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Neutral Citation Number: [2006] IEHC 184

THE HIGH COURT

[2005 No. 87 JR]

BETWEEN

L O'N

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Mr. Justice John MacMenamin dated the 1st of March, 2006.

Background

1. By order dated 31st January, 2005 McKechnie J. granted the applicant leave to apply for judicial review for the following reliefs:

(a) an order of *certiorari* quashing the order of return for trial of the applicant

(b) a declaration that the continuation of the indictment as against the applicant was in breach of Articles 5(3) and 6(1) and 13 of the European Convention on Human Rights 1950 and incompatible with the obligations that the respondents owed to the applicant pursuant to s. 3(1) of the European Convention of Human Rights Act 2003

(c) damages pursuant to s. 3(2) of the European Convention on Human Rights Act 2003

(d) a declaration that the said indictment was in breach of the rights of the applicant pursuant to Articles 34.1, 38.1, 40.3.1, and 2 of the Constitution of Ireland.

2. In summary, the grounds, upon which McKechnie J. granted leave in these proceedings were as follows:

1. That the decision of the respondent not to prosecute the applicant on indictment was, once communicated to the applicant following the admitted completion of the Garda enquiries a final and conclusive decision; the respondent had acted ultra vires and in breach of the applicant's constitutional rights and rights under the Convention purporting to reverse the said decision.

2. That the decision of the respondent reversing the decision not to prosecute was in breach of the applicant's right to fair procedures and constitutional justice; in particular that in failing to advise or warn the applicant when he was informed that no prosecution would ensure the investigation by the Gardaí, that the respondent reserved the right to reverse the said decision at any time in the future.

3. That the respondent had acted on foot of an improper policy in purporting to claim unto himself an unfettered right to reverse his decision not to prosecute the applicant when the said decision not to prosecute had been communicated to the applicant following completion of the Garda enquiries; that in the premises the respondent had acted *ultra vires* and in breach of the applicant's right to fair procedures.

4. That in the absence of good and sufficient grounds for so doing, it was not open to the respondent to purport to exercise the power to reverse a decision not to prosecute the applicant when the said decision had been communicated to the applicant following the admitted completion of the Garda enquiries; in the premises the respondent had acted *ultra vires* and in breach of the applicant's right to fair procedures.

5. The decision to reverse (the decision not to prosecute) was an abuse of the process of the court and brought the administration of justice into disrepute contrary to Article 34; further that there was undue delay by the respondent in prosecuting the applicant contrary to Articles 38.1 of the Constitution of Ireland and Articles 5(3)(3) or 6(1) of the European Convention on Human Rights 1950. In the alternative there was undue delay by the complainants in making the complaints which unfairly prejudiced the applicant.

6. That the applicant had as a result of the communication not to prosecute a legitimate expectation that he would never be prosecuted.

7. That a prosecution at this remove from the original decision not to prosecute was oppressive; further that the respondent in having regard to the views expressed to him by relations of the complainants misdirected himself in the exercise of this discretion, in reversing his decision not to prosecute the respondent further misdirected himself and acted *ultra vires.*

3. A full statement of grounds of opposition has been filed taking issue with each of the grounds upon which the applicant seeks to rely.

4. In essence in argument the applicant put forward two grounds as follows:

1. The delay by the prosecution in this case has been excessive and so much so that he has been denied his right under the Constitution to trial of the alleged offences to be heard with "reasonable expedition".

2. That has been a failure on the part of the Director of Public Prosecutions to observe fairness of procedures in reversing his decision not to prosecute.

Background

5. The applicant is a fitter welder and resides in a rural location. He faces a total of 81 counts alleging indecent assault, contrary to common law and contrary to s. 10 of the Criminal Law (Rape) Act 1981. In relation to these complaints there are two female

complainants, namely his relation by marriage, A.G., and S.C. 78 of the counts appertain to A.G. and the remaining three appertain to S.C. The counts on the indictment pertaining to A.G. accuse the applicant of alleged offences the earliest of which is stated to have been committed on 5th January, 1986 and the most recent of which is stated to have been committed on 28th June, 1987. The counts pertaining to S.C. accuse the applicant of offences the earliest of which is alleged to have occurred on 1st May, 1987 and the most recent of which is alleged to have occurred on 30th September, 1987. The complainants were aged between 7 and 10 years at the time of the alleged occurrences.

