

Jurisdiction: Ireland

Court: Supreme Court

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Docket Number: [1996 No. 176 J.R.; S.C. No. 299 of 1997]

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High Court

Supreme Court

[1996 No. 176 J.R.; S.C. No. 299 of 1997]

P.C. v. Director of Public Prosecutions

P.C.

Applicant

and

The Director of Public Prosecutions

Respondent

Judge Flann Brennan, Notice Party

Cases mentioned in this report:-

B. v. Director of Public Prosecutions [\[1997\] 3 I.R. 140](#); [\[1997\] 2 I.L.R.M. 118](#).

Barker v. Wingo (1972) [407 U.S. 514](#).

D. v. Director of Public Prosecutions [\[1994\] 2 I.R. 465](#).

Director of Public Prosecutions v. Byrne [\[1994\] 2 I.R. 236](#); [\[1994\] 2 I.L.R.M. 91](#).

Director of Public Prosecutions v. E.F. (Unreported, Supreme Court, 24th February, 1994).

G. v. Director of Public Prosecutions [\[1994\] 1 I.R. 374](#).

Harte v. Fanning [\[1988\] I.L.R.M. 70](#).

Hogan v. President of the Circuit Court [\[1994\] 2 I.R. 513](#).

Klopper v. North Carolina (1967) [386 U.S. 213](#).

O'C v. Smith (Unreported, Supreme Court, 24th January, 1997).

B. O'R. v. Director of Public Prosecutions (Unreported, High Court, Kelly J., 27th February, 1997).

E. O'R. v. Director of Public Prosecutions [1996] 2 I.L.R.M. 128.

The People (Director of Public Prosecutions) v. Pringle (No. 2) [1997] 2 I.R. 225.

Reg. v. Telford JJ., Ex p. Badhan [1991] 2 Q.B. 78; [1991] 2 W.L.R. 866; [1991] 2 All E.R. 854.

In the matter of Paul Singer (1960) 97 I.L.T.R. 130.

State (Healy) v. Donoghue [1976] I.R. 325; (1976) 112 I.L.T.R. 37.

State (O'Connell) v. Fawsitt [1986] I.R. 362; [1986] I.L.R.M. 639.

Z. v. Director of Public Prosecutions [1994] 2 I.R. 476.

Constitution - Right to fair trial - Reasonable expedition - Applicant alleging prejudice to right to fair trial by delay in reporting allegations - Whether real or serious risk of unfair trial established - Constitution of Ireland, 1937, Article 38.1.

Criminal law - Sexual offences - Delay in making complaints - Dominion - Whether delay between date of alleged offences and date of complaint prejudicial to fair trial of applicant - Whether any time limit in which to prosecute - Whether applicant in position of dominion over complainant.

Criminal law - Book of evidence - Contents - Statements containing hearsay - Witnesses who will not be called at trial - Whether new book of evidence required - [Criminal Procedure Act, 1967](#) (No. 12), s. 6(1)(c) and (d).

Judicial review.

The facts are summarised in the headnote and set out in detail in the judgment of McGuinness J., *infra*.

The applicant applied to the High Court (Laffoy J.) on the 22nd May, 1996, and was granted leave to apply by way of judicial review for, *inter alia*, an order of prohibition preventing further prosecution of the applicant on five charges of indecent assault on dates unknown between the 1st September, 1982 and the 30th September, 1983 and three charges of unlawful carnal

knowledge on dates unknown between the 1st September, 1983 and the 12th December, 1984 and an injunction to restrain the respondent from taking further steps to prosecute the applicant.

The application was heard by the High Court (McGuinness J.) on the 28th, 29th and 30th May, 1997.

The respondent appealed by notice of appeal dated the 3rd September, 1997. The Supreme Court (Hamilton C.J., Denham, Barrington, Keane and Lynch JJ.) heard the appeal on the 23rd April, 1998.

The applicant was a coach driver and swimming teacher at a school. He was charged on five counts of indecent assault on a pupil on dates unknown between 1982 and 1983 and three counts of unlawful carnal knowledge with her on dates unknown between 1983 and 1984. In 1986 or 1987, the complainant told a boyfriend of the alleged abuse by the applicant but did not tell her parents. In 1988, the complainant told three friends of the alleged abuse, one of whom told her father, a sergeant in the gardaí. Shortly after this, the complainant's parents and staff at her school were informed. However, no attempt was made by anyone to report the allegations to the Garda Síochána. The complainant did not make a complaint to the gardaí until 1995. The prosecution claimed that the reason for the delay in making the complaints was due to the applicant being in a position of dominance and control over the complainant. The applicant sought orders of prohibition and an injunction to restrain the respondent from taking any further steps in the prosecution of the offences alleged on the basis that the applicant was prejudiced in his defence of the proceedings and could not get a fair trial in due process of law on the grounds, *inter alia*, that the delay in instituting the proceedings was excessive, that there was a lack of specificity in the charges and that the book of evidence served on the applicant contained statements consisting solely of hearsay which could never be admissible at the trial.

Held by the High Court (McGuinness J.), in granting the relief sought, 1, that where a court was asked to prohibit the trial of a person on the grounds of excessive delay, it was justified in taking into account the extent to which the applicant had contributed to the delay in the reporting of the offence to the prosecution authorities.

B. v. Director of Public Prosecutions [1997] 3 I.R. 140 applied.

2. That the factors to be taken into account were: (a) whether there was such a close personal relationship between the applicant and the complainant which might prevent the making of a complaint; (b) whether there was evidence of the applicant having a domineering personality such as might delay the making of complaint; (c) whether the applicant caused the delay; (e) whether the abuse took place in the family home; (f) whether, because the abuse took place in the family home, the applicant might be prejudiced by reason of the delay in locating witnesses; (h) whether the applicant had made an entire or partial admission of guilt.

B. v. Director of Public Prosecutions [1997] 3 I.R. 140 applied.

3. That in delay cases warnings and directions to the jury might not be effective in avoiding the risk of an unfair trial.

4. That s. 6(1)(c) and (d) of the [Criminal Procedure Act, 1967](#), required that the documents to be served on an accused should include a list of the witnesses whom it was proposed to call at the trial and a statement of the evidence that was proposed to be given. Where the evidence proposed to be given was hearsay, so that such witnesses could not be called, such statements should not be included in the documents.

The respondent appealed to the Supreme Court.

Held by the Supreme Court (Hamilton C.J., Denham, Barrington, Keane and Lynch JJ.), in allowing the appeal, 1, that each case of this nature was unique and must be determined on its own circumstances.

2. *Per* Denham J. (Hamilton C.J. and Barrington J. concurring): that the complainant's inability to make a formal complaint until 1995, was a consequence of the alleged abuse, and was therefore not the complainant's delay. The fault for the delay lay with the alleged perpetrator of the crime and he could not profit from alleged illegal actions.

3. *Per* Denham J. (Hamilton C.J. and Barrington J. concurring): that although the delay was considerable, it had not altered the nature of the trial.

4. *Per* Lynch J. (Hamilton C.J. and Barrington J. concurring): that the onus of proving the risk of an unfair trial was on the applicant. Where a court had decided that a delay had made it more difficult for an accused to answer the charges against him, it then was to consider the case on the

assumption that what the complainant had said was true and decide which party had caused the added difficulties. Where the accused was responsible, he could not validly complain.

The People (Director of Public Prosecutions) v. Pringle (No. 2) [1997] 2 I.R. 225 followed.

5. *Per* Lynch J. (Hamilton C.J. and Barrington J. concurring): that *prima facie* presumption of dominion existed in cases of child sexual abuse which involved mature adults and children under the age of fifteen.

6. *Per* Lynch J. (Hamilton C.J. and Barrington J. concurring): that the lack of specificity in charges in a child sexual abuse case was not a valid cause of complaint.

Director of Public Prosecutions v. E.F. (Unreported, Supreme Court, 24th February, 1994) considered.

7. *Per* Keane J. (Hamilton C.J. and Barrington J. concurring): that in light of the presumption of innocence the paramount concern of the court when asked to prohibit the continuance of a prosecution on the ground of unreasonable delay, was whether the degree of prejudice was such as to give rise to a real and serious risk of an unfair trial.

D. v. Director of Public Prosecutions [1994] 2 I.R. 465 followed.

Cur. adv. vult.

McGuinness J.	24th July, 1997
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On the 21st August, 1995, the applicant was arrested and questioned with regard to alleged sexual offences against the complainant, A.M. He was subsequently charged on five counts of indecent assault on dates unknown between the 1st September, 1982 and the 30th September, 1983 and three counts of unlawful carnal knowledge on dates unknown between the 1st September, 1983 and the 12th December, 1984. He was served with a book of evidence and the matter of his return for trial on these charges now stands adjourned before the District Court. The applicant has at all times denied each and every allegation made against him and maintains that he is innocent of all the offences charged.

