

**THE HIGH COURT
JUDICIAL REVIEW**

2002106 JR

BETWEEN

P. D.

APPLICANT

**AND
THE DIRECTOR OF PUBLIC PROSECUTIONS**

RESPONDENT

Judgment of the Honourable Mr. Justice Quirke J. delivered on the 26th day of April 2006.

By order of the High Court (McKechnie J.) dated the 25th February, 2002, the applicant was given leave to seek relief by way of Judicial Review including an order prohibiting or restraining the respondent from proceeding further with the prosecution of the applicant in respect of fourteen criminal charges which have been preferred against him.

Six charges allege the commission of the offence of buggery contrary to the provisions of s. 62 of the Offences Against the Person Act, 1861 on unknown dates between the 1st June, 1982 and the 30th April, 1983.

The eight remaining charges allege the commission of the offence of indecent assault contrary to common law and to the provisions of s. 62 of the Offences Against the Person Act, 1861 on unknown dates between the 1st June, 1982 and the 30th April, 1983.

The applicant claims that by reason of inordinate and inexcusable delay on the part of (a), the complainant K.C. in reporting the alleged offences and, (b), the prosecuting authorities in bringing the applicant to trial before the courts he has suffered presumptive and specific prejudice in his capacity to defend himself. It is claimed, therefore, that there is a real and serious risk that the applicant will not receive a fair trial in respect of the offences alleged against him.

Relevant Facts

1. On the 7th February, 1996, K.C. called, by appointment, to Harcourt Square Garda Station. He had a conversation with Detective Garda O in relation to allegation of sexual abuse allegedly perpetrated upon him. He called periodically to the same Garda Station and had further conversations on the same subject with Detective Garda O during the succeeding three months.

2. On the 8th June, 1996, Detective Garda B.O. recorded in writing a statement of complaint made by K.C.

On 14th November, 1996, K.C. delivered typed and handwritten documents to Detective Garda B. O. comprising in excess of 300 pages.

In evidence in these proceedings K.C. described those documents as comprising a written account of incidents and events which had occurred in his life. He said that they had been prepared as part of a therapeutic process which he was then undergoing during counselling from a psychologist, Ms. C. M.

3. No evidence was adduced in these proceedings indicating that any step was taken by the prosecuting authorities in relation to the complaint made by K.C. between the 14th November, 1996 and the 4th December, 1997. On that date Detective Garda D. O'B. contacted K.C. He arranged to meet him on the 12th December, 1997.

4. On 12th December, 1997, the 18th December, 1997, the 27th February, 1998, and 4th March, 1998, K.C., made statements of complaint in writing to Detective Garda O'B. at Harcourt Sq. Garda Station.

5. Between December, 1997 and November, 1999 Detective Garda O'B. worked continuously and assiduously on the detailed investigation of the complaints made by K.C.

6. On the 27th October, 1999, the applicant was arrested and charged with the offences which have given rise to these proceedings. He was not returned for trial to the Dublin Circuit Criminal Court until 7th December, 2001. He denies all the allegations made against him.

7. By order of the High Court (McKechnie J.) the applicant was on 25th February, 2002, granted leave to seek the relief sought in these proceedings.

8. On 8th May, 2002, K.C. made a statement in writing to Detective Garda D. O'B. at Harcourt Sq. Garda Station. In that statement K.C. said that the reasons why he had not complained to the prosecuting authorities until 1996 in respect of assaults allegedly committed by the applicant in 1982 and 1983 were, (a), because he felt guilty and ashamed at the nature of the abuse allegedly perpetrated upon him when he was a child and, (b), because he felt responsible for participating in the sexual activities perpetrated by the applicant and by other adults introduced to him by the applicant.

He stated that he first felt strong enough to tell an adult when he was a member of a Church which, upon learning of the abuse decided to hold a c. c. to consider his excommunication from that church. He had, on the advice of members of the c., told a psychologist named J. McL. of the abuse. Mr. McL. has no written record of the meeting which gave rise to the disclosure. His files were destroyed five years after their closure, in accordance with his agency's policy. Mr. McL. apparently has a good recollection of the disclosure.

K.C. said that when he was a male prostitute during his teenage years and had been stopped on a number of occasions by members of An Garda Síochána. He had told them what he was doing but had not been provided with help or support from social services, from professional therapists or from his parents.

He said he had attempted suicide on a number of occasions by reason of his lifestyle. He believed that he might have disclosed the abuse whilst hospitalised on two occasions but nothing resulted from those disclosures.

