Neutral Citation Number: [2005] IEHC 165

THE HIGH COURT

[Record No. 2003/167 JR]

BETWEEN

W

APPLICANT

AND
DISTRICT JUSTICE FLANNAN BRENNAN

FIRST NAMED RESPONDENT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

SECOND NAMED RESPONDENT

Judgment of Mrs. Justice Macken delivered on the 14th day of April, 2005

1. These are judicial review proceedings by which the applicant seeks orders of a type frequently sought in what have become known as "delay" cases, that is to say, in cases where the applicant seeks to restrain the taking of any further steps in criminal proceedings because of alleged inordinate delay in one or other respect, such that his constitutional right to a fair trial cannot be guaranteed. The applicant also seeks relief in respect of allegedly unlawful returns for trial.

2. The subject matter of the charges in the trial are sexual offences allegedly committed by the applicant against a complainant at a time when the complainant was a minor of 12 or 13, between 1980 and 1982.

3. By Order of O'Donovan J. made on 10th March, 2003, this court granted the applicant liberty to issue judicial review proceedings as against the first named respondent, for an order of certiorari quashing the return of the applicant for trial dated 26th February, 2003, and as against the second named respondent, for an order prohibiting him from taking any further steps in those proceedings or in respect of the charges specified in the returns for trial.

4. The two series of grounds are quite separate, save in one aspect as will become clear from the summary which I set out below.

5. Although the applicant set forth in his statement to ground his application for judicial review dated 10th March, 2003 the background facts and matters upon which he claims to be entitled to ground his application, in reality his claim may be summarised as follows

a) As to the relief sought against the first named respondent, the applicant was returned for trial by the District Court on 19th December, 2001 on the basis of signed pleas of guilty which the applicant had not executed.

b) The High Court, on 16th December, 2002, granted an order of certiorari in respect of the returns for trial dated 19th December, 2001, and ordered that the returns for trial be sent to the High Court so as to be formally quashed without the need for further order, but this had not been done.

c) The applicant had subsequently pleaded not guilty to the charges pursuant to returns for trial dated 26th February, 2003 but was nevertheless returned for trial on the basis of fresh returns for trial dated 11th March, 2003 and accordingly there were in existence more than one set of documents purporting to be valid returns against the applicant for trial in respect of the same offences.

d) The applicant claims that the return for trial dated 26th February, 2003 are invalid on the ground that he has now been returned for trial on the basis of three separate returns.

e) As against the second named respondent, the applicant claims that he has wrongfully proceeded with the prosecution of the applicant in respect of the charges notwithstanding inordinate and inexcusable delay on the part of the complainant in making a complaint against him since the offences were allegedly committed, and the applicant claims to be is thereby impaired in his defence to such an extent that there is a real and serious risk of an unfair trial.

f) The applicant also pleads that the complainant had disclosed the alleged abuse to a member of An Garda Síochána in 1985, but while he had made no formal statement, this was not acted upon, giving rise also to inexcusable delay, which impaired his defence to such an extent that there was a real and serious risk of an unfair trial, or making it impossible to afford the applicant a trial in due course of law.

g) In addition, the applicant complains that although the complainant made formal complaint to An Garda Síochána in or around the month of August, 1988 in respect of the alleged sexual abuse, nevertheless the applicant was not arrested or questioned until January, 1999, which the applicant pleads exacerbated the prejudice to him previously existing.

h) Finally, the applicant pleads that although the investigation into the allegations was allegedly completed between the months of August, 1998 and January, 1999, there was a further inexcusable delay in charging the applicant who was not charged until the month of October, 2001, which delay, cannot be justified. In relation to this latter delay, the applicant pleads that his ability to raise a defence of delay has been further impeded, by reason also of the faulty returns for trial mentioned above.

