

**THE HIGH COURT
JUDICIAL REVIEW**

[2004 No. 867 J.R.]

BETWEEN**T.C.****APPLICANT****AND****THE DIRECTOR OF PUBLIC PROSECUTIONS****RESPONDENT****Judgment of Mr. Justice Clarke delivered 16th December, 2005.****1. Introduction**

1.1 In these proceedings the applicant seeks to restrain a trial on three counts of rape, two counts of indecent assault and one count of unlawful carnal knowledge. The complainants are three in number and are related. A.F. and T.F. are sisters while H O'L is a half sister. On 4th October, 2004 this court (deValera J.) gave leave to bring an application for judicial review seeking a variety of declarations which in substance contend that the applicant's right to a trial with due expedition and right to a fair trial have been prejudiced by the delay in the institution of the relevant criminal proceedings and in particular by the alleged failure on the part of each of the complainants to make complaints in a timely fashion and the alleged failure on the part of the prosecution authorities to institute proceedings at an earlier stage.

1.2 It is therefore necessary to commence with a review of the factual circumstances surrounding the position of each of the complainants, the time at which the relevant offences are alleged to have occurred, the age of the complainants at the relevant time and the circumstances in which complaint was made.

1.3 I therefore reproduce two tables which are an amendment of similar tables which formed part of the written submissions on behalf of the respondent ("The Director") and which summarise much of the relevant evidence contained in the affidavits before the court. I have made some minor modifications to the original tables so as to include additional information from the evidence which appears to me to be potentially material to the issues in this case.

1.4 There follows the two tables. Table A shows the applicant's age at the time of each alleged offence, the nature of the offence charged, the identity of the complainant and the age difference between that complainant and the applicant and the range of dates during which each offence is alleged to have occurred and the age of the relevant complainant at the time of the alleged offence.

1.5 Table B shows, in respect of each complainant and the applicant the month of their birth, the date on which it would appear that each complainant first made complaint to the Gardaí and the age which each complainant was at the time of the making of such complaint.

1.6 Table A

Applicant's Age at time of alleged offence	Offence	Complainant together with Applicant's Age Difference	Date of alleged offence	Age of Complainant
17/18	Rape	T.F. + 10	01.08.88 to 31.12.88	8 years
17/18	Indecent Assault	T.F. 01.08.88 to 31.12.88	8 years	
14/15	Rape	H O'L + 2 ½	03.04.85 to 31.12.88	12 years
15/16	Indecent Assault	H O'L	01.05.86 to 01.10.86	13 years
21/22	Unlawful Carnal Knowledge	A.F. + 8 2	3.11.91 to 23.11.92	13 years
21/22	Unlawful Carnal Knowledge	A.F.	23.11.91 to 23.11.92	13 years

Table B

	Month of Birth	Date of complaint	Age at time of complaint
T.F.	March 1980	19.9.02	22
H O'L	April 1973	19.9.02	29
A.F.	November 1978	11.11.02	24
Applicant	September 1970		

1.7 As will be seen from the above tables the offences are alleged to have occurred over a period of some seven and a half years between April 1985 and November 1992. During that period the applicant was aged between 14 and 22 years while the complainants were aged, (at the date of the offences relevant to each of them) between 8 and 13 years. Furthermore complaint was initially made to the Gardaí in the case of T.F. and A.F. when they were respectively 22 and 24 years of age and were, therefore, 4 and 6 years respectively beyond coming of full age. In the case of H O'L a period of 11 years would appear to have elapsed between coming of age and making complaint.

1.8 By way of general background it should also be noted that a feature of the case is that all three complainants also contend that they were abused by a separate individual (W O'L) who is their uncle. It would appear that W O'L has pleaded guilty to the offences charged and was, at the date of the hearing before me, due for sentence before the Circuit Court.

1.9 The hearing before me was conducted principally on affidavit but certain of the affidavit evidence tendered on behalf of the director was subject to cross examination. Before reviewing that evidence in detail it seems to me that it is appropriate to set out the legal principles by reference to which the undoubted jurisdiction of this court to stay criminal proceedings in cases of delay is to be

exercised.

