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Neutral Citation Number: [2007] IEHC 116

THE HIGH COURT

JUDICIAL REVIEW

[2005 No. 1344 J.R.]

BETWEEN

J. A.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of the Honourable Mr. Justice John MacMenamin delivered the 30th day of March, 2007.

This judgment was delivered on the same day as that in *C. O'B. v. DPP* [2005 No. 1242 J.R.] and should be read with reference to that decision.

Introduction

1. The decisions of the Supreme Court in the cases *P.M. v. The Director of Public Prosecutions*, The Supreme Court (Unreported, 5th April, 2006) and *H. v The Director of Public Prosecutions*, The Supreme Court (Unreported, 31st July, 2006), marked a further, and significant development in the evolution of the jurisprudence relating to delay in cases involving allegations of sexual assault on young persons. These decisions, and particularly the latter, have been followed by a number of others where the principles therein identified have been applied and certain nuances of interpretation identified. The effect of both decisions however, is a marked simplification of the process in which a court of first instance must now engage in cases of this type and a refinement of much of the earlier, and more complex case law.

2. Consequent on these more recent authorities one area of particular focus for the courts must now be to assess the degree of prejudice alleged by an applicant accused of offences in which there has been a considerable elapse of time. The simplified test which now to be applied was set out by Murray C.J. in *H. v. The Director of Public Prosecutions*:

> "…whether there is a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay. The test is to be applied in light of the circumstances of the case".

The Chief Justice added:

> "Thus the first inquiry as to the reasons for the delay in making a complaint need no longer be made. As a consequence any question of an assumption, which arose solely for the purpose of applications of this nature, of the truth of the complainant's complaints against the applicant no longer arises. The inquiry which should be made is whether the degree of prejudice is such as to give rise to a real or serious risk of an unfair trial. The factors of prejudice, if any, will depend upon the circumstances of the case".

He concluded:-

> "There is no doubt that difficulties arise in defending a case many years after an event. However, the courts may not legislate, the courts may not take a policy decision that after a stated number of years an offence may not be prosecuted. Also, as the legislature has not itself established a statute of limitations that itself may be viewed as a policy of the representatives of the People. Thus each case falls to considered on its own circumstances".

3. Kearns J. observed in the case of *C.K. v. The Director of Public Prosecutions*, Supreme Court (Unreported, 31st January, 2007) that the decision in *H. v. The Director of Public of Prosecutions* does not establish the prohibition:

> "that if any degree of prejudice is established, that a trial must automatically be prohibited, given that there is ample judicial authority for the proposition that prejudice arising in certain circumstances may be overcome or countered by means of appropriate directions or warnings from the trial judge…"

4. Either the ability of an accused to defend proceedings has been compromised to such a degree as to be incapable of rectification by appropriate directions or warnings of the trial judge or it has not. The weighing of this, sometimes finely balanced scale, will depend on fact and circumstance. The court must assess whether an applicant has discharged the onus of establishing, on the balance of probabilities, that he has been prejudiced by the consequences of delay to the extent that there is a real risk of an unfair trial. If that question is answered affirmatively, an applicant must further satisfy the court that such prejudice is of a degree or type which cannot be overcome or countered by appropriate directions or warnings to the jury to be given by the trial judge. As was pointed out in the decision of the Supreme Court in *C.K.*, only if an applicant succeeds in both respects is he entitled to an order of prohibition. These evidential burdens therefore are of particular importance and lie on the applicant.

5. One of the factors to which the court must have regard is whether, having regard to the elapse of time, "islands of fact" can be identified and provide an evidential framework within which these issue can be tried. As a corollary however, the fundamental consideration of the presumption of innocence cannot be misapplied so as to permit any and every circumstance which has changed as a consequence of elapse of time to be identified as one of "prejudice" to the accused. Prejudice must therefore be objective, specific and actual. "Possible" prejudice cannot be elided into "probability" in a process of false taxonomy by an applicant for judicial review. It will be insufficient also for an applicant to seek prohibition of the basis of mere hypothesis, imputation or a tendentious assertion as to evidence which an absent witness might, possibly, have given without establishing a substantive evidential basis or, a demonstrable very close linkage materiality to the allegations. Changed circumstances by reason of elapse of time do not, ipso facto constitute actual prejudice. Proximity or remoteness of apprehended prejudice to the alleged *'res gestae'* are considerations.

6. There must be a threefold identification of (i) the degree of prejudice, (ii) in the context of the right to a fair trial, and (iii) the circumstances of the case. While it may be intellectually attractive to seek to categorise prejudice into a number of discrete subdivisions (primary, secondary, tertiary) varying in gravity, the process must be essentially a practical one reliant in particular on context and circumstance. It will not always be possible to draw a "bright line" of distinction. But one fundamental dividing line, clearly mandated, is whether the prejudice is irremediable or whether it may be dealt with by warnings and directions by a trial judge.

Mere assertion, or subjective apprehension cannot constitute true prejudice. It would then become a purely "relative" concept. The ingredients and the effect must be therefore determined objectively.

7. Finally, it is only in exceptional circumstances that superior courts should intervene to prohibit a trial taking place. An applicant who seeks such relief carries the onus of establishing, on the balance of probabilities, that there is a real risk he will not receive a trial in due course of law in accordance with Article 38.1 of the Constitution of Ireland. It is not the function of any court to assume the burden of deciding whether or not to prosecute the applicant in any individual case. This function resides with The Director of Public Prosecutions (see judgment of Denham J. in *M.K. v. Judge Groarke and The Director of Public Prosecutions* (Unreported, Supreme Court, 25th June, 2002 p.11).

8. Framework
9. This judgment will consider first the issues of actual prejudice raised, and thereafter the allegation of prosecutorial delay. In order to do so, the factual context must first be outlined.

The Application
10. On the 12th December, 2005 the High Court (Peart J.) gave leave to the applicant to seek an order by way of judicial review restraining his trial on seventeen counts of indecent assault. The alleged offences are said to have occurred in the period of the 1st September, 1984 to the 31st August, 1989. The first fifteen charges concern events alleged to have taken place at the Christian Brothers Monastery. Charge No. 16 alleges an offence at F., County C. and charge no. 17 alleges an offence of Address "A", in Dublin.