9. He said that he disclosed the abuse to a clinical psychologist C. M. between 1994 and 1996. She was treating him in respect of gender and sexuality issues which related to the abuse.

C. M. informed him that, under the mandatory reporting measures adopted by the Health Board she had to inform her superiors and the Director of Public Prosecutions about the abuse.

He then suffered several breakdowns and was referred to St. James's Hospital Psychiatric Unit.

On the advice of C. M. he finally came forward and made a complaint to Detective Garda B. O. on 8th June, 1996.

10. In evidence in these proceedings K.C. stated that he had been "...*through enough for a book...whether I decide to write one or not...*". He said that was why he had reduced his thoughts to several hundred pages of text.

He said that he was first touched inappropriately when he was six years old by a priest, Father K.

He was then abused by an adult male P.J. when he was between eight and twelve years old. P.J. had given him money and gifts.

He said he was abused by P.J. from the time when he was seven or eight years old until he was twelve or thirteen years old and engaged in a lot of sordid activity with others almost every week.

His relationship with P.J. ended when he started work in the C. at the end of the summer of 1980/81. He was abused repeatedly and horrifically by another adult male, R.W. whilst he was working in the C. R.W. worked in the C. He abused K.C. regularly from the time when he started to work there. This continued for a period of 4 or 5 years. R.W. is now deceased.

He said that he had been introduced to prostitution by the applicant. The applicant and his acquaintances had introduced him to the Phoenix Park. He said he had frequented the Phoenix Park with a school friend and had "*cruised the streets*". At that time he regarded sex as being "...*like a drug*."

He said that he would meet the applicant in Burgh Quay and the Phoenix Park. On one occasion the applicant brought him to a clinic for Venereal Disease in Sir Patrick Dunn's hospital.

The applicant didn't know of K.C.'s abuse by R.W. although he did know that K.C. worked in the C.

He said that he met a number of other adults through his contact with the applicant. These were a group of men who frequented Burgh Quay. He said that on one occasion he made dinner for a group of men in the applicant's home where they all watched pornographic films.

He said he had a difficult home life. His parents had separated. There was alcoholism and neglect and some violence in his family life

He said during his teenage years he went from one crisis to another and was suicidal on many occasions.

He said that he had sexual relationships with a number of different men until he was aged eighteen to nineteen years. Then he met a person with whom he lived for a number of years.

Before he met that person he was sexually involved with different persons every day during the four or five year period involved. During that time he would have had sexual contact with hundreds, "*perhaps thousands*" of men.

He said that this type of sexual contact commenced after he met the applicant and began to frequent Burgh Quay, Parkgate St, the Phoenix Park and various public toilets in Dublin City.

He said that he became preoccupied with sex at that time, it was the only thing that he knew. He felt that he was looking for someone to look after him. He said that his motivation was to "*find love...*".

11. Mr. M. D. who is a senior clinical psychologist working at St. Brendan's Hospital in Dublin 7 testified in these proceedings. He said that at the request of the DPP he met and assessed K.C. on 12th September, 2002 and 2nd October, 2002.

He was concerned to discover whether the abuse complained of by K.C. had any effect upon K.C. whether long term or short term and what, if any, effects may have inhibited him from complaining of that abuse until he did so.

He was asked to itemise any isometric or other tests which he administered during the course of his assessments and he did so. He did not administer any standard tests.

12. In evidence Mr. D. stated that K.C. had reported that he was sexually abused by a number of men from the age of six years and that the alleged sexual abuse by the applicant had started when he was eleven or twelve years old.

K.C. told him that he was approached by the applicant on Burgh Quay when the applicant was in his late 20's or early 30's.

He said that subsequent to his first meeting he met the applicant two or three times a week and engaged in sexual activity with him over an eighteen month period.

He said that the applicant introduced him to some of his male friends who sexually abused him and made him watch pornography with the applicant.

He told Mr. D. that the applicant introduced him to prostitution.

He told him that the applicant had left him for a male Spanish student when he was fourteen years old and that he continued to work as a male prostitute for some time after the applicant left him.

He said that he then joined a Church where he reported the abuse to a female friend. This resulted in his leaving the c.

He reported that he began to work as a prostitute again and was abused further by another man (now deceased) while working in a C.

He reported coming from an unhappy family background with an alcoholic father who was violent to his mother.

