THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 82

Birmingham J.
Mahon J.
Edwards J.

No. 550/2015

P.P.

Appellant

-AND-

The Judges of the Circuit Court, the Director of Public Prosecutions,

Ireland and The Attorney General

Respondents

JUDGMENT of the Court delivered on the 7th day of February 2017 by

Mr. Justice Birmingham

1. This is an appeal from a decision of the High Court (Moriarty J.) refusing to prohibit the trial of the appellant on Bill 1090/13 in the Dublin Circuit Criminal Court and refusing a declaration that s. 11 of the Criminal Law Amendment Act 1885 is incompatible with the Constitution of Ireland, and had not been continued in force prior to its repeal in s. 14 of the Criminal Law (Sexual Offences) Act 1993, together with certain other ancillary orders.

2. The background to the proceedings in the High Court and now to this appeal is that the appellant has been charged before the District Court and has been returned for trial to the Circuit Court on seven counts of gross indecency. On each count, he has been charged that he did procure and/or in private commit an act of gross indecency with a male person on a date unknown between the 1st November, 1978, and the 30th June, 1980, both dates inclusive, contrary to common law and as provided for by s. 11 of the Criminal Law Amendment Act 1885. The charges are framed so as to make clear that each count on the indictment relates to dates different to and distinct from the dates when other offences were committed.

3. The complainant, who was born on the 30th November, 1962, is a former pupil of the appellant, who was a secondary school teacher at a north Dublin school. On the dates referred to in the charge sheets the complainant was between fifteen years and eleven months and seventeen years and six months. However, as we will see, the DPP has made clear that no charges will be proceeded with in respect of any period after the complainant turned seventeen years of age.

4. By reference to the book of evidence it emerges that the complainant attended counselling in 1994 and also in 2002/2003 but decided to make a formal complaint only in 2007. It appears the timing of the formal complaint was linked to the fact that the school which he had attended and where the appellant had taught was closing. In September 2008, he set out his complaints in a written document and then made a statement to gardaí over two days on the 8th and 12th October, 2008. It is to be noted that in these statements there is reference to incidents occurring between winter 1976 and 1978, but at a later stage this was amended to cover the period 1978 to 1980, and these were the dates that are now referred to in the indictment.

5. Detective Garda Cyril Kelleher, who was one of the lead investigators in the case, first became involved with the case in March, 2009. In late February 2011, he called to see the appellant at his home and made an arrangement for him to attend at a particular garda station two days later on a voluntary basis. The appellant did not attend, but instead attempted to take his own life. He did though attend at the garda station in June 2011, and when interviewed he made no admissions but indicated that he had denied the allegations to his solicitor and would be acting on his solicitor's advice.

6. Following consideration of the matter by the DPP, the appellant was charged and appeared before the Dublin Circuit Court for the first time on the 24th January, 2014. The appellant indicated that he would be pleading not guilty to all charges, and in those circumstances a trial date was set for the 19th January, 2015. On the 26th May, 2014, the appellant sought and was granted leave to seek judicial review.

7. In essence two issues are raised by the appellant in the course of the proceedings that he initiated. He raises the issue of delay and contends that there has been delay in this case to such an extent that the trial should not be permitted to proceed, and in that context he says that there is a real risk that he could not receive a fair trial. There is reference to complainant delay, and there is a particular emphasis on the issue of prosecutorial delay. Secondly, there is a constitutional challenge to s. 11 of the Criminal Law Amendment Act 1885 and to the offence of gross indecency, and in that regard reliance is also placed on the European Convention on Human Rights.

8. The matter was listed for hearing before Moriarty J. on the 6th May, 2015. On the morning of the hearing, the Chief Prosecution Solicitor furnished a letter stating that the DPP would not seek to "prosecute for any counts where the complainant . . . reached his seventeenth birthday". However, the appellant draws attention to the fact that all of the counts with which he has been charged, and to date there have been no amended or substituted charges, refer to a period of time spanning his seventeenth birthday.

9. In November 2015, Moriarty J. delivered a reserved judgment rejecting the various grounds of challenge and refusing the appellant the reliefs sought. The appellant now brings this appeal against that judgment.

