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THE HIGH COURT
JUDICIAL REVIEW

2006 888 JR

BETWEEN

J. M.

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS
AND
DISTRICT JUDGE SEAN McBRIDE

RESPONDENTS

Judgment of Mr. Justice McCarthy delivered the 17th day of December, 2008

1. There are now pending before Monaghan District Court two charges of sexual assault by the applicant on one L.B. The proceedings were initiated by summons and allege such assaults between the 1st January, 1994 and 31st December, 1997 (on different dates). Offences are alleged to have been committed at Tullyard, Monaghan, County Monaghan. The summonses were served on 21st June, 2006. It is not in dispute that on 23rd April, 2006, Garda Yvonne Martin, on behalf of the first named respondent ("the D.P.P.") informed the applicant that he had decided not to prosecute him in respect of the matters now the subject of the pending charges.

2. It appears that on the 16th August, 2005 L.B. made a statement to Garda Yvonne Martin alleging the commission of offences of sexual assault, that in the course of the investigation of those matters the applicant was arrested for such assaults on 10th October, 2005, detained at Castleblaney Garda Station pursuant to the provisions of s. 4 of the Criminal Justice Act 1984 that in the course of interview on that occasion he made certain admissions of guilt. In the ordinary course of events the Gardaí completed an investigation file (as Garda Martin terms it) and this was sent to the local State Solicitor on 22nd December, 2005 who, again in the ordinary course of events, sent on the file to the Director of Public Prosecutions, who ultimately informed the State Solicitor that no prosecution was to take place, Garda Yvonne Martin in those circumstances so informing the applicant of the position, and saying nothing to him about the possibility of review of the decision.

3. In these circumstances the applicant seeks to obtain relief by way of injunction restraining the continued prosecution by the Director of Public Prosecutions of the offences charged in the summonses: other relief sought arises from the manner in which the proceedings on the summonses were dealt with in the District Court but by agreement I do not need to deal with the latter at this stage, if at all.

4. My colleague Peart J. afforded leave on 24th July, 2006 to the applicant to seek relief by way of certiorari, injunction and declaration on foot of a Statement Grounding an Application for Judicial Review dated the 24th July, 2006 and an affidavit of Mr. James McGuill of the same date. There is a certain repetition in the relief sought in the Statement but I do not think that I unduly attenuate matters by saying that it seems to me that the following are the most significant.

> (1) An injunction restraining the continued prosecution of the offences contained in the said summonses (para. iv).
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> (2) A declaration by way of judicial review that the respondent is in breach of its constitutional duty to secure to the applicant fair procedures in the exercise of the respondents' statutory function in circumstances where the respondents' decision not to prosecute the applicant was communicated to the applicant by the prosecuting member of An Garda Síochána at the suit of the respondent in circumstances where the applicant was not warned that such a decision could be reversed by the respondent and where the respondent has since reversed the said decision and proceeded to prosecute the applicant. (see Para. vi).
>
> (3) A declaration by way of judicial review that the said proceedings have been brought in breach of the applicant's right to a trial in due course of law and in breach of the applicant's right to the expeditious initiation and disposal of criminal proceedings as required by law (see para. (vii)).

5. In the Statement of Opposition on behalf of the Director of Public Prosecutions, there are a number of traverses of averments in the applicant's Statement, but of particular relevance is the fact that the Director of Public Prosecutions, in denying that the decision not to prosecute communicated on 23rd April, 2006, was final and conclusive, avers that it was subject to review in accordance with the Director of Public Prosecutions' Published Guidelines (by reference to the Annual Report for 1998 published in March 1999), that the decision to prosecute is a matter solely within the control of the Director of Public Prosecutions who reserves the power to review any decision made in accordance with the Published Guidelines, that the Director of Public Prosecutions was not guilty of a breach of the applicant's right to fair procedures or constitutional justice by failing to advise and/or warn him of the fact that he reserves the power to reverse the decision, that the Director of Public Prosecutions was not at any time under an obligation to advise or warn the applicant that a decision not to prosecute might be the subject of review or reversal, but that if there was such duty, the Director of Public Prosecutions had discharged it by the publication of guidelines. Logically, the Director of Public Prosecutions denies that the applicant took any steps on foot of an assurance that the decision to prosecute was final or conclusive, since the Director of Public Prosecutions denies that any such assurance was given. The Director of Public Prosecutions also denies that an estoppel operates.