The Applicant
11. The applicant was born on 21st June, 1946 and is now aged sixty years. He is a member of the Christian Brothers. At the times material he was a mediator between pupils and teachers in the school. He is no longer engaged in teaching work and states that he is currently engaged in caring for his elderly parents.

The Complainant
12. The complainant was born on 8th August, 1971, and in September 1984 entered as a pupil in a C.B.S. School in where the applicant resided, with other brothers, in the monastery attached to the school.

Evidence
13. Three affidavits have been filed by the applicant, two by the complainant (M.O'C.), one sworn by Mr. M.D. a psychologist retained by the Director of Public Prosecutions, one by Detective Sergeant J.M. and one by Detective Garda J.D. who had charge of the investigation. (By reason of the recent developments in case law it is not necessary to deal with Mr. D.'s affidavit in the same detail as heretofore.) The substance of the affidavit evidence will be dealt with in consideration of the particular allegations of prejudice.

It will be helpful now to outline a brief chronology of events, when as can be seen, overlaps with that in the case of *O'Brien v. D.P.P.* referred to above.

14. Chronology

4th April, 2002. The complainant met members of the Gardaí and made a complaint of sexual assault against him when a minor against a number of persons including the applicant. No formal statement was taken but notes were made at this meeting which were made available to the applicant during the course of these proceedings.

22nd July, 2002. The complainant made his first statement of complaint. In this statement he made allegations against two individuals who lived in his locality namely B.C. and W.R.

23rd July, 2002. The complainant made a second statement of complaint. In this statement he made complaint against W.R. and the applicant.

Date unknown between 23rd July

and 13th November, 2002. The complainant made a third statement of complaint. In this statement he made complaints against the applicant J.A. and two other unnamed individuals. This statement (it is accepted) was wrongly dated the 22nd July, 2002.

13th November, 2002. The complainant made a fourth statement of complaint. In this statement he made allegations against a man from Northern Ireland called 'T.', and a man called 'S.'.

27th November, 2002. The complainant made a fifth statement of complaint. In this statement he made allegations against C. O'B., presently a co-accused of the applicant.

27th November, 2002. The complainant made a sixth statement of complaint. In this statement he made complaints against C. O'B.

21st June, 2003. Detective Garda M. and Detective Garda G.C. took a further statement from the complainant. Together with the complainant they attended at a number of scenes where it was alleged that the complainant had been assaulted by J.A., and also scenes where it was alleged that the complainant had been assaulted by C. O'B.

27th June, 2003. The complainant made a seventh statement. In this statement he identified Address "A", where he claimed that one of the incidents involving the applicant occurred.

22nd October, 2003. The complainant made an eighth statement. In this statement he identified the location where the Christian Brothers monastery once stood.

22nd October, 2003. The complainant made a ninth statement. In this statement he clarified the contents of previous statements.

18th March, 2004. The applicant J.A. was arrested and detained. During the course of his detention he was interviewed and denied the allegations made against him by the complainant.

15th April, 2004 The complainant made a tenth statement. This statement related to C. O'B.

31st May, 2004. The applicant furnished a statement to the Gardaí on a voluntary basis.

19th June, 2004. The complainant made an eleventh statement. In this statement he set out reasons why he did not complain earlier.

28th June, 2004. A file was submitted to the respondent.

15th November, 2004. The respondent issued directions, although these have not been specified in these proceedings.

27th November, 2004. The Gardaí met the complainant and put the statement of the applicant J.A. made on the 31st May, 2004 to him.

30th November, 2004 Detective Garda D. called to Address "B", Dublin and meets Mr. M.M. of S. D. C. Ltd. regarding his knowledge of apartments at Address "C".

26th May, 2005. The respondent issued directions to charge both applicants.

27th June, 2005. The applicant C. O'B. was arrested, charged and cautioned. He was released to appear before District Court 46 on 11th July, 2005.

29th June, 2005. The applicant J.A. was arrested for the purposes of charge.

11th July, 2005. The applicant C.O'B. first appeared in Dublin District Court.

20th July, 2005. Evidence of arrest, charge and caution of the applicant J.A. was given before District Court 46.

12th September, 2005. Book of Evidence served in case of the applicant C.O'B.

29th September, 2005. Book of Evidence served in the case of the applicant J.A. He was served with the Book of Evidence and was returned for trial.

11th November, 2005 The case was first mentioned before the Circuit Criminal Court.

14th November, 2005. General disclosure was furnished to the solicitors of the applicant J.A.

22nd November, 2005. A written request was made on behalf of the applicant J.A. for specific disclosure. It was accepted that Detective Garda James M. was unaware of the request until it was averred to by the applicant in these proceedings.

28th November, 2005 The applicant, C.O'B., was given leave to seek an order by way of judicial review.

12th December, 2005. The applicant was granted leave for judicial review.

14. Co-accused
It will be seen from the chronology that the applicant was accused with another man C.O'B., who also brought judicial review proceedings. Counsel for the respondent has informed the court that these two applications were listed and heard together because they concern a common complainant and investigation. The complainant, made allegations against a number of persons. In terms of sequence the first incidents of abuse alleged related to B.C. and W.R. who lived close to his home. Thereafter it is alleged that, during the time he was attending the Christian Brothers monastery he was assaulted by the applicant. The complainant made a number of allegations of having been then involved in sexual contact with a number of adult males in the city of Dublin while still a minor, but having ceased attending school. Apart from the identity of the complainant, and the nature of the complaints and the overlap in the investigation, no new fact has emerged linking the two matters. While there may be a degree of linkage, no satisfactory reason has been given for charging this applicant jointly with C.O'B., when the allegations come within quite a different framework of time and context. The cases must now of course be considered quite separately. The issue of separate trials must be a matter for the trial judge.

Charges in relation to alleged incidents in the Christian Brothers Monastery
15. The first fifteen charges facing this applicant concern matters alleged to have occurred at the Christian Brothers monastery, on dates unknown between the 1st September, 1984 and the 30th March, 1986, a broad time span of approximately 18 months.

16. The complainant states that he was in either first or second year of senior school. He had been suspended from school. He had not met the applicant before. The applicant introduced himself and invited the complainant and a friend over to the monastery for soup and sandwiches at lunch time.