2. The Law

2.1 It is fair to say that there has been a significant volume of litigation before both this court and, on appeal, before the Supreme Court in recent years in which both courts have been called upon to adjudicate issues concerning delay in the bringing of criminal proceedings most particularly relating to allegations of sexual abuse against persons who were, at the time of the alleged offence, under age. There is, therefore, a significant volume of jurisprudence. While it may be correct to state that certain very general principles can be said to emerge from that jurisprudence it is equally true that in respect of certain specific elements of the tests which are to be applied no clear view has as yet emerged. For example in the recent case of *P.L. v. Judge Buttimer and Another* (Unreported, Supreme Court, Hardiman, Geoghegan and Fennelly JJ., 20th December, 2004) while a certain level of agreement between each of the three judgments is to be found it is worthy of note that Geoghegan J. commented at p. 2, that:- "Although my colleagues Hardiman J. and Fennelly J. have expressed somewhat divergent views on the principles applicable to the other issues in the case, I find myself in the invidious position of not being in complete agreement with either".

2.2 For reasons such as those identified by Geoghegan J. it is necessary to treat aspects of the judgments in certain of the cases with suitable caution. Where, as is frequently the case, there is more than one judgment of the Supreme Court it is not infrequently the case that, while the court was in agreement as to the ultimate result of the case before it, divergent views as to the precise manner in which such judgment was arrived at and as to the detail of the principles to be applied, were expressed by different members of the court. Therefore the reasoning apparent even in judgments which form part of the majority, needs to be carefully considered to ascertain whether the relevant aspect of a determination met with the approval of a majority of the court. Having set out that caveat I should specify what appears to me to be the principles relevant to a consideration of a case such as that before me.

3. The Legal Principles

3.1 The underlying rationale behind the legal principles which apply in cases such as this can be found in the judgment of Denham J. speaking on behalf of the court in *M.K. v. Judge Groarke and the D.P.P.* (Unreported, Supreme Court, 25th June, 2002) at p.15 where the following was said:-

"With that constitutional protection for due process in mind, however, the courts do not give institutional protection to persons who commit crimes which by their nature may not be detected for years. It is not the function of the courts to establish a policy that a prosecution delayed by, say, 5, 10, 15 or 20 years may not proceed. Such policy matters are for the Oireachtas. It is not a matter for the courts to give institutional protection to crimes which, for one reason or another, may not be prosecuted for many years. It is for the courts to protect due process, to protect fair procedures".

3.2 The underlying principles are now well established. In *Z. v. D.P.P.* [1994] 2 ILRM 481, Finlay C.J. at p. 498 commented as follows:

"This court in the recent case of *D. v. D.P.P.* unanimously laid down the general principles of the onus of proof which is on an accused person who seeks an order prohibiting his trial on the grounds that circumstances have occurred which would render it unfair is that he should establish that there is a real risk that by reason of those circumstances ... he could not obtain a fair trial."

Finlay C.J. went on to note that as the relevant onus was: -

"An onus to establish a real risk of an unfair trial ... (this) necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk is a real one but the unfairness of trial must be an unavoidable unfairness of trial".

3.2 There has been some dispute as to whether there are different rules applicable in cases of alleged sexual abuse of children as opposed to other cases where, whether by reason of delay or otherwise, an accused contends that he can no longer obtain a fair trial. While the differences of opinion to which I have referred are interesting they do not, in my view, necessarily have a significant practical effect. There are certain unique features in cases where there is an allegation of sexual abuse against children which mean that the application of general principles would, necessarily, be quite different in practice in such cases. In most other cases where it may be possible to justify a delay in bringing a prosecution it would be necessary for the prosecuting authorities to establish that the relevant evidence was not available at any significantly earlier time. It is, of course, the case that in sexual abuse cases involving children there is a sense in which the evidence (that is to say the account of the child concerned) was at all material times available. The issue in such cases is, however, as to the reasons why the complainant concerned did not come forward at the time. It is now well established that there may be circumstances where, having regard to the nature of the sexual abuse concerned (particularly the sexual abuse of children), and having regard to the nature of the relationship between the abuser concerned and the child abused, it can reasonably be said that delay in reporting the abuse to relevant authorities may be explicable by virtue of the very nature of the crime itself and the other surrounding circumstances concerning the position of the complainant, the position of the person accused, and the relationship between the parties.

3.3 In that context the first question that must always be asked is as to whether there has been long delay. Assuming that there has then the court next has to consider the adequacy of any explanation offered for such delay.

