

**THE HIGH COURT
JUDICIAL REVIEW**

2002 No. 231 JR

BETWEEN

P.J. (AKA) P.J.C

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

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

1. The applicant in these proceedings was born on 27 January, 1928. He is married to J.M.C. He is retired and has four children. It is accepted and deposed to in the affidavit sworn by the applicant's solicitor that he is currently serving a nine year sentence in respect of other charges of rape and indecent assault on family members. The applicant received this sentence on 26 January, 2001. It was back-dated to 12 May 1999. The applicant was convicted on these offences on 7 December, 2000.

2. The applicant was returned for trial in relation to the present alleged offences on 20 December, 2001. It was found on the basis of the authority of *Zambra v. McNulty and the D.P.P.* [2002] 2 I.R. 351 that the return for trial was defective and the respondent herein obtained an order on 20 December, 2002, quashing the return for trial and remitting the matter to the District Court. However, the applicant has again been returned for trial on 30 June, 2003.

3. As against the applicant there are in the Book of Evidence two charges of indecent assault in relation to Mrs. M.C. and twenty-one charges alleging offences of indecent assault on K.N.C. K.N.C. is a daughter of Mrs. M.C. Mrs. M.C. is married to the applicant's brother, R.C., also an applicant in these proceedings. The allegations therefore refer to Mrs. M.C., the applicant's sister-in-law and K.N.C., his niece.

First complainant – Mrs. M.C.

4. Mrs. M.C. was born on 7 December, 1943. As indicated above, she is the applicant's sister-in-law. She is married to R.C. Senior (hereinafter 'R.C.') who is also one of the applicants. The complaint on foot of which this charge proceeded was made to the Gardaí on 10 June, 1999. It relates to an allegation of indecent assault between 1 July and 30 September, 1972.

5. The applicant apparently first became aware of the allegation on 20 July 2000, when the Gardaí sought his arrest in respect of the allegations made by Mrs. M.C. and then proceeded to interview him in respect of the allegations made by her; and also a complaint made by K.N.C. on 28th September, 1999.

Earlier complaints:

6. The complaints in question and now the subject of these charges were not the first complaints Mrs. M.C. had made to the Gardaí regarding sexual abuse. The evidence disclosed that on 19 December, 1986, Mrs M.C. visited the Gardaí in her locality. On that occasion she made allegations against her brother-in-law, F.C., also one of the applicants. These allegations related to two of her children, W.C. and R.C. Junior (hereinafter 'R.C. Jnr.'). These children were sons of Mrs. M.C. and R.C. W.C. was born on 23 January, 1978 and R.C. Jnr. was born on 29 March, 1975. This complaint was withdrawn on 25 February, 1987, little more than two months after it was made.

7. There is no evidence of any earlier complaints made in relation to the applicant by this complainant.

8. The complaint at issue (i.e. that relating to Mrs. M.C.) states that on a date unknown between 1 July, 1972 and 30 September, 1972, the applicant indecently assaulted Mrs. M.C. The complainant describes as follows an incident occurring in 1972 when her daughter, K.N.C. was four. It was, she alleges, in or around the month of August. She was able to identify the date because she had given birth to her daughter, M. in July of 1972.

9. She (M.C.) states that on a Saturday night she was in their mobile home with her two children. Her husband (R.C.) was in the pub. At around 12 o'clock or 12.30am, the door of the mobile home was flung open. She states that there was a person there with a gun. She was lying in the bed with K.N.C. and M.C., her children. The man with the gun came into the mobile home. She describes the gun as being long, like a rifle. She says she had seen this man in a local village before but did not know his name. He stated he was looking for her husband (R.C.). She asked him what it was about but she said that he would not tell her, and that he just wanted to get her husband. She grabbed the two children and ran past him. She ran over to R.C.'s mother's house to get them out of bed. When they came to the door she asked them to mind the children and that she wanted to run up and get P.J.C., that is the applicant herein.