He told Mr. D. that following a suicide attempt he had been referred to Ms. C. M. and subsequently attended Dr. M. F. and Mr. A.G. who were both clinical psychologists employed by the Eastern Health Board. Ms. M. had diagnosed him as suffering from a Borderline Personality Disorder and the notes from Dr. F. and Mr. G. were both consistent with a similar diagnosis.

Mr. D. concluded that K.C. was suffering from a Borderline Personality Disorder but decided not to administer a Personality Test to K.C. because it might have distressed K.C. and precipitated a crisis which would not be treatable.

13. In summary Mr. D. concluded that there were six reasons why K.C. did not report the alleged abuse during the 13 year period between the termination of the abuse and the first complaint to the prosecuting authorities. They were as follows:

- (1) That his life during that period was "*somewhat chaotic*".
- (2) That K.C. was working as a prostitute during much of this time and was unlikely to report sexual abuse to the gardaí since he was conscious that he was regularly committing offences at material times.
- (3) When he disclosed the abuse to adults in the Church it resulted in his rejection by that church.
- (4) He had ambivalent feelings about the applicant which may have inhibited him from reporting the abuse. That ambivalence is associated with his Borderline Personality Disorder.
- (5) Ms. M. was refusing to continue treating him for his psychological illnesses unless and until he reported the abuse to the gardaí.
- (6) The effects of his Borderline Personality Disorder inhibited him from complaining to the gardaí until he did so.

Mr. D. could not identify the precise cause of the Borderline Personality Disorder from which case he suffered. He could not state with any precision when that condition started but was satisfied that it was caused by his life circumstances. He believed that the disorder was caused by "*...his whole background. The whole maelstrom with his background, it was chaotic.*"

14. The clinic for the treatment of Venereal Disease in Sir Patrick Dunn's Hospital is now closed. Some records were transferred to St. James's Hospital but were later destroyed in a fire. Accordingly, no records from the Hospital of visits or treatment are now available to the prosecuting authorities or to the applicant's solicitors.

15. C. M., the psychologist who saw and treated K.C. and whose intervention led to his reporting the alleged offences will not be available to testify at the applicant's trial. She is now living in England. A. G., the psychologist who also saw and treated K.C. at that time is resident in South Africa. The prosecuting authorities have not been able to locate either C. M. or A. G.

16. By letter addressed "*To whom it may concern*" and dated 12th February, K.C. advised *inter alia* that it was his intention to take "*...three criminal cases and four civil cases against my abusers*".

17. Potential witnesses referred to respectively as "B. and T." who were apparently acquaintances of the applicant and who were alleged to have participated in the abuse of K.C. cannot now be located and will not be available to testify at the trial.

18. Other potential witnesses referred to as "D. and B." who are alleged to have relevance to the prostitution of K.C. cannot be located and will not be available to testify at the trial.

19. The address at C. where the majority of the offences were alleged to have occurred, is no longer occupied by the applicant. There is a dispute as to whether or not it is accessible to him for the purpose of gathering evidence to support and corroborate aspects of his defence.

The Law

The general principles of law which apply to applications to prohibit, on grounds of delay, the prosecution of offences of a sexual nature allegedly committed against children (and reported only after very substantial periods of time) are now well settled. They have been identified by the courts within this jurisdiction on countless occasions and are to be found in such cases as *Barker v. Wingo* 407 U.S. 514 (1972), *B v. Director of Public Prosecutions* [1997] 3 I.R. 140, *P.C. v. Director of Public Prosecutions* [1999] 2 I.R. 25, *P.O'C v. Director of Public Prosecutions* [2000] 3 I.R. 87, *J.L. v. Director of Public Prosecutions* [2000] 3 I.R. 122, *JO'C v. Director of Public Prosecutions* [2000] 3 I.R. 478, *P.L. v. Judge Buttimer and the Director of Public Prosecutions* (Unreported, Supreme Court, 20th December, 2004), *P.M. v. District Judge Malone and the Director of Public Prosecutions* [2002] 2 I.R. 560, and *T.S. v. Director of Public Prosecutions and Ors.* (Unreported, Supreme Court 22nd June, 2005). It is accordingly unnecessary to restate them herein.

