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Neutral Citation Number: [2006] IEHC 422

THE HIGH COURT
JUDICIAL REVIEW

[2005 No. 13 JR]

BETWEEN

P. T.

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment delivered by Ms. Justice Dunne on the 21st day of March, 2006

1. The applicant herein seeks an order of prohibition in respect of his proposed trial on twenty eight charges of indecent assault contrary to common law and s. 6 of the Criminal Law Amendment Act, 1935.

Background

2. The applicant herein is a R C P. He was born on 1st November, 1920. He was returned for trial on those charges on 12th October, 2004, to the then current sitting of the Circuit Criminal Court. Twenty two of the charges allege that the applicant committed indecent assault on one M. T. Q, nee C., from 1st April, 1965, to 1st September, 1970. Some twenty two of the charges relate to what was the then residence of the applicant and the remaining six charges are alleged to have occurred at an unknown location in the calendar years 1965, 1966, 1967, 1968, 1969 and 1970. The charges are formulaic in that they refer to offences committed on a date unknown and offences are specified each quarter commencing on 1st April, 1965, and concluding on 1st September, 1970.

3. The complainant herein was born on 12th May, 1957. She spent her early years in an orphanage and was adopted on 9th April, 1963. The alleged abuse would have commenced when the complainant would have been almost eight years of age and continued until she was approximately thirteen years of age. Having regard to the passage of time since the matters complained of are alleged to have occurred it is not surprising that the applicant bases his application on an argument that his right to a fair trial has been compromised by virtue of the lapse of time between the date of the alleged offences and the return for trial. A number of specific points are made in this regard to the effect that the applicant has suffered prejudice:

> (a) The vague and unspecific nature of the criminal charges against the applicant in the criminal proceedings the subject matter of the application,
>
> (b) The advanced age of the applicant having been born on 1st November, 1920,
>
> (c) The stress, anxiety and prejudice caused as a consequence of the allegations including removal from A M as a R C P.

4. A further complaint has been made to the effect that the applicant's right to a trial with due expedition is breached in that the respondent has been guilty of prosecutorial delay in respect of:

> (a) A lapse of time of over two years between the receipt of the complaint against the applicant and the first appearance in court on foot of a valid summons on 28th September, 2004,
>
> (b) A lapse of time of twenty one months between the questioning of the applicant in relation to the offence (on 8th December, 2002) and his first appearance in court on foot of a valid summons on 28th September, 2004.

5. In his affidavit grounding the application the applicant stated that to his recollection he had no contact with the complainant save on one occasion, from the year 1974 until the year 2002 when he received a letter from her solicitors. By letter dated 24th April, 2002, solicitors for the complainant indicated that between the ages of seven and a half and eleven and a half, the complainant, with the consent of her parents, lived on an irregular basis with the applicant at his home. The letter further alleges that the applicant took advantage of her vulnerability in terms of age and background and that the applicant sexually abused her. The letter went on to say:

> "Our client has lived with this for nearly forty years and the same has been a blight on her life. She has instructed us to write to you for the purpose of confronting you with your wrongdoing in relation to this matter and to call upon you to acknowledge the fact that you did abuse her.
>
> What flows therefrom remains to be determined."

6. The letter then requested that the applicant respond to the letter within fourteen days failing which they indicated they would take such steps as are appropriate in relation to the complaint.

7. Subsequently by letter dated 8th May, 2002, the applicant was removed from A M by his b in accordance with the guidelines of the R C C as a result of the said allegations. Thereafter, on 8th December, 2002, the applicant was questioned at his home by Garda J. O'F. and Sergeant J. McN. in relation to the allegations. A note or memorandum of the interview was made. On 6th June, 2003, the complainant by plenary summons of that date issued High Court proceedings against the applicant seeking damages for sexual abuse of her by the applicant. A set of twenty eight District Court summonses were served on the applicant requiring him to attend at court on 9th July, 2004. For technical reasons those summonses were struck out and the applicant had been advised in advance that the summonses would not proceed on that date. Ultimately further summonses required the applicant to attend court on 28th September, 2004. On that date the matter was adjourned until 12th October, 2004, a book of evidence was served and the matter was returned for trial as mentioned previously. The book of evidence contained two statements and listed two witnesses namely the complainant and her step-sister. The memorandum of interview referred to above was not included.

8. The applicant in the course of his affidavit went on to deal with a number of points relating to the information contained in the statement of the claimant herein. He deposed that the substance of the allegations contained therein was narrated in 1989 to a c in C. This is borne out by a statement from the said curate which was obtained during the course of the garda investigation but not included in the book of evidence. Subsequently the complainant narrated the substance of the allegations to her husband in the year 1993 or 1994. The allegations were also revealed to the following persons in the year 2002 approximately:

(a) Her general practitioner,

(b) A psychotherapist and

(c) Her sister.