10. She went running up the road for P.J.C. who lived nearby. He got dressed and was walking back down the road with her. The complainant states that P.J.C. was sort of running and kept saying "*hold on, girlie*". When they got down somewhere between his house and a local public house, which she identified, she alleges that P.J.C. grabbed her and threw her onto the ditch. She was wearing a skirt. It is alleged that P.J. stated to her "*you are too good for my brother [R.]*". He held her down. He then tried to take off her pants. He had her dress up around her waist. She was screaming, sometimes in abusive terms. She knew the applicant was trying to rape her. She punched him in the mouth and bit him in the arm. Then she broke free and ran away. She continued to run until she went back down to her mother in law's house. She then describes the applicant allegedly strolling down as if nothing had happened. She went into Mrs. C. Senior's house and he (the applicant) followed her in. At this point the man with the gun had gone. She states that her husband, R.C., came home at around half past two. P.J.C. allegedly asked him what he had done for a fellow with a gun to be looking for him. He, that is R.C., replied he did not know what he was looking for. She stated that she did not tell R.C., her husband, what P.J.C. had done to her because "*you can't talk to him about things like that*" and because "*he wouldn't believe me if I said anything against his family*". She went on to state: "*we never reported to the police about the man and the gun because when you lived up there (referring to the area in which she was then living with her family) you didn't involve the police in anything.*"

11. Mrs. M.C. is now 58 years of age. At the time of the alleged offence in 1972, she was 26 years of age. At the time she provided the statement, on 10th June, 1999, she was 53 years of age at which point a period in excess of twenty-five years had elapsed since the alleged offence took place.

12. I will mention at this juncture the applicant's comment that it is inexplicable that, when Mrs. M.C. took her daughter K.N.C. to the Garda station in 1986, she made no complaint in relation to any offences committed against herself and that apparently she only

made up her mind to talk to the Gardaí after one of her sisters-in-law, Je.C., made a statement to the Gardaí in 1999. Je.C. is the wife of the applicant herein (P.J.C.). However, the statement in question relates to previous proceedings brought against R.C. and is not part of the evidence herein. The applicant further points out that Mrs. M.C. had previously informed one P.D. and his wife E.D. that another individual (i.e. not the applicant) was abusing their son. Mrs. M.C. also states in her affidavit that when K.N.C. was about 4 years of age she (Mrs. M.C.) questioned her (K.N.C.) in relation to the actions of her grandfather, and K.N.C. reported to her what amounted to an indecent assault by him. Mrs. M.C. told her mother-in-law at that point that she would get the police. I will return to these issues later.

Second complainant – K.N.C.

13. K.N.C. is the second complainant. She was born on 23rd July, 1968. She is a daughter of Mrs. M.C. and R.C. Snr. The applicant in these proceedings faces twenty one charges alleging indecent assault in relation to K.N.C. between the dates 1978 and 1983, at which point the complainant was aged between 10 and 15 years.

14. K.N.C. describes a number of assaults which allegedly took place while she was in bed in her home. P.J.C. allegedly put his hand inside her pants and put his fingers inside her vagina. At the same time he was sexually stimulating himself. These occasions occurred four or five times a year. On one occasion she recollects being downstairs as a child and P.J.C. saying to her *"someday I will get you up in my house and I will show you what a real man is"*. She describes the applicant allegedly fondling her breasts and her sexual organs. She stated *"he used to say never to tell anybody because I would get hurt if I did, that he knew people in the I.R.A. and that they would come and blow my head off if I upset him or any of his family"*.

15. The complainant also describes other incidents of sexual abuse taking place at P.J.C.'s house. On those occasions she went to an outside toilet. These incidents and alleged incidents of a kindred type took place up to the time that K.N.C. was aged 16. K.N.C. describes the applicants saying that when he was having sex with her, the dog would be present. The applicant also allegedly threatened her, saying that if she did not have sex with him he would put the dog on her. Ultimately K.N.C. stated that she resisted the applicant's threats and actually threatened to kill him.

16. K.N.C. also stated that she recollected that when she was about 15 years she started to work in a hair studio. At that stage she went to her G.P., a Dr. Curry; she described abuse taking place although she did not name the alleged perpetrators. Dr. Curry suggested that she should attend the Rape Crisis Centre. K.N.C.'s stated recollection was that she was told she might have to speak to a group and this idea scared her.

17. K.N.C. moved to Leeds on 15th April, 1988. Thereafter she married and has three children in England. Approximately four years prior to the swearing of her affidavit, i.e. in or about 1998, she states she was depressed and went to see a Dr. Geraghty in Leeds where she is now married. He in turn referred her to a counsellor. She was thereafter referred by a further doctor to a Ms. Sue Kane, a counsellor who dealt specifically with sexual abuse.