10. The grounds of appeal formulated are as follows:-

> (i) That the trial judge erred in law in holding that the offence of gross indecency contrary to common law, as provided for by s. 11 of the Criminal Law Amendment Act 1885, was consistent with Article 38.1 of the Constitution of Ireland and/or with Articles 6 and 7 of the European Convention on Human Rights.

(ii) That, in particular, the trial judge erred in law in holding that the offence did not contravene the principle of legal certainty in criminal matters as guaranteed under the Constitution of Ireland and/or Articles 6 and 7 of the European Convention on Human Rights.

(iii) That the trial judge erred in law and in fact in entering into an adjudication on the facts as alleged by the second named respondent and in holding that the complainant did not or could not consent to the acts alleged against the appellant.

(iv) That the trial judge erred in law in holding that consent was not an element of the offence of gross indecency in circumstances where he relied on a submission on behalf of the second named respondent that she would confine the charges on the indictment to those that had arisen before the complainant had attained seventeen years of age.

(v) The acceptance by the trial judge of the undertaking of the second named respondent not to prosecute any acts that were committed prior to the complainant reaching the age of seventeen years of age is inconsistent with the finding of the trial judge that consent was not an element of the offence.

(vi) That in particular the trial judge erred in law in holding that the offence of gross indecency contrary to common law, as provided for by s. 11 of the Criminal Law Amendment Act 1885, was constitutional in circumstances where it failed to make any distinction based on the age of the parties involved.

(vii) That the trial judge erred in law in holding that the offence of gross indecency contrary to common law, as provided for by s. 11 of the Criminal Law Amendment Act 1885, did not discriminate on grounds of gender in breach of Article 40.1 of the Constitution of Ireland and Article 14 of the European Convention on Human Rights.

(viii) That the trial judge erred in law in holding that the offence of gross indecency contrary to common law, as provided for by s. 11 of the Criminal Law Amendment Act 1885, did not breach the rights of privacy as guaranteed by Article 40.3.1 of the Constitution of Ireland and Article 8 of the European Convention on Human Rights.

(ix) That the trial judge erred in law and in fact in failing to hold that there was culpable delay on the part of the second named respondent, the Director of Public Prosecutions, in investigating and prosecuting the appellant and in holding that any trial of the appellant would not be in breach of his right to a fair trial under Article 38.1 of the Constitution of Ireland and Article 6 of the European Convention on Human Rights.

Delay

11. I propose to deal first with the issue of delay. The appellant says that the prejudice inherent in putting someone on trial for offences alleged to have occurred between 36 and 38 years ago is illustrated in particularly stark terms in this case, where the complainant accepts that his memory was so fallible that he had initially thought that the offences occurred at a time when he was between thirteen and fifteen years of age, i.e. between the years 1976 and 1978, and only later adjusted his position.

12. The appellant stresses that, after significant delay on the part of the complainant in coming forward with a formal complaint, the situation was then compounded by very significant, and he says culpable, delay on the part of the prosecution which in large measure remains unexplained. On the prosecution delay aspect the appellant places particular emphasis on the decision in *PP v. The Director of Public Prosecutions* [2000] 1 I.R. 403, drawing attention to observations of Geoghegan J. who at p. 411 had commented:-

> "I think that where there has been a long lapse of time, as in these prosecutions for sexual offences, between the alleged offences and the date of complaint to the guards, it is of paramount importance, if the accused's constitutional rights are to be protected that there is no blameworthy delay on the part of either the guards or the Director of Public Prosecutions. If there is such delay, the court should not allow the case to proceed and additional actual prejudice need not be proved."

13. The appellant does acknowledge that the jurisprudence in this area has moved on, and that today delay without more would be unlikely to see a trial prohibited. He accepts that an applicant for judicial review is expected to "put more in the balance", but says that here there is much more, instancing the uncertainty and confusion on the part of the complainant in relation to dates.

