of assistance in identifying his location and his work times. The same considerations apply in relation to the other potential witnesses including Mr. J.McG. who the applicant says he visited almost every weekend.

But the factors outlined have not been demonstrated to go sufficiently to the core of a defence which the applicant seeks to advance or to any identified line of defence. The alleged circumstances differ. It is not possible, therefore, to conclude that the applicant has engaged with the facts so as to demonstrate that actual and grave prejudice has resulted by these changed circumstances. The issues outlined are, more appropriately to be seen as matters which must be dealt with by the trial judge in the form of warnings or directions to the jury.

33. The context in which it is alleged the offences here took place is a private one. It is not alleged there were any witnesses. It is not alleged that any other potential witness had actual or potential ongoing access to Address B. apartment. Although it is very probable that the complainant may be closely cross-examined as to his stated recollection of the incident and his general credibility, this does not of itself establish prejudice to a sufficient standard.

For the reasons outlined, the court does not consider that any actual prejudice has been established in the context of these two charges in accordance with the standard of proof applicable.

### **34. Prosecution Delay**

Again, for context, it is unfortunately necessary to repeat material recited in *A. v. D.P.P.* The applicant submits that the earliest date on the statement of charges is 8th August, 1985 and the latest 7th August, 1987. Thus, assuming it was possible to have a trial of the applicant within the next term, such a trial would take place in excess of 22 years after the first, and in excess of almost 20 years after the last of the dates when the offences alleged against the complainant are alleged to have occurred.

35. The time scale involved in the investigation has been outlined in the chronology set out earlier in this judgment. A distinguishing

factor between the instant case and the chronology outlined in that of *A. v. The Director of Public Prosecutions* is that in the instant case there has been oral evidence and cross-examination.

36. Nothing has been established in the course of this case to controvert the conclusion formed in *A.* that there has been inordinate delay in this investigation. While, for the best of motives, the Gardaí may have allowed the complainant to dictate the pace of the statements this is hardly a sufficient justification to allow a “drip feed” of statements over a period of two years from 4th April, 2002 to 19th June, 2004. While the motivations may have been for the best, the very gradual provision of evidence by an important single witness to crime over a period of two years is hardly a situation which would be countenanced in the investigation of other serious offences generally. These observations however must be balanced by the reasons which were furnished by Detective Sergeant M. and Detective Garda D. as to their reluctance to press the matter further and in the context of the risks which they saw of the complainant withdrawing his complaints altogether.

37. The facts of the instant case are distinct from those of *A.* also, in light of the specific context in which it is alleged these offences occurred, involving multiple perpetrators, and the alleged complexities caused by the manner in which the complainant asserts he was introduced to the applicant by the agency of an intermediary, albeit unidentified. Even on the best interpretation however, the investigation had a duration of over three years which, *prima facie*, can only be interpreted as inordinate delay.

38. As remarked in *A.*, and has been pointed out in a number of decided cases it is not the role of the courts to act in a disciplinary manner or to adjudicate upon complaints of delay against named Gardaí. Rather the focus must be upon the effects of any alleged delay particularly in terms of the core issue concerning the likelihood of the applicant obtaining a fair trial.

39. The court, again, can only express its concern as to the delay which occurred in this case. However, such delay, absent prejudice, would not be sufficient to justify prohibition. The legal principles applicable in the case in the context of prosecutorial delay have been outlined earlier in *A.* The court again refers to the authorities of *P.M. v. DPP* (Unreported, Supreme Court, 5th April, 2006), *P.M. v. Malone* [2002] 2 I.R. 560, and in particular the observations of Kearns J. in the later case where he observed:-

“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 the applicant will have obtained bail pending his trial. Secondly while he may assert increased levels of stress and anxiety arising from prosecutorial delay, any balancing exercise will have to take into account the length of such blameworthy delay, because if it is a 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.”

40. The fact that the applicant was specifically identified in detail in the statement of the 27th November, 2002 (the fifth statement) as opposed to the first, does not reduce or diminish the finding of the court that the delay was inordinate.

#### **41. A distinguishing factor giving rise to prejudice by reason of prosecutorial delay: applicable to Address A. charges only**

The distinguishing feature however is the death of the late Mr. B.B. The court has already concluded that Mr. B.’s death did, indeed, cause actual prejudice to the applicant in the context of the allegations relating to Address A. Mr. B. unfortunately ultimately died on 20th November, 2005, and thus it might be legitimately concluded that the prosecutorial delay actually resulted in this substantial prejudice. But such delay, and such prejudice, may only be imputed and found in the context of the charges relating to Address A. It has not been demonstrated that the prejudice that took place by reason of the death of B.B. has caused detriment, either in the form of irreparable actual prejudice, or by reason of prosecutorial delay, in the context of the charges relating to the offences alleged to have occurred in Address B. I find that the evidence for such a proposition is too remote.

In this context, the applicant herein (by contrast with *A.*) is not in a position to point to a multiplicity of charges as there is one sole alleged incident at Address B. and two charges in issue. While the applicant may with considerable justification point to other areas where it is alleged some form of lesser prejudice has occurred by reason of the elapse of time, it has not been demonstrated sufficiently that the occurrence of these events constitutes a degree of prejudice in relation to these charges still remaining which cannot be dealt with by directions or warnings of the trial judge.

#### **42. Exceptional Circumstances**

The applicant is not in a position to demonstrate any “wholly or exceptional circumstances” arising in the instant case whereby it would be unfair to put the applicant on trial. While there is no doubt that there is here, as in *A.*, a civil litigation background, it has not been demonstrated that this consideration which appears to have been one present in the mind of the complainant, impinged on the applicant at any time or was used as a method of placing pressure upon him. It has not been suggested that blackmail, improper pressure, or any criminal activity took place.

43. The court will consequently grant judicial review by way of prohibition in relation to those charges relating to Address A. but will decline judicial review in relation to those charges relating to Address B.