18. At the time of furnishing her statement, K.N.C. stated she had been attending Sue Kane once a week for a period of three months.

Earlier complaints – evidence not adduced:

19. It will be recollected that the 1986 complaint which is described here and in earlier judgments was made to Sergeant John Keating at S- Garda station. Sergeant John Keating is still alive and a member of An Garda Síochána. He has not sworn an affidavit in these proceedings as to the circumstances of the making and withdrawal of the complaint. This complaint as made by Mrs. M. C. on 19 December, 1986 related to alleged sexual abuse and misconduct on the part of F.C. (P.J.C. was not referred to therein.)

20. On 29th January, 1987, K.N.C. made a statement to Garda Aileen Kavanagh at S-Garda Station wherein she described alleged incidences of abuse by her uncles F.C. and B.C. The statement was withdrawn on 26th February, 1987. This is evidenced by a statement which was furnished by Garda Kavanagh withdrawing the allegations. P.J.C. was not referred to in this statement.

The 1999 investigation

21. In the course of his evidence Detective Sergeant Byrne describes the obtaining in 1999 of twelve statements from various members of the C. family and other potential witnesses. They are contained in the Book of Evidence. He testifies as to how difficult it was for him adequately to convey the complexity of the investigation, having regard to the large number of suspects and the fact that many of the complainants made allegations regarding more than one member of the C. family.

22. Seven investigation files and an overall report were forwarded in March, 2000 by the Chief State Solicitor's Office to the Director of Public Prosecutions. Following directions six members of the C family were arrested in July, 2000 and taken to B- Garda station.

23. On 25 July, 2000 Detective Sergeant Byrne obtained an authority pursuant to s. 42 of the *Criminal Justice Act 1999* to arrest the applicant in Cloverhill Prison (where he was serving a nine-year sentence for rape and indecent assault on family members). He was detained pursuant to s. 4 of the *Criminal Justice Act 1984* at B- Garda station where he was interviewed and the allegations made by complainants were put to him. He denied the allegations.

24. Following this a further file was prepared with attendant documentation and this was sent to the office of the Chief State Solicitor who were then the solicitors for the Director of Public Prosecutions on 8 November, 2000. On 5 March, 2001 directions were received from the office of the Director of Public Prosecutions to charge the applicant with specified offences.

25. In September 2001 the applicant was arrested and charged with offences of sexual assault before Dun Laoghaire District Court. The original return for trial was made on 20 December 2001. The case was mentioned in the Dublin Central Criminal Court on 19 March 2002. On 20 December, 2002, on the basis of the decision in *Zambra v. McNulty and the D.P.P.* [2002] I.R. 351, this return for trial was quashed. The applicant was again returned for trial, lawfully, on 20 June, 2003.

The applicant's grounds

26. The applicant contends that he:

- (a) is being deprived of trial in due course of the law and with due expedition,
- (b) has been significantly prejudiced by the delay in the bringing of these criminal proceedings,
- (c) has been significantly prejudiced by the prosecutorial delay in bringing these criminal proceedings,

(d) has been disadvantaged and not been given any details as to the reason or reasons for the lengthy delay in the making of any complaint against him and any reason prompting the sudden disclosure in relation to these offences,

(e) is unable to call potentially relevant witnesses in his defence,

(f) has suffered specific prejudice. (Particulars of alleged prejudice are furnished. Reference will be made to these below.)

Grounds of opposition

27. In the Statement of Opposition filed on 26 March, 2003 the issue of delay is denied. It is further contended that when the Director of Public Prosecutions does not have proper grounds for charging a person with an offence his failure to do so, and the elapse of time before he is in a position to do so, cannot give rise to a right on the part of the accused person to prohibit a trial on the basis of the defeat of his constitutional right to an expeditious trial. It is further submitted that there has been no delay of such a duration as would render the trial unsatisfactory by reason of that delay alone.

28. It is contended that if there has been delay, the applicant has been responsible therefore, was in a position of dominion over the complainants, and has prevented the making of complaints by threats and intimidation. The allegations of prejudice are denied.

