Neutral Citation Number: [2008] IEHC 39

THE HIGH COURT
JUDICIAL REVIEW

[2007 No. 1026 JR]

BETWEEN

A C (A MINOR) SUING BY HER GUARDIAN AD LITEM AND NEXT FRIEND RAYMOND McEVOY

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment delivered by Ms. Justice Dunne on the 21st day of February, 2008

1. The applicant herein is a minor who seeks an order in the nature of an injunction by way of application for judicial review restraining the respondent herein from taking any further steps in a criminal prosecution entitled The Director of Public Prosecutions (at the suit of Garda Martin O'Driscoll) and A C which proceedings currently stand adjourned before the Dublin Metropolitan Children's Court.

2. The grounds upon which the relief is sought are as follows:

> "(i) The respondent has failed to comply with the principles of natural and constitutional justice and basic fairness of procedures in failing to expedite the prosecution herein.
>
> (ii) The respondent by his conduct of this prosecution has violated the applicant's right to a trial in due course of law pursuant to Article 38.1 of the Constitution of Ireland 1937.
>
> (iii) ….
>
> (iv) The applicant has been deprived of her entitlement to reasonable expedition in the prosecution of the alleged offence and has thereby been deprived of her constitutional rights and in particular her right to a fair trial in due course of law.
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> (v) The applicant was 13 years and 3½ months of age at the time of the alleged offence on the 5th December 2005. By the time this matter first came before a court on the 15th February 2006 the applicant was 14 years and 5½ months of age. The applicant is a child who has been placed in the voluntary care of the Health Service Executive and has been identified with special needs. In the particular circumstances of the youth and vulnerability of the applicant the delay in the proceedings amounts to a breach of her constitutional rights and in particular her rights of a fair trial in due course of law.
>
> (vi) In all of the circumstances the decision made by the respondent and/or his servants or agents to initiate the instant prosecution by way of summons pursuant to the Courts (No. 3) Act, 1986 as opposed to proceeding by a more expeditious route amounted to a breach of procedures.
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> …
>
> (ix) The applicant is entitled to expect that summary criminal proceedings are conducted with all due expedition under the circumstances having regard to her entitlements pursuant to the Constitution and the European Convention on Human Rights. The delay in this case breaches those rights and entitlement.
>
> …
>
> (xii) The applicant as a vulnerable child with special needs has been prejudiced by the delay in this case and in those circumstances the prosecution should not be permitted to proceed having regard to her constitutional rights including those under Articles 38.1, 40.1, 40.3 and 42.

3. The background to this matter is set out in the verifying affidavit of Catherine Ghent, solicitor on behalf of the applicant.

Background

4. The applicant was born on the 26th August, 1992. She is charged with arson of her family home on the 5th December, 2005 in which some €15,000 worth of damage was caused. The applicant was interviewed on the 5th December, 2005 in the presence of her mother, Garda Ian Gillen and Garda Martin O'Driscoll. During the interview, the applicant admitted causing the fire with the intent of causing damage. The applicant at the time of issue of these proceedings resided at a High Support Unit, Co. Dublin. The applicant was first placed in the voluntary of the Health Service Executive (HSE) on the 15th January, 1993. She was again placed in the voluntary care of the Health Service Executive on the 22nd March, 2006 having been referred to the Social Work Department in October 2005. The solicitor for the applicant became aware of the alleged offence around the end of May 2006 having been notified of the matter by Garda Frances Ferris, a Juvenile Liaison Garda based at Dun Laoghaire Garda Station. A sequence of events then occurred which are set out in the submissions of the applicant and deposed to in the affidavit of Ms. Catherine Ghent, Solicitor for the Applicant. I do not propose to refer to the entire sequence of events but it would be helpful to refer in brief to that sequence.

