

THE HIGH COURT

RECORD NO: 2016/862 JR

M.W.

PLAINTIFF

AND

DIRECTOR OF PUBLIC PROSECUTIONS

DEFENDANT

JUDGMENT of Ms Justice Ní Raifeartaigh delivered on Tuesday 14th February, 2017

1. This is a case in which the applicant is facing trial in February, 2017, in respect of four charges of indecent assault and seeks a number of reliefs, including (1) *certiorari* in respect of a decision of the Circuit Court Judge refusing him second counsel under the legal aid scheme for the purpose of defending the trial; (2) prohibition of the trial itself; and (3) a declaration that the trial would be in breach of his right to trial with reasonable expedition together with damages for such breach.

Chronology

2. It is necessary to set out a brief chronology of matters relevant to this application, which came before the Court for hearing on 13th January, 2016. The trial listed for February, 2017, concerns allegations of indecent assault made by one C.W, a niece of the applicant. The offences are alleged to have taken place during the period 1980 -1991. A complaint was made to the Gardai by C.W. for the first time on the 13th October, 2013. This arose in circumstances where two other complainants, J.O'R and A.L, had previously made complaints and the applicant had been sent forward for trial in the Circuit Court in respect of those matters in 2013. Thus, there are two relevant timelines; that in respect of the J.O'R. and A.L. matters, and that in respect of the C.W. matter.
3. As regards the J.O'R. and A.L. cases, the indictment was severed and two separate trials took place. The applicant was convicted and sentenced in respect of both matters in November, 2014 and the sentence was backdated to 24th February, 2014. His release date in respect of those sentences was May, 2016.
4. Meanwhile the investigation in respect of the C.W. matter commenced with the taking of a statement from C.W. herself in October, 2013. Statements were taken from two witnesses in January, 2014, and a statement was taken from another witness in March, 2014. For reasons that have not been entirely explained (although they appear to be connected with, in the first instance, an illness on the part of the Garda in charge of the case, and, in the second, the same Garda taking maternity leave), the accused was not interviewed in connection with this matter until November, 2014. There appears to have been, therefore, a period of inactivity in the Garda investigation between March and November, 2014. The accused denied the allegations of C.W. during this interview. There appears to have been another period of inactivity in the Garda investigation until May 2015, during which time the Garda file was transferred to a second Garda (in March, 2015). In May, 2015, further statements were taken from C.W. and from another witness, the relevance of whom had only then come to light. The file was sent to the DPP on the 8th June, 2015, and was apparently received by the relevant officer in the Director's office on the 25th June 2015. Ten months then elapsed before the DPP's office issued

directions to charge the applicant in respect of the C.W. case in April 2016. At this stage, he had served most of his sentence in respect of the J.O'R. and A.L. cases and was due for release one month later. He was returned for trial on the 15th June 2006, and for reasons that are not relevant to the present application, the proposed trial date ultimately became February, 2017. There is no complaint regarding the period of time between charge and trial date; the complaint in this case is confined to the delay between the complaint of C.W. to An Garda Síochána (October, 2013) and the charging of the applicant (April, 2016).

5. It should also be said that the applicant was granted bail in respect of the C.W. case, but bail was revoked on the 14th June 2006. This was essentially his own fault. He failed to communicate with the Gardai as to his living address, this having been a condition of his bail. He had also failed to hand in his passport as required, and failed to comply with signing on conditions. It seems that the applicant had difficulties finding a place to live after his release from prison, but this should not have prevented him from keeping in touch with the Gardai as to his whereabouts. Further, a complaint was made against him that he had made a threatening approach to the father of C.W. in respect of the allegations and this was brought to the attention of the court on the date of the revocation of bail. He did not appeal the bail revocation. On the 28th July, 2007, bail was granted a second time, but he has to date been unable to take up this bail. On this occasion, one of the conditions of bail was one independent surety of €2,000 to lodge that sum, or two independent sureties each to lodge €1,000.

