Neutral Citation Number: [2005] IEHC 446

THE HIGH COURT
JUDICIAL REVIEW

[2002 No. 339 JR]

BETWEEN

B.C.

APPLICANT

AND
JUDGE BRIAN KIRBY AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

Judgment of Mr. Justice MacMenamin delivered the 11th day of February 2005

1. The applicant in these proceedings was born on 14th April, 1951. He is now aged 53 years. He is involved in the building trade. He is married with three children.

The complainants

2. Insofar as this applicant is concerned, there are three complainants who make allegations against him. They are Mrs. M.C. (sister-in-law), J.G.C. (niece) and K.N.C. (niece).

First Complainant, Mrs. M.C.

3. Mrs. M.C. was born on 7 December, 1943 and is the applicant's sister-in-law. She is married to R.C., also one of the applicants.

4. The alleged indecent assaults are stated to have taken place between 1 October, 1976 and 30 September, 1977, at a time when M.C. was thirty-three to thirty-four years old.

5. The complaint on foot of which these charges proceeded was made to the Gardaí on 10 June, 1999. A further statement was made by Mrs. M.C. on 18 October 1999. These complaints took place twenty-two years after the last allegation.

6. The complaints which are now the subject matter of the charges were not the first occasion on which Mrs. M.C. had made a complaint to the Gardaí regarding sexual abuse.

The 1986 complaint

7. The evidence disclosed that on 19 December 1986 Mrs. M.C. visited the Gardaí in her locality. On that occasion she made allegations against her brother-in-law, F.C., also one of the applicants. These allegations related to two of her children, W.C. and R.C. Junior. These children were sons of the complainant, Mrs. M.C. and R.C. Senior. W.C. was born on 23 January, 1978 and R.C. Junior was born on 29 March, 1975. This complaint was withdrawn on 25 February, 1987, a little more than two months after it was made.

8. The evidence disclosed that the withdrawal of the complaint took place because her husband, R.C., told her to drop the charges after a visit to their home from F.C. and his wife S.C. After this visit Mrs. M.C., her husband R.C. and F.C. and his wife drove down to the local Garda station to withdraw the complaints. Mrs. M.C. described the encounter thus: *"[F and S] arrived. They were very domineering. I put the kids out of the room (my husband) was left in the room. The four of us had a row which lasted about an hour. [F and S] maintained that there was no abuse – nothing happened. I remember screaming at them. (My husband) told me to drop the charges and 'we will sort something out'. I said no but later that evening agreed to drop the charges. I don't why I agreed."*

An earlier complaint in 1981-1982?

9. Mrs. M.C. relates in her statement in the Book of Evidence, confirmed by affidavit that she had, even earlier than December 1986, taken her daughter, K.N.C., to the same Garda Station when K.N.C. was thirteen or fourteen years of age. This visit was stated to be in relation to allegations against the applicant herein. This alleged complaint was apparently made in the year 1981 or 82. She stated that she was unsure whether these allegations were withdrawn or not. There is apparently no trace whatever of these complaints in the relevant Garda Station. There was no other evidence available on the issue in court despite strenuous efforts which were made by Detective Sergeant Byrne, the investigating Garda in these proceedings, to obtain any such information as might be material.

10. In the complaints made in 1999, Mrs. M.C. describes a number of incidents of indecent assault occurring in 1976. This particular date is of some importance in the light of an apparent inconsistency in the evidence regarding when the alleged abuse began. The complainant describes becoming aware that her daughter, K.N.C., was being allegedly abused by B.C. having received such information from her brother-in-law D.C., who is also an applicant. She became aware of this when K.N.C. was between thirteen and fourteen years of age, that is in the years 1981–1982.

11. By inference it would appear that no reference was made in the complaints of 1981/82 to allegations relating to alleged assaults on Mrs. M.C. herself. They appear to have related only to matters alleged to have taken place between the applicant and her daughter, K.N.C.

The 1999 complaint

12. The undisputed evidence in these proceedings demonstrates that Mrs. M.C. called to the Garda Station on 10 June, 1999. Her purpose was to make a complaint which appears to have initiated a train of events and given rise to a large number of the other allegations which were made in these cases. In the course of her statement, Mrs. M.C. recounted alleged abuse perpetrated upon her by her late father-in-law, J.C. (the father of the applicants). She also described being allegedly sexually assaulted by the applicant B.C., and his brothers P.J.C. and F.C.

13. Mrs. M.C. furnished a further statement on 18 October, 1999. In the course of her statement contained in the Book of Evidence Mrs. M.C. described the applicant saying after the incidents "*who is going to believe you*?" and "*whose word will anyone take, yours or mine*"? He states that B.C. ceased coming to her house about a year after the assaults.

14. At the time of the alleged offences Mrs. M.C. was aged between thirty-two and thirty three years of age. She is now in her fifty-eighth year. At the time of her statement on 10 June, 1999 she was in her fifty-third year. At this point, a period in excess of twenty-two years had elapsed since the most proximate offence was alleged to have taken place.

15. In the course of submissions, the applicant contends that it is inexplicable that when Mrs. M.C. brought K.N.C. to the Garda

Station in 1986 that she made no complaint in relation to any offence committed against herself. In response, she states that she only made up her mind to talk to the Gardaí after one of her sisters-in-law, J.C., made a statement to the Gardaí in 1999. This statement of J.C. does not relate to the instant case.

16. There is some history of the complainant having previously informed other persons regarding sexual assault allegations albeit not against herself. She informed one P. D. and his wife E. that another individual family member was abusing their son. The date of this alleged occurrence is not disclosed. By inference, Mrs. M.C. did not have this applicant in mind as being the alleged perpetrator.

17. Mrs. M.C. also states in her affidavit that when K.N.C., her daughter, was about four years of age, she questioned her in relation to alleged actions of her grandfather J.C. K.N.C. reported to her what amounted to an indecent assault committed by her deceased grandfather. Mrs. M.C. told her mother-in-law at that point that she would get the police. No evidence is available as to what, if anything, occurred thereafter.

18. By affidavit sworn on 21st October, 2003 Mrs. M.C. swore

> *"I was sexually abused by the applicant herein as set out in my statements. I had a constant fear of my husband and all of his brothers including the applicant herein. I was brought up very innocent. I never knew anything like this existed. I think that is why I did not know how to deal with it. I only made up my mind to talk to the Gardaí after my sister-in-law J.C. had made a statement to the Gardaí. I had been 34 years married to my husband .. and I got a slap in the face off (him). I told him I wasn't going into the 35th year of marriage with a fear of the C…s (name of family) I told him he was going to hear things he didn't like. He started shouting and roaring at me and that is when I dialled 999. When I saw that J.C.'s complaint was being investigated and proceedings issued I gained confidence."*

19. It is clear from the context and also from other material which emerges that the J.C. to which Mrs. M.C. refers is her sister-in-law who is married to P.J.C., also an applicant in these proceedings.

Second complainant, J.G.C.
20. J.G.C. is the daughter of M.C. and Je.C. She was born on 22 June, 1961. She is now aged forty years. She made a statement to the Gardaí relating to the applicant on 8th July, 1999. She was then thirty eight years of age. At that point a period of almost twenty five years had elapsed since the most proximate offence. There are two charges of indecent assault against B.C. in relation to this complainant. The incidents in question are alleged to have taken place on dates unknown between 22nd June, 1970 and 22nd June, 1974. At the time of these alleged offences the complainant was aged between nine and thirteen years. The first alleged incident of abuse was stated to be witnessed by her cousin J.C. Junior, a further cousin G.C., two neighbour's children C.M. and A.M. and one E. C.

21. It appears that the complainant J.G.C. reported her alleged abuse to her sister K., born on 18 April 1971, when she was approximately fourteen years of age. This apparently occurred in 1985, a period of eleven years after the alleged offence.