Legal Submissions

6. On behalf of the applicant, Mr. Giblin, S.C., submitted that Article 38 of the Constitution guarantees a fair trial and within that guarantee, a right to an expeditious trial. He argued that it is part of our law that although specific prejudice may not exist, prejudice may be presumed to exist if the period of time which has elapsed is such that there is a real risk of an unfair trial.

7. He further submitted that the offences in this case relate only to a period between 1980 and 1982, and that the applicant was not charged until 2001. He argued that this period of time is too long, that there is no adequate explanation for the delay and that the circumstances are not such that the complainant can bring himself within the ambit of any special rule relating to delay cases. Mr. Giblin contended that there was no formal dominion by the applicant over the complainant but only a common bond of friendship, and that there was no question of any intimidation by the applicant of the complainant at any time.

8. He submitted that the evidence clearly shows that the existence of an alleged offence was mentioned in 1985 to a member of An Garda Síochána. The Garda to whom this information was disclosed had claimed it was disclosed in confidence. However, Mr. Giblin argued that, taken with the delays which existed, it is clear that since the complainant was able to bring the alleged offence to the notice of that Garda, in 1985, there was no reason why a formal complaint could not also have been made by him at that time.

9. He also invoked the Supreme Court decision in *B v. D.P.P.* [1997] 2 ILRM 118, and in particular the judgment of Denham, J. in which she set out the factors to be analysed and applied in cases such as this, as follows:

(a) The delay in the case;

(b) The reason or reasons for the delay;

(c) The accused's action in relation to the events in issue

(d) The accused's assertion of his constitutional rights'

(e) Actual prejudice to the accused;

(f) Pre-trial incarceration of the accused

(g) Length of time of pre-trial anxiety and concern of the accused

(h) Limitation or impairment of the Defence

(i) The circumstances which may render the case into a special category

(j) The community's right to have the offence prosecuted.

10. Mr. Giblin referred the test laid down by Denham, J. in that judgment namely "whether there is a real risk that B, by reason of the delay, would not obtain a fair trial and that the trial would be unfair as a consequence of the delay."

11. Applying the foregoing tests to the facts in the present case, he submitted that the delay in the present case was at best 18 years, and also relied on the case *of People v. Robert Brophy*, 30th January, 1992, unreported, in submitting that the complainant did not make his complaint at the first reasonably available opportunity.

12. As to the second category, Mr. Giblin argued that no reasons for delay are set out in the Book of Evidence and further that the evidence presented by the psychologist is both insufficient and inadequate, and does not comply with the jurisprudence of this Court or of the Supreme Court, including that in the case of *J.L. v. D.P.P.*, Supreme Court, unreported, 6th July, 2000 which requires that the psychologist be fully informed on the matter.

13. As to the applicant's actions in relation to the events in issue, Mr. Giblin repeated that there was no question of dominion, and that the complainant's association with the applicant had ceased many years prior to the complaint being made. According to counsel, the applicant has suffered actual prejudice and has been impaired in his defence in that the dates and events making up the complaint vary over a period of at least 400 days and at a remove now of a twenty five year period and the applicant could not therefore provide any form of alibi evidence for the periods or times in question. The applicant is also prejudiced, according to Mr. Giblin, in that there are allegedly large gaps in the medical evidence pertaining to the complainant's attendance at University College Hospital and in relation to his treatment there.

14. On the issue of pre-trial anxiety and concern, the applicant has been cause concern since 16th January, 1999, the date of his initial arrest, and having regard to the faulty manner in which the returns for trial were dealt with, he has been unable to clear his name as soon as possible after arrest.

15. Mr. Giblin submitted that this case does not fall into the special category referred to in the case of *J.L. v. D.P.P.*, supra., as the prosecution did not seek to rely on any medical evidence to explain delay in these proceedings. While the community has a right to have offences prosecuted, he argued that this right must be balanced against the right of an accused person to have a trial in due course of law, relying on the judgment of Hardiman J. in *J.L. v. D.P.P.*, supra in that regard.