6. The grounding affidavit was that of Mr. McGuill of 24th July, 2006 with replying affidavits of Garda Martin and Ms. Balfe respectively dated the 20th November, 2006 and the 23rd November, 2006. Mr. McGuill swore two further affidavits, the only one relevant to the issue I have to decide being that of the 11th December, 2006 and the applicant swore a relevant affidavit on 12th December, 2006. A dispute exists on the affidavits between Garda Murphy and the applicant as to what was precisely said by her when she informed him on 23rd April, 2006 that there was to be no prosecution. He asserted that she said that the Gardaí in Cavan/Monahan had completed their involvement in the case. It appears that at one stage it was contemplated that it be sought to cross-examine Garda Martin because of this dispute but such did not occur and accordingly the case has proceeded on the basis that the applicant's assertion that those words were spoken has not been proved by him on the balance of probabilities, having regard to the impossibility of adjudicating on the dispute on the affidavits alone. However, it seems to me that even if these words were spoken they could have no effect either way but merely constitute a gloss which added nothing to what had already been said, that being, presumably, that obviously police involvement in the matter was at an end if the D.P.P. had decided not to prosecute. Thus, if the conflict were resolved in favour of the applicant, it would not, in my view, make any difference to the decision which I make in this case (as I think would be manifest from its tenor, below).

7. It appears that in October, 2004 L.B., niece of the applicant, made allegations of sexual misconduct to his wife. The applicant

apparently acknowledged his misconduct, apologised to the family of the complainant and entered intensive therapy, and, in particular attended Edgewater Counselling Craigavon, County Armagh on a weekly basis for individual and family therapy from in or about November, 2004 until May, 2006. The applicant was apparently residing at Crossmaglen, County Armagh, but moved to Monaghan in or about that time, having bought a site there a short time before with a view to constructing a house.

8. A number of authorities have been opened to me, bearing directly upon the point in issue in this case, namely, *Eviston v. D.P.P.* [2002] 3 I.R. 260, (the leading cases) *M.Q. v. D.P.P.* [2004] (Unreported, McKechnie J., 14th November, 2003), *Hobson v. D.P.P.* [2006] 4 I.R. 239, and *L.O'N v. D.P.P.* [2006] (Unreported, MacMenamin J., 1st March, 2006).

9. In *Eviston*, the applicant was the driver of a vehicle engaged in a collision with another causing death, and the D.P.P. decided that no prosecution should be initiated. That decision was notified to the applicant's solicitor but following it the father of the deceased requested the Director of Public Prosecutions to reconsider his decision, which he did, and the applicant was charged with the offence of dangerous driving causing death. The applicant furnished a signed written statement, by the agency of her solicitor, to the Gardaí on 3rd September, 1998, and reports (whether in the form of letters or otherwise) from consultant automotive engineers (Messrs. W. J. Rowley & Associates). This statement and those reports were before the Director of Public Prosecutions when he made his initial decision. The State Solicitor for the relevant area was told by the D.P.P., on 30th November, 1998 (by letter), that there would be no prosecution and the applicant, through her solicitor, was informed of this decision early in December 1998. As a result of the Director of Public Prosecutions' review, application was made for the issue of the summons against the applicant, of which the applicant's solicitor was informed. Leave to seek judicial review was granted on 22nd March, 1999, and the matter ultimately came before the Supreme Court, the judgments whereof are those of Keane C.J., Murphy and McGuinness JJ. (as they then were). The other members were Denham and Geoghegan JJ., who agreed but Murphy J. dissented in part.

10. It was held *inter alia* that the Director of Public Prosecutions was entitled to review an earlier decision by him not to prosecute and to arrive at a different decision, even in the absence of new evidence, and that he was not obliged in either instance to give reasons for his decision. It was further held that, on the evidence, the stress caused to the applicant therein by the initiation of the prosecution, after she had been told of the decision not to prosecute, would not, of itself, afford her legal grounds under Article 40.3 of the Constitution, or otherwise, for an injunction restraining the continuance of the prosecution, that there was no equitable estoppel where the applicant had not acted to her detriment in a reliance upon the decision not to prosecute and that there could be no legitimate expectation in the absence of the departure, without prior notice, from a legitimately expected particular procedure. In the course of his judgment, Keane C.J. reviewed what I might term the two principal prior decisions of the Supreme Court concerning the exercise by the Director of Public Prosecutions of his prosecutorial discretion, that is to say, *The State (McCormack) v. Curran* [1987] I.L.R.M. 225, *and H. v. D.P.P.* [1984] 2 I.R. 589: in those cases, the court was concerned with a decision not to prosecute. He pointed out that they:

> ". . . go no further than saying that the courts will not interfere with the decision of the respondent not to prosecute where: -
>
> (a) no *prima facie* case of *mala fides* has been made out against the respondent;
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> (b) there is no evidence from which it could be inferred that he has abdicated his functions or been improperly motivated;
>
> (c) the facts of the case do not exclude the reasonable possibility of a proper and valid decision of the respondent not to prosecute the person concerned."