14. The trial judge is criticised by the appellant for being unduly tolerant in relation to the delay that has occurred. I would accept that where there has been significant complainant delay that it is highly desirable that matters thereafter should be conducted with all reasonable expedition. However, I think one has to be realistic enough to accept that when complaints emerge in relation to events alleged to have occurred several decades earlier, it may not be possible for the authorities to put everything else aside to focus on the late emerging complaint. I also recognise that such allegations will require detailed and careful investigation. In the nature of things investigations of this type are unlikely to be straightforward, but rather likely to be difficult and time consuming. There may be difficulties in accessing records, and interviewing witnesses, e.g. where friends or colleagues of the complainant or the suspect may not be immediately available and may have to be tracked down. There may be witnesses who have moved, in some cases perhaps out of the jurisdiction; females may have married and may have changed their names; professionals in the medical area and related disciplines may have retired; medical practices may have closed or may have amalgamated; and there may be other difficulties of a similar type.

15. This investigation encountered difficulties. The detective garda who initially took on the investigation Detective Garda Daniel Quinlan had to relinquish his role because of ill health. Detective Garda Kelleher, now retired, then took over the investigation. He met the complainant for the first time in March, 2009 and told him that it would be necessary to assemble a good deal of further information and evidence, and so it proved to be. Between that date and mid October 2010, Detective Garda Kelleher obtained reports from several medical practitioners attended by the complainant, as well as taking statements from a number of witnesses, including the complainant's sister who was living France, and also from one of his friends. A total of nineteen witness statements were taken during that period.

16. Detective Garda Kelleher has stated in his affidavit that it was often difficult to make contact with the complainant and that this sometimes persisted for months at a time.

17. On the 22nd February, 2011, which was about four months after Detective Garda Kelleher had taken a further statement from the complainant, he called to see the appellant with a view to setting up an interview with the results we have seen. After the appellant

was eventually interviewed, the gardaí then took a number of further witness statements.

18. A file was submitted to the DPP on the 11th May, 2012. On the 20th November, 2012, there was a direction to charge the appellant. However, on the 20th December, 2012, the gardaí were contacted by the Office of the DPP and asked not to proceed with charging pending further consideration. Then, on the 27th May, 2013, gardaí were directed to proceed with the charges that had originally been indicated. Undoubtedly matters could have been moved along more quickly, and it would have been preferable had that happened, but this is not a case where the delay could be categorised as gross or egregious.

19. One relevant consideration is that the gardaí and then those in the office of the DPP called on to consider the situation were operating, as will become clearer in the discussion of the constitutional issues, against an unusual and complex legal background. There is also no reason to believe that the passage of time since the complaint, or since the allegations were put to the complainant, has given rise to additional prejudice. In saying that I do not ignore that the complainant has said that the period since he first learnt of the allegations has been a stressful one, and indeed I do not doubt that is so.

20. In this case the appellant relies on both complainant delay and prosecutorial delay, placing particular emphasis on the issue of prosecution delay. The leading authority on complainant delay in this much litigated area is the Supreme Court decision in *S.H. v. Director of Public Prosecutions* [2006] 3 I.R. 575. Since that decision it is no longer necessary to conduct an inquiry into the reason for the delay in reporting in a particular case. Rather, the question to be considered was whether "there is a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay". The leading authority on prosecutorial delay is the Supreme Court decision *in P.M. v. Director of Public Prosecutions.* [2006] 3 I.R. 172, in which it was held that blameworthy prosecutorial delay of significance, if established, was not sufficient *per se* to prohibit a trial, but that one or more of the interests protected by the right to an expeditious trial (i.e. those identified in *Barker v. Wingo* (1972) 407 U.S. 514, of which the Supreme Court expressed approval) must also be shown to have been so interfered with such as would entitle the applicant to relief. In this case, the appellant relies on the additional stress and anxiety allegedly caused to him (the second potential prejudice in the *Barker v. Wingo* list) and also on potential impairment of his defence due to delay (the third potential prejudice in *the Barker v. Wingo* list).

21. In this case the appellant has not identified any critical evidence which will not be available because of the passage of time but which would once have assisted him. He has not pointed to any "island of fact" that has been submerged or washed away.

