

THE HIGH COURT
JUDICIAL REVIEW

2008 289 JR

BETWEEN

T. McG.

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Herbert delivered on the 30th day of June 2009

The applicant is charged with a single count of rape, contrary to s. 48 of the Offences Against the Person Act 1861, and s. 2 of the Criminal Justice Law (Rape) Act 1981, as amended by s. 21 of the Criminal Law (Rape) (Amendment) Act 1990, arising from an alleged incident on the 6th November, 2005, at the dwelling house of the complainant.

By order of this Court made on the 14th March, 2008, the applicant was given leave to seek an injunction by way of an application for judicial review restraining the respondent from prosecuting the applicant in the Central Criminal Court on that charge, and, if necessary, an order extending the time for the bringing of the judicial review application.

The grounds upon which the applicant was granted leave to seek judicial review were as follows:-

- (i) That the members of An Garda Síochána are under a duty, arising from their unique investigative role, to seek out and preserve all evidence having a bearing or potential bearing on the issue of the guilt or innocence of an accused;
- (ii) That, in failing to seek out or preserve or provide to the defence evidence of a potentially exculpatory nature, namely evidence from forensic testing of the bed sheets, mattress and bedclothes from the scene of the alleged incident from which the said charge has arisen, that could have been beneficial to the applicant's defence, the respondent and the relevant members of An Garda Síochána have created a real risk that the applicant will not obtain a fair trial in due course of law;
- (iii) That, over and above the forensic evidence, the respondent and An Garda Síochána failed to properly investigate or cause to be properly investigated, the criminal allegation against the applicant, and failed to fairly and fully probe the circumstances surrounding that charge;
- (iv) That the respondent and the An Garda Síochána failed to properly interview or subsequently re-interview any of the persons who made statements in respect of the criminal charge against the applicant. Specifically, the respondent and An Garda Síochána failed to re-interview the complainant, the complainant's daughter, the complainant's son, or any other key witnesses in the context of subsequently disclosed information about the complainant's psychiatric condition, life circumstances and personal history of false allegations;
- (v) That the respondent and An Garda Síochána failed to advise the complainant that she should submit herself to a physical examination thereby denying the applicant evidence of a potentially exculpatory nature, namely medical evidence;
- (vi) That the respondent failed to provide full and meaningful disclosure of information and materials in his power or control in a proper or timely manner, or at all;
- (vii) That the respondent failed to take into account or properly investigate the *prima facie mala fides* of the complainant and the malicious nature of her complaints, including motives behind same;
- (viii) That the respondent has failed to perform his functions properly or fairly in the bringing of the criminal charge against the applicant;
- (ix) That the applicant's right to natural justice and fair procedures have been breached and would further be breached by any criminal trial arising from the charge herein;
- (x) In the light of what is now known about the complainant, in the light of the request made to the respondent to arrange to re-interview the complainant and other key witnesses, and in the light of the demonstrated failure of An Garda Síochána and the respondent to properly investigate the matter and take such further statements as were required, any trial of the charge would be unfair, not in accordance with law, not in accordance with the Constitution and in particular Article 38 thereof, and contrary to the applicant's constitutional rights to fair procedures in the trial and pre-trial process;
- (xi) In all the circumstances of the case, justice requires that the respondent should not be permitted to put the applicant on trial.

In the Statement of Opposition dated the 4th June, 2008, the respondent opposes the relief sought on the following grounds:-

- (1) The Applicant failed to seek judicial review promptly and/or within the time provided by the Rules of the Superior Courts and has not adduced any good reason why the Court should extend the time for seeking judicial review.
- (2) Pursuant to the provisions of the Prosecution of Offences Act 1974, the respondent is entrusted with the decision whether or not to initiate a prosecution where he considers that there is credible evidence that the offence alleged has been committed and in the absence of *mala fides*, improper motive or improper policy on his part this decision is not subject to judicial review.
- (3) The Court has not and should not appear to have any responsibility for the institution of a prosecution or to determine the evidence upon which it is to be advanced.
- (4) The respondent has no function in relation to the investigation of an alleged crime nor is he responsible for the actions of members of An Garda Síochána.
- (5) The investigation by An Garda Síochána was conducted properly and diligently and there was no failure to seek out and/or to preserve all evidence.
- (6) The Applicant has not discharged the onus of showing that there is a real and substantial risk that he will face an unfair trial.
- (7) The respondent has fully complied with his duties relating to disclosure and further and in the alternative, disclosure is a matter for the Trial Judge and is not properly a matter for judicial review.
- (8) There has been no breach of the Applicant's right to natural justice and/or fair procedures nor would such a right be breached by putting the Applicant on trial in relation to this charge.
- (9) There is no evidence of *mala fides* on the part of the complainant nor is there evidence of malice in relation to the making of the complaint.
- (10) There has been no breach of the Applicant's right to a trial in due course of law in accordance with Article 38 of the Constitution.

THE FACTS

The facts relevant to this application as gleaned from the several Affidavits filed in the application are as follows.

The alleged rape is claimed to have occurred in the complainant's bed in her bedroom at about 5.00 am on the 6th November, 2005. A reference to the calendar shows that the 6th November, 2005, was a Sunday. On the evening of the next day, Monday, the complainant told a friend who had telephoned her that the applicant had raped her, "on Saturday night the 7th November, 2005 or Sunday morning". In her statement to An Garda Síochána the complainant alleged that on Saturday she had organised a party for a relative by marriage in a local licensed premises. She stated that she had only three drinks during the course of the evening as she was responsible for the money. In his statement to An Garda Síochána the applicant denied the alleged rape and said that the complainant's daughter had told him that the complainant had a severe drink problem, that she loved attention and, that she was not happy with him and, had asked her daughter what was going to happen to her (the complainant) now that she was going out with the applicant.

The complainant's daughter made three statements to Detective Garda McLoughlin, on the 14th January, 2006, 23rd January, 2006, and 22nd March, 2006. However she subsequently sought to withdraw these statements stating that she did not then wish to have anything to do with the case and the main reason she withdrew her statements was that at the time she felt put under pressure by the doctors attached to the hospital to which the complainant was admitted and she was unable to put up with the stress of the case. Subsequently, the evidence of the complainant's daughter was taken on Deposition before a judge of the District Court on the 17th October, 2007.

In this Deposition the complainant's daughter stated that on Monday after 8.00 pm the complainant came into the house with one of her friends and told her what had happened on the Saturday night. The applicant was upstairs and the complainant's daughter had gone upstairs and taxed him with her mother's accusation. They had some conversation and then went downstairs in which a further conversation ensued. What the applicant said on both occasions is a matter of dispute. In the course of a cautioned Interview conducted with the applicant on the 27th February, 2006, after he had been arrested, he was asked whether the complainant's daughter was correct in saying that when he came downstairs he had said, "I couldn't have done it and if I did I don't remember". The applicant responded that what he said when he came downstairs was, "there is no way I could have done this. I don't remember you being in the house". He was asked whether the complainant was correct in saying that he said, "I don't remember doing anything and I can't remember". The applicant responded that this was not correct and what he said was, "I didn't do anything". In her statement to An Garda Síochána the complainant asserts that after the applicant had got off her, he said, using her name, "we'll keep this as our little secret" and had then left the room. He came back after about 10 or 15 minutes and she immediately told him, "get out of the room or I'll call (daughter)" and she did call her daughter's name about twice and he left the room and did not come back into the room.

The applicant was arrested on the 27th February, 2006. He was interviewed after caution by Detective Garda Edward McLoughlin and Sergeant Christine Quinn at 11.36 am and 14.25 pm on that day. The memoranda of these interviews state that the notes were read over to the applicant who made one change in the notes of the second interview. The applicant signed both memoranda. The applicant was sent forward for trial at the Central Criminal Court by Order of the District Court made on the 6th December, 2006. The trial date was set for the 21st May, 2007. This trial date was vacated on the 8th May, 2007, because Disclosure sought by the solicitors for the applicant had not been furnished and because a date for the taking of the evidence of the complainant's daughter on Deposition in the District Court had not yet been notified. A new trial date on the 3rd December, 2007 was fixed. Requests for Disclosure were made by letters from the Solicitors for the applicant dated the 19th January, 2007, 1st March, 2007, 23rd July, 2007, 26th June, 2007, 19th October, 2007 and 21st November, 2007.

