Neutral Citation Number: [2005] IEHC 103

THE HIGH COURT

[2003 No. 499 JR]

BETWEEN

P. O'C.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Ms. Justice Finlay Geoghegan delivered on the 11th day of March 2005.

1. By order of the High Court (Peart J.) of the 7th July, 2003, the applicant was granted leave to apply for reliefs by way of judicial review which seek to restrain the respondent, his servants or agents from further proceeding with the prosecution of the applicant on the alleged charge in the indictment on Bill No. CC 121/98 in which it is alleged that the applicant on a date unknown between the 1st April, 1982, and the 9th June, 1982, (both dates inclusive) at a named primary school did assault one E, a female, contrary to common law as provided for in s. 10 of the Criminal Law (Rape) Act, 1981.

2. Leave was granted upon the grounds set out in the statement of grounds. The primary ground is that the applicant is unable to obtain a fair trial by reason of the passage of time between the date of the alleged incident and the date of trial. At the leave date the trial had been fixed for the 7th January, 2004, which was approximately 21½ years after the date of the alleged incident.

Delay by applicant

3. A statement of opposition dated the 10th February, 2004, was delivered. Paragraph 1 of the statement of opposition states:-

> "The book of evidence was served on the 15th day of July 1998 and on the 5th day of October, 1998, the Applicant was returned for trial to the Central Criminal Court. Accordingly, the Applicant has not moved promptly and/or within the time provided by the Rules of this Honourable Court for seeking Judicial Review. He has not explained the delay in failing to seek the relief sooner and nor has he sought an order extending the time for the bringing of these proceedings. For these reasons, this Honourable Court has no jurisdiction and/or ought not to extend the time for seeking of the relief sought."

4. Counsel for the respondents relied upon O.84, r.21(1) of the Rules of the Superior Courts, 1986 and submitted that in the absence of any explanation by the applicant for the delay in commencing these proceedings this court should not extend the period within which the application may be made. Order 84, rule 21(1) of the Rules of the Superior Courts, 1986 provides:-

> "An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months when the relief sought is *certiorari*, unless the court considers that there is good reason for extending the period within which application shall be made."

5. As appears, the above rule relates to an application for leave to apply for judicial review. Such application was made as is permitted *ex parte* to Peart J. and he granted leave. The respondent did not apply to set aside the *ex parte* order nor to appeal same to the Supreme Court. This court is now considering the application for judicial review which has been brought pursuant to the Order made by Peart J. Accordingly this court has jurisdiction and it does not appear that the applicant requires any order of this court extending the period within which the application may be made. Order 84, rule 21 (1), in so far as it refers to an extension of time, applies to an application for leave and not to the subsequent application for judicial review where leave has been granted.

6. At the hearing, Counsel for the respondents also submitted that this application should not now be entertained, or in the alternative, not granted by reason of the applicant's delay in bringing same, in reliance in particular on the decision of the Supreme Court in *De Róiste v. The Minister for Defence and Ors.* [2001] 1 I.R. 190. In that case the Supreme Court decided that an applicant in judicial review proceedings may be precluded from pursuing his application or disentitled to relief by reason of delay in commencing same. However, the following important distinction appears to exist between considering the issue of delay by an applicant at a full hearing and at the leave stage.

7. On an application for leave the onus is on the applicant to show that he is applying "promptly" and within the time limit specified in Order 84, rule 21. If he is not so applying, then the onus is on him to establish that there are good reasons for which the court should extend the period within which the application for leave may be made. However, once leave is granted (without any reservation of the time point), then delay only becomes an issue if an application is made to set aside the leave or there is an appeal against same or (as has been done in this case), the respondents object to the application being pursued or the relief granted by reason of the delay by the applicant in bringing the application. Where this latter objection is made, the onus would appear to be on the respondent to establish that the delay in bringing the application is such as to disentitle the applicant to pursue the application or to obtain relief to which he might otherwise be entitled. This approach does not mean that the court ignores O. 84, r. 21 in considering the issue of delay. The court will have to have regard to the obligation under the Rules of the Superior Courts on an applicant to move promptly and within the time limits as specified. However, the court is not considering simply whether there exist reasons for which the time for making the application for leave should be extended. It is exercising a much wider discretion.

8. Counsel for the applicant did not dispute the applicability of the principles in *De Róiste v. The Minister for Defence and Ors.* [2001] 1 I.R. 190, but made submissions on the facts and invited me to follow the approach of Gilligan J. in *K(S) v. Director of Public Prosecutions* (Unreported, High Court, Gilligan J., 26th February, 2004).

9. Whilst the applicant has sought several reliefs, as the trial is before the Central Criminal Court, the relief to which the applicant may establish an entitlement is an injunction restraining the respondent from continuing with the prosecution at issue in these proceedings. No point was taken on his behalf that the approach of this court to his delay in commencing these proceedings should differ in any way by reason of the fact that the relevant relief is an injunction rather than an order of *certiorari* or prohibition. It appears to me to correct that no such distinction was made.

10. In those circumstances I consider that I am bound by the decision of the Supreme Court in *De Róiste v. The Minister for Defence and Ors.* [2001] 1 I.R. 190 and insofar as the approach of Gilligan J. in K(S) v. Director of Public Prosecutions (Unreported, High Court, Gilligan J., 26th February, 2004) may differ from that in *De Róiste*, I should not follow same.

11. *De Róiste v. The Minister for Defence and Ors.* [2001] 1 I.R. 190 had a number of special features. The decision sought to be challenged had been made 29 years ago. At the leave stage in the High Court an order was made granting leave and extending time

to that date, but Geoghegan J. in the order granted "liberty to the respondents to argue the time point at the hearing of these proceedings".