6. The complainant A.G. made two statements to investigating Gardaí in relation to this matter. The earliest of these two statements appears to have been made on 9th November, 1987. The second of A.G.'s statements was made on 25th September, 2000.

7. The complainant S.C. also made two statements of complaint. The early of these two statements appears also to have been made to the Gardai on 9th November, 1987. A further statement was made on 10th November, 2000. The applicant has been arrested on two separate occasions in relation to the alleged offences. He was first arrested on 11th November, 1987. Having been so arrested he made a statement largely inculpatory in nature to which reference will be made later.

8. The second arrest was effected on 21st August, 2004. On that occasion the charges as set out in the indictment were read over to the applicant and he made no reply. He was released on bail to appear before M. District Court on 9th September, 2004. On that date the District Court Judge issued a bench warrant due to his non-appearance in court. The reason why he did not appear in court on that day was that the applicant had taken a drugs overdose on that morning in a suicide attempt and thereafter had to be hospitalised. On 21st September, 2004 the applicant was brought before a local district court. On this occasion the Gardaí objected to bail and he was remanded in custody.

9. On 11th November, 2004 the applicant was returned for trial to the sittings of the local Circuit Court commencing on 30th November, 2004. On that date counsel on his behalf sought an adjournment so as to allow the applicant to apply to this court for an order set out in the statement of grounds herein. The Circuit Court Judge acceded to this application and the applicant's trial stands adjourned pending the outcome of this case.

10. It is not disputed that at the time of the original complaint in 1987 a fully completed file was forwarded to the Director of Public Prosecutions, or that at that time it was the view of the investigating Gardaí that the offences had been fully investigated and that on 11th November, 1987 the applicant was arrested, made a statement and was thereafter later released.

11. Two weeks after this arrest the applicant by invitation met a member of the Gardaí at a meeting in that Garda's home. He was told that there was a problem with the physical evidence in the case. To the applicant's best recollection he attended at the house of the Garda either at the request of that same Garda or at the request of another member of the force. He says he was informed that the respondent could not subsequently reverse a decision by re-arresting the applicant and charging him and taking any further steps incidental to the institution of criminal proceedings against him.

12. However, that the problem with the physical evidence in the case was not the only issue which gave rise to the decision by the respondent not to prosecute. In that context a letter has been exhibited in these proceedings from Mr. N.L. Legal Assistant in the Office of the Director of Public Prosecutions to the State Solicitor dealing with the matter. This letter dated 26th July, 1989 is headed: "re DPP v. L O'N". Mr. L. wrote:

> "Dear Sir,
>
> > In all the circumstances of the case it is considered that there should not be a prosecution in particular because of the attitude of the G's (that is the family of the first named complainant) and the apparent lack of interest on the part of the C's (the family of the second named complainant) in a prosecution. No further steps were taken regarding the prosecution.
> >
> > From 1988 the applicant lived and worked in the United Kingdom for ten years. Since 1998 he has been living in his home area and working there. At all stages he lived and worked openly in the United Kingdom for the period of time he spent there. He was not aware at any time of attempts made by the Garda Síochána or any person acting on behalf of the respondent to contact him or communicate with him in relation to the offences. The respondents do not contend any such efforts were made.

It will be convenient at this point to set out a brief chronology of events.