> 1st June, 2006 letter from solicitor to DPP seeking withdrawal of charges.
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> 1st June, 2006 application made for issue of summons to District Court office pursuant to s. 1 of the Courts (No. 3) Act, 1986.
>
> 7th June, 2006 letter from solicitor to DPP seeking withdrawal of charges in light of civil detention of the applicant pursuant to order of the High Court made for the protection of the applicant.
>
> 12th June, 2006letter from DPP to solicitor indicating prosecutor would review position.
>
> 10th July, 2006 letter from DPP to solicitor confirming prosecution to continue.
>
> 18th September, 2006 letter form solicitor to DPP indicating that a hearing in the District Court on other charges results on a finding that *doli incapax* not rebutted.

Also reference to self harm after hearing.

4th October, 2006 to 16th October, 2006 correspondence between DPP and solicitor.

15th February, 2007 the matter is listed in Dun Laoghaire Court at the behest of the solicitor for the applicant. (Summons never served on applicant).

Adjourned to Children's Court for 19th February, 2007.

19th February, 2007 first listing in Children's Court. Issue of delay raised and case adjourned for consideration of jurisdiction to 13th March 2007.

26th February, 2007 letter from solicitor to DPP asking for case not to be continued for three stated reasons.

13th March, 2007 jurisdiction accepted by District Court judge, issue of delay again raised and case adjourned for written submissions to the 19th March, 2007.

11th April, 2007 issue of delay decided against the applicant.

5. The issue of delay was heard by Judge Anderson sitting at the Metropolitan Children's Court at Smithfield on the 11th April, 2007 as noted above. At that time some sixteen months and one week had elapsed from the date of commission of the alleged offence. Notwithstanding, Judge Anderson had refused the application to set aside the proceedings on grounds of delay, holding that a fourteen month delay from the commission of the offence to the first day in court was not a sufficient delay. An issue has been raised by Ms. Ghent in her affidavit as to the calculation of delay which it is contended on behalf of the applicant should be considered to be from the date of the commission of the alleged offence up to the date of the 11th April, 2007 upon which date there was a first substantive hearing before the District Court as the previous hearing had been primarily for the determination of the issue of jurisdiction. I should say that this point that I disagree with that contention on behalf of the applicant and in my view the appropriate time for the consideration of delay is the fourteen month period from the date of the commission of the alleged offence to the first date in court. I cannot see how it could be said that the hearing in relation to jurisdiction was not a substantive hearing. Accordingly it seems to me that this court is concerned with a delay of approximately fourteen months.

6. On the basis of the delay complained of herein it is averred that the applicant's right to a fair trial in due course of law has been irreparably compromised and she is thereby prejudiced. Counsel on behalf of the applicant very properly and fairly conceded that this is not a case where actual prejudice is alleged.

7. In the course of the affidavit grounding this application, Ms. Ghent went on to outline certain matters in relation to background of the applicant. At the time of swearing her affidavit on the 30th July, 2007 the applicant was the subject of ongoing proceedings in the High Court in the "Minors" list, in proceedings brought by the Health Service Executive in which the applicant is a defendant represented by the guardian ad litem herein and by Ms. Ghent as her solicitor. The applicant has had an extremely troubled background which is referred to in Ms. Ghent's affidavit. The applicant most recently came to the attention of the Health Service Executive in October 2005. At that time the applicant was engaging in self harm and other adverse behaviour. The applicant was placed in a number of residential and foster placements by the Health Service Executive all of which broke down. An application was made on the 8th June, 2006 to have the applicant detained for her own safety. The application was granted.