12. The respondents in the statement of opposition alleged that the applicant had been guilty of gross delay and that they had been prejudiced in their capacity to defend the claim. Subsequently, the High Court (Kinlen J.) ordered that a preliminary issue on delay be heard. The High Court (McCracken J.) dismissed the applicant's claim. His decision appears to have been primarily based upon the well established principles relating to "inordinate and inexcusable delay" applicable to all types of proceedings.

13. On appeal, the Supreme Court considered the appeal both in relation to the general principles relating to "inordinate and inexcusable delay" applicable to all types of proceedings and the time limits relating to judicial review proceedings. Keane C.J. dismissed the appeal primarily by reference to the general principles applicable to "inordinate and inexcusable delay". Denham J. and Fennelly J. also dismissed the appeal but on the basis of principles pertaining specifically to delay in judicial review proceedings.

14. In this application no claim of "inordinate or inexcusable delay" was made. Hence it is the judgments of Denham J. and Fennelly J. which are most relevant.

15. Whilst there are some differences of approach in those judgments, Fennelly J. states that he fully agrees with the analysis of the principles by Denham J. There is one such difference of approach of direct relevance to the submissions made in this case. Counsel for the respondent in this case submits that, in the absence of an explanation or reasons proffered by the applicant for his failure to apply promptly, this court must exercise its discretion by refusing to entertain the application for judicial review. She makes that submission in reliance upon decisions of the High Court in *Solan v. Director of Public Prosecutions*. [1989] I.L.R.M. 491, *O'Donnell v. Dún Laoghaire Corporation (No. 2)* [1991] I.L.R.M. 301 and *Connolly v. Director of Public Prosecutions* (Unreported, High Court, Finlay Geoghegan J., 15th May 2003). The latter is a decision which I gave in which I followed the other two decisions.

16. I have concluded that whilst there is some support in the judgment of Fennelly J. for this narrow approach, it is not to be found in the judgment of Denham J. In accordance with her analysis (with which Fennelly J. agreed), there is an obligation on the court to consider all the circumstances of the case. At p.208 she stated:

> "In analysing the facts of a case to determine if there is a good reason to extend time or to allow judicial review, the court may take into account factors such as; (i) the nature of the order or actions the subject of the application; (ii) the conduct of the applicant; (iii) the conduct of the respondents; (iv) the effect of the order under review on the parties subsequent to the order being made and any steps taken by the parties subsequent to the order to be reviewed; (v) any effect which may have taken place on third parties by the order to be reviewed; (vi) public policy that proceedings relating to the public law domain take place promptly except when good reason is furnished. Such list is not exclusive".

17. Accordingly, it appears that whilst this court should have regard to any explanation offered by the applicant for a failure to apply promptly or any absence of such an explanation as one of the relevant matters, it should not refuse to entertain the application for judicial review or refuse relief simply by reason of a failure to offer an explanation for the relevant period of delay.

18. Applying the above principles to the circumstances of this case, the following are the matters which I consider should be taken into account when deciding the objection of the respondents on grounds of the applicant's delay.

> (1) The relief which the applicant seeks is of the utmost importance to him. It relates to a trial yet to take place. He alleges that there is a real risk of an unfair trial and in that sense a potential breach of his rights under Article 38.1 of the Constitution.
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> (2) The applicant is charged with a single count of sexual assault alleged to have occurred in May/June, 1982.
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> (3) The applicant was returned for trial on the 5th October, 1998, in respect of this charge (in relation to complainant E) and charges of sexual assault in relation to four other complainants (A, B, C and D).
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> (4) The trial in respect of the charges relating to all five complainants was first listed for hearing on the 22nd February, 1999. On the 23rd February, 1999, due to publicity, an adjournment was sought and obtained.
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> The matter was re-listed for hearing on the 15th November, 1999. On that date the indictments were severed and the trial proceeded in relation to one count of indecent assault in respect of complainant A. Following a nine-day trial the accused was acquitted on that charge.
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> (5) A trial proceeded on the 24th January, 2000, on the charges in relation to complainant B. In the course of the trial the jury had to be discharged and the trial was re-fixed for hearing on the 22nd May, 2000.
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> (6) On the 27th March, 2000, the trial proceeded in respect of two counts of sexual assault in respect of complainant C. The applicant was convicted.
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> (7) On the 22nd May, 2000, a new trial commenced in respect of the counts pertaining to complainant B. The applicant was acquitted of one count of rape and convicted on counts of sexual assault. At the commencement of this trial the applicant made an application to the trial judge "to stay the indictment". This was refused by Finnegan J. (as he then was).
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> (8) On the 26th June, 2001, the trial in respect of complainant D was listed for hearing. At the commencement of that trial the applicant applied successfully to Kinlen J., upon grounds of delay, to quash the indictment on the two counts of sexual assault.
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> (9) The trial in respect of complainant E on one count of sexual assault, the subject matter of this application, was listed for hearing on the 10th June, 2002. No judge was available. The matter was re-listed for hearing on the 12th January, 2004.
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> (10) The applicant was granted leave to appeal against the decision of Finnegan J. of the 22nd May, 2000. Judgment in that appeal was given by the Court of Criminal Appeal on the 27th January, 2003. The appeal was dismissed. The Court upheld the view of the trial judge that he had no jurisdiction to make the order sought at the commencement of the trial. The court expressed agreement with the principles set out by Finlay C.J. in *(The State) O'Connell v. Fawsitt* [1986] I.R.