22. If the trial proceeds then the trial judge will have the responsibility for ensuring that the trial is fair. One aspect of that is that the jury will be given a delay warning or a so called *Haugh* warning. If the judge feels there are insurmountable obstacles in the way of a fair trial, then he or she can withdraw the case from the jury. However, while that would be an exceptional development, it is one that is far better taken at trial where the significance of the issues identified can be assessed rather than at this stage where there has been no real engagement by the appellant with the evidence in the case and where complaints about prejudice remain at the level of the general.

23. So far as prosecutorial delay is concerned, it is accepted that since *P.M. v. Director of Public Prosecutions* delay alone is ordinarily insufficient. I have already commented that while matters might have moved quicker, that the delay here was not such that it would be categorised as gross or egregious. Prosecutions for child abuse are hugely serious and must be very stressful for complainants and accused persons alike. In the case of complainants, courts often hear powerful evidence in this regard, if the stage of preparing a victim impact report is reached. In the specific context of this case, there is the additional dimension that a lifelong career in education will be tarnished if there is a prosecution. In those circumstances it is appropriate that there should be no stumbling into a prosecution, but that the matter is thoroughly and objectively investigated and that full and careful consideration be given to the question of whether to prosecute. However, prosecutions for child abuse are likely to be stressful even if prosecuted without delay. To quote Kearns J. in *P.M. v Director of Public Prosecutions* [2006] 3 I.R. 172, at p. 185 (para. 33), *"… an applicant for such relief must put something more into the balance where prosecutorial delay arises to outweigh the public interest in having serious charges proceed to trial."* I do not believe that the appellant has put sufficient into the balance in terms of potential prejudice to lead to a conclusion that this is a trial that should be prohibited. The High Court did not have evidence that the appellant was suffering stress and anxiety at a level significantly greater than that likely to be encountered in any event as a result of such a prosecution even if prosecuted without delay. Moreover, any potential impairment of the defence is capable of being addressed within the four walls of any trial, by appropriate ruling and directions by the trial judge. Accordingly, on this delay aspect of the case I am in agreement with the approach taken by the High Court.

24. I turn now to the constitutional issues. Before addressing any of the details of the argument advanced, it is necessary to point out that there are some unusual if not indeed unique aspects of this case from a procedural point of view. The first unusual aspect is that it is sought to impugn the constitutionality of a measure that is no longer on the statute books having been repealed by the Criminal Law (Sexual Offences) Act 1993. Section 4 of that Act created an offence of gross indecency with a male under the age of seventeen years. Moreover, that section was itself repealed by the Criminal Law (Sexual Offences) Act 2006. Another aspect of the present proceedings is that the section now impugned in these proceedings was the subject of an earlier constitutional challenge in *Norris v. Attorney General* [1984] I.R. 36, when its constitutionality was upheld in the High Court and in the Supreme Court.

25. Ordinarily if the Supreme Court has upheld the constitutionality of a section, there could be no question of an inferior court, as this Court is, coming to a different view. That is particularly so where many of the grounds of the challenge as now formulated repeat grounds that were considered and specifically rejected on the earlier occasion by the Supreme Court. However, it might be argued that this is far from an ordinary situation and that the extent of litigation, legislative intervention, and indeed the 34th Amendment to the Constitution consequent upon the so-called "Marriage referendum", all of which has occurred since the Supreme Court gave judgment in *Norris*, means that it is not as unthinkable as would once have been the case that this Court would come to a different conclusion than the majority of the Supreme Court.

26. It might be useful to offer a thumbnail historical sketch. Historically the law in this jurisdiction and the neighbouring jurisdictions was to be found in s. 61 of the Offences Against the Person Act 1861, and in s. 11 of the Criminal Law Amendment Act 1885, usually referred to as the Labouchere amendment. The law prohibited, or certainly was interpreted as being broad enough so as to prohibit, consensual homosexual conduct taking place between adult males in private. The law was changed by statute in England and Wales in 1967 and in Scotland in 1980. Change in this jurisdiction and in Northern Ireland was slower in coming. The law in Northern Ireland was challenged before the European Court of Human Rights in the *Dudgeon v. U.K.* (1982) 4 E.H.R.R. 149 case. The European Court of Human Rights was of the view that the impugned sections were incompatible with the guarantee of privacy in Article 8 ECHR.

