Neutral Citation Number: [2009] IEHC 526

THE HIGH COURT

2008 683 JR

BETWEEN

MAURICE CONNOLLY

AND

DIRECTOR OF PUBLIC PROSECUTIONS

Judgment of Mr. Justice McCarthy delivered the 2nd day of December, 2009

1. This is an application to restrain by prohibition or injunction the prosecution of certain proceedings entitled *D.P.P. v. Maurice Connolly* now pending before Dublin Circuit Criminal Court and with the Bill number DU401/07. The applicant was initially charged on the 26th October, 2007 with seven counts of indecent assault, contrary to common law and as provided for in s. 6 of the Criminal Law (Amendment) Act, 1935 on divers dates between 1st June, 1966 and 1st December, 1969: it appears that summonses were also issued on the 18th December, 2006 but, whether or which, one assumes the matter proceeded on foot of the charges laid. In the events that occurred three of the seven charges, at the request of Mr. Garrett Sheehan, on behalf of the applicant, were withdrawn on 20th March, 2007. These pertained to events which allegedly occurred between 1st June, 1966 and 1st December, 1967 inclusive.

2. The complainant, Bernadette Frost (formerly Larkin) made statements on the 16th November, 2005, the 21st January, 2006 and the 24th August, 2006. Two only witnesses were contemplated by the prosecution, at least at the time of the return for trial, being Mrs. Frost and one Fr. Aquinas Duffy who made a statement on 28th July, 2006: he was "priest delegate" with the Child Protection Service of the Archdiocese of Dublin. Much in his statement is irrelevant to the prosecution or to the present proceedings. The crucial part is that his statement indicates that he would give evidence of the fact of the applicant's service as curate at St. Michael's Church, Inchicore, from 2nd December, 1967 to 15th September, 1972, in circumstances where Mrs. Frost's evidence would have been to the effect that indecent assaults occurred at the applicant's residence at 15A Bulfin Road, whilst he was resident there as curate in the parish. It was because of Fr. Duffy's statement that, plainly, the request to abandon three of the seven charges was granted

3. Prior to the trial, under cover of a notice of additional evidence, the respondent indicated that there would be called also on his behalf one Fr. Brian Power who lived in the same house as the applicant during what was conceived to be a relevant period (he having made a statement dated 30th August, 2006) and statements of a sister and brother of Mrs. Frost, being Marian White (who made a statement on 22nd November, 2005) and James Larkin (who made statements on 29th July, 2006 and the 31st July, 2007), respectively. By further such notice the director indicated that there would be called on his behalf one D. Garda Anne McGowan who appears to have the been the senior investigating member of An Garda Síochána, being that pertaining to what was said at a certain interview of the applicant on 7th June, 2006 and to prove a memorandum thereof. She had at that time made a statement on the 1st February, 2008.

4. The matter came on for hearing on 18th February, 2008 and was adjourned to the following day, apparently due to the exigencies of the lists. On that day the solicitors for the applicant were furnished with a statement of one D. Garda Brian Murray (which was undated) to the effect that Fr. Power was too ill to appear as a witness and it was indicated by letter that it was proposed to serve such statement under cover of a notice of additional evidence.

5. The matter had proceeded, thus far, in a relatively commonplace manner and needless to say all statements of a substantive nature, ultimately the subject of notices of additional evidence as aforesaid, had been disclosed to the solicitors for the applicant in advance of the trial, such that, in practice, there was no element of surprise by their service under cover of such notices at or shortly before the trial, D. Garda Murray's first statement excepted. In any event before the commencement of business hours on 19th February, 2008, the accused's solicitors requested, by letter, the following information or documents:-

> "(a) The identity of the child psychiatrist referred to in the statement in the book of evidence of Ms. Bernadette Frost and copies of her hospital records from St. James' Hospital where she attended.
>
> (b) Copy of the psychiatric report of Dr. Anne Leader, who has been retained by O'Neill and Quinn, solicitors for the personal injuries action that has been initiated by Ms. Frost against Maurice Connolly.
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> (c) Copy of the original complaint made to Philip Garland, Director of the Child Protection Service referred to in the statement of Fr. Duffy of the Child Protection Services made on 28th July, 2006.
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> (d) Copies of the original complaint made to Ms. Pauline Fahy, social worker of the HSE care of Our Lady's Clinic Patrick Street, Dunlaoghaire, in which Ms. Bernadette Frost alleges that she was abused by Maurice Connolly"

6. In reply to such correspondence, the Chief Prosecution Solicitor furnished the following:-

> 1. A copy statement of D. Garda Anne McGowan (made on 19th February, 2008).
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> 2. A copy of an application for medical records, and the reply from, St. James' Hospital.
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> 3. A copy of the report of Dr. Anne Leader: she has been retained on behalf of Mrs. Frost by her solicitors as aforesaid.

4. A document entitled "statement of Ms. Bernadette Frost taken in the office of the Child Protection Service, Archdiocese of Dublin on Tuesday 14th February, 2006. That appears to have been taken by Mr. Garland.

5. A copy of document entitled "case notes Re Bernadette Frost", apparently prepared by one Pauline Fahy, social worker, attached to the H.S.E.

There is amongst the papers a reference to a letter from Messrs. Sheehan to Ms. Fahy of 18th February, 2008 in which reference is made to a letter to the applicant but the latter does not seem to be amongst the papers: I assume that that letter or its contents are not material since it is presumably based (and I hope make a correct inference on this context) on the case notes.