On the 22nd May, 1996, the applicant was granted leave by Laffoy J. to issue judicial review proceedings seeking an order prohibiting the respondent from further dealing with the

prosecution of the applicant on the various charges and an order in the nature of an injunction restraining the respondent from taking any further steps in the criminal prosecution entitled *Director of Public Prosecutions v. P.C.*

The grounds set out in the applicant's statement grounding his application for judicial review are as follows:-

1. The delay in the institution of the proceedings herein:
 - (a) has prejudiced the applicant in his defence of these proceedings;
 - (b) is unfair and unjust to the applicant;
 - (c) violates the applicant's right to a trial with reasonable expedition;
 - (d) has prejudiced the applicant's chance of obtaining a fair trial;
 - (e) has been excessive and prejudicial;
 - (f) has violated the applicant's right to a trial in due process of law.
2. The lack of specificity in the charges:
 - (a) has prejudiced the applicant in his defence of these proceedings;
 - (b) is unfair and unjust to the applicant;
 - (c) has prejudiced the applicant's chance of obtaining a fair trial;
 - (d) has violated the applicant's right to a trial in due process of law.
3. The document served on the applicant pursuant to the [Criminal Procedure Act, 1967](#), contains statements from proposed witnesses which could never be admissible at the trial of the applicant and contain an exhibit which could never be admissible in evidence at the trial of the applicant and
 - (a) violates the applicant's right to a preliminary examination in accordance with law;
 - (b) constitutes an unfair procedure.

A statement of opposition was filed by the respondent on the 13th December, 1996. The grounds of opposition, *inter alia*, are as follows:-

2. There is no time bar to the prosecution of sex offences as are charged herein.
3. If there was delay in the making of complaints against the applicant herein the applicant has been responsible for the said delay. The applicant was during the period complained of a coach driver and swimming teacher of the complainant and in a position of dominance and control over her.
4. The applicant is being charged with repeated sexual offences against the complainant over a long period. In the circumstances, it has not been established that the defence of alibi realistically arises or that the applicant's right to a fair trial has been prejudiced by the alleged delay.
5. In so far as the length of time from the commission of each offence to the date of any trial of the applicant is concerned:-

(a) the same will not be so great as to render the trial unfair, having regard to the capacity and duty of the trial judge, by appropriate directions, to counter any alleged prejudice and to secure that the trial of the applicant will be fair in all respects;
(b) the defence of alibi is not a pre-requisite to a successful defence to any one or more of the charges made.

6. Adequate particulars of the offences with which the applicant is being charged appear in the book of evidence with as much specificity as is available given the nature of the offences charged and the lack of precision complained of is not such as to make it impossible for the applicant to defend himself.

7. It is denied that the documents served on the applicant pursuant to the [Criminal Procedure Act, 1967](#), violate the applicant's right to a preliminary examination in accordance with law or constitute an unfair procedure. Any alleged deficiencies in the said documentation can be dealt with by the District Court and the District Court Judge will be in a position to assess whether the said documentation discloses a *prima facie* case in law against the applicant.

The remaining grounds of opposition were not in fact argued at the trial before me.

The factual background

The complainant, A.M., was born on the 12th December, 1969 and lived with her parents. She was educated at first in a local national school and for her secondary education she attended a St. Louis convent. She successfully passed her leaving certificate in 1988. At that stage she proceeded to third level education in University College Dublin, where she obtained a B.A., and M.A. and subsequently, a Higher Diploma in Education. At present she is employed as a teacher in a private school abroad. As will be seen from this brief history of her educational career, she ceased to reside in her home town in or about the autumn of 1988 and has not resided there since. In or about February, 1995, she complained to the gardaí in Harcourt Street garda station that she had been sexually abused during the years 1982 to 1984, by the applicant. She apparently felt unable to make a full statement at the time. On the suggestion of the gardaí she sought advice from the Rape Crisis Centre, who referred her for counselling Ms. Anne Fitzmaurice, psychotherapist. Ms. Fitzmaurice has sworn an affidavit in these proceedings on which she was cross-examined by counsel for the applicant. On the 18th July, 1995, the complainant made her first full statement to the gardaí; this statement is included in the book of evidence served on the applicant.

The applicant is a coach operator who works locally in the complainant's home town area. During the period when the complainant was attending the St. Louis convent, the applicant drove a number of girls from the school, including the complainant, to a swimming pool each

Saturday, where they were learning to swim. It appears that from time to time he used to join the school girls in the pool and assist them in their swimming lessons, but not, of course, in a professional capacity.

At the time when the complainant brought her complaints to the gardaí in Dublin in 1995, the applicant was severely ill with stomach cancer, which at the time was believed to be terminal, a fact of which the complainant was apparently aware. The applicant appears to have recovered somewhat in health, although the court had no detailed evidence before it as to his present state of health.

The complainant's allegations of her sexual abuse by the applicant are fully set out in her statements contained in the book of evidence and are verified and to some extent commented upon in her affidavit sworn in these proceedings. I am conscious of the problem which arises in cases such as the present where the court gives a synopsis of the allegations made against the accused person. This was referred to by Budd J. in his comprehensive judgment in *B. v. Director of Public Prosecutions* [1997] 3 I.R. 140 where he stated at p. 147:

"A problem arises in prohibition and bail cases. These cases are heard in open court and may rightly attract considerable public interest. Frequently a synopsis of the allegations may be given. It should be noted that this synopsis of the allegations often contains hearsay matters and frequently consists of statements or evidence which have not been subjected to analysis under cross-examination. Even experienced journalists have a difficult task in writing an account of such cases when they must steer a course between the Scylla of brief blandness and the Charybdis of publishing lurid matter which may imperil a subsequent fair trial of an accused."

I am in complete agreement with Budd J. and the position in the present case is rendered more problematic by the fact that a large number of the statements included in the book of evidence are hearsay of a type which could never be admissible at any trial of the applicant on the counts with which he is charged. In surveying the factual background, therefore, I will endeavour to keep in mind Budd J.'s warning.

The complainant in her statement says that she started attending St. Louis convent in September 1982. On Saturdays she went swimming with other girls in the swimming pool. The girls were brought to the swimming pool by the applicant in his bus. At times he swam with them, holding them up in the water and helping them in their efforts to swim. He was a very

friendly person. After a time the applicant started to seek occasions where he would be alone with the complainant either in the bus or in its vicinity and he began to touch the complainant's body in an increasingly sexual manner both outside and inside her clothing. He praised the beauty of her body and said that she was the kind of girl who would not go and tell people about what was happening, unlike other girls. These episodes are set out in some detail by A.M. in her statement. They gradually increased in seriousness and culminated in a number of episodes when the applicant had full sexual intercourse with her. One of these episodes is described by her as taking place in the applicant's family home when his wife was absent, another took place in the complainant's own family home in the absence of her parents and another in the back of the applicant's car. Shortly before her sixteenth birthday, which was in December, 1985, A.M. describes the applicant as saying to her that "this would all be legal soon when I was sixteen". This had a considerable effect on her as she apparently had been unaware that what the applicant had been doing was illegal. All the episodes took place in an atmosphere of secrecy. The complainant says that on occasions she lied to her parents saying that she was going to visit a school friend when in fact she had arranged to meet the applicant; on other occasions she left the school premises without permission in order to meet him. There is no suggestion, however, that the applicant threatened her with any dire consequences should she tell anyone what was happening.

According to the complainant's statement once she became aware that what she and the applicant had been doing was illegal she began to avoid getting into situations where she would meet the applicant. She gave up swimming and gradually saw less and less of him. The relationship with him ended. She did not, however, inform her parents or anyone in authority at that stage.

About one year later, in or about 1986 to 1987, the complainant had a boyfriend J.D. with whom she did not have sexual relations. She told J.D. about her sexual abuse by the applicant and apparently spoke to him about it regularly but did not tell her parents.

In the early part of 1988, before A.M. sat her leaving certificate, she spent the night at the house of a school friend, J.J., whose father was a garda sergeant. Another school friend O.N. was also there. The three girls sat up late at night talking about sexual matters, and A.M. told her two friends that she had been sexually abused by the applicant. They were greatly upset and subsequently informed their own parents, including Sergeant J. The following day, the three girls did not attend their school classes and were found together by a teacher in another part of

the school premises. Not unnaturally, trouble ensued. A.M. says that in order to explain the situation she told her story of sexual abuse to her teacher Ms. C. Ms. C. was very supportive and offered to arrange counselling for A.M. A.M. recalls Ms. C. talking to her about the Director of Public Prosecutions, and asking her did she want to tell anybody about the situation. At her own request A.M. repeated her story to the school principal Sr. M. This she did, she says, in order to prevent the school from using the applicant's bus in the future on account of the possible danger to other young girls. Sr. M. did not feel that she was in a position openly to make accusations against the applicant but she agreed gradually to discontinue use of his bus, which she apparently did.

Ms. C. and Sr. M. eventually persuaded A.M. to inform her parents of the sexual abuse and she did this shortly before her leaving certificate in 1988. They were naturally very upset but following the disclosure A.M. states that her parents were really not able to discuss matters with her as on any occasion when either her father or her mother brought the subject up she would get extremely upset. She refused to go to counselling and the matter was not really discussed. She decided that she wanted to get on with her life and put the whole thing behind her.

By this stage, the complainant's disclosures were quite widespread but no attempt was made by anyone to report the matter to the Garda Síochána. Even Sergeant J., although a felony had been reported to him, took no action. In his somewhat laconic statement (which, though inadmissible, is contained in the book of evidence) he says that he became aware that A.M. had alleged that she was interfered with by the applicant who was known to him. He told her that if she had any problems with him she should inform her parents immediately but he never heard another word about it until this investigation began.