Under cover of a letter dated the 2nd December, 2007, the defence was furnished with a very considerable body of material comprising of, medical and psychiatric notes and records relating to the complainant, counselling notes relating to the complainant and, other documents relevant to the complainant's psychiatric history, and life circumstances including

previous claims of sexual and physical abuse made by her. The trial was adjourned by consent of the parties to enable the defence to deal with this disclosure. The defence contended, and this was not denied, that this large volume of material was not indexed, was not in any order, that handwritten portions of the material were extremely difficult to decipher and that the author and provenance of some of the documents was entirely unclear.

By a letter dated the 27th December, 2007, the solicitors for the applicant informed the Director of Public Prosecutions that they intended to seek an Order of Prohibition by way of Judicial Review within 21 days unless the Director in the meanwhile decided to discontinue the trial of the applicant. This very extensive letter, - it ran to 21 pages, - set out in detail the reasons why the defence considered that it would be unjust for the Director to continue with the trial of the applicant. By letter dated the 4th January, 2008, the Director indicated that the matter was under consideration. Meanwhile, Counsel for the defence was asked by Counsel for the prosecution to defer applying for an order granting leave to seek judicial review. On the advice of his legal advisors the applicant agreed to give the Director time to consider the matter.

By letter dated the 13th February, 2008, the solicitors for the applicant wrote to the Director of Public Prosecutions emphasising that other Disclosure sought by them remained outstanding. When the matter was listed for mention before the Central Criminal Court on the 25th February, 2008, Counsel for the Director of Public Prosecutions informed the Court that the case was ready for hearing and sought a new trial date. Counsel for the applicant informed the Court that responses to several requests for Disclosure were still outstanding. By order of this Court made on the 14th March, 2008, the applicant was granted leave to seek judicial review by way of an injunction restraining the Director of Public Prosecutions from prosecuting the applicant in the Central Criminal Court on the charge of rape. The applicant was further granted leave, if necessary, to seek an order extending the time for the bringing of the judicial review application.

In the letter dated the 19th February, 2007, from the solicitors for the applicant to the State solicitors, the writer refers to the fact that in her statement to An Garda Síochána the complainant had referred to memories of childhood rapes and of sexual and physical assaults and of obtaining psychological and counselling help. In addition to general disclosure the writer sought disclosure of, (a) documents pertaining to any previous allegations of rape or of sexual assault, (b) notes compiled by psychologists, treating counsellors or social workers in respect of the complainant and (c) reports from any of the foregoing. The writer sought disclosure of whether any charges had been brought and if so the background details and the results of the prosecution. The writer also sought disclosure of mobile telephone records in respect of an incident alleged to have occurred on the 6th November, 2001. By a letter dated the 1st March 2007, the solicitors for the applicant reminded the State solicitors that they had not received a response to their letter of the 19th January, 2007. In addition the writer requested copies of all statements made but not contained in the Book of Evidence, copies of any complaints made by the complainant to social workers and, all text messages made or received by the complainant's daughter on her mobile telephone.

By letters dated the 4th May, 2007, 10th May, 2007, 16th May, 2007, 22nd May, 2007, and, the 13th June, 2007, the solicitors for the applicant wrote to the State solicitors and to the Director of Public Prosecutions regarding the taking on deposition of the evidence of the complainant's daughter. A date was finally obtained for the taking of this evidence before a Judge of the District Court on the 24th September, 2007, but the matter had to be further postponed until the 17th October, 2007, when the evidence was finally taken.

By letters dated the 23rd July, 2007, 26th July, 2007, and the 19th October, 2007, the solicitors for the applicant complained to the State solicitors that the disclosure sought in their letters dated 19th January, 2007, and the 1st March, 2007, had not been made. By a letter dated the 21st November, 2007, from the solicitors for the applicant to the office of the Director of Public Prosecutions, the writer recorded that they had been informed by An Garda Síochána that they had no knowledge of any previous complaints of sexual assault by the complainant which had resulted in charges. However, the writer sought disclosure of any such complaints on the part of the complainant, whether they had resulted in charges or not. In addition, the writer sought disclosure of any documents in the possession, power or procurement of the Director of Public Prosecutions or An Garda Síochána relating to any of the following:-

1. Allegations of abuse arising from the complainant's stay in a (named) institution from age three to age seven.
2. Allegation that the complainant was abused by neighbours of her foster parents when she was aged between seven and sixteen.
3. Any allegations of abuse made against the complainant's first husband.
4. Any allegations made against the complainant's second husband relating to the allegation that he abused the complainant's daughter.
5. All counselling notes from interviews with the complainant.
6. All medical reports relating to the psychiatric condition of the complainant.

The writer also sought disclosure of any forensic tests carried out by An Garda Síochána on the nightclothes and bedclothes of the complainant at the time of the alleged rape, together with any reports and documents pertaining to such tests. The writer indicated that the making of this disclosure was most urgent as the trial had been fixed to commence in the Central Criminal Court on the 3rd December, 2007.

In the letter dated the 27th December, 2007, from the solicitors for the applicant to the Director of Public Prosecutions calling upon him, in exercise of his power under s. 6 of Prosecution of Offences Act 1974, to discontinue the trial of the applicant, the solicitors for the applicant pointed to three specific areas which they stated fatally undermined the fairness of the prosecution. These were identified as:-

1. The refusal of the complainant to submit to a physical examination after the alleged rape, resulting in potential prejudice to the applicant in that a negative finding in terms of semen, tenderness, bruising and other marks could have undermined her credibility.

2. The inexplicable failure on the part of An Garda Síochána to examine the scene of the alleged crime and to carry out any forensic examination of the bedclothes and the complainant's nightclothes.

3. The medical records and other information disclosed for the first time on the 2nd December, 2007, which disclosed that the complainant had made many false allegations in the past, had repeatedly told lies to get her own way, has had significant psychiatric difficulties, may be confused and recalling occasions when she was raped as a child and, that she bears considerable ill will towards the applicant and was not happy that her daughter was in a relationship with him.

The solicitors for the applicant rely upon the following matters, averred by them to be recorded in the medical notes and other material disclosed to them by An Garda Síochána on the 2nd December, 2007, as demonstrating, in a case, which they submit is otherwise one of assertion on the part of the complainant and denial on the part of the applicant, that there is a real and substantial risk that the applicant cannot have a fair trial.

EARLY MEDICAL HISTORY

At age fifteen years, the complainant first made contact with the Psychiatric Services Section of the Area Health Authority. In March 1975, aged eighteen years, the complainant made a complaint of having been physically assaulted at home. It was noted that there were difficulties with her supervision, that she was having "hysterical manifestations" and may have been suffering from epilepsy. In 1989, the complainant's marriage was annulled. She claimed that her husband had beat her and was having an affair with another woman. The complainant was diagnosed as suffering from depression and blackouts, and it was recorded that she had been drinking heavily for the previous year, at the rate of a bottle of whiskey a day. During 2001, the complainant had numerous voluntary admissions to psychiatric care and was in regular contact with the Adult Mental Health Unit of the hospital.

HISTORY 2001 TO AUGUST 2005

In July 2001, the complainant was found to have been drinking excessively for a week at a rate of 20 units per day. She claimed that her husband was beating her. For the first time she made a claim of having suffered sexual abuse as a child aged eight years while in foster care. The complainant was found to be abusing alcohol and double medicating. It was recorded that she was procuring Zimovane from other users and by means of multiple prescriptions and was engaging in lies and deceit about this. In 2002, the complainant was voluntarily admitted to the Psychiatric Unit following a period of alcohol abuse. It was noted that the complainant had a long history of alcohol abuse and of depression resulting from incidents of sexual abuse in her past. She was found to be suffering from alcohol dependence syndrome. It was recorded that she had complained of having difficulties with her daughter who had recently given birth. In January 2003, the complainant became a voluntary patient in the Psychiatric Unit. She complained that for the previous six months her mood was bad and she had poor motivation. It is noted that she had several other admissions during the course of 2003. She stated that her condition was due to letter which she had received from the Rape Crisis Centre which claimed that her daughter when aged about twelve years had been raped by the complainant's then partner, the father of her son. She stated that this had reminded her of how she had been abused while in Residential Care and of her abuse by a nephew of her foster parents and also by three neighbours of her foster parents between the ages of seven years and sixteen years. In 2005, the notes record friction between the complainant and her daughter who was then socialising with and dating the applicant.