27. In this jurisdiction David Norris, a Joycean scholar and gay rights activist, and later a long term member of Seanad Éireann, brought a similar challenge. He failed before the High Court and failed again before a sharply divided Supreme Court, where the decision was by a three to two majority.

28. Having failed to persuade the national courts, Mr. Norris took his case to the Strasbourg court, where not surprisingly the European Court of Human Rights followed its earlier ruling in *Dudgeon* and opined that the 1861 and 1885 provisions were incompatible with the guarantee of privacy in Article 8 ECHR, and because of its breadth and its absolute character was disproportionate to the aims sought to be achieved.

29. Change was on the way, and homosexual activity was de-criminalised in 1993. In 2010 the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, giving recognition to civil partnerships between same sex couples, was passed.

30. In May 2015, the people by referendum passed the 34th amendment of the Constitution which made provision for same sex marriages. The referendum was passed by 62% of voters on a turnout of 61% with only one constituency in the country failing to support the measure.

31. Before addressing some of the specific arguments advanced which in many respects, as has already been pointed out, repeat arguments that were made in Norris, it might be helpful to step back for a moment and try and take an overview.

32. The DPP seeks to mount a prosecution in relation to alleged sexual activity that occurred between 1978 and 1980 involving a school teacher and one of his pupils. The alleged activity involved buggery, oral sex, and the complainant being required to masturbate the appellant.

33. That activity was illegal in 1978/1980. At a time subsequent to that activity allegedly taking place the constitutionality of the statute by reference to which it is intended to prosecute the appellant has been upheld. Beyond any doubt, activity of that type if taking place today would be illegal. Insofar as the appellant contends that s. 11 of the Criminal Law Amendment Act 1885 and the offence of gross indecency do not accord with prevailing social mores, it is important to appreciate what does and does not accord. The appellant is certainly in a position to make the point, and in truth many would think it is almost an unanswerable point, that s. 11 because of its breadth and in particular because it criminalises sexual activity between consenting adults in private, does not accord with prevailing social mores.

34. However, what he cannot say is that prevailing social mores would preclude the criminal prosecution of an adult teacher engaged in sexual activity of the nature described with one of the school boys in his care. Insofar as the appellant contends that there is a constitutional prohibition on him standing trial on the offences charged, it is not because he says that the conduct alleged against him enjoys any form of constitutional protection or indeed any form of European Convention protection, but because the section of the statute prohibits other conduct which would not generally be regarded as objectionable by contemporary society.

35. Section 11 of the Criminal Law Amendment Act 1885, provides as follows:-

> "Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour."

Moriarty J. identified the core issue raised as being whether s. 11 is impermissibly vague or uncertain in its wording so as to preclude it remaining part of Irish or European law.

36. The trial judge took the somewhat unusual step of deferring consideration of issues that had been raised in relation to locus standi until after he had addressed the substantive challenge and indeed ultimately having regard to the view that he formed on the substantial challenge, found it unnecessary to address again the question of locus standi. In fact, in my view the appellant faces considerable difficulty in establishing standing. Insofar as he complains that the charges of gross indecency are vague and uncertain, and this is really his core complaint, it must be appreciated that in the case of a prosecution on indictment charges do not stand alone, but have to seen in the context of the book of evidence served. Here the book of evidence makes clear that the conduct alleged involves anal and oral penetration and masturbation, the participants being an adult and child, a teacher and school boy. By no stretch of the imagination can it be seen as a marginal case. It is a particularly clear cut case.