First alleged incident
A week later they met again. The complainant described an incident between 4 and 5 o'clock in the evening, and before 6 o'clock mass, when he called alone to the monastery. He was let in by the applicant and went into a room described as resembling a large sitting room with a coffee table with chairs around the wall. The complainant described the room as having no television, but with green velvet curtains. The curtains in the room were drawn and the light was on. When he went in the applicant got him a cup of tea and sandwiches or biscuits. The complainant described the applicant then engaging in intimate fondling and manual non-penetrative sexual assault for approximately 10 minutes.

Second alleged incident
17. A second incident was described, occurring in the same room a couple of weeks later, again involving the form of sexual contact. This incident was described as taking 5 to 10 minutes.

The complainant alleges that in total he was abused on approximately 15 to 20 occasions by the applicant in the Monastery either in the room described, or in a room beside it which was not described.

Age of Complainant
18. It is alleged that the abuse occurred from the time the complainant was aged 13 years. Thereafter it is said (though it is somewhat unclear from the complainant's statement) that the applicant left the monastery for a couple of months to go to L. Although there is reference to abuse occurring on two other occasions in the complainant's statement of evidence, it would appear that these occasions referred to alleged assaults at the other locations in question.

Prejudice alleged
The areas of alleged prejudice will now be outlined, first sequentially, and then in accordance with the particular significance of a number identified.

(i) Premises demolished
19. The monastery premises in which these 15 incidents are alleged to have occurred were demolished. The applicant states that the two rooms in question were never locked, and that there were a large number of people going to and fro through them without warning. This is not controverted in any evidence adduced in these proceedings. His recollection is that one of the rooms had two separate entrances. People calling at the monastery were regularly brought into either room. The brothers teaching at the school also regularly used the rooms during free classes. It is averred that the area was particularly busy between 4 p.m. and 6 p.m. None of these averments are controverted either.

20. Counsel for the applicant Mr. F.McE. SC submitted that the layout of the reception rooms referred to, and the constant through passage of persons militates against the credibility of the allegations. For the purpose of any trial it would be almost impossible for the applicant to establish this proposition, given that the rooms are no longer available for inspection, and that persons who frequented these room(s), and who would have been in a position to give evidence in respect of their constant use are no longer available to the applicant. The applicant contends that an inspection by a jury of the monastery building and the rooms referred to by the complainant would have demonstrated the unlikelihood of the incidents alleged to have occurred there.

(ii) Absent witnesses
21. Next it is alleged that a number of potential witnesses are no longer available to the applicant. These are said to be:

> a. Many of the Brothers with whom the applicant worked during the relevant period who are now deceased. These are named as Brother G.M., Brother C.K., and Brother K.E.;
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> b. Other Staff members, Brothers, and visitors to the monastery who frequented these rooms, and who would have been in a position to give evidence, are said to be no longer available. The applicant contends that such witnesses could also have substantiated the contention that the locus was one which persons passed through frequently and unannounced at irregular intervals.
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> c. The monastery housekeeper, whose identity is not now known to the applicant. He cannot recollect her name and does not know whether she is alive, and if so, her current whereabouts. The applicant avers that this woman had unrestricted access to the rooms on which the offences are alleged to have occurred. He further alleges that the she came in and out of the room of her own accord on occasions when the applicant was present in the rooms.
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> d. The cook in the monastery, Mrs. T. who also frequented the reception rooms and might have given evidence as to the implausibility of such a locus for the occurrence of sexual assault is now deceased. She died on the 4th December, 2004. The applicant avers that he recalls numerous occasions when Mrs. T. brought tea into the room for the applicant and other persons there.
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> e. P.C. and T.B. were frequent visitors to the applicant in the receptions rooms of the monastery during the period. These two men were homeless and spent considerable amounts of time in the monastery. They had access to the reception rooms where the offences are alleged to have occurred. The applicant asserts these two individuals might have been able to offer exculpatory evidence or, at least evidence demonstrating to a jury the inherent unlikelihood of the alleged offences occurring in these rooms.
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> [It was not disputed that the death of a witness could in this context constitute prejudice.]

(iii) Contemporaneous records unavailable
22. Contemporaneous records which existed from the time are no longer available. One particular category cited is the school attendance record of the complainant which cannot be located. While the Gardaí have obtained his examination results counsel for the applicant submits that the school records are of particular importance, as they would permit a jury to identify the dates upon which the complainant did or did not attend school which might have enabled the applicant to narrow the timeframes in which it is alleged the offences occurred. It is said that this is prejudice of particular gravity, given that the charges are broad in nature and cover such an extensive period as to be lacking in precision. It is further stated that the absence of such records demonstrates the difficulties facing the applicant in attempting to obtain other contemporaneous documentation which might furnish him with a defence. It has been observed earlier that the applicant was suspended from school at one point. By inference he was not always a regular attender.

(iv) Uncertain timescale and multiplicity of charges
23. The applicant submits that the complainant has given different dates as to when the alleged incidents are alleged to have occurred. In the criminal proceedings impugned herein, the complainant states that these occurred between 1984 and 1989. In a letter of claim from the solicitors acting on behalf of the complainant in civil proceedings, (unknown to the Gardaí until these judicial review proceedings), it is said that the incidents occurred between 1983 and 1985. In a plenary summons issued on behalf of the complainant on the 5th June, 2003, it is claimed that the incidents occurred between 1984 and 1986. Furthermore, in a report exhibited in the affidavit of M.D. sworn on the 27th April, 2006, the complainant informed Mr. D. that he was sexually abused by the applicant between the ages of 13 years and 15 years, and that the abuse ended when the applicant went to L. It is said that this is inconsistent with what the complainant told the Gardaí where he alleges that the alleged abuse occurred between the years of 1984 and 1989 and that incidents of abuse occurred both before and after the applicant went to L.

(v) Non-Disclosure by the complainant
24. Counsel submits that the failure of the complainant to disclose to the Gardaí, over the course of numerous statements, that he had initiated civil proceedings, rings discordantly with his protestations that the complaints were not about "money or prison". It is

claimed that this lack of candour by the complainant is a relevant factor in the consideration of the risk of an unfair trial.

(vi) Presence of co-accused on the Book of Evidence
25. This matter has already been briefly outlined. The offences alleged against the co-accused while similar in nature are, it is claimed, more serious in terms of gravity, and allegedly committed over a completely different time frame, subsequent to those alleged in the instant proceedings. The applicant states that he does not know the co-accused, does not understand why he is being treated as a co-accused. If the matter proceeds to trial as presently constituted the applicant claims he will be prejudiced by being linked with another accused.