362 and in particular referred to the passage in this judgment at p. 379:-

> ". . . . I am satisfied that if a person's trial has been excessively delayed so as to prejudice his chance of obtaining a fair trial then the appropriate remedy by which the constitutional rights of such an individual can be defended and protected is by an order of prohibition. It may well be that an equal remedy or alternative remedy in summary cases is an application to the Justice concerned to dismiss because of the delay. In the case of a trial on an indictable charge, however, I am not satisfied that it is correct to leave to the trial judge a discretion as to whether, as it were, to prohibit himself from letting the indictment go forward or whether to let the indictment go forward. A person charged with an indictable offence and whose chances of a fair trial have been prejudiced by excessive delay should not be put to the risk of being arraigned and pleading before the jury."

(9) In March, 2003, the Court of Criminal Appeal issued a certificate in respect of the above decision pursuant to s. 29 of the Court of Justice Act, 1924 on a point of law of exceptional public importance. At the hearing before me I was informed that such appeal had not been heard in the Supreme Court.

(10) The application for leave herein was made on the 7th July, 2003. The applicant has offered no explanation on affidavit as to why he did not apply prior to that date.

(11) The respondent herein has not asserted any prejudice by reason of the applicant's delay in seeking leave herein.

19. The first issue is the date from which I should consider that the applicant's obligation to apply promptly, arises. The respondents contend that it is the date of return for trial. On the particular facts of this case it appears that the more appropriate date is the date upon which the indictments were severed i.e. 15th November, 1999. It is only from that date the applicant was aware that he was facing a separate trial on one count of indecent assault in respect of complainant E.

20. The next question is what, if any, explanation and/or justification has been offered by the applicant for the failure to apply for leave between that date and the 7th July, 2003. As already stated, no explanation on affidavit has been offered by the applicant which is a factor which I should take into account.

21. Counsel on his behalf submitted, by way of justification, the uncertainty relating to the jurisdiction of a trial judge to entertain an application to stay an indictment by reason of delay at the commencement of a trial prior to the decision of the Court of Criminal Appeal of 27th January, 2003, and in particular the fact that one such order had been made by Kinlen J. in 2001, subsequent to the refusal of Finnegan J. in 2000, in respect of charges against this applicant. I consider those facts to be of some justification in respect of the period up to and including 27th January, 2003.

22. Counsel for the applicant also sought to rely upon the certificate obtained pursuant to s. 29 of the Court of Justice Act, 1924 as justifying the period up to and including the 7th March, 2003. I do not consider this to justify the further period. Following the decision of the Court of Criminal Appeal, it must have been clear to the applicant and his advisors that if they wanted to prevent the trial fixed for January, 2004, on the count pertaining to complainant E, that an application had to be made by way of judicial review, as even if a certificate were obtained any appeal was unlikely to be heard and determined before the trial date.

23. The overall position therefore appears to be that the applicant was obliged to apply promptly following the severing of the indictments in November, 1999. There is justification for his failure to apply up to and including the 29th January, 2003, but not thereafter. The obligation to apply promptly following the 29th January, 2003, cannot be considered to have been fulfilled by applying for leave on the 7th July, 2003. Further, there is no explanation or justification for the further period.

24. Against this delay and failure to apply promptly must be balanced the fact that the applicant applied approximately six months in advance of the trial; the seriousness of the issue raised i.e. a potential trial in breach of the applicant's constitutional right to a trial in due course of law; the determination by the Court of Criminal Appeal that this issue must be determined by way of judicial review rather than at the trial; the absence of any prejudice alleged by the respondents by reason of the applicant's delay and the fact that the respondent did not seek to set aside the order granting leave and raised the delay point in a notice of opposition filed on 10th February, 2004, i.e. in excess of six months after the seven-day opposition period envisaged in Order 84 rule 22. The overriding obligation of the Court to exercise a judgment as to whether, in its discretion on the facts of the case, the balance of justice is in favour of or against the proceeding of the case or application. See *Primor PLC v. Stokes Kennedy Crowley & Ors.* [1996] 2 I.R. 459 per Hamilton C.J. at p. 475:

> ". . . even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether , in its discretion , on the facts the balance of justice is in favour of or against the proceeding of the case".

25. On the facts of this case, considering all the facts set out above I have decided that the balance of justice is in favour of permitting the application to proceed.

Cause of delay in making complaint

26. The alleged incident giving rise to the charge is stated to have occurred between April and 9th June, 1982. The complainant first made a formal complaint on the 12th June ,1998. The book of evidence was served on the 15th July, 1998 and applicant returned for trial on the 5th October, 1998.

27. It is accepted that this is a case where there is no prosecutorial delay. The further periods of delay occurred by reason of the events set out above. At the date of the application for leave herein the trial had been fixed for January, 2004. The applicant would have faced, at that time, a trial in excess of 21 years after the date of the alleged incident.

28. Counsel for both parties submitted that this Court in considering this application should follow the approach set out by the Supreme Court and in particular in the judgment of Keane J. (as he then was) in *P.C. v. Director of Public Prosecutions* [1999] 2 I.R. 25. The only difficulty was that counsel differed in some respects as to what is that approach.

29. Counsel were in agreement, however, that this decision and the other relevant decisions of the Supreme Court require this Court in an application such as this, where there is no prosecutorial delay but the complainant has delayed for a very significant period of time (approximately sixteen years) in making the complaint, to consider whether, as a matter of probability, her delay in making the complaint was excusable by reference to the effect on her of the alleged incident or the nature of the applicant's relationship with her. Further, that the Court should assume, in considering such issue, that the incident as alleged by the complainant occurred.

30. At the date of the alleged incident the complainant was twelve years old. She would have been thirteen in July, 1982. She was in sixth class in primary school. The applicant was a teacher in the same school but never of the complainant's class. The applicant ran an athletic club associated with the school. The club used the school premises and in particular the school hall on a Saturday morning. The complainant states that in April or May, 1992 she went to Santry stadium with the applicant, other teachers and the running club. She alleges that on the following Saturday morning she went down to the school to join the running club. The applicant was the only teacher present. She alleges that after the other boys and girls had left, the applicant asked her to stay back to fill in the form to join the running club. He did not give her forms but instead reprimanded her for behaviour, with others on the bus coming home from Santry a few days previously, and threatened to tell the school principal and her parents about the behaviour. She states she became upset and in particular knew she would be in trouble at home if there was such a complaint. She commenced crying. He then took her to the school library and pulled down the blind and perpetrated the alleged abuse.