PRE ALLEGED RAPE PERIOD

In August 2005, it was noted that the complainant had stated that at a wedding party her daughter had consumed a great deal of alcohol and had announced that she was pregnant. An altercation arose between her and the applicant, in which she abused and attacked him. The applicant went home, but the complainant's daughter followed him and was refused admission because of her abusive behaviour. The complainant stated that she was obliged to telephone next day to apologise for her daughter's behaviour. Subsequently her daughter claimed that she had suffered a miscarriage, because the applicant had punched her in the stomach. Her daughter had broken off her relationship with the applicant which pleased the complainant. Her daughter had become very angry with the complainant who said she was going to report this to An Garda Síochána. The complainant was admitted to the Psychiatric Unit because of over medicating.

On the 12th September, 2005, the complainant was back in the Adult Mental Health Unit suffering from shaking which had persisted for the previous week. She claimed that the above episode had brought back memories of her own traumatic childhood experiences. On the 15th September, 2005, she was admitted as an in-patient to the Hospital suffering from depression and suicidal ideation. She stated that she was extremely upset as she felt that her daughter was not interested in what was happening to her. On the 27th September, 2007, it was reported that the complainant was drinking heavily at weekends. She was very annoyed that her daughter and the applicant had become reunited and by the fact that he had come to the house and had stayed overnight. She felt let down by her daughter, who had assured her that she would not take the applicant back.

On the 5th October, 2005, it was noted that the complainant was very upset that the applicant was back and appeared to be moving into the house. She continued to complain about this and was advised to lay down a rule that the applicant was not to stay in the house overnight. On the 2nd November, 2005, it was reported that the complainant had been drinking heavily the previous weekend. The notes suggest that the complainant had been devastated by the reported striking of her daughter by the applicant in the course of the events above described and she started remembering her own childhood experiences.

POST ALLEGED RAPE PERIOD

The material disclosed on the 2nd December, 2007, indicates that the complainant was an in-patient in the Psychiatric Unit of the hospital between the 9th November, 2005 (two or three days after the alleged rape) and the 9th March, 2006. She made statements to An Garda Síochána on the 16th December, 2005 and again on the 15th January, 2006. The notes record that she stated that she liked to live with her daughter and her daughter's daughter, but not with the applicant. However, her daughter had made it clear that she was unhappy about the complaint to An Garda Síochána concerning the applicant. There was great disharmony in the house at Christmas 2006 and New Year. The complainant complained of rows between herself and her son and her daughter. The complainant took an overdose of medication. On the 3rd April, 2006, the complainant reported that her daughter had struck her with her fist. On the 18th April, 2006, the complainant reported that her son had hit her three times over the previous two days because she could not stop coughing. The notes record that the complainant alleged that she had been persistently abused by her son and her daughter. She claimed that her son would come into her bedroom and had shaken her violently three or four times. He hit her on the side

of the head with a book. She claimed that her daughter was not paying the household bills. In early May 2006, the complainant was readmitted to the Psychiatric Unit.

The disclosed medical notes contain a letter from the complainant's daughter dated the 14th June, 2006, in which she complains that her mother was telling lies to the family, to friends, to neighbours, to doctors and to the psychiatrist about what was happening at home. She stated that the complainant stole from her and from her brother, that she rooted through their bedrooms and followed them around the house. Her daughter complained that the complainant could be violent, she had grabbed a knife and had threatened to commit suicide, had knocked dents in the washing machine and had ripped out a pipe under the sink in a fit of temper. The complainant's daughter in this letter stated, that she and her brother slept behind locked doors. She stated that the complainant was over medicating, was violent if she did not have her way and, was eating excessively because of the medication. She complained that the complainant drank herself to a state of raving intoxication. The notes record that the complainant stated that her daughter, "was out of control", had crashed the car, was sleeping late and was missing her educational courses.

About this time the Inspector of An Garda Síochána in charge of the investigation sought a report from the complainant's treating psychologist, in relation to her then present state of mental health. The Report is dated the 24th May, 2006, and states as follows:-

"At this session (23rd February, 2006), (the complainant) began to open up and inform me that her daughter had informed her that she had heard the complainant tell the applicant at the time of the reported rape, 'I'll tell (daughter) if you do not stop' and heard the applicant say, 'we will keep this as our little secret'. She went on to say how (her daughter) had a lot of ambivalent feelings regarding the reported rape. She wished that (the complainant) had not gone to the Gardaí and reported her now ex-boyfriend. She was expressing fear being back at home and being lectured by her daughter."

The notes record that the complainant was still double medicating and the social workers were very alarmed that she had given a sleeping tablet to her son.

On the 18th July, 2006, the complainant was re-admitted into the Psychiatric Unit for nine days as a result of abusing alcohol and prescription drugs. On the 29th August, 2006, the complainant stated that her daughter had threatened to hit her on a few occasions. She claimed that her son had rubbed ice cream in her face with a mop saying that she was useless. He had also placed an alarm in her room which went off every 15 minutes. On the 6th September, 2006, the complainant made an official complaint regarding the ice cream and alarm clock incidents as a result of which her daughter and her son were interviewed by social workers. Her son informed them that he had accidentally knocked over the ice cream bowl and there was no mop incident. He said that the complainant had sat there flicking ash into a mop bucket. He stated that there was no alarm and that the sound of which she complained of was the "battery low" warning of the smoke alarm and he had fixed it. He said that he and his sister had to sleep with their doors locked because the complainant had threatened to kill him. The social workers concluded that the situation was too volatile for the complainant's son and daughter to remain in the house, particularly her son, given the threat made by the complainant to kill him. They considered that there was a serious safety issue involved. By a letter dated the 18th October, 2006, solicitors for the H.S.E. wrote to the complainant's son and daughter regarding her complaint that they had subjected the complainant to verbal and physical abuse. On the 17th November, 2006, the notes record that the complainant had claimed that her daughter had kicked her.

The complainant complained that, during Christmas 2006, her daughter tried to strangle her and to burn down the house. This complaint was investigated by a senior social worker from the H.S.E. The complainant stated that she had drunk a bottle of whiskey the previous day. The complainant told a hospital staff nurse that her son was drunk and was vomiting while babysitting her granddaughter. The complainant's daughter told the social workers that on the 20th December, 2006, the complainant went on a drinking binge, was sick everywhere and refused to clear up afterwards, so they had to leave her lying in vomit. The complainant had remained in bed until the 23rd December, 2006. On the 25th December, 2006, she had consumed a bottle of wine by 11.30 am, she then consumed two more bottles of wine and at least four other drinks. By midnight the complainant was drunk and abusive so they left her and went to bed. On the 31st December, 2006, the complainant was drinking heavily and while trying to open the microwave, had fallen and broken her hand. She and her brother tried to help the complainant to get up, but she would not let them near her. Eventually she became unconscious and they were able to put her to bed. The complainant's daughter said that her brother had made a video of this incident on his mobile telephone. The complainant's daughter said that her brother was sick on St. Stephen's night, but that this was not due to the consumption of alcohol. He was unable to return to school on 8th January, 2007, because of a throat infection. The complainant stated that on 9th January, 2007, she had asked her son to do some Hoovering. He had refused and had hit her on her right arm with the head and hose of the Hoover and broken her arm. He then said, "go ahead and tell (name) . . . and the staff, who would believe a nutter bitch and there is two of use against you". A senior social worker interviewed the complainant's daughter and her son about this. The complainant's daughter said that this was an entire fabrication and her brother agreed.

The disclosed notes record that the senior social worker interviewed the complainant's foster mother, who had confirmed aspects of the complainant's behaviour. As regards the alleged rape, her foster mother had wondered whether the complainant was, "all mixed up and making allegations that relate to the past".