16. On behalf of the second named respondent, Mr. O'Malley, B.L. argued that the complainant had, in his affidavit, set out details of the abuse alleged against the applicant, about the impact of that abuse on him and the reasons why he could not make a complaint until 1998. Further, at the request of the second named respondent, Mr. M. D., Senior Clinical Psychologist had interviewed the complainant, and in the report exhibited had concluded that the complainant's delay in making a complaint was understandable.

17. In law, Mr. O'Malley submitted that while there is a free standing right to an expeditious trial, nevertheless where the reasons for the lapse of time are explained to the satisfaction of the court, the applicant's right to an expeditious trial has not been breached. It is, he argued, only in circumstances where no explanation, or a wholly inadequate explanation for the lapse of time is tendered that the court must then proceed to examine whether any of the interests protected by that right have been violated to such an extent as to justify the grant of the relief sought. For this reason, he contends that the first inquiry to be made is therefore as to the reasons for the delay.

18. As to the first period of delay alleged, namely until 1998 when the complaint was first formally made, Mr. O'Malley agreed with Mr. Giblin on the applicability of the various factors set out in the judgment of *B v. DPP*, supra, and already mentioned above. In that regard, he contended that a lapse of time of between 17 and 18 years does not, of itself, connote an automatic inference of prejudice, citing several examples from case law to support this. Secondly, he submitted that the complainant was a child at the time of the alleged abuse, born in 1969 and therefore only 12 or 13 at the relevant time. The applicant was a neighbour who befriended him, and was a teacher who took what appeared to be a paternal interest in the complainant. While it might be said that the applicant did not exercise dominion over the complainant in the sense of being a parent, guardian or his own teacher, he was nevertheless clearly regarded by the complainant as a person in authority, and this in itself is an important factor in determining if the complainant's delay in making a formal report about the alleged abuse was excusable.

19. As to the question of the psychological evidence, Mr. O'Malley contended that the evidence, consisting of that of the complainant himself and of the report of Mr. D., is sufficient to satisfy the requirements considered to be appropriate as enunciated in the recent

case of *W. v. D.P.P.*, Supreme Court, unreported, 31st October, 2003.

20. Mr. O'Malley submitted that in any event the applicant is not entitled to rely upon the lapse of time as a ground for alleging that his right to an expeditious trial which applies to the period post complaint, as opposed to a right to a fair trial, has been breached, in relying on the decisions in *State (Healy) v. Donoghue* [1976] I.R. 325 and *O'Flynn v. Clifford* [1988] I.R. 740.

21. He also argued that the views expressed in the latter case were approved by Walsh J., with the assent also of Finlay, C.J., and Griffin, J in the course of the appeal. And he relied also on the judgment of Finlay, C.J. in the case of *D.P.P. v. Byrne* [1994] I.R. 236 and contended that the dicta in those cases was never intended to apply to circumstances where there had been a delay between and alleged commission of an offence and the time when it was reported to an Garda Síochána, since it is clear that different considerations arise in such cases. He also invoked the judgment in *Cahalane v. Judge Murphy* [1994] 2 I.R. 262 in that regard, which again did not concern pre-complaint delay, but rather delay subsequent to that time. And finally, in this regard he cited the judgment of Finlay, C.J. in the case of *Hogan v. President of the Circuit Court* [1994] 2 I.R. 513, in which the Chief Justice had stated:

> "… in any case where the prosecuting authorities on the information available to them have not got proper grounds for charging any person with an offence, their failure to do so and elapse of time before they are in a position to do so cannot give an accused a right to prohibit a trial on the basis of the defeat of his constitutional right to an expeditious trial. For example, cases consisting of charges by young children in regard to assaults on them at an early age which are not brought to the attention of the authorities by such children until very many years after they occurred involve wholly different considerations to those applicable to the present case."

22. Mr. O'Malley suggested that the latter part of this passage has been invoked to suggest that it establishes a type of special category of offences involving persons who complain of having been the victims of sexual assaults as children, but he submitted that this would be erroneous, making further argument on the appropriate application of the principles enunciated in the case of *P.M. v. Malone* [2002] 2 I.R., 560.