8. Ms. Ghent also averred to the fact that the applicant and her advisers including Ms. Ghent have made great efforts to expedite the criminal proceedings the subject of this application arising from their concern as to the well being, health and best interests of the applicant. She complained that the applicant's rights had been infringed by the decision of the respondent to proceed in the least expeditious way possible in that he did not proceed by way of arresting the applicant and bringing her forthwith before the Children's Court, nor did he chose to proceed under s. 10 of the Petty Sessions (Ireland) Act, 1851, that is the basis upon which the relief herein is sought. I do not propose to go through all of the correspondence that was opened in court passing between the applicant's solicitors and the DPP. However, suffice it to say that the solicitors for the applicant engaged in lengthy correspondence setting out the circumstances of the applicant and did so largely with a view to having the charges against the applicant withdrawn. Much of the background and particular circumstances in relation to the particular difficulties and vulnerability of the applicant are set out in a letter which is exhibited at CG6 dated the 18th September, 2006 and addressed to the Director of Public Prosecutions. I do not propose to set out the details of that letter but it is fair to say that that letter highlighted serious concerns in relation to the mental health of the applicant. The letter of the 26th February, 2007 from the applicant's solicitor to the Director of Public Prosecutions is also of some relevance. It sets out certain complaints in relation to the state of the proceedings and highlighted the fact that:

> "Substantial efforts were made by this office to ascertain the situation and we were eventually informed sometime in or around August, that the summons had issued. We indicated that as the matter was to proceed, we were anxious to receive this summons to plan for matters, as soon as possible. …"

9. That letter went on to point out that the summons as issued was not in the correct form as it was issued for an adult court. The letter went on:-

> "In relation to the summons not being served again this is wholly unacceptable. Having been made aware that the summons was in existence, unusually, but on a strategic basis, this office made extensive efforts to get Gardai at a number of stations to trace and serve the summons in order that this matter, which your office directed should proceed, could do so as soon as possible. We wish to state in the clearest possible terms that we have only consented to this matter proceeding notwithstanding the difficulties referred to, as we believe not only is [it] in our clients best interests to have this matter resolved as soon as possible, but further having consulted with her guardian ad litem, it would actually be detrimental to A's welfare if the matter were to be struck out, re-entered and determined at an even later date, prolonging her uncertainty. You will note from my letter dated the 18th September that A has previously experienced the situation where matters have been struck out and re-entered some period of time later."

10. That letter again requested that the State withdraw the proceedings.

Submissions

11. In the course of his submissions, counsel on behalf of the applicant referred to a number of decisions on delay and referred in particular to the case of the *DPP v Byrne* [1994] 2 I.R. 236 and *DPP v McNeill* [1999] 1 I.R. 91. Those two cases were referred to in the judgment of O'Neill J. in the case of *DPP v Arthurs* [2000] 2 I.R.L.M. 363 where it was stated at p. 375:-

> "The judgments of the Supreme Court in these two cases seems to me to establish that where an accused person proves to the satisfaction of the court that there has been excessive delay in bringing his case to trail caused by the State, he must thereafter satisfy one or other of two tests before a Court would exercise its discretion to refuse to proceed with the trial. The first of these tests is that the accused person must show that he has or is likely to suffer an actual specified prejudice or that the length of the delay is so inordinate or excessive as to give rise to a necessary inference that there is a real risk that the trial will be unfair. Where an accused person satisfies the above test, it would seem to me that regardless of what reasons may be advanced by the prosecution to justify the delay, be they good or bad, that the accused person's right to an expeditious trial would necessarily be infringed, and hence the Accused's constitutional right to an expeditious trial is to be preferred as against the right of the community to prosecute the alleged offence."

12. As I have already mentioned, this is a case where counsel has conceded that there is no specific or actual prejudice but a case of presumptive prejudice on the basis of the delay complained of. Counsel emphasised that this was a case where the State knew immediately that the applicant was the prime suspect for the alleged offence and on the day of the incident complained of, she had made a statement of admission.

13. It was submitted on behalf of the applicant that there were three distinct grounds for complaining that the State had not taken all reasonable steps to ensure that a speedy trial was provided namely:

1. Choosing the least expeditious manner available for an initiating the prosecution;

2. The failure to initiate the prosecution for nearly six months;

3. The court process taking eight and a half months before the summons appeared in a court list, i.e. systems delay.

14. It was pointed out that this State could have arrested the applicant on foot of an arrest warrant and immediately brought her before the Children's Court. That could have been done more speedily than applying for a summons and serving the summons on the applicant for a date which would by definition been much later. From the 8th June, 2006 the applicant was in protective detention on foot of an order of the High Court. There would have been no difficulty in doing this.

