Neutral Citation Number: [2005] IEHC 382

THE HIGH COURT
JUDICIAL REVIEW

Record Number: 2002 No. 66 JR

BETWEEN

JF

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 16th day of November 2005

1. This is an application by the applicant for an Order of Prohibition or injunction to restrain the respondent from taking any further step against him in relation to a trial on two counts of indecent assault arising from an alleged indecent assault upon the complainant on the 21st January 1988. The complainant was on that date a youth of almost 18 years of age. The respondent was, from September 1979 until August 1996 a curate in the parish where the complainant resided – a small rural town. The complaint to the Gardai, arising out of this one alleged incident, was not made by the complainant for a period of some twelve years and eight months after the date on which the incident is alleged to have occurred.

2. From the affidavit sworn in these proceedings by Mr Garrett Sheehan, the solicitor acting for the applicant, it appears that both the applicant and the complainant were present at a hotel where a wedding reception took place on the date of the alleged incident. It is alleged that the applicant bought some lager for the complainant at this reception even though he was still just under age at the time, and also that he gave him a lift home during the course of the night. It is alleged also that during the course of that journey the applicant caressed the complainant's thigh, and also that when they arrived at the complainant's parents' house, he stopped the car, got out and closed the gate, and that he then returned to the car, kissed the complainant, fondled him and forced him to perform oral sex on the applicant.

3. An additional important allegation, and one in particular which the applicant submits he is now prejudiced as to his ability to rebut same by virtue of the passage of time, is that after this alleged indecent incident in the car, he brought the complainant to a local public house in the town where he bought two more beers at the bar, and that it was from the back door of this public house that the complainant attempted to make his escape from the applicant's company, having told the applicant that he was going to the toilet, only to find, by the time he arrived around to the front door of the premises, that the applicant was waiting for him. It is alleged that thereafter the applicant drove the complainant home, and that he made threats to the complainant in order to prevent him disclosing what had happened. The applicant denies that he was in that public house at all that evening.

4. The complainant has sworn an affidavit in these proceedings upon which he has been cross-examined before me. He has stated on affidavit that he was frightened of the applicant on the occasion in question, and that he was afraid to tell anyone of the incident thereafter. He says also that he always tried to avoid meeting the applicant, and stopped going to Mass. He also says that whereas before this incident the applicant would call to his parents' house, this stopped following this alleged incident. The complainant has sworn that he felt ashamed after the incident, that he encountered difficulties sleeping, had difficulties concentrating in school and that his school work deteriorated as a result. He says that he failed his Leaving Certificate in due course, and later dropped out of a Technical College course during his Second Year, and that he began to drink heavily, had difficulties forming relationships with girls, had difficulties relating to friends generally and lost them, becoming something of a loner, as well as abusing alcohol, smoking cigarettes to excess, and gambling. In relation to the latter activity, he says that he ran up debts which took a long time to pay off. He blames all of this misfortune on the incident which is the subject of the charges brought against the applicant.

5. The complainant states in this affidavit also that his father died in 1993 and that this was a great blow to him, and also that he decided at that time that he would report this alleged incident to the Gardai. That would have been some five years after it had taken place. In fact, no complaint was made until September 2000. The complainant states that in due course the applicant left the parish, and that it was only then that he felt able to make the complaint. He goes on to state that in fact the applicant seemed to be in the town more often after he had left the parish than when he was actually based there, and that this made him feel worse.

6. However, the complainant says that at that point he wrote a letter to the applicant telling him that he was going to report the matter to the Gardai and that he was willing to publicise the matter in order to encourage others to come forward to complain also. He in fact wrote to Fr. Brian Darcy about these alleged complaints and his letter was published in that priest's column in the Sunday World on the 3rd December 2000. He has exhibited the relevant page from that newspaper.

7. The applicant, again through Mr Sheehan's affidavit, states that the letter written to him by the complainant, and which he later destroyed, contained a demand for money and also enclosed a bank lodgement slip. The complainant denies making any demand for money in that letter. The applicant says that he wrote a reply to that letter, but again that letter seems to have been destroyed by the complainant, and the applicant did not retain a copy of it. The complainant, in his cross-examination, stated that the reason he had destroyed the letter was that at that time he had not told his family about the alleged incident.

8. The applicant states also through Mr Sheehan that he received a second letter from the complainant demanding money and seeking assistance with getting a job, and again referring to the fact that he intended to go public about the alleged incident. The complainant during his cross-examination has denied writing any second letter. But there is another affidavit sworn by another priest who was a curate colleague of the applicant at the parish in question, and he has sworn that around September/October 1996 the applicant showed a letter to him, and that while he cannot recall the detail of the letter, he does recall that it was from a person in that parish and that it was a demand for money and that it related to some matter of a sexual nature.

9. The applicant has stated also through Mr Sheehan that there was no special relationship between him and the complainant's family beyond the normal relationship between a priest and his parishioners, and that he has had no contact besides the letters referred to with the complainant.

10. Mr Sheehan states that the applicant's ability to defend himself against the charges brought has been impaired by the passage of time, since his recollection of the events is no longer clear and that if the complaints had been brought forward sooner he might have been able to call evidence to refute the allegations made against him, and that in this regard an opportunity to explore a possible avenue of defence has been denied him unfairly.

Cross-examination of the complainant on his affidavit
11. During his cross-examination, the complainant stated that he had started drinking to excess after the incident but before he had left school, mostly at the weekends. He had a part-time job at that time in his father's garage which was confined to putting petrol in customer's cars.

12. He also stated that he had commenced a motor mechanics course after school but that during second year he dropped out of that course. He blames that on a lack of concentration, which he in turn puts down to the incident complained of.