9. The applicant also referred to correspondence between his solicitors and the solicitors for the respondent herein. This correspondence related to the investigation of material matters at the request of the applicant herein. He further deposed that on 6th December, 2004, he was due to have a consultation with his counsel herein for the purpose of facilitating drafting of these judicial review proceedings but he was forced to cancel this consultation due to his ill-health. He referred to the fact that the criminal prosecution, the subject matter of the proceedings, has caused him considerable stress and anxiety particularly having been removed from A M as a result of the allegations of abuse. He referred to and exhibited a medical report in support of this contention. According to the report the applicant is in generally quite poor health. He has a past history of arthritis and has had three hip replacements. He has had replacement of the aortic valve in his heart and has long standing chronic congestive cardiac failure. He suffers from a chronic anxiety state. In the year 2003 approximately he was hospitalised with severe pneumonia and remains susceptible to chest and respiratory problems. He is on long term medication. The report goes on:

> "Given his general age and infirmity, it is my opinion that proceedings of this nature would be very detrimental to his overall health and wellbeing. While it is obvious necessary for these proceedings to take place, it is definitely not in his interest that they should be delayed in any manner, and any such delay could materially delay his long term health and survival."

10. The applicant in his affidavit points out that the lapse of time between the date of the earliest alleged offence and the return for trial of the said offence is over thirty nine years. He pointed out that he has been available for the purpose of such proceedings and has not contributed in any way to the delay in the proceedings. Finally he averred that if his trial went ahead at this stage it would breach his constitutional right to a speedy trial and his right to fair procedures in the trial process. He also referred to a failure on the part of the respondent to make adequate disclosure and to request the Gardaí to make further investigations as referred to in correspondence between his solicitor and the solicitor for the respondent.

11. G. M G., Consultant Psychologist, swore an affidavit at the request of the respondent. In her affidavit she set out her qualifications and the basis upon which she was requested to interview the complainant. She was requested to interview the complainant with a view to preparing a written report setting out the effect of the alleged offences upon her, the reasons for the delay in reporting the alleged offences, whether such reasons for the delay could be attributed to the applicant's conduct and any other matter which was relevant in assessing whether the delay in reporting the offences was reasonable in the light of her circumstances. She outlined the material she had when interviewing the complainant and she stated that she interviewed the complainant on 5th April, 2005, and 25th April, 2005. She exhibited a report dated 28th April, 2005, in her affidavit. I do not propose to go through the report in detail at this point save to say that it refers at length to the psychological effects of the alleged abuse on the complainant and it then goes on to outline the delay in reporting. It recounts the fact that she first disclosed the abuse in 1989 to another P. She did so because of the fact that she had been reading a book which dealt with the subject of child sexual abuse and that cases of child sexual abuse were being highlighted in the media on a regular basis. The reaction of the P was to bless her and tell her that he would pray for her and she was extremely upset by this reaction. Some years later in 1994/1995 she disclosed the abuse to her husband. She did so after having consumed a few drinks. As a result of this disclosure she felt rejected and misunderstood. Subsequently in 1997, shortly after her mother's death, she confided in a solicitor who was a friend. The solicitor listened but did not offer any opinion or other advice. Finally it appears that 2002 she spoke to her then general practitioner. She recounted to the psychologist that this was the first time she ever felt believed. Eventually she said to the psychologist that she gained the courage in May 2002 and spoke to a b and also to his aide, another P. As a result, the c. authorities reported the abuse to the Gardaí and in September, 2002, she made a statement to Sergeant McN. Dr. M G considered the history of delay in reporting having described the reported attempts at disclosing the abuse beginning in 1989 and went on to say as follows:

> "Given the experiences in her own life and being married at such an early age she was some thirty three years old when she first disclosed the abuse."

12. Dr. M G then went on to deal with her personal circumstances and the fact that it was only when her children started to grow up that she felt she had the choice to disclose. It was only after her disclosure to Dr. McC that she felt believed and she was able to speak to c. authorities and subsequently make the statement to Gardaí. Dr. M G also attributes parts of the delay in reporting to the "significantly strong religious environment" in which the complainant grew up. Reference is also made to the fact that the complainant was adopted and grew up believing she was different from her older sister and it is concluded that this also had a significant effect on the time of disclosure.