3.4 While there were differences as to certain of the principles that might be applicable between the members of the Supreme Court in *P.L.*, there is to be found in the judgment of Fennelly J. (at p. 10) in that case a summary of the fundamental principles applicable to the question of the excusability of delay, which is in the following terms:-

"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 and 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 the particular case must be considered. The question is not simply whether the complainant continues to be affected by the alleged abuse, but whether such affects constitute a reasonable explanation for the delay in complaining;

4. The burden of proving that the trial should be prohibited lies on the applicant. However, where the delay is *prima facie* such as to give rise to a presumption that the applicant's right to a fair speedy trial is infringed, the court will have regard to the adequacy of any explanation offered by the complainant."

3.5 While there were undoubted differences between all three judges as to certain of the subsidiary principles applicable on the facts of that case, I do not understand there to be a dispute as to the applicability and correctness of the general principles so identified by Fennelly J. Of relevance to the facts of this case are the comments of the members of the court on the question of whether a trial may be prevented merely because of the absence of an "island of fact" or merely because there might have been a potential "island of fact" which was never explored. The judgment of Hardiman J. appears to suggest that such is the case. It would not appear that the other two members of the court agreed. As pointed out by Geoghegan J. at p. 2 of his judgment in *P.L.* the jurisprudence of the court does not appear, as yet, to have gone that far. Furthermore neither Geoghegan J. nor Fennelly J. appear to have agreed with Hardiman J. that cases involving mere assertion contradicted by mere denial should also be prohibited for that reason alone.

In those circumstances it appears to me to remain the case, on the current state of the jurisprudence, that the series of tests identified by Fennelly J. remain to be applied even where the case involves mere assertion and mere denial and where there are no, identifiable, "islands of fact".

3.6 In a series of connected cases which I shall call the C cases by virtue of the fact that the surname initial in the case of each applicant was C (Unreported, High Court, MacMenamin J., 11th February, 2005) the court had to deal with an extremely complex set of inter related allegations of sexual abuse within an extended family. The case involved multiple complainants and multiple accused. Amongst the issues which arose, in that context, was the fact that assuming, as Fennelly J. puts it, "for the purposes of the inquiry as to whether the delay is explicable, but not further", that the allegations of sexual abuse were true it may be said that the psychological effects on the complainants concerned were brought about by a combination of the actions of a number of accused persons. It would appear that MacMenamin J. in the C cases was satisfied that the court could and should look to both the combined and individual effect of a number of allegations of sexual abuse. I agree. It is, therefore, of course, necessary for the court to be satisfied that the actions of any individual accused, again on the assumption of the truth of the allegations, had contributed in a material way to the overall psychological inhibition in respect of any individual complainant. However provided that the court is so satisfied and provided that the overall effect on the psychological state of the complainant concerned, from the totality of sexual abuse alleged, is sufficient to meet the test required by the jurisprudence of the court I am satisfied that, as a matter of principle, it would be proper for the court to find that threshold met notwithstanding that it may not be possible to distinguish in any meaningful way between the elements of the effect on the complainant concerned brought about by the alleged actions of each separate accused.

3.7 It should also be borne in mind that reasons for delay in reporting which may well be reasonable from the perspective of the complainant concerned may not be sufficient to excuse the delay in law. As Keane C.J. pointed out in *P.M. v. Malone* [2002] 2 I.R. 560 at p. 580 the complainant in that case:- "made a conscious decision, as an adult, not to proceed with the complainant for reasons which seemed good to her at the time but which were not the result of any dominion exercised over her by the applicant."

3.8 If, in accordance with the above jurisprudence, the delay on the part of the complainant is regarded as explicable it is also necessary for the court to consider whether, having regard to any prejudice which may have been suffered by the applicant as a result of the delay, considered in accordance with the test identified by Finlay C.J. in *Z.*, the accused may no longer be able to have a trial in accordance with fair procedures. In that context Denham J. noted in *P.C. v. D.P.P.* [1999] 2 I.R. 25 that counsel in that case had correctly accepted:-

"that if the applicant is the cause of the delay he cannot take advantage of what he caused, subject to a reservation that after a certain length of time no matter who caused the delay these may not be a fair trial."