15. Alternatively it was submitted that procedure under the Petty Sessions (Ireland) Act, 1851 could have been utilised. In other words a member of the Garda could have sworn an information before a district judge who could then have issued a summons provided it was appropriate to do so.

16. It should be noted that in this case the application for the summons pursuant to the provisions of s. 1 of the Courts (No. 3) Act, 1986 was made some five days before the time would have elapsed for the making of a complaint.

17. Counsel referred to the decision in the case of *Robert Byrne v DPP* [2005] 2 I.R. 310, Peart J in that case noted at p. 316:-

> "In the present case there is also the initial delay in having the summons brought, and this arose I am told because of a delay on the part of the complainant in making a decision as to whether the charge should be brought. That too is delay which must inure to the benefit of an accused in the overall weighing of the competing rights in this case. It is also a delay which ought to have ensured that, where there had already been some delay in bringing the matter forward initially, this case did not suffer the sort of delays which bogged it down thereafter."

18. I should note at this point that in the present case one of the matters that contributed to the delay was the fact that the papers in the case as set out in the affidavit of Martin O'Driscoll sworn on behalf of the respondent herein were sent for consideration to the National Juvenile Office to see if the applicant was suitable for the Juvenile Diversion Scheme in accordance with s. 18 of the Children Act, 2001. That was done on the 15th January, 2006. It appears that by the 14th April, 2006 a decision had been taken that the applicant was unsuitable for inclusion in that Scheme and the file was then sent to the Chief Prosecution Solicitor on the 27th April 2006.

19. Counsel on behalf of the applicant also complained of system delay and in that regard counsel noted the comments of Peart J. in the case of Robert Byrne referred to above at p. 318 where he stated:-

> "I would be prepared to say in the present case that the length of the delay itself when combined with the reasons for same, results in a situation where, of itself and without either actual prejudice being made out or even inferred, there has been a breach of the applicant's right to an expeditious hearing of the charge, a right independent of the right to a fair hearing, such that his further prosecution ought to be restrained."

20. Having referred to the decision in *DPP v Arthurs* and *DPP v Byrne*, Peart J. added:-

> "I am of the view that the burden resulting from delay or lapse of time – system delay in particular – need not be one, in an appropriate case, which ought to be borne by way of an onus upon an applicant, who complains about it, to establish prejudice or an inference of prejudice.
>
> Delay of the kind established in the present case is one caused by the lack of a sufficiently resourced District Court which has shown itself, even allowing a reasonable measure of allowance for normal and expected human and system frailty, unable to deal adequately with its workload."

21. Counsel referred to the decision of the Supreme Court in the case of *DPP v Byrne* [1994] 2 I.R. and in particular to a passage from the judgment of Denham at p. 259 which seems particularly apposite in the circumstances of this case:-

> "The fact that approximately eight months of the elapsed time in this case occurred as a result of a delay in the court's issuing process is not a matter, or a delay, to be endorsed by this or any court, especially in the absence of an explanation. The fact that it is computer based should have made it even more efficient.
>
> It is highly undesirable that the court process should be as lengthy as in this case. It is a matter to be addressed by the appropriate authorities as a matter of urgency. Further, there may be an issue of statutory duty to be analysed."

22. Notwithstanding the delay in that case, it was found that there was no prejudice to the applicant in that case. It is to be noted that in the present case the delay from the date of application for the summons to the first appearance before a court was

approximately eight and a half months.

23. Counsel on behalf of the applicant submitted that the three grounds relied on by the applicant showed that the State had failed in its duty to ensure that a speedy trial was provided.

24. Counsel further submitted that the special circumstances of this case should be borne in mind, namely that the applicant is a child. Reliance was placed on the case of *B.F. v DPP* [2001] 1 I.R. 656.

25. In his judgment in that case Geoghegan J. having referred to the case of *DPP v Byrne* [1994] 2 I.R. 236 commented that it was clear:-

> "That neither actual or presumed prejudice is in all cases essential to stop a prosecution."

