

**THE HIGH COURT
JUDICIAL REVIEW**

2002 No.12 JR

BETWEEN**S.A.****APPLICANT****AND****THE DIRECTOR OF PUBLIC PROSECUTIONS****RESPONDENT****Judgment of O'Neill J. delivered the 18th day of July, 2005.**

1. The applicant is a member of the congregation of Christian Brothers in Ireland. By order of the High Court (Ó Caoimh J.) made 14th January, 2002, and the order of the Supreme Court made 1st November, 2002, he was given leave to apply for Judicial Review and orders of prohibition in respect of eight charges of buggery, 63 charges of indecent assault and one charge of attempted buggery allegedly perpetrated against six minors, five of whom were inmates or residents of Artane Industrial school and the sixth a female who was the grandchild of an employee of the Christian Brothers and as part of his employment had a cottage or house on the lands of the Christian Brothers in Marino. All of the offences alleged to have been committed against the five residents of Artane Industrial School are alleged to have been committed between 31st July, 1961 and 31st January 1964, and the offences alleged against the sixth person who was not a resident of the Industrial School are alleged to have been committed between 15th August, 1964 and the 6th July, 1969.

2. The applicant's case is that because of the very lengthy delay between the dates of the alleged commission of these offences and the making of complaints in relation to them, in 1998/1999/2000, and further by reason of the delay in prosecuting the offences, the applicant cannot now get a fair trial and specifically his defence to these alleged crimes is prejudiced by reason of the fact that essential witnesses, such as two lay workers in the kitchen in Artane Industrial School, the nurse in the infirmary and a brother who was allegedly an eye witness to some of these offences, are either dead or non-traceable.

3. He complains that there is an absence of independent evidence as to the layout of the kitchen, the furniture in it and that it cannot be proved whether the door of the storeroom could be locked or not, and it cannot now be established who had access to which rooms. The applicant also makes the case that by reason of the large amount of extremely prejudicial press coverage of the Artane Industrial School in recent times that it would not be possible to find a jury that was not irretrievably biased against a Christian Brother charged with the offences alleged in this case and hence it would not be possible for the applicant to get a fair trial and it would not be possible for the trial Judge by way of directions to cure or even ameliorate that bias.

4. The respondents resist the application firstly on the grounds, that it was not brought promptly or within a period of three months from the relevant date as required by Order 84 Rules of the Superior Courts. Secondly, he contends, relying upon the evidence of the applicants and also of the psychologist Mr. Paul Gilligan, that the delay in the applicants bringing their complaints is explained and excused by reason of the dominion of the applicant and/or the inherent psychological effects of the alleged crimes on the complainants. Furthermore the respondent contends that there was no culpable delay on the part of State authorities in the prosecution of these offences from the time when they were reported to them by the complainants and in this regard they point to the fact that there was a very large number of complaints of a similar kind against members of the Christian Brothers congregation serving in the Artane Industrial School, such that it was necessary to set up a special unit in An Garda Síochána to deal with these complaints; that it was necessary when these complaints came in, including the complaints of the six complainants alleging offences against the applicant, to conduct extensive inquiries to establish the *bona fides* of these complaints, including an extensive search for and retrieval of old records. They also contend that it would not have been practicable to have treated each complaint as a separate case for the purposes of reference to the Director of Public Prosecutions or for the purposes of court proceedings, and they waited to assemble all of the complaints against individual alleged perpetrators of offences before referring these to the respondent for his decision on whether to prosecute. The first named respondent contends that having regard to the enormous task involved here, that there was no unreasonable or culpable delay in the prosecution of these complaints from the time of complaint.

5. The respondent also contends that the applicant has not been at all prejudiced in his defence of these proceedings; that in his interviews with members of An Garda Síochána he demonstrated a detailed memory of time and place and surrounding circumstances of these alleged events, and that those persons who are either deceased or non-traceable could not in all probability materially assist the applicant's defence.

6. In regard to the publicity concerning the Artane Industrial School, the respondent submits that none of this refers to the applicant himself and in any event much of it is now a number of years old and by the time the applicant's trial would come on "the fade factor" would have worked and in any event it is well settled that this is a problem that is amenable to appropriate directions by the trial judge.

7. The first issue to be confronted is that of delay on the part of the applicant in bringing these proceedings. Some doubt has arisen as to whether or not there were returns for trial in respect of all of the charges. There is undoubtedly a return for trial in respect of eight charges. I am satisfied from the affidavits and in particular the affidavit of S.C. that on 20th September, 2001, the District Court did make the appropriate order of return for trial in respect of all charges other than those relating to the complaints made by M.W., although it would appear that in error the order drawn up was only in respect of eight charges.