In addition where, as here, the applicant also complains of prosecutorial delay it is necessary to consider the justification offered for any delay between initial complaint being made to state authorities and the actual bringing of the charges concerned.

3.9 Finally, before departing from the legal issues in this case, I should record a significant aspect of written submissions filed in these proceedings on behalf of the Director. Very detailed submissions were directed towards arguing that the appropriate time frame in respect of which the court should consider delay is the time subsequent to the making of complaint to the Garda authorities. Thus, on the basis of that argument, any delay on the part of the complainant should not be relevant to the courts consideration.

However, it was accepted by counsel on behalf of the Director that there was clear and recent authority from the Supreme Court which was against the proposition which he sought to argue. For those reasons counsel confined himself to formally arguing the matters as set out in the written submissions for the purposes of preserving his position in relation to a possible appeal. It was accepted that so far as this court is concerned I was bound by the current jurisprudence of the Supreme Court and was required to approach the case on the basis that it was necessary that I should have regard to delay in accordance with the established jurisprudence and thus consider delay up to the time of the making of original complaint to the authorities.

3.10 In summary the issues which I have, therefore, to address are the following:-

- (i) has there been excessive delay;
- (ii) if so is that delay excusable. Insofar as the delay is complainant delay have the tests outlined in *P.L.* been met.
- (iii) Having regard to the answers to issues (i) and (ii) and any other relevant circumstances (including any prejudice to the applicant) can it be said that the applicant has established that he cannot have a trial in accordance with the principles of constitutional justice.⁴

Application to facts of this case

4.1 The delay in the commencement of the criminal proceedings with which I am concerned falls into two parts. Firstly there is the delay in making complaint to the authorities. Thereafter there is the period of time which elapsed between the making of the

complaint and the commencement of the proceedings. The applicant complains about both the former ("complainant delay") and the latter ("prosecutorial delay"). I turn first to complainant delay.

4.2 There has, undoubtedly, been a significant delay in the making of complaint to an Garda Síochána in each of the cases with which I am concerned. However for the reasons pointed out above it is necessary to give a detailed consideration to the explanations proffered on behalf of the Director for the delay concerned both insofar as those explanations relate to complainant delay and prosecutorial delay. I turn first to the question of complainant delay.

5. Complainant delay and the case of H O'L

5.1 In that regard, in each case, the Director caused a psychological assessment to be conducted in respect of each complainant. The assessment was carried out by Michael Dempsey, a Senior Clinical Psychologist at St. Brendan's Hospital. Mr. Dempsey was asked and answered specific questions raised with him on behalf of the Director and incorporated his views into reports relating individually to each of the complainants. Furthermore Mr. Dempsey swore an affidavit verifying the contents of those reports and was subject to cross examination on that affidavit.

5.2 Furthermore each of the complainants swore an affidavit in these proceedings. For the reasons indicated above it must be assumed, for the purposes of ascertaining whether there is, in accordance with the jurisprudence of the courts, an adequate explanation for any complainant delay, that the account of the complainant in respect of the alleged offences is correct. There is not, of course, any such presumption in relation to any other aspects of the accounts of the complainants. However while Mr. Dempsey, as I have indicated, was subject to cross examination on his affidavit and while the investigating Gardai were also subject to cross examination in relation to their affidavits (which dealt with the allegations of prosecutorial delay and certain other aspects of the case) it should be noted that the complainants were not subject to cross examination. Nor was any evidence tendered on behalf of the applicant which was directed towards the relevant factual and psychological issues which arise in respect of each of the complainants. In the circumstances the state of the evidence in respect of the psychological state at all material times of each of the individual complainants consists of the affidavit sworn by that complainant together with the expert evidence of Mr. Dempsey with only the latter being subject to cross examination.

5.3 In a number of the authorities to which I have been referred, expert evidence such as that given by Mr. Dempsey in this case has been tendered. It has been stated that while such evidence may be useful, the court remains entitled to bring to bear on the situation its own view from common experience in relation to the delay issues in proceedings such as this.

5.4 The specific questions which Mr. Dempsey was asked to answer in respect of each complainant were as follows:-

- (i) the effects of the alleged offence on the complainant concerned;
- (ii) the reasons for the delay in reporting the alleged offence;
- (iii) whether those reasons can be attributed to the applicant's conduct, its effects or any other identifiable factor; and
- (iv) Mr. Dempsey's views as to whether the delay in reporting the offence to an Garda Síochána was reasonable in the light of the complainants circumstances.