7. There is explicit reference in the second statement (21st January, 2006) of the complainant to attendance at a child psychiatrist at St. James' Hospital from the ages of seven to ten (being a period which in part overlapped with the times during which it is alleged indecent assaults occurred). This statement, it appears, was disclosed to the applicant's solicitors on 18th December, 2006 by way of what D. Garda McGowan correctly calls general disclosure. As a result of that statement D. Garda McGowan, two days later, wrote to St. James' hospital enquiring for medical records pertaining to the applicant and received a reply on the 11th April, 2006. Regrettably, due to an oversight or misconception, these letters were not furnished by way of disclosure when they ought to have been and, indeed, they only came into the hands of the Chief Prosecution Solicitor on the 19th February. The trial was adjourned in the events which had occurred. It has been stayed pending the disposition of these proceedings.

8. Subsequent to the adjournment D. Garda McGowan made further enquiries and made a statement pertaining thereto on 11th April, 2008. From that statement it is clear that a responsible doctor at the hospital confirmed (as appeared in the correspondence) that there were no reports available in respect of Mrs. Frost but a line of enquiry was opened in terms of potential treatment of the applicant at what was called the Garden Hill Unit which is a now a medical physics unit dealing with medical equipment only. The applicant contacted one Dr. Ivor Brown, now retired, who I infer was engaged in the practice of psychiatry at St. James' Hospital at a material time, who informed D. Garda McGowan that the unit in question never dealt with child psychiatry. In her statement she asserts that she has exhausted all avenues of enquiry in relation to the treatment of the applicant; I agree with that assertion. So far as the statement of Mr. Garland, the notes of Ms. Fahy and the report of Dr. Leader are concerned, D. Garda McGowan deposes to the fact that she knew nothing of these prior to 18th February, and they were not in her hands. She does, however, say that she was aware that Mrs. Frost had had dealings with the H.S.E. but was not aware of the existence of what she describes as "their reports" – I infer that the only such documents furnished (and relevant) are the case notes. Contact with the social services, is, of course, a commonplace in cases of the present kind.

9. With respect to what I might term the third party documents there is no basis in law to compel either their provision to members of An Garda Síochána or the Director of Public Prosecutions, prior to trial. No blame can be attached to the Gardaí in this connection accordingly. The solicitors for the applicant, of course, must have been aware, also, of the commonplace fact that complainants in cases such as the present frequently have contact with the social services and knew of the psychiatric treatment when general disclosure was made.

10. Nothing of significance was added to the sum of the knowledge of the applicant and his solicitors pertaining to the fact of the attendance of the complainant at St. James' Hospital on 18th December, 2006 by disclosure of two additional statements of D. Garda McGowan. The statement of the 19th February, 2008 merely referred to the correspondence. The inquiries which she conducted subsequent to the adjournment, as set out in her statement of 11th April, 2008, supplemented or perhaps more correctly confirmed, the earlier information pertaining to the non availability of any records. Similarly nothing was added to the sum of knowledge about any psychiatric treatment of the applicant. In particular, at the risk of repetition the applicant knew of the fact of the psychiatric treatment as of 18th December, 2006. The inquiries supplemental to the correspondence merely served to exclude the possibility, raised by the hospital, that treatments might have taken place at the Garden Unit. The complaint, accordingly, against the Gardaí in relation to the physiciatric issue must be late provision of the correspondence and failure, prior to the 19th February, to conduct the inquiry evidenced in the statement of 11th April, 2008, even though those added nothing and, in particular did not achieve their aim, namely, obtaining any documents. It appears, however, that at all stages the complainant fully co-operated because the absolutely privileged medical report of Dr. Leader was disclosed, whereby it seems right to infer that she waived her absolute privilege and she consented to the provision of any notes since it will be the universal experience of practitioners that a social worker will not disclose parts of his or her file pertaining to an individual without that individual's consent or court order (and there is no suggestion of the latter), as well as the material in the hands of Mr. Garland.

11. With respect to the contention of the applicant of a failure of the prosecution in terms of investigating I refer first to *D.C. v. D.P.P.*, [2005] 4 I.R. 281. In that case the applicant alleged that the respondent had acted otherwise than in accordance with the principles of natural and constitutional justice in failing to seek out and make available witness statements and by failing to ascertain the identity of certain individuals. He sought to restrain his prosecution for offences of sexual assault and rape in circumstances where certain information apparent from statements in the book of evidence led the accused's representatives to seek to identify two men, in whose company the complainant had been prior to the alleged rape and sexual assault. No statements were obtained from such persons. Denham J. referred to *Bradish v. D.P.P.* [2001] 3 I.R. 127, *Dunne v. D.P.P.* [2002] 2 I.R. 305, *Murphy v. D.P.P.*, [1989] I.L.R.M. 71 and also *Dillon v. O'Brien and Davies*, [1887] 20 L.RIR. 300 and in particular the quotation from the judgment of Palles C.B. by Lynch J. in *Murphy*:-

> "But the interests of the state in the person charged being brought to trial in due course, necessarily extends as well to the preservation of material evidence of his guilt or innocence as to his custody for the purpose of the trial"

Denham J. went on in the context of *Murphy* to say that:-

> "Lynch J. held that evidence relevant to guilt or innocence must, as far as is necessary and practical, be kept until the conclusion of the trial; which principle also applies to the preservation of Article which may give rise to the reasonable possibility of securing relevant evidence. Further, an accused must be afforded every reasonable opportunity to inspect all material evidence which is under the control and power of the prosecuting authority in order adequately to prepare his defence."

She went on to address, by reference to *Dunne*, the issue of the obligation of the prosecution, not merely to preserve but to seek out evidence and quoted with approval from the judgment of McGuinness J. and in particular the passage (at p. 309) where she stated:-

> "Where a court would be asked to prohibit a trial on the grounds that there was an alleged failure to seek out evidence, it would have to be shown that any such evidence would be clearly relevant, that there was at least a strong probability that the evidence was available, and that it would in reality have a bearing on the guilt or innocence of the accused person. It would also be necessary to demonstrate that its absence created a real risk of unfair trial."