The legal aid issue

6. It may be noted that Director of Public Prosecutions did not offer evidence or argument in respect of this issue when the matter was dealt with in this Court. It is not the practice of the Director to become involved in legal aid applications and, in accordance with this normal practice, her representative did not play any role in relation to this issue in the Circuit Court.
7. The Circuit Court Judge dealt with the issue of legal aid on two separate dates. Unfortunately, there is no transcript of either hearing and the Court is entirely reliant upon the affidavit of the applicant's solicitor for details of what was said by the Judge on each of those occasions.
8. The applicant's solicitor's affidavit provided as follows:

"I am so informed and believe Counsel on behalf of the Applicant applied to His Honour Judge O'Donnabháin on the 24th October for a certificate for second Counsel. I say and believe that my Counsel indicated to the Court that the prosecution's case consisted of three counts of alleged indecent assault upon [C.W.] at various locations in the 1980s. I say that Counsel outlined to the Court that the prosecution's case included allegations of grave indecent assault constituting oral and vaginal rape. The Applicant is alleged to have forced his penis into the mouth of the complainant when she was about 7 or 8 years of age, and further rub his penis between her legs, on one occasion causing a burning sensation in her vagina

by placing his penis in her vagina. Counsel submitted that the charges as alleged were of the utmost gravity. I say that my Counsel stated that this alone warranted a second Counsel in the circumstances. I say and believe that Judge O'Donnabháin questioned my Counsel as to what complexity was in the case. I say that my Counsel replied stating that the seriousness of the allegations themselves alone merited second Counsel. I say and am so informed that Judge O'Donnabháin refused the application stating that he did not believe there was any great complexity in the matter."

The affidavit goes on to state the following under the heading "Reapplication for second counsel for the [W] trial":

"I say that on the 7th day of November 2016 that Counsel for the Applicant herein reapplied before the [Judge] herein for a certificate for second Counsel. I say that Counsel informed the [Judge] that he had previously applied for a certificate for second Counsel on the 24th October 2014 and that he was making a renewed application arising from new grounds. I say that Counsel for the Applicant stated that he was now applying for second counsel in circumstances where the Defence involved matters of exceptional difficulty. I say that Counsel outlined the following four grounds;

- a. That disclosure had disclosed intentional prosecutorial delay in circumstances where the Applicant had been prosecuted and convicted previously and that the complaint which grounded the current prosecution was made in and around the same time as the previous prosecution but despite this the prosecution delayed in bringing new charges until the end of the applicant's term of imprisonment and that same was an abuse of process. In the circumstances this had a complicating effect on sentencing in the present case.
- b. That the State were purporting to adduce evidence in the trial which offended against the rule against narrative.
- c. There was an exceptional difficulty in that there was a delay of 26 to 32 years bringing the prosecution after the alleged commission of the offences. There was a consequential difficulty in cross-examination arising from same.
- d. That the case involved historical sexual offences involving a minor where the allegation involved oral and vaginal rape of a young child. There was an obvious difficulty in cross examination arising from same.

Ruling of the learned trial judge in respect of reapplication for second counsel

I say that the [Judge] stated that the fact of a previous trial should have initially been brought to his attention on the 24th October 2016 and that it may be a matter for another Court. I say that the [Judge] stated that there did not appear to him to be anything new of any complexity or severity and that there was nothing new in the renewed application other than the fact of the previous prosecution. I say that the [Judge] stated that he was not disposed to vary matters. I say that

Counsel for the Applicant asked the [Judge] if he was refusing his application. I say that the Judge did not reply. I say that Counsel for the Applicant asked the [Judge] again if he was refusing his application. I say that the [Judge] did not reply. I say that the [Judge] did not give any coherent reasons for his refusal.”

9. The applicant's complaint is that the Circuit Court Judge solely addressed his mind to the issue of 'complexity', and failed to consider other relevant matters, such as the difficulty of defending a case involving allegations relating to the period 1980-1991, and the gravity of the offence, involving as it did allegations of indecent assault at the most serious end of the scale. Indeed, the description of some of the incidents by C.W. in her statement in effect amount to rape contrary to section 2 of the Criminal Law (Rape) Act, 1981, as well as rape contrary s.4 of the Criminal Law (Rape)(Amendment) Act, 1990, although the offences actually charged were indecent assaults. The applicant also argues that the interaction between the previous cases, those involving J.O'R. and A.L., and the present case, involving C.W., creates extra difficulties, in particular as regards sentencing, if the applicant were to be convicted. Further, reference was made to the fact that there would likely be legal argument as to the 'rule against narrative' by reason of the contents of the statements of C.W. as to what she told others about the events.