(vii) Pre-trial Stress
26. The applicant states that since he became aware of the allegations he has become increasingly worried and anxious. He avers that his anxiety has been exacerbated by his apprehension that the lapse of time has rendered him unable to adduce evidence of an exculpatory nature to corroborate his denials.

(viii) Absence of procedural safeguards
27. The applicant submits that there are no procedural safeguards capable of application in the course of the criminal trial process which adequately address the prejudice which the applicant now confronts. There is no direction which a trial judge can give to a jury which will cure the injustice opened up by the failure of the prosecuting authorities to make thorough investigation to establish "islands of fact" and no direction in law which can set at nought the difficulties created by the absence of witnesses and records which might be relied upon to test the credibility of the complainant.

(ix) Absence of other alleged perpetrators
28. The distinction between core witnesses and evidence, and peripheral material is well illustrated by a further contention advanced on behalf of the applicant which can be dealt with immediately.

It was submitted that the absence of two other alleged perpetrators, B.C. and W.R., deprived the applicant of the opportunity of interviewing such witnesses, and thereby obtaining evidence which might raise issues as to the credibility of the applicant. Such a proposition is to base one speculative hypothesis upon another. Neither the court nor any of the parties are in a position to make any determination (or even indication) as to the innocence (or guilt) of these two deceased persons, now no longer alive to vindicate their good name. The court is clearly in no position to speculate on the relevance of any evidence which such persons might have tendered, or on the credibility of such hypothetical evidence. Thus the absence, *per se* of these potential witnesses is no basis for an order of Judicial Review. The onus of proof is not discharged.

Further Consideration of the "monastery charges"

(i) & (ii) The alleged premises demolished/Monastery witnesses unavailable
29. These factors will be considered together as they are integrally linked.

No plan or map of the premises has been provided in the book of evidence. The Gardaí have obtained a plan of the general area in which the school was located from the Valuation Office. However, this in no way illustrates the interior of the alleged *locus in quo* or the interior of the buildings generally. The complainant has described one room by reference to curtains and furniture. He has not given any description of the other room or its furnishing. The applicant does not assert he has any absence of memory of the rooms in question. Nor does he say there are *no* other witnesses available to him such as other members of the congregation who resided or taught in the monastery. While certain named persons are deceased, it is not said they were the *only* persons who can testify as to the interior structure and arrangements in the monastery. There is no evidence that this material has been sought either by the Gardaí, or the applicant, from living witnesses who could testify on this issue. Save as earlier identified, the "other staff members and visitors" are not named. No evidence is adduced as to what steps, if any, the Gardaí or indeed the applicant have taken to identify the former monastery housekeeper by name. This information is surely procurable. It is not explained in what precise circumstances, P.C. or T.B. might have had access to the rooms in question. It is not established that the applicant cannot by alternative means, deal with those issues. If the offences occurred, they did so in private with no witness actually present, in allegedly within a period of 10 or 15 minutes.

30. Counsel on behalf of the respondent Mr. M.O'H., B.L. relied strongly on the decision in *J.B. v. Director of Public Prosecutions* (combined cases [2004] 1033 J.R. and [2006] 81 J.R. The High Court Unreported 21st December, 2006). In that recent case Quirke J. declined prohibition in circumstances where a number of witnesses had died and where a building complex containing an apartment where a number of offences were alleged to have occurred had been demolished.

31. There are, however, factual distinctions between these facts in *B.*, and those in the instant case. In *B.* the applicant simply contended that he had friends who visited him at home at evening time, and that it would now be difficult to contact such persons whose recollection would not be reliable. He identified a witness who worked in a warehouse where it was alleged another one of the offences was committed who was now deceased.

32. But in *B.* the vast majority of the offences allegedly occurred in the undeniable privacy of an apartment in a complex. It would not be possible to enter such apartment without the consent of the owner who was the accused.

Here different considerations arise, specifically in the case of the demolished premises and the deceased cook who, in the context of the nature of the more specific allegations is of relevance, as to preparing, or cleaning away meals even having regard to the complainant's account of the applicant himself giving him tea and sandwiches.

33. A consideration of whether a potential line of defence exists must be seen in the context of facts which are sought to be proved in the book of evidence and such additional evidence which has been adduced before the court in the judicial review proceedings. No specific line of defence was indicated in an interview between the applicant and the Gardaí. But is the unlikelihood of the alleged offences having been committed in these rooms in the monastery a reasonable foreseeable indeed inevitable line of defence? Would the absent witnesses or the nature of the locus in quo have been of relevance in dealing with this issue?

(iv) Multiplicity of charges
34. The answers to these questions must be seen in the context of the multiplicity of allegations made in relation to alleged incidents in the monastery. There are fifteen such charges. Just two are described in any detail, summarised earlier. Those remaining are to be evidenced merely by the applicant identifying their total number and giving a generalised, or generic description of the circumstances. In total, the treatment of the balance of these occupies no more than eight lines in the complainant's statement. Yet upon those eight lines a trial judge and jury would be *asked to individually* adjudicate the guilt or innocence of the applicant/accused on each

charge. No 'external' isolated identifying features are identified in relation to these other allegations. They are not fixed in terms of time other than within general parameters set in the charges. The incidents are stated to have occurred in one or two separate rooms. No time of day or night is identified. There are no specific incidents or circumstances outlined which might permit an accused to call witnesses or adduce evidence. Pre-eminently therefore, the balance of the thirteen alleged incidents are occasions of "bare assertion and denial" where the evidential threshold, if crossed in sworn evidence at trial would be low.

35. The applicant has stated that while he has a good recollection of the complainant he is unable to recollect with any degree of precision to circumstances of his whereabouts, his specific movements, or persons who may have been present during the periods which the alleged offences are alleged to have occurred. It is not possible to fix in time the two more alleged offences more specifically described, or to correlate them in sequence to any of the other charges in this category. It is difficult then to identify which, precisely, of the 'monastery charges' might be identified as those relating to the more incidents more specifically described. Thus a process of conviction or acquittal in relation to, or amongst the fifteen charges, were they all preferred, would be entirely a matter of random selection by a jury, a judge charging such jury, or entertaining an application for a direction at the completion of the prosecution case of 'no case to answer'. While the multiplicity of charges is not a determining factor in this case it is an unavoidable feature, to be seen in the context of the meagre evidence to be adduced and intended to support these other thirteen charges.