22. J.G.C. resided with her parents up to the time of her marriage on 20 March 1982. In the course of her statement in the Book of Evidence she describes her uncle B.C. reporting her to her father for alleged "*misbehaviour*" as a result of which she was allegedly beaten. She also pointed out to the Gardaí two locales where she alleged that sexual assaults took place and also described the type of car which B.C. allegedly owned between 1970 and 1974.

23. She described being abused by her grandfather J.C., her uncle R.C. and her uncle P.J.C. as well as the applicant. She made a short additional statement on 20 August, 1999.

24. The complainant describes in an affidavit, sworn on 20 October, 2003, being "*terrified of the applicant and his family*". She describes the applicant compelling her to wear short-sleeved dresses and to adopt sexual poses. On one occasion when she refused, the applicant told her father that she had told him to "*shut up*". Her father then beat her for not having good manners. She also describes intimidating and threatening behaviour causing her to wake when she was in her bed in a caravan on F.C.'s land. She was still afraid of the applicant but not as much as previously.

Third complainant, K.N.C.
25. The third complainant, K.N.C., was born on 23 July, 1968. She is a niece of the applicant, being a daughter of Mrs. M.C., the complainant earlier referred to, and R.C.

26. The applicant, B.C., faces three charges of rape on K.N.C. on dates unknown between 1 June, 1977 and 22 July, 1982. He also faces thirty-three charges of indecent assault upon the same complainant on dates unknown between 23 July, 1972 and 30 September, 1983.

27. At the time of these alleged offences the complainant was aged between four and fifteen years.

28. K.N.C. again describes the locale in which the family lived and also the unusually close geographical proximity of their dwellings. At times, various family members were living in mobile homes within the grounds of property owned by one or other of the brothers or their parents. In the course of her statement in the Book of Evidence, K.N.C. describes a series of incidents of indecent assault and rape upon her by B.C. during this period. She states she was provided with pornographic magazines by the applicant. She recounts staying with her grandmother, that is B.C.'s mother, for the period of July and August in each year between the time she was aged nine and thirteen. During this period she alleged that B.C. sexually assaulted her every night. She describes her earliest memory of B.C. as touching her when she was aged about four. This allegedly was after her grandfather, J.C., had also commenced to touch her sexually. She describes indecent assaults taking place on a regular basis when she was young. She describes attempted sexual intercourse on the part of B.C.

Complaints prior to 1999?
29. K.N.C. describes an encounter at the age of fourteen or fifteen with the applicant. Referring to the alleged sexual contact between them she said she was not doing this anymore and he was not going to continue to hurt her. B.C. allegedly replied that if K.N.C. did not do what he wanted he would make M., her younger sister, do it. At this stage M. was aged approximately fourteen having been born on 5 July 1972. K.N.C. describes an alleged incident where, after this discussion with B.C., she ran outside to the car where her younger sister M. (not a complainant) was about to travel off with the applicant. K.N.C. dragged M out of the car. She describes herself screaming at B.C. that as soon as her mother came home she would tell the police. The applicant allegedly took off in his car. This is the last that was seen of him for months. K.N.C. states that she told her mother and father that B.C. had been abusing her and that he had threatened to do it to M. and that she wanted to tell the police. K.N.C. states that she remembers her

father losing his temper and saying that she had better be right about everything, that it wasn't something you could just say. She remembered her mother and father arguing, and that her mother saying that she was going to do something about it to help her. K.N.C. alleges that she and her mother travelled on a bus to the local Garda Station where she made a statement to the Gardaí about the issue. She also claimed that she told them everything about B.C. and that she wanted him stopped.

30. This chronology correlates relatively closely with the complaint having been made in 1986. When she was older, aged about sixteen or seventeen years, B.C. allegedly asked her why she had gone to the police. He said he couldn't understand why she had stopped such a great relationship. K.N.C. states that even at that stage she was still scared of him. B.C. allegedly stated he would deny everything and would say that it was "*all in her mind*", and that people would believe him and not believe a "*filthy tramp like her*".

31. The complainant swore in an affidavit dated 31 October, 2003:

> *"I felt like I was born bad, like this was a punishment when the applicant did this. I didn't understand exactly what he was doing. I was scared of the applicant. He used to say things like I'd end up in a home and that everyone would do things like that to me if I told anybody. On one occasion the applicant grabbed a pillow and put it on top of my face. On another occasion the applicant said if I didn't do what he wanted he would make M. my sister do it."*

Reports to other persons
32. K.N.C. recounts that when she aged was about fifteen years she started to work in a hair studio. At that stage she went to her GP, Dr. Corry, and described sexual abuse taking place although she did not name the alleged perpetrator. It was suggested to her that she should attend the Rape Crisis Centre. K.N.C. stated in recollection that she was told she might have to speak to a group, and that this idea scared her. K.N.C. moved to England on 15 April, 1988 and thereafter married. Approximately four years prior to the date of her affidavit (I infer in or about 1998) she was depressed and went to see a Dr. Geraghty in England. She was in turn referred to a counsellor, a further doctor and ultimately to a Mrs. Sue Kane, a counsellor who dealt specifically with sexual abuse. At the time of furnishing her statement, K.N.C. stated she had been attending Sue Kane once a week for a period of three months. K.N.C. states she did not give a full account of the alleged abuse to Ms. Kane.

Evidence not adduced in this case
33. It must be stated at the outset that there are significant areas where the prosecution evidence is less than full. A prime example of this is that the person to whom Mrs. M.C. made her original complaint is still alive. He was then Sergeant John Keating. He is still a member of An Garda Síochána. He has not sworn an affidavit in these proceedings nor has any explanation been tendered to the court as to why not.

34. Equally, K.N.C. made a statement to Garda Eileen Kavanagh wherein she described incidents of abuse by her uncle S.C. and the applicant. No explanation has been tendered to the Court as to the absence of any affidavit from the Garda witness.

35. Mrs. M.C.'s statement was furnished on 19 December, 1986. It was withdrawn on 25 February 1987.

36. K.N.C.'s statement was made on 29 January, 1987 and was withdrawn on 26 February, 1987. This is evidenced by a statement furnished to Garda Kavanagh, withdrawing the application. No contemporaneous Garda evidence was available as to why and in what circumstances these complaints were withdrawn.

37. It will be seen that the withdrawal of the complaints took place within a one-day time span. There is, however, other evidence from which inferences may be drawn by the court, are dealt with below.

The 1999 investigation
38. In the course of his evidence, Detective Sergeant Byrne describes the obtaining of twelve statements in this investigation from various members of the C. family.

39. In the Book of Evidence there are in fact four statements from members of the C. family, thirteen Garda statements and also statements from two other civilian witnesses. Detective Sergeant Byrne testified that it would be difficult to adequately convey the complexity of the investigations having regard both to the large number of suspects, the sequence in which information became available and also the fact that many of the complainants made allegations regarding more than one member of the C. family. He says that the issues were inextricably interwoven. Seven investigation files and an overall report were forwarded in March 2000 by the Chief State Solicitors Office to the Director of Public Prosecutions.

40. Following directions, six members of the C. family, including the applicant, were arrested in July, 2000 and taken to a Garda Station. The exception was P.J.C. who was already in custody on other charges of a kindred type.

41. The applicant B.C. was arrested on 14 July, 2000 and interviewed in relation to the allegations. He was charged with a number of sexual offences before the District Court.

42. In August 2000 a further seven files were sent to the Chief State Solicitor's Office in respect of the C. family. The matter appeared in the District Court from time to time. On 18 July, 2000 the applicant was remanded on bail until 31 October. This was on consent. Thereafter the matter was remanded on a number of occasions until ultimately, on 9 April, 2001, the Book of Evidence was served on the applicant. On 5 June, 2001 the matter was adjourned until 10 July 2001, not (as was deposed to by the applicant) 7 July, 2001. Ultimately, on 11 January, 2002, the applicant was sent forward for trial on foot of a return for trial of that date. This return for trial is also initially an issue in these proceedings arising from the decision in *Zambra v. McNulty* [2002] 2 I.R. 351.