29. In support of the statement of grounds of opposition affidavits were sworn by Detective Sergeant Byrne on 25 April, 2003; Mr. Michael Dempsey, psychologist, on 3 April 2003; Catherine Finn, solr., on 28 August, 2003; K.N.C on 16 June 2003; and Mrs. M.C. on 14 October, 2003. Additionally, affidavits were sworn by Mr. Dempsey on 12 January, 2004 and 26 February of that year. Further affidavits were sworn by Detective Sergeant Byrne on 17 November, 2003 and 1 April, 2004, with an additional affidavit being sworn by Catherine Finn on 19 December, 2003. An affidavit was sworn by Mr. Darragh McCarthy, solicitor, on behalf of the applicant on 5 April, 2004.

Mrs. M.C. – evidence on affidavit

30. In the course of her affidavit sworn on 15th October, 2003 Mrs. M.C., the first complainant, describes psychological and physical abuse by her husband, R.C., and (alleged) assaults and also rape by another one of his brother's, F.C. She describes having lived in terror of the C. brothers including her husband and the applicant. The applicant allegedly claimed he was a member of the IRA and this added to her general fear of him. At the time of swearing of the affidavit she had left her husband R.C. and gone to live in England.

31. She accepted that she had contacted the Gardaí in 1986 regarding sexual abuse which her children had allegedly suffered at the hands of the C. family.

32. She did not mention the abuse perpetrated on herself. She says she was still in total terror of her husband and brothers-in-law. Although she allowed her children to make statements of complaint outlining these allegations, these had to be subsequently withdrawn, she stated, due to the pressure and intimidation under which she was subsequently placed by the extended C. family and especially by her husband.

33. She became aware of a complaint of abuse made by her sister-in-law, Je.C. It had been taken seriously by the Gardaí. She stated this helped her. She says she then found the courage to pursue the complaint of her own. Following being assaulted and struck by R.C. on their 34th wedding anniversary she decided she was finally going to make a stand against the abusive and violent behaviour of R.C. and his family.

34. Mrs. M.C. says she was in a state of total terror and intimidation by her husband R.C., and his brothers throughout her married life. Making a statement to the Gardaí was unthinkable due to the repercussions which would have followed. Her husband himself would not have believed her about the rape. While she had brought her children to the Gardaí to make statements before 1986, they were forced to drop the matter by her husband.

K.N.C. – evidence on affidavit

35. K.N.C., in her affidavit sworn on 16th June, 2003 states that as a result of what occurred she still experiences nightmares about the applicant and his two brothers. She still has the feeling she is dirty and has an obsession with washing herself sometimes using undiluted bleach to wash her hands. She states that:

"all my life I have known nothing but pain and abuse at the hands of P.J., B. and F. C. Their abuse of me commenced when I was three years old and continued until I was fifteen. I was continually told by my three uncles how bad I was and that their sexual abuse of me was what God wanted for me. They told me that everything they did to me was right; that I was dirty, that nobody wanted me and that if I said anything to anyone I would be taken away. I was also told that the IRA would get me and kill me because they knew people within the IRA. As a child all I knew about the IRA was what I had seen on television and all I remember about them and associate with them was death. They put the fear of God into me. If you tell someone something often enough, especially a vulnerable child they will begin to believe it. I began to believe what I was being told; that I was bad, dirty, ugly, no good, dumb and that no one would ever love someone like me. So I gave up. I let my uncles (and my grandfather now deceased) continue to abuse me because I believed everything they told me. As a vulnerable child I was hardly in a position to stop the abuse anyway, even if I hadn't believed them. In hindsight I can now see that my uncles were very devious people always making me believe that if I did not let them do what they wanted everything they told me about being sent away or killed by the IRA would come true. They also threatened to start abusing my younger sisters. I could not let that happen so instead I endured a life of hell and misery. Little did I know that in all my years of pain and suffering my sisters were suffering also. I believe with all my heart that my uncles all knew about each others abuse of me and would discuss it with one another. I can only hope that it is not too late to stop these bad nasty people so that they never hurt anyone again".

Interviews by Michael Dempsey Psychologist

36. The complainants were interviewed by Mr. Michael Dempsey, Senior Clinical Psychologist who furnished reports exhibited with his affidavit and who was also made available for cross-examination.