12. Thus, before the prosecution could be in breach of its duty to seek out evidence its relevance would have to be shown together with a strong probability that it was available and that it would in reality have a bearing on the guilt or innocence of the accused (as well as the necessity to demonstrate that its absence created a real risk of an unfair trial).

13. In the present case, any documentary material pertaining to psychiatric treatment could never be received in evidence as evidence of facts stated therein but it could afford material out of which the complainant might perhaps be cross-examined or open up further avenues of enquiry to the applicant and they simply cannot be found or, more probably, it seems fair to infer, no longer exist. Criticism of the Gardaí is not made because documents have not been found but rather, it is said, sufficient inquiry had not been made about their potential whereabouts earlier or, perhaps more widely, pertaining to the psychiatric treatment, though, as a fact, no matter how wide (or unduly limited) those inquiries might have been it could have had no effect on the case, one way or another. Any potential relevance of notes or psychiatric treatment is speculative. They would, and have proved, to be a dead end to use Mr. Mullins phrase. In the High Court in D. L. O'Caoimh J. in his judgment of the 18th May, 2004 *inter alia* said that:-

> "The obligation on Gardaí to seek out evidence was stated by Hardiman J. in *Dunne v. Director of Public Prosecutions*, [2002] 2 I.R. 305 at p. 323 not to extend to any remote, theoretical or fanciful possibility. I believe that the applicant's case is based on such a remote theoretical or fanciful possibility. As stated by McCracken J. in *McKeown v. Judges of the Dublin Circuit Court*, (Unreported), Supreme Court, 9th April, 2003 at p. 9:-
>
> > 'There are obviously limits to the lengths which the Gardaí must go in either seeking out or preserving evidence…'"

In the present case, it seems to me that the duty of the Gardaí was amply fulfilled in the terms of the inquiries and that they have, indeed, arrived at a dead end. I think, that, in reality, they did so in the course of correspondence between D. Garda McGowan and Dr. Morgan and I think the initial enquiry by correspondence was indeed enough to discharge the prosecution duty. The additional information set out in the statement of the 11th April made assurance doubly sure, so to speak, subject to this: the further inquiries did elicit the information that no child psychiatry was practised at the Garden Hill Unit. At first glance this new information might serve to afford a basis for either challenging the prosecution case or at least opening up a further line of inquiry for the defence (in the sense referred to above) but this ultimately could not be the case since the complainant never said where she received the treatment; there, and this was merely an unfounded suggestion made by the hospital. Detective Garda McGowan's enquiries went as far as contacting Dr. Ivor Browne, now retired (but to no avail). The absence of records is not something for which the prosecution could bear any responsibility.

14. Proceeding, accordingly, upon the basis that no criticism can be made of the prosecution in terms of the investigation of the alleged offences, one must ask one self whether or not there has been a fault on the part of the prosecution in terms of what has come to be known as prosecutorial delay. What is meant here, of course, is significant delay. I reject the idea that because the inquiries made after the adjournment on 19th February, were more extensive that those made by the letter of 23rd January, 2006, the prosecution was guilty of blameworthy delay or, to put the matter in another way, that relevant delay was constituted by a failure to make the inquiries ultimately made in April, 2008, in January, 2006. If blameworthiness arose for that reason the proposition would have to be that blameworthy prosecutorial delay can be constituted by a further investigation (yielding nothing extra of substance) of an issue already adequately investigated in a timely manner. If there is blameworthy delay, accordingly, it arises in the failure to make disclosure of the letters earlier.

15. Whilst I have referred to *D.C.* and in particular the judgment of Denham J. primarily in the context of the prosecution obligations in respect of evidence Denham J. stressed therein (at p. 284):-

> "The Constitution and the State through legislation have given the Director of Public Prosecutions an independent role in determining whether or not a prosecution should be brought on behalf of the people of Ireland, the Director having taken such a decision, the courts are slow to intervene. Under the Constitution it is for a jury of twelve peers of the applicant to determine whether he is guilty or innocent, however, bearing in the mind the duties of the courts to protect the constitutional rights of all persons, in exceptional circumstances the court will intervene and prohibit a trial. In general such is not necessary as the trial judge maintains at all times the duty to ensure due process and a fair trial. The basic assumption to apply in relation to all pending trials, is that they will be conducted fairly, under the presiding judge."

16. In *R.McC v. D.P.P.* (Unreported, Supreme Court, 19th July, 2007) (per Denham J.), it was said that:-

> "… [that several authorities] pointed to four key factors militating in favour of the exceptional character of the jurisdiction to prohibit the trials. Firstly, the people have the right and the courts a co-relative duty to ensure that persons charged with criminal offences are duly and properly tried. Secondly the Director of Public Prosecutions acting in the name of people act independently in deciding who should be tried and for what offences and the courts should not likely interfere with his exercise of that power. Thirdly, the Constitution ordains that the proper forum for the trial of serious offences is the jury: jury trial is central plank of our legal and judicial system and the court should not use up that function. Finally, the courts will presume that criminal trials would be conducted fairly, a principle which depends principally on the presumption of innocence, but which also rests upon a range of other well established protection of the rights of the accused."
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> These principles, of course, apply not merely to restraint on the continuation of criminal proceedings under the

heading prosecutorial delay but also delay causing a real and unavoidable risk of an unfair trial"

17. In *P.M. v. Malone*, [2002] 2 I.R. 560 the Supreme Court was called upon to address the issue of whether or not a trial ought to be prohibited where there was inordinate delay in bringing it to trial. Apart from cases where a risk of an unfair trial might arise, Keane C.J. elaborated upon a different circumstance in which a trial might be inhibited when he said (at p. 572) 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. 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 prospective prejudice (the difficulties necessarily inherent in giving evidence a lengthy period) which may affect his ability to defend himself and, hence, which compromise the fairness of the trial. That, however, may not be the only consequence for the accused of significant and culpable delay to which he has not contributed."

and

> "The first major consequence may be the loss of 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 being brought to trial".