31. The complainant alleges that the applicant approached her in school in the week following her Confirmation and attempted to pull her towards him by the Confirmation medal and broke the chain. No other contact is alleged.

32. The respondent in accordance with current practice by a letter from the Chief Prosecution Solicitor requested Dr. Melissa Darmody, Psychologist, to assess the complainant and prepare a report regarding:

> 1. The nature of the relationship between the applicant and the complainant having regard to the issue of dominance
>
> 2. The effect, if any, which the alleged offence had upon the complainant
>
> 3. What reasons existed for the complainant's failure to make a complaint to the Gardai at an earlier date
>
> 4. Whether her failure to come forward earlier was referable in any way to the effect of the alleged assaults of the applicant or any of his actions and/or the nature of the applicant's relationship with the complainant
>
> 5. Whether the delay in coming forward was reasonable in the circumstances.

33. Dr. Darmody has sworn an affidavit in these proceedings in which she has exhibited her report. In that she sets out the above matters upon which she was asked to report and states that she reviewed the book of evidence and had three meetings of approximately one hour each with the complainant. In her affidavit Dr. Darmody states that the report accurately reflects the details provided by the complainant and her conclusions in relation to the assessment. The conclusion of Dr. Darmody in her report is:

> "After reviewing the book of evidence and meeting [the complainant] on three occasions it is my professional opinion that it is reasonable that [the complainant] did not make a formal statement to the authorities until June 1998".

34. Undoubtedly, Dr. Darmody was asked to express a view on this issue at question No. 5. However whilst this Court will of course have regard to Dr. Darmody's professional opinion as to whether it was reasonable, that is not the issue which this Court must decide. This Court must determine, as a matter of probability, whether the delay in coming forward was caused by or excusable by reference to the nature of the incident alleged, its effect on the complainant, or the nature of the relationship between the applicant and the complainant. The court would have obtained more assistance from Dr. Darmody's assessment if she had reported expressly on the matters set out at points 3 and 4 above by the Chief Prosecution Solicitor.

35. Dr. Darmody, after an initial history, sets out a history of events. In such, after describing the alleged incident and subsequent meeting (where he pulled her Confirmation medal) stated to be within the same week, she states that the complainant then left the running club and the applicant did not have access to her and there were no further abusive events. One further brief meeting occurred some months later when the applicant called at her home to sell encyclopedias. The complainant is recorded as stating she opened the door to him and ran away with fear and was hit by her mother for being rude to him.

36. Dr. Darmody reports on a difficult relationship between the complainant and her mother, due to the violent nature of which the complainant did not consider she could confide in her mother. However when the complainant was approximately fifteen years old i.e. 1984/85 her mother approached her regarding abuse by the applicant. The complainant's mother had heard gossip of alleged abuse by him of girls in the school and asked the complainant whether she had suffered this abuse. The complainant then disclosed the alleged incident to her mother. She states she was embarrassed at the time and was unclear as to what was appropriate action. Her father was also told and made comments which were perceived to be disbelieving or minimalising of what had occurred.

37. At the end of the section of the report setting out the history of events Dr. Darmody states:

> "From the time [the complainant's] mother approached her until 1998 she believed [the applicant] to be in prison for offences to other girls. It was not until 1998 that [the complainant] become aware that [the applicant] was not in prison and that she became clear of the appropriate action to make an official statement. In 1998 [the complainant] was supported by her mother to make an official statement to the authorities, which she did on June 12, 1998. It was not until this time that [the complainant] was informed enough to know how to make a complaint and felt in the appropriate mental state with the support of her partner and her mother to make an official statement to the authorities"

38. In the next section of her report under a heading of "effects of alleged offences" Dr. Darmody reports on the effects on the complainant as described by the complainant. Dr. Dermody does not make any professional assessment of the effect on the complainant in relation to her ability to report the matter in this section of the report.

39. Dr. Darmody summarises, under a heading of "Delay in reporting alleged offences", the position as she perceived it. She states:

> "When the alleged abuse happened [the complainant] was a child and [the applicant] was a teacher in a position of authority over her. [The applicant] also used the fear [the complainant] had of her mother as a way of keep the abusive event "a secret". [The complainant's] relationship with her mother was violent and unsupportive and left [the complainant] in a position of fear in relation to disclosing the abusive events.
>
> When [the complainant] was fifteen her mother approached her and asked if she has been abused by [the applicant]. At this time [the complainant] stated she felt her mother believed her but that her father made comments that made her felt disbelieved. During this time [the complainant] was not encouraged by the adults in her life to make a formal complaint and no one informed her of the need to make a formal complaint. In addition [the complainant] felt embarrassed and ashamed regarding the alleged abuse. It was not until 1998 when [the complainant] was in a strong supportive

relationship of her own, that she had the support and encouragement of her mother, and that she felt the need to protect her daughter and other children that she was in an appropriate mental state to make a formal complaint".

40. It should be noted that this summary makes no reference to, or comment upon, the belief of the complainant between the time her mother approached her (i.e. at latest 1985) and 1998, that the applicant was in prison for offences to other girls. Further, whilst it refers to the complainant being in a strong supportive relationship of her own in 1998, it also appears from an earlier part of the report that the complainant told Dr. Dermody that she had been in that relationship for twelve years (i.e. from 1991). Further, that she described the relationship as supportive. Finally, whilst Dr. Darmody also stated in the earlier part of the report that the complainant's relationship with her mother influenced her ability to disclose the alleged abusive events, it is clear that her mother had been aware of same since 1985.