13. He says that he was still drinking to excess at this time and that his excessive drinking continued up to the year 2000. He was also gambling to excess on horses. He had an account in one bookies shop, where he was able to avail of credit. This habit also caused problems for him. His father died in 1993 and this was a big blow to him. His drinking and gambling also caused difficulties for him with his sister and mother. He also moved from job to job and could not settle. It appears that the family garage business had to be sold after his father's death in order to settle some outstanding matters with the Revenue Commissioners.

14. He was asked whether he put all his difficulties down to the one incident with the applicant and he said that he did, and that in 2000 he decided to write to him after the applicant had left the parish. When asked what was in the letter he stated that he told the applicant that he was then no longer afraid of him and that he was now going to get his life back on track and that the applicant would suffer for what he had done in the future. When asked whether he had indicated in the letter how the applicant might suffer, he stated that he had told him that he was then going to make a statement to the Gardai and that the applicant "would get justice in time". He stated however that he had not made any request for money, but that he was aware that the applicant had received some money as a gift from the parish upon his departure from that parish. He did not know how much had been collected.

15. He was questioned about whether he was short of money around the time of writing the letter to the applicant. The complainant says he was never short of money even though he was drinking and gambling. The applicant on the other hand said in his statement to the Gardai when he was questioned, that the applicant was short of money and requested money from him, and in fact sent a lodgement slip so that money could be lodged to an account. The complainant denied in his cross examination that he was ever short of money, but Mr Gageby pointed to an averment in his own affidavit in this application where the complainant states at paragraph 9 thereof that he had several accounts in different bookies' shops and had got into debt and that it had taken a long time to get out of it. When cross-examined he stated that it had taken him a couple of years to get out of that debt but that it had not been a question of these bookies coming after him for these debts. He thought the total amount may have been about €1500. But he denied that he had ever asked the applicant for money.

16. He was also asked about looking for a job around 1996/1997 when he was unemployed. He said that he had not asked the applicant to help him get any job. He was asked what he thought the applicant meant then when in his reply to the complainant's letter the applicant had made a reference to being blackmailed by the complainant. The complainant said he had not known what the applicant meant by that, but thought he was just trying to frighten him off from going to the Gardai.

17. Mr Gageby asked him also why after he wrote the letter to the applicant in 2000 he did not go to the Gardai for another three years. In reply, the complainant stated:

> *"Because I was not ready at that stage to go. It has taken me a long time to go."*

18. It was put to him that he was in his mid-twenties at that stage, and that he had been able to write a letter to him, and that by then there had been much publicity about priests being prosecuted, but the complainant repeated that it had taken him that three years to do it.

Cross-examination of Garda McC.
19. He was cross-examined and he stated that he was the Garda in charge of this investigation, and that he had received a complaint from the complainant in September 2000 about the alleged incident in this case. When he got that complaint he set about establishing where it was alleged to have taken place and on what date, as the complainant could not be sure about these matters, but was able to say that it took place after a certain family wedding, and from that information, the Garda was able to establish that it was the 21st January 1988.

20. Garda McC. was asked about what the complainant says in his statement about being brought to a bar after the alleged incident, and attempting to escape from the applicant through the back door of the pub , only to meet the applicant again at the front of the premises. In his affidavit he had referred to the fact that the lady owner of the pub was deceased by the time of the complaint, but that it was quite possible that certain other named persons were also working there on that night, namely children of the owner, and her husband. Garda McC. said that during his investigations he had not find out from these latter persons whether they had a recollection of the applicant being in the pub that evening with the complainant. He said that he did not. He saw no reason why any of these persons would have any reason to recall that particular night, and saw no point in trying to find that out. Garda McC. also said that it would not have been unusual for the applicant to be with another person, and that everybody in the parish knew him. Mr Gageby suggested to him that if the complainant had come forward with his complaint on, say, the day following the alleged incident, one of the first things he would have done would have been to go to the owner of the premises. However, Garda McC. said that he could not be sure that this is what he would have done due to the sensitivity of the nature of the complaint about a local curate. He did however say that whatever about not going to the premises on the day following the complaint, if the complaint had been made nearer to the date of the alleged incident he may gone to the owner, but that it would be a last resort. Mr Gageby asked about this in the context of it possibly being a matter affecting whether the applicant might be convicted or acquitted, to which Garda McC. stated that he would have to weigh that up at the time, but that in the present situation he could not see that any person would remember some twelve or thirteen years ago, unless some particular incident had occurred inside the bar. He accepted that if somebody could have recalled that on that night the applicant had not been there with a young man, this would be important.

Legal Submissions

Removal of paragraph 3 from the Statement of Opposition
21. I need to deal with this matter briefly before setting out some of the legal submissions which have been made to me. By Order of the Supreme Court dated 26th April 2005, paragraph 3 was ordered to be removed from the respondent's Statement of Opposition in these proceedings, because the complainant had refused to consent to a psychological examination by a psychologist nominated by the applicant's solicitor. This was in circumstances where he had been examined by a clinical psychologist appointed by the prosecutor. The purpose of the second examination was for the purpose of calling evidence to rebut the complainant's evidence that the delay in reporting the alleged incident was due to the acts of the applicant complained of, and to assist in the cross-examination of the prosecutor's specialist.