The Applicant's Claim

The applicant claims that his trial in respect of the alleged offences should be prohibited on three separate grounds. They are as follows;

1. Because his constitutionally protected right to a trial with reasonable expedition has been violated by reason of inordinate and inexcusable pre-complaint delay on the part of K.C. in making his complaint to the prosecuting authorities. The applicant claims that as a result of that delay he has suffered an unavoidable presumption of prejudice in his capacity to defend himself in respect of the charges preferred against him and
2. Because his constitutionally protected right to a trial with reasonable 'expedition has been violated by reason of inordinate and inexcusable delay on the part of the prosecuting authorities in completing their investigation into the offences and bringing him before the courts for trial and
3. Because his constitutionally protected right to a fair trial has been violated by inordinate and inexcusable delay on the part of (a), K.C. (in reporting the offences) and (b), the prosecuting authorities (in completing their investigation and bringing the applicant before the courts). The applicant claims that this has caused him specific prejudice in his capacity to defend himself in respect of the offences alleged against him and has thereby exposed him to a real and serious risk that he will not receive a fair trial in respect of the charges preferred against him.

Pre-complaint Delay

The right of an accused person to a trial with reasonable expedition is well settled. It has been recognised by the courts in this jurisdiction repeatedly (see *The State (Healy) v. Donoghue* [1976] 1 I.R. 325, *The State (O'Connell) v. Fawsitt* [1986] I.R. 362 and other cases.

The right is derived from Article 38.1 of Bunreacht na hÉireann. It is also protected by Article 6 of the European Convention on Human Rights.

In *P.C. v. Director of Public Prosecutions* [1999] 2 I.R. 25 the Supreme Court (Keane J.) observed (at p. 68) that:

"The delay may be such that, depending on the nature of the charges, a trial should not be allowed to proceed, even though it has not been demonstrated that the capacity of the accused to defend himself or herself will be impaired. In other cases, the first inquiry must be as to what are the reasons for the delay and, in a case such as the present where no blame can be attached to the prosecuting authorities, whether the court is satisfied as a matter of probability that, assuming the complaint to be truthful, the delay in making it was referable to the accused's own actions.

If that stage has been reached, the final issue to be determined will be whether the degree to which the accused's ability to defend himself has been impaired is such that the trial should not be allowed to proceed."

Applying the test in PC to the facts of the instant case I am satisfied as follows that this is a case where:

"The first inquiry must be as to what are the reasons for the delay and...whether the court is satisfied as a matter of probability that, assuming the complaint to be truthful, the delay in making it was referable to the accused's own actions."

I am required therefore to inquire into the reasons for the delay in this case and to determine whether the court can be satisfied as a matter of probability that, assuming the complaints of K.C. were truthful, the delay in making them was referable to the actions of the applicant.

Reversing the presumption of innocence (enjoyed by the applicant in every other aspect of these proceedings), as I must for the purpose of applying the test identified in PC, I am satisfied that, whilst it has been established on the evidence that the delay on the part of K.C. in reporting the abuse was explicable, it was not referable to the actions of the applicant.

I accept the evidence of Mr. D. that K.C. suffered from a Borderline Personality Disorder which inhibited him from reporting the abuse to the gardaí until he did so.

I accept also the six reasons identified by Mr. D. why K.C. did not report the abuse during the 13 year period between the termination of the abuse and the first complaint to the prosecuting authorities.

It was the personality disorder which inhibited K.C. from reporting the abuse. The disorder was caused by "...his whole background. The whole maelstrom with his background, it was chaotic" as outlined by Mr. D..

Mr. McDermott. B.L. on behalf of the respondent argued that the applicant, by his conduct, contributed to "...the whole maelstrom with his background" and that, accordingly, K.C. was inhibited from reporting the abuse by reason of a psychological disorder which was partly referable to the conduct of the applicant.

The difficulty with that contention is that Mr. D. was not in a position to state that the disorder which inhibited K.C. from reporting the offences was partly caused or contributed to by the conduct of the applicant.

K.C. was born in January, 1969. On the evidence his relationship with the applicant continued for a period between twelve and eighteen months terminating towards the end of 1983 or the beginning of 1984. The alleged abuse by the applicant therefore, commenced in 1982 and concluded before the summer of 1984 when K.C. was thirteen years old.

The evidence has established that K.C. was first touched inappropriately when he was six years old in 1975 and was then abused constantly by P.J. when he was between eight and twelve years old. During that time he engaged in sordid activity with P.J. and with others "...almost every week."

In 1980 and 1981 when he was eleven or twelve years old he began working in the C. and was there abused repeatedly and seriously by R.W. Accordingly, on the evidence, K.C. was continuously abused by P.J. and by R.W. and by others from the time when he was eight years old in 1977 until he was approximately sixteen years old in 1985.