The applicant's grounds
43. In addition to the *Zambra* point, where it is contended that the first-named respondent acted *ultra vires* in making a return for trial under the Act of 1992, it is further alleged that the respondents had been guilty of delay in these proceedings on the basis of the complainant's delay in the initiation of complaints, prosecutorial delay, and the fundamental unfairness in continuing the proceedings in view of the alleged elapse of time since the dates of the complaints and the dates of initiating these criminal proceedings.

Grounds of opposition
44. In the statement of grounds of opposition filed on 29 October, 2003 the second named respondent admits the first named respondent acted *ultra vires* in making the order returning the applicant for trial under the Criminal Justice Act, 1999. This is therefore an acceptance that the applicant is entitled to an order of *certiorari* quashing the order of the District Court returning the applicant

for trial on 11 January, 2002 on foot of the *Zambra* decision.

45. Turning to this respondent's other grounds: As well as disputing the existence of delay, the Director further submits that if delay did occur it is not such as should prevent the trial from proceeding. It is contended that if delay did occur this is as a result of the conduct of the applicant being in a position of dominion over the respondent. It is submitted that the applicant had prevented the making of a complaint by threats and intimidation.

46. In support of these contentions, affidavits were sworn by Detective Sergeant Byrne (16 October, 2003 and 17 November, 2003); Mr. Michael Dempsey, psychologist (28 October, 2003 and 26 February, 2003); J.G.C. (20 October, 2003); Mrs. M.C. (21 October, 2003); K.N.C. (3 October, 2003); and C. Finn of the Office of the Chief State Solicitor (31st October, 2003). The latter affidavit exhibits a helpful chart containing a family tree of the 'C' family and also charts indicating the manner in which the alleged victims are related to the alleged perpetrators.

47. Further affidavits were adduced from the applicant which in turn engendered a further affidavit from Detective Sergeant Byrne on 21 May 2004.

The evidence of Michael Dempsey, psychologist
48. The complainants were interviewed by Michael Dempsey, senior clinical psychologist who furnished reports which were exhibited with his affidavit and was also made available for cross examination.

Mrs. M.C. – psychological evidence
49. Mr. Dempsey states on affidavit that the procedure he adopted in interview was to read the Book of Evidence and then put various elements of it to the complainants.

50. He stated that Mrs. M.C. had alleged that B.C. began to touch her inappropriately "soon after" she married R.C. in 1965. She reported that she was frightened of B.C. She did not tell her husband about this alleged behaviour as she felt he would not believe her. She stated that B.C. had stopped touching her inappropriately about two or three years afterwards. She did not know why it had stopped. The identified marriage date is of importance in the context of Mrs. M.C.'s statement in the Book of Evidence. There she states that so far as relates to the applicant, the sexual abuse incidents began in 1976. This, of course, is quite different from stating that such abuse allegedly commenced in 1965.

51. The applicant submits that this constitutes prejudice. I will return to this issue later in the judgment.

52. Mrs. M.C. gave Mr. Dempsey a brief history of her marriage. She had been married twenty three years. Her husband, both sexually and physically, was violent to her. She even now lives in fear of him. She stated she had been raped by another brother F.C. She further stated she had been sexually assaulted by yet a third brother P.J.C. on one occasion in 1972. She described this alleged incident as an attempted rape.

53. She stated to Mr. Dempsey that she lived in constant fear of the C. brothers including her husband R.C. She reported that P.J.C. (also one of the applicants) had told her he was a member of the IRA and she felt threatened by him. Mrs. M.C. stated that she had become withdrawn and depressed as a result of the sexual assault she experienced from the brothers. She stated she had felt suicidal in the immediate aftermath of the alleged rape by F.C. She prevented herself from committing suicide by the thought of her children.

54. She emigrated to England in 2000. She continued to feel threatened by her husband then and thereafter. She explained the absence of any complaint regarding assaults upon herself in 1986 or earlier as being the result of fear of her husband and brothers-in-law.

55. Mr. Dempsey described carrying out tests on Mrs. M.C. on the Impact of Events Scale, a self-report measure of a person's subjective response to stressful events. He also used a Beck Depression Inventory, a self-report measure of current depression.

56. Mr. Dempsey found that Ms. M.C. is currently reporting symptoms of post traumatic stress and severe depression. He states these are a common consequence of sexual assault.

57. It was not possible, in Mr. Dempsey's opinion, to separate out the contribution of the different sexual assaults by the different alleged perpetrators to her current symptoms. He found that one reason for the delay may be psychological avoidance caused by post traumatic stress. However, in his view, the dominant reason for her failure to disclose the alleged sexual assaults until relatively recently was simply fear of the C. brothers. She was inhibited in reporting the assaults to the Gardaí by the psychological consequences of the various assaults she allegedly experienced and by her fear of the brothers generally.

58. She finally overcame her fears and reported the alleged assaults to the Gardaí when she heard that her sister-in-law had complained to them. The event which finally precipitated her contact with An Garda Síochána was her husband striking her on their 34th wedding anniversary.

59. It will be recollected that Mrs. M.C. stated she was married in 1965.

J.G.C. – the psychological evidence
60. J.G.C. told Mr. Dempsey that she had been sexually abused by her uncle, the applicant B.C., from the age of eight until thirteen or fourteen years. She stated also she had been sexually abused in childhood by her now deceased paternal grandfather J.C., her father and a number of her uncles. In Mr. Dempsey's view, this history of abuse from various members of the family had the psychological consequence of delay in reporting such abuse to the Gardaí.

61. As in the case of Mrs. M.C., Mr. Dempsey considered it was not possible to separate the specific psychological consequences of the alleged abuse by specific perpetrators. The issues were inextricably interwoven.

62. She reported to Mr. Dempsey that she had told the Gardaí of the alleged abuse by the applicant when she was contacted by them when she was age twenty seven years. By inference this would have been in 1988.

63. This was in the course of an investigation of her first cousin's complaint of alleged abuse. No charges resulted from this investigation. There was no further evidence in relation to this matter or as to the identity of the first cousin. J.G.C. stated to Mr. Dempsey that she was afraid of her uncle R.C., her father and also the applicant. Mr. Dempsey identified fear as being one factor inhibiting the applicant in reporting what she alleged occurred.

64. Mr. Dempsey recommended that a report should be obtained, if possible, from a counsellor who J.G.C. attended for three months following her complaint to the Gardaí. No evidence emerged from this counsellor or the institute where the complainant attended.

65. With regard to the specific evidence relating to B.C., Mr. Dempsey states that the lack of action upon the reporting of the matter to the Gardaí, the sense of shame she felt of the alleged abuse and fear of her uncles all prevented her from disclosing what had allegedly occurred to the Gardaí at any subsequent time.

K.N.C. – psychological evidence
66. Mr. Dempsey considered that K.N.C. was experiencing symptoms of post-traumatic stress to a moderate/severe degree as a result of the alleged abuse. He pointed out that in this, as in the case of the other complainants, it is not possible to separate out the specific contribution to her psychological problems of each alleged perpetrator including the applicant. The reasons for the delay in reporting the alleged abuse to the Gardaí were the same in the cases of both her uncle P.J.C., also an applicant, and also the applicant herein.

67. Mr. Dempsey referred, in the course of his affidavits in this case, to reports received relating to the aforementioned other applicant P.J.C. He told of K.N.C. describing sexual abuse from her paternal grandfather, her uncle B.C. the applicant and her uncle P.J.C. K.N.C. felt that all three of her uncles, including the applicant, had "*power*" over her as a child.