5.5 Having regard to Mr. Dempsey's evidence and my assessment of the evidence generally I have come to somewhat different conclusions in respect of the situation insofar as it relates to, on the one hand, H O'L and, on the other hand A.F. and T.F.

5.6 In the case of H O'L Mr. Dempsey came to the view that it was, in his opinion, doubtful "whether the reasons for the delay in reporting the alleged offences can be attributed to (the applicant)". He did, however, express the view that the delay can be attributed to naiveté on that complainant's part.

5.7 In her affidavit H O'L set out her background including the fact that she married in 1994 and separated in 1996. She is the third eldest of a family of ten. The applicant is her first cousin on her mother's side. She described two instances of serious sexual abuse of which she alleges the applicant was guilty. The account which she gives, on affidavit, of her circumstances subsequent to those alleged events is consistent with the account which she gave to Mr. Dempsey and I will refer to it further when considering his evidence and expert opinion. She also gave an account of having been sexually abused by her uncle from the age of 8 until approximately 14. In particular, she deposed to the fact that she "only realised that the applicant's behaviour towards me was sexual abuse when I was in the process of making my complaint to the Guards with my step sister (T.F.) about the abuse perpetrated by my uncle".

5.8 The view of Mr. Dempsey to which I have referred at 5.6 above was in answer to question (iii). Mr. Dempsey does not appear to have found that the alleged offence had any serious adverse psychological effects on H O'L. He notes that she says she was not shocked when it would appear that she first had had sexual intercourse with the applicant at a time when she was aged 12. It would also appear from the account which H O'L gave to Mr. Dempsey that she suggested that she had, prior to the first occasion on which he had sex with her, seen the applicant having sex with her sister. As reported to Mr. Dempsey it would appear that H O'L gave the following account:-

"She reported that (the applicant) had sex with her when she was 12 and he was approximately 16/17 years. (H O'L) reported that when (the applicant) had sex with her she thought it was normal as she had seen him and her sister having sex. However she reported that she was disgusted when he gave her £1 after she had had sexual intercourse with her and told her not to tell her sister (name). She had thought that when he had sex with her that he had intended to develop a relationship with her instead of her sister but she reported that she knew that when he gave her the £1 that this was not going to happen. She reported that she subsequently felt bad having had sex with him because she knew her sister was "very fond of him".

5.9 In respect of the second question Mr. Dempsey expressed the view that the reason for the delay in reporting the alleged offence was that H O'L had not regarded the sexual encounters which she suggests she had with the applicant as sexual abuse until she complained to the Gardaí about the alleged sexual abuse of her by her uncle W O'L. As indicated above H O'L, in the affidavit sworn by her in these proceedings, recounts the offences which she alleges and also verifies both specifically and generally the account which she gave to Mr. Dempsey.

5.10 From all of that evidence it is not possible to conclude, on the balance of probabilities, that, on the assumption that the

allegations are true, the applicant was responsible either alone or in conjunction with W O'L, for the circumstances leading to the failure to report.

5.11 Furthermore, as pointed out earlier in this judgment, a period of 11 years elapsed from H O'L coming of full age to the time when complaint was made. While Mr. Dempsey makes reference to her being naïve there is, in reality, no explanation as to why she could not, at least at some earlier stage after she achieved full age, have made complaint to the Gardaí.

5.12 As regards this last point it should be noted that in response to question (iv) in relation to H O'L, Mr. Dempsey expressed the opinion that "the delay in reporting the alleged sexual abuse by (the applicant) was reasonable in the light of her life circumstances. She had not realised it was abuse until she was in the process of making her complaint about her uncle ...".

5.13 In considering that answer I should firstly note that I am doubtful as to the benefit of asking a psychologist whom it is intended should give expert evidence a question such as that set out at item (iv). It is clear from the authorities referred to above that the reasonableness or otherwise (from the perspective of the complainant) in delaying making a complaint is not really the issue. For example it has been pointed out that there may very well be good reason from the perspective of a complainant (such as not wishing to cause distress to an elderly parent) which might well give rise to an understandable reluctance on the part of such a complainant to inform the relevant authorities. However where there is no psychological impediment to so informing which has been brought about by, or at least materially contributed to by, the actions of the complaint concerned then those reasons are not relevant to the courts consideration.