The complainant then sat her leaving certificate (with success) and in the autumn of 1988 left for her studies in University College Dublin. She says that she had decided to put the matter of the sexual abuse behind her; it was too late to do anything about it. The evidence of the counsellor Ms. Fitzmaurice was that A.M. had decided to complete her education and get a job and her own money and then to deal with the sexual abuse by going to the gardaí. Ms. Fitzmaurice makes the rather curious suggestion that A.M. delayed making a complaint until she had her own money because the case against the applicant would be a financial burden on her parents. Given the general nature of the evidence of Ms. Fitzmaurice I am not at all certain whether it was A.M. or Ms. Fitzmaurice herself who held the erroneous belief that the costs of a

prosecution by the State would fall on A.M.'s parents. At any rate A.M. makes no such suggestion in her own statements or affidavit.

In considering the question of delay in this case, therefore, there are two distinct periods of delay. The first period is between the mid-1980's when the alleged abuse was taking place and the summer of 1988 when A.M. told her story to her school friends (and indirectly to their parents), to the school teachers and to her parents. The second period is from the summer of 1988 to February/July, 1995. Counsel for the applicant, Mr. McEntee, relies most heavily on the second period of delay, when the complainant had already informed persons in authority, when she was no longer residing in her home town and when she was in no way under the dominance of the applicant, with whom, on her own account she had had no relationship since late 1985 or early 1986.

Counsel for the respondent, Mr. Ó Caoimh ó caoimh, when dealing with the reasons for this delay, relies on the evidence of Mr. Alex Carroll, senior clinical psychologist, employed by the Midland Health Board. Mr. Carroll in his affidavit sets out his views on the dynamics of child sexual abuse generally together with the reasons why the victims of child sexual abuse may fail to make a complaint for a long period of time. He goes on to exhibit a psychological report on A.M. the major part of which is headed "Interview with A.M". I shall refer to Mr. Carroll's affidavit evidence later in more detail.

An affidavit was also sworn by Ms. Anne Fitzmaurice who counselled A.M. over a considerable period. Ms. Fitzmaurice sets out in her affidavit matters which had been told to her by A.M. and states that A.M. is at present in therapy and presents what she describes as "issues which are consistent with research done on victims of sexual abuse".

Ms. Fitzmaurice was cross-examined on her affidavit by counsel for the applicant. Her replies to cross-examination reflected what are now widely accepted theories on the effect of child sexual abuse on victims in their later life, but she had great difficulty in elaborating with any degree of logic or scientific method what lay behind those concepts. She was vague about the nature of the organisation from which she had received her qualifications and also about the process whereby she treated those whom she counselled. While I have no difficulty in accepting that Ms. Fitzmaurice is a person of good will who is using her best endeavours to assist persons suffering from trauma undoubtedly caused to victims of sexual abuse, I had difficulty in accepting that she was sufficiently qualified to be an expert witness as to what lay behind A.M.'s delay in making her complaint to the gardaí in this particular case. In reply to cross-examination Ms.

Fitzmaurice completely rejected any idea that her role might include any investigation or background research in regard to her clients other than personal interviews with the clients themselves. This is in complete contrast with the practice of psychiatrists and psychologists assessing children and families, for instance, in family law cases. In my experience such a system includes many interviews with other parties, visits to the children's homes and/or schools and the general building up of a balanced picture through collateral histories. I do not doubt that Ms. Fitzmaurice's therapy may well be of considerable assistance to the complainant; I merely feel that her evidence is not of very great use to the court in reaching a decision in the issues before it.

As I have said affidavit evidence was also provided by Mr. Carroll, senior clinical psychologist. He was not cross-examined on his affidavit.

In the first part of his affidavit he set out in clear form the general situation where an adult is able to abuse a situation of dominance and power implicitly or directly to coerce a child into a sexual relationship. He states that it is not possible to over emphasise the significance of the exploitation and misuse of accepted primal relationships when assessing the impact of sexual abuse on a child, including the failure or otherwise of the child to disclose the fact of the abuse at the time it was taking place. He then sets forth a number of reasons why the victims of child sexual abuse may fail to make a complaint in relation thereto for a long period of time.

Mr. Carroll is a person with experience of providing evidence in this type of case. In his judgment in the case of *B. O'R. v. Director of Public Prosecutions* (Unreported, High Court, Kelly J., 27th February, 1997), which is also a case of delay, Kelly J. quotes at some length from an affidavit sworn by Mr. Carroll in that case (at pp. 6 to 8 of the judgment). That affidavit is clearly extremely close both in content and in actual wording to Mr. Carroll's affidavit sworn in the instant case - although the factual circumstances of the two cases are, of course, very different. Some of the general statements made by Mr. Carroll in the first part of his affidavit are of only marginal relevance to the facts of the present case. However, I have no difficulty in accepting in general terms the position as regards the relationship between child sexual abuse victims and their abusers as set out by Mr. Carroll and I have no doubt that a person of dominance, where it exists, has a very real effect in preventing the victim from disclosing sexual abuse.

Mr. Carroll then exhibits his psychological report on A.M. which as I have said mainly consists of an account of what is stated to be an interview with A.M., which is of course the normal

primary method of psychological or psychiatric assessment. However, in a subsequent affidavit sworn by A.M. herself, in which she corrects some factual inaccuracies in Mr. Carroll's affidavit, she states in regard to a particular inaccuracy:

"I did not expressly mention this to him but he had sight of my statement."

At para. 3(c) of her affidavit she states:

"Dr. Carroll had a copy of my statement prior to seeing me and I believe that the details of the abuse referred to by him in his report are taken from my statement as I did not reiterate all of these matters in my discussion with him."

I am somewhat concerned that Mr. Carroll did not himself state in his affidavit that he did not go through all the details of the complainant's history with her himself and that he was relying on a statement which appears to have been provided to him by the gardaí or by the prosecution in advance of his interview with the complainant. This does not strike me as the most desirable way of carrying out an in-depth psychological assessment in a matter of such crucial importance both to the complainant and to the applicant. I conclude that I accept the general theory put forward in the first part of Mr. Carroll's affidavit while maintaining a degree of reservation in regard to his assessment of A.M. herself.

The law

The question of delay in criminal trials where the accused is charged with sexual offences which are alleged to have been committed against young children has been considered in a number of cases in recent years, both in this Court and in the Supreme Court. These would include *G. v. Director of Public Prosecutions* [1994] 1 I.R. 374; *O'C v. Smith* (Unreported, High Court, Barr J. 17th November, 1994); *O'C v. Smith* (Unreported, Supreme Court, 24th January, 1997) and *B. O'R v. Director of Public Prosecutions* (Unreported, High Court, Kelly J., 27th February, 1997). In his comprehensive and thorough judgment in *B. v. Director of Public Prosecutions* [1997] 3 I.R. 140, Budd J. surveyed the authorities both here and in other jurisdictions and there is no need for me to cover that ground again.

Counsel for the applicant relied particularly on the judgment of Keane J. in this Court in *E. O'R. v. Director of Public Prosecutions* [1996] 2 I.L.R.M. 128, in which the learned judge after careful consideration of the authorities granted an order of prohibition on grounds of delay. In that case, as in the present case, the alleged abuser did not live in the same house as the victims -

although he was in fact their uncle - and he considered that this "rendered the likelihood of dominion by the applicant over them significantly less" (p. 135 of the judgment). He added that in addition:

"... the vagueness and lack of precision as to the dates on which the offences were alleged to have been committed coupled with the lengthy period of time involved made it difficult, if not impossible, for the applicant to defend himself against the charges."

Keane J.'s decision was overturned by the Supreme Court in a brief *ex-tempore* judgment (Unreported, Supreme Court, 18th March, 1997) in the main on the ground that the learned High Court Judge had not found any specific prejudice attending the trial from the accused's point of view.

The various decisions, most of them unreported, on the topic of delay in these cases have culminated in a decision of the Supreme Court in the case of *B. v. Director of Public Prosecutions* which fortunately is now reported at [\[1997\] 3 I.R. 140](#). In her judgment in this case, with which a full court concurred, Denham J. analysed the law on the right of an accused to a reasonably expeditious trial in the context of alleged offences of sexual abuse of young children in past years, dealing in particular with the concept of dominion or domination. It is unnecessary to quote extensively from the judgment, almost all of which is relevant in considering the law and the facts in the instant case. However, a number of passages should be stressed.

The learned judge points out that statute law places no limitation in time on the prosecution of the alleged offences. Any such statute of limitations is a matter for the Oireachtas. The Constitution places relevant parameters on a criminal trial in cases of unreasonable delay. Under the heading "Reasonable Expedition" she goes on to say at p. 194:-

"The Constitution does not state expressly that there is a right to a speedy trial. Article 38.1 provides that no person shall be tried on any criminal charge save in due course of law. In addition Article 40, s. 3 imposes duties on the State, and thus on the courts as the judicial arm of government, which include the protection of such rights as fair procedures.

The right to reasonable expedition was cited by Gannon J. in *State (Healy) v. Donoghue* [1976] I.R. 325 at page 336. In *State (O'Connell) v. Fawsitt* [1986] I.R. 362 Finlay C.J. stated that:-

'... a person charged with a criminal offence is entitled, as part of his right to be tried in due course of law, to a trial with reasonable expedition.'

The right to reasonable expedition must be assessed in each case in light of the particular circumstances of that case. If the accused's defence has been explicitly prejudiced by the State's delay, for example by the non-availability of material witnesses, then he is entitled, on the delay being unreasonable and prejudicial, to an order prohibiting the trial ...