K.C. was also, during that period, allegedly abused by the applicant repeatedly during 1982 and 1983.

On the evidence it is readily explicable that he developed a personality disorder caused, cumulatively by his personal circumstances, his traumatic family life, and in particular the continual and repeated sexual abuse to which he was subjected by a number of adult males from the time when he was six years old and thereafter throughout his childhood and teenage years.

On the evidence however it has not been established that the abuse to which K.C. was subjected by the applicant, of itself caused or contributed to the disorder which inhibited K.C. from reporting the abuse.

It might be argued that the abuse by the applicant contributed to the development of a personality disorder in a young man who was already fragile and vulnerable to the development of such a condition. However the evidence does not support that conclusion.

On the evidence K.C. has been traumatised by a wide and varied sequence of events and circumstances which commenced when he was six years old and may not yet have concluded.

The abuse to which he was subjected by the applicant may have been a factor which contributed to his developing the Borderline Personality Disorder which he developed and which inhibited his disclosure of the alleged abuse by the applicant. However, that has not been established on the evidence and on the balance of probabilities.

It follows that the applicant has proved on the balance of probabilities that there was inordinate delay on the part of K.C. in reporting

the alleged abuse to the prosecuting authorities and that that delay was not referable to the actions of the applicant.

It has also been established on the evidence however that the delay on the part of K.C. in reporting the abuse to the prosecuting authorities was explicable and understandable having regard to other factors which have been outlined earlier.

In *T.F. v DPP and Anor* (Unreported, High Court, 18th January 2005) this court took the view that the right of an accused person to an expeditious trial has a separate existence, independent from that person's constitutionally protected right to a fair trial observing *inter alia*; that

"...had the delay in P.C. (and countless similar cases since) been the result of unexplained inaction on the part of the complainant then the clear breach of a constitutionally protected right would have been established. Could that breach have been ignored in such circumstances?

If, having conducted the enquiry, the court must, in every case, proceed to consider the question of specific prejudice then what was the purpose of the earlier inquiry? If the issue of specific prejudice must be considered in every case of this kind then the test in every such case is the issue of specific prejudice and the overall question of the "...real and serious risk of an unfair trial".

If that is so then the right to an expeditious trial has no separate existence independent from the right to a fair trial. Undeniably the right to an expeditious trial is based upon the concept of basic fairness. That is because it is seen to be unfair that an accused person should be exposed to the presumptive prejudice caused by the passage of an inordinate period of time for which no reasonable explanation has been provided on behalf of the State. It is not because the accused person has been expressly prejudiced in his or her capacity to defend himself or herself. If the latter were the test then it would be unnecessary for the courts to conduct any enquiry or investigation into the reasons for the delay. Prejudice would be the only issue requiring consideration."

Although in this case the evidence has established that the applicant has been subjected to presumptive prejudice caused by inordinate delay on the part of K.C. in reporting the alleged abuse, detailed and comprehensive evidence has been adduced which has adequately explained the delay.

The delay did not result from unexplained inaction on the part of the complainant or because the complainant wished to put matters behind him and concentrate upon building a secure and successful career, (as in *T.F. v. Director of Public Prosecutions*).

K.C. was inhibited from making a complaint to the prosecuting authorities by reason of his very real and very serious personality disorder. That fact has been corroborated by expert and other evidence. It has been and is accepted by this court.

Accordingly K.C.'s complaint to the prosecuting authorities in 1996 can be categorised as evidence which, through no fault of the complainant or of the prosecuting authorities remained hidden for a very substantial period of time but which nonetheless comprises *prima facie* evidence of the commission of criminal offences. It was evidence which was made available to the prosecuting authorities by K.C. as soon as it became reasonably possible for him to do so.

Accordingly, although the delay by K.C. in reporting the offences was not referable to the actions of the applicant, I am, nonetheless, satisfied that the applicant's right to a trial with reasonable expedition has not been violated by that delay.

I am however also satisfied that the presumptive prejudice which the applicant has suffered by reason of the passage of time between the commission of the alleged offences and the date when they were reported to the prosecuting authorities is a factor which must be taken into account by this Court in determining whether there is a real and serious risk that the applicant may be exposed to the risk of an unfair trial.