8. The judicial review proceedings were commenced on the 14th January, 2002, which is slightly less than four months after the returns for trial, and taking the returns for trial as being the appropriate date from which time ran for the purposes of Order 84, the application was made out of time.

9. The affidavit of Garrett Sheehan sworn on the 1st April, 2004, and in particular paragraph 11 thereof provides an explanation and excuse for the delay in making the *ex parte* application which commenced these proceedings. Mr. Sheehan says that before commencing judicial review proceedings, he sought to obtain as much discovery as he could from the State and in that regard as late as December, 2001, relevant and importance disclosure was still coming from the State and in addition to that he was making his own inquiries to ascertain what witnesses might be available and what documentation might be available.

10. In my view where it is apprehended that by reason of delay an accused person may not get a fair trial, there is an onus on the legal representatives of that person to establish as best they can what evidence is available, before applying for judicial review provided that this is done in an expeditious and timely manner, so as not to cause any further undue delay.

11. I am satisfied that Mr. Sheehan on behalf of the applicant did engage in such a process and that process was ongoing right into December 2001. The application was made soon after the commencement of the new term in 2002 and I am satisfied that in all the circumstances the explanation for the delay is acceptable and understandable and in my opinion excuses the relatively short delay that occurred.

12. That being so it would be wrong in my opinion for this application to be struck out, in limine and I would grant the necessary extension of time.

13. The problem of delay in alleged sex abuse cases against children has over the last decade or so led to a vast amount of litigation in these courts, in which accused persons as applicants have sought to have their trials prohibited on the grounds of inordinate delay in the reporting of the alleged offences and in a relatively small number of cases because of delay in the prosecution of those alleged offences. This litigation has led to a very large corpus of jurisprudence, from which I take the following principles to be now well settled.

1. The right to a speedy and expeditious trial derived from Article 48.1. of the Constitution may be invoked not only where the complaint is of prosecutorial delay but also where the complaint is of a lapse of time from the commission of the alleged offence until it is reported to the relevant authority i.e. An Garda Síochána.
2. Delay or lapse of time may be of such an inordinate degree as to give rise to an inference or presumption of prejudice such that a fair trial cannot be expected to ensue.
3. Child sex abuse cases are in a special category, insofar as the treatment of delay or lapse of time is concerned.
4. In a child sex abuse case inordinate delay may be explained and excused where it is shown that the delay was the result of the dominion of the accused over the alleged victim or the inherent psychological effects of the alleged crime which can be shown to have had the effect of preventing the victim from reporting the alleged crime to the Gardaí. The rationale for this is that the perpetrator of the alleged crime will should not escape justice on the basis of inordinate delay where in effect that delay is itself the consequence of the alleged crime.
5. For the purposes of the inquiry as to whether or not the delay can be explained and excused it is necessary for the court to assume the truth of the complaint. This assumption is necessary because otherwise it would be necessary to prove the facts of the alleged complaint i.e. the crime which would lead to the wholly impermissible situation of the guilt of an accused person being, in effect, proved in advance of his trial on the balance of probability in a civil action, which would inevitably destroy the presumption of innocence, and, put in jeopardy the prospect of a fair trial subsequently.
6. Once the inquiry as to whether or not the delay is explained and excused is completed the presumption of innocence is fully restored and then, if the court is satisfied that the delay has been adequately explained, the court must then consider whether or not the accused can demonstrate that it is probable that a specific defence which was available to him is no longer available or has been seriously weakened, by the passage of time, and if so satisfied, whether the degree of prejudice so caused is such as to create a serious risk of an unfair trial.
7. A necessary consequence of this approach is that if the court is satisfied that the delay is explicable, the accused person cannot rely upon what may be considered to be presumed prejudice resulting from the delay and if the trial is to be halted the accused must be able to point to specific prejudice in the form of a significant impairment of his defence caused by the passage of time. On the other hand if the delay is not explained adequately to the satisfaction of the court it follows that an accused person can avail of presumed prejudice the weight of which will vary according to the length of the delay itself and the nature and extent of the evidence actually available. For example there would be much less prejudice presumed in a case which depended on documentary evidence as compared to a case which depended solely on oral testimony.
8. The above approach for all its apparent inadequacies, nevertheless strives to strike a just balance between the community's right to prosecute in child sex abuse cases and an accused's right to a fair trial bearing in mind of course that in the hierarchy of rights the accused's right to a fair trial takes precedence over the community's right to prosecute.
9. A crucially important factor in determining whether to hold a trial is whether or not the difficulties presented can be adequately dealt with by appropriate directions from the trial judge such as pointing out to the jury the added difficulties faced by an accused when having to defend an allegation of crime of considerable antiquity.

14. Turning to the facts of this case the first issue which necessarily arises is whether or not there has been inordinate delay and secondly, if there has been, whether or not it is adequately explained and excused. I propose to deal with the question of prosecutorial delay first.