10. The issue of legal aid has both a statutory and constitutional dimension. The statutory parameters in respect of a trial on indictment are established by section 3 of the Criminal Justice (Legal Aid) Act 1962 (as amended by section 12(2) of the Criminal Justice Act, 1999), which provides as follows:

“3.—(1) Where—

- (a) a person is sent forward for trial for an indictable offence, and
- (b) a certificate for free legal aid (in this Act referred to as a legal aid (trial on indictment) certificate) is granted in respect of him by the District Court, upon his being sent forward for trial, or by the judge of the court before which he is to be or is being tried,

the person shall be entitled to free legal aid in the preparation and conduct of his defence at the trial and to have a solicitor and counsel assigned to him for that purpose in such manner as may be prescribed by regulations under section 10 of this Act.

- (2) A legal aid (trial on indictment) certificate shall be granted in respect of a person sent forward for trial for an indictable offence if (but only if)—

- (a) application is made therefor,
- (b) it appears to the District Court or the judge of the court before which the person is to be or is being tried that the means of the person are insufficient to enable him to obtain legal aid, and
- (c) either—
 - (i) the person is charged with murder, or

- (ii) it appears to the District Court or the judge of the court before which the person is to be or is being tried (as the case may be) that, having regard to all the circumstances of the case (including the nature of such defence (if any) as may have been set up), it is essential in the interests of justice that the person should have legal aid in the preparation and conduct of his defence at the trial."

This area is further, regulated by the Criminal Justice (Legal Aid) Regulations, 1965, (S.I. No. 12/1965), (as amended by Regulation 3 of the Criminal Justice (Legal Aid) (Amendment) Regulations, 1975 (S.I. No. 100/1975)), Regulation 7 of which provides,

"7.—(1) Upon the grant of a certificate for free legal aid, the court granting the certificate shall, having taken into consideration the representations (if any) of the person to whom the certificate was granted, assign to him a solicitor from the appropriate list kept pursuant to Regulation 4 of these Regulations to act for him in the preparation and conduct of his case.

- (2) The court granting a certificate (other than a legal aid (District Court) certificate) for free legal aid may, if the person to whom it is granted is charged with murder *or the case concerning him appears to present exceptional difficulty* and is not an appeal to the Circuit Court *and the court is of opinion that his case cannot be conducted adequately without the assistance of two counsel*, direct that two counsel be assigned to the person to act for him in the preparation and conduct of his case." (emphasis added)

- 11. The constitutional dimensions of legal aid have been discussed by the Supreme Court on a number of occasions, most famously in *State (Healy) v. Donoghue* [1976] 1 I.R. 325, where the Supreme Court recognised the right to legal aid, and the right to be told of it, as having a constitutional basis in the right to a fair trial. More recently, in *Carmody v the Minister for Justice, Equality and Law Reform and ors* [2010] 1 I.R. 635, the issue was the extent of legal representation to which an accused was entitled to in circumstances where he was facing charges in the District Court of a more complex nature than the norm. The plaintiff (the accused) had been charged with 42 offences contrary to regulations relating to the protection of cattle from brucellosis. He sought legal aid to include the assignment of junior counsel, but was granted legal aid in the form of a solicitor only, in accordance with s.2 of the 1962 Act. He sought a declaration that s.2 was inconsistent with the Constitution. On appeal, the Supreme Court did not grant the relief sought, but made an order prohibiting the trial from proceeding until the plaintiff was afforded the right to apply for legal aid to include solicitor and counsel. It held that the principles of constitutional justice required that a person charged with a serious criminal offence, including an offence before the District Court, who could not afford legal representation, be provided with such representation by the State as was essential in the interests of justice, although the nature and extent of such representation could be affected by the gravity and complexity of the charge and any exceptional circumstances. In the course of delivering judgment, Murray CJ said:

"The right is a constitutional right. Everyone has a right to be represented in a criminal trial but justice requires something more than the mere right to be represented when a person, who cannot afford legal representation, is facing a serious criminal charge. Such a person has a constitutional right to be granted legal aid by the State to enable him or her to have legal representation at the trial. *The nature and extent of that right may be affected by the gravity and complexity of the charge.* In addition, although the Act does not require it, every unrepresented defendant must be informed of his or her right to legal aid if they cannot afford it themselves." (emphasis added)

Murray CJ went on to discuss the respective roles and functions of the two professional branches of the legal profession and continued:

"[75] There are many criminal cases which come before the District Court which are serious and complex. Solicitors are professionally well qualified to represent and conduct defences on behalf of defendants in such cases so as to meet the requirements of constitutional justice. But the question, as properly raised by the plaintiff, is whether that can be said of all cases where there is a *confluence of the gravity of the charges and particular complexity or other factors.*

[76] As O'Higgins C.J., also stated in *The State (Healy) v. Donoghue* [1976] I.R. 325, at p. 350: -

'However, criminal charges vary in seriousness. There are thousands of trivial charges prosecuted in the District Courts throughout the State every day. In respect of all of these there must be fairness and fair procedures, but there may be other cases in which more is required and where justice may be a more exacting task-master. *The requirements of fairness and of justice must be considered in relation to the seriousness of the charge brought against the person and the consequences involved for him.* Where a man's liberty is at stake, or where he faces a very severe penalty which may affect his welfare or livelihood, justice may require more than the application of normal and fair procedures in relation to his trial.'

[77] Then in referring to a citizen unable to defend himself adequately O'Higgins C.J., added at p. 350: -

'In such circumstances his plight may require, if justice is to be done, that he should have legal assistance. In such circumstances, if he cannot provide such assistance by reason of lack of means, does justice under the Constitution also require that he be aided in his defence? In my view it does.'

[78] The court reiterates the view that the principles of constitutional justice require that a person who is charged with an offence before the District Court and who does not have the means to pay for legal representation be provided by the State with legal representation that is necessary to enable him or her to prepare and conduct the defence to the charge. The legal representation provided must be that which is

essential in the interests of justice *having regard to the gravity of the charge, the complexity of the case, including the applicable law, and any exceptional circumstances.*" (emphasis added)

12. In *Joyce v. Brady* [2011] 3 I.R. 376, the issue was whether the Judge, in considering the legal aid application on behalf of an accused in a theft case, had applied his mind to the correct test when doing so. He had inquired of the prosecuting Garda whether the accused was 'at risk', meaning at risk of a custodial sentence. The Garda replied that he was not and the Judge refused legal aid. The Supreme Court made it clear that the Judge had erred in confining his inquiry to the question of whether a conviction in the District Court would result in a possible sentence of imprisonment. In the course of delivering judgment, O'Donnell J. said of *State (Healy) v. Donoghue* as follows:

"[17] The fundamental importance of that justly celebrated case is that it made it clear that the issue of legal aid was not simply a matter of statutory construction: it was in certain circumstances a constitutional entitlement. This was well expressed in the recent decision of this court in *Carmody v. Minister for Justice* [2009] IESC 71, [2010] 1 I.R. 635, at p. 652, as follows: - "... the statements of principle in the judgments delivered in [*The State (Healy) v. Donoghue* [1976] I.R. 325] have informed and governed the manner in which the Act of 1962 is implemented and they explain why the right to legal aid for poor persons in criminal cases resides in the Constitution and not just in the statute". It follows that even if the Act of 1962 had not existed, the result in *The State (Healy) v. Donoghue* would have been the same. The constitutional right, from which an entitlement to legal aid for impecunious defendants was deduced is, primarily, the right to a trial in due course of law guaranteed by Article 38 of the Constitution. That is a right to a fair *trial*; it cannot be reduced to a right not to be deprived of liberty without legal aid. There is something fundamentally incongruous in the contention that a trial for theft would be unfair if the accused was convicted (perhaps having pleaded guilty) and sent to jail for even a day, but that a trial of the selfsame offence including the same facts and issue of law would become fair if the accused were only fined or required to do community service if convicted, even though such conviction would brand him a thief.