The court must look at the circumstances of each case, the issues and the constitutional interests of the parties, to determine the matter. There is no definitive time limit. There is no exhaustive or exclusive list of factors. There are interests which must be protected in the constitutional scheme of things."

Having listed a number of factors which should be included in determining the issues Denham J., under the heading "Community's Right" states (at p. 195 of the report):

"It is not the applicant's interests only which have to be considered. It is necessary to balance the applicant's right to reasonable expedition in the prosecution of the offences with the community's right to have criminal offences prosecuted. The community's right to have offences prosecuted is not absolute but is to be exercised constitutionally, with due process. If there is a real risk that the applicant would not receive a fair trial then on the balance of these constitutional rights, the applicant's right would prevail, see *D. v. Director of Public Prosecutions* [1994] 2 I.R. 465 at pp. 473 and 4. *Z. v. Director of Public Prosecutions* [1994] 2 I.R. 476 at p. 506."

She then goes on to acknowledge that delay in cases relating to allegations of sexual abuse of children and young people fall into a special category and to quote Finlay C.J. in *G. v. Director of Public Prosecutions* [1994] 1 I.R. 374, where he stated at p. 380:-

"The court asked to prohibit the trial of a person on such offences, even after a very long time, might well be satisfied and justified in reaching a conclusion that the extent to

which the applicant had contributed to the delay in the revealing of the offences and their subsequent reporting to the prosecution authorities meant that as a matter of justice he should not be entitled to the order."

In listing the matters relevant to B.'s case the learned judge considered a list of seven factors which should be considered before reaching a decision that the relief of prohibition should or should not be granted. Most of these factors are also relevant, or alleged to be relevant, to the present case and it would be helpful to consider them in relation to the facts in the present case as compared with the facts in B.'s case. The factors are as follows:-

A. Relationships

These are inter-personal relationships between the accused and the complainant. In *B. v. Director of Public Prosecutions* [1997] 3 I.R. 140, the relationship was that of father and daughters and is described by Denham J. as

"... a relationship of trust, a breach of this trust and duty of a parent affects the complainant so that the usual concepts as to reasonable time may not apply." (p. 197).

In the present case the accused has no such close relationship with the complainant. He was simply the bus driver who took the school girls to the swimming pool and sometimes swam with them. As submitted by counsel for the Director of Public Prosecutions, Mr. Ó Caoimh ó caoimh, this is a relationship of some authority and trust between an adult and young girls but the degree of authority and of trust is not at all of the same importance or effect as that of a father/daughter relationship.

B. Dominion

In *B. v. Director of Public Prosecutions* [1997] 3 I.R. 140, the trial judge had found on the evidence that B. had a violent, dominant and menacing personality, and during their childhood the complainants had been completely dominated by him and had been living in fear of him. His behaviour towards his wife was such that she obtained an indefinite barring order against him in 1982, but even after he had left the house his dominance was such that his daughters were unable to make their complaints until after the death of their mother in 1991.

"This dominion," states Denham J. at p. 199 "places this (and similar cases) in a special category as by the said control the applicant's actions prevented the complainants taking steps so that the prosecution could proceed within a more usual time frame. The applicant is barred from arguing that the delay is unreasonable while such dominion existed."

These facts do not bear any relationship with the facts in the instant case. There is no suggestion that the applicant is a person of general bad character or a menacing, dominant or evil person. If he were it is hard to imagine that the St. Louis nuns would hire him to drive a party of school girls to their swimming. He had not the same opportunity to dominate the complainant as would a father or other close relation. He did not live in the family home and there is no suggestion that he was a regular visitor there or a close friend of the complainant's parents. The complainant herself states that once she realised that what they were doing was illegal (in December, 1985) she withdrew from her relationship with him and ceased to go to swimming lessons. This is not, in my view, evidence of the type of "dominion" which is dealt with in B.'s case, or indeed in the other cases to which I have been referred. In all of these the accused was closely related to the complainant or was at the least a close family friend.

I am aware that Mr. Carroll and Ms. Fitzmaurice in their affidavits describe a type of "kindly" domination, but I feel that their views contain an element of rationalisation by hindsight. This court cannot accept that a situation of domination exists automatically in all cases where a person is accused of sexual offences. The presumption of innocence has to play a part in the court's consideration and the court must base its decision on the actual evidence before it.

C. Whose delay?

As in *B. v. Director of Public Prosecutions* there is no suggestion here of delay on the part of the State once the complainant had made her statement to the gardaí in July, 1995. There are two periods of delay, firstly the period from 1985 to 1988, before A.M. told the school authorities and her parents. This is generally understandable and counsel for the applicant did not strongly suggest that this period of delay was unreasonable. However, in 1988 A.M. told her school friends, her teacher, her school principal and her parents. Sergeant J. was also informed of her complaint. Yet no action seems to have been taken either by herself or anyone else concerned. Apparently her parents tried to raise the matter with her on a number of occasions but without success. She left her home town and lived in Dublin where the accused could not possibly have exercised any particular influence over her. She stated that she wanted to put it all behind her.

She apparently told Ms. Fitzmaurice that she wanted to complete her education, get a job and have her own money before making a complaint to the gardaí. I am far from suggesting that these feelings would not be understandable or that one could not feel sympathy for them. Nevertheless they have to be looked at in the context of the effect such delay would have on the possibility of a fair trial for the accused.

I cannot but conclude that the delay from 1988 onwards, however understandable, was the complainant's own delay and to a lesser extent that of the persons to whom she made her complaint in 1988. There is no factual evidence that the delay from 1988 to 1995, was caused by the applicant. This is in stark contrast to the facts in *B. v. Director of Public Prosecutions* [1997] 3 I.R. 140.

D. Alleged sexual abuse in the home

When sexual abuse is taking place in the home, Denham J. in *B. v. Director of Public Prosecutions* analyses the situation thus at p. 201:-

"There is no doubt that in cases of alleged sexual abuse in the home by a parent of a child or a young person the onus rests on the applicant to prove his case on the balance of probabilities if he wishes to succeed to prohibit the trial on the grounds of delay. The fact that the acts were alleged to have been committed in the home by a parent or trusted figure purports to establish a family dynamic that mitigates against disclosure. However, each case must be viewed in the light of its own circumstances. The applicant retains his constitutional rights, they are not negated by the allegations. His constitutional right to a trial with fair procedures supersedes society's right to prosecute. It is necessary, therefore, to consider the facts to determine whether his constitutional rights have been infringed."

E. Alibi

In B.'s case and in other cases where the alleged abuse has taken place within the family or in the home, both this Court and the Supreme Court have held that in the nature of these cases alibi evidence is unlikely to be relevant. This is not necessarily so where specific incidences and occasions of abuse outside the home by a non-relative are alleged. Had the complaints been

made at an early stage, or at least in 1988, one would have expected that a teenage girl would have been able to recall dates and times which would enable more specific charges to be brought. At that stage and in those circumstances the applicant might well have been able to seek alibi evidence, an opportunity which is clearly not available to him after a lapse of some twelve years since the last of the alleged offences.

F. Witnesses

Much the same applies here as in the case of alibi evidence. One would not suggest that actual episodes of sexual abuse would take place otherwise than in private. However, an early complaint which was more specific as to dates and times might well allow for witnesses as to the details of the trips to the swimming pool, the general behaviour of the applicant with the other girls, the alleged absences from the school premises by the complainant and other circumstantial matters. This was urged with considerable cogency by counsel for the applicant and must be weighted when considering possible prejudice to the accused at this trial.

G. Admission of guilt

In B.'s case the accused had made a partial admission of guilt to the gardaí. This is irrelevant in the instant case where the applicant has maintained his complete innocence of the charges at all times.

Decision

I have followed the analysis so carefully laid out by Denham J. at [\[1997\] 3 I.R. 140](#) and compared the facts in that case with the facts in the instant case at some length. I have done this in large part because I consider that there may be a danger that B. v. Director of Public Prosecutions and the unreported cases to which I have also been referred might be taken as authority for the proposition that in all cases where an accused is charged with sexual abuse of a child or young person which took place some years ago, any claimed prejudice on account of delay can be negated by a claim that the accused exercised "dominion" over the complainant.

In years gone by, accusations of rape or any kind of sexual assault were treated with considerable suspicion. The orthodox view was that accusations of rape and sexual assault by women against men were "easy to make and hard to disprove" and judges were required to give

stern warnings in their charge to the jury of the need for corroboration and the dangers attached to convicting on the evidence of the complainant alone.

No one today would support this orthodoxy of the past and there has been a great increase in the psychological understanding of sexual offences generally.

Nevertheless, it would be unfortunate if the discredited orthodoxy of the past were to be replaced with an equally rigid orthodox view that in all cases of delay in making complaints of sexual abuse the delay can automatically be negated by dominion. This is emphatically not the *ratio* of the *B. v. Director of Public Prosecutions* judgment. In fact Denham J. is most careful to repeat at several points in her judgment that each case must be analysed and decided on its own circumstances and facts as she herself has done in B.'s case.

I consider that in the instant case there is a real risk that the applicant, by reason of the delay, would not obtain a fair trial and that the applicant is not on the evidence prevented from asserting his constitutional right to a reasonably expeditious trial either by his own actions or by the factors which generally fall to be considered in cases where the accused is charged with sexual offences against children or young persons.