15. The first formal statement of complaint was taken from K.K. in January of 1996. The applicant was not interviewed in relation to the content of this statement until 18th April, 1997, when he denied the allegations. Nothing appears to have happened in the investigation of the complaints of KK until 30th May, 1998. On 30th May, 1998, the Gardaí established a separate Artane School Inquiry. From then on there was a considerable amount of activity evident. The other complainants came forward and made statements. I am satisfied on the evidence of Detective Sergeant Scott on affidavit and in cross-examination that a great deal of work had to be done in the taking of a very large number of statements from a very large number of complainants. This in turn led to the enormous task of conducting inquiries to establish the *bona fides* of these complaints which involved the search for and retrieval of a large volume of records. In due course the applicant was on the 22nd June, 1999, charged in respect of five complainants. On 22nd July, 1999, the applicant was interviewed in respect of the allegations of M. McE. and on 11th November, 1999, he was charged in respect of these allegations. On 22nd February, 2000, J.W. made his statement. The applicant was interviewed in respect of his allegations on the 16th March, 2000 and on 25th January, 2001, the applicant was charged in respect of these allegations. Subsequently depositions were sought and the matter adjourned before the District Court but that procedure was not pursued. On 14th September, 2001, the respondent indicated that he was not proceeding with the charges in respect of M.W. Finally on 20th September, as already mentioned here, I am satisfied that there were returns for trial in respect of all charges apart from those relating to M.W.

16. I am satisfied that from May of 1998 onwards there was no inordinate or inexcusable delay in the conduct of the prosecution. I am also satisfied that between January 1996 when a statement was taken from KK there was unreasonable delay on the part of An Garda

Síochána in progressing the investigation into the allegations made by KK. However I am satisfied that the applicant has not pointed to any particular prejudice be it presumptive or actual relative to the delay for that particular period and that being so I have come to the conclusion that that particular delay did not contribute in any kind of significant way to a risk of an unfair trial of the applicants in respect of the charges relative to KK. Accordingly the applicant's claim for prohibition of the further prosecution of the charges in respect of KK could not be entertained on the ground of that particular delay.

17. This brings me next to the question of lapse of time from the commission of the alleged offences until they were reported.

18. There can be absolutely no doubt that the delay involved here is quite inordinate ranging from 1961 to 1969 up to 1998/99/2000. The minimum period of delay here is 30 years and the maximum is 36 years approximately. Delay of this magnitude could not rationally be considered to be anything other than inordinate.

19. That being so the onus rests on the respondent to explain and justify the delay in question. In this regard affidavits have been filed by all of the complainants and, the respondent also relies upon the evidence of Paul Gilligan a Clinical Psychologist in which he exhibits reports on all of the complainants.

20. Whilst it is the case that in the great majority of cases of child sex abuse the respondent has relied upon the expert evidence of psychologists to explain the delay involved, it is of course not always necessary that that should be the case. The task of the court is to hear whatever evidence is advanced to explain the delay be it expert or simply evidence of fact, to assess the weight of that evidence and draw from it such inferences as appear appropriate. Such an approach was approved in *Barry v. Director of Public Prosecutions* judgment of the Supreme Court delivered 17th December, 2003.

21. In this case all of the complainants rely upon similar reasons to explain their delay and these may be summarised as being:

1. Fear that any complaint by them while they were inmates or residents of Artane would result in dire consequences and in particular severe corporal punishment. This would not apply to M. McE.
2. Guilt at their involvement in these activities.
3. A sense of shame because of the nature of the activities.
4. An overwhelming sense that having regard to the nature of their complaints, their own low status, the very high status in the community of clergy, that they would never be believed and that if they did complain to authorities that there could be dire consequence for them.

22. It has to be remembered that for the purposes of this part of the inquiry the court must assume the truth of the complaints made. Doing that, I do not have any difficulty in understanding these reasons advanced. I can readily appreciate, as a matter of common sense and relying upon my own experience of life, that for persons who had the life experiences of these complainants, that these above reasons would have been overwhelming inhibitors to disclosure by them of these complaints until such time as there occurred a very public sea change in public opinion, which would have conveyed to these complainants that if they brought forward their complaints there was a likelihood, that they would be sympathetically received by the relevant public authorities and that there would be no untoward consequences for them.

23. It follows from the foregoing, that I am of the view that expert evidence is not required to explain reasons of the kind set out above and indeed in the absence of any expert evidence I would have no difficulty in holding that the delay in the reporting of these alleged offences by these complainants is explained and justified. In this regard I note that a similar approach was taken by McGuinness J. in the case of *D.W. v. Director of Public Prosecutions*, judgment delivered on 31st October, 2003.