22. According to the judgment of Mr Justice Hardiman on this issue dated 26th April 2005, the applicant's solicitor had sworn*, inter alia*, that *"the refusal of the complainant to attend for independent assessment hinders and impedes unfairly the applicant in replying to the issues raised in the Statement of Opposition and in particular in rebutting the finding that the delay on the part of the complainant in bringing the alleged offences to the attention of the authorities was reasonable."*

23. Paragraph 3 had read as follows:

> *"Insofar as there has been any delay in the making of the complaints as a result of which the applicant has been charged, that delay arises as a consequence of the effect of his acts upon the complainant and the reason why he failed to make an earlier complaint in respect thereof."*

24. This matter assumed relevance before me because of the fact that even though paragraph 3 was ordered to be removed, paragraph 2 remains in the Statement of Opposition, and it reads as follows:

> *"The lapse of time in the institution of the proceedings herein is neither excessive nor prejudicial. The said lapse of time does not prejudice the applicant's chance of obtaining a fair trial and/or prejudice him in the preparation and presentation of his defence."*

25. It follows therefore that on the one hand the prosecutor has not been permitted to rely upon the plea that the delay in making the complaint results from the acts of the applicant, yet at the same time, given the plea in paragraph 2, he is permitted to argue that the delay is not excessive. Mr Patrick Gageby SC for the applicant seeks to argue that given the fact that the complainant's refusal to submit to psychological examination by the applicant's nominated psychologist has been found by the Supreme Court to infringe the applicant's right to a fair trial by hindering him from meeting the allegation that the delay was caused by the applicant's own actions, that same argument cannot now be made in relation to the respondent's plea that the delay which took place is not excessive. He submits that for the respondent to argue that the delay was not excessive involves also reliance upon the nature of the offences alleged and their effect on the complainant in preventing him from coming forward earlier, and that if it is permissible to make that argument under paragraph 2 of the Statement of Opposition, then the order of the Supreme Court has had no effect, and the applicant remains prejudiced in the way found by the Supreme Court, and the same argument is being made then "through the back door" so to speak, through paragraph 2.

26. Mr Anthony Collins SC for the respondent, on the other hand, has stated that both he and Mr Gageby were present in the Supreme Court when it reached its decision that paragraph 3 should be removed, and that following the indication that this was the order being made there was extensive discussion between Counsel and the Bench in relation to this perceived difficulty with paragraph 2. Mr Collins has submitted that it is no accident that paragraph 2 has remained in the Statement of Opposition, and that he can argue that the delay was not excessive, even if this involves a submission that it was the effect of these alleged offences on the complainant which caused him not to report the incident sooner.

27. This Court is not privy to everything involved in the application to have the Statement of Opposition struck out, and which eventually resulted in the said order of the Supreme Court. But it seems clear from what this Court has been told, and from the judgment of Mr Justice Hardiman that the application arose because of the fact that the DPP had arranged for the psychological examination of the complainant (presumably for the purpose of having evidence available, should it be required, to show what effect from a psychological point of view the alleged incident had on the complainant), and that the complainant had refused to submit to a further examination by a psychologist to be nominated by the applicant's solicitor. That refusal resulted in the removal of paragraph 3 and not also paragraph 2 of the Statement of Opposition. There must therefore be presumed to be some distinction between the old paragraph 3 and paragraph 2. I note from the said judgment that the applicant's solicitor had by letter informed the prosecution that he had received the advice of counsel to the effect that "*the refusal of the complainant to attend for independent assessment hinders and impedes unfairly the applicant in replying to the issues raised by the Statement of Opposition and in particular rebutting the finding that the delay on the part of the complainant in bringing the alleged offences to the attention of the authorities was reasonable."*

28. It is impossible to discern any meaningful distinction between an assertion that a delay was reasonable and one that it is not excessive. But, in the present case, it seems clear that what is intended by the Supreme Court order is that the prosecutor should not be permitted to rely on any evidence of the specialist (Mr Ware) who had examined the complainant could not give evidence which would otherwise be relied upon to support the pleading in paragraph 3 of the Statement of Opposition that the delay was *"a consequence of the effect of his acts upon the complainant and the reason why he failed to make an earlier complaint…"* Clearly the complainant is maintaining this position and he was to be supported in that position by expert evidence.

29. Attempting, as I must, to determine whether, in spite of the fact that paragraph 2 remains in the Statement of Opposition, the prosecutor cannot still make any submission which is based on the alleged effect of the applicant's alleged acts upon the complainant in order to satisfy the Court that the delay was not "excessive", I have reached the only conclusion which seems to make sense, and that is that since this Court must arrive at a decision as to whether this trial should be halted because of the fact, as submitted by the applicant, that as a consequence of the delay he has suffered prejudice, I must be entitled to arrive at a view as to whether or not there is explanation for that delay, and that in so doing I can hear such evidence of the complainant as may be given as to his reasons for delaying, but which must remain unsupported by any expert evidence from any clinical psychologist as to the effect of the alleged acts upon the complainant. It is noteworthy that in the said order, it was not ordered that the relevant passages from the complainant's affidavit which deal with the reason for the delay, be removed. I note from the judgment of Mr Justice Hardiman, that at the conclusion thereof he stated that he "would hear further submissions from counsel in relation to paragraph 6 – 17 of the affidavit of the complainant because I believe that large portions of this material, at any rate, might be described as narrative." Obviously further discussion took place in court about this and the situation is that paragraph 2 remains in the Statement of Opposition and the entire of the complainant's affidavit remains on the record.

30. When this question was raised at hearing before me, I decided that the respondent could argue the reason for the delay in order to maintain his plea that the delay was not excessive, but I indicated that in taking those submissions and any evidence of the complainant either on affidavit or through his cross-examination on that affidavit, I would bear in mind that it is now to be unsupported by any expert evidence as to the effect of the applicant's alleged acts upon him. I am conscious of some difficulty in understanding precisely the manner in which the exclusion of the old paragraph 3 and the retention of paragraph 2 can be reconciled and dealt with, but in a case such as this where delay is clearly of such central importance to the applicant's argument, it seems to be fair to hear the complainant's evidence by way of his affidavit and his cross-examination, as to his reason for that delay, even though paragraph 3, which appears to have been reliant on the evidence of Mr Ware, has been excluded. Otherwise it seems impossible to determine whether the delay was excessive in all the circumstances of the case, and this would result an inability to argue paragraph 2, and that would create an assumption by way of an uncontroverted plea by the applicant that the delay is

excessive. That has the potential to present an advantage to the applicant which, as far as I can see, was not intended by the learned judgment of Mr Justice Hardiman.