68. She stated to Mr. Dempsey that she thought she must be a really nasty human being for this to be happening to her. She thought the alleged sexual abuse was going to occur for the rest of her life. Her uncles used to say she was there for their pleasure. She stated she attempted to tell about the sexual abuse in confession but did not receive an adequate response. She though of the sexual abuse as being a punishment from God for something she had done wrong. She described suffering nightmares and obsessional behaviour including personal hygiene, the latter included bleaching her hands on many occasions with neat bleach. She describes spending "*a fortune*" on deodorant and soap to be rid of the smell of her uncles. Sometimes she took more than two baths a day. She obsessively cleaned her house.

69. Mr. Dempsey carried out similar tests to those he had used earlier on other complainants.

70. The complainant stated that she did not divulge the extent of the abuse to Ms. Sue Kane, the counsellor which she attended in England as she felt she would be too ashamed to state everything that was in her Garda statement to any counsellor.

71. Mr. Dempsey's conclusion was that among the factors inhibiting the complainant from reporting the allegations to the Gardaí were her earlier complaints to them, and her feelings of guilt from having informed the priest in confession as to what occurred, but more specifically her fear of each of her uncles including the applicant. As in other cases herein, Mr. Dempsey concluded that it was not possible to attribute specific psychological consequences in a segregated way to each individual alleged perpetrator.

72. The fear allegedly felt by each of the complainants, and indeed other family members, was also the subject matter of testimony from Detective Sergeant Byrne in cross-examination. He referred to the 'C' family generally as being a "*mini mafia*".

The applicant's evidence and submissions
73. In the course of the affidavit sworn by him, the applicant contends he is unaware of any physical abuse carried out on J.G.C. by her father. While she may have been terrified by members of his extended family, she had no reason to be afraid of him. He was unaware of any actions taken by his brothers leading to the withdrawal of Mrs. M.C.'s complaint to the Gardaí of 19th December, 1986. In particular he was unaware of his brother R.C. telling Mrs. M.C. to drop the charges after "*the applicant*" and S.C. came to the house.

74. The applicant herein, B.C., states that he believes that the reference here may be to another one of his brothers F.C. F.C. is indeed married to S.C. (This fact of B.C.'s "belief" is a matter to which I will refer later). He states he was unaware of any fears felt by any other members of the family regarding complaints of sexual abuse. He contends he is a stranger to any acts of intimidation and the respondents appear to be confusing his actions with those of his relations for whose conduct he cannot be responsible: the fact that other members of the family may have engaged in violence does not mean he is of a similar disposition. He states he is a stranger to other alleged incidents of violence involving other members of the family including such actions alleged against F.C. He contends he was a stranger to any misconduct on the part of J.G.C.'s parents towards her and that he has not been in contact of any type with Mrs. M.C. since approximately 1994.

75. The applicant alleges he has suffered prejudice because of inability to obtain material from his former employers which might have provided alibi evidence. It may have been possible, he says, for one of his work associates at the time of the alleged incidents to provide evidence relating to his whereabouts. He has lost touch with such people. While he may have a specific recollection of certain incidents he would not have a general recollection of the dates or times at which ordinary incidents occurred – that being the youngest of six brothers in the family he had no contact with his other brothers apart from F.C. since 1990 – he has no idea where any of his brothers live apart from F.C. He has virtually not spoken to them at all in the last ten years. He denies the allegation of alleged intimidation, threats or involvement with such matters.

76. The applicant submits that the delays in this case viewed either separately or compositely breaches his constitutional rights. The delay, it is contended has three aspects –

> 1) the delay in laying charges;
>
> 2) the delays by the prosecuting authorities in proceeding the charges; and
>
> 3) the elapse of time between arrest and charge and prosecution before the Central Criminal Court which was to have taken place on 30 June, 2003.

77. The applicant further submits that he has been charged with offences alleged to have taken place between 1970 and 1983, between nineteen and thirty two years prior to the application for leave to obtain judicial review. These include twenty seven offences of indecent assault contrary to common law as provided by s. 6 of the *Criminal Law (Amendment) Act 1935*; ten offences of indecent assault contrary to common law as provided by s. 10 of the *Criminal Law (Rape) Act 1981* and three offences of rape contrary to s. 48 of the *Offences Against the Person Act 1861.*

Return for Trial
78. In *Zambra v. McNulty* [2002] 2 I.R. 351 the Supreme Court considered whether the order extending time for service of the Book

of Evidence constituted a "step" which was taken under Part 2 of the *Criminal Procedure Act 1967* in relation to its prosecution. It is accepted by the respondent that a step had been taken which is *ultra vires*. By reason of the foregoing, the first-named respondent (it is accepted) acted *ultra vires* in making the return for trial under the 1999 Act.

General principles of applicable law

Complainant delay
79. Under this heading I propose to deal with the general principles of the law insofar as it relates to matters of this type and thereafter to deal with the specific application of the law to the facts of the case in the context of the submissions made by the parties

80. In *P.C. v. D.P.P.* [1999] 2 I.R. 25 at p. 68, Keane J. (as he then was) set out the fundamental principles which are now applicable to cases of this category. This discussion was further developed by him (as Chief Justice) in his judgment in *P.O'C. v. D.P.P.* [2000] 3 I.R. 87 at p. 93.

81. While acknowledging that there may be slight differences of emphasis, the law as authoritatively laid down has the following aspects.

82. The first of these is an overarching principle recognising the right to a fair trial in due course of law under Article 38.1. Here the paramount concern of the court will be whether it has been established that there was a real and serious risk of unfair trial. This is what is meant by a guarantee of trial in "*due course of law*". A question to be asked is whether the delay is such that, depending on the nature of the charges, the trial might not be allowed to proceed even though it has not been demonstrated that the capacity of the accused person to defend himself or herself will be impaired. This would be "*prima facie delay*". It seems to me that this overarching principle is applicable in cases of all categories although having special reference to allegations of sexual conduct by adults with minors such as in the instant case.

83. Insofar as this relates to cases of this identified category there are then two special tests. These are -

(a) The provenance and nature of delay –

> here the first inquiry must be as to the reasons for the delay. In a case where no blame can be attached to the prosecuting authorities, the question to be asked is whether the court is satisfied as a matter of probability that assuming the complaint to be truthful the delay in making it is referrable to the actions of the accused.

(b) The degree of prejudice –

> if test (a) above has been reached, a further issue to be determined is whether the degree to which the accused's ability to defend himself/herself has been impaired in such a manner that the trial should not be allowed to proceed.

84. In considering the question of problems and nature of delay at (a) in cases which involve allegations of sexual offences committed by adults on children, the inquiry involves the Court necessarily being asked to assume by way of temporary hypothesis that the allegations are true. Absent such an assumption, it would not be possible for the Court to conduct such an inquiry. Instead there would be an automatic obligation to prohibit the trial of a person because of the expiry of a lengthy period of time. This would hold even though this elapse of time was due to a dominion exercised by an adult over a child during the period of abuse and even where the abuse has been perpetrated over many years by a parent or step parent of a child actually living in the family home with the perpetrator. Since that patently cannot be the law the presumption of innocence which applies in its full effect to a criminal trial does not apply in the usual way to inquiries of this nature.

85. If, such an assumption having been made, the Court invited to halt the trial is satisfied that as a matter of probability the failure of the victim to complain of the offending conduct was the result of the conduct itself, the delay of itself and without more, will not be a reason for halting the trial.

86. I believe I am bound by these expressions of the law so authoritatively stated. It may be that the issues which courts are called upon to determine in cases of this type may be assessed without a necessary abandonment of the presumption of innocence at any point. For as Murray J. (as he then was) pointed out in *P.O.C. v. D.P.P.* [2000] 3 I.R. 87 at p. 104

> *"the right to prosecute does not depend on the assumption that the evidence being tendered by the prosecution against a particular accused is true. It is based on the right to have the issue of guilt determined on the basis of such evidence".*

87. He went on to state that "*the decision of itself does not concern the quality of truth of the evidence tendered by the prosecution and it does not disturb the presumption of innocence*".