36. On behalf of the respondent counsel has contended that it has not been demonstrated that this line of defence has been entirely lost to the applicant. He contends that the timing of the incidents was at the instance of the abuser, that it has not been shown that no other colleague could testify on the question of access to the rooms. It is contended that the position in not analogous that which arose in *P.O'C. v. Director of Public Prosecutions* [2000] 3 I.R. wherein the complainant graphically described a specific incident such as a key turning in the lock of a door. There the absence of such a clear piece of evidence was held to be an issue of grave prejudice. While certain of the Christian Brothers have died, it has not been averred that all of those in the monastery are now deceased. It is accepted that Mrs. T. died in December, 2004. Nothing the Gardaí could have done would have prevented this unfortunate event occurring prior to the trial.

37. It has been pointed out elsewhere that it is the duty of those charged with the collection of evidence to identify that evidence which both favours the complainant and the accused. The Gardaí have sought to adduce certain additional evidence, as to events in the life of the monastery and its closing. But there is none whatsoever as to the "routine" in the monastery. The question of access and throughput to the room is necessarily and foreseeably a central issue, and a line of defence open to the accused in the context of this case. To assert that the timing of the incidents is at the instance of the abuser would be to negative the presumption of innocence, which was re-emphasised in the case of *H. v. Director of Public Prosecutions* as of fundamental importance. The absence of specificity in the charges, and in the evidence on most of the alleged incidents (as distinct from *P.O'C.*) is precisely the point which is identified as being prejudicial to the accused in the context of this case. Were the premises in existence, were there a plan or photographs of the interior, were there other witnesses to testify as to the use of the rooms, such issues could be addressed. The fundamental issue now relied upon by the accused is the likelihood, or otherwise, of the offences having occurred in the context of the usage of the rooms and (impliedly) the recollection of the complainant as to the location. It is to be assumed at this stage that in the light of the eleven statements obtained from the complainant and others from elsewhere, all material evidence which is available and to be adduced has now been collected in the book of evidence.

It is now necessary to deal briefly with other allegations of prejudice before reverting to these substantial questions below, at para. 43 of this judgment.

(iii) Contemporaneous school records
38. The issue here has already been outlined and does not require further explanation below. The effect of the absence of these records is uncertain, in the absence of evidence from the complainant as to whether he was attending school at a material time. The existence of examination records which may be of little relevance. It is unclear whether the allegations are dependent at all on whether or not the complainant was actually attending classes in the school at the time.

(v) The non-disclosure of civil proceeding
39. While this is advanced as an issue of prejudice. I am unable to agree. It should, more appropriately be treated as a matter of credibility and may be dealt with in cross examination; and by warnings from a trial judge.

(vi) Absence of co-accused on Book of Evidence
40. This is a matter for the trial judge. An application for a separate trial is pre-eminently nor a matter for judicial review.

(viii) Pre-trial stress
41. While this was undoubtedly a factor identified in *P.M. v. Malone* (cited earlier), no specific psychological or medical evidence has been adduced in this case. Being uncontroverted, however, it is a matter to be placed in the balance in the issue of prosecutorial delay (dealt with later).

(viii) Absence of procedural safeguards
42. This is a general complaint and relates to the adequacy of any warning or direction, dealt with in paras. 43 to 46.

Decision on monastery charges
43. This judgment has sought to identify matters which go to the core of the defence on the one hand, (true prejudice), and more peripheral issues on the other. The following linked factors are especially noteworthy, the demolition of the premises (and its consequences), the absence through death of Mrs. T., the cook, the multiplicity of charges and the absence of any evidence as to usage of the rooms or the 'routine' of the monastery. There is, as a starting point, one incontrovertible and objectively indisputable fact: the monastery building is no longer in existence. The Book of Evidence includes no plan of the rooms in question, either formal or informal. The applicant's core defence is the improbability of one, two or all of the allegations having occurred as described. There are no photographs. Nor is there any but the most tangential evidence as to how the rooms connected with the remainder of the monastery buildings. There is no other evidence as to the usage of, or access to the rooms, other than that of the applicant.

44. While certain elements of alleged prejudice can indeed be dealt with by cross examination or by direction, there are central questions which arise here. First, would a jury obtain a fair mental or physical picture of the premises and context in which it is alleged this multiplicity of offences were allegedly committed? Second, are such issues essential to the fair trial of the applicant? When placed in such simple terms I find the answer to the first question must be in the negative. It is impossible to conceive how these lacunae could be dealt with by any charge, direction or warning of the trial judge. While not *in itself* a core issue, the absence of Mrs. T. is of importance in relation to the two most specified incidents (paras. 16 and 17) in that, by inference at least, she, as cook, might foreseeably have been engaged either in the preparation, or removal of any meal from the room.

45. While the incident in which there is mention of food is but one of those outlined, is impossible too to ignore the insubstantial nature of the intended evidence on what was described earlier as the "other thirteen charges." In the context of this case a further question arises,: would a jury have any adequate evidential criteria to distinguish any one of these, particular, charges from the others? Each of these is alleged to have occurred at times and dates unspecified. It is not suggested that the complainant met any other witnesses either before or after the alleged occurrence. There is no linkage or connection between what allegedly occurred and any other independent event or happening. Unlike many other cases of this type where there are a multiplicity of charges, it is entirely possible that the outcome of the first two charges here might have a determinative effect on the balance, without any opportunity for distinction, identification or the establishment of independent supporting facts, on charges, capable of discrete evaluation in evidence and verdict.

The consequence is that, in relation to these charges, important evidence on these central issues is unavailable. I find it impossible to conceive of a charge or warning from a trial judge which could remedy this prejudice. It follows there must be a real risk of an unfair trial on these charges.

46. The court will make an order of judicial review by way of prohibition in relation to the fifteen monastery charged.

The alleged incident at F., Co. C.
47. An incident alleged to have occurred in F., Co. C. is dealt with in a somewhat more specific fashion by the complainant in the Book of Evidence. It is timed to have occurred in the summer of 1985 between the 3rd day and 10th day of August. (The complainant's birthday, was the 8th August). The complainant recollects a summer trip to F. A birthday party, supervised by the applicant and a student Christian Brother named J.T. was held for him in a mobile home in which he, and "seven to eight other lads", all from his area, were accommodated in a caravan park. He describes travelling to C. in a minibus and staying in a mobile home there. It was located near a pub called D., about ten minutes from the beach. The complainant describes the locale by reference to persons living in the neighbourhood.