Delay

Standalone right to an expeditious hearing?
31. Mr Gageby has submitted that the delay in this case, even allowing for the special category of case as regards delay into which cases of sexual assault on children is placed, is an excessive delay, and one which remains unexplained or unexcused, such that even without showing any particular prejudice, the applicant's constitutional right to an expeditious hearing has been violated, and that the further prosecution of the applicant should be prohibited/injuncted.

32. He submits that if there is a right to a speedy trial, then that right must be respected and vindicated. I will refer to that right as a "stand-alone right". He submits that in such a situation, it is unnecessary in the present case for the applicant to show a particular prejudice, even though he maintains that in this case he can in fact do so. In addition he submits that there are unusual features in the present case, and in this regard points firstly to the fact that the age of the complainant at the date of the alleged incident, namely almost seventeen and four months, takes the case beyond the scope of the numerous judgments of the courts in recent years which have recognised that special considerations exist in cases of delay by young children in coming forward with complaints of this nature and which can explain and excuse very lengthy delay.

33. Secondly, he has referred to the fact that this case involves one alleged incident on one date only, and not a series of alleged assaults over perhaps a number of years as is often the case.

34. Thirdly, he has pointed to the fact that there has been no evidence of any special relationship between the applicant and the complainant, such as might be seen as giving rise to the element of dominion which has been found to excuse delay in coming forward with a complaint.

35. Fourthly he has pointed to the fact that there is no evidence of any communication between the applicant and the complainant after the alleged incident beyond some correspondence which has already been referred to.

36. Accordingly, in his submission, there has been no act on the part of the applicant, over and above the nature of the alleged offence itself, which can have caused the delay in making the complaint. Mr Gageby has submitted that if there were found to be actions on the part of the applicant which are regarded as having caused the complainant to delay in making his complaint, the applicant would not be entitled to the relief sought herein, but that in the absence of such acts the applicant is entitled to rely on the delay of twelve years as being excessive, and obtain a restraining order without going further and establishing any prejudice, since his right to an expeditious trial – a stand-alone right- will be violated should the trial be permitted to proceed.

37. In his submission also, this delay must remain unexplained given the removal by the Supreme Court order to which I have referred, and that therefore it must be regarded as excessive given its length of over 12 years, and he submits that this gives rise to the relief sought without proof of any particular prejudice. But he also submits that in this case given the fact that the applicant has not been responsible for any part of the delay in coming forward with the complaint, that there is a presumptive prejudice, quite apart from an actual prejudice which he says also arises in any event.

38. In relation to this so-called "stand-alone right" to an expeditious trial, Mr Gageby has referred the court to the judgment of Finlay CJ in *DPP v. Byrne* [1994] 2 IR 236 where at page 245 he refers to the three categories of potential prejudice identified by the United States Supreme Court in *Barker v. Wingo* (1972) 407 U.S. 514 as being:

> (i) to prevent oppressive pre-trial incarceration;
>
> (ii) to minimise anxiety and concern of the accused;
>
> (iii) to limit the possibility that the defence will be impaired.

39. Having referred to these matters, Finlay CJ concluded that instances could occur where a trial should be prevented, even where actual or presumptive prejudice may not conclude the issues which have to be determined. That case was not of course one involving the alleged commission of a sexual assault upon a young person. Rather it was in relation to what is colloquially referred to as a "drink driving charge". Nevertheless the Court was satisfied not to interfere with the decision of the judge in the court below to prohibit the trial, on the basis that there had been a delay in that case, which caused stress and anxiety to the applicant because of the capacity of the result to affect his livelihood and career by virtue of a disqualification order.

40. Mr Gageby referred also to the judgment of Keane J. (as he then was) in *PC v. DPP* [1999] 2 I.R. 25. At pp.66-67 he refers to fact that in an application such as this the issue is "*whether the Court is satisfied as a matter of probability that the circumstances were such as to render explicable the inaction of the alleged victim from the time of the offence until the initiation of the prosecution."* The learned judge went on:

> *"It is necessary to stress again that it is not simply the nature of the offence which discharges that onus. All the circumstances of the particular case must be considered before that issue can be resolved."*

41. The learned judge stated also *that "the paramount concern of the Court will be whether it has been established that there is a real and serious risk of an unfair trial"*, resulting from the delay, and that *"the delay may be such that, depending on the nature of the charges, a trial should not be allowed to proceed, even though it has not been demonstrated that the capacity of the accused to defend himself or herself will be impaired"*.

42. Mr Gageby relies on this, even though, or, perhaps more correctly, without prejudice to his contention that, in the present case he can show actual prejudice to the capacity of the applicant to defend against the charges brought, and he relies on the submission that in this case the delay cannot be attributed to the applicant.

43. The case of *DPP v. Byrne* [1994] 2 IR 236 to which I have referred above was one of prosecutorial delay, and not delay in the reporting of the offence, but the judgment is however of relevance in relation to the general principle that there can be circumstances where, even in the absence of a particular prejudice to the ability to properly defend a charge being found to exist, and in the absence of a risk of pre-trial incarceration, other factors can be taken into account such that a trial can be prevented – in that case those factors being stress and anxiety. However, I would just add that in that case those features were held by the

majority to outweigh the public interest in having the charge dealt with, perhaps because of the nature of the delay and the comparative simplicity with which such cases can and should be prosecuted. That is a far cry from the present type of case which will often have difficulties inherent within it, which can delay the matter being brought forward in the first place, and indeed in having the matter brought to trial. There can be no question either that in every case of delay, the trial should be halted because the applicant has been under and continues to be under stress and anxiety, since it is likely that most people facing charges of any kind in court will feel a sense of strain and stress. Each case will be looked at on its own particular facts and circumstances, as stated by Keane CJ in PC v. DPP (supra). The nature and cause of the delay will be considered, and the nature and cause of the stress and anxiety will be considered, and at the end of the day a balancing exercise will be undertaken to determine whether an unfairness is truly present which outweighs the requirement that cases are brought to trial.