5.14 If H O'L was naïve to the point of suffering from a psychological condition which rendered it, in practice, impossible for her to make complaint then there might be circumstances where a different view might be taken. Certainly, a person alleged to have been guilty of a sexual offence in respect of a person under a disability may well be faced with additional issues before succeeding in applications such as this. A person who, in fact, is guilty of sexual abuse against an individual under a disability must take the consequences of having abused such a person. One of those consequences is that the person concerned may not realise the wrongful nature of the act and, by virtue of their disability, may not come to realise it's wrongful nature at any subsequent stage or at least until the facts become known to some person in authority.

5.15 However there is no evidence of any disability in this case. Such evidence as there is concerning H O'L being naïve does not, in my view, go far enough to allow me to conclude that, on the assumption that the applicant was guilty of the offences concerned, he chose, as a victim, a person who was inherently unlikely ever to realise the significance of his wrongful actions without external assistance.

5.16 In all the circumstances I have concluded that there is no permissible explanation, within the jurisprudence of the courts, for the delay in making complaint in the case of H O'L.

6. The case of A.F.

6.1 Mr. Dempsey produced a report in similar format in relation to A.F., which expressed his views on the same set of questions as I have already set out in respect of H O'L.

6.2 In the affidavit which she swore in these proceedings, A.F. also gave an account of her background. At the date of the swearing of her affidavit she was 26 years of age and had five children ranging in age from 9 years to 11 months. She also described two instances of alleged serious sexual abuse on the part of the applicant. As with H O'L she also deposed to the fact that she had been sexually abused by her uncle when she was between the ages of 7 and 11 years. She deposed to an account of the difficulties which she suffered subsequent to the alleged abuse and in particular to the fact that she had complained to her mother about what her uncle had done to her. She states that "my mother hit me and she did not believe that I had been abused by my uncle". She also indicated that after "the incident with the applicant ... when I was 13, I told my mother and the applicant's girlfriend what he had done to me. My mother hit me and told me that I was a liar". She gave an account of serious alcohol abuse and indicated that in 2001 her children were taken into care as a result of her drinking. She also deposed to the fact that between the ages of 14 and 15 she was sick and suffered from bulimia.

6.3 Finally it should be noted that in the case of A.F., her complaint to the Gardaí was just short of two months later than the complaints made by the other two complainants. It would appear that the circumstances of her making complaint to the Gardaí arose as a result of her uncle admitting abuse in respect of her (apparently as a result of being interviewed in the light of the earlier complaints by her sister and half sister). In those circumstances she deposed to the fact that she "then decided to make a full statement to (the Gardaí) about what had happened to me as a child including what (the applicant) had done to me. I knew that my sister (T.F.) had already gone to the Guards some time before but I wasn't going to do anything about it at that time. When (the Gardaí) came to me I decided to change my mind and to get the matter off my chest. It was a result of that that I made my statement to (the Gardaí) on 11th November, 2002". The account which she gave in her affidavit is consistent with the account which she gave to Mr. Dempsey and I now turn to his evidence.

6.4 In expressing his views as to the effects of the alleged offence, Mr. Dempsey noted that A.F. appeared depressed on interview and reported symptoms of severe depression. He also noted that she reported suffering from bulimia at 14/15 years and further noted an association between bulimia and childhood sexual abuse. Mr. Dempsey expressed the view that one of the reasons for the delay in reporting the alleged offence was the stated position of A.F. that the applicant had threatened her not to tell anyone about the alleged abuse. A further reason was that she had, in or around the time of the relevant abuse allegedly occurring, made complaint to her mother about being abused by her uncle and by another cousin. She had given an account of her mother not believing her and acting aggressively towards her as a result of that complaint.

6.5 As to whether those reasons can be attributed to the applicant's conduct, Mr. Dempsey expressed the view that they could, at least in part. He noted that the fact that her mother had not believed her about other abuse gave rise to her having little expectation that other adults might believe her in respect of abuse generally. Mr. Dempsey did note that A.F. had also experienced coping difficulties and psychological problems throughout the years since the alleged abuse occurred and that, in his opinion, these factors contributed to her delay in making the complaint to the Gardaí.