24. The expert evidence of Mr. Gilligan does validate the reasons given by the complainants and in certain respects adds additional reasons which could not be discerned without the expertise of a psychologist.

25. Mr. Gilligan's evidence and his reports were criticised in the affidavits of Mr. Tully and challenged in cross-examination on a number of basis, namely, that he had failed to disclose the results of psychological testing, that he had failed to conduct collateral inquiries to establish the veracity of the complaints and that he had failed to seek consultation with other medical/psychiatric advisers, where it was known that the complainants may have attended these in the past. Mr. Gilligan countered these criticisms by saying that he had conducted with each applicant two interviews involving a total of approximately four hours in respect of each complainant, that he had conducted psychological testing, that it was not his function to forensically test the veracity of the complaints, and that the clinical assessment resulting from the foregoing clinical process was sufficiently robust, as to not require the additional inquiries suggested either by Mr. Tully or by Mr. Murphy S.C. in cross-examination. He also drew attention to the ethical, clinical and practical difficulties of having to make inquiries of a variety of people such as family members or employers from whom the complainant may or would invariably have concealed the complaint over a very long period of time. He also stressed the purpose of his intervention which was limited by the instructions in writing to him from the Chief Prosecution Solicitor.

26. I am satisfied that the criticisms levelled at Mr. Gilligan are ill-founded and that it is safe for me to rely upon his conclusions based upon the interviews conducted by him with each complainant and the standard psychological testing carried out by him. I am satisfied, that Mr. Gilligan has not adopted an approach which has been criticised in previous cases, of merely setting out general principles relating to complaints of sexual abuse and ascribing these to the individual complainants without having conducted an examination which would be sufficient to demonstrate to Mr. Gilligan, the psychological make up of each individual and how each individual was affected by the alleged abuse. It is quite clear that Mr. Gilligan was apprised of the nature of the abuse concerned from his exposure to the statements in the book of evidence together with his lengthy interviews with each complainant and the normal psychological testing would have, and did reveal to him the effects which this had on each complainant.

27. In the case of B.M. Mr. Gilligan found that as a result of psychological testing his profile on the Traumas Symptom Inventory was consistent with his presentation during interview and was reflective of a chronic post traumatic stress reaction, depressive personality, and difficulties understanding and expressing feelings. He echoes what was said by B.M. in his affidavit namely that when he complained of by the applicant he believed this resulted in the removal of the applicant from Artane but with the consequence of him being subject to a three day beating by other members of the congregation. When he left Artane he did not report it because of his belief that he would not be believed which he says was confirmed when he spoke to a psychiatrist in 1969. In respect of B.M. Mr. Gilligan concludes as follows:

28. In the last paragraph of his report;

"Overall in my opinion the assessment indicates that the alleged incidences have had a lasting psychological impact on B.M. and have contributed significantly to his reluctance to report the alleged abuse. It is my opinion that Mr.M's delay in reporting the alleged incident of abuse is reasonable and understandable".

29. Mr.Gilligan's expertise in discerning a lasting psychological impact on B.M. which has contributed significantly to his reluctance to report the alleged abuse, reinforces a conclusion, that as a matter of common sense and normal understanding, as discussed above that the delay in reporting alleged abuse was both explicable and understandable.

30. In the case of N.C. Mr.Gilligan found that N.C.'s profile on the Trauma Symptom Inventory is reflective of a post traumatic stress reaction and that his profile also reflected sexual post traumatic stress which was not uncommon amongst those who have been sexually victimised and also a depressive personality style and difficulty in understanding and expressing feelings. He says in his report that he did not disclose the alleged abuse after he left Artane because of a sense of shame and also a belief that he would not be believed because of the status of Christian Brothers and the respect that people had for them. Mr.Gilligan concludes that the alleged incidents of abuse have had a lasting psychological impact on him N.C. contributing to his reluctance to report the alleged abuse and that his delay in reporting the alleged abuse was reasonable and understandable.

31. In the case of P.J.M.(O'C) Mr.Gilligan found that his profile on the Trauma Symptoms Inventory was consistent with his presentation during interview and reflective of a post traumatic stress reaction and also reflected a sexual post traumatic stress was not uncommon in those sexually victimised and also a depressive personality and difficulty in understanding and expressing feelings. He reports that Mr.M.(O'C) did not report his abuse when he was in Artane because of a fear of punishment and a sense of shame. When he left Artane his sense of shame and fear that people would consider him homosexual and a feeling that he would not be believed prevented him from reporting. He still has a fear of disclosure and he did not approach the Gardaí, they approached him. Mr.Gilligan was of opinion that Mr.M(O'C) has not resolved the feeling of shame and self doubt caused by the alleged abuse and these feelings have served to prevent him from confronting or proactively disclosing the alleged abuse and that the alleged abuse had a lasting psychological impact on him which has contributed to his reluctance to report the alleged abuse and that his delay in reporting the alleged abuse is reasonable and understandable.