23. On the question of the right to a fair trial, Mr. O'Malley argued that every judge presiding over a criminal trial is presumed to take all necessary and appropriate steps to ensure that it is conducted in due course of law, and therefore it is not part of the Courts' function to formulate a policy regarding the propriety of a trial proceeding after five, ten, fifteen or more years, following the decision in *K. v. Judge Groarke and the D.P.P.*, Supreme Court, unreported 25th June, 2002.

24. In determining whether or not a trial should proceed, the Supreme Court had established, in the same case, the following test:

> "… whether there is a real or serious risk of an unfair trial. This test may be applied in other circumstances seeking to protect the same constitutional rights. Thus it may be applied in a case where there has been delay in prosecuting the case and it may also be applied if there has been extensive pre-trial publicity."

25. It follows, he submitted, that where an applicant seeks to invoke the jurisdiction of the court to stay a trial by reason of the existence of a real and serious risk of a permanent defect going to the root of the trial such that nothing a trial judge can do in the conduct of the trial can relieve against its unfair consequences, the applicant must establish at least some factual basis for that assertion. In the present case the applicant has failed to establish any such circumstances, and therefore he submitted that the applicant would be in no greater difficulty than would have been any person accused of similar offences committed in more recent times.

Conclusions

26. Faced with these different approaches to the law, it seems to me that it is appropriate to consider the issues from the point of view of the period prior to the complaint being made, and then the period subsequent to that.

27. I have previously indicated that in these cases involving allegations of sexual abuse against children which are not reported for a considerable period of time, the jurisprudence of this Court and of the Supreme Court has been evolving in nature, and it is in my view important not to consider that the jurisprudence is absolutely and rigidly fixed such that every case will have the same outcome, given the nature of these cases and the equally evolving nature of the psychology in matters such as child sexual abuse, as is evident from the materials considered in a wide range of such cases. It is nevertheless abundantly clear that this Court has the benefit of a number of very helpful decisions of the Supreme Court, and I propose to adopt the same approach in this case as I did in the case of *B. v. D.P.P.*, 21st December, 2004 unreported, namely, that rather than analysing each and every case invoked by one or other of the parties, I shall be guided by the unanimous decision of the Supreme Court, delivered recently in the case of *T.S. v. The Director of Pubic Prosecutions*, 28th July, 2004, unreported, in which the Supreme Court stated:

> "In a succession of judgments this Court has set out the principles of law which should be applied in deciding whether, in the circumstances of a particular case, a trial of the accused should be permitted to proceed. These judgments acknowledge that there is a balance to be struck between the public interest in seeing that persons are tried for serious offences where it has been found that there is sufficient evidence to warrant that person being put on trial and the constitutional right of a citizen to a trial in accordance with law, that is to say a fair and expeditious trial."

28. The Supreme Court then referred to the case of *Hogan v President of the Circuit Court* [1994] 2 I.R. 513 at 521, and the citation from the judgment of Finlay, C.J., which Mr. O'Malley also invoked, and which I have set out above. It then continued, in the *T. W.* case, in its exposition of the applicable principles, as follows:

> "The kind of considerations which may fall to be considered were referred to again by Finlay C.J. in *G v. Director of Public Prosecutions* [1994] 1 I.R., 374 when he stated at p. 380:
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> > 'The Court asked to prohibit the trial of a person on such offences, even after a very long time, might well be satisfied and justified in reaching a conclusion that the extent to which the applicant had contributed to the delay in the revealing of the offences and their subsequent reporting to the prosecution authorities meant that as a matter of justice he should not be entitled to the order.'