26. Having referred to the test established in *P.C. v DPP* [1999] 2 I.R. 25 he noted:-

> "In that passage Keane J. also recognises that the there may be cases, depending on the circumstances, where a trial should not be allowed to proceed on the grounds of delay even though prejudice has not been established."

27. Geoghegan J. then referred to his decision in *P.P v DPP* which was a case dealing with historic sexual assault cases. He commented at p. 666 of his judgment in *B.F. v DPP* as follows:-

> "To some extent by analogy, I also take the view that in the case of a criminal offence alleged to have been committed by a child or young person as in this case, there is a special duty on the State authorities over and above the normal duty of expedition to ensure a speedy trial, having regard to the obvious sensitivities involved."

28. *B.F*. was a case involving an accused who was fourteen at the time of the alleged offences in 1995.

29. Counsel also referred to the cases of *Jackson v DPP* and *Walsh v DPP* [2004] I.E.H.C. 380, a decision of Quirke J. in which he concluded at p. 16 of his judgement:-

> "It is no secret that persons in their late teenage years have particular vulnerabilities. These vulnerabilities can be compounded by difficult or deprived family or social circumstances and by a variety of other causes. The interests of the community will not be served by subjecting such persons to substantial delay in confronting them with complaints of criminal activity made against them.
>
> The interests of the community will surely be better served by efficient action on the part of the State authorities designed to ensure that young persons acquitted of criminal offences may be enabled to resume normal life and those convicted may be dealt with in such a manner as to reduce the risk to the community of further criminal activity."

30. He went on to refer to the decision of Geoghegan J. in *B.F*. Director of Public Prosecutions in which he had referred to his own judgment in P*.P. v Director of Public Prosecutions* and quoted comments from Geoghegan J. at p. 66 of his judgment in that case and then went on to say:-

> "I cannot see why the principle identified by Geoghegan J. in that passage should be confined to cases involving the commission of sexual offences. I do not believe that it was the intention of the court in that case to so confine that expression of principle.
>
> I take the view that where a criminal offence is alleged to have been committed by a child or a young person there is always a special duty upon the State authorities (over and above its fundamental duty), to ensure a speedy trial of the child or young person in respect of the charges preferred.
>
> I am satisfied that the State authorities have not discharged that duty in respect of either of the applicants in these proceedings."

31. In those two cases which were dealt with together by Quirke J. the delay was approximately three years but the charges in those cases were proceeding by way of indictment.

32. The final issue raised by counsel on behalf of the applicant in relation to the manner in which the relevant test should be considered having regard to the circumstances of this case related to the issue of anxiety. Thus counsel submitted that in this particular case there was a special duty on the part of the State authorities to deal with this matter expeditiously. It was also pointed out that the delay in this case would have been longer but for the intervention of the applicant's solicitor.

33. He referred at length to a passage from the judgment of Peart J. in the case of *Robert Byrne v DPP* above at pp. 319 to 320 of the judgment. I do not propose to set out that passage but counsel in referring to that judgment and the issue of anxiety referred in particular to the matters set out in the affidavit of Ms. Ghent as to the background circumstances of the applicant herein and in particular to the letter exhibited in the affidavit and dated the 18th September, 2006. Without reiterating the contents of the affidavit or indeed of the letter referred to, it think it is fair to say that the applicant in this case is a young person with particular vulnerability and the fact that she was the subject of an order made for her detention by the High Court speaks volumes in this regard.

34. Counsel on behalf of the respondent referred to the leading cases setting out the principles in relation to delay and culpable prosecutorial delay. She referred firstly to the decision in *P.M. v DPP* [2006] 3 I.R. 174, a decision of the Supreme Court in which it was held that blameworthy prosecutorial delay of significance, if established, was not sufficient per se to prohibit 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. It is interesting to note that in that case it was also held that the trial judge was correct in determining that the unchallenged evidence of the applicant of significantly increased anxiety arising from the blameworthy prosecutorial delay was sufficient to outweigh the public interest in having the charges prosecuted.