Prosecutorial delay

Five years and six months elapsed between June 1996 when K.C. first recorded in writing a statement of complaint to Detective Garda B. O. outlining the commission of the alleged offences against him by the applicant and the date when the applicant was returned for trial on 7th December, 2001.

No step appears to have been taken by the prosecuting authorities to investigate the complaints made by K.C. or to process the prosecution of the applicant during the period of more than 12 months between 14th November, 1996 and 4th December, 1997.

The investigation of the complaints made by K.C. was detailed and arduous and I am satisfied on the evidence that Detective Garda O'B. worked continuously and assiduously on the investigation of the complaints in December, 1997 and November, 1999 when the applicant was arrested and charged with the offences.

A further period of more than three years elapsed before the applicant was returned for trial to the Dublin Circuit Criminal Court on 7th December, 2001. The applicant does not allege delay of a culpable kind on the part of the prosecuting authorities in respect of that two year period. The delay appears to have been contributed to by difficulties involving the disclosure of documents and other matters which arose between the parties and which delayed the return for trial.

There has undoubtedly been unexplained and inordinate delay on the part of the prosecuting authorities in investigating these offences and processing the prosecution of the applicant between the 15th November, 1996 and 4th December, 1997.

The overall period which elapsed between the date when the offences were first disclosed to the prosecuting authorities and the date when the applicant has returned for trial was very substantial. However I am not satisfied that the prosecutorial delay on this case comes within the category of "*blameworthy*" delay of the kind which was identified by the High Court (Geoghegan J.) in *P.P. v. Director of Public Prosecutions* [2001] 1 I.R. 403 when the investigation was found to have been "*conducted in a lackadaisical and slovenly fashion.*"

Accordingly I am satisfied that the prosecutorial delay in this case is not of the kind which, of itself, requires that the trial should be prohibited in the absence of evidence of prejudice to the accused person.

However I am satisfied that the passage of a further five years which elapsed between the date when the alleged offences were reported in 1996 and a date when the applicant was returned for trial in December, 2001, should be taken into account by this court (a), in determining whether the applicant will be exposed to the risk of an unfair trial in respect of the charges and (b), if the court

seeks to conduct a balancing exercise between the applicant's right to an expeditious trial and the right of the community to have criminal offences prosecuted.

Prejudice and the risk of an Unfair Trial

It is contended on behalf of the applicant that, in addition to the presumptive prejudice which he has suffered by reason of the passage of time between the date of the alleged commission of the offences and the date of his return for trial the applicant has suffered specific prejudice in his capacity to defend himself in respect of the charges preferred against him. It is argued that in consequence that he will be exposed to a real and serious risk that he will not receive a fair trial.

It is claimed that nine witnesses who would have been in a position to adduce relevant testimony in support of the applicant at his trial will now not be available to him because six cannot now be located and three are deceased.

The three witnesses who are now deceased are (i), the complainant's mother, who apparently made a statement to the prosecuting authorities reporting an account given to her by the complainant that he was abused by two persons other than the applicant, (ii), a Mr. N. who is now deceased, but was the owner of the C. at relevant times and, (iii), Mr. J.H. who is alleged to have abused K.C. It is suggested J.H. might have been in a position to rebut K.C.'s account of certain events.

I do not accept the applicant has been prejudiced by the fact that those three witnesses are not now available to testify at his trial. There are available a large number of witnesses who worked at the relevant time at the C., who are available to the applicant and who can testify on the issue of access to that premises from time to time.

The contention that potential testimony from K.C.'s mother and J.H. might have undermined the credibility of K.C.'s testimony is a contention of a kind which has been repeatedly rejected by the courts in similar cases to this. The evidence comes within the speculative category the absence of which cannot be relied upon as a ground to prohibit a trial.

The six witnesses who cannot now be located by the prosecuting authorities and by the applicant's solicitors may, however, come within a different category.

The persons referred to as "B." and "T." are alleged to have participated in K.C.'s abuse. They cannot now be located. The applicant contends that if they were available they would be in a position to testify on relevant factual matters and to rebut or undermine the evidence of K.C.

It is claimed that the persons referred to as "D." and "B." have relevance to the prostitution of K.C. during his youth. They have been referred to by K.C. in his statements. It is claimed on behalf of the applicant that, if available they would have been in a position to testify in relation to collateral factual matters and to undermine the evidence of K.C.

It is contended that if C. M. and A. G. were available and were called on behalf of the prosecuting authorities then their testimony might have been undermined in cross-examination in relation to circumstances and details of K.C.'s allegations against the applicant.