- [18] The emphasis placed in the District Court on a prediction of the possibility of imprisonment was, in my view, misplaced. *Even on the words of the Act of 1962, the issue is the gravity of the charge*, which imports some objective assessment, rather than some necessarily crude speculation about a future possible sentence of an individual offender, in respect of which there might be a number of variable features over which the accused had no control. The statute itself refers to the "*gravity of the charge*" which directs attention to the intrinsic significance of the charge (in this case theft), rather than an assessment of the seriousness with which a court might view the offender if convicted." (emphasis added)

He also said that the words of the Act must be approached in light of the Constitution:

"[23] It is clear therefore that the Act of 1962 does not merely confer a statutory right to legal aid, it is the "practical implementation ... [of] ... a constitutional guarantee" and must be interpreted accordingly. As O'Higgins C.J. observed at p. 352 of the judgment, the provisions of the Act do not match exactly what the Constitution requires. The words of the Act must always be approached therefore in light of the Constitution. A restrictive approach to the language of the Act is therefore likely to mislead. *When the Act speaks of the "gravity of the charge" and "exceptional circumstances" the words must be interpreted and applied to ensure that the constitutional objective of a fair trial - a trial in due course of law - is achieved. If the trial of a person in the District Court on a given charge, without legal aid, would be unfair, then the charge is of sufficient gravity or the circumstances are sufficiently exceptional so as to require legal aid. There is no doubt that the real risk of imprisonment is one compelling indicator that a trial without legal aid would be unfair, but the perceived absence of such a risk is not the sole or decisive test justifying a refusal of legal aid. Furthermore, the refusal of legal aid following an inquiry by one District Justice of one member of the gardaí as to whether that member perceived the accused to be "at risk" (particularly when the trial may proceed before another District Judge and be prosecuted by another garda) falls in my view short of what the Constitution requires. In this regard it should be noted that the decision in *The State (Healy) v Donoghue* [1976] I.R. 325 has stood the test of time, and was an important foundation for the recent decision of this Court in *Carmody v. Minister for Justice* [2009] IESC 71, [2010] 1 I.R. 635. Both cases not only explain that the right to legal aid resides in the Constitution, but also give valuable guidance as to how that right should be applied in practice."* (emphasis added)

13. In the present case, the issue is not whether the accused was entitled to legal aid at all, which was the issue in *State (Healy) v. Donoghue*, or whether he was entitled to counsel in addition to a solicitor, as in *Carmody*, but rather whether he is entitled to a second counsel in a trial on indictment, or more accurately, whether the Judge applied his mind to the correct test in considering this issue. Section 3 of the 1962 Act does not set out any test in this regard, saying merely that in the case of a person sent forward for trial for an indictable offence (assuming he satisfies the financial criteria for entitlement to legal aid), he is entitled to have a solicitor and counsel assigned to him "*in such manner as may be prescribed by regulations under section 10 of this Act*". The relevant legal aid regulation made under section 10 of the Act, is Regulation 7(2) of the Criminal Justice (Legal Aid) Regulations, 1965 (S.I. No. 12/1965), (as amended by Regulation 3 of the Criminal Justice (Legal Aid) (Amendment) Regulations, 1975 (S.I. No. 100/1975)), and provides that the court may,

"if the person to whom it is granted is charged with murder or the case concerning him appears to present exceptional difficulty....and the court is of opinion that his case cannot be conducted adequately without the assistance of two counsel, direct that two counsel be assigned to the person to act for him in the preparation and conduct of his case".