44. The Court has also been referred to the judgment of Keane CJ in *PM v. Malone* [2002] 2 I.R. 560 which is relevant in this regard. In that case the learned trial judge in the High Court had refused to grant an order of prohibition, from which there was a successful appeal. The learned trial judge in refusing the order sought concluded:

> *"The fact that a young person commits a crime and delay occurs, does not of itself per se confer immunity from prosecution. If the delay does not occur through any fault of the State and is explicable and reasonable from the point of view of the alleged victim and if the accused's ability to defend himself is not so impaired that [there] would be a real and serious risk of an unfair trial, then the trial should go ahead…"*

45. As I have stated there was a successful appeal against this refusal by the High Court to grant an order of prohibition. During the course of his judgment in that appeal, the learned Chief Justice, having referred to the judgment of Gannon J. in *O'Flynn v. District Justice Clifford* [1988] I.R. 740, stated at page 578:

> *"In the light of the subsequent decision of this court in Director of Public Prosecutions v. Byrne [1994] 2 I.R. 236 to which I have already referred, it is now clear that delay of itself, even where neither actual nor presumptive prejudice to the accused is demonstrated, may be a ground for restraining the continuance of the trial.*

46. The learned Chief Justice, being satisfied that, because a complaint had originally been made many years beforehand but without charges being brought, he would have suffered anxiety and concern thereafter, went on to conclude as follows at page 579:

> *"I am accordingly satisfied that in determining whether the concern and anxiety caused to an accused person is such as to justify the prohibition of his trial on the ground that his constitutional right to a reasonably expeditious trial has been violated, the court, depending entirely on the circumstances of the particular case, may be entitled to take into account, not merely delay subsequent to his being charged and brought to trial, but also delay prior to the formal charge. It is to be remembered that, in upholding the applicant's rights in such a case, the court is not merely vindicating and protecting the rights of all persons coming before the courts to the dispatch of criminal proceedings against them with reasonable expedition. It is also upholding the general public interest in the speedy prosecution of crime."*

47. The learned Chief Justice was also satisfied that that was not a case in which the applicant's ability to defend himself had been impaired, or that prejudice could be presumed in the absence of a specific prejudice. In his view, in that case, and being one in which it could not be said that the applicant's ability to defend himself had been impaired by the delay, it was necessary to decide if the stress and anxiety caused to the applicant as a result of the violation of his right to a fair trial justified the prohibition of the trial proceeding. He went on to state also that in cases where unnecessary stress and anxiety have been caused the court must engage in a balancing process between the "right of the accused person to be protected from stress and anxiety caused by an unnecessary and inordinate delay" and "the public interest in the prosecution and conviction of offences". He was also of the view that in conducting this exercise the Court would be "concerned with the nature of the offence and the extent of the delay".

48. I think that it is worth noting something else which is apparent from that judgment. That is the fact that it appears to be the case, judging from what appears at page 581 of the judgment, that there was no evidence either from the complainant or from the psychologist's report in the case that there was any significant long-term consequences for her in psychological terms. I refer to that feature because of the fact that paragraph 3 of the original Statement of Opposition in the present case has been deleted because the complainant herein refused to be examined by the applicant's psychologist. This Court therefore has no evidence from any psychologist as to any long-term effect, and has only the complainant's own affidavit and cross-examination evidence such as it is in relation to the reason he delayed making his complaint to the Gardai. It may become relevant to consider this feature of the case in considering the nature and cause of the delay in the context of offences of the nature brought against the present applicant.

49. On behalf of the Respondent, Anthony Collins SC has submitted on this point that while there undoubtedly exists a constitutional right to a reasonably expeditious trial which can be breached by an unexplained delay, it does not automatically follow that a trial will be halted, unless it be shown that some interest protected by that right has been impaired. He has referred to the judgment of Mrs Justice McGuinness in *Blood v. Director of Public Prosecutions*, Supreme Court, unreported, 2nd March 2005.

50. It should be noted immediately that this case arose out of the investigation of an unlawful killing in 1994 which resulted in two firearms charges being brought against the applicant. It was in excess of five years before the applicant was arrested and charged and a Book of Evidence served, although it appears that he had been arrested and detained under s. 30 of the Offences against the State Act 1939 in July 1994 and was released without charge. It was a further sixteen months following his arrest in 1999 before he was returned for trial in January 2001, which was almost seven years after the alleged offences were said to have been committed. It is a case of prosecutorial delay. Those two features - the nature of the offences and the nature of the delay - constitute significant distinctions from the case at hand. I will bear that in mind in considering the submissions made in reliance upon that judgment in the present case.