6.6 Under cross examination it was suggested to Mr. Dempsey that the extent of the enquiries which he made were insufficient to allow him to form the views which he did. In particular it was suggested that there were certain external matters reported to him by A.F. which could have been checked up and verified by contacting third parties.

6.7 While it may well be that some of those criticisms are sustainable it nonetheless appears to me that taking the evidence as a whole (including the affidavit evidence of A.F.) together with at least certain aspects of Mr. Dempsey's evidence I can and should

come to the view, on the balance of probabilities, that the alleged offences, if they in fact occurred, together with the other actions of the applicant were sufficient to bring about in A.F. a psychological state where it was not reasonable to expect her to report matters to the authorities until some reasonable period after she had achieved adulthood. In that context it should be noted that she was 24 years of age at the time when she first made complaint to the Gardaí. For the reasons outlined above it is well settled that delay, even after the end of the period when a complainant may be said to be directly affected by the applicant, 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. While it is true to state that A.F. made an initial decision not to go to the Gardaí at the same time that her sister made her original complaint, the additional delay caused by this factor amounts to only two months and is not, in my view, material.

6.8 It is also clear that I should have regard in coming to such a view to all the relevant circumstances. It is also clear that psychological evidence, while useful, is not essential. In all those circumstances I am satisfied that, on the assumption that the allegations be true, the complainant A.F. remained in a situation where she was under a psychological inhibition to make a complaint until quite close to the time when she, in fact, did complain to the Gardaí.

7. The case of T.F.

7.1 In the affidavit sworn by T.F. she again deposes to her background and describes two instances of sexual abuse which she alleges the applicant was guilty of in respect of her. She also describes being sexually abused by her uncle between the ages of 7/8 and 10/11. The account which she gives in her affidavit is consistent with the account which she gave to Mr. Dempsey. She does depose to threats on the part of the applicant to the effect that she should not tell anyone about what he had done to her. She gives a history of depression and in particular becoming depressed shortly after the birth of her eldest daughter which occurred when she was approximately 21 years of age. She indicates that the birth of her daughter reminded her of the abuse which she alleges she suffered and gave rise to a concern that her daughter might be vulnerable to sexual abuse as well. She deposes to the fact that the principal reason why she did not report the abuse to the Guards at the time was that she was afraid that she would not be believed. As to the circumstances immediately surrounding her going to the Guards she indicates that she was talking to H O'L one night and told H O'L what had happened. H O'L told her that she (H O'L) had also being abused. She states that "my father was sick about that time and the matter was left sit for a time. I did not want my father to know about the abuse as he would have been distressed by it. I later told my partner (name) and with his support I was able to go to the Guards".

7.2 In the case of T.F., Mr. Dempsey suggests that a long term effect of the alleged abuse is that T.F. has suffered from depression. He notes that she became depressed shortly after the birth of her eldest daughter (which occurred when she was 21). As indicated above, T.F. contends that the birth of her daughter reminded her of the alleged abuse and that she became concerned that her own daughter might be vulnerable to be sexually abused.

7.3 As to the reasons for the delay in reporting the alleged offences, T.F. indicated that she had known that H O'L and A.F. had told their mother about their own alleged abuse but that their mother had not believed them. In those circumstances she herself had not told her mother as she felt that her mother would not believe her. Mr. Dempsey notes that a delay in reporting allegations of sexual abuse frequently occurs because of the victim's fear that she or he will not be believed. It would appear that T.F. told her husband and H O'L about the alleged abuse shortly after the birth of her eldest daughter. It should be noted that she does state that part of the reason for delay may be attributed to the fact that she did not want her father to know about the alleged abuse because he would have been distressed by it. It would appear that she waited until her father had died before reporting the matter to the Gardaí.

7.4 However in her case she was only 22 at the time of reporting the matter to the Gardaí. While the evidence is somewhat unclear, it does appear that the period during which this complainant was in a psychological position to report the matter to the Gardaí, but did not do so because of being concerned not to distress her father, was quite short.

7.5 In all the circumstances I am satisfied that for virtually the entire period (save for some months or perhaps at most a year) between the date of the alleged offences and the date of initial reporting to an Gardaí Sióchana, this applicant was under a psychological inhibition brought about, at least in part, by the actions of the applicant.