Dominion – the effects of abuse – earlier complaints
88. Insofar as relates to the issue as outlined in the subheading I believe considerable assistance may be obtained from the judgment of Denham J. in *P.C. v. D.P.P.* [1999] 2 I.R. 25 at p. 62. There the offences were alleged to have occurred between 1982 and 1984. The complaint was finally initiated in 1995. However in 1988 the complainant told some school friends, her teacher, the school principal and her parents of the alleged abuse. None of these persons took any action.

89. Denham J. said:

> *"If the matter of dominance alone were to determine the issue of the delay from 1988 to 1995 the applicant would have a much stronger case but it is not the only factor. Each case must be determined on its own circumstances and there can be no definitive list of factors. Factors may include the relative ages of the accused and victim, the issue of dominance, the relationship of the parties, the place of the abuse and the nature of the abuse. As knowledge grows of the nature and effects of child sexual abuse and as medical, psychiatric and psychological evidence is expanded and presented to the courts other factors may become apparent. Also each case depends on its own circumstances."*

90. It is clear then that the court may have regard to the "*effects of abuse*" and that these effects may continue after the end of dominion proper. The delay in reporting abuse may be imputed to the repressive effect of the alleged actions upon the complainant. Here again, however, the judgment of Keane J. (as he then was in P.C.) is of assistance;

> *"it is necessary to stress again that it is not simply the nature of the offence which discharges that onus (to explain delay in action up to the date of complaint). All the circumstances of a particular case must be considered before that issue can be resolved."*

91. In that case, Lynch J. in his concurring judgment also concluded at page 79 that the applicant was largely responsible for the delay by the complainant in making the complaint. He added

> *"this is not to say that there may not be cases of extreme delay, some or most of which may be attributable to the applicant himself, where nonetheless prohibition might be grounded but this is not such a case".*

92. As is clear from the authorities the issue of dominion is one for determination having regard to the facts and circumstances of each case. Having regard to the circumstances of the instant cases I am satisfied that in those cases where she is a complainant Mrs. M.C., even though an adult, was under the dominion of the applicants, by reason of their conduct as described, the nature of the inhibition acting upon her, the relationship between the parties and the apprehension regarding the complainants which she describes. I would emphasise that this finding is reliant entirely on the facts of this case but it is not without precedent (see *F.S. v. D.P.P.* Supreme Court, unrep., McGuinness J. 19th December, 2000; *Barry v. D.P.P.* Supreme Court unrep., Keane C.J. 17th December, 2003.)

A summary of the tests
93. The above and other principles, decided in earlier authorities, have been summarised by Fennelly J. in the case of *P.L. v. Her Honour Judge Buttimer and the Director of Public Prosecutions* (unreported, Supreme Court, 20 December 2004). While this case was decided after the hearing, the matter was re-entered and I enquired of any party if there was objection to my adopting these summaries of the law. No objection was made although counsel on behalf of the respondent indicated that the judgments were premised on somewhat different approaches. Nonetheless this case very helpfully sets out both a summary of the principles and also a summary of the guiding criteria which have been relied on in the *application* of the principles set out by Keane C.J. (formerly *qua* Keane J.).

94. This case very helpfully sets out a series of guiding criteria which have been relied on in the application of the principles set out by Keane C.J.

95. First, one turns to the fundamental and binding principles, Fennelly J. summarised them thus:

> 1. Long delay by a complainant in making a complaint of sexual abuse may be explained by the fact that the accused, by reason of disparity of age combined with the tenure by the accused of a position of trust of authority over the complainant;
>
> 2. For the purposes of the inquiry as to whether the delay is explicable but not further it will be assumed that the allegations of sexual abuse are true;
>
> 3. Delay, even after the end of the period when the accused is in a position to exercise dominion, may be explained by showing that the alleged sexual abuse continued to affect the complainant in the sense that he or she was psychologically inhibited from complaining. In deciding this issue, psychological or psychiatric evidence may be relevant but is not essential. All the relevant circumstances of a particular case must be considered. The question is not simply whether the complainant continues to be affected by the alleged abuse, but whether such effects constitute a reasonable explanation for the delay. The burden of proving that the trial should be prohibited lies in the applicant. However, where the delay is prima facie such has to give rise to a presumption that the applicant's right to a fair and speedy trial is infringed, the court will have regard to the adequacy of any explanation offered by the complainant.

Evidential issues: "*islands of fact*"
96. Issues of this type have been summarised in the course of Hardiman J.'s judgment in P.L. He said: "*the role of such isolated factual elements in a case such as this was described in my judgment in JOC v. D.P.P.* [2000] 3 I.R. 478 at 504:-

> *"The effect of documentary, physical or forensic evidence, where it exists is to provide some basis on which the part of a case which depends on mere assertion can be assessed and tested. Inevitably there will be a certain number of criminal cases and far fewer civil cases in which no such evidence exists. In such case each side will normally look at the surrounding circumstances: the prosecution to see whether there is corroboration or at least evidence consistent with the allegations being true, and the defence to see if there is material with which the complainant's story can be contradicted even on a collateral matter, or his credibility? Apart from the effect of lapse of time on the memories of those principally involved, an interval of 20 or more years makes it difficult if not impossible to clarify the surrounding circumstances and to introduce any element at all of undoubted fact with which the statements of the parties can be collated and tested. The element of hazard or chance which this state of affairs introduces into a trial has been recognised for centuries. The more nearly a serious trial consists of mere assertion countered by bare denial, so the less it resembles a forensic enquiry at all"*

97. The role of evidence in relation to its surrounding circumstances was more fully discussed in *P.O.C. v. D.P.P.* [2000] 3 I.R. 87. There the continuation of a trial was prohibited on the basis that the applicant was able to point to a relevant aspect of the case whether or not a particular door was capable of being locked – "*which it is reasonable to think could have been the subject of irrefutable evidence one way or the other but for the very lengthy lapse of time*" and which would have been useful to the defendant.

The principles summarised
98. The present position is best summarised in an unreported judgment of the Supreme Court delivered by Geoghegan J. and concurred with by Murray J. (as he then was) and Fennelly J. on 19 May 2004 in the case of *D.D. v. Director of Public Prosecutions*. In that judgment Geoghegan J. expressly approved the following passage from an *ex tempore* judgment of Kearns J. in the High Court.

> *"Equally the island of facts which Mr. Gageby says existed by reference to the dormitory arrangements, I am not satisfied that there is an island of fact such as was capable of being pursued in the way Mr. Gageby says it should have been. Accounts available at this point in time seem to me to be equally consistent with either version of events. I do not think there is either an island of fact or demonstrable prejudice in this case insofar as the accused is concerned. I do*

accept and it is one of the great misfortunes of this kind of case that there is inevitably a sense of potential prejudice and general prejudice but essentially this case comes down to a credibility contest between the complainant and the accused. That inevitably is the case across a spectrum of different cases notably and I took this as an example, in a rape situation where the defence is consent, there are no other witnesses and it all hinges on essentially the resolution of a contest of that nature. That, of itself, cannot be a ground for stopping a case, the fact that there is simply one person's testimony against another."

99. Geoghegan J. went on to point out in P.L.:-

"cases of rape or sexual assault which are brought in good time may frequently involve simple credibility contests between complainant and the accused because inevitably a great number of these offences are committed in some secret place and frequently in the dark. Until the law was changed there was a safeguard to some extent at least against the danger of a false accusation. There used to be an obligation on the part of the trial judge to instruct the jury that it would be dangerous to convict in the absence of corroboration. That mandatory requirement has now gone but there is still a discretion left in a trial judge and in my opinion such an opinion should always be given as a matter of discretion in a one to one contest".

100. The principles which have been outlined above are of assistance in assessing the evidence in this case from the point of view of whether the applicant has discharged the onus of proof to the requisite standard.