48. He states that during the course of this trip, the party went on a hill walk. There was a rush to get to the top. The hill had loose shale. He was one of the last in the party and making his way up the hill beside the applicant when he and the applicant stopped for a rest behind a large rock. They sat down facing down the hill having attained a considerable height from ground level. The complainant describes an incident occurring involving non-penetrative sexual contact. This incident is described as having occurred precisely, on the third day of the holiday.

49. A Brother B. states in the Book of Evidence that he was aware that Brother A. used to bring teenagers down to a mobile home on a campsite in Co. C. and times his residence at a house in Dublin as being up to August 1989.

50. A further witness is J.T., who in 1985 was a student Christian Brother. He states that he remembers being on such trip as he had only been once in F. He was asked to attend by the applicant. He times the occasion as having being one in which the applicant was resident in the Christian Brothers monastery working with young people. He says the trip to F. was in the summer of 1985, and recollects the party all travelling there in one minibus. His memory was that five boys travelled with the two Christian Brothers. While Mr. T. (as he now is) recollects staying in a mobile home, he does not recollect the names of any of the boys who were on the trip. He does, however, recollect a birthday having occurred and a cake being brought out with a candle. He does not however, describe any incident involving the party going hill walking.

51. In the course of his affidavit sworn in these proceedings the applicant points out that Mr T. does not refer to any hill walk where the complainant states an indecent assault upon him is alleged to have occurred. While the applicant asserts his innocence, and denies having committed any of the offences in question, the affidavit does not actually deal with whether he himself has any recollection of such a hill walk. He does, however, time the trip as having occurred between the 18th day and the 14th day of August, 1986 rather than the summer of 1985 contrary to Mr. T.'s recollection. The applicant also states that he is unable to recollect "with any degree of precision the persons who were present and the specific movements of the group during the course of the week". The affidavit is carefully phrased in this regard, in that the applicant does not swear that he has *no* recollection of the persons present during the week, or any steps he has taken to ascertain who was there. While he swears that he does not recollect the specific movements of the group, he does not depose at all to any actual recollection of whether a hill walk occurred.

52. In a further affidavit the applicant refers again to the incident and to his certainty that the trip did not occur in the summer of 1985 but in 1986. He deposes to the effect that he has no way of independently verifying this and is left in a position where his only defence would be his own testimony. Again, the applicant does not say that he has no recollection of a hill walk. He does however, aver that had the allegations been made at a much earlier stage, he would have been able to adduce independent evidence that the trip had not occurred in 1985 but that this is now lost to him because of delay. The owner of the campsite is now deceased. This presumably is a matter either within his own knowledge or alternatively was ascertained in the course of preparing his defence for these proceedings. While it is suggested that the deceased owner of the campsite, Mr. McC. *might* have been in a position to give an account of the movements of the applicant and the group, this is far removed from suggesting that the deceased man was present on any hill walk. It is certainly remote from any suggestion that the evidence of Mr. McC. *would* have been central to any key issue arising in the charge, or any identified core part of the defence. The identification of the year may appropriately be a matter for warning and is an issue of credibility. But it has not been shown to be in itself a core issue to the defence.

53. Decision on F. Charges
Consequently, the court concludes on the evidence that the applicant has not discharged the onus of proof of establishing actual prejudice in relation to Charge Sheet No. 000000 alleging indecent assault against the complainant between the 3rd day of August, 1985 and the 14th day of August, 1986. While the time span in the charge is indeed broad, it has not been shown either that this issue taken in isolation is a core element of a foreseeable line of defence available to the applicant.

54. By way of distinction from the charges relating to the monastery it is not suggested that the locale is in any way altered. The circumstances of the alleged assault are stated to have taken place when the applicant and the respondent were behind a large rock when allegedly the rest of the party had, proceeded ahead up the hill. By way of distinction from the first fifteen charges, it is not contended herein that it is intrinsically unlikely that such an assault might have occurred by reason of the potential presence of, or interruption by, other persons at the *locus in quo*. By way of distinction also from the "monastery allegations" I find the issues of alleged prejudice are matters which can more appropriately be dealt with by appropriate warnings from the trial judge and therefore fall within the category of "lesser prejudice" identified in the judgments of *H. v. Director of Public Prosecutions* and *C.K. v. Director of Public Prosecutions* cited earlier.

Alleged offences at Address "A"
55. The applicant is charged finally that on a date unknown between the 1st day of August, 1987 and the 31st day of August, 1989

he indecently assaulted the complainant at Address "A".

56. The complainant describes his being driven by the applicant to the house in question in either a red Opel or Renault 5 car. He alleges inappropriate sexual contact in the living room of the house. Thereafter it is said that the applicant invited the complainant upstairs to a bedroom at the front of the house. Both got undressed and got into bed. Thereafter the complainant describes a non-penetrative sexual encounter taking place at a time the complainant was a minor. The complainant describes the curtains having been drawn in the bedroom, as there was a person on a ladder outside the window. He speculates that this may have been a window cleaner or a person cleaning the gutters, and that this person may have been present for about five to ten minutes. During this period it is said that both the applicant and the complainant remained quiet in bed. The complainant describes having been involved in this incident for approximately fifteen to twenty minutes and that it would have been shorter but for the arrival of the person who arrived outside with the ladder. It is not suggested however, that any person actually witnessed the assault.

Prejudice alleged
57. The applicant states in his grounding affidavit:

> "At this time I have no recollection of the complainant being present at Address "A"."

It is difficult to avoid the inference that this sworn statement, is somewhat 'open-ended', or carefully phrased. The applicant does not say, but may mean, he has no such recollection whatsoever. But this is not said. The applicant denies that he ever owned a red Opel or Renault although he accepts that he did own a red Peugeot from October 1989 (at a time when he says he was living elsewhere) and not at Address "A".

58. The statement from J.T. referred to earlier briefly deals with this charge. He states that from 1987 to 1989 he lived with the applicant, first in I. and then at Address "A". He was residing there for a period of two years with the applicant. Also present when residing in this house were "a lad from B., a lad from D., who was a student in Trinity College at the time, and a lad from L.". They are individually identified.