Neither in *Eviston*, or here, is it suggested here that the Director of Public Prosecutions acted with *mala fides* or that he was influenced by an improper motive or policy in reversing his original decision, or abducted his functions, but rather, as here, so in *Eviston*, the contention of the applicant was that, having arrived at a decision not to prosecute him and communicated that decision to him, he could not, as a matter of law, subsequently reverse that decision, save where new factors had come to light which were not present when he made his original decision, and having failed to inform the applicant of his entitlement to review. Keane C.J. pointed out that:

> "… the respondent is entitled to review an earlier decision made by him not to prosecute and to arrive at a different decision. Nor is he obliged, in either instance, to give reasons for his decision. The respondent (in that case) was thus entitled, as a matter of policy, to adopt a procedure of reviewing earlier decisions made by him. Clearly, it could not be suggested that such a policy was in any sense improper: on the contrary, given the consequences for both the victims of crime and those suspected of having committed a crime of a decision to prosecute or not prosecute, such a policy could only be regarded as being in the public interest, since, in the absence of an appeal procedure, it provides at least some opportunity to the respondent of reversing decisions which, on further consideration, appear erroneous."

The learned Chief Justice further pointed out that so far as equitable estoppel might apply:

> "One could not say that there followed in the legal sense some detriment to the applicant which would render inequitable the continuance of the prosecution, since her ability to defend the proceedings had not in any way been impaired. Different considerations would have arisen if, for example, on receipt of the respondent's first decision, the wheel and tyre had been disposed of (the state of which was relevant to the cause of the collision). In such a case, one could conceive of a prosecution being restrained, either on the basis of an equitable estoppel having arisen, or since the applicant could not be deprived of her constitutional right to a trial in due course of law because of the loss of evidence resulting from the respondent's actions."

And going on to deal with the doctrine of legitimate expectation, he took the view that it could not be successfully invoked:

> "Deep and natural disappointment may well be the result of another person's action, as in this case, but that cannot, of itself, justify the invocation of this doctrine. In general terms, there must at least have been a legitimately founded expectation that a particular procedure would be followed and an alteration in that procedure without prior notice to the person concerned. That is not what happened in this case."

11. I make reference to the question of equitable estoppel on the basis that it might be sought to contend that because of what was done and or said by or on behalf of the D.P.P., the applicant acted to his detriment in as much as he apparently, on the evidence, proceeded to begin to build his new house and otherwise contracted liabilities and expended monies. This is not, of course, detriment in the sense meant by Keane C.J. in as much as nothing that he did undermined or diminished his capacity to defend himself. There

was no departure by the D.P.P. from the procedures which have been adopted by him in respect of reviews and reversals of prior decisions not to prosecute, since the procedure in that regard was first elaborated in his Annual Report for 1998, so hence legitimate expectation does not arise either.

12. Keane C.J. considered that it was of significance that in as much as Mrs. Eviston had not been told that the decision not to prosecute could be subjected to review, that could not be regarded as having been known to her, as the review procedures were not part of the law of the land. Whilst the review procedures are not themselves part of the law, it is the law that a review may take place with or without the consideration or availability of additional or new evidence or circumstances and the applicant must be taken to be aware thereof.

13. It has been submitted to me, on behalf of the D.P.P., as set out in the affidavit of Miss Balfe, that the fact of the existence of a review procedure is in the public domain since the publication in March 1999 of the Director of Public Prosecutions annual report for 1998 under the heading "Reviews of Director of Public Prosecutions Decisions" therein. Ms. Balfe points out that, substantively speaking, the fact of the existence of a review procedure and the manner in which it might be triggered or operated has been referred to in subsequent publications and, also, is to be found on the Director of Public Prosecutions' website.