13. The complainant also swore an affidavit herein on 29th June, 2005. In her affidavit she set out details of her personal circumstances. She referred to the statements she had made to the Gardaí. She stated as follows:

> "My experience of abuse has had a very traumatic effect on my life. I felt there was a lot of shame attached to it, that I was dirty and that it was my fault. I buried the abuse inside myself. I thought there was no point in telling anyone and that nobody could fix it."

14. She went on in her affidavit to describe the various attempts at disclosure. In relation to the disclosure in 1989 she outlined that the response of the P to whom she had spoken reaffirmed her feelings of guilt and her sense that the abuse had been her fault. She referred to the negative reaction of her husband on disclosure to him. She described speaking to the solicitor who was a friend of hers after her mother's death and the advice she gave which was to the effect that if something had happened to her she should do something about it. However, she explained that following her earlier experiences she did not feel capable of bringing the matter to the attention of the authorities. She described how in 2001 she saw a photograph of the applicant on the wall of a hall which she was attending in connection with a first aid and manual handling course. She said she felt physically sick as a result and visited F. B., the P she had first spoken to in 1989 again. Ultimately in 2002 she made contact with B B. and met him and also spoke to his aide F. F.B. Arrangements were made for her to speak to a C. G. Following contact with C. G., the c. authorities passed on her complaint to the Gardaí. She confirmed that she had read the report of Dr. M G and that it was true and accurate insofar as it set out facts relating to her personal circumstances.

15. Sergeant J. McN also swore an affidavit herein on 29th June, 2005. He outlined how he commenced inquiries in relation to the background of the applicant and the complainant following the receipt of correspondence from the c. authorities via the Superintendent in charge of the district. Sergeant McN outlined the steps taken in the course of the investigation. A telephone

contact was made with the applicant in November 2002 and subsequently on 8th December, 2002, Sergeant McN and another member of the Gardaí called to the applicant's house and conducted a cautioned interview with the applicant. Other steps were then taken in the course of the investigation. An investigation file was forwarded to the D.P.P. on 10th July, 2003. A number of further inquiries were directed by the D.P.P. and a further file was furnished to the D.P.P. on 1st December, 2003. Thereafter on 1st March, 2004, directions were received from the D.P.P. Subsequently draft copies of summonses were prepared and issued for 9th July, 2004; as a result of a mistake as to the appropriate district court area in which to issue the summonses, the same were withdrawn and subsequently reissued for the correct District Court on 28th September, 2004. The matter was then adjourned to 12th October, 2004, for the service of the book of evidence. In fact the book of evidence was ready on 28th September, 2004, and was in fact served on that date. On 12th October, 2004, as stated previously the defendant was sent forward for trial to Cork Circuit Criminal Court.

16. Finally an affidavit was sworn by E.B. on behalf of the applicant on 10th October, 2005, in which reference was made to an inconsistency in the affidavit of the complainant as to the disclosure of abuse. Reference was made to the fact that in a statement of the complainant to Gardaí made on 13th October, 2003, she indicated that she had told no one else about the abuse apart from a P and her husband. In the affidavit it is disclosed that a friend of hers, a solicitor, was told about the abuse around 1997. Further reference is made to the fact that in the statement dated 13th October, 2003, the said complainant indicated that she told her husband about the abuse around 1989. In her affidavit she has averred to telling him around 1994. The complainant was served with a notice to attend for cross-examination in respect of the affidavit sworn herein by her. In the event she was not cross-examined on behalf of the applicant herein.

17. A notice to cross-examine Dr. M G had also been served and she gave evidence in relation to this matter. In the course of her cross-examination she was asked about the instructions she had received and she stated that she understood that she was to interview the complainant, talk to her about the effects of abuse on her, to interview her about the delay in reporting and to access whether the delay was reasonable, given the passage of time. She met and interviewed the complainant on two occasions in April, 2005. She ascertained that the complainant's GP was unchanged since approximately 1987. No inquiry was made as to who the complainant's GP was prior to 1987. She confirmed that the complainant had been referred by her solicitor to a Dr. D. and further that she obtained counselling after seeing her solicitor and psychiatric assistance after seeing a solicitor. (The counsellor she went to was in fact recommended by a friend, not the Solicitor.) Dr. M G spoke to the complainant's GP, Dr. McC., on the date she completed her report and the understanding was that symptomology complained of by the complainant made sense in the light of the disclosure. Dr. M G described as significant the fact that the complainant had made a series of attempts to make disclosure since 1989. She stated that many victims didn't seek appropriate help and she said that the complainant in this case did not feel believed until she spoke to Dr. McC. In response to a query as to whether the solicitor friend of the complainant indicated that she failed to believe the complainant, Dr. M G stated that the advice from her was to do something about the situation. She, the solicitor, did not appear to have full details of the allegations but was supportive. Dr. M G commented on the fact that this disclosure was made shortly after the complainant's mother had died. She observed that from a psychological point of view it is often at a time of a significant life event that disclosure is made.