Consideration of the psychologist's evidence – criteria for explaining delay – the utilisation of the criterion of "reasonableness"

101. The issue of psychological evidence and its quality has been discussed in a number of decided cases; see judgment of McGuinness J. *O.R. (D) v. D.P.P.* (unreported, Supreme Court, 30 July, 2004) at p. 13; judgment of Kearns J. in *AW v. DPP* (unreported, High Court, 21 November, 2001); *JEM v. DPP* (unreported, High Court, 22 October, 2004); *D.H. v. His Honour Judge Kennedy and the D.P.P.* (unreported, High Court, 22 October, 2004). All of these authorities are agreed on the somewhat unsatisfactory nature of ephemeral and vague criteria being used by some psychologists and some psychiatrists in order to account for delay.

102. In this case, I should mention at this point that I consider that the applicant has discharged the burden of showing that by reason of elapse of time a trial would be *prima facie* unconstitutional. It is not sufficient to allege abuse and say that it was "*reasonable*" for the complainants not to complain. Such evidence must be connected to the accused. The "*reasonableness*" must be of a quality worthy of setting in the balance against the constitutional right of the accused person. The reasons must be tangible and demonstrable. I would not go so far as to say that the reason must be due to "*some psychiatric disease or some psychological defect or abnormality duly expressed by expert or non expert testimony*."

103. When turning to the evidence in this case, the question will be: Is the combination of dominion and effect of abuse on the facts of this case, such as to constitute demonstrable and tangible reasons susceptible to objective judgment as to why there was delay in making complaint?

104. In assessing the evidence the court is entitled to have regard not only to psychological evidence but also to the plain facts of testimony which is before it. Such an approach was authoratively determined by Keane CJ in *J.M.B. v. D.P.P.* (unreported, Supreme Court, 17 December, 2003) where, referring to *S v. D.P.P.* (unreported, Supreme Court, 19 December, 2000), he stated:-

"however the fact that it was thought necessary or at least desirable to adduce such evidence in that case is not a ground for concluding that it is essential in every such case. I have no doubt that the trial judge is correct in the approach he adopted i.e. considering the admissible evidence. Attaching such weight to it as it deserved and drawing such inferences from the evidence as seemed to him necessary or reasonable."

Delay *per se*

105. Lapse of time may of course give rise to circumstances whereby a person's right to a fair trial may be so compromised as to entitle them to an order staying his or her trial. However as McGuinness J. pointed out in *D.W. v. D.P.P.* (unreported, Supreme Court, 31 October, 2003) the fact that general evidence may no longer be available in cases where the offences are alleged to have occurred some time ago is a matter which can be drawn to the attention of the jury by the trial judge. In the course of her judgment she drew attention to the proposition that if an offence was alleged to have been committed recently, the chances were that an accused would be able to work out his whereabouts. However if an allegation is made that certain alleged events occurred some considerable time ago it is harder to defend than it is to prosecute. She points out that it is not the law that old offences cannot be tried. In such cases, a jury must be more careful and be harder to satisfy in relation to an event that is phrased in a vague and general way rather than an event which carries details and particulars. It will be a matter for the trial judge to decide whether to issue a direction of this nature in order to ensure that the appellant will not face an unfair trial.

Prosecutorial Delay

106. Where prosecutorial delay proper may be shown to have occurred it is clear the court should not allow the case to proceed and additional actual prejudice need not be proved.

107. This principle was stated with clarity by Geoghegan J. in *P.P. v. D.P.P.* [2000] 1 I.R. 403 at p.409 when he stated:-

"it is not acceptable and in my view is a breach of a defendant's rights under Article 38.1 of the Constitution for the prosecuting authorities to allow unnecessary delay to occur in a case such as this involving sexual offences committed many years ago. The necessarily delayed trial is most unfortunate, but it is wholly intolerable that it should be postponed still further due to unnecessary delays on the part of the prosecuting authorities. I am using this expression "prosecuting authorities" to cover the Director of Public Prosecutions and the Garda Síochána".

108. He continued:-

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

109. In this context the statements of law by McCracken J. in *M.(J). v. D.P.P.* (unreported, Supreme Court, 2004) are apposite:

> "In *O'Flynn v. Clifford* [1988] I.R. 740 Gannon J. in a passage subsequently approved of by the Supreme Court said at p. 745:
>
> > *"A person who is a mere suspect (and therefore presumed innocent) has no legal right to have a charge made against him nor to have some legal process diligently or expeditiously pursued by arrest or by summons to bring him before a court. The public interest and good sense require that every crime be properly investigated and that the offender be expeditiously brought to justice. But the public interest also requires diligence and conscientious care in the investigation of crime and the assembling and presentation of cogent evidence in support of the prosecution. It is not part of the functions of the courts to participate in the investigation of criminal offences or in a supervisory direction of those engaged in that work. The courts must remain detached and independent in relation to all matters antecedent to the laying of charge against a person of a criminal offence. … The court cannot of its own motion investigate the circumstances leading to the laying of the charge or procedures of investigation. But if it should appear to a court that an accused was unlawfully detained without charge to facilitate the investigation and formulation of intended charge his immediate release would be ordered. Equally if it should appear to a court that an accused person has been deprived of the right and opportunity of a fair trial or put to an unfair disadvantage in facing his trial by reason of circumstances, and the control of the prosecution, such as by unwarranted delay in bringing a charge, the constitutional obligations on the courts to vindicate the rights of the citizen would require dismissal of the charges or other refusal to adopt the unwarranted procedures".*

110. McCracken J. points out:-

> *"the issue is not whether the investigation of the complaints was slovenly or carelessly carried out on the one hand nor whether the delay on the part of the investigating authorities was justified by the circumstances on the other hand. The court does not know, nor has it the means to enquire into, the means of investigation or the justification for the delay. However, there undoubtedly in the present case a considerable delay, and whether that delay was justified or not, from the point of view of the investigating authorities, the court is concerned primary whether such delay has affected the constitutional rights of the applicant, and in particular whether it has jeopardised his right to a fair and expeditious trial"*

111. McCracken J. further points out:-

> *"there are cases in which prosecutorial delay may in fact be so "blameworthy" … as to justify the prohibition of the trial with nothing further, but I do not think this is one of those cases. There has certainly been an exceptional delay in this case but it does appear that there was a reason for the delay in that there were several parallel investigations going on at the same time. To that extent the delay was not "blameworthy". The delay can be excusable if it does not affect the applicant's constitutional rights. However while a prosecutorial delay may not in itself lead to the prohibition of the trial it is a fact which can be taken into account in the overall assessment of the situation by the court."*

When does prosecutorial delay begin?
112. In the course of submissions Mr. McDonagh SC on behalf of the Director of Public Prosecutions made submissions regarding the correct interpretation of *D.P.P. v. Byrne* [1994] 2 I.R. 236 at p. 243-244; *Hogan v. President of the Circuit Court* [1994] 2 I.R. 513–521. The court is in agreement with the comments (albeit *obiter dicta*) of Geoghegan J. in the case of *D.D. v. Director of Public Prosecutions* where he said "*the broad statements of principle enunciated by Finlay C.J. in D.P.P. v. Byrne and with which the other judges agreed were intended to apply to every kind of criminal proceedings and to lapses of time whether before or after complaint or before or after charge*."

Application of the principles and guiding criteria to this case
113. On the basis of the evidence the applicant has discharged the onus to demonstrate that there has been delay which is prima facie inordinate. This applies, in my view, both to the delay in initiating prosecutions and also under the rubric of prosecutorial delay. Has this delay been explained? I consider that it has.

Delay *per se*
114. I do not think the delay which has arisen in this case is sufficient to ground a finding of delay per se or to automatically justify prohibition of trial. The elapse of time which has occurred is considerable, but not outside the range of cases where prosecutions have been permitted to proceed; see e.g. judgment of McGuinness J. in *S. v. D.P.P.* (unreported, Supreme Court, 19 December, 2000).