Keane C.J., having taken the view that the "unarguable" violation of the accused right to a trial with reasonable expedition had arisen said (at p. 581) that:-

> "Where, as here, the violation of the right has not jeopardised the right to a fair trial, but has caused unnecessary stress and anxiety to the applicant, the court must engage in a balancing process. On one side of the scales, there is the right of the accused to be protected from stress and anxiety, caused by an unnecessary and inordinate delay. On the other side, there is the public interest in the prosecution and conviction of those guilty of criminal offences. In all such cases, the court will necessarily be concerned with the nature of the offence and the extent of the delay".

18. On the same issue in *P.M. v. D.P.P.* [2006] 3 I.R. 173 the leading judgment of the Supreme Court was given by Kearns J. who said (at p. 185):-

> "I believe that the balancing exercise referred to by Keane C.J. in *P.M. v. Malone*, [2002] 2 I.R. 560 is the appropriate mechanism to be adopted by a court in determining whether blameworthy prosecutorial delay should result in order of prohibition. It means that 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 precede to trial. In most cases, pre-trial incarceration will not be an element as an applicant will probably have obtained bail pending his trial. Secondly, while he may assert increased levels of stress and anxiety arising from prosecutorial delay, any balancing exercise will have to take into account the length of such blameworthy delay, because if it is a short delay rather than one of years, the mere fact that some blameworthy delay took place should not of itself justify the prohibition of a trial".

and he went on to say (at the same page):-

> "As part of the balancing exercise it should also be borne in mind that on order of prohibition may not be the only remedy available in such circumstances. A court may have the ability to direct that a particular trial be brought on speedily and be given priority, although precisely how this would be policed or operated in practice may be problematic".

He concluded by saying (also at p. 185):-

> "… I am satisfied that if blameworthy prosecutorial delay of significance was been established by the applicant, then that is not sufficient *per se* to prohibit the trial, but that one or more of the interests protected by the right to expeditious trial must also be shown to have been so interfered with such as would entitle the applicant to relief".

19. Geoghegan J. addressed the issue of allegations of anxiety consequential on delay and said, in that regard, at p. 176:-

> "…I do not think that the courts should normally concern themselves with the degree of anxiety in a quantative sense requiring proof thereof. It is perfectly obvious that a person who was told that he is on suspicion of having committed a sexual offence and who was innocent of the offence (applying the presumption of innocence this must be assumed by the court) will suffer a high degree of anxiety. The size of the anxiety will be determined by the length of time rather than on a qualative basis."

20. In *Cormack v. D.P.P. and Others* and *Farrell v. D.P.P. and others*, (dealt with together),(Unreported, Supreme Court, 2nd December, 2008), Kearns J. referred to the fact that, at first instance, Edwards J., in the context of the delay being causative of stress and anxiety, had said that:-

> "… an applicant must demonstrate something more than the predicable levels of anxiety, that any citizen would feel in the face of an impending trial".

and Kearns J. went on to say:-

> "Obviously, it may be helpful in a particular case if medical evidence is furnished in support of a contention that an

applicant has suffered a peculiar level of stress and anxiety in the particular circumstances of his or her case. This may arise in a variety of ways and for a variety of reasons, such as in the case of an offence alleged to have occurred in a small rural community where the applicant's identity would be well known, or in the case of an elderly applicant who might in addition be afflicted with other medical problems likely to be exacerbated by stress and anxiety. There may indeed be cases where undue levels of stress and anxiety may be inferred as a matter of common sense, though from the particular facts of the case, although I appreciate a different view was taken by Fennelly J. in the course of a judgment he delivered in *M. O'H. v. D.P.P.* [2007] 3 I.R. 299."

Kearns J. also said that he did not however:-

"… think it necessary for an applicant to meet a threshold of establishing or proving a form of psychiatric illness for the purpose of making out a case of stress and anxiety. I have previously expressed the view that it would be most unfortunate if cases of this nature came to be determined by reference to a contest between doctors called for the applicant on the one hand or the prosecution on the other".

21. In *M.O'H. v. D.P.P.* the decision of the majority in the Supreme Court was delivered by Fennelly J. (Kearns J. dissenting). The offences alleged were said to have occurred between 1981 and 1982, and the applicant accused had been charged on the 26th July, 1995. The trial, once fixed, was adjourned from time to time. Ultimately, in any event, on the 25th May, 1998, the applicant commenced proceedings to restrain prosecution on grounds of general delay and sought an order of *mandamus* directing the DPP to furnish certain medical reports of the complainant's doctor, Dr. Bereen (to which the complainant consented but which, initially, Dr. Bereen objected); in any event, ultimately, after *inter alia* the question of disclosure had been addressed by O'Sullivan J. with the doctor, the certain clinical notes (which Dr. Bereen said constituted the entirety of the papers held by him) were furnished on the 7th October, 1999. In as much as O'Sullivan J. had taken the view that the appropriate course for the applicant was to seek third party discovery in the Circuit Court (then conceived to be lawful); on the 21st March, 2000, it was so sought against the Health Board and an affidavit was sworn by such third party, with discovery of certain documents on the 26th September, 2000. At the trial objection was made to cross examination of Dr. Bereen by reference to certain clinical notes made by others but the jury was discharged for other reasons. Thereafter, the applicant sought the assistance of the respondent in identifying (*inter alia*), certain files of social workers which were furnished (the last on the 5th March, 2002) and further adjournments of the trial were necessitated: I attenuate the matter considerably. The second set of proceedings to restrain the trial on the grounds of prosecutorial delay (with all that that entailed from the authorities aforesaid) were commenced on the 26th July, 2002. In deciding whether or not, by virtue of prosecutorial delay, and in accordance with the authorities, the court decided that the prosecution was not blameworthy.