29. The Supreme Court then continued:

> "These issues have tended to arise mainly in the context of persons who have been charged and sent for trial for sexual offences against young children. The considerations which arise in such cases were further dealt with by Keane J. (as he then was) in *P.C. v. Director of Public Prosecutions* [1990] 2 I.R. 25 at 67:

'The approach that must be adopted by a court asked to prohibit the trial of a person charged with such offences was dealt with comprehensively by Denham J., speaking for this court in *B. v. Director of Public Prosecutions,* [1997] 3 I.R. 140, and has been considered by her again today. Clearly, 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. . . . There are cases, however, of which this is one, where the disparity in age between the complainant and the person accused is such that the possibility arises that the failure to report the offence is explicable, having regard to the reluctance of young children to accuse adults of improper behaviour and feelings of guilt and shame experienced by the child because of his or her participation, albeit unwillingly, in what he or she sees as wrongdoing. In addition, of course, in individual cases there may be threats, actual or implied, or punishment if the alleged offences are reported.

The delay may also be more readily explicable in cases where, not merely is the person concerned significantly older than the complainant at the time of the alleged offences, but occupies a particular role in relation to him or her e.g. as parent, step parent, teacher or religious. In such cases, dominion by the alleged perpetrator over the child and a degree of trust on the part of the child may be more readily inferred.

This is not to say that the court in dealing with applications of this nature must disregard the presumption of innocence to which the accused person is entitled. But the issue is not whether the court is satisfied to any degree of proof that the accused person committed the crimes with which he is charged. The issue in every such case is whether the court is satisfied as a matter of probability that the circumstances were such as to render explicable the inaction of the alleged victim from the time of the offence until the initiation of the prosecution. It is necessary to stress again that it is not simply the nature of the offence which discharges the onus. All the circumstances of the particular case must be considered before that issue can be resolved.

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. In other cases, the first inquiry must be as to what the reasons for the delay and, in a case such as the present where no blame can be attached to the prosecuting authorities, whether the court is satisfied as a matter of probability that, assuming the complaint to be truthful, the delay in making it was referable to the accused's own action.

If that stage has been reached, the final issue to be determined will be whether the degree to which the accused's ability to defend himself has been impaired is such that the trial should not be allowed to proceed. That is a necessary inquiry, in my view, in every such case, because, given the finding that the delay is explicable by reference to the conduct of the accused is necessarily grounded on an assumption as to the truth of the complaint, it follows that, in the light of the presumption of innocence to which he is entitled, the court asked to halt the trial must still consider whether the degree of prejudice is such as to give rise to a real and serious risk of an unfair trial.'"

30. I propose to adopt and apply these very helpful principles or criteria and the guidance found in that judgment, to the facts in the present case.

31. I do not have to decide whether or not dominion in the formal sense of that word existed between the applicant and the complainant. I have previously found that, according to the jurisprudence, true cases of continuing dominion of one party over another after the cessation of the events complained of, are rare. On the contrary, most cases concern the issue of whether the delay in making the appropriate complaint was due to the applicant's own behaviour towards the complainant, and the consequences of such behaviour, sometimes also called dominion in the case law. This latter type of influence has been interpreted in the sense that, if the alleged sexual abuse has prevented the complainant from making a complaint earlier, because of the trauma or other adverse consequences to the complainant resulting from the abuse, then that may be attributed to the applicant's own behaviour and if there is sufficient evidence to support this, it will, in general, render the delay in making the complaint explicable and the delay will therefore be excused.

32. In the present case both the complainant and the psychological expert aver to the trauma and the adverse consequences which the sexual abuse allegedly caused. Neither the complainant nor the expert was cross-examined on their respective affidavits, and so the only evidence before the court on this aspect of the matter is their evidence on affidavit. Adopting the approach proposed by McGuinness, J. in the case of *W. v. Director of Public Prosecutions,* Supreme Court, October 31st 2003, unreported, and applying it to the evidence in the present case, I am satisfied from the evidence of the complainant and also from the report of Dr. D. as to the effects of the alleged abuse on the complainant, and I conclude from their evidence that the delay in making the complaint is both explicable and may therefore be excused.