32. In the case of J.W., Mr.Gilligan found on testing that his profile was *"valid indicating no clinically significant elevations."* Mr.Gilligan reports that he did not report the alleged abuse while he was in Artane because of a fear of receiving a physical beating and that in adult life he did not do it because he did not think anybody would believe him having regard to the fact that the applicant was a *"man of the cloth"*. He moved to England to get as far away as he could from the applicant and he retained a fear that the applicant might *"come to get him"*. He decided to report the alleged abuse only when he was approached by the Gardaí and he felt that it was important to *"tell the truth"*. Mr.Gilligan is of opinion that the main delayed impact of the alleged abuse on J.W. was an inability to express his feelings and a distrust of people in general and he concluded that the alleged abuse did have a lasting psychological impact on him and did contribute to his reluctance to report the alleged abuse and he concluded that his delay in reporting the alleged incidents of abuse was reasonable and understandable.

33. In the case of K.K., he did report the alleged abuse to the Christian Brother in charge of the Artane School but he alleges that this resulted in further punishment and abuse. In adult life he did not report because he felt ashamed and had a sense of guilt and would not have reported it without the support of his foster mother to whom he first revealed it. Mr.Gilligan was of the opinion that his assessment indicated that the alleged incidents of abuse had a lasting psychological impact on KK which contributed to his reluctance to report.

34. In the case of M.McE, Mr.Gilligan found that she suffered from a severe depression which she attributed to her childhood experiences. Her profile on the Trauma Symptom Inventory showed a chronic post traumatic stress reaction, sexual Post Traumatic Stress combined with excessive, inappropriate or dysfunctional sexual activity, a depressive personality style and difficulty understanding and expressing feelings. Early in life she did not report the abuse because she was afraid to cause trouble with the Christian Brothers, on whom her family depended for a living and she did not think anybody would believe that a member of the church would be involved in that kind of activity. As an adult she did not disclose the alleged abuse because she was ashamed about what had happened and did not want anybody to know and did not think she would be believed. Her eventual disclosure was the result of media exposure of abuse by members of the church and was an attempt to help her resolve her psychological difficulties. Mr.Gilligan was of opinion that psychologically the impact on M.McE contributed significantly to a reluctance to report the alleged abuse, and that her delay in reporting it was reasonable and understandable.

35. I am satisfied that in addition to the reasons advanced by each applicant for not reporting, in respect of which no expert assistance was in my opinion required for the understanding of them, they were also in respect of each of the complainants significant psychological impacts, as discerned and explained by Mr.Gilligan, which also significantly contributed to the delay in disclosure, and I am satisfied that these additional factors make the delay in reporting even more explicable and understandable.

36. In the light of the fact that the delay has been explained and is in my opinion excusable, the applicant cannot rely upon presumptive prejudice resulting from that delay and must point to specific prejudice to his defence.

37. In this regard the applicant points to a number of areas in which evidence has been lost through the passage of time as a consequence of which he cannot now realistically advance a defence to these proceedings beyond bare denial.

38. Firstly it is said that the applicant's own memory is impaired, that apart from the passage of time he is now 74 years of age and has difficulty remembering events so long ago.

39. I have carefully considered the memos of interviews with the applicant and it would appear to me that they give a strong impression of a good intact memory. It is of course the case that all memory deteriorates with time and age but in the absence of evidence of disease or dementia affecting memory, I would conclude that the applicant has a normal functional memory of the period in question and indeed appears to have a good or ready recollection of a great deal of detail, and a strong sense of exactitude about a lot of it, concerning the surrounding circumstances of these alleged events.

40. I would therefore conclude that insofar as the applicant's own physical or mental capacity to deal with these allegations is concerned, he has not by the passage of time being significantly disadvantaged.

41. Next the applicant complains that several if not nearly all of his fellow Christian Brothers who were in Artane at or about the time of these alleged incidents, and also a number of lay workers, are either dead or not traceable. In this regard particular emphasis is placed on two men who worked in the kitchen area namely T.C. and C.O'K and to a lesser extent J.M. who worked in the Boiler house.