37. As a person charged with a criminal offence, he has the *locus standi* to challenge the constitutionality of the offence with which he is charged – however that does not mean that he is at large and can advance arguments entirely divorced from his personal situation. Just as the Supreme Court made clear that Mr. A would never have had locus standi to challenge the Criminal Law Amendment Act 1885 because of its failure to have regard to the possibility of a defence based on a reasonable mistake as to age, since it was a defence that could never have been open to him as he was well aware of the age of the child he was defiling, she being a classmate of his daughter, so Mr. P cannot challenge on a basis that it would have impinged on his rights if he was a homosexual involved in a consensual relationship with another adult. (See the judgment of Hardiman J. in that regard at pp. 164 – 165 of *A. v. Governor of Arbour Hill* [2006] 4 I.R. 88).

38. *Norris v. Attorney General*, a case of considerable significance in the current context, is a good example of the principle that because one has a right to bring a challenge to the validity of a statute, does not mean that one has a right to bring every challenge on every ground. O'Higgins C.J., with whose judgment Finlay P. and Griffin J. agreed, was prepared to accept that Mr. Norris had standing to challenge the section that made buggery a criminal offence, but he was precluded from addressing arguments to the court related to an infringement of marital privacy. The cases of *Douglas v. The Director of Public Prosecutions* [2014] 1 I.R. 510 and *McInerney and Curtis v. Director of Public Prosecutions* [2014] 1 I.R. 536 which have been referred to by the appellant in this Court and in the High Court are readily distinguishable. There the offences in question, "causing scandal" and "injuring the morals of the community" in *Douglas*, and "offending modesty" in *McInerney* and *Curtis*, were so inherently vague and elastic that anyone charged with the offence was affected.

39. In contrast, the concept of indecency is one that is long familiar to the criminal law. The standard charge delivered by judges to juries every day of the week tells them that the offence of sexual assault was previously known as indecent assault, and defined as an assault accompanied by circumstances of indecency, the determination of indecency being a matter for them as jurors.

40. In this case I am forced to conclude that Mr. P is not seeking to mount the challenge grounded on the facts of his case, but he is, to use the language of Hardiman J., engaged in seeking to make up facts which suit him better.

41. I would take the view that Mr. P lacks the standing to make the arguments that he wishes, and so I would dismiss the appeal. In these circumstances, while it is perhaps strictly unnecessary to do so, I will comment briefly on the individual arguments that have been raised, though some comments will involve an element of repetition of what has gone before.

42. The nature of the conduct alleged does not provide scope for significant disagreement as to what is indecent. Right thinking people generally are unlikely to have any real doubt but that the alleged conduct, if it occurred, was grossly indecent. If the trial proceeds, the jury is unlikely to be troubled greatly by whether the acts alleged amounted to gross indecency, rather the issue is likely to be whether the prosecution has proved beyond reasonable doubt that the facts alleged actually occurred.

43. While it may be possible to conceive of borderline or marginal cases, and such cases can safely be left to the good sense of juries if prosecuted, in the great majority of cases jurors would have no difficulty in determining what is grossly indecent.

44. Thus, I find myself in agreement with the trial judge that the offence of gross indecency does not fall foul of the requirement for legal certainty contemplated by the Constitution and by the Convention.

The issue of consent and gross indecency
45. The appellant has argued that consent is a necessary ingredient of the offence, but has further argued that insofar as there is any uncertainty on this point, that serves to illustrate the extent to which the elements of the offence are vague and uncertain, and are so to an impermissible extent. It is true that this is an issue on which there are conflicting English authorities: *R. v. Hall* [1964] 1 Q.B. 273, holding that consent was not a required element, while *R. v. Preece and Howell* [1977] Q.B. 370 taking the contrary view. It is pointed out in the written submissions on behalf of the Attorney General that the Singapore courts have preferred the approach in *Hall*.

46. It seems to me that the starting point for consideration has to be that s. 11 of the Criminal Law Amendment Act 1885 is silent on the issue of consent. If consent is to be regarded as an essential ingredient, then that has to be read into the statute. I see an analogy in the approach of the Criminal Law Amendment Act 1935. Again the section is silent in relation to consent, but while most cases prosecuted would have been cases of *de facto* or *quasi* consent, other cases were prosecuted where the question of consent was in controversy, *C.C.* was such a case. Still other cases were prosecuted under the section, though it was clear that the prosecution was saying that there was in fact no consent.