33. I should also consider the allegation that in 1985 the complainant was able to inform a member of An Garda Síochána about the abuse. While Mr. Giblin did not press me greatly on this aspect of the matter, it is also clear on the evidence of the complainant that while he spoke to the Garda who was a family friend, at this time, he was not in a position psychologically – on the basis of advice of his then psychiatrist at University College Hospital – to make any formal complaint. He was, at the time, about 17 and undergoing psychiatric treatment. While it is true that there was not before the court any medical records of the complainant in respect of his treatment at that hospital during the relevant period of time, nevertheless, having regard to the evidence given which has not been challenged, I find that the failure of the complainant to make a formal complaint in such circumstances, in 1985, should not be taken as a failure by him to complain at the first available opportunity.

34. I now turn to the second delay aspect of this case, namely delay which the applicant argued occurred in the period after the complainant did make a formal in 1998. In this regard, the applicant complains about two periods, the first period from then until 1999 when he was arrested, and the subsequent period up to when he was charged in December 2001.

35. It is clear from the cases of *State (Healy) v. Donoghue* [1976] I.R. 325 and *Hogan v. President of the Circuit Court* [1994] 2 I.R. 513, both invoked by Mr. O'Malley, that if all appropriate enquiries that ought to be made were being made, and/or proper grounds upon which to charge a person with an offence did not yet exist, an accused does not have a right to prohibit a trial on the basis of a breach of a right to an expeditious trial.

36. In the present case, Detective Garda C., who had charge of the investigation of the complaints, swore two affidavits in which he set out the steps taken in the matter. According to this evidence, the complainant made several statements after his first statement made in August, 1998, the last one being made in November, 1999. In the meantime, statements were also taken from five other people in or around February, 1999. Prior to that time a decision was taken in or around December, 1998 to forward the file to the National Bureau of Criminal Investigation. The applicant was arrested on 16th January, 1999 and was cautioned. In January and February, 1999 Detective Garda C. and Detective Garda M. met with the complainant, and were taken to various locations at which the alleged abuse took place, and this exercise continued in August, 1999 in County Galway and County Mayo, and the completed file was sent to the office of the second named respondent in or around August, 2000. Certain queries were received from that office in December, 2000 and in January and March, 2001 further visits occurred in County Galway and County Mayo in connection with the queries which had been raised. In July, 2001 directions were received from the second named respondent. On 17th October, the applicant was charged and was then brought to Dundalk District Court, when the applicant was remanded on bail. Detective Garda C. was also engaged at the same time in the investigation of four major criminal matters during the course of the above period, as part of his ordinary workload.

37. As to the first of these periods, from August, 1998 until January, 1999 when he was arrested, no complaint whatsoever can be made in relation to this period. The complainant first called to An Garda Síochána on 6th August, 1998 and a statement was also subsequently taken, after he had been advised by the Garda who took that statement, to consider any major events or matters that occurred about the time he was abused. That further statement was taken on 7th October 1998, and the applicant was arrested just over three months later. The steps which were being taken were appropriate and it was also perfectly legitimate that the complainant be asked to consider his statement and bring to the notice of the Gardaí anything further of significance.

38. On the second period, which is a complaint alleging true prosecutorial delay, an analysis of what occurred, according to the affidavits filed, indicates that in January and February, 1999 investigations were continuing, further statements were taken, not only from the complainant but from members of his family and from others. Because of the locations in which the abuse allegedly occurred, it was necessary to visit those locations, and arising from queries on the part of the second named defendant, to do so more than once. Further directions were received as to the steps to be taken in the matter.

39. It is clear that this investigation was a relatively complicated one. And it is not suggested on behalf of the applicant that the investigation could have been carried out over a much shorter period of time. What is suggested rather is that the period of time was too long, simpliciter.