14. It has been argued on behalf of the applicant in this Court that the word 'difficulty' in the regulation has a meaning other than the term 'complexity', which was the test applied by the Judge. It was argued that, for example, the cross-examination of a complainant in a serious sexual offence case of considerable antiquity might be extremely "difficult", without it necessarily being "complex". It was argued that the Circuit Court Judge confined himself to the question of complexity to the exclusion of other relevant factors in the case, such as the gravity and antiquity of the charges, and the complications arising from the fact that there was a delay in the investigation in the C.W. case which would interact (at least in terms of potential sentence) with the previous cases arising out of J.O'R and A.L.'s complaints. Further, it was argued that he failed to have any regard to the evidential complexities raised by the 'rule against narrative' issues in the case, which had been drawn to his attention but did not feature at all in his ruling on legal aid.
15. I am not completely convinced that there is a substantial difference between the terms 'difficulty' and 'complexity' in this context, but I have carefully considered the remarks of the Judge in the round, and I am persuaded that he may have taken an overly restrictive view to the question of legal aid in this case by focussing on the term 'complexity' to the exclusion of other matters. I note in this regard that his rejection of the application appears to have been done in rather summary terms, and that there is no appeal from a decision on legal aid.
16. In the first instance, there is no doubt that the issue of the gravity of the offence features in all of the judgments of the Supreme Court discussed above as a matter centrally relevant to the question of whether legal aid should be granted and what level of legal aid is required. The present case is a case of indecent assault, but involves allegations amounting effectively to allegations of rape under section 4 of the Criminal Law (Rape) (Amendment) Act, 1990 and section 2 of the Criminal Law (Rape) Act, 1981. It is the invariable practice of the courts to award second counsel in the case of rape allegations. The maximum sentence in respect of these particular indecent assaults alleged by C.W. is, the Court was informed, one of ten years, and it would have to be borne in mind that the applicant, if convicted, would be facing a sentence in circumstances where he had previously been convicted of sex offences in respect of J.O'R. and A.L. It seems to me inescapable that the issue of the gravity of the alleged offences should be to the forefront of any consideration of legal aid, be it the question of whether or not an accused should be granted one counsel in the District Court or second counsel in a trial on indictment.
17. Secondly, the antiquity of the offences must be a factor relevant to the difficulty of conducting the defence. The cross-examination of a complainant in a case involving a sexual offence is always a difficult and delicate task for counsel, but it requires particular skill when the events are alleged to have taken place decades before, at a time when the adult now being cross-examined was a child. In the present case, the commencement date of the period during which the offences are alleged to have taken place was January 1980, some 36 years before the date of charge. The end date of the period was January 1991, some 26 years before the date of charge.

18. Thirdly, it seems to me that evidential complexities in the case are a matter which should be put into the balance. Here, the defence argued that the rule against narrative introduced an element of evidential complexity into the case. The Judge does not appear to have considered that matter at all. That is not to say that the Judge ought necessarily to have reached the conclusion that the evidential issues were in fact complex in this particular case, but he should at least have considered the matter as part of the decision-making process.
19. Further, the case did have an extra layer of complication by reason of the fact that there had been a delayed complaint by C.W., resulting in the applicant being charged one month before his release date in respect of the J.O'R. and A.L. offences.
20. It is perhaps a straw in the wind in the overall context, but I also note that in the 'delay' part of the case, discussed below, one of the arguments put forward on behalf of the Director of Public Prosecutions was that the reason for the lapse of 10 months between the submission of the Garda file to the Office and the issuing of directions to charge was: "As this was a historical case where there had been a number of complainants with different levels of offences alleged over a lengthy time period at a number of locations it required extensive consideration and communications between the directing officer and the state solicitor", implying a degree of complexity in the case.
21. While I am reluctant to interfere with any decision made by a Circuit Court Judge exercising discretion, it does seem to me, on balance, that he confined himself rather too much to the issue of 'complexity' when reaching his decision, and did not sufficiently take into account either the wording of Rule 7 of the Criminal Justice (Legal Aid) Regulations, 1965, (S.I. No. 12/1965) (as amended), or the general principles outlined in the Supreme Court decisions referred to, which should inform a decision on legal aid. The ultimate question to be posed is whether, in the absence of the level of legal representation sought, there is a real risk of an unfair trial, having regard to all the relevant factors. What factors are relevant may vary from case to case, and may include matters such as the personal characteristics, age or circumstances of an accused person, but in the present case the factors which warranted consideration certainly included the nature and gravity of the charges, the fact that there was a period of up to 36 years between the events alleged to have taken place and the forthcoming trial, the interaction between this set of allegations and those in respect of which the accused had already been sentenced, and any evidential complexities relied upon by the defence.
22. Accordingly, I will grant the relief of *certiorari* in respect of the decision of the Judge in respect of the legal aid matter and remit this issue for a further consideration of whether a second counsel is warranted on the facts of the present case, having regard to all the relevant factors referred to.