59. The applicant in his affidavit states that he believes the names of the other occupants were M.F. and C.A. But he does not relate these names to the descriptions in the previous paragraph. He states that he does not know the whereabouts of M.F. or whether or not he is still alive. He makes no averments as to any efforts made to trace him. No such observation is made at all in relation to C.A. It is not stated that M.F. is deceased or that his whereabouts cannot be ascertained. It is, however, averred that witnesses that may have been resident in Address "A" would not, at this stage have a recollection which would be of assistance to the applicant. The evidential basis for this assertion is not clear. While it was asserted in written submissions that the applicant states that it would be unusual for him to be alone in the house at Address "A", this was not actually stated in affidavit form. This contention is not therefore evidence. It was also said in written submissions that the applicant was unaware of the current whereabouts of both M.F. and C.A. This contention was not reflected in affidavit, where the applicant deposes only that he is unaware of the current whereabouts of M.F. Consequently any contention as to the applicant's lack of knowledge of the current whereabouts of C.A. must be disregarded as being unsupported by actual evidence. The confusion with regard to these matters is entirely understandable in the complexity of the case.

60. The material in the Book of Evidence relates to an offence with allegedly occurred in private within a relatively short period of time. It is not alleged that other persons were in the house at the time. It is not contended that other persons might have had ready access to the applicant's bedroom, or that the room in which the alleged more serious assault took place was a location which was in anyway "semi-public" as opposed to rooms in the monastery. While the applicant's account may indeed contain inconsistencies as to dates, or as to the type of car owned by the applicant, I find these are matters which fall to be categorised as issues for cross-examination.

Decision
61. The questions of prejudice here are ones which again fall into the lesser category which can be dealt with by warnings from the trial judge. The complainant in his account states that when he and the applicant arrived to the house there was nobody else there. He says he arrived because he had been offered either lunch or dinner by the applicant. While there is no specific identification as to time, there is evidence that during the period of the assault a person was working outside as described earlier.

It must be accepted however that a trial on this charge may take the form of assertion and denial, if other residents in the house or witnesses are not called. Had the trial taken place sooner the applicant might have been in a better position to address those issues, but this is not the test to be applied. The Gardaí have not provided a sketch map of the interior of the house. But despite these circumstances the court does not consider that the applicant has discharged the onus of proof of demonstrating that the prejudice alleged goes to the core of a reasonably foreseeable line of defence. It follows that the prejudice falls within the category of material more appropriately dealt with by directions warnings or a charge by the trial judge. Prohibition will not be ordered on this charge.

Prosecution Delay
62. As a separate and discrete issue the court must now consider and weigh whether there has been prosecution delay and consequential prejudice in relation to all or any of the charges in suit.

63. The applicant submits that the earliest date on the statement of charges is the 1st September, 1984, the latest date in the entire range being the 31st August, 1989. Assuming it was possible to have a trial of the applicant within the next term, such a trial would take place in excess of 22 years after the first, and in excess of 17 years after the last of the dates when the offences alleged against the complainant are alleged to have occurred.

64. It is submitted that the prosecuting authorities failed adequately to record the initial complaint of the complainant made in April, 2002. This record consisted of handwritten notes. It is contended that the prosecuting authorities failed to progress the prosecution, given what is now stated to be an absence of multiple perpetrators; did not offer the applicant a prompt opportunity to respond to the allegations against him by the complainant; omitted to seek out evidence which would tend to corroborate the complainant's allegations or the applicant's denials; and failed to carry out a full investigation of the circumstances and the allegations with a view to isolating "islands of fact". It is further pointed out the applicant is co-accused with a person unknown to him as described earlier.

65. There is no doubt that a very considerable period of time elapsed between the 4th April, 2002, and the ultimate arrest of the applicant for a charge on the 29th June, 2005. *Prima facie* there is delay in the prosecution process which is inordinate.

66. Detective Sergeant M., who first met the applicant states that when he first met the complainant on the 4th April, 2002, he obtained an overview of the sexual abuse the complainant alleged, without getting into specifics, and thereafter outlined the role of

the prosecution agencies. He said it would be necessary for the complainant to explain the reason why he did not come forward to report the abuse at an earlier time and that persons who he alleges abused him would be entitled to instigate judicial review proceedings in the nature of which was explained. At the meeting on 2nd April, 2002, the Detective Sergeant states that he took details of allegations of abuse against a number of male persons. He says that the complainant found the meeting very upsetting and that he broke down crying on several occasions. He explained that he would be "guided" by the complainant, thereby allowing as best he could, for free and voluntary evidence of the alleged abuse to be obtained. He sought to do so so that any decision as to the furtherance of his allegations would be entirely the complainant's, own decision, and also so that the process would take place on a timescale of the complainant's choosing, thereby making allowances for the trauma and stress of the process.

67. A number of subsequent meetings took place wherein the applicant furnished statements to members of the Gardaí. The second statement taken (ostensibly, but not in fact, on the 22nd July, 2002), did not contain allegations against the applicant herein. A further statement taken at a date apparently approximate to that did contain such allegations. Ultimately two further statements were taken the latter on the 13th November, 2002.

68. The Garda evidence from Detective M. and D. is that the investigation at the statement taking and at analysis stage, was concerned with identifying various persons whom the complainant alleged sexually abused him, or whom it was alleged were involved in the procurement of boys for sexual abuse purposes. It is said that it was necessary to investigate the possibility of links between the named persons in the locations provided. The Detective Sergeant adds that this investigation into all the named persons and places had to be conducted methodically and professionally to ensure that all evidence, whether proved or disproved, would be obtained and considered. This involved, (with reference to this applicant) a visit to Address "A", the identification of the former location of the monastery, and obtaining explanations as to why the applicant had not reported the abuse earlier, which issues are addressed in statements of the 27th November, 2002, and the 19th June, 2004.

69. The affidavit of Detective Sergeant M. contains a number of references to the investigation of a "ring of persons" engaged in the procurement of boys for sexual abuse. It was stated that it was necessary to obtain details of the links between such persons. Be that as it may, it was accepted only in the course of these proceedings that no such allegation stood against the applicant herein.

70. While this issue is more appropriately for the trial judge, no satisfactory explanation has been furnished as to why the applicant is currently been co-charged with another person, whose alleged offences are in no way related to those concerning the applicant. It is not deposed that there was evidence that the applicant herein was involved in any "ring", nor that any such allegation was a source of delay in the investigation so far as the applicant himself was concerned. It was inappropriate that this explanation should have been used as a justification for the delay which did occur, in relation to the prosecution of the offences against this applicant, the subject matter of which are entirely separate and distinct from allegations against others.