Two other matters arise. Firstly, it is submitted by the respondent that the risk of an unfair trial may be avoided by careful rulings and directions to the jury to be given by the trial judge. This has been accepted by this Court and by the Supreme Court in a number of cases, both where there has been a problem of delay and where there has been excessive pre-trial publicity. Counsel for the applicant submits that in the case of delay such *dicta* are "without content" as it is impossible to frame effective warnings and directions to the jury in such a case. While I would not go so far as does counsel for the applicant, I would accept that, while warnings and directions in the pre-trial publicity cases are relatively simple and, one hopes, effective, the position is more difficult in delay cases. One reason for this is that evidence of late complaints and other relevant evidence may, at the actual trial, be inadmissible.

The second matter is that of the nature of the book of evidence served on the accused in this case. The applicant claims that the fact that the book of evidence contains statements from proposed witnesses which could never be admissible at the trial of the applicant violates the applicant's right to a preliminary examination in accordance with law and constitutes an unfair procedure. The respondent claims that these matters can be dealt with by the District Judge who

will be in a position to assess whether the documentation discloses a *prima facie* case in law against the applicant.

There is no doubt that the book of evidence in this case does not comply with s. 6(1)(c) and (d) of the [Criminal Procedure Act, 1967](#). The section provides that the documents to be served on the accused should include, *inter alia*:-

- (c) a list of the witnesses whom it is proposed to call at the trial and
- (d) a statement of the evidence that is to be given by each of them.

The vast majority of statements of proposed evidence in this case consist solely of hearsay and such witnesses could not be called at any proposed trial. A medical report (which is not proved) is presented as an "exhibit". It is clear that counsel for the respondent from his own considerable expertise and knowledge is conscious of these defects and candidly admits them. It would seem to me that such a book of evidence should not be left to the District Judge to rule on; it should be withdrawn and a fresh book issued. However, as I have decided this case on other grounds such action will be unnecessary.

I am satisfied for the reasons set out above that the applicant has established his claim and as a result he is entitled to the order of prohibition which he has sought.

Cur. adv. vult.

Hamilton C.J.	28th May, 1998
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I have read the judgments about to be delivered by Denham, Keane and Lynch JJ. and I agree with them.

Denham J.

This is an appeal by the Director of Public Prosecutions, respondent against an order of the High Court prohibiting and injuncting the prosecution of the applicant on five charges of indecent assault contrary to s. 10 of the [Criminal Law \(Rape\) Act, 1981](#), and three charges of unlawful carnal knowledge of the complainant, a girl under the age of 15 years, contrary to [s. 1 \(1\) Criminal Law Amendment Act, 1935](#). These charges relate to a period of time between the 1st

September, 1982, and the 12th December, 1984. They are representative charges describing alleged child sexual abuse over the time indicated.

The five charges of indecent assault are worded similarly except that they related to different time spans. Thus, one of the charges states:-

"That you did on a date unknown between the 1st September, 1982, and the 28th February, 1983, at ... within the District Court area of ... did indecently assault one ... a female contrary to common law as provided for in s. 10 of the [Criminal Law \(Rape\) Act, 1981](#)."

The three charges of alleged unlawful carnal knowledge are also representative charges and state, for example:-

"That you did on a date unknown between the 1st September, 1983, and the 31st December, 1983, in the State did unlawfully and carnally know one ... a girl under the age of fifteen years, contrary to s. 1(1) of the Criminal Law (Amendment) Act, 1935."

The applicant deposed that the first he knew of the charges being brought against him was on the 21st August, 1995, when he was questioned by a detective sergeant of the Garda Síochána. He was subsequently charged as set forth and served with a book of evidence.

On the 22nd May, 1996, the applicant applied to the High Court for leave to apply for judicial review. This was granted by Laffoy J., who ordered that he do have leave to apply for:-

- (1) An order prohibiting the respondent from further dealing with the prosecution of the applicant herein on the five charges of indecent assault, on dates unknown between the 1st September, 1982, and the 30th September, 1983, and three counts of unlawful carnal knowledge on dates unknown between the 1st September, 1983, and the 12th December, 1984, on which the applicant has been summonsed to appear before the notice party and which are presently adjourned before the District Court to the 28th May, 1996.
- (2) An order in the nature of an injunction restraining the respondent herein his servants or agents from taking any further step in the criminal prosecution entitled *The Director of Public Prosecutions v. P.C.* currently adjourned before the notice party to the 28th May, 1996.

The grounds for such relief were:-

- (1) The delay in the institution of the proceedings herein:
 - (a) has prejudiced the applicant in his defence of these proceedings;
 - (b) is unfair and unjust to the applicant;
 - (c) violates the applicant's right to a trial with reasonable expedition;
 - (d) has prejudiced the applicant's chance of obtaining a fair trial;
 - (e) has been excessive and prejudicial;
 - (f) has violated the applicant's right to a trial in due process of law.
- (2) The lack of specificity in the charges:
 - (a) has prejudiced the applicant in his defence of these proceedings;
 - (b) is unfair and unjust to the applicant;
 - (c) has prejudiced the applicant's chance of obtaining a fair trial;
 - (d) has violated the applicant's right to a trial in due process of law.
- (3) The documents served on the applicant pursuant to the [Criminal Procedure Act, 1967](#), contained statements from proposed witnesses which could never be admissible at the trial of the applicant and contained an exhibit which could never be admissible in evidence at the trial of the applicant and
 - (a) violate the applicant's right to a preliminary examination in accordance with law,
 - (b) constitute an unfair procedure.

The applicant deposed that he was not guilty of any of the allegations being brought against him. He further stated:-

"The lapse of time of between ten and half and thirteen years between the alleged incidents occurring and me being notified of them has the effect that, if a criminal trial were to take place, I would be severely handicapped in my ability to prepare and present my defence. Despite the efforts of myself, my solicitor and family I have been unable to ascertain either accurately or with any degree of precision the circumstances of my whereabouts during the period in which it is alleged these offences were committed."

Further, he deposed that he was unable to identify any witness who may have material evidence concerning his presence or conduct during the relevant time. He pointed out that the charges are alleged to have taken place over a long and indeterminate period and that there is no specific date mentioned in any of the charges.

He further deposed:-

"I understand from the book of evidence that the complainant in this case is now 26 years of age and that she has a master's degree, together with a postgraduate qualification. I have not been in a position, nor have I sought, to exercise any influence

over her and I understand from the book of evidence that she has been residing in Dublin and away from my locality for the past eight years."

And he further deposed:-

"I say and believe that the delay in instituting these proceedings and the manner in which the book of evidence has been prepared has caused unfairness to me and that as a result it would not be possible for me to obtain a fair trial in accordance with law."

The respondent filed a statement of opposition which included the following grounds:-

" ...

(2) There is no time bar to the prosecution of such offences as are charged herein.

(3) If there was delay in the making of complaints against the applicant herein, the applicant has been responsible for the said delay. The applicant was, during the period complained of, a coach driver and swimming teacher of the complainant, and in the position of dominance and control over her.

(4) The applicant has been charged with repeated sexual offences against the complainant over a long period. In the circumstances it has not been established that the defence of alibi realistically arises, or that the applicant's right to a fair trial has been prejudiced by the alleged delay.

(5) Insofar as the length of time from the commission of each offence to the date of any trial of the applicant is concerned:-

(a) same will not be so great as to render the trial unfair, having regard to the capacity and duty of the trial judge, by appropriate directions, to counter any alleged prejudice and to secure that the trial of the applicant will be fair in all respects,

(b) the defence of alibi is not a prerequisite to a successful defence to any one or more of the charges made.

(6) Adequate particulars of the offences with which the applicant has been charged appear in the book of evidence with as much specificity as is available, given the nature of the offences charged, and the lack of precision complained of is not such as to make it impossible for the applicant to defend himself.

(7) It is denied that the documents served on the applicant pursuant to the [Criminal Procedure Act, 1967](#), violate the applicant's right to a preliminary examination in accordance with law, or constitute an unfair procedure. Any alleged deficiencies in the said documentation can be dealt with by the District Court and the District Court Judge will be in a position to assess whether the said documentation discloses a *prima facie* case in law against the applicant."

Judgment of the High Court

This matter was heard before the High Court (McGuinness J.) on the 28th, 29th and 30th May, 1997, judgment was reserved and delivered on the 24th July, 1997. On the issue of delay the learned High Court Judge concluded:-

"I consider that in the instant case there is a real risk that the applicant by reason of the delay, would not obtain a fair trial and that the applicant is not on the evidence prevented from asserting his constitutional right to a reasonably expeditious trial either by his own actions or by the factors which generally fall to be considered in cases where the accused is charged with sexual offences against children or young persons."

There were a number of particularly important findings made by the learned trial judge. They relate to key matters on this appeal.