8. Prejudice

8.1 In accordance with the authorities to which I have referred, it is clear that a delay of the type with which the court is involved here will give rise to a presumption that there will be some prejudice. The applicant is, of course, entitled to rely on that presumptive prejudice.

8.2 However it is also open to any applicant, in addition to relying upon the presumptive or general prejudice that can be expected to occur by reason of the delay concerned, to also rely upon any specific prejudice which can be put forward. No such prejudice is relied on in this case. However, in fairness to the applicant it should be noted that he does place reliance upon the fact that the periods during which the various offences are alleged to have occurred are quite lengthy. As can be seen from Table A above, those periods range from 5 months to a year.

8.3 Against that it should, however, be noted that it is apparent from the evidence (to which I will shortly turn), in relation to the time which elapsed between the making of complaint to the Gardaí and the bringing of charges against the applicant, that the applicant was in a position to give to the Gardaí the names of a significant number of witnesses who, in the applicant's view, might be in position to give relevant evidence. While some difficulty seems to have been encountered in tracing each of the individuals concerned it does not appear that any of those potential areas of evidence were not ultimately capable of being pursued. There is no evidence that any of the evidence that might have been available from any of those sources is no longer available. In all the circumstances I am not satisfied that this applicant is entitled to rely on any prejudice beyond the undoubted difficulties which would occur in any case in which a delay of the length of time with which we are involved here had occurred. This is not a case where the delay is such that, in the words of P.C. "no matter who caused the delay there may not be a fair trial".

9. Prosecutorial Delay

9.1 Finally it is necessary to turn to the case made by the applicant to the effect that the delay between the making of complaint by each of the complainants to an Garda Síochaná and the bringing of charges amounts to an unacceptable delay on the part of the prosecuting authorities.

9.2 In that context evidence was given on affidavit by the investigating Gardaí and cross examination followed.

9.3 From Table A above it is clear that both T.F. and H O'L made complaint on the 19th September, 2002. A.F. made a later complaint on 11th November, 2002. The applicant was arrested on 12th November, 2002 and interviewed. It would appear that during interview the applicant named a number of individuals as being persons who might have relevant information to give and that the Garda concerned, N. M., considered that it was necessary to interview those persons as part of the investigation process. I am satisfied on

the evidence that as a result both of that issue, and also as part of the general investigation, Garda Murphy was required to continue the investigation by interviewing a number of persons in the relevant geographical area. I am also satisfied that Garda M. had considerable difficulty in being able to interview a number of the persons concerned. It would appear that the majority of the persons whom Garda M. required to interview were members of a community. I am satisfied that he had considerable difficulty in making contact with many of the relevant individuals. Even where contact was made, Garda M. had difficulty in making sustainable appointments, with a number of arrangements not being met by the person whom he wished to interview.

9.4 On the basis of that evidence I am satisfied that there is an entirely adequate explanation for the fact that it took from September 2002 until the 18th September, 2003 for the compilation of the Garda investigation file for submission onwards. Garda M. indicates that he submitted the file to the Superintendent in B. Garda Station on 18th September, 2003. The applicant was charged on 17th May, 2004. Having regard to the questions which arise in these proceedings I am not satisfied that the applicant has discharged the onus of proof in establishing that a delay of some 8 months between the Garda file being ready for submission to the prosecuting authorities and the bringing of charges was excessive or inordinate.

9.5 I am not, therefore, satisfied that the applicant has discharged the onus of proof in relation to prosecutorial delay.

10. Conclusions

10.1 In all three cases I am satisfied that there has been an inordinate delay in the making of complaint to the prosecution authorities. I am not, for the reasons indicated above, satisfied that there is any specific prejudice established over and above the general or presumptive prejudice that must arise in every case where there is inordinate delay. Nor I am satisfied that there is any prosecutorial delay. In those circumstances it seems to me that the applicant's case in respect of those charges referable to each of the complainants comes down to a question as to whether a sufficient explanation, in accordance with the jurisprudence of the court, has been tendered to justify the delay. For the reasons indicated above, I am not so satisfied in the case of H O'L. I am satisfied in the case of A.F. and T.F.

10.2 For those reasons it seems to me that I should make a declaration in the terms of paragraph (iii) of the notice of motion herein but confined to those charges contained within Bill CC0039/04 which concern allegations of offences in respect of which H O'L is the complainant.