The Adult Mental Health Unit notes disclosed to the defence on the 2nd December, 2007, record that on the 2nd January, 2007, the complainant had said that she had a good Christmas and a good New Year. On the 10th January, 2007, the complainant was asked if she felt safe at home and she said she did, but that too much of the household work was falling to her. On the 12th January, 2007, it was noted that complainant's left hand was in a plaster of paris cast and that she was for review in the Orthopaedic Unit of the hospital in two weeks. On the 15th January, 2007, the notes record that the complainant said that she was only pretending that all was well at home. Her son was drunk on St. Stephen's night. He had also hit her on the right hand with the Hoover. On the 24th January, 2007, the complainant complained, that her daughter was very angry following the service of a witness summons on her and had threatened to strangle her and to burn the house down and then drown herself. On the 25th January, 2007, the complainant alleged that her daughter threatened to strangle her with her bare hands because she had complained to the gardaí that her daughter was hitting her. There is a reference in these notes to an accident in the kitchen on New Year's Eve in which the complainant had fallen and broken her arm.

At the end of February 2007, the complainant's daughter and the complainant's son left the house. In March 2007, the complainant was re-admitted to the Psychiatric Unit of the hospital. The Admission Note reads:-

"Impossible to estimate the true mental state of patient, because of the dishonesty perpetrated on staff of unit – over the last few months in particular. Despite support at day hospital patient is seriously abusing (named drug), tablets were smuggled into her and she was consuming alcohol on the ward."

In April 2007, the complainant was reported as hearing voices in bed at night. She thought that these might be the voices of the nurses when she was a child. In September 2007, it was recorded that the complainant had suffered several crises over the summer arising from financial problems, alcohol abuse, abuse of prescribed medication and obtaining extra (named tablets). She was diagnosed as suffering from persecutory ideation with auditory hallucinations and her situation remained acute.

The complainant made a detailed statement to An Garda Síochána on the 16th December, 2005. It is to be noted that this was forty one days after the alleged rape. In a statement made by a Consultant Psychiatrist to Detective Garda Edward McLoughlin, on the 20th November, 2007, it is stated that the complainant was admitted to the Adult Mental Health Unit on the 9th November, 2005, complaining of depression and suicidal thoughts. In this statement and in an affidavit sworn in these proceedings on the 4th June, 2008, this Consultant Psychiatrist states that it is her opinion that the delay on the part of the complainant in reporting the alleged rape to An Garda Síochána was reasonable, despite having reported the matter to her general medical practitioner, because of her mental state and high levels of distress and anxiety, because of her concerns regarding the impact of such reporting on her relationship with her daughter and because of her past history of sexual abuse during her childhood and adolescence. The statement concludes by recording that in recent times the complainant had made great efforts to deal with her problems in a mature fashion and was very compliant with treatment currently.

In a statement made by a general medical practitioner to Detective Garda Edward McLoughlin on the 20th November, 2007, he states that the complainant was a long standing patient of his practice. He states that she had attended for consultation on the 7th November, 2005, and had informed him that on the previous Saturday night the 5th November, she had been subjected to rape by her daughter's partner. She appeared distressed and had informed him that she was arranging to meet her adviser regarding sexual abuse. He stated that he had advised her that she should arrange to undergo a formal sexual assault examination, although she was somewhat confused as to the appropriate option, given the relationship of the assailant with her daughter. He had not attended her with respect to the alleged incident apart from the above attendance.

Having regard to the issues raised by the applicant in this application, it is important to refer to certain aspects of the complainant's statement to An Garda Síochána. The following is her account of the alleged rape, the clothing worn by her, and the location and time of the alleged rape:-

"I got home at 3.00 am. (My daughter and her partner) were not home. I checked their room. I had a cup of tea and a cigarette and went to bed. I did not wear any nightclothes. I just left on my bra and knickers. I fell fast asleep, next thing I remember was the duvet being pulled off my bed and the next thing (the applicant) was on top of me. He called me my name, and he was naked and while on top of me, he put one hand down and pulled off my knickers, while I was in shock, you know how you'd be after being woke up. I said 'stop', but he put his penis into my vagina and he began thrusting himself on top of me and while keeping his penis in my vagina. He didn't hurt me, only a little at first, but he wasn't rough. But I couldn't push him off, he was too heavy. He kept doing this for about 10 minutes, but he did not ejaculate. He even withdrew his penis at one point and began rubbing it with his own hand and then inserted it back into my vagina, but he still didn't ejaculate. So he got off me and said '(her name), we'll keep this as our little secret' and left the room. He didn't take my bra off. I just sat on the bed in a state of shock. I checked the time and it was about 5.00 am."

In her statement the complainant said that on that Sunday, she did not come out of her room at all only to go to the toilet. She took some anti-depressants and a sleeping tablet. On Monday her daughter and her partner did not get up until 1.00 pm approximately. When they came downstairs the applicant behaved as normal and just said "hello (her name)" and went to the kitchen and had tea and then they went into town. She started to cry and her granddaughter asked her why she was crying. A female friend telephoned to apologise for not being at the party on Saturday night and she told her friend, on being pressed, that the applicant had raped her. Her daughter and the applicant came back to the house and her son was also there. About 4.30 pm her female friend took her to see the general medical practitioner and her son looked after her granddaughter. In the statement the complainant says that she told the general medical practitioner the whole story and she thought that she would be examined then and there. He said that she would have to go to the Guards first and then to a Gynaecologist for examination. She states that the general medical practitioner advised her that she should go to the Guards after she left him or at least the following morning and he gave her a prescription. She says that her female friend and herself went to a public house, where her friend had dinner and they discussed what she should do. She was afraid to go to the Guards, because of her daughter, whether she would believe her, so therefore they went back to the house.

The complainant then recounts how she told her daughter of the alleged rape and the exchanges which then ensued between them and the applicant, to which I have already averted. Her female friend, who had remained present throughout, brought the complainant to the complainant's brother's house, where she remained until the afternoon of Tuesday the 8th November, 2005. The complainant states that she telephoned (the hospital) to tell them she could not attend (for a pre-arranged consultation) and what had happened and she then went to bed having taken her tablets. At approximately 4.00 pm a nurse (named) from the Hospital and a social worker came to the door. She states that her daughter told her to get rid of them. They left but told her to be at (the hospital) the following morning. That evening she told her son John what had occurred. The complainant states that she did not want to make a statement before then, (16th December, 2007) because she was afraid for her father and mother who are both in their 80s, but they found out about it, so she wanted to make the statement then. She said that her daughter did not want her to go to the guards, but she was afraid that the applicant would do this to someone else.

In the final paragraph of her statement, the complainant states as follows:-

"I contacted the (area) Rape Crisis Centre and I spoke to a Lady and gave her my name and number. That was on Wednesday the 9th November, 2005. I got a call from them last Friday the 10th December, 2005, and was going to make an appointment when I got out of the Hospital and did, for Thursday the 15th December, 2005, but I told them to leave it until I found out what was happening, so then she said that they may sent someone up to me here in the Hospital, but no one has called yet. This rape has really upset and traumatised me because of the flashbacks and nightmares, I am having and it brings back the bad memories of rapes and sexual and physical assaults, I was subjected to between the age of four years and seven years while in care and between seven and sixteen by neighbours. Two of them are now dead. I am trying to deal with those the best I can. I attended counselling and a psychologist (names given). (The applicant) would have been made aware of my past by (my daughter)".

In the statements made to Detective Garda McLoughlin by the complainant's daughter, statements which she subsequently said she wished to withdraw, for the reasons to which I have already averted, she stated that her mother told her about the alleged rape at 8.00 pm on Monday the 7th November, 2005, in the presence of her mother's female friend. When she heard her mother describe what had occurred, she had said to the applicant "you did do it". She stated that from the description her mother had given her of what she alleges the applicant did to her, she would believe her mother as she had slept with the applicant and knew from that it was the same way. This was her opinion and it was based on her experience with the applicant.