42. Insofar as two lay worker in the kitchen are concerned the specific complaint is that without these, the applicant is deprived of corroboration of his evidence and also additional evidence from them concerning the running of the kitchen and dinning area and as a consequence of this the applicant is not in a position to establish surrounding detail against which the credibility of the complainants could be tested. In particular stress was laid upon a management of the storeroom and the locking of it i.e. who had keys or who had access to the storeroom.
43. In regard to fellow members of the Christian Brothers congregation two in particular were mentioned. These were the two who were alleged by K.K. to have been present when particular acts of abuse were committed by the applicant. In respect of one of these the applicant had claimed that he is untraceable and in respect of the other that he could not be identified.
44. The applicant also complains about the absence of records and in particular medical records in relation to the complainants and their attendances at the infirmary and also complains that the nurse who was in charge of the infirmary at the time, and the brother who succeeded her are no longer available.
45. In regard to B.M. the applicant complains that because a Mr. Brown a psychologist whom it is alleged by B.M. he attended in 1969 cannot be traced the truth or otherwise of B.M.'s evidence that he attended this person in 1969 and was informed by him that his complaints would not be believed if he disclosed them, cannot be tested.
46. He complains that the inability of N.C. to identify the other boy whom he alleges was abused by the applicant at the same time as himself is entirely the result of the passage of time and had these alleged incidents been reported at an earlier time he would have had no difficulty in identifying this person and thus his allegations, insofar as this other boy are concerned, could be tested. This cannot be done now.
47. The applicant points to the allegation of J.W. concerning the placing of a hot coal in his Wellington in the boiler house and complains that the untraceability of J.M. who was in charge of the boiler house, who would be able to give evidence as to whether or not the applicant frequented the boiler house, deprived the applicant of the opportunity to contest the truth or otherwise of this allegation by J.W., and notwithstanding that no charge is laid in respect of this incident, the establishment of the truth or otherwise concerning it would have a crucial bearing on the credibility of the other allegations made by J.W.
48. The applicant points to various allegations made by M.W., T.H. and M.H. concerning the applicant which are alleged to have happened in the 1950's in Artane and having regard to the fact that the applicant did not come to Artane until October 1961 are demonstratively ill-founded, as, demonstrating the very great danger of permitting the applicant to stand trial where the allegations against him are all dependent upon memories of events that are now between 36 and 44 years old.
49. The applicant also complained of the fact that the grandfather of M. McE is now deceased and therefore not available to contradict the evidence of M. McE as to the frequency of visits by the applicant to her grandfather's house.
50. In determining whether or not the applicant has been prejudiced by the passage of time in regard to a specific defence a number of factors are crucial to a determination on this topic.
51. Firstly it has to be remembered that sexual abuse is invariably a furtive practice and it is extremely rare indeed for there ever to be independent witnesses to it. Thus whether the incident of alleged abuse happens long ago or is of recent times the problem of the absence of independent evidence of it or evidence corroborative of the allegation of the alleged victim, will invariably be there. Because of dominion or inherent psychological effects of the crime itself, absence of corroboration in the form of a complaint to an appropriate authority, is a hallmark feature of offences of this kind, perpetrated against minors. Because of all of this, defending allegations of this kind tends to be by bare denial. Thus the real issue becomes the credibility of the person making the allegation of abuse. The only means of attacking that credibility, is to demonstrate inaccuracies in the evidence of a complainant usually in regard to surrounding circumstances. These inaccuracies may be of such seriousness as to demonstrate either the impossibility of the commission of the offence in the manner alleged or to give the accused an alibi. The allegations of M.W. could be cited as an example of this.
52. Thus where an accused person could identify inaccuracies or impossibilities in some of the detail of the allegation made against him, it can be said, that his defence is prejudiced where by virtue of the passage of time it is no longer possible to prove these.
53. The applicant in this case does not point to any particular factual matter which he says is no longer capable of proof, but what he says is that the surrounding circumstances and detail of time, place, and practices to do with the running of the kitchen and in particular the storeroom cannot now be established so as, in effect, to prove the improbability of the occurrence of these alleged offences in the area of the kitchen or dining area, insofar as some of these offences are alleged to have occurred there.
54. The first thing to be observed of course is the fact that one of the two lay workers in the kitchen at the relevant time is alive and available and has been interviewed by the Gardaí, and thus, issues such as the use of petroleum jelly on the knives and, other working practices of the kitchen and the access to the storeroom can be explored with him.
55. Apart altogether from the availability of CO'K, it would appear to me that what the applicant wishes to establish, is that the kitchen area was an extremely busy, place where 400 approximately boys were fed three times a day, where in addition to the kitchen staff, teams of boys were employed for various duties in the kitchen numbering up to 30 or 40 per day; that access to the store room was required by the lay workers and hence that it was unlikely that offences of the kind alleged could have occurred in any part of the kitchen or dining area.
56. It would seem to me that it would be very unlikely that there would be any dispute as to the foregoing facts or in general as to the operation of the dining room and kitchen areas. As far as access to the storeroom is concerned, the applicant in the interviews with members of an Garda Síochána has admitted that he alone had keys to the storeroom, that it could be locked, but that the two workmen had to have access to it.
57. Insofar as the physical layout of the kitchen and dining areas is concerned there is no evidence that plans of this area are unavailable. In any event there would appear to be little turning on the physical layout other than in respect of the storeroom and so far as that is concerned there appears to be a very high level of consistency between the description of it by the complainants and the applicant.
58. I am satisfied that the applicant has failed to discharge the onus of demonstrating that any defence he would wish to make in respect of the offences alleged to have been committed in the dining/kitchen area are prejudiced by the passage of time and in

particular the non-availability of one of the lay workers i.e.T.C.