> 1. The dates of alleged offences. As shown earlier there are two complainants, one A.G. and secondly S.C. Insofar as A.G. is concerned the earlier offences dated 5th January, 1986 and the more recent 28th June, 1987. Insofar as refers to S.C. the earlier alleged offence is the 1st May, 1987 and the more recent 30th September of that year. They were both young girls at the relevant times.
>
> 2. On 9th November, 1987 A.G. made a formal complaint to the Garda Síochána as did S.C.
>
> 3. On 11th November, 1987 the applicant was arrested and made a statement.
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> 4. In or about this time Garda K. B. noted that a fully completed file had been forwarded to the Director of Public Prosecutions. She expressed the view that the alleged offences had been fully investigated.
>
> 5. On 25th November, 1987 or thereabouts the applicant was informed by a member of An Garda Síochána that there was a problem with the physical evidence.
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> 6. On 1st February, 1988 the file was actually sent to the Chief State Solicitor.
>
> 7. On 26th July, 1989 the Director of Public Prosecutions directed that there should be no prosecution. No explanation has been furnished as to the elapse of time of over one year.
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> 8. During the period 1988 onwards the applicant resided in England and received no communication from the Garda Síochána. He returned home in 1998.

9. On 5th September, 2000 A.G. made a further complaint.

10. On 10th November, 2000 S.C. made a further complaint.

11. In the following two year period, that is 2001 to 2002, Garda K. T. the Investigating Garda was on extended sick leave on two separate occasions.

The file was not passed to any other member of the Garda Síochána, it is said, in view of the stated sensitivity of the case. No colleague of Garda T. took any step in progressing the re-investigation during this two year period. No other explanation is tendered for this elapse of time.

12. By July 2002 Garda T's investigation was complete. The file was sent to the Superintendent.

13. On 23rd October, 2002, the Garda investigation file was received by the office of the Director of Public Prosecutions.

14. On 12th November, 2003 the file was returned from the Director of Public Prosecutions Office. An affidavit regarding this one year time period from 2002 to 2003 has been sworn on behalf of the respondent. Thereafter, there was a request for further information.

15. On 27th December, 2003 this additional information was compiled. No information is available to the court on the nature of the information.

16. On 15th November, 2004 the additional information was forwarded to the Office of the Director of Public Prosecutions.

17. On 9th February, 2004 the Director of Public Prosecutions directed that there should be no prosecution.

18. On 30th March, 2004 the Director of Public Prosecutions Office received a letter from A.G.'s solicitors.

19. On 20th April, 2004 Superintendent S. wrote to the respondent requesting a review of his decision not to prosecute.

20. In July 2004 Garda T. was again on sick leave.

21. On 1st July, 2004 the respondent directed that a prosecution be taken.

22. On 21st August, 2004 the applicant was arrested for the second time.

23. On 9th September, 2004 a bench warrant issued. After the applicant had taken a drug overdose and been brought to hospital.

24. On 21st September, 2004 the bench warrant was executed and the applicant was brought to the District Court and remanded in custody.

25. On 11th November, 2004 the book of evidence was served and the applicant was returned for trial to the sittings commencing on 30th November, 2004.

26. On 30th November, 2004 application was made on behalf of the applicant to have the trial adjourned so as to permit the application to make judicial review proceedings.

13. Turning back to the events of 1987, it is clear from statements contained in the book of evidence that appointments were made for both complainants at the Sexual Abuse Unit in the Rotunda Hospital for the 8th December of that year. On 14th December, 1987 Garda D., according to a statement exhibited, received from the Unit a medical report on S.C. apparently confirming what she had told the Garda. However A.G.'s mother refused to have her medically examined. No report was therefore available. Thereafter Garda D. called to both families on a number of occasions and spoke with the applicant and his wife. Understandably due to time elapse, the court has not been told what transpired in these conversations. The Garda states that on 15th January, 1987 she received a report from a Doctor G. concerning the applicant and the treatment he was receiving. It will also be recollected that the prosecution did not proceed as a result of the "attitude of the G's", and the "apparent lack of interest of the C's". The marriage between the applicant and A.G.'s sister after a lengthy relationship began to founder in 1984. That relationship had commenced in 1980. There was one child of that marriage, born in January, 1984.

14. In an interview carried out for the purpose of these proceedings the first named complainant A.G. told Mr. Michael Dempsey Senior Clinical Psychologist that she was sexually abused by the applicant, her brother-in-law on a number of occasions between the ages of 7 years and 10 years. This abuse progressed over time from kissing, to touching intimately, oral sex and attempted rape. The complainant's sister, who was then married to the applicant, eventually queried her about her husband's behaviour towards her and she disclosed the alleged abuse. She was brought to the Gardaí and she made her first complaint. She contends that when she made her first statement to the Gardaí she did not disclose the full extent of the abuse because she was afraid that if she did something would happen to her parents. The complainant A.G. states that the applicant had threatened her if she told anyone about the abuse that the Gardaí would take her parents away from her. The alleged abuse stopped when she made the first complaint to the Gardaí.