18. Dr. M G also considered the fact that the complainant did not seek psychiatric or psychological assistance before visiting Dr. D. in 2002. She said that the effects of abuse had inhibited her from coming forward. Asked whether there was a clinical condition that precludes someone from disclosing she said that there was certainly not a condition as such. However, the complainant in this case suffered from periods of reactive depression, suicidal ideation and had various other stress related symptoms. She accepted that there were other factors in relation to the stress including the early childhood memories of the complainant, the fact that she spent her early years in an orphanage, that she became pregnant at seventeen and married the F. of the child and that by the time she was in her early twenties she had four children. She also had some difficulties in her marriage. Dr. M G was of the view that certain matters in her life which would have caused stress, for example the fact that she was rejected by her adoptive mother, the early pregnancy, her family difficulties were such as to reinforce the effects of the trauma caused by sexual abuse in that it made it difficult for her to trust people. She reacted to this by becoming dis-inhibited in her teens.

19. In relation to the concept of dominion she accepted that the complainant was not under the ostensible dominion of the applicant since she was a young child but Dr. M G referred to the reaction of the complainant in seeing his photograph on the wall in the hall when she was attending the first aid and manual handling course. The effects of the abuse were always with the complainant. Dr. M G pointed out that what is relevant is the early dominion not the date when it ceases.

20. Asked about validation exercises in relation to what she was told by the complainant, Dr. M G said that she had assessed this and went through the standard indices in regard to that. Finally she confirmed that apart from her conversation with Dr. McC on the date of completing her report she had no other contact with clinical carers and did not see any other clinical notes in relation to the complainant. She was furnished with the report of Dr. D. dated 9th September, 2002.

21. Mr. Paul Coffey S.C. on behalf of the applicant referred to the constitutional provision at Article 38.1 which provides:

> "No person shall be tried on any criminal charge save in due course of law."

22. As part of the right to trial in due course of law it is now clearly established that this includes a right to a trial with reasonable expedition. In balancing the right of the public to have criminal charges tried the right of an accused to defend himself must be considered. He referred to a decision of the Supreme Court in the case of *J.L. v. D.P.P.* [2000] 3 I.R. 122 in which it was held by the Supreme Court in allowing an appeal against a decision refusing prohibition where there had been a delay of some twenty one years that the right of an accused person to reasonable expedition in the prosecution of offences was to be balanced with the community's right to have the criminal offences prosecuted. If there was a real risk that the applicant would not receive a fair trial, the applicant's right to a fair trial would prevail.

23. Mr. C. then referred to the decision in the case of *P.C. v. D.P.P.* [1999] 2 I.R. 25 at p. 68 where it was stated by Keane J. (as he then was) as follows:

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

24. If that stage has been reached, the final issue to be determined will be whether the degree to which the accused's ability to defend himself has been impaired is such that the trial should not be allowed to proceed. That is a necessary inquiry, in my view, in every such case, because, given the finding that the delay is explicable by reference to the conduct of the accused is necessarily grounded on an assumption as to the truth of the complaint, it follows that, in the light of the presumption of innocence to which he is entitled, the court asked to halt the trial must still consider whether the degree of prejudice is such as to give rise to a real and serious risk of an unfair trial."

25. Mr. C. accepted that the onus of proof in this regard was on the applicant. If the respondent shows that the delay is reasonable then the evidential burden shifts. He referred to the judgment of Hardiman J. in the case of J. *O'C. v. D.P.P.* [2000] 3 I.R. 478 and to a passage at p. 500 where Hardiman J. referred to the principles applicable in delay so far as civil cases are concerned and then went on to consider the situation in respect of criminal cases. He said:

> "It can scarcely be doubted that the principles summarised above are applicable to criminal cases as well. It would be strange indeed if the courts were less solicitous of a person in peril of his liberty and reputation by reason of having been charged with a criminal offence than of a civil litigant who will often … be indemnified by an insurer."