35. She also referred to the decision in the case of *H. v Director of Public Prosecutions* [2006] 3 I.R. 575 which has clarified this issue further. In that case the Supreme Court held that the test to be applied in applications to prohibit criminal trials on grounds of complaint delay was whether the delay had resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair

trial. The court went on to conclude that it would not exclude wholly exceptional circumstances, where it would be unfair or unjust to put an accused on trial.

36. She pointed out that in these proceedings there was a bald assertion of prejudice with nothing to back up the allegation of any prejudice. She pointed out that in correspondence passing between the applicant's solicitors and the Director of Public Prosecutions' office the Director of Public Prosecutions was asked to review the decision to prosecute and he did so and decided notwithstanding the matters set out in correspondence to continue the prosecution against the applicant.

37. Counsel referred to the onus on an applicant seeking prohibition and referred in that regard to the case of *D.C. v DPP* [2005] 4 I.R. 281 where it was stated by Denham J. as follows:-

> "Such an application may only succeed in exceptional circumstances. The Constitution and the State, through legislation, have given to the respondent 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."

38. She went on to refer to a number of decisions in which the onus of establishing prejudice has been considered namely *Z. v DPP* [1994] 2 I.R. 476, *McFarlane v DPP* (Unreported, Supreme Court, 07.03.2006), *B.J. v DPP* (Unreported, Supreme Court, 1st May, 2006). Thus, she emphasised that the onus was on the applicant to establish prejudice such as to entitle him/her to relief.

39. Counsel for the Director of Public Prosecutions also referred and emphasised the comments made in the case of *S.A. v DPP* [2002] I.R. 560. She referred to that case for two reasons; first, in relation to the issue of anxiety and stress together with the age of the applicant and second, dealing with the issue of admissions. That was a case in which the applicant was a Christian brother who had admitted indecent acts, but denied allegations of buggery. The judgment to the Supreme Court was given by Hardiman J. and at p. 3 of his judgement he commented:-

> "It appears to me that these admissions are a significant factor in the present case. Admissions, depending on their context, may vary greatly in their significance on an application like this. Non recorded and disputed allegation may be of little or no significance unless its terms or context make it very compelling. A disputed allegation of admissions to Gardai will normally be verified by recording: an omission to record will call for explanation. However, in the present case the admissions do not appear to have been denied or glossed in any way so that it seems reasonable to take them at face value.
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> …
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> In that context I would not regard the inability to recall specific children by name as gravely prejudicial to the applicant's prospects of a fair trial. It is perfectly clear from the undisputed verbal admissions that the applicant has positive memories of behaving in the manner indicated, to the point at which he indicated that he was prepared to accept the truth of the allegations made. …"

40. He went on to say:-

> "To look at these admissions from another point of view, it would in my opinion be extraordinary to prohibit a trial in circumstances where the defendant admits a significant amount of behaviour of a criminal nature. Without doubt his ability to be more precise as to the individuals involved, and perhaps about other features, is due to lapse of time, but, having regard to the admissions, that lapse of time would itself appear to be caused or contributed to by the defendant's activities. In those circumstances I do not consider that the demands of justice or the requirement of a fair trail require that the respondent be prohibited from prosecuting any of the charges against the applicant. There is, of course, still a need for great care to be taken after so long a lapse of time. To ensure that the defendant is not unreasonably prejudiced by it. This is a matter primarily for the trial judge on the hearing of the criminal case."

41. Counsel pointed out that this was a case in which admissions had been made.

42. Counsel also referred to the decision in the case of *O.H. v DPP* (Unreported, Supreme Court, 28th March, 2007) in which the applicant claimed that he had suffered excessive pre-trial anxiety. The court found no evidence to support the allegation and said that the applicant should have sworn a short affidavit explaining or describing that anxiety or distress. At para. 78 of his judgment Fennelly J. stated:-

> "The only suggestion of anything to be put in the balance is contained in the order granting leave, which mentions that the applicant had 'suffered excessive pre-trial anxiety.' There is, however, no evidence to support this allegation. I am 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 common sense. 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."