In my view the language of the section of the 1885 statute is broad enough to cover consensual and non consensual activity. I do concede that its enactment in 1885 was probably motivated by a determination to uphold the moral standards of the time and to condemn what was seen as immoral behaviour I draw some comfort from the fact that O'Higgins C.J. in *Norris* was firmly of the view that the legislation criminalised both consensual and non consensual conduct, at p. 51 he commented:-

> "It is to be noted that the offences dealt with in ss. 61 and 62 of the Act of 1861, can, in relation to mankind, be committed with or upon a male or female person, but can only be committed by a male. It is also to be noted that the offence dealt with in s. 11 of the Act of 1885, only applies to male persons that the section applies irrespective of the ages of the male persons involved and irrespective of whether the act is committed in public or private, or **with or without consent**. While the impugned legislation does not expressly deal with homosexual practices and conduct, it is accepted that the effect of the three sections, taken together, is to prohibit and criminalise such conduct between male persons. No similar prohibition exits in relation to such practices and conduct between females." (Emphasis added)

Gender discrimination
47. The trial judge dealt with this issue in the following terms:-

> "Nor do I feel there is any significant merit in the argument that the section amounts to invidious discrimination, insofar as it relates only to conduct involving males. The code of sexual offences, whether statutory or common law, in its entirety must necessarily make provision for a wide range of possible crimes, some like heterosexual rape, necessarily gender specific. Whether, in relation to alleged perpetrator or victim, a 'one gender fits all' concept is feasible must be viewed as in the vast preponderance of instances an inoperable and unrealistic aspiration."

48. I am in agreement with the trial judge that there was no invidious discrimination here. I am also in agreement with the trial judge that it is appropriate to have regard to the code of sexual offences, statutory and common law as a whole. In truth there is no discrimination here of which the appellant can legitimately complain. Had he engaged in the same conduct with a school girl of the same age back in 1978/1980, he would have been committing an offence under the Criminal Law Amendment Act 1935. If he, as a school teacher, engaged in similar conduct today, he would be committing the offence of defilement of a child and would as a teacher and class tutor, and so a person in authority, be liable to a maximum sentence of ten years being twice the maximum generally applicable.

Privacy
49. The trial judge is criticised as dismissing the arguments in relation to privacy in peremptory terms. He did so in the following terms:-

> "In addition, given all the circumstances of this specific case, the further argument that the Section in some sense infringes the applicant's right of privacy appears to me so unrealistic and far fetched as not to merit separate consideration."

50. At the risk, indeed the inevitability of exposing myself to similar criticism I have to say that I am in complete agreement with Moriarty J. Bluntly, there is and there was no constitutional right to privacy in order to abuse a child.

51. In conclusion, for reasons which I have pointed out earlier, I regard this challenge as unmeritorious. The activity which is alleged to have occurred in 1978/1980 was criminal at the time. If the alleged activity had been brought to garda attention then or soon thereafter, any attempt to invoke constitutional principles in order to prevent a prosecution would have received short shrift. Similar activity if engaged in by a person in a similar position to that of the appellant would have been criminal at all stages since 1978. Such activity if it took place today would be criminal, though with the important distinction that the maximum penalty prescribed by the Oireachtas in 2006 is a much higher one, reflecting the seriousness with which contemporary society views such conduct.

52. The appellant has sought to render himself immune from prosecution largely because a statute drafted 115 years ago criminalises certain conduct which contemporary society would not regard as being properly the concern of the criminal law. However, contemporary society would regard the conduct in which he is alleged to have engaged as being properly the concern of the criminal law.

53. The submissions on behalf of the Attorney General raised the possibility of reading down the provision in issue as by declaring that

it would not be possible to prosecute in particular circumstances, e.g. when what was in issue was consensual activity between adults. In my view the notion that there would be any attempt to prosecute in respect of pre 1993 conduct in these circumstances is sufficiently remote that it is neither necessary nor appropriate to engage in that exercise at this stage. Rather I am content to say that all grounds of challenge fail, and I would dismiss the appeal.