51. In the High Court, the learned High Court judge had been satisfied that while there had been some excessive prosecutorial delay (it being alleged, inter alia, that the Gardai had deliberately waited until some other persons had been convicted of certain other offences before proceeding against the applicant), the applicant had not shown any particular prejudice, and that it could not be presumed that the applicant had been prejudiced to the extent that he was deprived of a fair trial as a result of the breach of his right to a trial with reasonable expedition. In concluding that the appeal should be allowed, the learned Mrs Justice McGuinness stated:

> *"I would accept that the applicant in the present case has not provided very strong evidence of specific prejudice resulting from the delay which has occurred in prosecuting the offences with which he has been charged. However, it seems from the material contained in the Book of Evidence which was served on the applicant that all the events*

connected both with the death of Stephen Murphy and with the offences alleged against the applicant occurred in the context of what the applicant described as "motor bicycle fraternity". In those circumstances his evidence that he had ceased to associate with any of that fraternity and has lost contact with any potential witnesses is at least of some importance. He appears also to have suffered stress arising from the impending proceedings which has contributed to the breakdown of his marriage……There is a danger that a lengthy delay in itself will, through its effect on the memory of potential witnesses and of the accused person himself, render a trial unfair (see J v DPP) quoted above). In the case of the applicant his loss of contact with his motor cycling associated, together with his anxiety and concern at the impending proceedings against him and the fact that he is now charged with a less serious offence, must be added factors.

As has already been pointed out, cases involving delay in prosecution, or the denial of the right to an expeditious trial, must be decided on an ad hoc basis, in the particular circumstances of the case. In the particular circumstances of this case, taken as a whole, it seems to me that the delays in the latter period of the prosecution of the applicant amount to a denial of his right to an expeditious trial. There is also a real danger that this may lead to an unfair trial."

52. Mr Collins has submitted that it is clear from the conclusion reached by Mrs Justice McGuinness that before a trial will be prohibited there must be shown not merely that there has been delay but that some interest protected by the right to an expeditious trial has been impaired by that delay. I take this to be a submission to the effect that some specific prejudice must be shown to have been suffered. Mr Collins submitted that such interests were: impairment of the ability to defend against the charge; anxiety and concern; unnecessary pre-trial incarceration; and the right of a minor to be tried expeditiously. He submits that even in the case of PM referred to above, Chief Justice Keane had gone against the notion that there is a free-standing right to a reasonably expeditious trial, such that without showing more than delay itself which was excessive, the applicant would be entitled to an order of prohibition.

53. I take the view that the Blood decision turns very much on its own facts, and it seems clear that in that case, the learned judge in the Supreme Court took the view, unlike the learned High Court judge, that the applicant had made out a sufficient case, though not a very strong one, on the impairment of the ability to defend himself against the charges due in part to his later dissociation from his former motor cycling colleagues, and to which she added some element of stress and anxiety resulting from the delay and which had contributed to the breakdown of his marriage. I do not see the decision as stating any new principle, or suggesting any revision of previous judgments of the Supreme Court. I note in passing that the judgment of Chief Justice Keane in PM is not referred to in the judgment at all, and it is reasonable to conclude therefore that nothing stated in Blood is intended as any dissent with or moving away from the views expressed therein.

Prejudice/Ability to defend against the charges

54. It is apparent from the Book of Evidence that the applicant has made certain statements to the Gardai in which he recalls the wedding in question, and giving the complainant a lift home that night, and he has admitted during the course of those statements that when they reached a certain point in the journey he put his arm around the complainant's shoulder "in a friendly gesture", but that there was nothing of a sexual nature. He stated that he had no recollection of caressing his thigh, or anything else alleged in the nature of an indecent assault. He also denies that after the alleged incident he and the complainant went into a public house. At a later stage in one of the statements made, the applicant says that he may have rubbed the complainant's thigh, but that he did nothing else, and that he was as sure as he can be about that. I cannot see therefore that it can be successfully submitted by the applicant that his ability to defend himself against these charges is impaired because his recollection of the day's events is impaired through the passage of time. He has not stated to the Gardai in his statements that he cannot recall what happened. He has given answers very much on the basis that he can recall what happened and what did not happen.

55. The applicant in his statements to the Gardai has denied going into a public house on the way to the complainant's family home after the wedding. He denies, as is alleged, that he bought two drinks there. He denies also meeting the complainant again at the front door of that premises after the complainant had gone to the toilets.

Inability to call witnesses from the pub

56. In my view, the fact that there has been a delay of 12 years from the date of the offence to the date of complaint has not resulted in any inability to call any witness who is material to any central fact in this case. I accept that a Mrs O'C, the person described in Mr Sheehan's affidavit as being "the person usually in charge of the bar" has died. But, first of all, I am not satisfied that there is any reality in the contention by the applicant that she would have been able to confirm that he did not visit her premises in the company of the complainant or otherwise on the night in question. All he states, through his solicitor's affidavit, is that "she might have been available to corroborate [his] account of the events on the night the offences are alleged to have occurred." At best, her possible evidence, if she could give it at all, even were the complaints made much earlier, that she did not recall seeing the applicant in those premises on that night, would touch upon the credibility of the applicant. In other words if she could positively recall that he had not visited the premises as alleged by the complainant, then at least it would confirm the applicant's testimony in that regard and may assist his overall credibility before the jury. It would also of course cast some doubt upon the accuracy of the complainant's testimony in that regard. But that evidence has no relevance to the central facts alleged to support the charges brought against the applicant. Those facts relate to things that either did or did not happen in the applicant's car, and in circumstances where there could be no witness who is now unavailable to be called. As is frequently the case in charges of this nature, many of which are brought many years after the date of the alleged incidents, it is the complainant's assertion of facts against the denial of same by the accused which the jury must consider, and has often been pointed out in cases of this nature, it is the overall credibility of the complainant and the accused which will exercise the mind of the jury. The fact that in the present case, the applicant feels left to simply get into the witness box and deny that the indecent assaults took place in the way described by the complainant is not unusual given the nature of the offences and the fact that almost inevitably take place when the two participants are alone.