59. Very serious allegations were made by KK in regard to sexual abuse by the applicant and other Christian Brothers, alleged to have been perpetrated in a bedroom of a Christian Brother adjacent to a dormitory. The applicant's complaint in regard to his capacity to defend these allegations was that one of these brothers was found not have existed or certainly not under the name under which he was identified and the other was untraceable. It has turned out in fact that the other brother i.e. Brother M whom it is alleged by K.K was present when it is alleged that the applicant perpetrated very serious sexual abuse on the applicant, has been interviewed by the Gardaí in respect of these allegations and has denied them and is available to the applicant to give evidence on his behalf.

60. The applicant in my view has failed to establish specific prejudice in regard to his capacity to defend against these allegations.

61. It has been alleged by J.W. that he was regularly abused by the applicant during the course of the showing of motion pictures. He alleges that the applicant would come in when the picture had started and would sit beside him and whilst the picture was ongoing he regularly abused him.

62. It is quite clear in my view that the passage of time has not altered the capacity of the applicant to defend himself against these allegations. The place and circumstances in which it is alleged this abuse took place can easily be described in evidence and the likelihood or otherwise of these offences occurring at all or on a regular basis in these circumstances can be as readily portrayed to the jury now, as they could have been many years ago. Insofar as these allegations are concerned, it does not appear to me that the passage of time has at all prejudiced the applicant's ability to defend himself against these allegations.

63. M.McE alleges that she was abused on the farm attached to the Marino College. The applicant's complaints in regard to his capacity to defend against these allegations is that her grandfather is no longer available to contradict the evidence of M.McE as to the frequency of his visits to the household. In the first place it is to be observed that not all of the allegations of alleged abuse by M.McE are related to visits by the applicant to the house of the grandfather. Some, it is alleged occurred as a result of encounters between the applicant and M.McE away from the house. Apart altogether from that, the prospect of contradiction by the grandfather of the evidence of M.McE as to the frequency of his visits to the house is a matter of pure speculation on the part of the applicant.

64. It would appear to me that it is necessary for an applicant to do more than simply to speculate as to the nature of the evidence that would have been given by a witness no longer available. In my opinion where an accused person seeks to prohibit a trial on the basis that evidence is no longer available, the onus rests on such an applicant to demonstrate on the balance of probability, what the nature of that evidence was or would have been and its relevance to an issue that may arise in the trial e.g. the credibility of the complainant. Mere speculation as to what that evidence might be will not suffice.

65. The applicant lists several members of the Christian Brother congregation not heretofore mentioned who are now dead or untraceable and he complains that the absence of their evidence prejudices his defence. In the first place he does not even suggest what their evidence might be or how it might impinge upon the credibility of the complaints or otherwise support his defence. That being so I am quite satisfied that he has failed to demonstrate that his capacity to defend himself against the allegations of sexual abuse made against him is not prejudiced by a non-availability of these other members of the Christian Brother congregation.

66. The applicant complains that N.C. is unable to identify the other boy who he alleges was abused by the applicant at the same time as himself, in the storeroom. Mr. Sheehan in his second affidavit says that it is a matter of common sense to say that had this allegation been reported earlier that N.C. would have been able to remember the name of the other boy allegedly abused. The simple reality of course is that because of the nature of these allegations disclosure of them soon after the events could not have happened. The impact of these alleged events, as discussed above continued long into adult life, inhibiting disclosure. Thus during the time when as Mr. Sheehan has said as a matter of common sense, that N.C. would have recollected the name of this boy, disclosure was not realistically possible, and by the time that N.C. felt able to disclose the alleged abuse, his inability to recollect this name is entirely understandable. It would appear to me that insofar as there may be prejudice to the applicant by this inability of N.C. to recollect this name, it has to be properly regarded as part of the general or presumptive type prejudice about which the applicant cannot complain because in essence it is the inherent result of the alleged crime themselves. Apart altogether from that, there is again the question of speculation, the applicant speculates that this other boy would deny the allegations.