15. It appears that the second complaint made by A.G. was in the year 2000. At that stage she was a fully grown adult aged 28 years having been born on 27th November, 1976. The applicant had been away in the United Kingdom. In the year 2000 the complainant A.G. saw the applicant in a public house and states she became "nauseous and panicky". She had not seen the applicant during that period he was away and thought he was still in the United Kingdom. She reported the matter to the Gardaí the next day. Mr. Dempsey considered that there was position of dominion between the applicant and A.G. In the course of his report Mr. Dempsey describes the effect and consequences of the alleged abuse upon the applicant including self harm, bulimia, depression and post traumatic stress.

16. The second complainant S.C. was born on 10th February, 1977. A friend of A.Gs, she described sexual abuse between the ages of

7/8 years until she was in her tenth year. This abuse ended when A.G.'s sister told her parents about it in 1987. In the report furnished by Mr. Dempsey S.C. describes a sense of "feeling dirty", over protectiveness of her own children, depression, insomnia, poor appetite and post traumatic stress. She states that she eventually went to the Gardaí when A.G. phoned her to inform her that the applicant had returned to their area.

17. However the issue of dominion does not arise for consideration in this case for reasons that will appear below.

18. Those acting for the respondent have filed an affidavit of E. M., a professional officer in the office of the respondent. She states that the Garda investigation file in relation to the later investigation was received in the office of the Director on 23rd October, 2002 (emphasis added) and was assigned for her attention two days later. She was aware that there had been a previous Garda investigation in 1988 and she requisitioned the file concerning that investigation from long term storage. This earlier file has been dealt with by professional officers more senior to herself and it had been decided that there should not be a prosecution in the matter in 1989.

19. Ms. M. deposes that, in considering the file, she understandably found the matter difficult and thereafter reverted to it periodically. Finally she decided that a prosecution would be appropriate. She formulated that view in a submission on the file to a more senior professional officer on 24th October, 2003. However this was one year after the file had been received in the Office of the Director and three years after the complaints made in the year 2000. The more senior officer in the Office of the Director was reluctant to prosecute and made a legal submission to the Director of Case Work in the Office of the respondent on 10th November, 2003. At this point queries were raised by the Director of Case Work with the Gardaí. A letter was sent to the Chief State Solicitor asking for the Gardaí to investigate further. A reminder letter was sent to the State Solicitor on 13th January, 2004. A reply to the respondents query was received from the Gardaí through the State Solicitor on 16th January, 2004. Additional material was considered by the more senior professional officer and the Director of Case Work and a direction was again issued to the Gardaí through the State Solicitor confirming the decision of 1989 that there should be no prosecution. This direction was issued on 5th February, 2004.

20. On 30th March, 2004 a letter was received by the respondent from Ms. A.G.'s solicitors requesting a review of the decision not to prosecute. As a result a review was carried out, stated to be in accordance with the guidelines of the respondent, for that purpose. These guidelines have not been referred to in any detail. Following such a review it was in July 2004 the respondent directed that a prosecution be taken in relation to the charges now contained in the book of evidence. Ms. M. states that the nature of the work in the Office of the respondent is very pressing and that many other matters of a serious nature demanded her urgent attention during the relevant period.

The Law
Prosecution Delay
21. The first legal issue to be considered is that of prosecution delay.

22. It is common case that the Constitution guarantees to every citizen that the trial of a person charged with a criminal offence will not be delayed excessively and that such a trial will take place "with reasonable expedition". The right of an accused to a trial with reasonable expedition is separate from and an addition to his right to a fair trial. The principles which apply in cases of this category are well known and only a brief summary is necessary.