Mrs. M.C. – the psychological evidence

37. Mr. Dempsey states in his report that Mrs. M. C. alleged that she had been sexually assaulted by the applicant (P.J.C.) on one occasion in 1972 which she described as an attempted rape. She stated that she lived in constant fear of the C. brothers including

her husband. She reported that the applicant P.J.C. had told her he was a member of the IRA and that she felt threatened by him. She stated she had become withdrawn and depressed as a result of the sexual assaults she had experienced from the C. brothers. She further states that she had felt suicidal in the immediate aftermath of the alleged rape by F. C. She had prevented herself from committing suicide by the thought of her children. She had emigrated to England in the year 2000 as she continued to feel threatened by her husband. She explained the absence of complaints regarding the assaults upon herself as being the result of fear of her husband and brothers-in-law.

38. Mr. Dempsey described carrying out tests on Mrs. M.C. on the 'Impact of Events' scale, a self-report measure of personal subjective response to stressful events and a Beck Depression Inventory, a self-report measure of current depression.

39. Mr. Dempsey took the view that Mrs. C. was then "*reporting*" the symptoms of post traumatic stress and severe depression which he states are a common consequences of sexual assault.

40. He states that it is not possible, in his opinion, to separate the contribution of the different alleged sexual assaults by the different alleged perpetrators for her current symptoms. He further states that one reason for the delay in reporting the alleged assaults may be avoidance caused by post traumatic stress.

41. In Mr. Dempsey's view however, the dominant reason for her failing to disclose the alleged sexual assaults until relatively recently was simply fear of the C. brothers. He further stated that in his view she was inhibited in reporting the assaults to the Gardaí by the psychological consequences of the various assaults she allegedly experienced and by her fear of the brothers generally.

42. She finally overcame her fear and reported the alleged assaults to the Gardaí when she heard that her sister-in-law had made such a complaint to the Gardaí. The event which finally precipitated her contact with the Garda Síochána was her husband striking her on her 34th wedding anniversary.

K.N.C. psychological evidence

43. As regards K.N.C., Mr. Dempsey considered that she was experiencing symptoms of post traumatic stress to a moderate/severe degree as a result of the alleged abuse. He also pointed out that it was not possible to separate as a specific contribution to her psychological problems of each alleged perpetrator including her uncle B. The reasons for the delay in reporting the alleged abuse to the Gardaí are the same in both the cases of her uncles P.J. and B.

44. Mr. Dempsey describes K.N.C. describing sexual abuse from her paternal grandfather, her uncle B. the applicant, her uncle F. and her uncle P.J.C. Mr. Dempsey reports Ms. K.N.C. feeling that all three of the uncles referred to (including the applicant) had "power" over her as a child. She stated to Mr. Dempsey that she thought she must be a really nasty human being for this to be happening to her. She thought the alleged sexual abuse was going to occur for the rest of her life. Her uncles used to say that she was there for their pleasure.

45. She stated that she attempted to tell about the sexual abuse in confession but did not receive an adequate response. She stated that she thought of the sexual abuse as being a punishment from God for something she had done wrong.

46. She described nightmares, obsessional behaviour including as to her personal hygiene, involving bleaching her hands with neat bleach. She described spending "*a fortune*" on deodorants and soap to be rid of the smell of her uncles. She described taking a least two baths a day. She also reported obsessive cleaning of her house.

47. Mr. Dempsey described carrying out the Maudsley Obsessional Compulsive Inventory, the Beck Depression Inventory and the Impact of Events Scale. He also states that K.N.C. did not divulge the extent of the abuse to her counsellor Ms. Sue Kane as she felt that she would be too ashamed to state everything that was in her Garda statement to any counsellor.

Consideration of the evidence and application of the legal principles:

48. As in the other cases wherein judgment is being delivered today, I will seek here to set out my application of the principles, as they are identified in the authorities and as they are set out in the case of B.C. wherein judgment was delivered today.

Delay per se

49. The applicant submits that the delay of thirty-two years from the date of commission of the first alleged offence and twenty one years from the latest offence to the earliest trial date is such as to amount to a *prima facie* excessive lapse of time such as to render a fair trial impossible, even in the absence of any specific prejudice.

50. He relies on the statement made by Hardiman J. (dissenting) in the case of *J.O.C. v. Director of Public Prosecutions* [2000] 3 I.R. 480 at p. 504 – subsequently applied by McGuinness J. in *J.L. v. Director of Public Prosecutions* [2000] 3 I.R. 122 and *B.J. v. D.P.P.* (unreported, Supreme Court, 19 December 2003) – to the effect that "apart from the effective lapse of time and the memories of those principally involved, an interval of twenty or more years makes it difficult if not impossible to clarify the surrounding circumstances and to introduce any element at all of undoubted fact with which the statements of the parties can be co-related and tested. The element of hazard are chance which this state of affairs introduces into a trial has been recognised for centuries. The more nearly a serious trial consists of mere assertion encountered by bearer denial the less it resembles a forensic enquiry at all."