26. He also referred to a passage from the same judgment at pp. 503 – 504 and I think it would be helpful to refer to the last paragraph of the passage referred to by Mr. C. in which Hardiman J. stated:

> "The effect of documentary physical or forensic evidence, where it exists, is to provide some basis on which the part of the case which depends on mere assertion can be assessed and tested. Inevitably there will be a certain number of criminal cases, and far fewer civil ones, in which no such evidence exists. In such a case each case will naturally look to the surrounding circumstances: the prosecution to see whether there is corroboration or at least evidence consistent with allegations being true, and the defence to see if there is material with which the complainant's story can be contradicted, even on a collateral matter, or his credibility challenged. Apart from the lapse of time on the memories of those principally involved, an interval of twenty or more years makes it difficult if not impossible to clarify the surrounding circumstances and to introduce any element at all of undoubted fact with which the statements of the parties can be correlated and tested. The element of hazard or chance which this state of affairs introduces into a trial has been recognised for centuries. The more nearly a serious trial consists of mere assertion countered by bare denial, the less it resembles a forensic inquiry at all."

27. Mr. C. made the point that in this case there was an egregious delay of thirty two years from the last alleged offence to the date of the first complaint. There are two statements contained in the book of evidence. The case is one which cannot be advanced beyond assertion. He argued that there was a gross delay and that in those circumstances, having regard to the nature of the evidence there is presumptive prejudice/unfairness. Insofar as the prosecution sought to explain the delay the onus shifted to the respondent in respect of this issue. He pointed out that there had been little or no contact since 1974 between the applicant and the complainant. The complainant was married, she had worked, had four children and was a grandmother. She had had no contact with health or medical services prior to the year 2002. Mr. O'Higgins then referred to the decision in the case of *T.S. v. D.P.P.*, a judgment of the Supreme Court delivered on 22nd June, 2005, and in particular to the judgment of McCracken J. In the course of that judgment McCracken J. stated as follows:

> "There is no doubt that the evidence of a psychologist may be very relevant and valuable in assessing the reasons for a failure to report sexual abuse. However, in the present case the ultimate conclusions reached by Ms. McElvaney were that in the case of both M.D. and I.G. the delay was 'reasonable'. In fairness to Ms. McElvaney this is what she was asked to give an opinion upon, but it is not the proper test. It may have been perfectly reasonable that there was no reporting of this alleged abuse either because the complainant was ashamed or indeed because it never occurred to the complainant to report the abuse. However, that is not the test, and in the light of Ms. McElvaney's concession under cross-examination that neither of the complainants had any serious psychological or psychiatric problems, it is hard to place too much reliance on her evidence."

28. Having referred to that decision, Mr. C. made the point that in this case there had been no liaison between various doctors prior to reporting. There had been a fifteen minute phone call between Dr. M G and Dr. D. There was never any suggestion that there had been complaints of any kind of a psychiatric nature or indeed treatment in respect of the complaint. Accordingly he argued that the second test referred in the judgment of Keane J. referred to above had not been met.

29. He went on to argue that if he had failed on the second test, in other words if the delay was explicable, then he argued that there was prejudice. He pointed out that the applicant is an eighty five year old man in the declining health. He further referred to the fact that there was prosecutorial delay of two years and two months in this case, which compounded the growth delay prior to the compliant. He complained of the fact that it took two years and two months for the State to produce a book of evidence containing only two statements. He argued that the D.P.P. must be vigorous in prosecuting a stale case.

30. He pointed out that if the case had been brought in the lifetime of the complainant's parents they would have been able to say whether or not the complainant stayed over in the course of most weekends or not, they would have been able to comment on her demeanour and whether the complainant had been given gifts or had consumed alcohol whilst with the applicant.

31. Ms. McD. on behalf of the respondent did not accept all of the outline written submissions of Mr. C. She did not dispute those submissions relating to the right to a fair trial and as part of that right the right to an expeditious trial. She accepted that the case of *P.P. v. D.P.P.* [2000] 1 I.R. 403 was authority for the proposition that there was a need to avoid prosecutorial delay where there has been delay in making the complaint. She disagreed with the suggestion that the judgment of Hardiman J. in the case of *J. O'C. v. D.P.P.* [2000] Vol. 3 I.R. 478 was authority for the proposition that because of substantial delay a case could be stopped. She pointed out that that judgment was not the majority judgment in that case.

32. In dealing with the alleged prosecutorial delay she pointed out that although there were only two statements in the book of evidence, the Gardaí in the course of the investigation took more than two statements. She contrasted the facts of this case with the facts of *P.P. v D.P.P.* referred to above in which Mr. Justice Geoghegan in the course of his judgment in that case referred to the investigation of the offences involved in that case and described the investigation as having been conducted in "a lackadaisical and slovenly fashion" (p. 410 of his judgment). Ms. McD. contrasted that with the investigation in this case in which, she argued, the same clearly could not be said.