23. On behalf of the applicant Mr. David Goldberg S.C. referred to the decision of the Supreme Court in the United States in *Barker v. Wingo* (1972) 407 US 514 which has been cited in this and other common law jurisdictions as being helpful guidance as the factors which may be properly taken into account in determining whether the delay on the part of the authorities was excessive. It is clear that as a principle all of the of the material circumstances should be taken into account. In T*he State (O'Connell)v. Fawsitt* [1986] I.R. 362 the delay which occurred was almost four years. However at least some part of that delay was accounted for by the absence of the accused abroad or adjournments made on consent of both parties. In that case what is termed "culpable delay" on the part of the authorities may have been significantly less than four years but a decisive factor in prohibiting a trial was that the delay in fact prejudiced the accused in that it deprived him of an important witness.

24. However it is clear that neither actual or presumed prejudice is in all cases essential to halt a criminal prosecution. As was stated by Finlay C.J. in the course of his judgment in *The Director of Public Prosecutions v. Byrne* [1994] 2 I.R. at 326

> "In many instances delay or lapse of time between the date of an alleged offence and the date of a proposed trial may have the consequence of creating a real or probable risk that the accused would be subjected to an unfair trial. This can arise in any of two ways. A court whose jurisdiction is invoked to prevent such an invasion of constitutional rights might be satisfied, from an excessive length of time itself can raise an inference that the risk of an unfair trial has been established as a reality. More frequently (as arose in *The State (O'Connell) v. Fawsitt* [1986] I.R. at 362) the accused was in a position to establish of its facts the real risk of a particular prejudice which could render the trial unfair".

25. Later at p. 245 of the judgment Finlay C.J. added:

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

26. Although Finlay C.J. was in a minority in the view he took of the facts of that case it is clear from the other judgments that the principles of law set out in an issue were accepted by all members of the court.

27. The issue was further discussed in the well known case of *P.C. v. The Director of Public Prosecutions* [1999] 2 I.R. at p. 25 a decision also of the Supreme Court. In his judgment Keane J. (as he then was) stated at p. 68

> "Manifestly in cases where the court is asked to prohibit the continuance of a 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 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, a 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 enquiry 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, where the court is satisfied as a matter of probability that, assuming the complaint to be truthful, the delay in making was referable to the accused's own actions."

28. It is clear therefore that there may be cases depending on the circumstances a trial should not be allowed to proceed on the grounds of delay even though prejudice has not been established.

29. In the case of *P.P. v. The Director of Public Prosecutions* [2000] 1 I.R. at 403 Geoghegan held that where there was quite clearly culpable delay on the part of the Garda authorities in relation to the prosecution of sexual offences which had occurred a long time previously the trial ought to be prohibited even if prejudice was not proved. In the case of sexual offences committed a long number of years previously it is particularly incumbent upon the state authorities not to contribute to further delay.

30. In the course of his judgment in that case Geoghegan J. in referring to the decision of Keane J. in *P.C.* stated with reference to the passage earlier cited:

> "It is clear from this passage that Keane J. is impliedly acknowledging that different principles may apply to blameworthy delay on the part of the prosecuting authorities. Counsel for the applicant argues that there was such delay in this case. I think that counsel for the applicant is clearly correct. It is not acceptable and in my view is a breach of defendant's rights under Article 38.1 of the Constitution for the prosecuting authorities to allow unnecessary delay to occur in a case such as this involving sexual offences committed many years ago. An unnecessarily delayed trial is most unfortunate but it is wholly intolerable that it should be postponed still further due to unnecessary delays on the part of the prosecuting authorities".

31. In assessing the relevance of these principles to the instant case it may also be observed that it was submitted with incisiveness on behalf of the respondent by Mr. Maurice Gaffney S.C. that there had been change of circumstance between the position which obtained in 1987 and that which arose in the year 2000. In that connection he pointed to the fact that the applicants by the latter date were both adults and in a position to testify where as, apparently, at the earlier time there may have been some reluctance so to do. Moreover Mr. Gaffney sought to identify additional information which was contained in the statements made in the year 2000 so as to distinguish the position which existed at that time from the information which was available to the Gardaí in 1987.