14. The guidelines are addressed by Mr. MacGuill in his affidavit of 11th December, 2006, but such affidavit deposes to no new fact but consists almost exclusively of commentary or submissions. The one possible exception is the exhibition of a copy of a speech of the Director of Public Prosecutions, given on 25th November, 2006, at a conference on the criminal law, but I do not see such speech as being relevant. I do not think that the fact of the existence of these guidelines or otherwise that information concerning the fact of the existence of, or the procedures to be adopted on review has a bearing on the position one way or the other in this case: they are not the law of the land and, accordingly, a citizen cannot be deemed to know them. Of course, the position might be different if one were talking of notorious facts, possibly akin to those of which judicial notice might be taken but there is no evidence to suggest that the applicant knew of them and they do not fall into the latter category.

15. Keane C.J., on the authority of the *State (O'Callaghan) v. Ó hUadhaigh*, [1977] I.R. 42 also said that:-

> "Where, as here, the respondent avails of his undoubted right not to give reasons for a decision by him to reverse a previous decision not to prosecute, but concedes that there has been no change of circumstances, his decision is as a matter of law, prima facie reviewable on the ground that there has been a breach of fair procedures. Whether such a breach has been established must, of course, depend entirely on the circumstances of the particular case".

And he pointed out that the contention in *Eviston* was that

> "Having arrived at a decision not to prosecute her and communicated that decision to her, he could not as a matter of law subsequently reverse that decision, save where new factors had come to light which were not present when he made his original decision."

It is arguable on the basis of the former passage that it is only where there has been a concession by the Director of Public Prosecutions that there is no change of circumstances (by which will ordinarily be meant, I think, no new evidence) that the power of review can be exercised. One could also say, on the basis of the *State (McCormack) v. Curran*, [1987] I.L.R.M. 225 and H. v. D.P.P. [1994] 2 I.R. 589 that where the facts of the case do not exclude the reasonable possibility of a proper and valid decision of the respondent not to prosecute the person concerned, and one applied that principle to a decision to prosecute after review that the facts of this case "do not exclude the reasonable possibility of a proper and valid decision of the respondent *to* prosecute". On this basis it might in turn be possible to argue that the decision to prosecute here might have been actuated by a change of circumstances (including new evidence) such that, even if the applicant was not informed of the power of review when told that there would be no prosecution, a court would not intervene on such facts. This was not, argued, and I will not proceed on this basis.

16. Could it be suggested that if there was a change of circumstances such as the availability of new evidence, a court would inhibit a prosecution? There is no suggestion in *Eviston* or any of succeeding authorities that, in those circumstances, there would be a breach of constitutional justice or the right to fair procedures as the authorities are limited to circumstances where there appears to be no such change. The principles in question are not, of course, the classic principles of *audi alterem partem* and *nemo iudex in casa sua* but, as pointed out by Keane C.J. the Supreme Court "has established beyond argument that the requirements of natural justice in particular cases may extend beyond the observance of those traditional criteria".

17. Keane C.J. in *Eviston* stressed that he was excluding from his mind "every element of sympathy for the applicant" but that where "no reason had been advanced… as to why the applicant was not informed that the decision of the respondent not to institute a prosecution might in fact be reviewed at a later stage". He was:-

> "Forced to the conclusion that in circumstances where the respondent candidly acknowledges that there was no new evidence before him when the decision was reviewed, the applicant was not afforded fair procedures to which, in all the circumstances, she was entitled. It follows that the requirements of the constitution and the law will not be upheld if the appeal of the respondent in the present case were to succeed."

18. Denham J. agreed with the decision of Keane C.J. and Geoghegan J. agreed with both. Murphy J. dissented and I will pass over that judgment. It is clear, however, from the decision of McGuinness J. that she regarded the case for intervention by the court as limited when she said:-

> "In my view 'the particular circumstances' in the instant case must require fair procedures on the part of the respondents. In thus holding I am bearing in mind all of the facts of the case as they have emerged during the course of the proceedings. I also bear in mind the level of stress and anxiety which has been borne over a considerable period by the applicant. On these particular facts, it seems to me that once the respondent had unequivocally and without any caveat informed the applicant that no prosecution would issue against her in connection with this road traffic accident, it was a breach of her right to fair procedures for him to reverse his decision and to initiate a prosecution by the issuing of the of the summons on 23rd December, 1998."