The complainant's female friend made a statement to An Garda Síochána which is included in the Book of Evidence. She stated that she contacted the complainant on the 8th November, 2005, and the complainant told her what had happened on Saturday night the 7th November, 2005, a Sunday morning. She states that it was she, who arranged the appointment for the complainant with the general medical practitioner at 4.30 pm on the 8th November, 2005. Her recollection of what occurred after the complainant in her presence, told her daughter of the alleged rape on the 8th November, 2005, is as follows:-

"We got (her daughter) on her own and we told her. (Her daughter) just fell to the floor in disbelief and distraught and said "just get him to fuck out of the house". She then calmed down and went upstairs and brought (the applicant) down to us. The complainant's daughter then said to (the applicant) in my presence what (the complainant) had told her "you had raped my mother" and he said "no way that is a lie". I said (the complainant) would not lie, look at the state of her. He then said if I did I could not remember. (The complainant's daughter) said it was because of the Red Bull and vodka. Then (the applicant) said "(the complainant's name) did I hurt you". I can recall saying don't be asking stupid questions. I felt at that stage to take (the complainant) out of the house, and away as I felt it was for the best. I wanted (the complainant) to go to the guards after this, because of (the applicant's) reactions. He was cool and calm and he did not raise his voice, he kept saying he could not remember and did I hurt you. I can recall (the complainant) say in front of (the applicant) as it was suggested by whom I cannot remember that (the applicant) thought it was (the complainant's daughter). She stated too that (the applicant) said "this will be our secret (calling her by her name)". The only people present while all this took place was (the complainant), (the complainant's daughter), (the applicant) and myself. After this I took (the complainant) out to her brother in (named place). On the way out we meet (her brother's wife) at a filling station and (the complainant) told her and later told (her brother). I left (the complainant) that night at 10.30 pm approximately and went home. I have visited (the complainant) in the hospital since and she told me she told the Gardaí. I wish to add, while we were in (the general medical practitioner's) (the complainant's) social worker rang and she told her what had happened. I also spoke to her on the phone".

In a statement given by the community mental health nurse for the area to An Garda Síochána she recalled that on the 8th November, 2005, accompanied by a senior social worker, she made a domiciliary visit to the complainant at the request of the nurse manager of the hospital. They met the complainant who told them that she had been sexually assaulted by her daughter's boyfriend on the night of the 6th November, 2005, in the early hours of the morning at 4.00 am. The complainant was very distressed at the time and crying. They advised her to report the matter to the Gardaí. She asked the complainant to attend the following morning at the hospital to see the Acting Consultant Psychiatrist and she agreed. The complainant stated that she was advised by the general medical practitioner to attend at Accident and Emergency for gynaecological examination, but she did not avail of it. A statement in similar was terms given by the senior social worker, Adult Mental Health, to An Garda Síochána.

In her Deposition evidence given on the 17th October, 2007, the complainant's daughter said that she and the applicant went to bed in the same bed. When she woke up, the applicant was not there, he was in her daughter's bed. [Note: the complainant's granddaughter was staying elsewhere on the occasion]. She stated that she had spilled a glass of water on the bed and assumed that that was the reason why the applicant had left the bed. On Sunday she noticed that the applicant was a bit different but put this down to drink and being hung over. She stated that the applicant had said to her that the complainant would be going in again to the Acute Unit as she had too much drink over the weekend. The applicant knew that the complainant had psychiatric difficulties. On Monday after 8.00 pm the complainant came in with one of her friends and told the witness what had happened on Sunday night. The witness stated that she said to the applicant, "they're saying downstairs that you raped my mother like". The applicant went downstairs to confront them. He said, "I can't remember". The witness said that this had stuck in my mind. She stated that in March the applicant was very intimidating towards her. They had discussed what happened and she felt intimidated and threatened. She recalled that she had become angry and had thrown a drink at him. She stated that later she telephoned to apologise and made a statement withdrawing the other statements in order to get on with her life and forget about it.

In cross examination, the complainant's daughter was asked whether the reason she gave for withdrawing these other statements, was that she had felt under pressure from doctors and she replied in the affirmative. She confirmed that the complainant had a drink problem and was in hospital prior to November, 2005. She confirmed that there were issues about the complainant having been abused when she was growing up. The witness stated that on Saturday night and into Sunday, she herself was well drunk and could not recall at what time they had got back to the house, but it was later than 2.30 am. She had fallen asleep at once and had spilled water on the bed. On Monday, her mother and her mother's friend had come back to the house about 8.30 pm. It was put to the witness that the applicant had given clear instructions that when the allegation was put to him he had denied it. The witness replied, "no he didn't, he never denied it he said, I can't remember". Again it was put to the witness that when the allegation was made, the applicant denied it in the clearest terms. The witness replied in the negative. She stated that their relationship had ended about three weeks

after that. She accepted that she had made contact with him again and they renewed sexual relationships thereafter. She stated that the social workers were insisting on the complainant reporting the matter to the Gardaí. She was asked if she had ever in the past found her mother unreliable and she replied in the negative.

In a replying affidavit, sworn on behalf of the respondent on the 4th June, 2008, Detective Garda Edward McLoughlin, who identifies himself as a member of the investigation team, confirms that the complainant did not report the alleged rape to An Garda Síochána until the 16th December, 2005, that is 41 days after the alleged rape. At para. 8 of this affidavit Detective Garda McLoughlin avers that:-

"From inquiries carried out, I ascertained that the house in question was a rented accommodation. The complainant had left this house on the 9th November, 2005, when she was committed to a psychiatric hospital following a breakdown she suffered in the aftermath of the incident of the 5th November, 2005. She had lived there with her daughter (name stated), her son (name stated) and her grand-daughter (name stated). The other members of her family left this property on the 28th November, 2005. Subsequently new residents moved into this house. I was also aware that the Applicant had stayed in the house for at least two nights after the incident. Moreover the complainant in her statement of complaint indicates that the accused did not ejaculate. Accordingly there would have been no semen left at the scene. Because of the aforesaid factors, the gardaí took the view that the scene would have been contaminated and an operational decision was taken that an examination of the scene would not have yielded evidence of any probative value at that remove."

At para. 9 of the same affidavit, Detective Garda McLoughlin avers that as the complaint was made 41 days after the alleged rape, An Garda Síochána did not believe it would have been helpful to their investigation to advise the complainant to undergo a physical examination then as no evidence would have been obtained as a result, due to the passage of time.

At para. 11 of this affidavit, Detective Garda McLoughlin, does not accept that the complainant had a history of making false allegations. He states that she had never made a complaint in relation to a sexual offence to An Garda Síochána prior to his complaint. He considered that her "treating professionals" were satisfied that the complainant had suffered a history of childhood sexual abuse. At para 12 of this affidavit, Detective Garda McLoughlin, states that An Garda Síochána have always known and accepted that the complainant suffered from psychiatric problems, including alcohol abuse and depression and that she had been treated for these problems over a number of years. He states that this fact was well known to the applicant prior to the disclosure (on the 2nd December, 2007) and was also known to his legal advisers, and in this respect he refers to the evidence of the complainant's daughter given on Deposition (I infer that the reference is to the cross examination at p. 18 lines 17 – 34 and p. 19 lines 1 – 13). At para. 13 of this affidavit, detective Garda McLoughlin, avers that the statements of the general medical practitioner, the consultant psychologist, the senior staff nurse and the senior social worker are not inconsistent with the complainant's statement. He also points to the fact that none of these health care professionals express any concerns about the mental state of the complainant not do they suggest that her accusation against the applicant was a fabrication or was motivated by malice. At para. 14 of this affidavit, Detective Garda McLoughlin states that the statement made by the complainant's daughter and by her female friend are consistent to the complainant's account of the alleged rape and that the portion of her daughter's statement (which, I have already noted, she subsequently stated she wished to withdraw for the reasons to which I have adverted), in relation to the manner in which the alleged rape was carried out provides a measure of corroboration in this regard. At para. 15 of this affidavit, Detective Garda McLoughlin denies that the complainant's failure to report the alleged rape the next day, (I infer that he is referring to the Sunday), reflects on her credibility having regard to the identity of the alleged perpetrator and her relationship with her daughter. At para 16 of this affidavit, Detective Garda McLoughlin states that he wishes to emphasise that at no stage in the investigation did he find the allegations in any way suspect, manifestly false or maliciously motivated, basing this view on the statements taken during the course of the investigation all of which he considered were supportive of the complaint and the evidence of the complainant.

At para. 17 of this affidavit, Detective Garda McLoughlin avers as follows:-

"I say that full disclosure has been made by the prosecution. I am not in possession of any documentation or evidence relevant to the matters in issue which have not been disclosed to the prosecution [I assume that the reference should be to the defence]. The complainant did not attend any psychiatric services for over 20 years. She did attend psychiatric services up to the age of 17 or 18 years. Accordingly, there are in fact no notes available between 1978 and 2001, to the best of my knowledge. Nor did I ever come into possession in relation to any notes from the Rape Crisis Centre. I did not conduct any investigation with the Centre and accordingly have not been furnished with any documentation from the Centre. I am also aware that it is not the policy of the centre to ever release such notes on grounds of client confidentiality."