32. While I accept that the viewpoint of the applicants may have altered by the year 2000 I do not think that ultimately this is relevant to the matters in issue. What occurred in 1987 is that, as a result of a number of different circumstances and motivations which now can only be a matter of surmise, a decision was made not to proceed with the prosecution. Information was apparently conveyed to the applicant in that same year that there was a problem with the physical evidence. It is clear that A.G.'s mother was not disposed to allow her to be medically examined at that time. This may or may not have been the problem with the physical evidence. More fundamentally however, it is also clear that the respondent has been unable to identify any significant information which was provided to the Gardaí in the year 2000 by either of the complainants which was not, in essence, available to the Gardaí in 1987. While a degree of peripheral detail was provided in 2000 and not provided earlier, the fact is that there was sufficient information available to the Gardaí in relation to the events giving rise to each of the charges in 1987 and that a decision was made at some point between 1987 and certainly by 1989 that the prosecution should not proceed. Nothing whatever happened in this case for a period of 10 years thereafter even though the ingredients of evidence necessary to establish a basis for the charges had been obtained.

33. In the year 2000 A.G. and S.C. made renewed complaints: thereafter there were again unfortunately significant delays. Garda T. states that during the period 2001 to 2002 she was on extended sick leave on two separate occasions. She states in her affidavit that because of the sensitive nature of the investigation it was felt appropriate that the investigation would await her return from sick leave rather than have another colleague assign to deal with the matter in her absence. By July 2002 the investigation file was complete and it was forwarded to the Superintendent in M. requesting the directions to the respondent. No steps were taken in the investigation for a period of more than two and a half years. Thereafter the file was forwarded to the Superintendent in M. It appears that thereafter another significant delay occurred in excess of one year for the file was actually received in the office of the respondent on 1st November, 2002.

34. There would appear to be an internal conflict in the evidence on the part of the respondent in that Garda T. deposes that she became aware that the investigation file was received at the office of the respondent on 1st November, 2003 and was returned with a request for further information on 12th November, 2003. However in Ms. M's affidavit it is clearly stated that the Garda investigation file was received in the office of the Director on 23rd October, *2002* and assigned for her attention two days later.

35. In either instance it appears that a further period of delay occurred between the completion of the file in July 2002 and the decision ultimately arrived at by the office of the Director that there should be no prosecution which was issued on 5th February, 2004 one and three quarter years after the file was completed.

36. On the evidence as found I am unable to conclude that there were new circumstances or new evidence available to the respondent in 2000 which was not available at the time the original complaints were made in 1987. The relevant material upon which a decision was made not to prosecute was available to the Gardaí and to the prosecution authorities and it is clear at the very minimum that a decision not to prosecute was made and communicated on 26th July, 1989.

37. The ultimate decision to prosecute was made on 1st July, 2004 17 years after the original complaints were made in circumstances where no significant alteration in the nature of the evidence available can be identified. I do not think that on any basis such prosecution delay can be countenanced.

38. Even if the evidence were interpreted in a different way it appears undisputable that there occurred an elapse of time of four years between the time of the complaints made in 2000 and the ultimate decision to prosecute in 2004. I am unable to accept the explanation tendered for the fact that no investigation continued for a period of two years while the Garda was on sick leave. It can only be inferred that the matter was simply neglected by others or set to one side. Then it appears that the matter remained in the offices of the Director of Public Prosecutions, albeit with requests for further information until the ultimate decision to prosecute was made on 1st July, 2004. While I do not wish to ascribe blame to any person or official individually it is clear on the basis of the legal authorities cited that the delay which occurred in the prosecution process of over four years is also unacceptable and, I am afraid, must come within the realm of what was described by Geoghegan J. as being "culpable" on the part of the prosecution.

39. In the circumstances, and on any interpretation of the evidence it is unnecessary for the applicant to demonstrate prejudice. I

am satisfied that on those grounds alone the applicant is entitled to the relief which he claims.

Fair Procedures
40. A second facet of the case is whether the reversal of the decisions not to prosecute was made in circumstances which denied the applicant fair procedures. It is clear there were two such decisions in 1989 and February, 2004. The ultimate decision to prosecute was made on 18th July, 2004.