22. Even though Fennelly J. had concluded that the applicant had failed to make out a case for prosecutorial delay, he considered also the application of the balancing test. He pointed out:-

"It cannot be doubted, and has been confirmed in several cases, that there is a strong and legitimate public interest in prosecuting cases of alleged sexual assault on minors. This is such a case. The complainant was about fifteen years of age at the time of the alleged offences. The applicant was thirty years her senior. The authorities show that it is necessary for an applicant to put something into the balance in his favour, if he is to persuade a court to stop his trial."

In this case, of course, charges pertain to a period when the complainant was even younger and the applicant was in a position of considerable authority, as a local curate apart altogether from the fact that he was in his late thirties at the relevant time, and the complainant was especially vulnerable.

23. What was put into the balance in *M.O'H.* was the fact that it was alleged (perfectly understandably) that the applicant had "suffered excessive pre-trial anxiety": the applicant, however, had not sworn an affidavit and Fennelly J. said that there was no evidence to support the allegation. Fennelly J. pointed out, and I think that this is of some relevance in the present case, that he was:-

"Far from saying that it is necessary to have psychiatric or psychological evidence of stress or anxiety. Whether anxiety or stress has been suffered is largely a matter of commonsense. I merely say that some evidence is necessary. Here there is none. It is obvious that it is stressful for any individual to have to face criminal proceedings. Some distress is inevitable. There must be evidence of something more than normal, something extra caused by the alleged prosecutorial delay. On this ground, even if there were blameworthy prosecutorial delay, I would hold that the applicant has not established that his trial should be prevented."

This approach was stressed in the dissenting judgment of Kearns J. and, it seems that any conflicting views on this aspect in the context of prosecutorial delay are more apparent then real.

24. In *McFarlane (No. 2) v. D.P.P.* (Unreported, Supreme Court, 5th March, 2008) the judgments were given by Fennelly and Kearns J.J. What was in issue, ultimately, was systemic delay, following the inception of earlier judicial review proceedings in 1999. This of course took place against the background of the fact that the offence was alleged to have been committed on 24th November, 1983, had been arrested in, and was ultimately extradited from, the Netherlands to Northern Ireland and, until shortly before his arrest on 5th January, 1998 he had been imprisoned in Northern Ireland. Kearns J. *inter alia* referred to *P.M. v. D.P.P.* [2006] 3 I.R. 172 and *P.M. v. Malone*, [2000] 2 I.R. 560.

25. He went on to set out the principles which appear to have been established in relation to prosecutorial delay:

(a) Inordinate, blameworthy or unexplained prosecutorial delay may breach an applicant's constitutional entitlement to a trial with reasonable expedition

(b) Prosecutorial delay of this nature may be of such a degree that a court will presume prejudice and uphold the right to an expeditious trial by directing prohibition

(c) Where there is a period of significant (as distinct from minor) blameworthy prosecutorial delay less

than that envisaged at (b), is demonstrated, the court will engage in a balancing exercise between the community's entitlement to see crimes prosecuted and the applicant's right to an expeditious trial, but will not direct prohibition unless one or more of the elements referred to in *P.M. v Malone* [2002] 2 L.R. 560 and *P.M. v D.P.P.* [2006] 3 T.R. 172 are demonstrated.

(d) Actual prejudice caused by delay which is such as to preclude a fair trial will always entitle an applicant to prohibition.

26. He further analysed those principles, also, as follows:

(a) The length of the delay
Until there is a delay which is presumptively prejudicial, there is no necessity for an inquiry into the other factors that go into the balance. The length of delay which will demand an inquiry is necessarily dependent upon the peculiar circumstances of the case. Thus the delay which can be tolerated for an ordinary street crime is considerably less than for a complex conspiracy case

(b) Reasons for delay
Different weights should be assigned to different reasons. A deliberate prosecution attempt to delay the trial in order to hamper the defence should weigh heavily against the prosecution; more neutral reasons such as negligence or overcrowded courtrooms might weigh less heavily but must nonetheless be considered, given that the ultimate responsibility for such circumstances rests with the State rather than

the defendant. A valid reason, such as a missing witness, might serve to justify delay.

(c) Role of the applicant
An applicant's assertion of his right to a speedy trial is entitled to strong evidentiary weight in determining whether he is being deprived of his constitutional right; a failure to assert the right may make it more difficult for an applicant to prove that he wanted or was denied a speedy trial. In this context the court noted that delay may sometimes operate to the advantage of a defendant.

(d) Prejudice
The Court identified three interests of defendants which the speedy trial right was designed to protect: (i) the prevention of oppressive pre-trial incarceration; (ii) the reduction of anxiety and concern of the accused and (iii) most importantly, the limitation of the possibility that the defence will be impaired.

27. For the sake of completeness, I note that a considerable number of authorities have been referred to in the written submissions of both parties. I believe, however, that the law as it now exists has been sufficiently elaborated in the case law with which I have sought to deal in some detail, to a greater or lesser extent. For the sake of completeness, however, reference has been made on behalf of the applicant accused to *D. v. D.P.P.* [1994] 2 I.R. 465, *B. v. D.P.P.,* [1997] 3 I.R. 140, *Z. v. D.P.P.* [1994] 2 I.R. 476 in support of the proposition that the defendant's right to a fair trial is a superior to the community's right to prosecute whereby there is a real or serious risk that the accused will not receive such a trial, no balancing exercise arises. I will not elaborate on this, obviously.