41. Dr. Darmody was not cross-examined on her affidavit. Notwithstanding, counsel for the applicant submitted that the evidence of Dr. Darmody as set out in her report was not such as would warrant this Court making a finding that, as a matter of probability, the delay of the complainant in making a complaint to June, 1998 was referable to, in the sense of caused directly or indirectly, by the alleged abuse or relationship between the complainant and the applicant. Reliance was placed on the judgment of the Supreme Court in *J.L. v. Director of Public Prosecutions* [2000] 3 I.R. 122 and in particular the judgment of Hardiman J. at p. 146 where having referred to the earlier judgments of the Supreme Court in *B. v. Director of Public Prosecutions* [1997] 3 I.R. 140 and P.C. v. Director of Public Prosecutions [1999] 2 I.R. 25 he stated:-

> "From the above citations, then, it would appear that the psychological effects which the courts will regard as potentially excusing gross delay extend to:
>
> (a) dominance, particularly if the parties are closely related or associated, live in the same house or institution or are otherwise inextricably connected, over a long period of time;
>
> (b) repression or suppression of the alleged abuse, if it can be viewed as a consequential effect of dominance and the abuse itself;
>
> but
>
> (c) the fact that the offence charged is of a sexual nature is not of itself a factor which would justify the court in disregarding the delay, however inordinate, and allowing the trial to proceed".

42. At the time of the alleged incident the applicant was a teacher in the same school, but never a teacher in the complainant's class and that connection ended when the complainant finished primary school at the end of June, 1982. Apart from what appears to have been a chance call to the house, there was no further contact and even if contemporaneous dominance should be presumed, the facts could not give rise to a finding of any continuing dominance after the complainant left primary school in summer of 1982.

43. It was also submitted on behalf of the applicant that there is no evidence of suppression or repression after the date upon which the complainant's mother approached her in relation to the incident i.e. in 1985. Whilst, as already stated, Dr. Darmody discusses in her report the effect of the alleged offences on the complainant and indicates a number of distressing effects for the complainant such as flash-backs and nightmares and interference with her intimate relationship with her partner, there is no evidence of repression or suppression found by Dr. Darmody after the date of disclosure to her mother.

44. I am aware that the views expressed by Hardiman J. in J.L. v. Director of Public Prosecutions referred to above may properly be considered to be a minority view in that case and therefore not binding on me. However, even if one was to look beyond the existence of repression or suppression and taking into account what is now known about continuing effects of child abuse, I have concluded from the Supreme Court decisions that there must be a causal link between the effects of the alleged incident or relationship with the applicant on the complainant, and the delay in coming forward, if such delay is to be considered excusable.

45. The complainant swore an affidavit in these proceedings. At para. 3 she stated:

> "I confirm that I was afraid to tell anybody when the abuse happened. I was terrified that the applicant would tell my parents. I confirm that my mother was extremely strict. I always felt ashamed to tell anyone what had happened. I never forgot about the incident but only felt able to report it when I did, and even then it was my mother who made the initial call to the gardaí".

46. Considering the entire of the evidence on this issue in the case and in particular the report of Dr. Darmody I am not satisfied that the entire period of delay of the complainant in coming forward until June, 1998 is, as a matter of probability, attributable until that date to the effects on the complainant of the alleged incident or any relationship with the applicant. The delay until 1985, when she told her mother, is explicable by reference to the nature of the offence. However the complainant was 18 in July, 1987. There was a further ten -year delay, for seven of which the complainant was in what she describes a "supportive relationship" of her own. Further, I have concluded on the report of Dr. Darmody that the complainant's belief that the applicant was in prison during this period, as a matter of probability, contributed to the delay.

47. Accordingly, I have concluded on the facts that as a matter of probability there was a period of delay of approximately seven to ten years in the making of the complaint which is not excusable, even upon an assumption that the alleged incident occurred.

Issues

48. Article 38.1 of the Constitution provides:

> "No person shall be tried on any criminal charge save in due course of law".

49. Counsel for the applicant submits that the test to be applied by the Court in determining whether or not the trial should proceed is whether there is a real or serious risk of an unfair trial. Further, she accepts that the burden is on the applicant to establish, as a matter of probability, that there is a real or serious risk of an unfair trial if it were permitted to proceed.

50. Counsel for the applicant firstly submits that there is actual prejudice to the applicant in the defence of this charge such that there is a real and serious risk of an unfair trial.

51. Counsel for both parties were in agreement on the applicable law to this issue. In accordance with the decision of the Supreme

Court in *D. v. Director of Public Prosecutions* [1994] 2 I.R. 465, amongst others, if an accused establishes, as a matter of probability, a real and serious risk of an unfair trial, then an injunction or order of prohibition will follow. Further, such entitlement exists for an accused who establishes a real risk of an unfair trial by reason of actual prejudice to his defence caused by delay, even where the delay maybe attributable to the effects of the alleged offence on the complainant or to his or her relationship with the accused. *P.C. v. Director of Public Prosecutions* [1999] 2 I.R. 25.

52. Counsel for the applicant secondly submits that upon a proper analysis of the Supreme Court decisions that, where there had been a significant lapse of time from the date of the alleged incident (without prosecutorial delay) and the delay in making a complaint is not excusable by reference to the effect of the alleged offence or relationship with the accused, then even in the absence of actual prejudice to the applicant in the defence of the trial, there is a presumption that by reason of the lapse of time there is a real and substantial risk of an unfair trial.