At para. 18 of this affidavit, Detective Garda McLoughlin, observes that if there had been disharmony between the complainant and her children, at no point did the complainant's daughter indicate in writing or otherwise that she was unhappy with her mother's complaint in relation to the applicant.

In an affidavit sworn on the 14th July, 2008, on behalf of the respondent, Deirdre Thompson, Solicitor in the office of the Chief Prosecuting Solicitor, at para. 5 avers as follows:-

"I say and believe that the matters raised in the Applicant's solicitor's letter of the 27th December, 2007, prompted a full review of the matter at the very highest level in the office of the Respondent and after receipt the Director, Mr. James Hamilton, decided that the prosecution should proceed. The plaintiff's psychiatric condition and life circumstances were known to the Respondent prior to the direction of the prosecution. The prosecution was directed on the grounds that there was credible evidence that the offence had been committed. This is the standard applied to every prosecution."

SUBMISSIONS

In the Statement of Grounds, in the written submission and, in the course of argument before the court, it is claimed that there is a real or serious risk that the applicant would not receive a fair trial for all of the following reasons:-

1. The medical and psychiatric notes demonstrate that the complainant is a dangerously unreliable remembrancer, with a history of having deceived and manipulated various healthcare professionals and, of making allegations of sexual abuse.
2. What is said by the complainant's daughter as recorded in her three statements to An Garda Síochána is unreliable because she sought subsequently to withdraw these statements.
3. An Garda Síochána failed to investigate the, "inexplicable gap" in the medical – psychiatric records between 1978 and 2001 and, having regard to the contents of the disclosed records, this could have a bearing or potential bearing on the issue of guilt or innocence of the applicant.
4. The complainant having failed to complain of the alleged rape between the early hours of Sunday morning and late on Monday afternoon, failed to undergo a formal sexual assault examination as advised by her general medical practitioner.
5. An Garda Síochána did not carry out any forensic examinations or investigation of the complainant's bedroom, the mattress, pillows or duvet and, the clothes worn by the complainant at the time of the alleged rape.
6. An Garda Síochána did not ensure that the complainant had a physical and gynaecological examination when she reported the alleged rape to them 41 days after the date of the alleged incident.
7. Despite the fact that a Report dated the 24th May, 2006, from a psychologist, which was included in the disclosed medical – psychiatric notes, records that the complainant had informed the psychologist that she was told by her daughter, that at the time of the alleged rape she heard the complainant say to the applicant, "I'll tell (daughter) if you don't stop", and had heard him reply, "We will keep this as our little secret", An Garda Síochána did not re-interview and take statements from the complainant, her daughter and the psychologist about this matter.
8. Despite the fact that in her statement, the complainant had informed An Garda Síochána that she had contacted the Area Rape Crisis Centre and had spoken to persons there, An Garda Síochána did not investigate this matter and seek disclosure of records from the Rape Crisis Centre.
9. An Garda Síochána did not seek out and preserve the mobile telephone visual recording which the complainant's daughter is recorded, in the medical – psychiatric notes as having informed social workers, was made by her brother of an incident alleged to have occurred on New Years Eve 2006, in which the complainant had fallen and broken her hand, an injury which she informed social workers, had been caused by her son.
10. An Garda Síochána failed to interview and obtain a statement from the complainant's foster mother, despite the record in the medical – psychiatric notes, that she had stated to a senior social worker, with regard to the alleged rape, that she wondered whether the complainant was all mixed up and was making allegations that related to the past.
11. The disclosed medical – psychiatric notes reveal that the complainant was ill-disposed towards the applicant prior to the alleged rape, and the respondent failed to take this into account and failed to properly investigate the *prima facie mala fides* of the complainant and the malicious nature of her complaint.
12. An Garda Síochána did not re-interview the complainant, her daughter, her son and other key witnesses in the context of what the medical – psychiatric notes and records disclosed of her psychiatric condition, life circumstances and her making false allegations.

It is submitted, that the applicant had fully engaged with the known facts and had demonstrated that there was a real or serious risk that he would not receive a fair trial. The court, Counsel said, must look not only at the individual complaints, but must take a general overview of the matter and have regard to the fact that there are a multiplicity of complaints in the instant case. Counsel for the applicant accepted that it was not sufficient to demonstrate that there were shortcomings in the investigative process and that the onus was on the applicant to show that there was a real risk that he would not receive a fair trial.

While accepting that a trial judge has ample powers to make rulings as to Law and to give instructions to the jury, Counsel submitted that on the facts of the instant case no warnings, rulings or instructions could overcome the non availability of crucial evidence.

Because of the matters in respect of which complaint was made, there was no objective factor in the evidence and Counsel submitted that this rendered the intended trial a profoundly hazardous proceeding. It was not sufficient, Counsel stated, for the respondent to contend that these matters could be dealt with by rulings and directions of the trial judge. Counsel relied on the following passage from the judgment of Denham J. in *D.C. v. The Director of Public Prosecutions* [2005] 4 I.R. 281 (Supreme Court), where that learned judge had stated:-

"The basic assumption to apply to all pending trials is that they will be conducted fairly, under the presiding judge. However, in circumstances where there is a real or serious risk of an unfair trial the courts will interfere so that a defendant may not be exposed to the commencement of the process. . . ."

On behalf of the respondent it was submitted that the applicant had not discharged the onus of proof, which lay on him, of establishing that there was a real risk. – not just a remote, theoretical or fanciful risk, – of an unfair trial, which could not be avoided by rulings and directions on the part of the trial judge.

The decision of An Garda Síochána not to carry out the particular forensic examinations or to insist upon the complainant undergoing a physical and gynaecological examination, for the reasons stated by Detective Garda McLoughlin was both reasonable and rational and, did not amount to a failure to seek out and preserve all evidence having a bearing or potential bearing on the issue of the guilt or innocence of the applicant. There was no obligation or duty on An Garda Síochána to re-interview or to take additional statements from the complainant or her daughter because of what was recorded in the report of the psychologist, dated the 24th May, 2006, which report had been disclosed to the applicant.

Detective Garda McLoughlin had sworn on affidavit, that all medical and psychiatric notes in the possession of An Garda Síochána had been disclosed to the applicant's legal advisers. He averred that to the best of his knowledge the

complainant had not attended the Psychiatric Unit between 1978 and 2001 and there were no notes available for this period. Detective Garda McLoughlin had stated in his affidavit that he did not have any notes from the Rape Crisis Centre in his possession and he had not carried out any investigation involving the Rape Crisis Centre. Detective Garda McLoughlin had further stated on affidavit that none of the health care professionals who had made statements to An Garda Síochána, - the general medical practitioner, the consultant psychologist, the senior staff nurse and, the senior social worker, - had expressed any concerns about the mental state of the complainant, nor did they suggest that her accusation against the applicant was a fabrication or was motivated by malice.

Counsel for the respondent submitted that a lack of medical or forensic evidence is not at all uncommon in sexual cases. Though the absence of this evidence in the instant case was known to the applicant from the date of the service of the Book of Evidence on the 6th December, 2006, no application was made to seek to halt the trial on this basis and, it was accepted by the applicant's legal advisers during the course of argument that such an application was unlikely to be successful. The respondent denied that there was any failure on the part of An Garda Síochána to seek out and preserve evidence, as explained in *Scully v. Director of Public Prosecutions* [2005] 1 I.R. 242 at 250 – 251, per Hardiman J. (Supreme Court). The trial judge, counsel submitted, is possessed of ample powers, including the power to deal with issues of disclosure, and is obliged to use these powers to ensure that the trial is fair. Counsel for the respondent accepted that the onus on the applicant was to demonstrate a "real risk" as opposed to a "certainty" or even a "probability", that the trial would be unfair.

DISCUSSION

The first matter which falls to be determined is whether or not there has been delay on the part of the applicant in seeking this relief and, if so, whether there is good reason for extending the period to enable this application to be made. Order 84, r. 21 of the Rules of the Superior Courts requires that an application for judicial review, where the relief sought is prohibition, shall be made promptly and in any event within three months from the date when grounds for the application first arose. In considering this matter, the court has regard to what was held by Hardiman J. in *Scully v. The Director of Public Prosecutions* [2005] 1 I.R. 242 at 247, para. 9:-

"... one is concerned not simply with the temporal extent of the delay but with the time lapse in all the circumstances of the case. It is essential that the Court should view any lapse of time in its context in the particular case if, on the one hand, the requirements of fair procedures are to be met and, on the other hand, the administration of justice is not to be compromised by artificial, tactically grounded complaints."