67. The complaint in regard to the unavailability of J.M. the man in charge of the boiler room, relates to an incident which is not the subject matter of any charge. The only potential relevance of this incident is in regard to the creditability of J.W. who makes an allegation of a very serious assault against the applicant occurring in the boiler room. Like the various allegations of sexual abuse, the incident alleged is one which would be very unlikely to occur in the presence of any witness, and there is no suggestion by J.W. that J.M. was present or nearby when this incident allegedly occurred. The fact that the applicant may or may not have visited the boiler infrequently or not at all would appear to me to be irrelevant to whether or not this incident occurred and hence it would appear to me that evidence from J.M. to the effect that the applicant was an infrequent visitor or that he had never seen the applicant in the boiler room would have little or no bearing on the credibility of the allegation made by J.W., in regard to this alleged incident in the boiler room, unless it was the case that the boiler room was, for some obscure reason, prohibited to the applicant a suggestion which certainly hasn't been made and indeed if it was, it would be quite surprising.

68. The applicant complains that the Doctor or Mr. Brown who B.M. alleges he consulted in 1969 is no longer traceable and that he is prejudiced by not being able to test the truth or otherwise of whether or not he was informed by Dr. Brown that his allegations would not be believed. The advantage with which the applicant would hope to get from the pursuit of this matter would be to either establish that there was no Dr. Brown or Mr. Brown and hence the allegation made by the applicant that he consulted with him was false or alternatively that if he did consult with this Dr. Brown that he was not told that he would not be believed.

69. The inquiries conducted with the Medical Council appeared to reveal that the person in question was not listed as a medical practitioner at the time and inquiries with Dublin Corporation have revealed no trace of this person. Insofar as the existence of this person is concerned, as matters stand it would appear that the applicant, is well armed to challenge B.M. as to the existence of, or identity of this person.

70. As to what may have been said by this person to the applicant it would appear to me that the applicant would face enormous difficulties in obtaining evidence of the kind they would wish for from this person, having regard to the apparent professional relationship between B.M. and this person and even if these events had only occurred a short time ago these difficulties would be there.

71. In the interview the applicant admitted sexual assaults on B.M., another named boy, not one of the complainants, and two unnamed boys. It would seem to me, appropriate that the admission in respect of B.M. should be taken into account in any assessment

of his capacity to defend against the allegations of B.M., bearing in mind of course that the conduct admitted is significantly different to the conduct alleged by B.M.

72. I am not satisfied that the applicant is prejudiced, by reason of the non-availability now of this Mr.Brown.

73. The applicant also complains about the absence of records from the infirmary and the non-availability of the person in charge of the infirmary.The problem that the applicant envisages here is that the allegation by the various complainants that they were beaten and suffered bruising cannot be tested by reference to records which it is said would or should reveal the existence of complaints or bruising or of a finding of bruising on examination.

74. Insofar as one claimant is concerned i.e.K.K.the infirmary record with regard to him has been found and is available to the applicants.The allegation made by J.W.of a very serious assault to his left foot according to the statement of J.W.was not reported to the infirmary because he alleges the applicant would not let him go to the infirmary.

75. B.M.describes a beating all over his body with a leather, from the applicant when he was approximately twelve and a half years of age.He says he was black and blue from that beating for weeks after that.However he does not say that he went to the infirmary or otherwise sought any kind of medical attention.It would seem to me to be very unlikely that any medical records concerning B.M.would shed any light one way or the other on these allegations.

76. N.C.it would appear was beaten, it is alleged, by the applicant, for spreading rumours concerning the applicant but there is nothing in the papers to suggest that he sought medical attention or attended at the infirmary and complained of any injuries

77. P.J.M.(O'C) in a statement said that he was beaten in class with a leather with coins in it but that he never received any severe beating and there is no suggestion of any complaint of injuries being made in the infirmary.

78. M.McE makes no allegation of any beating or anything of that nature and because she was not an inmate would not have intended the infirmary.

79. In my view it is not realistic to suggest that the absence of infirmary or medical records relating to the complainants other than K.K.at all prejudices the applicant in his defence.Having regard to the foregoing, the same can of course be said about the unavailability of the nurse or subsequently the brother who was in charge of the infirmary.

80. Having carefully considered all the allegations of prejudice advanced by the applicant I am satisfied that the applicant had failed to demonstrate any specific prejudice to his defence by reason of the delay in the initiation of the prosecutions in respect of the various charges arising out of the complaints of sexual abuse made against him.

81. This brings me finally to the applicant's complaint about prejudicial publicity.

82. As is apparent none of this publicity refers personally to the applicant.Undoubtedly a great deal of prejudicial publicity has been directed at the Christian Brothers in Ireland but as time goes on there is undoubtedly a "*fade factor*" and whilst it will undoubtedly be the case that by the time when the applicant's trial comes on there will be still a significant presence of prejudicial publicity directed against the Christian Brothers, in my view, this is a problem which can be and has been in past trials dealt with by the trial judge by way of an appropriate direction.That being so in my view the application on this ground also fails.

83. In conclusion therefore this application for an Order of Prohibition must be dismissed.