53. Counsel for the respondent disputes this analysis of the case law and submits that prejudice must exist such that there is a real risk of an unfair trial, or in the alternative, that if the analysis of counsel for the applicant is correct then the Supreme Court in its decisions have relied upon Article 38.1 as including a right to an expeditious trial in the sense of a right to be tried within a reasonable time of the commission of the offence, as distinct from the date upon which the prosecutorial authorities have been put in possession of sufficient facts to bring a charge, then such case law is in error and this Court should not follow it.

54. In *P.C. v. Director of Public Prosecutions* [1999] 2 I.R. 25 and *P.O.C. v. Director of Public Prosecutions* [2000] 3 I.R. 87 several judgments envisage a court stopping a trial by reason of a lengthy lapse of time even in the absence of actual prejudice to the accused in defending himself in circumstances where there was delay in making the complaint which was not found excusable by reference to the nature of the alleged offence or the relationship with the accused. In *P.C. v. Director of Public Prosecutions* [1999] 2 I.R. 25 Keane J. (as he then was) at p.66 stated:

> "Unlike cases of summary jurisdiction where the application for a summons must normally be made within six months from the date of the offence, there is no time limit for the institution of a prosecution for a major offence. Accordingly, it is not possible to specify the lapse of time which must occur before a court will be put on inquiry as to whether the accused's right to a trial with reasonable expedition has been violated. In the present case, the delay was of the order of thirteen years from the time of the first alleged offence to the complaint and, in the absence of any other factors, would clearly justify an inference that the right had indeed been violated.
>
> This case, however, belongs to a category of cases in which another factor is present."

55. Later in the same judgment he stated:

> "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, is what is meant by the guarantee of a trial "in due course of law". The delay may be such that, depending on the nature of the charges, 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 will be impaired."

56. In the same case Denham J. at p. 56 under a heading of "Efflux of Time" stated:

> "However, it may not be necessary to prove that a trial has been prejudiced. The efflux of time of itself may be such as to create circumstances where the accused would not obtain a fair trial. This fundamental principle was stated by Finlay C.J. in *Director of Public Prosecutions v. Byrne* [1994] 2 I.R. 236 at p. 245:-
>
> > "... of necessity, instances may occur 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 or 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 lapse of time, failure to establish actual or presumptive prejudice may not conclude the issues which have to be determined."

57. In *P.O.C. v. Director of Public Prosecutions* [2000] 3 I.R. 87 Keane CJ summarised the position at p. 93 in the following terms:

> "While the principles applicable in cases of this nature are well settled and have been explained in a number of decisions in this court in recent years, they must be summarised again for the purposes of this appeal. There is not, and never has been, any statutory period of limitation in respect of the institution of prosecutions for serious crimes. However, the requirement in Article 38.1 of the Constitution that no person is to be tried on any criminal charge "save in due course of law" entitles any person so charged to a trial with reasonable expedition. Accordingly, significant and culpable delay on the part of the prosecuting authorities may result in the continuance of a prosecution being restrained. Where there is no such delay on the part of the prosecuting authorities, but there has been significant delay on the part of the victim of the alleged crime in reporting it to the authorities, a question may arise as to whether the delay is explicable by reference to the nature of the crime itself. This question arises in cases of sexual offences allegedly committed by adults against children and particularly in cases where the adult is in a position of authority in relation to the child, e.g. as parent, step-parent, teacher or religious. In cases coming within the last named category, the inquiry conducted by the court which is asked to halt the trial necessarily involves an assumption by the court that the allegation of the victim is true.
>
> . . . .
>
> If, such an assumption having been made, the court invited to halt the trial is satisfied that, as a matter of probability, the failure of the victim to complain of the offending conduct was the result of the conduct itself, the delay, of itself and without more, will not be a reason for halting the trial. There remains, however, a further inquiry which must be conducted by the court in every case, i.e. as to whether the degree to which the applicant's ability to defend himself or herself has been impaired is such that the trial should not be allowed to proceed."

58. What is envisaged in the above decisions is made clearer in the single judgment in the case of *P.M. v. Malone* [2002] 2 I.R. 560 delivered by Keane C.J. (with whom Guinness J. and Hardiman J. agreed).

59. This was a case where the court held the accused was not responsible for the delay at issue. Also, the accused did not exercise dominion over the complainant. The complainant and the accused were brother and sister. They were nine and seven when the alleged incidents commenced and fourteen and twelve when it was accepted they ended. The authorities were made aware of the incidents in 1992, when it appears the accused also made a statement with some admissions. The complainant at that time did not wish to pursue the complaint. In 1998 she made a formal complaint and charges were brought in 1999.

60. In dealing with the applicable law Keane CJ at p. 572 stated:

> "As the authorities point out, the right of an accused person to a reasonably expeditious trial has been recognised as an essential feature of the Anglo-American system of criminal justice for many centuries. Since the decision of Gannon J. at first instance in *State (Healy) v. Donoghue* [1976] I.R. 325, it has been recognised as an essential feature of the trial "in due course of law" guaranteed by Article 38.1 of the Constitution, his statement of the law to that effect being upheld by this court *in State (O'Connell) v. Fawsitt* [1986] I.R. 362.
>
> It must be acknowledged that a reading of some of the Irish authorities in this area might suggest that the right to a reasonably expeditious trial is recognised and protected by the law solely in order to ensure the fairness of the trial process itself. As it is sometimes put, it is not the delay, but the effects of the delay, which are crucial. Witnesses may die or disappear or, where they are available, their memories of events in the past may be clouded and unreliable. The defendant may experience difficulty in establishing an alibi because of vagueness and imprecision as to when events are said to have occurred.
>
> That such consequences may flow from a failure, however caused, to bring the accused promptly to trial is obvious. But it does not follow that impairment of his ability to defend himself is a necessary precondition to the successful invocation by him of the discrete constitutional right to a speedy trial. *Where there has been significant and culpable delay to which he has not contributed in any way, the result may be either actual prejudice (the loss of otherwise available evidence) or presumptive prejudice (the difficulties necessarily inherent in giving evidence after a lengthy period) which may affect his ability to defend himself and, hence, fatally compromise the fairness of the trial*.(emphasis added) That, however, may not be the only consequence for the accused of significant and culpable delay to which he has not contributed.
>
> The first major consequence may be the loss of his liberty while the trial is pending. That does not arise in this case and, where it does arise, is capable of remedy through the machinery of bail and *habeas corpus*. The second major consequence is the anxiety and concern of the accused resulting from a significant delay in his being brought to trial. There are thus three interests of defendants which the right to a speedy trial is intended to protect, the third being the possibility that the defence will be impaired."