57. The applicant argues that it is this very feature which I have identified in cases of this nature which makes it all the more important that someone such as the applicant should not have to face trial where some other potential witness, albeit one whose testimony could have a bearing only on his credibility, is no longer available to him, since credibility of testimony both by the complainant and the applicant is what the jury must really decide in arriving at a verdict of guilt or innocence, since it will be very much a matter of one person's word against another's. It is certainly true that in such cases credibility is a very important feature, but in the present case, the applicant is simply speculating that Mrs O'C may have been able to confirm his evidence that he did not call to the premises that night. He is not going so far as to say that she could give that evidence, but has been denied the opportunity to explore a relevant and important avenue of inquiry which would have been open to him if the complainant had come forward at an earlier stage. In my view the possible evidence of Mrs O'C is of too peripheral importance to the central facts to amount to a relevant and sufficient prejudice to injunct the trial of the applicant. In addition the evidence which it is suggested she, or indeed some other member of the pub staff, might have been able to give, is evidence of a negative. In other words, they would be asked whether or not they saw the applicant and or the complainant in the pub that night. On the assumption, from the applicant's point of view, that the answer would be in the negative, that may simply be evidence that none of them saw the applicant or cannot

recall seeing the applicant, and so on. It does not of necessity prove that the applicant was not briefly in the premises as the complainant alleges. In my view the absence of such a category of evidence would not create a real risk that a trial of the applicant on these charges would be an unfair trial. At most it enables the applicant to speculate as to the possibility that somebody working in the premises that night could recall whether or not the applicant was there, with or without the complainant.

58. This therefore is a case in which there has been an inordinate delay in the sense that the complainant has delayed from January 1998 until September 2000 – a period of nearly 13 years. By 'inordinate' I mean that it is a delay which is beyond normal or usual. Whether it is excessive depends on whether it can be justified from a legal viewpoint. The respondent has sought to justify this passage of time on the evidence of the complainant, as appears in his affidavit. In that affidavit the complainant has stated that while the applicant was still a priest in the parish he was afraid of him, that when the applicant brought him home after the alleged incident he was warned not to tell anybody and that if he did he would not be believed and would be considered to be homosexual. He stated that all of this was told to him in a threatening way by the applicant. He went on to say that he was afraid of the applicant who remained a priest in the parish until 1996. It was not until he had left the parish that the complainant felt able to write to the applicant and he did so in 1996 saying that he was going to make a complaint to the Gardai. There is a dispute as to whether there was a threat contained in that letter and whether there was a demand for money. I cannot resolve that dispute, but there seems to be no dispute from the complainant that in his reply to the letter the applicant said something to the effect that blackmail was a crime. That does indeed beg the question why the applicant would refer to blackmail in his reply if there was no demand for money or other threat contained in the letter. But I prefer to make no finding in relation to even on the basis of a balance of probability. Instead I prefer to simply rely on the fact that a letter was written in which it was stated that the complainant was going to make a complaint to the Gardai, and the fact that he waited for a further period of three years before doing to and at a time when he was about thirty years of age. In August 1996 when the applicant left the parish and the complainant would have been about twenty six years of age. In my view while I can understand that while the applicant's presence in the same parish until August 1996 may have been a psychological barrier to the complainant making his complaint, the further delay of three years is not in my view excusable.

59. The fact that in the later part of 1996, after the applicant had left the parish, the complainant wrote a letter to the applicant indicates to me that he was of a mind to do something about the alleged offences, namely make a complaint to the Gardai. It is from that point onwards that the applicant would have been aware that of the possibility, if not probability that the complainant was going to have the matter prosecuted. Yet it was a further three years before he was even interviewed, because the complainant failed to go to the Gardai for whatever reason. In my view, that period of time cannot be explained simply by the affidavit evidence of the complainant, or his answer during cross-examination, namely *"Because I was not ready at that stage to go. It has taken me a long time to go."* This is the point at which the evidence of a clinical psychologist may have assisted the complainant in providing a reasonable explanation for the further passage of time during which he was able to write to the applicant and write to Fr. D so that his letter could be published, but was yet unable to go to the Gardai. Because the complainant refused to submit to psychological examination by a consultant appointed by the prosecution, the Court is left without that possible evidence from which it may have concluded that this further delay was excused or explained satisfactorily, and the prosecution/complainant is left in a position where he cannot rely on the effect which the alleged offence had on him after it took place. In my view the removal of paragraph 3 and the exclusion of evidence as to the effect of the alleged offence on the complainant means that there is this unexplained period of delay, which in my view renders the passage of time excessive.

60. It follows from my conclusions thus far that there is firstly an excessive delay, and yet secondly the fact that I am satisfied that notwithstanding this excessive delay the applicant has not suffered actual prejudice in view of how I have concluded the question of the absence of any evidence of personnel from the licensed premises where the applicant is alleged to have brought the complainant in the immediate aftermath of the alleged incident.

61. The question then arises as to whether the applicant can rely on what has been referred to as a 'stand-alone' right to an expeditious trial without establishing either presumptive or actual prejudice, and secondly whether this is a case in which there may be presumed to be a prejudice in the applicant's ability to have a fair trial on account of the excessive delay.

62. Dealing with the latter question first, namely whether this is a case in which presumptive prejudice can be said to exist, it is important first of all to say that where there has been delay in making the complaint which can be attributed to some act on behalf of the applicant, or where the necessary element of dominion over the complainant has been established by evidence, usually supported by evidence from a clinical psychologist, then an applicant cannot be seen to complain of and rely on presumptive prejudice.

63. However even where the applicant has been found not to have had that element of dominion, or has not in any other way caused the complainant to delay in coming forward, as in the present case, and that therefore the delay is excessive or inexcused, it cannot not automatically follow that there exists the necessary degree of presumptive prejudice which has been found in some cases to justify the court in prohibiting the trial of the applicant. Something more must be shown, as was the case in DPP v. Byrne.