51. It is further submitted that the lapses of time are *prima facie* excessive and such that a trial should not be permitted to proceed whether or not it is demonstrated that the capacity of the applicant to defend himself will be impaired (see judgment of Keane J. (as he then was) in *P.C. v. Director of Public Prosecutions* [1999] 2 I.R. 25 at p. 68 and also judgments of Murray J. and Hardiman J. in *P.O.C. v. Director of Public Prosecutions* [2000] 3 I.R. 87 at pages 106 and 118-119 respectively.

52. It is further contended that the delay is further prejudicial to the applicant in the absence of specifics, in that the absence of specifics deprives the applicant of all defences but a bare denial.

53. The court must assess the evidence in the light of the authorities. There is not doubt but that there is significant lapse of time in this case between the date of the alleged offences and the date of complaint.

54. In the case of Mrs. M.C., the complaint relates to an incident which occurred allegedly in 1972, twenty-five years prior to the complaints made on 10 June, 1999. In the case of K.N.C., the complaints in question relate to incidents alleged to have occurred between 1978 and 1983.

55. I do not accept that the lapse of time is such as to constitute delay *per se* sufficient on its own to ground prohibition. Such lapse

of time as exists, and it is indeed unusual, is towards but not at the end of lapses of time which have been countenanced in previous decisions; see, e.g. *S. v. D.P.P.* (unreported, Supreme Court, 19 December, 2000 where a delay from 2000 back to the early 1960's was countenanced).

56. What is the explanation for the delay? The evidence of the complainants indicates fear and intimidation continuing to the present day. There is evidence of classic "*dominion*" exercised by and on behalf of the applicant as identified in *B. v. the D.P.P.* Ultimately the test is whether or not the delay was reasonable having regard to the circumstances; see *S. v. D.P.P.* per McGuinness J. (unreported, Supreme Court, 19 December 2000). See also *Barry v. D.P.P.* per Keane C.J. (unreported, Supreme Court, 7 December 2003).

57. There is evidence here of conduct by or on behalf of the applicant which was specifically motivated to ensure that information regarding complaints of sexual abuse was either stifled at source or if made to the Gardaí, withdrawn under compulsion. In my view therefore the applicant is not entitled to rely solely on delay *per se*.

Prosecutorial delay

58. It is further submitted that there has been prosecutorial delay. The specific chronology of events in this regard has already been set out in the course of this judgment. The applicant was arrested and charged with the offences alleged on 20 September, 2001 and returned for trial on 20 December, 2001, two-and-a-half years after the first formal complaint. As a result of a defective return for trial the respondent obtained an order on 20 December, 2002 remitting the matter to the District Court. The applicant now stands indicted before the Circuit Criminal Court on foot of a return for trial dated 30 June, 2003.

59. The applicant's time for making an application for leave commenced at that point when he was returned for trial on 20 December, 2001. The fact that subsequently, on foot of the *Zambra* decision, it became necessary for the D.P.P. to quash the return for trial and obtain a remittal to the District Court does not in my view, create a situation which commences time running once more for the purposes of reliance thereon in making any contention of prosecutorial delay.

60. The chronology and sequence of events does not differ in any significant way from that described in the case of *B.C. v. the D.P.P. and Judge Brian Kirby* wherein judgment has been given today. For the reasons set out in that judgment, I do not consider that there is any basis for a contention of prosecutorial delay warranting prohibition.

Complainant delay

61. The applicant complains of the delay of twenty-seven years from the date of the alleged offences in respect of Mrs. M.C. and the delay of sixteen years from the date of the last alleged offence in respect of K.N.C. in making a formal complaint. He contends that it cannot be explained by reference to the actions of the applicant. It is further contended that neither complainant was under the dominion of the applicant nor were they psychologically impaired or incapacitated in any way in regard to the making of a complaint.

62. Specific reliance under this heading is placed on the allegation that K.N.C. was in a position to make a complaint of sexual abuse against the applicant B.C. in or around 1983 or 1984. Reference was made to the statement of K.N.C. dated 28 September, 1999 wherein it is alleged she made such complaint in those years. The statement is a lengthy one. No specific reference is made in the course of that statement to any complaint in or around 1983 or 1984. If there was such a complaint there appears to be no record of it.