On the service of the Book of Evidence on the 4th December, 2006, the applicant must have become aware that no forensic investigation of the bedroom, bed linen and, night attire had been carried out by An Garda Síochána and that the complainant had not undergone any physical, medical or gynaecological examination. It is clear from the evidence of the complainant's daughter taken on Deposition on the 17th October, 2007, that the applicant was then aware that the complainant had a history of psychiatric/psychological difficulties and of serious alcohol abuse, that the complainant's daughter had endeavoured to retract her three statements made to An Garda Síochána and that the complainant had not complained of the alleged rape between the early hours of Sunday morning and Monday afternoon. It was further clear from the Book of Evidence, that the complainant had not taken the advice of her general medical practitioner to have a formal sexual assault examination, (vide statements of witnesses 4 and 5 in the Book of Evidence).

Judicial review was not sought until the 14th March, 2008, despite the fact that these matters are now advanced as reasons while there is a real or serious risk that the applicant will not receive a fair trial. It was accepted in argument that counsel had considered the question of the failure to carry out a forensic investigation and the failure to have a gynaecological examination and had advised that an application to prohibit the trial of the applicant on these grounds would be most unlikely to succeed. I consider that counsel were entirely correct in this advice.

The medical and psychiatric notes and records were furnished by An Garda Síochána to the Solicitors for the applicant on the 2nd December, 2007. By a letter dated the 27th December, 2007, the Solicitors for the applicant called upon the respondent to discontinue the prosecution failing which an application would be made for leave to seek judicial review in the form of prohibition. A response was received from the respondent, dated the 4th January, 2008, stating that the matter was under consideration. By a letter dated the 13th February, 2008, the Solicitors for the applicant reminded the respondent that they had not received an answer to their letter dated the 27th December, 2007, indicating his decision in the matter. However, when the prosecution was listed for mention before the Central Criminal Court on the 25th February, 2008, for the purpose of fixing a trial date, it was then made perfectly clear to the applicant's legal advisers that the respondent was proceeding with the prosecution.

The applicant's claim for relief is based upon information concerning the complainant and, alleged failures on the part of An Garda Síochána to properly investigate the complaint, of which his legal advisers only became aware as a result of the disclosure on the 2nd December, 2007, of the medical and psychiatric notes and records. Counsel for the applicant submitted that in the light of the contents of these notes and records, the other matters of which they had been aware on or prior to the 17th October, 2007, (taking of evidence on Deposition of the complainant's daughter) require to be reassessed and assume an entirely new significance. In my judgment, the date when the grounds for this application first arose was not the date of the service of the Book of Evidence, but the 2nd December, 2007, the date of disclosure of these medical and psychiatric notes and records, which were in the possession of An Garda Síochána even though it is not intended to refer to them as part of the case for the prosecution.

This being so, the latest date allowed by the provisions of O. 84, r. 21 of the Rules of the Superior Courts for the bringing of this application was the 2nd March, 2008, (see also O. 122, r. 1). In fact, the application for leave to seek judicial review was not made until the 14th March, 2008. However, in view of the shortness of this delay, especially in the context of the time lapse between the arrest of the applicant on the 27th February, 2006, and the disclosure of the notes and records on the 2nd December, 2007, in view of the letters exchanged between the solicitors for the applicant and the respondent dated the 27th February, 2007, 4th January, 2008, and, 13th February, 2008, to which I have already referred, in view of the fact that it was not until the 25th February, 2008, that the applicant's legal advisers discovered that the respondent intended to press ahead with the prosecution and, in view of the fact that neither the respondent nor any third party could properly be said to have been damnified by this delay, the court considers that it would be unjust and altogether disproportionate not to extend the time for the making of this application. The court will therefore extend the time to the 14th March, 2008.

A recorded comment by a healthcare professional, that the complainant had deceived and manipulated healthcare personnel and others in order to obtain extra unauthorised medication, to conceal her abuse of alcohol on the ward or, to seek attention, even if admitted as by evidence, is scarcely a basis for a finding that the complainant is so incorrigibly, compulsively and universally mendacious that in the absence of some corroborative evidence there is a real or serious risk that the applicant would not receive a fair trial. Otherwise, this background material is a matter to be addressed in the context of the credit of the complainant and of the provisions of s. 7 of the Criminal Law (Rape) (Amendment) Act 1990, (No. 32 of 1990), and the discretion vested in the trial judge by that section.

The sworn evidence of the complainant's daughter taken on Deposition supports what is recorded in the medical – psychiatric notes and records that the complainant from July 2001 onwards, when she was about 44 years of age, reported to healthcare professionals that she had been sexually abused as a child and as a teenager and, had identified at least some of the persons by whom she had been sexually abused. However, there is nothing in the disclosed medical – psychiatric records and notes which suggest that the complainant had at any time made a complaint to An Garda Síochána in relation to this sexual abuse or in relation to the burial of babies or misbehaviour of attending priests at the institution where she spent her childhood years. This is supported by the affidavit evidence of Detective Garda McLoughlin. There is nothing in the disclosed medical – psychiatric notes and records which would suggest that the healthcare professionals had any reason to doubt the truthfulness of these complaints of sexual abuse. This is altogether dissimilar from the situation which pertained in the case of *The Director of Public Prosecutions v. Nora Wall* [2005] I.E.C.C.A. 140.

In that case the court concluded that:-

"The prosecution which did take place inasmuch as it involved the tendering of corroborative evidence by a witness known to be unreliable was thus, in that format, a prosecution that should not have been brought."

The court found that a corroborative witness had made a statement to An Garda Síochána which was untrue. Members of An Garda Síochána who had dealings with this witness during previous investigations had found her to be most unreliable. The officer within the office of the Director of Public Prosecutions charged with responsibility for the file had noted that this witness's evidence should not be accepted as accurate. A decision was taken that this witness should not be called as a witness in the case of the prosecution, but due to a most unfortunate error she was called and gave evidence at the trial. The court also found that there had been significant non disclosure in that case, including the information that this witness had made but had not pursued an allegation of being raped in England and that she had a very approximate and material psychiatric history. In my judgment, there is nothing whatever in the complainant's background in the instant case as disclosed by the medical – psychiatric notes and records, however tragic or sordid, it otherwise might be, which could justify a conclusion that she was so unreliable that this prosecution should not have been brought and, should therefore be stopped.

The disclosed medical – psychiatric notes and records refer to accusations made by the complainant to healthcare professionals, in the period both prior to and subsequent to the date of the alleged rape, that she had been physically abused by her daughter and her son. These allegations were investigated by social workers and the accusations were denied and counter allegations made involving claims of serious alcohol abuse by the complainant. No definite findings appear to have been made as to whether these allegations or counter allegations were true. Perhaps this material might be considered relevant as affecting the credibility of the complainant, - I make no finding whatever in this regard, - but I do not accept that it in any way renders her so manifestly unreliable as a witness that there is a real or serious risk that the applicant could not receive a fair trial and should therefore not be exposed to the commencement of the process.

The three statements made by the complainant's daughter are not evidence of the matters stated in them and, neither is the sworn Deposition evidence, (except in certain circumstances such as, were the witness not to give evidence at the trial due to fear or intimidation). If this listed witness gives evidence, then these statements, if inconsistent with her sworn oral testimony, may be used to cross examine her with a view to establishing a lack of consistency and therefore of credibility. The fact that she indicated that she wished to withdraw these statements for the reasons give by her, does not render her so totally unreliable a witness that she should not be called in evidence in the case for the prosecution. No analogy in my judgment may properly be drawn between the circumstances of this witness and the witness in *Director of Public Prosecutions v. Nora Wall* (above cited).