The Delay Issue

23. The applicant seeks an order for prohibition of his trial, together with declaratory relief and damages, for what he says is an inordinate and culpable delay on the part of the prosecution in respect of the C.W. case. When these judicial review proceedings were

commenced, the pleadings asserted that the State authorities had intentionally delayed the charging of the accused and that this constituted an abuse of process, but at the hearing of the case it was indicated to the Court that this claim was not being pursued and that the case was instead being presented on the narrower and more usual basis of inordinate and culpable delay on the part of the prosecution.

24. As was set out in the chronology above, the period of time between C.W.'s complaint to the Gardai (13th October, 2013) to the date of charge (21 April, 2016) was one of two and a half years. This was in a context where the events the subject matter of her complaint are alleged to have taken place during the period January, 1980, to January, 1991. The applicant argues that, against this background of complainant delay, it behoved the State authorities to deal with the case in an expeditious fashion once her complaint was made, particularly when there were ongoing cases (those of J.O'R. and A.L.) arising out of the same period. I also note that the case was a relatively small investigation, involving, in essence, the taking of statements from the complainant and a small number of prosecution witnesses, and the interviewing of the accused on one occasion. As noted above, there appear to have been periods of inactivity in the Garda investigation (a) between March and November, 2014; (b) between November, 2014 and May, 2015; and I also note (c) that the file was in the DPP's office for 10 months before directions to charge were issued.
25. It is not necessary for present purposes to examine in detail the numerous authorities on the issue of delay in cases involving sexual offences cited to me, including *P.O'C v. DPP* [2000] 3 I.R. 87, *J.M. v. DPP* [2004] IESC 47, *D.C. v. DPP* [2005] 4 I.R. 281, *P.M. v. DPP* [2006] 3 I.R. 172, *S.H. v. DPP* [2006] 3 I.R. 575, *P.O'C* [2006] 3 I.R. 238, *Devoy v. DPP* [2008] 4 I.R. 235, *J.D. v. DPP* [2009] IEHC 48, *Cormack v. DPP* [2009] 2 I.R. 208, *Kennedy v. DPP* [2012] IESC 34, *S.O 'C v. DPP* [2014] IEHC 65, and *M.S. v. DPP* [2015] IECA 309. The relevant principles are well-established, as set out by Kearns J in *PM v. DPP* [2006] 3 I.R. 172. In a case of alleged prosecutorial delay, it is necessary for the Court to take into account the length of the delay, the reason for the delay, the manner in which the defendant asserted (or failed to assert) his right to trial with reasonable expedition, and any prejudice caused to the defendant by reason of the delay. With regard to the latter point, the Court must take into account the situation regarding pre-trial incarceration; the anxiety and concern caused to the defendant and in particular whether this goes over and above the levels one would normally associated with facing into criminal proceedings of this nature; and whether there is any possibility that the defence of the proceedings will be impaired. It was made clear in *P.M. v. DPP*, that if there is a real and serious risk of an unfair trial by reason of lost evidence, prohibition should be granted; but that if there is no such risk, the Court must engage in a balancing exercise in order to ascertain whether the other interests of the defendant have been so interfered with that it would be wrong to permit the trial to proceed.
26. In the present case, even if one were to assume that there was culpable delay on the part of the prosecution, it does not appear to me to be a case which would warrant prohibition in any event. In the first instance, it was not sought to be argued on behalf of the