33. She then dealt with the question of specific prejudice. So far as the age and health of the applicant is concerned she stated that that did not amount to prejudice. Equally she stated that the applicant was not entitled at this hearing to argue that there was a

prejudice by reason of the death of the parents of the complainant given that that was not a ground raised in the application for leave. So far as the issue of credibility and a contest in that regard is concerned she made the point that the case as tried now would have been the same as it would have been had it been tried many years ago.

34. She referred to the issues identified in the well known case of *Barker v Wingo* (1971) 404 U.S. 307 and pointed out that in this particular case there was no pre-trial incarceration. So far as the applicant complains of stress and anxiety she argued that such stress and anxiety may well exist but not as a result of the delay but rather as a consequence of the proceedings. She made the point that insofar as there is a right to an expeditious trial she pointed out that *Barker v Wingo* so far as it is relied on by the applicant refers not to pre-complaint delay but only to prosecutorial delay.

35. Ms. McD. accepted that the respondent must justify the excessive pre-complaint delay herein. She did so by referring to the evidence of the complainant and to the psychological evidence. Reference was made to the fact that the complainant had sworn an affidavit herein explaining the delay on her part and in that regard Ms. McD. pointed out that all though leave to cross-examine the complainant was sought, that opportunity was not taken. Accordingly the matters contained in the affidavit of the complainant are unchallenged. In her affidavit, the complainant described at paras. 5, 6 and 7 her attempts to disclose the alleged abuse. She had not been supported in her attempts to deal with these allegations. Ms. McD. referred to the decision in the case of M.Q. v. The Judge of the Northern Circuit and the D.P.P., Unreported, McKechnie J., 14th November, 2003, in which McKechnie J. outlined the previous attempts made by the complainant in that case to seek help. In that case it was not suggested that the disclosures made at earlier stages could be equated with the making of a criminal complaint. Ms. McD. submits that the position is the same in the present case. She pointed out the personal circumstances and position in life of the complainant. She pointed out that the law does not require the delay to be due to dominion and argued that in some cases the failure to make a complaint may be due to the consequences of the abuse. In the case of *D. O'R. v. D.P.P.* [1997] 2 I.R. 273 McGuinness J. stated as follows:

> "(i) Child sexual abuse often involves a known adult who is in a legitimate position of power over a child and who exploits accepted societal patterns of dominance and authority to engage in sexual activity which the child does not comprehend or understand. The power and authority of adulthood and/or the position of authority occupied by the abuser conveys to the child that the activity is acceptable and sanctioned.
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> (ii) It is not possible in my opinion to over emphasise the significance of the power relationships and exploitation and misuse of accepted power relationships in assessing the impact of sexual abuse on a child, including the failure or otherwise of the child to disclose the fact of the abuse or to make complaint at the time the abuse was taking place in subsequent years or indeed at all.
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> (iii) Sexual abuse invariably gives rise to feelings of guilt and shame on the part of the victim.
>
> (iv) The victim may feel that she/he would not be believed if they complain or alternatively may be daunted by what they see as the difficulty of having their story accepted. The abuse may also give rise to confusion in the mind of the victim and cause reluctance to complain."

36. In the present case, Ms. McD. pointed out that the complainant had had difficulty in making disclosure, that it was a gradual process and that she had a difficulty in having her story accepted.

37. Insofar as the applicant relied on prosecutorial delay Ms. McD. argued that the principle in the case of *Flood v. D.P.P.*, Unreported, Supreme Court, McGuinness J., 2nd March, 2005, applied. That was not a sex delay case but was one in which the principles in *Barker v Wingo* were accepted by the Supreme Court. Ms. McD. relied in particular on a passage from the judgment of McGuinness J. at p. 16 of the decision:

> "In the passage from his judgment quoted above the learned trial judgment in this case held that it was a matter for the Director to decide upon what evidence he would prosecute any particular charge and that it was not the function of the court to substitute its view for that of the Director who was charged at law with the decision who, when, with what charge and on what evidence to prosecute in any case. In my view the learned trial judge in so hold; the applicant may not rely on the period up to March, 1998, in seeking to prevent his trial. While the lapse of time from the alleged commission of the offences up to March 1998 was justifiable it was, however, a very considerable period. Thereafter it was undoubtedly the duty of all concerned to proceed with all reasonable speed."

38. Ms. McD. also referred to the decision in the case of *D.W. v. D.P.P.*, Unreported, Supreme Court, 31st October, 2003, which dealt with the issue of dominion, the practice of the D.P.P. proffering evidence of a clinical psychologist in cases such as this and in particular she referred to a passage at p. 36 of the judgment of McGuinness J. where she stated:

> "It seems to me that there are two ways in which expert psychological evidence can be of assistance to the court in these cases.