19. Accordingly, there is a right to fair procedures in the event of a change of mind by the Director of Public Prosecutions without a change of circumstances (including new evidence) where the suspect or the accused has not been told, when being informed that he is not to prosecuted, that the decision can be reviewed by the Director of Public Prosecutions and, on review, a decision to prosecute him could be made: the breach of the right to fair procedures would constitute, in those circumstances the very fact of prosecution. The right in question in such circumstances would however, be breached if there was knowledge on the part of the suspect or

accused of the fact of the review procedure.

20. In *Hobson v. The D.P.P.*, it was sought, on the authority of *Eviston*, to restrain a prosecution for dangerous driving causing death, when the accused had been prosecuted, to put the matter shortly, for less serious road traffic offences, arising from an accident but there it was established that there was a change of circumstances in as much there was new material before the Director of Public Prosecutions when he changed his decision. Assertions of prejudice were made on other grounds but these do not appear to be relevant for the present purpose, nor, indeed was the fact that a private prosecution for the relevant offence had been initiated and there had been an indication by letter to plead guilty to the lesser charges.

21. The crucial point from the present purpose is that in his conclusions Peart J. stated that:-

> "I am also satisfied that since *Eviston* it has become public knowledge that the respondent may review decisions made by him, and that the applicant cannot successfully complain that the respondent failed to indicate when he made his first decision that he was entitled to review and alter that decision."

The fact of the decision in *Eviston*, alone, is presumably what Peart J. had in mind here and of course it is equally applicable in the present case.

22. In *M.Q. v. The Judges of the Northern Circuit and the D.P.P.* the question of fair procedures on the occasion of a reversal of decisions to prosecute were also considered. In this instance there were two such decisions (two reviews, accordingly taking place), the ultimate decision to prosecute being made on the 18th July, 2004. There was no communication to the applicant on any of the occasions when he was told that there would be no prosecution (i.e. initially and on the occasion of the first change of mind). McKechnie J. rejected the proposition that it could in any real sense be said that there was new material (or hence a change of circumstances) on the occasion of the reviews.

23. MacMenamin J., of course, applied the principles elaborated in Eviston and subsequently followed in *M.Q* when deciding *L.O'N v. D.P.P.* (Unreported, 1st March, 2006). In L.O'N. v. D.P.P. one of the issues which fell to be determined was similarly that of the application of fair procedures by the Director of Public Prosecutions having regard to the fact that the initial decision not to prosecute was made on 26th July, 1989, (being, as it happened, in excess of one year from the time of the dispatch of the file to the Chief State Solicitor). In any event on 26th July, 1989, the D.P.P. directed that there should be no prosecution. After further elapses of time and investigation, the file was again referred to the D.P.P. on 15th November, 2004, when on 9th February, 2004 he again directed that there be no prosecution. The reason for the next review of the papers does not matter, having regard to the decision of Keane C.J.'s view that the reason for review is irrelevant, but a prosecution was directed on 1st July, 2004 and the accused was arrested and charged on 21st October of that year. The cumulative delay between the initial decision not to prosecute was some four and half years in *M.Q.* but approximately 13 years in the case of *L.O'N.*. In that case, also, no information was imparted to the accused that the course adopted by the Director of Public Prosecutions (i.e. not to prosecute) was subject to review or reversal and MacMenamin J. found that "the respondent had no new significant matters of an evidential nature before him" and "no evidence has been adduced that fresh additional material" was put before the (Director of Public Prosecutions) between the second decision not to prosecute in February, 2004 and the later decision to do so. To put the matter in another way, there does not appear to have been any change of circumstances.

24. MacMenamin J. pointed out that the lapse of time between the communication of the decision not to prosecute and the issue of summonses in *Eviston* was in or about three weeks. He concluded that:-

> "Having regard to the circumstances therefore, it seems to me that this case comes within the category of *exceptional cases* envisaged by *Eviston* when because of the nature of the communication and conduct and issue of fair procedures arose. Having regard to the similarity of facts I consider that the authority of *M.Q.* should be followed in this case. The facts of the instant case are clearly distinguishable from that of the case of *Cyril Hobson v. D.P.P.* where it is quite clear from the judgment there was before the D.P.P. a substantial quantity of new evidence which led him to reverse his decision. The instant case, therefore, closely resembles *Eviston* and *M.Q.* on its facts but does not resemble *Hobson* on the decisive issue. An additional factor which cannot be ignored is the consideration of stress and anxiety it is the uncontroversial evidence that on the 9th September, 2004, the applicant took a drug overdose in an attempt to take his own life and as a result was hospitalised and he went on to say:-
>
> "I conclude that in the instant case the applicant was entitled to fair procedures and (was) entitled to be notified and make written submissions on the issue as to whether or not the respondent should reverse the decision not to prosecute and was denied that right."