applicant that there was any real risk of an unfair trial by reason of evidence having been lost during the period of alleged prosecutorial delay. The applicant has referred to the death of his twin brother in May 2015, which is a sad loss for him and in particular creates a significant loss of personal support for him in respect of the trial. However, it was not suggested that this death had led to the loss of any evidence. Secondly, as regards the issue of pre-trial incarceration, the applicant was in fact granted bail and only lost it by reason of his own conduct, and indeed, has again been granted bail which he is at liberty to take up if he can satisfy the conditions. I note also that he did not appeal the revocation of bail. Thirdly, the Court has heard of a number of medical conditions from which the applicant suffers and also of the shock he experienced on being charged in respect of the C.W. case one month before his release from prison. These were described in the Supplemental Affidavit of the solicitor for the applicant, sworn on the 11th January, 2017, which provides as follows:

- "3. I say and believe that the Applicant herein suffers from Chronic Obstructive Airways (Pulmonary) Disease (COPD), Osteoarthritis, Gout, Umbilical Hernia (surgically repaired in October 2016) and depression. I say that the Applicant is in poor health and is on multiple medications including Cipramil (anti-depressants), Nexium and Sterioids.
4. I say and am instructed that the Applicant has and continues to suffer from reactive depression in relation to previous and pending prosecutions."

The Affidavit sworn by the applicant himself on the 19th December, 2016, states,

- "3. I saw that I am currently on medication for depression and that in October 2016 I underwent a hernia. I say that I generally do not enjoy good health and that my health has deteriorated while I have been in custody over the past few years. I say that I am also awaiting treatment for sleep apnea which has also become a serious problem for me.
4. I say that my twin brother died on or about the 3rd May, 2015, while I was serving a sentence for the [J.O'R. and A.L.] proceedings. I say that this upset me greatly. I say that my brother supported me during the previous two trials and that I gave him copies of the book of evidence. I say that I feel more isolated now that my brother is dead, as he was the main family member with whom I still had good relations and his loss has made the prospect of the [C.W.] trial even more stressful.
5. When I heard that I was being prosecuted for a third time, I felt as if I was going to snap and that the news came as a terrible shock. I had thought the criminal proceedings I was facing had come to an end, only for them to start all over again, shortly before my release."

I note that the medical report was dated the 9th October 2014, some twenty-six months before the hearing of the case in this Court. Also, the applicant describes his shock on being charged in April, 2016, but it must be said that, as he was interviewed in

connection with the CW allegations in November, 2014, he was on notice of them from that date. While I accept that the applicant undoubtedly suffers from various physical illnesses as well as stress, anxiety and depression arising out of the various charges he has been facing, including the present set of charges, they do not amount, in my view, to allegations of stress and anxiety the severity which would warrant the trial being prohibited.

27. For completeness, I should say that the issue of his assertion of right to trial with reasonable expedition does not arise in the case; the delay complained of relates to the period between complaint and charge, over which he himself had no control.
28. Finally, even if there had been some culpable delay on the part of the State authorities in the period of two and a half years between complaint and charge, this is not at the most serious end of the scale of investigative delay that has arisen in cases of this nature.
29. In all of the circumstances, it would not seem to me to be appropriate to prohibit the trial from going ahead. It must be borne in mind, in this regard, that inbuilt protections against potential unfairness exist in the manner in which trial judges conduct proceedings before them and give directions to the jury. The remedy of prohibition on the basis of unfairness is only appropriate where such unfairness, established to the requisite level, cannot be avoided by the rulings and directions of a trial judge. I therefore refuse the relief of prohibition.
30. By reason of the imminence of the trial at the time of the present application, the Court was invited to confine itself to the issues of legal aid and prohibition, and to hold over any ruling on whether the plaintiff was entitled to declaratory relief or damages for breach of his right to trial with reasonable expedition. For the avoidance of doubt, I wish to say that while there were certainly periods of inactivity during the Garda investigation, and also what seems like a rather long period of consideration of the Garda file by the DPP's office, I do not at this point propose to rule on whether there was inordinate or culpable delay on the part of the State authorities which would warrant any form of relief other than prohibition and will leave that matter for argument on another day.

The Plaintiff subsequently informed the Court that it was not intended to pursue the claims for declaratory relief or damages.