28. Reference has been made to the entitlement of an accused to a trial with reasonable expedition, as referred to in *P.O'C. v. D.P.P.,* [2000] 3 I.R. 87, said, again, there is no doubt about that right. With respect to the authorities relating to allegations of sexual abuse of children and the fact that they fall into a special category, namely, *G. v. D.P.P.* [1994] 1 I.R. 374, B. aforesaid and *P.C. v. D.P.P.,* [1999] 2 I.R. 25, nothing is added to the principles to which I have referred.

29. Further, the authorities relied upon on behalf of the respondents include *P.L. v. Judge Buttimer,* [2004] 4 I.R. 494. That is a case where prohibition was granted on its own facts (due to the unavailability of a physical exhibit). *S. B. v. D.P.P.* (Unreported, Supreme Court 21st December, 2006) concerns the unavailability of certain records and *R.M.C.C. v. D.P.P.* [2007] pertained to the death of a prospective witness, *D.J. v. D.P.P.*, (Unreported, Supreme Court, 1st May, 2007), *D. v. D.P.P.,* (Unreported, Supreme Court, 23rd July, 2008), where a prospective witness had similarly died and *T.D. v. D.P.P.* (Unreported, Supreme Court, 23rd April, 2008) could not be found; all turn upon their own facts. It is worth noting, however, in passing, that in P.D. the court refused prohibition in circumstances where the allegation was that the applicant had taken the complainant to the V.D. clinic when he was 13 (many years previously) but the records were, unsurprisingly, unavailable.

30. It is lawful for the prosecution without limit, to serve additional witness statements under cover of a notice of additional evidence (or exhibits) during the trial. The type of difficulty which arose in the present case is not entirely uncommon and might be regarded as one of the ordinary hazards of litigation whether civil or criminal. I do not think that I can exclude consideration of the nature of the delay. One can well envisage why delay might be blameworthy in the sense contemplated by the case law if, say, there was a long lapse between completion of the investigation and the subsequent receipt of directions from the D.P.P. or a lapse between that time and any further step in the process such as the charging of an individual. In this case the only delay was a failure to furnish material which confirmed a negative and assisted no one.

31. I do not think that there was significant prosecutorial delay which was blameworthy or culpable. Whether or not delay arises in a given case is a moveable feast. There is no doubt but that greater expedition is required in a case of antiquity or where, either because of antiquity or the age or state of health of an accused, a delay might cause greater stress or anxiety or otherwise infringe one of the interests protected by the right to an expeditious trial. In the present case the desirable course would have been to have disclosed the correspondence with the hospital sufficiently in advance of the trial as to permit the accused's solicitor and counsel to consider the fact that medical records about psychiatric treatment of which they already knew were (unsurprisingly) unavailable, and, if thought fit, to make their own inquiries. One would have thought that as a counsel at perfection it would have been best to have done this at the time of disclosure of other material on 18th December, 2006. Since the purpose of disclosure is to make available to the accused any document which might be relevant to his defence; this is the core object and must take place in sufficient time. In practice, the material ought to have been furnished at the latest weeks previously and possibly months. In as much, by definition, precision is impossible in a case of this kind, I would have thought that perhaps two or three months might have been appropriate. Of course, as a matter of practicality, a very much shorter period would almost certainly have sufficed in this case (I have seen problems occasioned by late disclosure dealt with in days). Delay from the adjournment

of the trial on 20th February, to the date when a new trial date was obtained was just under two months and the remaining delay's to the scheduled trial date.

32. It is also necessary to consider the role of the applicants: I accept that there was no omission on the part of the applicant to seek a vindication of his right to a speedy trial because an adjournment of the trial took place. What I consider relevant, however, is that the fact that even though correspondence was apparently entered into between the Chief Prosecution Solicitor and Messrs. Garrett Sheehan and Partners pertaining to other aspects of disclosure (as set out in the affidavit of Alison Morrissey and apparently including a copy of the custody record) no issue was raised about psychiatric treatment or any records in relation thereto, even though the accused's solicitors were aware of it. It is not, in my view, to suggest that there is some shifting of the burden of proof or a depravation of the right of an accused to stand mute so to speak (I do not use the word as term of art) and merely put the prosecution on proof of its case to say that in complaining of delay one is entitled to take into account the fact that steps might have been taken by or on behalf of an accused to obtain information or documents. In particular, it seems to me that it would have been reasonable to expect, if significance was to be attached to the fact of psychiatric treatment in any event, that inquiries might have been made in relation thereto of the hospital. This is in any event, as a minimum to be taken as confirmatory of the insignificant nature of the material.

33. In terms of prejudice, I think that what arises here (excluding any issue pertaining to a risk of an unfair trial) is the invasion of interests which are protected by the right to expedition. In as much as one of those rights is the prevention of oppressive pre-trial incarceration, it is relevant to say that did not arise here. The other which is identified in the case law is the anxiety, stress and concern to which an accused person might be subjected by reason of delay.

34. Having regard to modern trends in longevity I do not think that too much emphasis should be placed on the age of an applicant of Fr. Connolly's age, (I speak generally) subject to his state of health. Furthermore, it seems to me that there must be some connection between any blameworthy delay and the consequences thereof (e.g. what I might term enhanced stress or anxiety or adverse consequences for someone's state of health). In the present case the applicant has deposed to the fact that he is in poor health as a result of :-

> "A serious and greatly debilitating cardiac condition. I had coronary artery by-pass in 1998 and angioplasty in 1999 and in late 2006 and early 2007 I was confirmed to be suffering from significant symptoms of ischemic heart disease, ventricular dysfunction and congestive heart failure."