Obviously the latter conclusion is a very large extension of the pre existing law as elaborated in *Eviston* and is in the nature of extending the entitlement to fair procedures to embrace the right of "*audi alterem partem*". As set out above Keane C.J. has referred to *inter alia* that right but held that the right to fair procedures extended to a separate, additional right (having regard to the broader definition of constitutional justice or fair procedures, beyond those of *audi alterem partem* and *nemo iudex in rea sua*). I think it clear from the judgment of Keane C.J. and the proceeding authorities as to the status and rights of the D.P.P. that it was not envisaged by *Eviston* that there would be a right to be heard on the part of a putative accused in the event that a review was considered. I therefore respectively disagree with my colleague, MacMenamin J. on this point. I should add, of course, that it is not pleaded in this case that there is a right to be heard and, if I may say so, rightly so.

25. Such then are decisions dealing with the position contended for by the applicant, and it seems to me that the relevant or *potentially* relevant factual matters here are as follows.

> (a) The charges in question relate to two unknown dates between the 1st January, 1994 and the 31st December, 1997.
>
> (b) Allegations according to the tenor of the charges were made in October, 2004 to the applicant's wife, whereupon he acknowledged his misconduct, apologised to the family of the complainant and entered therapy.
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> (c) He moved house to County Monaghan in or about December, 2004 because of the allegations. On 13th October, 2004 (but prior to the allegations) he had bought a plot upon which he proposed to build a house. It appears that he intended to move to Monaghan from Armagh before the allegations were made. In June, 2005 he took possession of premises in Monaghan with a view to establishing a restaurant business, which was so established and with success subsequent to being informed that there was to be no prosecution. He has undoubtedly entered to substantial financial commitments and has commenced building work upon his new home – in circumstances where he appears reasonable to infer that this was

postponed pending resolution of the investigation by the Gardaí or any prosecution.

(d) On 10th October, 2005 the applicant was arrested for the investigation of the offences with which he has been charged.

(e) On 23rd April, 2006 the applicant was informed that there would be no prosecution. The applicant was served with the summonses on 21st June, 2006 (approximately two months later).

(f) The applicant confessed to the offences in question to the Gardaí and also admitted them when taxed by members of his extended family (if I might put the matter thus) in October, 2004: he does not seek to impugn or question these admissions.

26. I disregard, as was done by Keane C.J., the extra stress and anxiety caused by the change of mind. *Eviston* and the other authorities to which I have referred were not cases where there was any change of position from an economic or financial point of view as happened here, but it seems to me that as a matter of principle the Director of Public Prosecutions' discretion to prosecute even after a review, where notice was not afforded to a putative accused of the prospect of a changed decision should not be limited because of a factor of this kind. I do not regard the time period as materially changing the position from *Eviston*.

27. It seems to me, accordingly, that there are only two substantive relevant differences from *Eviston*, here. The first is that by virtue of *Eviston* (if not subsequent decisions) the entitlement of the Director of Public Prosecutions to review decisions and prosecute even where he has earlier decided not to do so and so informed the applicant has been clearly established: in, this regard I take the same view as Peart J. in *Hobson*. I have disregarded knowledge, as set out above, by virtue of publications of the Director of Public Prosecutions. It seems to me that having regard to the fact (as quoted above) that in *Eviston*, Keane C.J., dealing with the fact that the Director of Public Prosecutions had "not given (Mrs. Eviston) the slightest intimate that this was a decision which could be subjected to review in accordance with the procedures in his office" said that:-

> "If those review procedures form part of the law of the land, then, the applicant would be assumed, however artificially to have been aware of that law."

The position is now different.

28. I have asked myself whether or not, by this passage, Keane C.J. meant that a putative accused could not be taken to know the fact that reviews could take place (in accordance with the review procedures of the Director of Public Prosecutions). I think the learned then Chief Justice must have meant this became the gravaman of the case was the absence of knowledge; apart from the guidelines (which I have excluded) everyone now knows (or is deemed to know) that it is now the law of the land that a review can take place in accordance with certain procedures, being procedures which do not involve prior notice or a warning to the applicant.