(i) Practice of psychiatrists and psychologists in family law cases

Regarding Ms. Fitzmaurice the learned trial judge stated at p. 35:-

"Ms. Fitzmaurice was cross-examined on her affidavit by counsel for the applicant. Her replies to cross-examination reflected what are now widely accepted theories on the effect of child sexual abuse on victims in their later life, but she had great difficulty in elaborating with any degree of logic or scientific method what lay behind those concepts. She was vague about the nature of the organisation from which she had received her qualifications and also about the process whereby she treated those whom she counselled. While I have no difficulty in accepting that Ms. Fitzmaurice is a person of good will who is using her best endeavours to assist persons suffering from trauma undoubtedly caused to victims of sexual abuse, I had difficulty in accepting that she was sufficiently qualified to be an expert witness as to what lay behind A.M.'s delay in making her complaint to the gardaí in this particular case. In the reply to cross-examination Ms. Fitzmaurice completely rejected any idea that her role might include any investigation or background research in regard to her clients other than personal interviews with the clients themselves. This is in complete contrast with the practice of psychiatrists and psychologists assessing children and families, for instance, in family law cases. In my experience such a system includes many interviews with other

parties, visits to the children's homes and/or schools with the general building up of a balanced picture through collateral histories. I do not doubt that Ms. Fitzmaurice's therapy may well be of considerable assistance to the complainant; I merely feel that her evidence is not of very great use to the court in reaching a decision in the issues before it."

The trial judge also noted the affidavit evidence provided by Mr. Carroll, senior clinical psychologist and she pointed out that he was not cross-examined.

(ii) *Dominion*

On reviewing relevant factors the High Court determined that the applicant had no relevant relationship with the complainant, as he was simply the bus driver who took the schoolgirls to the swimming pool and sometimes swam with them, that he was not a person of general bad character or a menacing, dominant or evil person. The learned trial judge held at p. 40:-

"He had not the same opportunity to dominate the complainant as would a father or other close relation. He did not live in the family home and there is no suggestion that he was a regular visitor there or a close friend of the complainant's parents. The complainant herself states that once she realised that what they were doing was illegal (in December, 1985,) she withdrew from her relationship with him and ceased to go to swimming lessons. This is not, in my view, evidence of the type of 'dominion' which is dealt with in B.'s case, or indeed in the other cases to which I have referred. In all of these cases the accused was closely related to the complainant or was at the least a close family friend."

(iii) *Length of delay*

On the length of delay the learned trial judge found that:-

"There are two periods of delay, firstly the period from 1985, to 1988, before the complainant told the school authorities and her parents. This is generally understandable and counsel for the applicant did not strongly suggest that this period of delay was unreasonable. However, in 1988, A.M. told her school friends, her teacher, her school principal and her parents. Sergeant J. was also informed of her complaint. Yet no action seems to have been taken either by herself or anyone else concerned.

Apparently her parents tried to raise the matter with her on a number of occasions but without success. She left her home town and lived in Dublin where the applicant could not possibly have exercised any particular influence over her. She stated that she wanted to put it all behind her. She apparently told Ms. Fitzmaurice that she wanted to complete her education, get a job and have her own money before making a complaint to the gardaí. I am far from suggesting that these feelings would not be understandable or that one could not feel sympathy for them. Nevertheless they have to be looked at in the context of the effect such delay would have on the possibility of a fair trial for the applicant.

I cannot but conclude that the delay from 1988 onwards, however understandable, was the complainant's own delay and to a lesser extent that of the persons to whom she made her complaint in 1988. There is no factual evidence that the delay from 1988 to 1995, was caused by the applicant. This is in stark contrast to the facts in B.'s case."

(iv) Abuse not in the family home

McGuinness J. pointed out that the factor of alleged sexual abuse taking place in the home did not exist in this case and thus the family dynamic militating against disclosure would not exist. McGuinness J. distinguished this case from cases where alleged child abuse has taken place within the family or the home, stating at p. 42:-

"Had the complaints been made at an early stage, or at least in 1988, one would have expected that a teenage girl would have been able to recall dates and times which would enable more specific charges to be brought. At that stage and in those circumstances the applicant might well have been able to seek alibi evidence, an opportunity which is clearly not available to him after a lapse of some twelve years since the last of the alleged offences."

(v) Witness

On the issue of witnesses the learned trial judge pointed out that whereas one would not suggest that actual episodes of sexual abuse would take place otherwise than in private, however, an earlier complaint with more specific dates and times might well:-

"... allow for witnesses as to the details of the trips to the swimming pool, the general behaviour of the applicant with the other girls, the alleged absences from the school premises by the complainant and other circumstantial matters."

(vi) *Orthodoxy of the past*

McGuinness J. held at p. 43:-

"In years gone by, accusations of rape or any kind of sexual assault were treated with considerable suspicion. The orthodox view was that accusations of rape and sexual assault by women against men were 'easy to make and hard to disprove' and judges were required to give stern warnings in their charge to the jury of the need for corroboration and the dangers attached to convicting on the evidence of the complainant alone.

No one today would support this orthodoxy of the past and there has been a great increase in the psychological understanding of sexual offences generally.

Nevertheless, it would be unfortunate if the discredited orthodoxy of the past were to be replaced with an equally rigid orthodox view that in all cases of delay in making complaints of sexual abuse the delay can automatically be negated by dominion. This is emphatically not the *ratio* of the *B. v. Director of Public Prosecutions* judgment."

Appeal

Against that judgment the respondent has appealed. The appeal is based on several grounds, including that the learned trial judge erred in law in:-

(1) ... relying upon her own stated experience of the practice of psychiatrists and psychologists in family law cases in assessing the evidence of Ms. Fitzmaurice and in relying on the fact that she was vague about the organisation from which she had received her qualifications;

(6) ... holding that the delay from 1988, was the complainant's own delay and that there was no factual evidence that the delay from that time to 1995, was caused by the applicant in circumstances where the evidence before the court disclosed that the complainant was extremely traumatised and is very traumatised and suffered enormous guilt and difficulty in communicating the complaints and the inability of the complainant to make a formal complaint until after she had received counselling;

(7) holding, in the absence of any evidence supporting the same, that one would have expected a teenage girl would have been able to recall dates and times had the

complaints been made at an early stage or at least in 1988, in circumstances where the evidence disclosed repeated sexual abuse of the complainant when she was still a child;
(8) failing to have regard to the complainant's circumstances in 1988, when she was still a child and had sought to bring the matter to the attention of persons in authority including her parents and had difficulty in dealing with the matter at the time;
(9) holding that in 1988, and in the circumstances at the time that the applicant might well have been able to seek alibi evidence in light of the complaints of repeated abuse of the complainant;
(14) ... holding that there was a real risk that the applicant by reason of the delay would not obtain a fair trial and in failing to have regard to the evidence against the applicant relating to his own actions and further the evidence of the experts called on behalf of the applicant as to the factors which generally fall to be considered in cases of child sexual abuse.

Submissions on behalf of the respondent

Counsel for the respondent, submitted as follows:-

(1) *On the issue of delay that:-*

- (a) There were affidavits sworn by the complainant, Mr. Alex Carroll, psychiatrist, and Ms. Ann Fitzmaurice, psychologist. That there was no cross-examination of the complainant or Mr. Carroll. That there was no contradictory evidence to the affidavit of Mr. Carroll.
- (b) The learned trial judge had misunderstood the function of Ms. Fitzmaurice. She was giving counselling and did not have the role described in a family law case.
- (c) In the circumstances the delay was not caused by the complainant deliberately acting with a view to delaying the process, that she was traumatised, she was unable to make a complaint until she had had counselling.
- (d) The onus is on the applicant to establish that there is a real risk of an unfair trial before he is entitled to an order prohibiting the trial, and he had not discharged that onus.
- (e) Delay in cases where child sexual abuse is alleged require special factors to be considered by the court, the list of factors set out in *B. v. Director of Public Prosecutions* [1997] 3 I.R. 140, are not the universal factors.
- (f) In the context of the alleged child sexual abuse in this case the issue of an alibi does not arise.
- (g) The issue of absence of witnesses is not relevant.

2. *On the issue of lack of specificity that:-*

- (a) The law had been stated in *Director of Public Prosecutions v. E.F.* (Unreported, Supreme Court, 24th February, 1994) and that these charges met those parameters.

(b) Had the offences come to light six or seven years previously exactly the same situation would exist. It is not the passage of time that has caused any problem for the applicant's defence. The difficulty alleged is because the nature of the allegations, allegations of habitual sexual offences of a young girl.

3. *Of the Book of Evidence:-*

Counsel submitted that this was a matter for the District Court. He stated that notwithstanding the unfortunate manner of its presentation, he agreed some items should not be there, they are items that would normally be furnished to the defence but are not part of the evidence in the book of evidence. He submitted that the form of the book of evidence is for the trial and should not give rise to an order of prohibition.

Submissions on behalf of the applicant

Counsel for the applicant, accepted that the onus was on the applicant to satisfy the court that there is a real risk that if the delayed trial goes ahead the applicant will not get a fair trial. Further, he accepted, correctly, that if the applicant is the cause of the delay he cannot take advantage of what he has caused, subject to a reservation that after a certain length of time no matter who caused the delay there may not be a fair trial.

(a) Counsel for the applicant relied on the judgment of the High Court. He submitted that the time lapses in this case are of an order that must give rise to a deep concern as to whether a fair trial is possible.

(b) He submitted that if the complaints had been made in a timely fashion the charges would not have been laid in such a wide scope. The charges are not specific as to dates, the applicant has no way of knowing on what day, week or month the alleged offences occurred. This has serious consequences for the applicant in that it means that he has great difficulty getting witnesses. For example, counsel submitted the applicant would, if informed earlier, have been able to seek witnesses at the pool. Counsel submitted that this case is unusual in that some offences are alleged to have occurred in semi-public *i.e.* in the swimming pool and at the bus.

(c) Further, counsel submitted that a judge cannot say anything by way of direction or otherwise in this case to stop an unfair trial.