Complainant Delay in this case: Findings of fact
115. This case is distinct from others. It has the following and unusual and perhaps unique combination of factors:

(a) the familial relationship between the complainants and the respondent;

(b) the close proximity in which they lived during the relevant times;

(c) the continuing fear which the complainants had of the applicant and his brothers;

(d) the clear evidence of dominion. This dominion is not confined simply to *the relationship between the parties*. There is also ample evidence that the domineering conduct of the applicant on his own behalf and through the conduct of F.C., and the other brothers has been such as to constitute either a continuation of dominion up to the time of the making of the complaints or alternatively continuation of the effects of the relationship between the complainants and the respondent.

116. Despite the fact that Mr. Dempsey applies the broad and rather general criterion of "*reasonableness*" to explain delay, his evidence is of considerable assistance. What is more important is the evidence which was tendered both by the complainants and Mr. Dempsey in relation to the state of fear existing between the complainants and the respondent, the degree of inhibition, and the individualised evidence of the complainants themselves as to their fear. All of this evidence is connected to the applicant *inter alios* and to the allegations of abuse.

117. To a degree the court can, I think, rely on the evidence of Mr. Dempsey albeit he unfortunately uses the criteria of reasonableness. But what is more important is the evidence which he tendered in relation to the state of fear existing between the

complainants and the applicant, the degree of the inhibition, the effect on their capacity *and* the evidence of the complainants themselves of their fear.

118. In this context I believe the court is entitled to place weight on the sworn evidence of the complainants. I believe greater weight can be placed on this than the somewhat vague and rather evasive comments of the applicant where he seeks to assert that he had no hand, act or part in conduct amounting to dominion. I do not believe that this is easily reconcilable with his knowledge of the visit which F.C. and his wife S.C. paid to the complainant Mrs. M.C., which led to the withdrawal of the complaints. I believe consequences flow from this concession in that it allows the inference to be drawn that B.C. was well aware of what occurred, was aware of the meeting and was aware of the circumstances surrounding the withdrawal of the complaint. He was a beneficiary thereby. In the light of this evidence the court is entitled to infer that the close proximity and dates wherein the complaints of 1986 were withdrawn in 1987 were as a result of suppression of others of such complaints.

119. I conclude that the dominion and the effects of the relationship between the applicant and the complainants continued up to the date of the making of their complaints.

120. It is redolent of the eloquent and pithy phrase used in *B v. D.P.P.* (cited earlier) by Denham J. at p. 200 regarding the complainants:

> *"they were living in their own world which had been created by the applicant's dominion and actions".*

121. This is not to say that purely subjective criteria can be used in the assessment of whether dominion exists. In my view there must be demonstrable and tangible evidence which the court, assessing the matter objectively, is entitled to take into account. I believe such a position exists here on the basis of the evidence of the complainants, Detective Sergeant Byrne, and Mr. Dempsey. I am not stating that the word "*reasonable*" as used by Mr. Dempsey is sufficient in themselves. But, taken into account with the relevant other factors, there is clear evidence I consider that the respondents have discharged the onus of proof which devolves upon them in the proceedings.

Prosecutorial delay – the evidence
122. The applicant draws attention to the fact that the complainants made their statements on the 10 June, 11 July and 28 September, 1999. He was not arrested until 14 July, 2000 and charged later on that day. The Book of Evidence was not served until 9 April, 2001 the matter having been remanded in the District Court on a number of occasions. The matter was not returned for trial from the District Court until 11 January, 2002. There was delay arising from the return for trial having been rendered ineffective and void as a result of the *Zambra* decision. But there are similarities between the instant case and the issues identified by McCracken J. in *M(J) v. D.P.P.* (unreported, Supreme Court, 2004). There has been unusual delay. But the court must have regard not only to the procedures which were to be carried out in this case but also all others, and the inter-relationship between the complainants as well as the applicants. Detective Sergeant Byrne has clearly outlined this inter relationship. This is relevant evidence which the court accepts to explain the delay.

123. In the circumstances therefore I am of the view that the elapse of time which has occurred in the prosecution has been explained adequately by the respondent even though it is indeed unusual.

124. There is no evidence at all that the nature of the investigation was slovenly or careless. Indeed it is noteworthy that such a proposition was hardly put to Detective Sergeant Byrne in the course of his evidence.

125. Insofar as the assertion of prosecutorial delay is made, it is clear that the applicant has failed to discharge the onus of proof so as to demonstrate anything in the nature of conduct which might be identified as blameworthy, lackadaisical or slovenly. The court finds that there has been no prosecutorial delay of that nature.

Actual Prejudice
126. In assessing the evidence the court should have regard to the fact that with one exception the offences alleged would have taken place in private. Therefore in this case there may well be difficulty in identifying "*islands of fact*" which would have been present regardless of delay.

127. On behalf of the applicant it has been asserted his parents are now deceased. His mother died on 24th August, 2003 having suffered senility in excess of a year prior to her death. His father died on 12th February, 1983. It is pointed out that E. C. is now dead. But is the fact of deceased witnesses sufficient in itself to discharge the onus of proof? No evidence has been tendered that the deceased witnesses were in a position to give relevant or material evidence. Indeed the contrary may be true so far as concerns the applicant's father. No evidence was tendered, even of a speculative type, as to how, and in what manner, the absence of these particular persons had a prejudicial effect upon the applicant or upon his constitutional right to a fair trial.

128. It is further submitted that his difficulties would be compounded by inability to establish his whereabouts and potentially an alibi at some material time due to unavailability of work records or work colleagues. But in order to discharge the onus of proof it seems to me that the applicant must go further. It is not for the court to speculate as to what evidence there might have been. It is for the applicant to discharge the onus of proof as to what evidence would have been available on the balance of probabilities. To merely make a generalised assertion is to invite the court to speculate. Speculation is not an adequate basis to discharge the onus of proof in the absence of identifiable and tangible prejudice.

Prejudice – the standard of proof
129. The issue of prejudice caused by the absence of witnesses is illustrated in a number of cases. In *the People (D.P.P.) v. Quilligan (No. 3)* [1992] 2 I.R. 305 the Supreme Court held that a four year delay in the holding of a re-trial infringed the constitutional rights of the accused as a *witness who had given relevant and material evidence to the defence* had died in the meantime.

130. In *B. v. D.P.P.* [1997] 3 I.R. 140 Mrs. Justice Denham said one of the factors that must be weighed in the balance "*against that presumed prejudice (is) not merely the absence of proven specific prejudice but also the extent to which the delay was due to the conduct of the accused*" (emphasis added). In *P.O.C. v. D.P.P.* [2000 3 I.R. 87 Keane C.J. drew the distinction between a bald assertion as to specific prejudice, on the one hand, and a genuine defence issue on the other. Hardiman J. in the same case also drew attention to the absence of significant elements of specificity and particularity in the context of his reference to "*islands of relevant and ascertainable facts*".

131. In *J.O.C. v. D.P.P.* [2000] 3 I.R. 478 the majority of the Supreme Court declined to find that the absence through death of the applicant's wife relating to allegations of 25 years previously constituted prejudice in circumstances where it would have been unlikely

that the applicant's wife would have provided much assistance as she would clearly not have been present when the alleged abuse was taking place. In *P.P. v. D.P.P.* [2000] 1 I.R. 403 the applicant asserted he was prejudiced by the absence of daily records from the period where he was working during which alleged incidents of assault took place. The court accepted that this could be prejudicial if it was disputed for example that the complainant had never even worked in the particular employment. However the court (Geoghegan J.) held that a prosecution would not be prohibited merely because the applicant asserts he would have an alibi defence based on dates and records no longer available. And in *D.W. v. D.P.P.* (unreported, Supreme Court, 21 October, 2003) Mrs. Justice McGuinness pointed out that the absence of documentation such as school timetables in a prosecution for sexual assault were matters which could be drawn to the attention of the jury by the trial judge by appropriate directions.