61. Following the above decisions it appears clear that an accused may establish the risk of an unfair trial contrary to Article 38.1 by reason of either actual prejudice or presumptive prejudice as explained. Further, that an accused is only entitled to prohibit a trial by reason of presumptive prejudice where he is not considered responsible for the delay or lapse of time (upon an assumption that the alleged events occurred). I do not accept (as was submitted by Counsel for the applicant) that the Supreme Court judgments, when collectively considered, warrant this Court automatically presuming that a risk of an unfair trial exists where there is a significant lapse of time for which the accused is not considered responsible. Almost all the decisions have emphasised that each individual application to prohibit a trial by reason of delay must be considered on its own facts. In *P.C. v. Director of Public Prosecutions* [1999] 2 I.R. 25 p.57 Denham J stated:

> "The right to reasonable expedition, the issue of delay and the matter of elapse of time fall to be analysed in light of the circumstances of each case."

62. Hence, it appears that even where there is significant delay for which the accused is not responsible the Court must consider whether, on the facts of the particular case, presumptive prejudice exists.

63. I also accept the submission of Counsel for the respondent that the underlying reasoning in a number of decisions *including P.C. v. Director of Public Prosecutions* [1999] 2 I.R. 25 and *P.O.C. v. Director of Public Prosecutions* [2000] 3 I.R. 87 relies, at least in part, upon the right of an accused to a trial with reasonable expedition. In certain of the decisions members of the Court, including Keane C.J. and Denham J., appear to have considered the essential question to be addressed by the court on an application to prohibit by reason of delay, to be whether there is a real and substantial risk of an unfair trial and as part of such issue to have considered the right to a trial with reasonable expedition. For example in P*.C. v. Director of Public Prosecutions* [1999] 2 I.R. 25 Keane J. (as he then was) commences his judgment with a consideration of the recognition of a right of an accused person to a trial with "reasonable expedition" in Article 38.1 of the Constitution and the authorities relating to same and then continues, as set out earlier in this judgment, to state that , " 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".

64. I would respectfully suggest that it appears that in certain of the cases including *P.C. v. Director of Public Prosecutions* [1999] 2 I.R. 25 and *P.O.C. v. Director of Public Prosecutions* [2000] 3 I.R. 87 members of the court, including Keane C.J. and Denham J., may have been using "unfair trial" as including trials which may be considered unfair for two different reasons:

> (i) Where by reason of actual or presumptive prejudice to the accused's ability to conduct his defence, the trial if proceeded with, would be unfair:
>
> and
>
> (ii) Where by reason of a significant lapse of time between the date of the alleged incident and the proposed date of trial (for which the accused should not be considered responsible directly or indirectly) it would be constitutionally unfair, and in that sense, an unfair trial if the accused were now subjected to a trial. The constitutional unfairness arises by reason of the breach of the accused's right to an expeditious trial recognised by Article 38.1 of the Constitution.

65. In *P.C. v. Director of Public Prosecutions* [1999] 2 I.R. 25 at p. 58 Denham J. stated under a heading "Right to a fair trial"

> "In the analysis of the delay or efflux of time the issue to be determined is whether the delay or efflux of time was such an unfairness as to be unconstitutional: the test being whether a real risk of an unfair trial had been established: *D. v. Director of Public Prosecutions* [1994] 2 I.R. 465. If the test has been applied and a real risk established then that determines the matter in favour of the accused: *Z. v. Director of Public Prosecutions* [1994] 2 I.R. 476.

66. In the decision in *P.M. v. Malone* [2002] 2 I.R. 560 the Court appear to have taken a slightly different approach and to have determined that the right of an accused under Article 38.1 to a trial "in due course of law" includes two discrete rights which may be identified as:

> i. a right to a fair trial; and
>
> ii. a right to a reasonably expeditious trial.

67. I refer to the extract from the judgment of Keane C.J. set out earlier in this judgment, and in particular the analysis that ". . . it does not follow that impairment of his ability to defend himself is a necessary precondition to the successful invocation by him of the discrete constitutional right to a speedy trial".

68. The final issue is the appropriateness of the court taking into account pre-prosecutorial delay. The actual periods of delay considered by the Court in both *P.C. v. Director of Public Prosecutions* [1999] 2 I.R. 25 and *P.O.C. v. Director of Public Prosecutions* [2000] 3 I.R. 87 included the period prior to the making of the complaint. However the justification for doing so was not expressly considered in those cases. It was however expressly addressed by Keane C.J. in *P.M. v. Malone* [2002] 2 I.R. 560. In that case, the Court considered the period of delay from 1992 – 1998. The Court appears to have considered this as part of the pre-prosecutorial period. It was considered to be an inordinate delay and one for which the prosecuting authorities were not responsible by reason of the deliberate decision of the complainant in 1992 not to make a formal complaint. Keane C.J., having considered the views expressed by Gannon J. *in O'Flynn v. District Justice Clifford* [1988] I.R. 740 in relation to whether to take into account pre-charge delay, and views expressed by Lamer J. in *Mills v. The Queen* [1986] 29 DLR 161 stated at p. 579: .