(d) Counsel submitted that the delay from 1988, was the complainant's delay. He accepted (quite rightly in my view) that if the complaint had been pursued in 1988, the applicant would probably not have had any case to make for prohibition. The complainant had talked about the alleged incidents in 1988, to friends, teachers, family and, he submitted, had consciously decided not to pursue the matter. Counsel referred to the answer to Q.141 given by Ms. Fitzmaurice where she stated:-

"In [the complainant's] own terms she would say she would get on with her life. She made a calculated decision that when she was able and when she finished her master's then she would address the whole area of abuse. That's what she told me. Go to college get her qualifications then they would bring this to the court. She had it very, very worked out. She felt she had to work it out."

Counsel on behalf of the applicant submitted that it is only if the complainant cannot go to the authorities that the delay brought about runs against the applicant. But that that was not the situation in this case, here the complainant had made a conscious decision not to pursue the matter. Counsel pointed out that it is an important distinction between the person who is not able to pursue a complaint and a person who decides not to do so.

(e) Counsel agreed that there must be a real risk established before the trial will be prohibited. He stated that it may ultimately be that the efflux of time is the real prejudice. He asked the question "at what point does a case become stale?"

(f) On the book of evidence it was submitted that it was a disgrace containing prejudicial material. He pointed out that these types of cases are highly emotive and that unnecessary material should not be before the District Judge. That, whereas a District Judge would make his best efforts to put such inadmissible material out of his mind, doubt was cast as to whether this would always be possible or work. Counsel submitted that should the matter go to trial the State should be told to serve a book of evidence not containing the prejudicial material.

The law

(i) Delay

Where a trial of a person has been excessively delayed so as to prejudice his chance of obtaining a fair trial the appropriate remedy to protect his constitutional rights is an order prohibiting the trial: *State (O'Connell) v. Fawsitt* [1986] I.R. 362. In that case there was an excessive delay prejudicial to the accused's chance of a fair trial, the determining feature being the non-availability of a witness who would have been a material witness for the defence. That witness had been available and willing to give evidence earlier. That fact plus the extreme length of the delay entitled the accused to an order of prohibition.

The law in relation to delay in criminal cases in general is clear. The accused has a right to the reasonable expedition of his trial *per* *State (Healy) v. Donoghue* [1976] I.R. 325. The prosecuting authorities must move with reasonable expedition in all the circumstances: *Hogan v. President*

of the Circuit Court [1994] 2 I.R. 513. The rights under the Constitution of Ireland to reasonable expedition and a fair trial are not couched in the same terms as in other jurisdictions, for example the right to speedy trial in the Constitution of the United States of America, but reasons for the right are similar - prejudice to the accused - as has been recognised in this jurisdiction in *Director of Public Prosecutions v. Byrne* [1994] 2 I.R. 236. These reasons were stated in *Barker v. Wingo* (1972) 407 U.S. 514 by Powell J. at p. 532:-

"Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pre-trial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defence will be impaired."

(ii) *Efflux of Time*

However, it may not be necessary to prove that a trial has been prejudiced. The efflux of time of itself may be such as to create circumstances where the accused would not obtain a fair trial. This fundamental principle was stated by Finlay C.J. in *Director of Public Prosecutions v. Byrne* [1994] 2 I.R. 236 at p. 245:-

"... of necessity, instances may occur in which a delay between the date of the alleged commission of an offence and the date of a proposed trial identified as unreasonable would give rise to the necessity for a court to protect the constitutional right of the accused by preventing the trial, even where it could not be established either that the delay involved an oppressive pre-trial detention, or that it created a risk or probability that the accused's capacity to defend himself would be impaired. This must lead of course to a conclusion that, on an application to prohibit a trial on the basis of unreasonable delay, or lapse of time, failure to establish actual or presumptive prejudice may not conclude the issues which have to be determined."

This approach is also to be found in *Reg. v. Telford JJ., Ex p. Badhan* [1991] 2 Q.B. 78 at p. 91 where Mann L.J. stated:-

"This is not a case where the length of elapsed time is due to some act or omission of the prosecuting authority which is unjustifiable. In such a case, which is truly describable as one of 'delay', when an accused can show on the balance of probability that he has been,

or will be, prejudiced in the preparation or conduct of his defence then an abuse of process should be found ... Leaving aside cases (of which this is not one) where the elapse of time is due to an accused having concealed his offence or his person, we are of the view that an elapse of time for which the prosecuting authorities are not to blame, can be such that an accused can be heard to say that a fair trial is no longer possible and the committal proceedings would therefore be an abuse of process ... As in a case of delay, we think the onus will normally be on the accused to show that on the balance of probability a fair trial is now impossible. How the accused is to discharge the onus upon him must depend on all the circumstances of the case."

The right to reasonable expedition, the issue of delay and the matter of elapse of time, fall to be analysed in light of the circumstances of each case. It is a matter of analysing and balancing the factors. In *Barker v. Wingo* (1972) [407 U.S. 514](#) at p. 530 Powell J. stated:-

"A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."

(iii) *Special Cases*

In analysing issues of delay or efflux of time in cases of allegations of child sexual abuse special factors may apply in addition to those relevant such as identified by Powell J. This was indicated in *G. v. Director of Public Prosecutions* [1994] 1 I.R. 375 at pp. 380 and 381. Relevant factors have been identified such as dominance, relationship, relative ages, place of offence, nature of offence: *B. v. Director of Public Prosecutions* [\[1997\] 3 I.R. 140](#). This list of factors is not exhaustive.

(iv) *Right to a fair trial*

In the analysis of the delay or efflux of time the issue to be determined is whether the delay or efflux of time was such an unfairness as to be unconstitutional: the test being whether a real risk of an unfair trial had been established: *D. v. Director of Public Prosecutions* [\[1994\] 2 I.R. 465](#). If

the test has been applied and a real risk established then that determines the matter in favour of the accused: *Z. v. Director of Public Prosecutions* [1994] 2 I.R. 476.

(v) *Civil proceedings*

The evidence for consideration and the facts upon which the decision of the court must be made is in the affidavits and cross-examination before the court. These are civil proceedings by way of judicial review. Thus the presumption of innocence is not a determining factor, that presumption is part of a criminal trial not a civil trial.

(vi) *Burden of proof*

The burden of proof is on the applicant. He must prove his case on the balance of probabilities.

Circumstances

The circumstances of this case relate to alleged sexual abuse of the complainant when she was between 12 and 15 years of age. The applicant, who is charged with the events, was a bus driver who drove school children on a bus to the swimming pool. It is alleged that he used to get into the swimming pool with the girls, play with them and show them how to swim. There are detailed allegations of sexual abuse by the applicant of the complainant taking place on the bus, in the swimming pool and elsewhere.

In 1988, the complainant spoke of the abuse to her parents, teachers, friends and a friend's father who was a sergeant in the gardaí. It was let lie. At that time the complainant was still a schoolgirl. In 1995, she went to the gardaí to make a formal complaint but was unable to proceed until she had received several months counselling. Thereafter she made a formal complaint which launched the criminal proceedings in issue in this case.

There was evidence from Ms. Fitzmaurice, counsellor, of her work with the complainant. In addition, there was evidence on affidavit from Mr. Alex Carroll, senior clinical psychologist of the Midland Health Board. He stated:-

"4. In my experience the dynamics of child sexual abuse most often involve the known adult who is in a legitimate position over a child and who exploits accepted societal patterns of dominance and authority to engage the child in sexual activity. It is impossible in my opinion to over emphasise the significance of the exploitation and misuse of accepted power relationships in assessing the impact of sexual abuse on a

child, including the failure or otherwise of the child to disclose the fact of the abuse at the time it was taking place, in subsequent years, or indeed at all.

5. Child sexual abuse usually commences in a low key non forceable fashion, often representing the activity as a game, or as something 'special'. Power and authority of adulthood conveys to the child that the proposed behaviour is acceptable and sanctioned.

6. I say that there are many reasons why the victims of child sexual abuse may fail to make a complaint for a long period of time. Sexual abuse invariably gives rise to feelings of guilt on the part of the victim. The abuser may be a person in authority held in high esteem not only by the victim but also by adults and more especially by the victim's parents. In such circumstances the victim may feel that she/he will not be believed if they complain. Alternatively he/she may be daunted by what they see as the difficulties of having the story accepted. The abuse may also give rise to confusion in the mind of the victim and cause reluctance to complain.

7. When the victim becomes mature and is no longer under the influence of the abuser and is in a better position to understand how he/she has been wronged they may still feel prevented from making a complaint. He/she may have kept out of their mind or driven out of their mind the incidents of abuse and not wished to recall them, no matter what the circumstances. The recall and confession of the incidents may be unduly repugnant to the victim as something degrading and humiliating. In addition the publication of the fact that he/she has been abused may be thought by the victim to be humiliating both to themselves and to members of their family.

8. The sexual abuse suffered by a victim may have produced an unhealthy attitude to sexuality, so that the victim cannot be objective or discuss with others the fact of the abuse.

9. Victims of sexual abuse during their childhood will not, in most cases, be capable of seeing the abuse as an offence against the criminal law or as something which they have a public duty to report. Some victims may never come to view the abuse of themselves in that light, some, who do come to view the abuse in that light long after maturity, may still require great effort and will to report the abuse.

10. Many victims form a determination to put the abuse 'behind them' and get on with their lives. Some victims may come to view the making of the complaint as impeding this process.