132. The clear thrust of these authorities, taken together, demonstrate that mere assertion of prejudice will not be sufficient to discharge either the onus of proof or to cross the threshold of the standard of proof. What is necessary is that the prejudice alleged must be proved as a matter of probability and must be specific. The authorities demonstrate that '*specific'* for these purposes does not mean simply that a witness or document is absent. It must be shown that the absence of such material is prejudicial and material. That is, there must be evidence upon which the court may act in order to infer that the absent witness would have been in a position to give relevant evidence to the defence of the case. In the context therefore "*specific*" prejudice relates not to a mere general category of potential prejudice but one with identified and real content which can be stated with particularity.

The issue of discretion in judicial review
133. Remedies in judicial review are discretionary. See *State Vozza v. O'Floinn*, *G. v. D.P.P.* [1994] 1 I.R. 374; *Cork Corporation and O'Connell* [1982] I.L.R.M. 505*; R. v. Kensington I.T.C.* (1917) K.B. 486. The question arising is whether there can be conduct on behalf of an applicant which will of itself, if accepted by the court, result in the court exercising its discretion not to grant judicial review. Can a situation arise such as envisaged in *T.W. v. The Director of Public Prosecutions* (unreported, Supreme Court, 28 July 2004) where the Supreme Court stated:-

> *"the court asked to prohibit the trial of a person of such offences, even after a very long period, might well be satisfied and justified in reaching a conclusion that the extent to which the applicant had contributed to the delay in the revealing of the offences and their subsequent reporting to the prosecution authorities meant that as a matter of justice (my italics) he should not be entitled to the order."*

134. I have held that in this case there is evidence of continuing dominion and that such dominion has resulted in the complainants not being in a position to make sustainable complaints which the prosecution authorities could investigate. Complaints were withdrawn within a short period of time. Indeed, the evidence is consistent with collusive conduct giving rise to such withdrawal of complaints.

135. I do not consider however there is any authority that the court should or even might decline to exercise its discretion to grant judicial review even in such circumstances.

Consideration of the principles in application to the instant case
136. On behalf of the applicant it has been asserted that his parents are now deceased. His mother died on 24 August, 2003 having suffered senility in excess of one year prior to her death. The applicant's father died on 12 February, 1983. For the reasons I have outlined earlier I do not consider that these facts alone are sufficient to discharge the onus of proof which devolves upon the plaintiff. There is no indication that either of the witnesses would have given evidence which would have been relevant or material. No evidence has been tendered even of a speculative type as to how and in what manner the absence of these particular witnesses would have had a prejudicial effect upon the applicant or upon his constitutional right to a fair trial.

137. Similar considerations apply to the absence of E. C. It is true that E. C. is deceased but the alleged assault by the applicant upon A.J.C. was witnessed only by J.C. The appellant then allegedly requested J.C. to bring in five of his friends, including E. C. He asked them to kiss and feel her but only a couple of those friends complied. The evidence, if any, of E. C. would have been peripheral to the alleged assault. More importantly, however, there is not clear or sufficient evidence at all to demonstrate that the actual evidence of E. C. would have been relevant or material to the defendant's conduct of his defence in the proceedings.

138. It is further submitted by the applicant that his difficulties are compounded

(1) by inability to establish his whereabouts, or

(2) potentially to establish an alibi at some material time.

139. This, it is alleged, arises due to unavailability of work records or work colleagues. But the threshold approve which the applicant must surmount is different. It is not simply to establish that certain documentation is absent. It is to establish that such absence raises the probable risk of an unfair trial. The circumstances of this case and having regard to the nature of the allegations and the charges, this court is entitled to conclude that such a matter would best be dealt with by specific directions of a matter from the trial judge. The question of the absence of documentary evidence arose in *P.P. v. D.P.P.* [2000] 1 I.R. 403. In that connection Geoghegan J. pointed out that the absence of such documentation might be of relevance if it was contended that the applicant had never even worked on a milk round. No contention was made by the applicant that he is simply not present during the relevant periods. Similar considerations arise in the consideration of the absence of work records with a previous employer, a stonemason. These are not in themselves sufficient to establish prejudice. And equally, the assertion that at some points the applicant was abroad is not sufficient to discharge the onus of proof with any degree of specificity or particularity.

140. It is undoubtedly true that there is evidence that complaints were made earlier in 1986 by K.N.C. and Mrs. M.C. Earlier complaints were made in 1981/82 by Mrs. M.C. A number of points arise here.

141. With regard to the 1986 complaints, the evidence establishes that the circumstances surrounding their withdrawal were as a result of acts or conduct carried out by the applicant by F.C. and S.C. to the benefit of the applicant. Those facts and circumstances are consistent with dominion. They do not establish capacity. In fact, the very circumstances of their early withdrawal demonstrate the opposite proposition even in the absence of Garda evidence of a contemporaneous nature.

142. It is true also that complaints were made in 1981/82. These apparently related to the applicant. But the evidence only goes thus far. There is no evidence at all that such complaints as were made in 1981/82, in any way tended to exonerate the applicant or to indicate that the circumstances were such that no prosecution should take place having regard to the continuance of dominion. Certainly, there is no evidence that a position similar to that in *J. v. D.P.P.* (unreported, Supreme Court, 19 December, 2003) existed. In that case the evidence established that not only had there been a previous Garda investigation into an allegation of sexual abuse but also, by inference, the results of such preliminary investigation were such that the applicant was informed that he would hear no

more about it. The evidence does not go so far in this case. It must be assessed against the matrix of all the other evidence and the circumstance of the case. In particular it must be measured in accordance with the onus and standard of proof which devolves upon the applicant. If the matter falls within the category of general prejudice it is material which may be drawn to the attention of the jury by the trial judge.

143. It has been submitted that there would appear to be inconsistency in the statement of Mrs. M.C. regarding the dating of the commencement of the alleged abuse on the part of the applicant.

144. Mr. Dempsey says that in the course of his report that Mrs. M.C. had alleged that B.C. began to touch her inappropriately soon after she married R.C. in 1965. She reported that she was frightened of B.C. She did not tell her husband about this alleged behaviour as she felt he would not believe her. She stated that B.C. had stopped touching her inappropriately about two or three years afterwards. She did not know why it had stopped. As regards the material in the Book of Evidence, the commencement date of the alleged sexual abuse was 1976. This is manifestly different from stating that the abuse allegedly commenced in 1965. It is undoubtedly an inconsistency. However, is such inconsistency in itself sufficient to constitute prejudice? The court concludes that this apparent inconsistency comes within the realm of general prejudice and is not such as within itself to justify an order of prohibition. It is a matter which can be dealt with by the trial judge by appropriate directions.

145. Moreover were there charges which expanded the area of enquiry to a period prior to 1976? It might be conceded that trial on such charges might indeed be sufficient to ground a finding of prejudice and to issue prohibition. But in fact this is not the case. The charges which relate to Mrs. M.C. as complainant (109 of 2000 and 40 of 2001) relate to the period on or after *1976*. While there is indeed inconsistency it has not been demonstrated beyond the bounds of probability that such inconsistency constitutes prejudice. In fact the actual charges laid confined the parameters of the case rather than expanding them.

146. Finally, it will be noted that in many of the authorities, particularly those most recent, issues have arisen for consideration by the courts regarding changes on a locale or the location of alleged assaults. There are numerous instances of this type. It has been alleged that the internal characteristics of buildings have altered. Courts have illustrated the issue of prejudice by the absence of specific items of furniture or details of internal furnishing such as a particular door or a particular desk which are now absent. These all appertain directly to the circumstances in which the alleged specified incidents of assault are stated to have taken place.

147. No such case or submission has been made in this application. It is not open to an applicant to seek to establish the case on generalisation, assertion or speculation.

Decision
148. It has been accepted by the respondent that the applicant is entitled to judicial review on the grounds of the decision in *Zambra*. I will grant relief on those grounds alone. The application for judicial review on the grounds of delay under the various headings is declined.