71. It may well tell against the complainant's credit that he did not disclose to the Gardaí that he had previously instructed his solicitors to write a letter of claim seeking compensation, particularly in the light of his comments in his statement dated the 19th June, 2004, where he states:

> "In taking this case it is not about money or prison. If I got money I would obviously use some to enhance my life but I would give a lot away to charity."

72. It is a legitimate criticism to state that it was only on the 19th June, 2004, approximately two years and two months from the date of the applicant's first formal complaint, that he was asked specifically to deal with the issue of his delay in making allegations against the applicant to the Gardaí, particularly so in light of the fact that he had been informed this was a probability as early as his first interview with the Gardaí.

73. *Prima facie* there was a delay between the 27th November, 2002 and March, 2003, when the statements obtained by Detective Sergeant M. were handed over to Detective Garda D. who has sworn an affidavit in these proceedings also. The applicant complains as to delays which were taken which took place in the obtaining of statements in the year 2003, from another alleged perpetrator, and family members of the complainant. It is further pointed out, correctly, that statements were taken from other members of the Christian Brothers as late as 3rd February, 2004, (Brother J.B.) and 21st February, 2004, (Mr. J.T.). Seventeen months elapsed before the latter statement was taken. The voluntary statement made by the applicant dated the 31st May, 2004, was not put to the complainant for his comment until the 27th November, 2004. Five months delay occurred between the submission of documents to the Director of Public Prosecutions by Detective Garda D. on the 14th December, 2004 and directions emanating from that office on the 26th May, 2005. It is correctly submitted out that no justification has been furnished for the delays in inspecting the premises at Address "A", and bringing the complainant to identify the alleged locus, at a date 14 months after his first reporting the alleged incident to the Gardaí. The applicant, in the course of his affidavit embarks on a broad critique of the various delays which took place during the course of the investigation which are either unexplained, or insufficiently explained.

74. At the outset of the proceedings application on behalf of the respondent was made to file a further affidavit on these issues. The court rejected this application for the reason that such application was made far too late and in circumstances of objection and prejudice to the applicant. It is difficult to see how any additional evidence could affect the consideration of these facts and an unavoidable finding of inordinate delay.

75. But what remains absent from these lengthy, (and justifiable) criticisms is any evidence of any, or any additional prejudice having being caused to the applicant other than stress and anxiety, all of which must be placed in the balance with the right of the public that alleged serious offences should be brought to trial.

76. It has been pointed out in a number of decided cases that it is not the role of the courts to act in a disciplinary way or to adjudicate upon complaints of delay against named Gardaí. Rather the focus must be upon the effects, if any, alleged delay may have particularly in terms of the core issue concerning the likelihood of the applicant obtaining a fair trial.

Factors in the Balance

77. The court herein can only express deep concern in this case as to the delay. However such delay, absent prejudice, is not now sufficient to justify prohibition. There is no causal connection between the elapse of time in the prosecution and investigation and any factor found to constitute actual prejudice, or which cannot be dealt with by warnings by the trial judge. What is not actual irremediable prejudice is not, on any present authority, to be metamorphosed into any single, or agglomeration of "prejudice" for the purpose of establishing culpable prosecutorial delay. Such a proposition was not advanced or argued in this case. As was pointed out by Kearns J. in *P.M. v. D.P.P.* (Unreported, Supreme Court, 5th April, 2006), an applicant for relief must now place something more into the balance where prosecutorial delay arises so as to outweigh the public interest in having serious charges proceed to trial.

78. In *P.M.* it was held that where blameworthy prosecutorial delay of significance had been established by the applicant, such finding was not sufficient, *per se*, to prohibit the trial, but that one or more of the interests protected by the right to an expeditious trial must also be shown to have been interfered with in such a manner as would entitle the applicant to relief. The court therefore applied the balancing exercise referred to by Keane C.J. in *P.M. v. Malone* [2002] 2 I.R. 560 as the appropriate mechanism to be adopted in determining whether blameworthy prosecutorial delay should result in an order of prohibition.

79. In *P.M.* Kearns J. observed that:

> "… an applicant for such relief must put something more into the balance where prosecutorial delay arises to outweigh the public interest in having serious charges proceed to trial. In most cases pre-trial incarceration will not be an element as the applicant will have obtained bail pending his trial. Secondly while he may assert increased levels of stress and anxiety arising from prosecutorial delay, any balancing exercise will have to take into account the length of such blameworthy delay, because if it is a short delay rather than one of years the mere fact that some blameworthy delay took place should not of itself justify the prohibition of a trial."

That judge continued:

> "As part of the balancing exercise it should also be borne in mind that an order of prohibition may not be the only remedy available in such circumstances. A court may have the ability to direct that a particular trial be brought on speedily and be given priority, although precisely how this would be policed or operated in practice may be problematic…"

80. In the instant case the applicant has been unable to adduce substantive prejudice (save on the monastery charges) other than evidence concerning an increased level of stress and anxiety as a result of the delay which undoubtedly occurred in this case. No issue of pre-trial incarceration arises on the facts. I am not satisfied that this issue of anxiety or stress alone tilts the balance in favour of the applicant. The court has sought to engage in the balancing exercise identified in *P.M. v. Malone*. The absence of any additional prejudice, in this context leads the court to conclude that the applicant has failed to discharge the onus of proof to show that a trial should not proceed on the categories of charges where specific prejudice has not been found i.e. that those related to F. Co. C. and Address "A" should be permitted to proceed, those relating to the monastery should be the subject of an order of judicial review by way of prohibition.

81. Exceptional circumstances
The applicant has not been in a position to demonstrate any "wholly exceptional circumstances" arising in the case whereby it would be unfair to put the applicant on trial. While there is no doubt there is a civil litigation background to the case, it has not been demonstrated that this consideration, which appears to have been present to the mind of the complainant, impinged on the applicant or was used as a method of placing pressure upon him. It has not been suggested that blackmail, improper pressure, or any criminal activity took place by the complaint on the applicant.

Conclusion
82. While the court will grant prohibition in relation to the 15 charges relating to the alleged incidents at the Christian Brothers monastery, such relief is declined relating to the charges relating to alleged incidents at F., Co. C. and Address "A".