41. In the case of *Eviston v. Director of Public Prosecutions* [2002] I.R. at p. 260 Keane C.J. considered the question as to whether a decision by the Director to reverse an earlier decision not to prosecute was in certain circumstances "fatally vitiated by a want of fair procedure". In dealing with this question Keane C.J. stated at p. 298 of the judgment

> Q "It was undoubtedly open to the respondent in this case, as in any other case to review his earlier decision and to arrive at a different conclusion even in the absence of any new evidence or any change of circumstances other than the intervention of the family of the deceased. The distinguishing feature of this case is the communication by the respondent of a decision not to prosecute to the person concerned, followed by a reversal of that decision without any change of circumstances or any new evidence having come to light. In the light of the legal principles which I have earlier outlined I am satisfied that the decision of the respondent was prima facie reviewable by the High Court on the grant that fair procedures had not been observed."

42. He continued:

> "Whether in the particular circumstances of this case fair procedures were not in fact observed is a difficult question. As I have emphasised more than once in this judgment stress and anxiety to which the presumably innocent citizen is subjected to when he or she becomes the accused in the criminal process should not conceivably be, of itself a sufficient justification for interfering with the undoubted prosecutorial discretion of the respondent. It is, however beyond argument that the degree of such stress and anxiety to which the applicant is subjected is exacerbated by the decision of the respondent to activate the review procedure in circumstances where he had already informed the applicant that she would not be prosecuted and had not given her the slightest intimation that this was a decision which could be subjected to a review in accordance with the procedures in his office. If those review procedures form part of the law of the land, then the applicant would be assumed however artificially to have been aware of that law. The review procedures of the respondent however are not part of the law: they constitute a legitimate and indeed salutary system of safeguards to ensure that errors of judgement in his department which are capable of correction are ultimately corrected. No reason has been advanced, presumably because none exist as to why the applicant was not informed that the decision of the respondent not to institute a prosecution might in fact be reviewed at a later stage. In the result she was subjected to a further and unnecessary layer of anxiety and stress. Reviewing the matter objectively and leaving aside every element of sympathy for the applicant, I am forced to the conclusion that in the circumstances where the respondent candidly acknowledges that there was no new evidence before him when the decision was reviewed, the applicant was not afforded the fair procedures to which in all the circumstances she was entitled. It follows that the requirements of the Constitution and the law will not be upheld if the appeal of the respondent in the present case were to proceed".

43. In the case of *M.Q. Applicant v. The Judge of the Northern Circuit and the Director of Public Prosecutions Respondents* McKechnie J. had to consider facts which in many ways are remarkably similar to those of the instant case.

44. In the case of *M.Q.* information was imparted to the applicant that there would be no prosecution. In the instant case the applicant was informed in 1987 that there was a difficulty with the evidence. He was so informed by a member of the Garda Síochána. It appears that between 1987 and 1989 communications took place between the prosecution authorities and the G family and the C family which led the Director to conclude on 26th July, 1989 that there should not be a prosecution as a result of the attitude of the G's and the apparent lack of interest on the part of the C family. I am satisfied on these facts that having regard to the information imparted to the applicant in 1987, and coupled with the absence of any further action for a period of 13 years there was sufficient basis to permit the applicant reasonably to conclude that there would be no further action on the part of the prosecution authorities.

45. Reflecting the position in *M.Q.* there was a decision to re-open the investigation many years later. No substantial or significant additional material was provided to the prosecution authorities in the meantime. I would adopt the phrase used by McKechnie J. in the course of his judgment at p. 27 of *M.Q.* –

> "it seems to me from an examination of both statements of the victim (here obviously the two alleged victims) that all of the ingredients necessary to constitute the charges ultimately preferred against the accused are contained in her original account. Equally so there was sufficient material to describe at least in an acceptable way the effect which such abuse had had on her. Therefore I do not believe that it can be truly said that the second statement added anything of significant evidential nature to the material already before the D.P.P. … accordingly I cannot see in any of the documentation placed before this court material which would justify in holding that the D.P.P. had new evidence before him in 1998. In my view and on any factual analysis of the papers before me he did not so have. From the legal side I do not agree that more recent case law however relevant or material can be said to constitute new evidence for the purpose of a new D.P.P.'s review."