The onus of proving the commission of a criminal offence rests upon the State. That onus must be discharged on the evidence and beyond a reasonable doubt to the satisfaction of a jury.

The State is not required to adduce particular testimony or to call specific witnesses in support of its contentions (although it must disclose relevant evidence and, if required, tender relevant witnesses for the benefit of an accused person).

It is improbable that the State would have relied upon the testimony of "B." or "T." or "D." or "B." if they were now available to testify on behalf of the prosecution. However, should they have been prepared to do so, they are not now available to testify on behalf of the applicant to rebut, if they could, the testimony of K.C. or to corroborate, if they could, evidence which may be adduced by or on behalf of the applicant.

C. M. or A. G. or both might have been called to testify on behalf of the State if their evidence was deemed admissible. If they were not called to testify on behalf of the State then they would have been available to testify on behalf of the applicant.

C. M. was the first person to whom the applicant made a detailed report of the alleged abuse. A. G. was the second.

What K.C. told C. M. and A. G. during their early interviews with him has considerable relevance to the offences alleged against the applicant.

The applicant will not be in a position to cross-examine either C. M. or A. G. or to call them to testify on his behalf.

It is also claimed on behalf of the applicant that the records of the clinic of Sir Patrick Dunn's Hospital are now available to him. It is claimed that their contents might have permitted him to undermine the testimony of K.C. in relation to the alleged visit to that clinic in the company of the applicant.

Similarly it is claimed the applicant may now find it difficult or impossible to access his former residence in C. in order to verify or rebut relevant assertions made by K.C.

I am not satisfied that the destruction of the records from Sir Patrick Dunn's Hospital is likely to prejudice the applicant in the preparation of his defence and I am not satisfied either that difficulty in accessing his former residence will cause him specific prejudice sufficient to warrant the prohibition of his trial.

Decision

In this case thirteen years elapsed between the date of the commission of the alleged offences and the date when they were reported to the prosecuting authorities. A further five and a half years elapsed before the applicant was returned for trial in respect of the charges preferred against him.

It is now more than 23 years since the date of the commission of the alleged offences.

It has not been established on the evidence and on the balance of probabilities that the initial delay in reporting the alleged abuse was referable to the actions of the applicant. However a perfectly valid and reasonable explanation has been provided for that delay.

Thereafter the prosecuting authorities took more than 12 months longer than they ought to have taken in the investigation of the alleged offences and in returning the applicant for trial.

The testimony of K.C. will be central to the prosecution of the applicant. That testimony will be lengthy and complex. K.C. has provided the prosecuting authorities with a documentary history of the events surrounding the alleged offences which runs to several hundred pages. If the applicant's trial proceeds then K.C.'s credibility will, apparently, be vigorously challenged. During that challenge, his psychological condition at different times, from his early childhood until the date of the commission of the alleged offences and there after is likely to be scrutinised in some detail.

Since C. M. and A. G. were the psychologists to whom K.C. first reported details of the abuse it is undeniable that their expert testimony, if available, would be relevant to the issues to be determined at the trial. It is not now possible to discover with any certainty whether their testimony would benefit the prosecuting authorities or the applicant. They cannot now be contacted. They were however available and would have been in a position to testify at the trial as late as 1996 and probably for some time thereafter.

The persons referred to as "B." and "T." cannot be contacted either. They may well have been reluctant to testify on behalf of the applicant but they might have been prepared to do so. It is impossible to say whether their testimony would have assisted the prosecuting authorities (in cross-examination) or the applicant, (in direct testimony).

Their unavailability, by itself, might not have resulted in specific prejudice to the applicant's capacity to defend himself sufficient to warrant a prohibition of his trial. However their unavailability forms part of an overall matrix which additionally includes (a), the absence, through unavailability of C. M. and A. G., (b), the nature and complexity of K.C.'s complaints and the very large period of time during which he was abused by a variety of different adult males, (c), the fact that it has not been established that any part of the delay was referable to the actions of the applicant and (d), a period of unexplained prosecutorial delay.

Taking all these factors into account I am satisfied that the applicant has established on the balance of probabilities that if his trial is allowed to proceed then he may be exposed to a real and serious risk that he will not receive a fair trial.

In the circumstances his right to a fair and expeditious trial outweighs the right of the community to have these alleged offences prosecuted. It follows that the applicant is entitled to the relief which he seeks.