43. Reliance was also placed on the decision in *J.B. v DPP* (Unreported, Supreme Court, 29th November, 2006). Finally reference was made to the case of *J.K. v DPP* (Unreported, Supreme Court, 27th October, 2006). Both of those cases involved elderly applicants seeking to prevent their trial in relation of allegations of sexual abuse of a number of complaints. In the first of those two cases, *J.B.*, there was evidence of a severe stress reaction on the part of the applicant having been questioned by Gardai in relation to the allegations. In the other case the applicant was eighty four years old at the time of the application. There was evidence before the court that the applicant due to his increasing age and physical and mental disability would be unable to understand the nature of the charges against him and would be unable to deal with cross examination and was in general unfit to stand trial. It was not accepted by the Supreme Court that his present age and health problems amounted to wholly exceptional circumstances as referred to in *H. v DPP*. It was stressed that the ability of the applicant to stand trial was effectively a matter for the trial judge.

44. It was accepted that there was delay in this particular case having regard to effecting service of the summons on the applicant. Other than that, it was submitted there was little culpable prosecutorial delay and it was submitted that there was not enough evidence of prejudice to entitle the applicant to prohibition of the trial. Finally, it was submitted that the case did not fall within the exceptional circumstances that were put forward in the *H.* decision as there was not enough evidence to suggest it would be unfair or unjust to put the accused on trial.

Decision

Delay
45. The first question to consider is whether or not there has been prosecutorial delay in this case. It is accepted that there has been some delay on the part of the respondent. In fact the position appears to have been accepted in the course of submissions that the summons was never in fact served on the applicant and that it had in fact lapsed by the time the matter was mentioned before the District Court on the 15th February, 2007. It is also accepted that the matter ultimately was listed in court at the instigation of the solicitor for the applicant. In his submissions on behalf of the applicant, counsel had emphasised the decision in the cases of *B.S. v DPP* [2001] 1 I.R. 656 and that of the High Court in the case of *Jackson v DPP* and *Walsh v DPP* [2004] I.E.H.C 380, the judgement of Quirke J., which referred to the special duty upon State authorities to ensure a speedy trial of a child or young person. In this case, the delay covers a period from the date of the commission of the alleged offence to the first date of substance in the District Court i.e. the 11th February, 2007. I can see no basis for complaining about the period during which the matter was dealt with in the National Juvenile Liaison Office. However, it is difficult to understand the delay between the date in June when the summons was issued and the 15th February, 2007. During that time there was considerable correspondence between the applicant's solicitors and the office of the Director of Public Prosecutions. It is very difficult to understand in the light of all of the efforts made by the applicant's solicitor to ascertain the whereabouts of the summons that the summons could not have been served on the applicant. In the end the matter was brought into the District Court without the summons having been served. . I am satisfied that bearing in mind the special duty described by Geoghegan J and Quirke J. in the decisions referred to above that in the context of this case, the State has failed to comply with that special duty. The State was aware that the applicant was a minor, that she was a particularly vulnerable minor and her solicitor was doing everything possible to persuade the Director of Public Prosecutions to withdraw the proceedings. The Director was perfectly entitled not to do so but having made the decision to proceed with the charge against the applicant, it behoved the State authorities to ensure that the matter was dealt with expeditiously. Ms. Ghent had provided all the information necessary to alert the State authorities to the urgency of the situation and the importance of advancing the case expeditiously. However, there appears to have been no sense of urgency on the part of the State authorities whatsoever. To that extent I am satisfied that the delay was blameworthy prosecution delay.