At para. 17, his replying affidavit sworn in these judicial review proceedings on the 4th June, 2008, Detective Garda McLoughlin swears that to the best of his knowledge there are no notes relating to the complainant from the psychiatric services in respect of the years 1978 to 2001 inclusive. Though the applicant's legal advisers clearly carried out a most comprehensive and even minute examination of the medical – psychiatric notes and records disclosed to them by the respondent on the 2nd December, 2007, it was not suggested to this Court that there was some indication in these notes and records to the contrary. Neither is there any such indication in any of the other documents disclosed, such as, the statement of the Consultant Psychiatrist made on the 20th November, 2007, the statement of the general medical practitioner made on the 20th November, 2007, the Report of the psychologist dated the 24th May, 2006, the statement of the Community Mental Health Nurse and the statement of Senior Social Worker Adult Mental Health. This is a matter which the applicant's legal advisers may pursue further at the trial and, the trial judge has adequate powers to deal justly and properly with issues of disclosure and non-disclosure. In my judgment as the matter now stands it is neither necessary nor practicable for An Garda Síochána to pursue this matter any further.

Early complaint and the results of forensic examination and gynaecological medical and physical examination, are simply aspects of the evidence in a rape trial which can go to the strength or weakness of the prosecution case. Some or all of these matters are very frequently absent and they are not in any sense necessary to sustain a fair prosecution. Evidence of an early complaint by an alleged victim goes towards establishing consistency and therefore credibility. Material derived from forensic, medical, physical and gynaecological examination is capable of providing corroboration of the evidence of a complainant and a negative finding is of undoubted assistance to an accused person. In my judgment, if there was a duty on An Garda Síochána in the circumstances of the instant case, to carry out a forensic examination of the bed, bed linen and night attire and, to take all reasonable measures to ensure that the complainant submitted herself to physical and gynaecological examination, that obligation existed just as much prior to, as subsequent to the disclosure to the Solicitors for the applicant of the medical – psychiatric records and notes on the 2nd December, 2007.

The existence of a duty on the part of An Garda Síochána to seek out, so far as is necessary and practicable, evidence

which might realistically and, not to just remotely, theoretically or fancifully, afford an applicant a real opportunity of rebutting the prosecution case, could not depend upon whether a complainant appeared to be a reliable, not so reliable or, a totally unreliable witness. I am satisfied on the facts stated on oath by Detective Garda McLoughlin in his affidavit and, not challenged with appropriate affidavit evidence by the applicant, that the operational decision taken in the instant case by An Garda Síochána, not to carry out a forensic examination or to insist upon the complainant submitting to a medical, physical or gynaecological examination was realistic, reasonable and rational. The fact that the complainant did not complain until Monday afternoon, and the fact that she did not follow the advice of her general medical practitioner to undergo a formal sexual assault examination remains. The fact that her failure to complain about the alleged rape to An Garda Síochána for 41 days resulted in there being no forensic or medical evidence remains. The weight to be attached to this evidence and to any explanations offered is entirely a matter for a jury properly directed. In my judgment these aspects of the evidence do not assume any greater significance because the disclosed medical – psychiatric notes and records may enable it to be established that the complainant was deceitful and manipulative on occasions during the course of her medical treatment and, that she had informed the health care professionals that she had been sexually assaulted as a child and as a teenager. Neither do they assume any greater importance, because she delayed in complaining about the alleged rape, because she did not follow the advice of her doctor to undergo a sexual assault examination, because her daughter, – for a time at least – continued to live with and have sexual relations with the applicant or, because the complainant has a long history of alcohol abuse and psychiatric illness,. None of these matters render the operational decision of An Garda Síochána a breach of their duty to take realistic and rational steps to seek out and to preserve all important evidence regardless of which way it points.

I find that there was no requirement for An Garda Síochána to re-interview and take further statements from the complainant and from her daughter concerning the statement in the Psychologist's Report of the 24th May, 2006, that the complainant had informed her that her daughter had overheard her say, "I'll tell [daughter] if you don't stop" and had heard the applicant reply, "we will keep this our little secret". This Report is not included in the Book of Evidence, but was properly disclosed to the defence. This assertion does not appear in the complainant's statement to An Garda Síochána or in any of the three statements made by her daughter or, in her daughter's evidence taken on Deposition. The prosecution does not intend to use this material but it is open to the defence to make whatever use (if any) of it they consider proper. An Garda Síochána do not have any documents or notes from the Rape Crisis Centre, nor is there any indication that any such exist. Neither do they have the mobile telephone photographic footage stated in the medical – psychiatric notes and records to have been taken by the complainant's son of an alleged incident in which the complainant fractured her wrist or her hand. If the defence consider that these matters are important and should be pursued, it is open to them to make application to the trial judge who can make appropriate orders. As the applicant denies that the alleged incident occurred at all, this issue could only go to credit.

The comment referred to in the medical – psychiatric notes and records as having been made by the complainant's foster mother to a senior social worker that she wondered whether the complainant was all mixed up and making allegations that related to the past, is no more than mere surmise. It does not and could not amount to an evidential basis for a finding that the complainant was confused in her evidence or was fantasising. I find that there was absolutely no obligation on An Garda Síochána to interview and take a statement from this woman. Should they wish to pursue it, there is no legal inhibition to the defence interviewing her and calling her as a witness.

Whether anything contained in the medical – psychiatric notes and records is sufficiently relevant to be admissible in evidence as supplying a possible motive for the making of a false allegation of rape against the applicant by the complainant, is a matter essentially for a ruling by a trial judge. If it can be established that the complainant, prior to the alleged rape, had expressed dislike for the applicant or annoyance or anxiety that her daughter was meeting the applicant as his girlfriend, it remains open to debate as to whether such facts could supply a motive for making a false allegation of rape and, as to what weight (if any) should be given to such possible motive. In my judgment, nothing indicated by the applicant amounts to *prima facie* evidence of *mala fides* or of malice on the part of the complainant.

In my judgment, having made full disclosure of the medical – psychiatric notes and records to the defence, there was no obligation on An Garda Síochána to re-interview the complainant, her daughter, her son, or any other witness. I am satisfied that there is nothing in the extracts from these medical – psychiatric notes and records placed before this Court by the applicant, which would require that some aspect of the evidence be re-investigated by An Garda Síochána or the decision to prosecute be re-assessed by the respondent.

CONCLUSION

In my judgment, neither individually nor collectively, could the pleaded matters give rise to a real or serious risk that the applicant would not receive a fair trial.

CASES REFERRED TO IN ARGUMENT

D.P.P. v. Nora Wall [2005] I.E.C.C.A. 140.

C.C. and P.G. v. Ireland, The Attorney General and The Director of Public Prosecutions [2005] I.E.S.C. 48.

McFarlane v. D.P.P. and Others (Unreported, Supreme Court, 7th March, 2006).

K.M. v. D.P.P. [1994] 1 I.R. 514.

Braddish v. D.P.P. and Another [2001] 3 I.R. 127.

Dunne v. D.P.P. [2002] 2 I.R. 305.

D.K. v. D.P.P. [2006] I.E.S.C. 40.

O'Flynn v. Clifford and Others [1998] I.R. 740.

Scully v. D.P.P. [2005] 1 I.R. 242.

P.G. v. D.P.P. [2007] 3 I.R. 39.

O.H. v. D.P.P. [2007] I.E.S.C. 12.

B.F. v. D.P.P. (Unreported, High Court, 15th June, 2007).

Bowes and McGrath v. D.P.P. [2005] 2 I.R. 25.

H. v. D.P.P. [2006] I.E.S.C. 55.

J.B. v. D.P.P. (Unreported, Supreme Court, 29th November, 2006).

P.L. v. Buttimer [2004] 4 I.R. 494.

J.O'C. v. D.P.P. [2000] 3 I.R. 478.

Noonan (aka, Hoban) v. D.P.P. (Unreported, Supreme Court, 27th July, 2007).

D.C. v. D.P.P. [2005] 4 I.R. 281.

P.T. v. D.P.P. (Unreported, Supreme Court, 31st July, 2007).

Healy and Dodd v. D.P.P. (Unreported, High Court, 30th May, 2005).

O'Donnell v. Corporation of Dunlaoghaire [1991] I.L.R.M. 301.

Folan v. D.P.P. [1989] I.L.R.M.

Z. v. D.P.P. [1994] 2 I.L.R.M. 481.

State (McCormack) v. Curran [1987] I.L.R.M. 225.

B.T.F. v. D.P.P. [2005] 2 I.R. 559.