He has exhibited a report of a consultant cardiologist (Dr. McDonald) who says *inter alia* that:-

> "As a result of medical therapy he is functioning at a restricted level but remains quite tenuously controlled. I would certainly be concerned about the stress of any legal procedure having a significant and deleterious impact on his cardiovascular status."

35. I do not set out in full the evidence of the applicant pertaining to the stress, strain and anxiety of the proceedings. He says, however, *inter alia* that the proceedings are "killing" him and that it is "obvious to me and those close to me that the case has already damaged my health seriously and permanently". He further says that if he did not exert himself too much he had been able to function normally but that "in the past year and a half I have dramatically aged, lost a huge amount of weight and I find myself constricted and unable to move even after some short amount of walking" (ie. a year and a half from the date of his affidavit, being the 12th June, 2008). With respect to the ultimately adjourned trial, he says he faced this "as best I could" and that "his nerves were shattered for weeks afterwards" and that he had not "recovered from the ordeal of it". He says that he had some "small hope" that "the inquiries about the complainant's attendance during the (1960s) at a child psychiatrist in St. James' hospital might help to clear me but unfortunately those searches have proved it to be a dead end".

36. There is no medical evidence to support the proposition that the applicant's health has deteriorated as a result of the stress and anxiety. The furthest Dr. MacDonald went was that he would be "concerned about the stress" in terms of its deleterious impact on his cardiovascular status. Indeed, there is no evidence to suggest that there has been deterioration in that respect, from whatever cause. However, he himself says that his physical condition has deteriorated and he attributes this to the proceedings, and especially the stress and anxiety associated therewith. I cannot be satisfied as a probability, however, that his association of any deterioration in his physical condition is attributable to the delay herein, and this is a relevant factor. One must stress in this connection that the burden of proof lies upon the applicant accused. I am prepared to accept, however, that he was a bad subject for the stress and anxiety associated with proceedings of this type and that to that extent he would have found it more difficult to cope with stress and anxiety, as distinct from a more youthful man in good health, and, further as set out in the medical report of Dr. McDonald that the proceedings could worsen his state of health. I am prepared also to accept that the stress and anxiety has been continued by the fact that the trial was put off and that the matter is still unresolved. However, I do not think that one can ignore the fact that, as set out above, adjournments of trials are a commonplace for any number of reasons, including late service of evidence or late disclosure: these are the viscidities of litigation and an adjournment, in good faith, is merely part and parcel of the process sometimes incapable of avoidance, in reality. Similarly, when cases are adjourned, it may be some months before a new trial date is obtained. Of course I accept that medical evidence is not essential but one cannot overlook its absence as to causation here in the nature of the evidence to date – it is one factor in the equation on the present facts.

37. I do not think accordingly that the criteria necessary for a stay of proceedings on the grounds of prosecutorial delay arise. I now proceed accordingly to deal with the jurisdiction to stay proceedings in exceptional circumstances, notwithstanding non-fulfilment of the criteria for reliance by an applicant under either the rubric of prosecutorial delay or unavoidable risk of any unfair trial.

38. In *P.T. v. D.P.P.* [2008] 1 I.R. 701 the applicant was born in 1920 and the charges of indecent assault in question pertained to a period of between 34 and 39 years prior to the return for trial. Medical evidence was adduced that the stress on the part of the applicant associated with a criminal trial could have a major effect on his health. In her judgment on behalf of the court, Denham J. stressed that it was:-

> "Important to note to what this decision does not relate. The applicant has not discharged the onus of establishing on the balance of probabilities that he has been prejudiced by the delay to such extent that there is a real or serious risk of an unfair trial. Nor has the applicant discharged the onus of establishing that there has been prosecutorial delay as described in law by *P.M. v. Malone*… and *P.M. v. D.P.P.* …"

39. Denham J. went on to point out, however, that even if on application of the test and in particular in balancing the community's right to prosecute and the interests of an accused person legitimately falling to be protected by virtue of the right to an expeditious trial gave rise to a *prima facie* conclusion that the trial was to proceed, that would not be the end of the matter. This was by reference to the decision of the Supreme Court in *S.H v. D.P.P.* [2006] 3. I.R. 575. Notwithstanding failure to satisfy the test, the court might nonetheless restrain any further steps in proceedings where it was found that there were wholly exceptional circumstances which made it unfair or unjust to put the accused on trial. In that regard she quoted from judgment of the court in *S.H.* (at p. 622) as follows:-

> "In this case, the developing jurisprudence as to delay in bringing a prosecution for offences of child sexual abuse was considered by the court. I am satisfied that in general there is no necessity to hold an enquiry into or to establish the reasons for delay in making a complaint. The issue for a court is whether the delay has resulted in prejudice to an accused, so as to give rise to a real or serious risk of an unfair trial. The court does not exclude wholly exceptional circumstances where it would be unfair or unjust to put an accused on trial".