> "I am accordingly, satisfied that in determining whether the concern and anxiety caused to an accused person is such as to justify the prohibition of his trial on the ground that his constitutional right to a reasonably expeditious trial has been violated, the court, depending entirely on the circumstances of the particular case, may be entitled to take into account, not merely delay subsequent to his being charged and brought to trial, but also delay prior to the formal charge. It is to be remembered that, in upholding the applicant's rights in such a case, the court is not merely vindicating and protecting the rights of all persons coming before the courts to the dispatch of criminal proceedings against them with reasonable expedition. It is also upholding the general public interest in the speedy prosecution of crime. While I do not propose to refer to them in any detail, since they were not opened to us in the course of the oral arguments in this case, it is of interest
>
> The courts in New Zealand have taken a similar view so far as pre-charge delay is concerned: (see *Watson v. Clarke* [1990] 1 N.Z.L.R. 715 and *Hughes v. The Police* [1995] 3 N.Z.L.R. 443)".

69. It must be noted that the above consideration was given in the context of an accused's right to an expeditious trial. It forms no part of the function of this Court to consider the submissions of counsel for the respondent as to the correctness of this approach. Further, the applicant in this case does not rely on the now identified discrete right to an expeditious trial. His claim is based upon the alleged risk of an unfair trial by reason of actual or presumptive prejudice. I am satisfied that it is consistent with the Supreme Court decisions in such a context to take into account in the case of actual prejudice the entire lapse of time from the alleged offence, and in the case of presumptive prejudice at least such period of delay for which the applicant is not considered responsible.

Nature of Alleged Prejudice

70. The applicant in his grounding affidavit firstly asserts that he is unable to obtain a fair trial due to the passage of time between 1982 and the present date, due to the absence of certain evidence which he considers to be essential. He states these to include:

> (1) The absence of certain athletes and the failure of other athletes to recall the events of Saturday the 22nd day of May, 1982, the date of the alleged assault.
>
> (2) The destruction of detailed training diaries in the intervening years which would have confirmed my presence at a certain location on the said date.
>
> (3) The death of Father Burrows, who was in charge of the keys for the school on non-school days, which would include Saturday the 22nd day of May, 1982.
>
> (4) The death of Mr. White, Caretaker, who would also have had knowledge of the keys for the school on the said date.

71. An affidavit was sworn by Tomas O'Reachtabhra, school principal, at the request of the respondent, dealing the question of the keys to the school. I am not satisfied in the light of his affidavit that the applicant has established any actual prejudice by reason of any issue relating to keys.

72. The applicant also asserts that he is now unable to recall the events of the particular day mentioned by the complainant in 1982. He states (which is not disputed in any of the replying affidavits including that of the complainant) that the allegations made by the complainant firstly related to a Saturday in May, 1982. At that time she appears to have stated that she was Confirmed on the 22nd May, 1982. The applicant states that in a subsequent statement the complainant alleged the assault took place on Saturday the 22nd May, 1982 and that she was Confirmed on Wednesday the 9th June, 1982. He refers to a further subsequent statement in which the complainant states she was Confirmed on Saturday 22nd May, 1982.

73. It appears from the applicant's affidavit that, at the relevant time, he was an international athlete competing in international events. Further, that he has been able to ascertain that he attended an international athletics meeting in Paris on Saturday 29th May, 1982 and a further meeting in Brussels on Saturday 5th June, 1982.

74. The applicant has been able to ascertain that the Confirmation for the school took place on Saturday 22nd May, 1982.

75. The applicant believes that by reason of his international meetings that he was training intensively during that time at the Belfield athletics track UCD campus and it is likely that on Saturday 22nd May, by reason of the international meeting on the following Saturday, he would have been there. However, he states that he is now not able to precisely recall his movements at that time. Further, he states that he has made contact with one athlete who ran with him at the time but that he is unable to precisely recall events on either Saturday 22nd May, 1982, or Saturday 5th June, 1982. Further, that athlete has indicated that he kept training diaries which were destroyed in the 1980s. The applicant asserts that these diaries would have confirmed his involvement in training at the Belfield athletics track on the 22nd May, 1982.

76. I have concluded, as a matter of probability, that having regard to the nature of the alleged offence i.e. one single incident, alleged obviously to have taken place in private but in a particular context i.e. at the end of a Saturday morning athletic club meeting, that by reason of the very significant lapse of time, the applicant has been prejudiced in his ability to defend this charge. If the complaint had even been made in the middle or end of the 1980s (the end of any period of delay for which the applicant should be considered responsible) I have concluded that the applicant would have been in a better position to remember and ascertain his movements on the Saturday on which the offence is alleged to have occurred and to have obtained corroborating evidence from fellow athletes. Further, a trial at that time would have avoided the difficulties necessarily inherent in giving evidence after a very lengthy period.

77. I am satisfied on the above facts that the applicant has discharged the onus of establishing that by reason of at minimum, presumptive prejudice (as that term has been explained in *P.M. v. Malone* [2002] 2 I.R. 560), there is a serious risk of an unfair trial. It is therefore unnecessary to consider whether the applicant on the facts herein has established actual prejudice.

Conclusion
78. There was a delay in making the complaint herein of between seven and ten years which is not excusable by reference to the nature of the alleged incident or any relationship between the complainant and the applicant.

79. The applicant has discharged the onus of proof of establishing that, as a matter of probability, there is a serious risk of an unfair trial by reason of at minimum, presumptive prejudice.

80. Accordingly, I will make an order restraining the respondent, his servants or agents from proceeding further with the prosecution of the applicant on the indictment on Bill No: CC 121/98.