63. The applicant also refers to the statement made by K.N.C. on 29 January 1987 in relation to allegations of sexual abuse allegedly committed by B.C. and F.C. This was withdrawn on 26 February, 1987 in circumstances where K.N.C. stated that she did not wish to proceed with the prosecution.

64. Reliance was also placed on the complaint made by Mrs. M.C. on 19 December, 1986 regarding allegations of sexual abuse on her two sons allegedly committed by B.C. This was withdrawn on 25 February, 1987. (No reference to the applicant appears in either complainant's earlier statements.)

65. I do not regard the circumstances surrounding the making and withdrawal of these complaints as indicative of full and uninhibited capacity to make a complaint. Indeed my conclusion is the opposite. The evidence which is available and which is now adduced in regard to the circumstances surrounding the withdrawal of the complaints in 1987 is indicative not of capacity but of circumstances amounting to real dominion and conduct in the nature of being oppressive on the part of the applicant and other members of the C. family.

66. With regard to the issue of membership of the IRA, it is deposed on behalf of the applicant that he recalls being a member of the Sinn Féin Cumann in his area for a period of twelve months in the early 1970s. It is denied that he was ever chairperson of this Cumann. It is further denied that he was ever a member of the IRA. The allegations made by Mrs. M.C. and K.N.C. that he would or could call upon the IRA to threaten either complainant or that he would kill them or blow their heads off are denied.

67. In this connection I prefer the evidence of the complainant. The court is entitled to resolve issues of fact and here it seems to me the weight of evidence is in favour of the testimony sworn, directly, by the complainant.

68. Reference is also made to the notes taken by Sue Kane, the counsellor in England. Even disregarding the purely technical point that such notes as exist were not proved in evidence, no specific submission been made as to how, even if proven in evidence, they would or might be relevant.

69. The relationships between Mrs. M.C. and K.N.C. respectively, and the applicant, is one sufficiently close to justify dominion. There is ample evidence of conduct on behalf of the applicant vis-à-vis the complainants, which was sufficient and tantamount to repression, pressure and intimidation. Here the evidence of Detective Sergeant Byrne under cross-examination on 26 November 2004 is relevant. He stated that the conduct of the C. family amounted to a "*mini mafia*".

The affidavit of Catherine Finn, solicitor, regarding Sue Kane, counsellor

70. With regard to the notes of Sue Kane, counsellor, the affidavit of Catherine Finn is relevant. She is a prosecution solicitor in the Chief Prosecution Solicitor's Division in the office of the Director of Public Prosecutions. She deposes that in February 2003, she contacted Sue Kane who was by then a therapist of K.N.C. in order to explore the possibility of taking up counselling notes in respect of K.N.C. or alternatively Ms. Kane making them available to Michael Dempsey, psychologist.

71. Ms. Finn states that sometime later she received a phone call from a Rebecca Gaines who had just been appointed head of the counselling services where Sue Kane formerly worked. She informed Ms. Finn that she, Sue Kane, was no longer employed there. She also stated that due to the specific type of therapy K.N.C. had been receiving at the centre there were no notes in existence dealing

with the matter of delay in making a complaint. She further stated that the thrust or the type of counselling given to K.N.C. was to assist her in dealing with the day-to-day challenges in her life rather than focussing intensely on her past life.

72. Ms. Finn caused Mr. Dempsey to write to Ms. Gaines on 13 August, 2003. This letter is exhibited in an affidavit sworn by him. He received no reply to this and so stated in a letter of 30 October, 2003 where he also says that it would have been helpful to have a report from Ms. Kane.

73. Having regard to the foregoing I do not believe that the evidence establishes that there are notes in existence which would be of assistance to the applicant. Even if there were it seems to me that every effort has been made by the respondent to obtain these notes.

Prejudice

74. It is contended that the applicant was unaware of the complaints at issue until he was questioned by the Gardaí on 25 July, 2000. Detective Sergeant Byrne says that he considers this unlikely.

75. The court is here faced with the difficulty of resolving an issue on the basis of what can only be hearsay evidence in relation to the applicant's state of mind. The applicant is of course entitled to have affidavits sworn on his behalf by his solicitor. They are admissible evidence. But in the circumstances I do not think such evidence as there is before the court is sufficient to allow the court to resolve the matter so as to discharge the onus of proof.