Prejudice
46. As I have already stated this is a case in which the concession has been made that there is no actual prejudice on the part of the applicant herein. It has to be borne in mind that these are summary proceedings. The test to be applied in considering whether or not to prohibit a trial was most recently stated *in H. v Director of Public Prosecutions* [2006] 3 I.R. stated by Murray C.J. to be as follows:-

> "The test to be applied by a court in such an application has been an evolving one. In *B. v Director of Public Prosecutions* [1997] 3 I.R. 140 the test was described by Denham J. at p. 196 as:
>
> > 'The test is whether there is a real risk that the applicant, by reason of the delay, would not obtain a fair trial, that the trial would be unfair as a consequence of the delay. The test must be applied in light of the circumstances of the case and the law.
>
> The extant case law on the constitutional right to reasonable expedition, as developed, applies to this case. However, in addition there must be analysis of new factors.'"

47. That was of course a decision in a case involving delay in a sex abuse case in which the allegations were later to complaints going back to the late 1960s and to an individual charged in respect of those complaints in 2001. Nonetheless, that is the appropriate test. Murray C.J. in his judgment went on to say 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 inquiry 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."

48. I think it is helpful to recall the words of Fennelly J. in his judgement in *O.H. v. DPP* referred to above. In para. 78 he commented on the fact that it is stressful for any individual to have to face criminal proceedings. As he said that is an inevitability. He went on to say that there should be something more than normal, something extra caused by the alleged prosecutorial delay. It seems to me that this is a case which has something more than normal. First of all, the case came before the court on the 15th February, 2007 for the first time at the instigation of the applicant's solicitor as opposed to any step taken by or on behalf of the respondent. That fact alone makes this an unusual case. It is also an unusual case in the sense that at the time a summons was being applied for on the 1st June, 2006 the applicant was in the care of the Health Service Executive which was about to apply for an order in the High Court for the detention of the applicant for her own protection. That fact alone does not seem to me to be such as to bring this case within the wholly exceptional circumstances referred to in the in *H.* case. However, it does seem to me that there are certain other facts that cause serious concern. The solicitor for the applicant in her affidavit has set out various matters and has exhibited correspondence between herself and the Director of Public Prosecutions in relation to the applicant and to the fact that delay in dealing with proceedings "would actually be detrimental to A's welfare". In the letter of the 18th September, a number of matters were set out as to the circumstances of the applicant. Following a hearing before the District Court in relation to other charges which took place on the 14th July, 2007 the applicant returned from court and apparently consumed a bottle of hair dye in a serious self harm attempt. It is clear that she was in a state of serious distress. It is also clear from the letter that other matters had occurred which were contributing to her distress. Most importantly she was at that stage in a very serious state of vulnerability. Following circumstances in which she was informed that she was to be brought to court on the 13th September, 2007 in respect of other charges she cut her arms up to her elbows. In the letter of the 18th September, 2006 her solicitor commented:-

> "A would not show me this on the 13th but in a visit to her on the 15th September, I was shocked at the extent of it".

49. Her solicitor went on to write in that letter as follows:-

> "A's presentation last Friday when I visited her is extremely worrying, she is clearly depressed. She is a child who is so traumatised by previous events that highly unusually she does not cry. I was informed by staff that she cried the night before being brought to court and self harmed after that. She spoke to staff about killing herself, a threat which was taken so seriously by staff, her room was stripped of anything which she could use to affect same."

50. That letter was written at a stage where the applicant's solicitor was attempting to persuade the Director of Public Prosecutions

in the unusual circumstances of the case and having regard to the vulnerable state of her client to have the charges withdrawn.

51. I accept that the delay in this case is not the cause of the applicant's current state of difficulty but in her particular vulnerable state, the delay in dealing with the prosecution of the applicant in respect of the charge arising out of the events of the 5th December 2005can only have exacerbated the situation as is borne out by the letter of Ms. Ghent referred to above. Given the facts and circumstances of this case set out in that letter and indeed in the affidavit of the solicitor for the applicant grounding this application, this case seems to me to be one which comes within the category of wholly exceptional circumstances where it would be unfair or unjust to put an accused on trial.

52. For that reason I would allow the application herein.