39. In certain cases there is ample ordinary evidence which would assist the court in understanding, from its own common sense and general experience of life, why, for example, a child did not immediately report sexual abuse by an adult.

40. The case of *B v. DPP* 1997 3 I.R. 140 is one example. In such cases, it seems to me, any expert evidence could be limited to a general exposition of the reasons for delay in reporting in these cases. The numbered list of factors set out by the expert's witness in the case of *K v. Judge Groarke and the D.P.P.* at pp. 3-4 of the judgment of Denham J. in that case is a good example."

41. Finally Miss McD. referred to the complaint made by the applicant that the parents of the complainant are now dead and unavailable to deal with certain matters raised by the applicant. She pointed out that his housekeeper was still alive and available to give evidence in relation to the matters referred to. Accordingly, she argued that there was no basis upon which the court should prohibit the trial from taking place.

42. In reply, Mr. C. reiterated the fact that in this case there was gross delay in making complaint. That delay is compounded by the nature of the case. In the light of the fact that following the Garda investigation there are only two statements in the book of evidence, he queried whether it was possible to have a meaningful forensic enquiry. Because of the gross delay he argued that there was an absence of reliable evidence of the surrounding circumstances.

43. So far as the issue of prosecutorial delay is concerned, he referred again to the decision in the case of P*.P. v. Director of Public Prosecutions* [2000] 1 I.R. 403 and to para. 4 of the headnote where it was held: "that it was intolerable that an already delayed trial

be further postponed by considerable and unnecessary delays by the prosecuting authorities. Where there had been a long lapse of time between the alleged offences and the date of complaint to the Guards, if the accused's constitutional rights are to be protected, there ought to be no blameworthy delay on the part of the prosecuting authorities. If such delay exists, the court should not allow the trial to proceed and additional actual prejudice need not be proved." He referred to the affidavit of J. McN referred to above and stated that because there was no cross-examination of him as to the time involved in the investigation, the court should not draw an inference from that as to the lack or otherwise of prosecutorial delay. He referred to the judgment of Kearns J. in the case of *A.W. v. D.P.P.* Unreported, 23rd November, 2001, at p. 27, where he stated:

> "A 27 month delay after an interval of so many years could only be justified in my view, in a case of considerable complexity where far ranging inquiries were required. However, as Mr. Hartnett has pointed out, this case is essentially a simple one, involving virtually no witnesses outside the extended W family."

Decision

44. The effect of delay in cases of child sex abuse has now been considered in a number of decisions over the last number of years. The leading case is the decision of Keane J. in the case of *P.C. v. D.P.P.* I have referred above to the passage from his judgment at p. 68 thereof. From that judgment it is clear that the first question a court has to consider is whether an applicant has established that there is a real and serious risk of an unfair trial. Thereafter, he went on to set out the three tests which are referred to in many of the subsequent decisions in this area. The first test is whether the delay is such that a trial should not be allowed to proceed. The second test is whether the delay can be traced to the actions of the accused. The third test is whether it can be shown that the accused has suffered actual specific prejudice. Most recently the issue has been considered in the Supreme Court judgment in the case of *T.S. v. D.P.P. & Ors.*, Unreported, 22nd June, 2005, and in particular, in the judgment of McCracken J. in that case. The delay in that case ranged between 35 to 41 years. In that case, in considering the first test enunciated by Keane J., McCracken J. identified the question as to whether the delay may be such that there is an irrebuttable presumption of prejudice which would lead to an unfair trial. He observed at p. 6 of his judgment as follows:

> "There is no doubt that, the longer the delay, the greater the danger of prejudice, and the more readily a court will infer prejudice. However, that does not mean that in all cases an unfair trial would result."

45. Having considered that issue, he rejected the proposition that the passage of time alone would be grounds for the prohibition of a trial. He then went on to consider the reasons for delay proffered in that particular case and had a number of comments to make on the value of a psychologist's evidence.

46. In this particular case, the complainant herein swore an affidavit setting out the reasons for the delay. She described the experience of abuse as having had a very traumatic effect on her life and she referred to the shame attached to it. It was not until 1989 that she first attempted to make some effort to disclose the abuse. However, the reaction to that was negative and she had a similar reaction when she attempted to disclose the abuse to her husband some years later. Again she spoke to a friend of hers who was a solicitor and the response from her solicitor appears to have been of a very neutral kind. It was not until the events described in 2001 that she finally had the courage to take the matter further. In the written report of Dr. M G this is described as follows:

> "The straw that broke the camel's back was in 2002 when Mrs. Q. spoke to her general practitioner, Dr. P.McC. She said that this was the first time she ever felt believed. She confided in Dr. McC following seeing a picture of F. T. in C. The picture upset her greatly and brought the experiences of child sexual abuse flooding back to her."