29. Therefore the position is now different from that identified as arising by Keane C.J. at the time of *Eviston* (or, to put the matter in another way, *Eviston* itself articulates a legal rule that review is possible). One has had, in addition, the decisions to which I have referred, on the same issue and, accordingly, I am of the view that the applicant must be deemed to be aware of the fact of the potential for review.

30. It is not clear to me that in Hobson Peart J. was necessarily basing his decision as to what the position was as to knowledge since *Eviston*, by virtue of the application of the principle that everyone must be presumed to know the law. He did, however, say and I will not repeat it, that review had become "public knowledge" (to put the matter shortly); it is possible that in this connection he was referring to the publications of the Director of Public Prosecutions but I base my view on the former interpretation.

31. The second difference of substance from the facts in *Eviston* (or indeed the other authorities) is the fact of the admissions by the accused. It is arguable that the free standing right to fair procedures at the hands of the Director of Public Prosecutions cannot be affected one way or another by the fact of an uncontested admissions of guilt, even where the issue is whether or not a prosecution should be inhibited. Mr. Collins, however, strongly contended that the fact of the uncontested admissions was relevant. Mr. McGuill dealt with the applicant's apology and acknowledgement of wrong doing, as well as the fact that he underwent counselling, on the basis that they did not constitute a confession of guilt relevant to criminal proceedings and that they do not negate the presumption of innocence. No one suggests the latter has been impaired, or should be impaired. However, he is simply wrong as a matter of law to say that an admission of sexual misconduct to, say, a member of his family is not an admissible confession for the purpose of criminal proceedings, even if one were to ignore that one has the confession made to the Gardaí.

32. As to the relevance of the admissions Mr. Collins has relied, *inter alia*, on *McFarlane v. Director of Public Prosecutions and Ors* (Unreported, Supreme Court, 5th March, 2008) and in particular, he has quoted (aptly in my view) from the judgment of Kearns J..

33. Kearns J. referred to alleged admissions indicative of guilt made by the accused whilst in Garda custody after arrest as being part of the case against him (with certain fingerprints), and he pointed out that neither in those proceedings nor previous relevant proceedings had be disputed the admissibility or accuracy of the evidence in relation to such admissions. In the context of that application for prohibition or injunction restraining continued prosecution, where admissions so uncontested so arose, Kearns J. said:-

> "Further, where an applicant has made admissions in the course of an investigation the court should be entitled to have regard to that fact. That is not to say that the admissions may not be contested or ruled out at trial, but in the context of a quite different application on the civil side an uncontested admission is a factor which must go into the balancing exercise. This point was well made by Denham J. *in B. v. Director of Public Prosecutions* [1997] 3 I.R. 140 and, has been pointed out in another judgment of this Court in *S.A. v. Director of Public Prosecutions* [2007] IESC 43, that it would be "extraordinary" to prohibit a trial in circumstances where the defendant admits to behaviour of a criminal nature."

The latter reference was from the judgment of Hardiman J. (in the latter case) who said that:-

> "Admissions, depending on their context, may vary greatly in their significance on an application like this. An unrecorded and disputed allegation may be of little or not significance unless its terms or context make it very compelling. A disputed allegation of admissions to Gardaí will normally be verified by recording: an admission to record will call for an explanation. However, in the present case the admissions do not appear to have been denied or glossed in any way so that it seems reasonable to take them at face value."

and also:-

> "To look at these admissions (in that case) from another point of view, it would in my opinion be extraordinary to prohibit a trial in circumstances where the defendant admits a significant amount of behaviour of a criminal nature."

34. In the latter case the applicant was seeking to inhibit the continuation of the criminal proceedings on the grounds of prejudicial delay where, of course, a prohibition or injunction would only follow from a finding that there was a real risk of an unfair trial. *McFarlane* is of more assistance here since the application was *inter alia* based on the breach of free standing rights (as here) under the constitution or of relevant Articles of the European Convention on Human Rights and Fundamental Freedoms, due to systemic delay in the conduct of litigation, prejudice being irrelevant. The applicant failed to establish blameworthy prosecutorial or systemic delay and accordingly any question, for example, of balancing the community's right to prosecute against, say, the accused right to an expeditious trial did not have to be determined but the relevant point, however, is that in that context, the admission was considered relevant.

35. Of course, in *Eviston* (or the subsequent decisions) the Supreme Court, or this Court, were not confronted with facts which necessitated an address of the effect of an admission where there has been a breach of the right to fair procedures. I am satisfied that there was no such breach and even if I am wrong I am satisfied that the reliefs sought should be refused because of the fact of the admissions.