76. The query is further raised as to why no complaint was made by Mrs. M.C. at any stage prior to 10 June, 1989, and no reason offered as to the delay, being a period of approximately twenty-seven years. Similar queries are raised in relation to K.N.C., particularly in the context of her discussions with doctors and counsellors since 1988.

77. The court's conclusions in relation to these matters, as indicated, are that the delay was attributable to the dominion and conduct of the applicant or his brothers. There is a fundamental distinction, on the facts of this case, to be made between discussions regarding abuse between family members, doctors and counsellors on the one hand and making a complaint to the Gardaí on the other. This fundamental distinction, shown in the evidence, demonstrates the actual *incapacity* due to pressure and intimidation of the complainants to make any *sustainable* complaint regarding the alleged abuse. Moreover, in the overall context of the evidence, it may well explain the absence of a coherent Garda investigation prior to 1999.

78. Further submission is made in the context of the complaint of Mrs. M.C. Here the alleged incident is stated to have taken place between 1 July, 1972 and 30 September, 1972 on an identified road. The incident referred to occurred late at night. The evidence is that the road in question is a quiet country road. Neither Mrs. M.C. nor the applicant in their respective statements make reference to any other person being in the vicinity of the road at the time alleged. Indeed the applicant denies that any incident occurred at all. I do not find that the applicant has identified prejudice here in specific, tangible way. The test must be as to whether there is relevant and material evidence. This has not been shown.

79. The allegations made by K.N.C. are alleged to have occurred at her family home and also the applicant's family home. It is contended that the applicant would be prejudiced at his trial in his defence as it would be impossible to clarify at this juncture who was present at either address at any given point in time in respect of the allegations. But no person or persons who might have proved material or relevant witnesses have been identified. Nor has the nature of any such intended testimony been set out. Two consequences flow from this:

1. it is impossible to investigate the whereabouts of any missing witnesses in circumstances where the applicant confines his assertion to a generalisation or speculation; and
2. the applicant fails to discharge the onus of proof of demonstrating prejudice by the absence of material or relevant evidence.

80. A further question is raised regarding the discussion which is stated to have taken place between K.N.C. and Dr. Geraghty in Leeds. The better evidence is that this took place in 1995 and not in 1988 as is alleged. I do not consider there is evidence of prejudice on this point.

81. A further submission is made relating to the fact that the complaint made by K.N.C. to the Gardaí in 1987 related to two of her uncles and did not name the applicant. In my view, the following are relevant points here:

- the statement itself was relatively brief;
- on the evidence, it is unlikely such complaint could have been investigated properly by the Gardaí because it was withdrawn shortly afterwards due to pressure and threats; and
- the absence of any mention of the applicant does not constitute tangible prejudice.

82. Finally while a reference is made, on instructions, to the applicant's absence of memory, a consideration of the documents in the Book of Evidence, and his conduct when questioned, do not appear to disclose such impairment. Insofar as it is necessary to resolve any evidential conflict the court would hold that such evidence that has been adduced by or on behalf of the applicant has not sufficiently demonstrated on the basis of the affidavits, any such memory impairment. Moreover, this contention must be seen in the context of the applicant's contention that no such incidents took place at all in relation to either of the complainants.

83. With regard to the incidents alleged concerning K.N.C. it has not been suggested that there were any alleged witnesses. In those circumstances I do not think the applicant can rely on their absence. While accepting the apt statement that '*absence of evidence is not evidence of its absence*', there is nonetheless an onus upon the applicant to demonstrate that there is actual, specific prejudice. This can only be done on the basis of indicating to the court to the requisite standard that there is relevant and material evidence missing due to the elapse of time, the absence of which would deny the applicant a fair trial.

84. In the broad range of authorities cited in the course of these proceedings evidence of prejudice has been found when the prejudice is specific, i.e. identifiable and particularised. One might instance changes in a geographical location or the internal structure dimensions of furnishing of buildings in which alleged offences occurred. No such evidence has been adduced of any such prejudice in these proceedings. Nor is the generalised evidence sufficient in my view to justify a finding of actual prejudice sufficient to ground prohibition of the applicant's trial.

Decision

85. The application for judicial review by way of prohibition is for the reasons outlined therefore declined.