40. I am not satisfied that the applicant has discharged the onus on him to establish that the investigation was unreasonably lengthy or might have been completed much sooner. Nor am I satisfied that the applicant has established that by reason of the period of time which elapsed after complaint and before being charged interfered with his right to an expeditious trial.

41. Finally, the applicant links the above delay to the alleged continuing delay in his trial arising from the wrongful returns already referred to. It is, of course, the case that an order was made in December, 2001 that the returns for trial be sent to this Court to be formally quashed. It has been explained to the court that the returns were not so forwarded. Although once this order was served on the party in question, it ought to have been complied with I had no evidence before me as to service of the order, nor of the attempts made, if any, to compel the order to be brought forward for quashing, although of course I accept what counsel has told me as to the current status of the returns for trial. Nevertheless, if the applicant seeks to complain about delay arising from that event, it was at all time open to him to apply to this court and seek its assistance, pursuant to the order made. In the absence of any evidence of the steps taken in that regard, any additional period which elapsed as a result of the foregoing order not being complied with, should not be taken into account in calculating the period of delay in prosecuting the trial.

42. I return now to consider whether, since I have held that the delay in making a complaint was excusable, nevertheless the applicant cannot be guaranteed a fair trial, because of the delay in question. I deal with this from the point of view of actual prejudice and of presumed prejudice.

43. In the case of actual prejudice, the only case made by the applicant is that, given the allegations are spread over a period of about 400 days, and are alleged to have occurred in several different locations, and a long time ago, he is prejudiced in that he cannot account for his whereabouts on all these possible occasions at this remove, and therefore cannot invoke an alibi defence which he would otherwise be able to do.

44. I do not consider this is a sufficient ground upon which to establish material or actual prejudice. Even if the complaints had been made at a much earlier period, the same circumstances would have arisen, namely, that they extended over a lengthy period of time between 1980 and 1982, and occurred at several different locations, The question of providing an alibi defence might well arise. These are matters on which a trial judge can properly instruct a jury, in the ordinary discharge of his/her functions, and would not, of themselves, constitute a ground for finding that the applicant could not secure a fair trial. In that regard I rely on the judgment of McGuinness, J. in the case of *D.W. v. D.P.P.*, supra., where she stated:

> "The applicant's case in this regard is that school records and time tables and general evidence about, for example, the usage of the medical room, will no longer be available. This may well be so, but these matters can be drawn to the attention of the jury by the trial judge."

45. as offering sufficient guidance for a trial judge to direct a jury on the question of the absence of information concerning dates or times or places during which or where the alleged abuse took place.

46. As to presumed prejudice based on the lengthy period of time which has elapsed, this is always a very difficult issue to resolve in the context of an applicant's plea that, by reason of delay simpliciter, he cannot be guaranteed a fair trial. It is true, undoubtedly, that length of time may, if it is of so long a duration that it is clear a fair trial could not be assured or guaranteed, give rise to presumed prejudice. Nevertheless mere lapse of time, even if inordinate, does not automatically equate to presumed prejudice. In the present circumstances, the delay between the commission of the offences, in 1980 to 1982 and mid 1998 when he applicant first complained is indeed long, even inordinate. But I do not accept that, without more, that length of time is to be considered automatically as supporting a finding of such prejudice. The applicant does not point to anything further upon which the court should find that the period of time in question would constitute a real and serious risk of an unfair trial, or rather to a trial which, in all the circumstances, cannot be as fair as can be expected.

47. For the foregoing reasons I reject the application for judicial review based on delay.

48. The application for judicial review is also based on the allegation of faulty returns for trial in that, leaving aside the first returns

for trial mentioned above, more than one set of such returns still exist. Since this is of relevance only in the case, as here, where I have held that delay is not a sufficient ground upon which to make the order of prohibition sought, I will hear from the parties further in relation to that aspect of the case, which should be capable of being dealt over a very short period of time, and will adjourn the case to a date to be fixed for that purpose, if that issue cannot be resolved by agreement between the parties.