She said that at issue, having regard to her rejection of the proposition that there was blameworthy prosecutorial delay (and the applicant did not accordingly satisfy the tests as aforesaid), was whether or not, the applicant fell within the terms of the "wholly exceptional circumstances where it would be unfair or unjust to put an accused on trial". The thrust of *S.H.,* as much as *P.T.,* of course, is that irrespective of whether or not an applicant can successfully restrain his trial on either of the primary grounds with which those cases are concerned (i.e. prejudice in terms of fair trial or blameworthy prosecutorial delay), there are circumstances in which prosecution might be restrained

40. Denham J., having taken the view that there was neither a real risk of an unfair trial and that grounds did not exist for restraining the continuation of the proceedings under the principles elaborated in the case of prosecutorial delay addressed the issue of whether or not due to exceptional circumstances it would be unfair or unjust to permit the prosecution to proceed. She said that:-

> "At issue in this case is whether the applicant falls within the terms of the "wholly exceptional circumstance" were it would be unfair or unjust to put an accused on trial".

and she went on to say:-

> "and this, is a test based on "wholly exceptional circumstances", which are essentially fact based and thus previous cases are of limited value as precedents. It is necessary when analysing this aspect of the test to consider the particular facts of a case, and to determine whether it would be unfair or unjust to put that specific accused on trial in all the circumstances of the case.
>
> In this case relevant factors include:
>
> (1) It is an old case, i.e. the allegations relate to the events between 37 and 42 years ago.
> (2) Consequently it has the features of an old case.
>
> (3) There was an interval of time between the church authorities being told of the allegations, the formal complaint, the charging of the applicant and the return for trial.
>
> (4) The applicant is in his old age, he will be 87 years old in the Autumn.
>
> (5) The charges have had a detrimental effect on the life of the applicant because of the nature of the charges.
>
> (6) The health of the applicant."

41. Of relevance to the present case is perhaps the evidence of the applicant's consulted cardiologist there. One Dr. Kenny, apparently said:-

> "At present he is quite short of breath on pretty minimal exertion and has great difficulty in moving around. When I last saw him on 21/12/2006 he had heart failure but his heart failure is well controlled on his medication. He also suffers quite a bit from stress and given the unstable nature of his cardiac condition I feel that the stress associated with a criminal trial could have a major effect on his health and possibly precipitate heart failure or acute myocardial infarction"

42. Denham J. pointed out that:-

> "Factors may exist, or may develop, after a decision has been made by the Director of Public Prosecutions, which would render a trial unjust. The issue in this case is whether such an exception has occurred. In this balancing exercise the court must give consideration to the right of the public to have crimes prosecuted. This is not an absolute, for prosecutions to be taken when they are in the public interest. It is part of the justice system which is for the common good, which includes consideration of the constitutional requirement of due process. A prosecution is not an exercise in vengeance. While a court should give careful regard to the position of the victims, it must protect the integrity of the justice system as a whole".

and further:-

> "No single factor renders the case an exception. The decision does not mean that a person may not be prosecuted

> for a crime committed many years ago, nor that a person in their eighties may not be prosecuted, nor that a person with ill-health may not be prosecuted. It is the cumulative effect of these factors which bring this case within the category of an exception requiring a balancing exercise to be conducted by the court. Of specific importance is that it is an old case, that the prosecution took some time to mount (I am not finding that there was prosecutorial delay but merely recording the fact of the time lapse), the applicant is an elderly man in his eighty-seventh year and he is in bad health."

She reiterated a reference to the nature of the criminal justice system (in conclusion), in finding that in all of the circumstances the case fell within an exceptional category whereby prosecution should be restrained, when she said:-

> "It demeans a system of justice if its process is one of vengeance, or has such a perception. It invokes concepts of primitive jurisprudence. The people of Ireland under the Constitution required that there be due process in the justice system. The courts are required to protect the integrity of that system, which may mean that in exceptional circumstances a prosecution should be restrained. It is question of proportionality".

43. With respect to the question of the real risk of an unfair trial it seems to me that three factors could be relevant, namely, the fact it is not possible to identify the psychiatrist by whom the applicant was treated, and the non availability of any notes in relation thereto. Obviously that these two are closely related. I have addressed this aspect of the case at para. 13 above and need not repeat it here other then to repeat that no prejudice arises under this head. In any event, the report of the complainant's psychiatrist, Dr. Leader, is available and she could be called upon to give evidence. The third factor is the unavailability of Fr. Power, the housekeeper or Fr. McCarthy. With respect to them, however, it seems to me, that Fr. Michael Connelly can give evidence in respect of the period from 9th December, 1967 to a date unspecified in 1969. Whilst I do not know when in 1969 Fr. Michael Connolly left 15A Bulfin Road, Fr. Power's evidence is unfavourable to the applicant in as much as it is to the effect, *inter alia*, that:-

> "I remember a lot of people coming in and out of the house and this included a lot of children from the area. There were children around always".

whereas Fr. Michael Connolly says that:-

> "There was (sic) a lot of coming and goings there. Older people calling but I never saw young children in the house or hanging around the house".

Any role of (or evidence which could be given by) the housekeeper is entirely speculative as is the case with Fr. McCarthy in terms, say, of comings and goings or otherwise or whether or not the household might have changed at any time from the type of household described by Fr. Michael Connolly to that described by Fr. Power or vice versa. Furthermore, there is no reason to suppose that Mr. James Larkin, (who was an altar boy and frequently visited the house in the company of his sister, the complainant) would not be anything other than a truthful witness about the household. However, that is the type of infirmity which potentially arises in every old case and I do not think that absence of a number of potential witnesses when others can substantially address any questions which might be relevant are available gives rise to unfairness. The death or non availability of a witness is not, *per se*, a bar to a fair trial and each case must depend on its own facts: this rule is of application to all criminal trials.

44. It seems to me that the circumstances of the present case are not so exceptional as to warrant restraint of continuation of the proceedings under the head of "exceptional circumstances" even when one has issues pertaining to non-availability of witnesses as dealt with above. There is no basis for conflating the absence of witnesses with the other factors relevant when the absence itself (or any other factor) does not give rise to a real risk of an unfair trial. The burden of proof is on the applicant and one must be very slow to the public interest in restraining proceedings.

45. I therefore refuse the relief sought.