46. McKechnie J. continued in M.Q. -

> "Based upon the above findings it seems to me that the features which distinguished *Eviston v. Director of Public Prosecutions* [2003] 1 ILRM 178 from *The State (McCormack) v. Curran* [1987] 1 ILRM 225 and *H. v. D.P.P.* [1994] 2 I.R. at 589 equally exist in this case. There is no doubt but that the communication took place and that it was not qualified in any way. Whilst the evidence of new material as a concession in evidence the finding of this court to the same effect must lead to a similar conclusion. In addition in my opinion this case has at least two additional matters of considerable significance which favour the applicant. In the first instance it is clear from the evidence of Sergeant H. cited at paragraph 5(A) above that there was in fact back in 1984 a review of the original decision not to prosecute. Therefore what the D.P.P. did in 1998 constitutes what was in effect second review rather than an original review. Even though I was not referred to the review procedure of the D.P.P. (see p. 188 of *Eviston*) I doubted that procedure envisages a second review. Secondly the time period which elapsed in *Eviston* between the communication of the decision not to prosecute and the issue of the summons was something like three weeks. In the present case it was more than four and a half years for which there is no satisfactory explanation. These factors coupled with the undoubted added stress, anxiety and concern suffered by the applicant in 1999 makes a conclusion in my view almost inevitable that fair procedures were not followed by the Director of Public Prosecutions when making his decision at the end of 1998 or early 1999".

47. While the nature of the communication in the instant case differs it must be seen in the context of the subsequent conduct of the respondent that is in a decision not to proceed further for a period of 13 years. Moreover by 1989 there was actually a decision not to prosecute. In February 2004 a similar decision was made. Thus as in *M.Q*. effectively what took place in this case was a review of the review. No information was imparted to the applicant that the position or the decision was subject to review or reversal. The respondent had no new significant matters of an evidential nature before him. No evidence has been adduced that any fresh or additional material was put before the Director of Public Prosecutions between the second decision not to prosecute in February 2004, and the decision to initiate a prosecution in July of that year. While correspondence may have been received from the solicitor for A.G. and from the Superintendent inviting the respondent to consider reviewing his decision it cannot be contended that such letters or correspondence could, on any reasonable view, be considered as matters of an evidential nature. Finally the time period which elapsed in *Eviston* between the communication of the decision not to prosecute and the issue of the summons was a period of three weeks. In the *M.Q*. case the period was four and a half years for which there was no satisfactory explanation. The delay in the instant case between the date of communication in November 1987 and the arrest and charge of the applicant in the year 2000 is in the order of 13 years. Having regard to the circumstances therefore it seems to me that this case comes within the category of exceptional cases envisaged by *Eviston* where because of the nature of the communication and conduct an issue of fair procedures arose. Having regard to the similarity of facts I consider that the authority of *M.Q.* should be followed in this case. The facts of the instant case are clearly distinguishable from that of the case of *Cyril Hobson v. The Director of Public Prosecutions* Peart J. 16th November, 2005, where it is quite clear from the judgment that there was before the Director of Public Prosecutions a substantial quantity of new evidence which led him to reverse his decision. The instant case therefore closely resembles *Eviston* and *M.Q*. on its facts but does not resemble *Hobson* on that decisive issue. An additional factor which cannot be ignored in the consideration of stress and anxiety is the uncontroverted evidence that on 9th September, 2004 the applicant took a drug overdose in an attempt to take his own life and as a result was hospitalised.

48. In weighing these features therefore I conclude that in the instant case the applicant was entitled to fair procedures are entitled to be notified and make written submissions on the issue as to whether the respondent should reverse the decision not to prosecute and was denied that right.

49. Having regard to the circumstances I consider that the applicant is entitled to an order of *certiorari* quashing the order of return for trial both on the grounds of prosecution delay and the want of fair procedures on the part of the respondent in reversing his decision not to prosecute.