36. Obviously, on any application to prohibit or restrain the continuance of a criminal proceeding, one could never refuse to do so in any case where there was real risk of an unfair trial, and no question of balancing competing rights would arise. In particular, the community's right to prosecute would always yield to the entitlement to such trial. Where the right infringed is a free standing right to fair procedures at the hands of the Director of Public Prosecutions, my concern, of course, must be the necessity for strict adherence to *Eviston* as I am bound thereby. However, in the light of the fact that the Supreme Court was not confronted with an admission, and that in other classes of case where it is sought to inhibit a trial, the fact of an admission is relevant I do not see how in principle it might be irrelevant in a case such as the present.

37. In as much as there is no prejudice in terms of the defence of the proceedings, it seem to me legitimate to balance any right infringed to fair procedures at the hands of the Director of Public Prosecutions by the commencement of a prosecution on the basis of a change of mind (where an accused was not apprised of the capacity for a review) against the community's right to prosecute. It seems to me that in the balancing exercise I should not adopt what has been characterised as a course which would be "extraordinary".

38. For the sake of completeness I should say that a number of other decisions have been opened to me on the substantive issue. In *D.P.P. v. Monaghan* (Unreported, Charleton J., 14th March, 2007), where he found it necessary to cite *Eviston* (with approval) and elaborate the principles stated therein, and in *Dunphy v. D.P.P.* [2005] 3 I.R. 585, a question of discovery arose where it was sought to inhibit a prosecution by virtue of the fact that whereas another engaged in the same offence was unlike the accused, not prosecuted, but subjected, instead, to the Garda Juvenile Liaison Scheme – the case did not concern *Eviston* in any substantive way, but concerned issues canvassed in *Eviston* about the subjection of the Director of Public Prosecutions to judicial review (although it was referred to by Mr. Ó Lideadha in the context of the issue which he raised as to the burden of proof imposed upon him in relation to the decision to prosecute).

39. It was submitted by Mr. Ó Lideadha that the facts pertaining to the decision to prosecute here are or were in the peculiar knowledge of the Director of Public Prosecutions, whereby the burden of proof shifts to him. He relies upon *Brennan v. Windle* [2003] 3 I.R. 494. In that case the applicant had been sentenced to a term of imprisonment in his absence and when he was unaware of the hearing. An issue arose as to whether or not valid service of a summons had occurred and, also, as to whether or not a committal warrant had been validly reissued. The State apparently submitted that on these issues the applicant had failed to discharge the burden of proof. Hardiman J. expressed his "distaste" for the stance taken by the notice party (the D.P.P.) and said that where a moving party had established a *prima facie* case where the liberty of the citizen was in issue, there was an imposition on the party defending the decision because of the fact that the relevant facts were peculiarly within its knowledge. Mr. Ó Lideadha contends that where the decision on whether or not to prosecute has been put in issue and the Director of Public Prosecutions is silent as to the facts directly relevant to that decision (I paraphrase) there was an obligation on the Director of Public Prosecutions to show (I infer on the balance of probabilities) that his actions were not absent fair procedures. I do not think that any impropriety has been shown and, very properly, as one would expect from Mr. Ó Lideadha, in any event, he has quoted a passage from the decision of Hardiman J. in *Dunphy* (a discovery application it will be recalled) to the effect that:-

> "In a case where this special protection is relied upon there is a special evidential standard for the applicant as described in the cases cited above. This onus must be discharged by any person seeking relief of the sort the applicant seeks here. It is of course true that she does not have to discharge that onus at this stage of the litigation but the existence of this unusual onus is important to the resolution of the present issue. The granting of discovery, even if the applicant failed to get inspection, would or might undermine the special protection available to the respondent. His entitlement to that protection is beyond argument, certainly in the court as at present constituted. In order to validate it, the applicant must show at least suggestive evidence of an impropriety. This has not occurred."

Thus, far from casting some burden on the Director of Public Prosecutions, the special protection which he enjoys surely buttresses the ordinary rule in civil litigation that he who asserts must prove. There was no suggestion in *Eviston* or the subsequent decisions on the substantive issue here that any other rule might apply. I think that the reason must be obvious.

40. Counsel are to address me in relation to the outstanding issues raised in the proceedings (i.e. other than what I have called he substantive point) in as much as they have now been resolved. So far as the substantive issue here, being the matter in continuing dispute, is concerned, I refuse the relief sought.