47. In her conclusions, Dr. M G described her as having been deeply upset by her experiences.

48. I have already referred at length to the psychological effects on the complainant as outlined by Dr. M G. It seems to me that this contrasts significantly with the circumstances of the complainants in the case of *T.S.* Insofar as one of those complainants was concerned the psychologist in that case accepted that she had had a happy childhood and had a busy and active and well-balanced life and had no psychiatric difficulties during her lifetime. In the case of the other complainant, the psychologist described her as a happily married woman with a good education and a normal family life and that, likewise, she had not had any psychiatric problems. She had coped with other traumatic experiences in her life very well. This seems to me to contrast very significantly with the circumstances of the complainant in this particular case. In the circumstances of this case, I am satisfied that the effect of the abuse on her was such as to render it difficult for her to make complaint about these matters at an earlier age. To some extent it may be encapsulated in one of the psychological effects identified by Dr. M G when she stated of the complainant that her own perception of herself and her sense of unworthiness and low self-worth has been an ongoing battle all her life. In the circumstances it seems to me that there is a reasonable explanation for the delay.

49. Obviously this does not conclude matters. It is then necessary to consider whether the delay subsequent to making the complaint is such that the trial should be prohibited. The delay in regard to this aspect of the matter ranges from 29th May, 2002 when the complaint was notified to An Garda Siochána by the C. authorities and 28th September, 2004, approximately some 28 months. There was a brief appearance in the District Court in July, 2004 on one set of summonses but they were, as indicated above, not proceeded with, as they had been issued in the wrong District Court area.

50. Counsel for the applicant placed great reliance on the judgment in the case of *P.P. v. D.P.P.* referred to above. In that particular case, there had been a delay in reporting the alleged offences to the Gardaí for a period of some eighteen years. The matters were first reported to the Gardaí in November, 1995. The applicant in that case was interviewed on 22nd January, 1997 and ultimately was arrested in April, 1998. As mentioned earlier, Geoghegan J., in the course of his judgment in that case, described the conduct of the investigation by the Gardaí as lackadaisical and slovenly. Clearly the investigation in this particular case could not be so described. However, it does seem to me that in this case there has been a lack of urgency in bringing matters to a stage where the applicant could be charged with the alleged offences. Geoghegan J. made the comment in *P.P. v. D.P.P.* at p. 411 of the judgment:

> "I think that where there has been a long lapse of time, as in these prosecutions for sexual offences, between the alleged offences and the date of complaint to the guards, it is of paramount importance, if the accused's constitutional rights are to be protected that there is no blameworthy delay on the part of either the guards or the Director of Public Prosecutions. If there is such delay, the court should not allow the case to proceed and additional actual prejudice need not be proved."

51. Ultimately, this case, were it to proceed to trial, is one in which the prosecution will be based on the statement of the complainant and her sister. The prosecution relies on no other evidence. This is not a case in which there was any difficulty in locating witnesses or, indeed, ascertaining the whereabouts of the applicant. Sergeant McN in his affidavit carefully set out the

various steps taken in the course of the prosecution of this matter but I cannot understand, notwithstanding the matters he sets out at length, why it took so long for this matter to reach court from the date when the complaint was first received, 29th May, 2002, until the date when the applicant was brought before the court on 28th September, 2004. In the written submissions furnished on behalf of the applicant, reference is made to unexplained delays in the steps taken by State authorities in this case. To cite just one example, it took from the 1st March 2004 when the direction to prosecute was received by the Gardai until the 28th September 2004 to bring the applicant properly before a court. There is no explanation for the delays which occurred throughout the process of investigation and the receipt of directions from the office of the respondent leading ultimately to the charges being brought against the applicant. The timescale involved seems to me to be such as to attract the description "blameworthy". This is particularly so in the context of a case where the earliest of the offences is alleged to have occurred over 41 years ago and the most recent, some 36 years ago. It also seems to me that as a matter of common sense, in a case such as this where the applicant is of such advanced years it behoves the State authorities to act expeditiously once a complaint is received. The applicant in this case is now 85 and in less than perfect health according to the letter from his doctor exhibited in the applicant's affidavit.

52. In the circumstances, it seems to me that I have to accept the submission that the delay of 28 months post complaint is unacceptable and that it has had the effect of breaching the applicant's right to a trial with due expedition. In the circumstances, I have no option but to grant the relief sought herein.