64. Some features of the present case are relevant to this question. Firstly, there is the fact that the complainant was close to being eighteen years of age when the offence is alleged to have occurred. That is important in my view since this is not a case in which the complainant was very young as was often the case in these offences. In those cases the court has been able to find the necessary element of dominion to exist from the type of relationship which existed between the complainant and the accused, such as where there was a close family relationship or a teacher/pupil relationship or suchlike, and where given the tender age of a complainant and perhaps also the duration of time over which the abuse was alleged to have taken place, it was easy to infer dominion and thereby excuse sometimes enormous delay in coming forward with the complaint. There is no element of dominion to e simply inferred in the present case and there is no evidence before the Court from which that conclusion can be drawn.

65. Secondly, this is not a case in which there have been many alleged offences over many years. This is a single alleged incident said to have taken place in very specific circumstances when the complainant almost an adult.

66. Thirdly, there is the fact that having already delayed from the age of eighteen to the age of twenty six before writing to the applicant indicating that he was going to make a complaint to the Gardai, the complainant delayed for another three years until just after his thirtieth birthday before making that complaint.

67. Fourthly there is the fact that when cross-examined on his affidavit before me the complainant stated that one of the reasons for writing to the applicant was to make the applicant suffer. Mr Gageby asked him to recall what he had stated in the letter to the applicant, and he replied:

> "I told him basically that now that he was gone out of [the parish] I was no longer afraid of him and that I was going to get my life back on track and that he'd suffer for it in the future." He added to that reply as follows:

"He'd suffer for it in the future – that I wasn't gone away."

68. He was then asked whether he had indicated how the applicant would suffer, to which he replied:

"I said I am ready now to make a statement to the guards and you will get justice in time."

69. Despite the assertion that he was "ready" to tell the Gardai, a significant delay ensued thereafter until the year 2000. That is a period of time in my view during which the applicant can have been expecting to be approached by the Gardai and questioned about this matter. If the complainant had immediately gone to the Gardai in 1997 after writing that letter, perhaps the applicant would not be in a position to talk now about presumptive prejudice and oppression. But in my view it ought not to be permissible for someone in the position of the complainant – an adult well into his twenties – to hold on to his complaint for three years, especially having told the person against whom the complaint is going to be made, and decide at some stage in the future, at a time of his choosing only, that he will now come forward and make his complaint. That delay is not excused in this case, though I can accept that in some cases it might be depending on the circumstances. I am satisfied that each of these cases must be looked at on its own facts in order to see if an unfairness exists such that a trial should not take place. In my view the complainant in this case has indulged in an exercise of revenge for the alleged incident by waiting for so long. He has said himself that he wished that the applicant would suffer for what he was alleging he had done. While it is not clear from the evidence that the complainant delayed deliberately so that the applicant would suffer for as long as possible, the fact is that once the letter was written by the applicant in late 1996 the applicant was on notice that something may happen, and it is reasonable to infer that, even though he denies any guilt in relation to the alleged offences, he would have endured significant stress and anxiety, even before the Gardai eventually interviewed him.

70. I think that it is worth stating that as far as the complainant is concerned this is not a private prosecution being brought by him against the applicant. The Director of Public Prosecutions performs a public role in prosecuting alleged offenders and the public interest in these matters is something which the court must weigh also. That has two features. Firstly there is the public interest in having matters prosecuted so that persons who are alleged to have committed offences can be tried and, if found guilty, be punished. That right of the general public is often to be balanced against an accused person's right that any such trial should be brought expeditiously in all the circumstances, and should be fair. The concept of fairness is not confined to the trial itself. Fairness must also be an ingredient of the process leading up to the trial. For this reason delay in making a complaint can, depending on the circumstances, amount to an unfairness. In the present case I have already found that there is no reality to the claim of prejudice made by the applicant as to his ability to defend against the charges, but I believe that in this case the delay by the complainant, not confined to the delay of three years after the letter was written but certainly compounded by same, is such that an unfairness has been shown to exist in the process leading up to the prosecution of the applicant, and that this unfairness amounts to an oppression created by the complainant's actions. In that regard I am of the view that the reasons put forward for not coming forward with his complaint sooner are inadequate to justify the delay given his age and the circumstances generally. The applicant's right to an expeditious trial has been infringed, and the expressed motive on the part of the complainant is something which aggravates the delay into one which causes an unacceptable oppression, and unfairness, which in all the circumstances is un just.

71. I note again the judgment in *PM v. Malone* {supra] and by way of summary refer to the headnote of the reported judgment, where it is stated that the Supreme Court held as follows:

> 1 that, where inordinate delay did not jeopardise the accused's right to a fair trial but had caused unnecessary stress and anxiety, the court had to engage in a balancing process between the accused's right to be protected from such stress and anxiety and the public interest in the prosecution and conviction of those guilty of criminal offences.
>
> 2 that, in determining whether the concern and anxiety caused to an accused person was such as to justify the prohibition of his trial, the court, depending on the circumstances of the case, might be entitled to take into account not merely delay subsequent to the accused being charged and brought to trial, but also any delay prior to the formal charge.
>
> 3. That no special factors, such as a significant disparity in age nor dominion exercised over the complainant were present in this case to bring it within the exceptional category of cases where the court would be entitled to regard the delay as not merely explicable, but referable to the accused's own conduct.
>
> 4. That the complainant's conscious decision, as an adult, not to proceed with her complaint for reasons which seemed good to her at the time but which were not the result of dominion exercised over her by the applicant did not constitute an appropriate ground for denying the applicant his right to a reasonably expeditious trial.
>
> 5. That delay of itself, even where neither actual or presumptive prejudice to the accused was demonstrated may be a ground for restraining the continuance of the trial."

72. It seems to me that in almost every respect the same can be said of the present case.

73. In all the circumstances I grant an injunction restraining the respondent from taking any further steps in the prosecution of the applicant herein on foot of [town] Charge Sheet number 19 of 2001.