11. If some of the foregoing reasons are present a victim may never complain at all. It sometimes happens that the explanation for a victim complaining is the happening of some event long after the last episode of abuse.

12. Many adult victims of child sexual abuse arrive at the decision to make a complaint after undergoing the process of counselling. It is during this process of counselling that they come to realise the seriousness of the abuse to which they have been subjected."

With his expert knowledge he conducted an assessment of the complainant and concluded:-

"I find quite reasonable from a psychological point of view that in the case now before the court that a long period of time has elapsed between the last incident of abuse and the date of the complaint."

All the circumstances of the case must be analysed to see if they render up factors relevant to the delay or lapse of time in issue.

Decision

Fundamental principles at the heart of a constitutional society are at the kernel of this case. These principles and constitutional rights have to be weighed and balanced by the court. They include the community's right to legal issues being determined in the courts; to have criminal charges processed through the courts; the right and duty of the prosecutor to bring to the courts for adjudication allegations of serious child sexual abuse alleged to have taken place; the community's right to have its society protected, especially its most vulnerable - children. Also at the core of this case is the rule of law; the right of the applicant to a fair trial; the right of the community to the rule of law for all, including the applicant.

The time in issue in this case is from 1982, when it is alleged the first offences occurred until 1995, when the complainant made a formal complaint. This time is bisected by the events of 1988, when the complainant spoke of sexual abuse to her friends, a teacher, the head nun and her parents.

There is no explicit delay by any party. The respondent did not delay: *Hogan v. President of the Circuit Court* [1994] 2 I.R. 513. The applicant has not explicitly caused the delay, for example, by escaping from custody as in *Harte v. Fanning* [1988] I.L.R.M. 70.

Because of the circumstances in issue, the nature of the crime alleged, additional factors must be considered in analysing the delay, the efflux of time. At the time of the alleged events the complainant was a child and the applicant an adult. Thus, this is not a case of two teenagers. The

disparity of ages is an important factor. There is an inbuilt authority to the applicant because of the imbalance in age. It gave him a position of power.

The applicant held a position as a bus driver who had the responsibility of driving schoolgirls in a bus and bringing them to swimming at a pool in a local town. Whereas this position was not one of the status of *e.g.* a teacher or priest in society he did hold a position of authority over the children. This level of responsibility was increased by his actions in giving them swimming lessons and thus taking on a *de facto* position as a teacher. This increased his relationship and responsibility for the children.

The alleged incidents took place in areas including the swimming pool and the bus. They therefore could be related to his area of authority.

The complainant has stated that she "didn't know at that time that a person under 16 years should not have sex". Thereafter, she said, she avoided situations where she would meet him. These statements underline the disparity between the schoolgirl and the bus driver. This is not a case of a dominant and menacing man as in *B. v. Director of Public Prosecutions* [1997] 3 I.R. 140. However, I am satisfied that the applicant, because of his status as an adult and because of his position of authority as the adult in charge of the group of schoolgirls and as instructor in swimming, did exercise a dominant position over the complainant while she was in school, that is up to 1988.

If the matter of dominance alone were to determine the issue of the delay from 1988 to 1995, the applicant would have a much stronger case. But it is not the only factor. Each case must be determined on its own circumstances and there can be no definitive list of factors. Factors may include the relative ages of the accused and victim, the issue of dominance, the relationship of the parties, the place of the alleged abuse and the nature of the abuse. As knowledge grows of the nature and effects of child sexual abuse and as medical, psychiatric and psychological evidence is expanded and presented to the courts other factors may become apparent. Also, each case depends on its own circumstances.

In this case there was evidence given by Ms. Anne Fitzmaurice, psychotherapist, as to her counselling of the complainant. The learned trial judge erred in her analysis of this witness's duty. Ms. Fitzmaurice's duty was to counsel the complainant and to give evidence of this to the court. She was not a probation officer or social worker or a family psychiatrist in a family law

case. Thus the learned trial judge erred in her assessment of the role of Ms. Fitzmaurice. This affected her analysis of that evidence.

There was evidence of the nature of the effect of child sexual abuse on the victim. This effect extended after dominion in the sense of the actual presence of the accused adult in the complainant's life. As an expert Mr. Carroll was of the opinion that the delay by the complainant was reasonable. He was not cross-examined. His evidence is a factor which a court must take into account.

There was evidence that the complainant was unable to acknowledge the alleged abuse or its effect until 1995. The matter was repressed. The first time the complainant sought professional help was after she went to the garda station in 1995, and unable to make the formal complaint sought the aid of a counsellor. It was only thereafter that she was capable of addressing the matter overtly.

Taking her evidence together with that of Mr. Carroll and Ms. Fitzmaurice I am satisfied that the complainant was affected by the incidents of which she stated until 1995. Her decision not to complain formally until 1995, was comprehensible. The fact that when she originally approached the gardaí in 1995, and was unable to make a formal complaint even then until after counselling illustrates the continuing effect of the alleged acts.

In 1988, when the complainant spoke to her teachers, parents, friends and a friend's father who was a sergeant in the gardaí she was still a schoolgirl. These were the authority figures in her life. I am satisfied that the fact that she did not make a formal complaint at that time (did not, for example, go herself to a garda station or contact the respondent) is entirely comprehensible in light of the reaction she got to her initial disclosure of the abuse. She was not supported. She was not brought to a counsellor. She was not brought to a garda station. The reaction to her "telling" by the authority figures in her life is understandable at a personal level and taken, I believe, by her parents, with concern for her best interest. The fact that the authority figures did not take appropriate action in 1988 is not a reason to fault the complainant's actions, or lack of them in 1988. It is part of the circumstances.

In all these circumstances I am satisfied that the complainant did not take an informed decision not to make a formal complaint against the applicant in 1988. The time from 1988 to 1995 is thus part of a single length of time, from 1982 to 1995, none of which was the complainant's fault.

The delay from 1988 was not the complainant's delay. To so hold was contrary to the uncontroverted expert evidence before the court. On the evidence the complainant was still suffering the effects of child abuse from 1988 to 1995. The delay was caused by the complainant's inability to make a formal complaint until 1995. This was a consequence of the alleged sexual abuse, the alleged criminal actions. Thus, fault lies with the alleged perpetrator of the actions - the applicant. The applicant may not profit from alleged illegal actions. Thus he is not entitled to prohibition on the ground that fault lies with the complainant in delaying making a formal complaint.

There remains the question as to whether the simple efflux of time, for whatever reason, has so prejudiced the applicant that there is a real risk that he will not receive a fair trial. While the delay in this case is very considerable (though not unusual in criminal prosecutions of this kind) it has not altered the nature of the trial. A trial of charges of this type, in the circumstances described, is in fact a trial of the credibility of the witnesses. The delay is damaging to both parties. The nature of the offences alleged is such that it is not likely that any witness could usefully have been called even if the trial took place in the years immediately after the complainant reached 16 years of age. Even the allegations as to what took place in semi-public in the swimming pool relate to actions alleged to have taken place under water when the applicant was teaching the complainant to swim and probably even if the issue were tried in a court of law immediately after the alleged events they would be tried on the credibility of the witnesses.

The learned High Court Judge erred in her analysis of the factors of the case. Each case is unique and must be decided on its own circumstances. The dominion in this case was not of a menacing man of the type in *B. v. Director of Public Prosecutions* [1997] 3 I.R. 140, however, it was of a figure of authority and power and that dominion existed until 1988. Thereafter the dominion was not simple dominion but there was a repressed effect on the complainant from the alleged actions of the applicant. The effect is illustrated by the fact that she was unable to make the formal complaint when first she went to the gardaí in 1995 but had to receive counselling before she could return to make the formal complaint. This effect of abused power may be more subtle than the initial dominion but it was clearly explained by expert evidence which was not diminished by cross-examination. Nor was there any contrary psychological or psychiatric evidence.

I am in total agreement with the learned trial judge when she states:-

"Nevertheless, it would be unfortunate if the discredited orthodoxy of the past were to be replaced with an equally rigid orthodox view that in all cases of delay in making complaints of sexual abuse the delay can automatically be negated by dominion."

But the matter is more complex than the issue of simple dominance. Our knowledge of the extent and the dynamics of child sexual abuse is of very recent origin and is growing. Expert evidence was placed before the court by two experts. It is clear that dominance even if it is not overtly evil and menacing can, because, for example, of an age disparity, exist in the form of adult authority and power. Even when this overt dominance is lost, when a child grows up to first sense they can do something such as the complainant did in this case at the age of 16, the effect of the years of abuse is not lost. It appears that rational consideration of abusive events is frequently suppressed for complex personal, family and social reasons. Unless there is counselling the victim may not be able to complain formally. The learned trial judge erred in dismissing this consequential effect of dominance and alleged child sex abuse, which decision was contrary to the evidence.

The complainant should not be turned away from the courts, the prosecution should not be stayed, because of the delay resulting from an effect on the complainant of the wrong alleged. It is the very nature of the offence of childhood sexual abuse which prevents early complaint. It is the mental effect of childhood sexual abuse which causes the delay. Thus the delay is not the fault of the complainant but in fact the fault of the applicant in that it is a consequence of the alleged wrongful actions. This renders the delay reasonable on behalf of the complainant. The fact that delay or efflux of time is not the fault of the complainant, but rather of the applicant, does not finalize the matter. There then must be applied the test: is there a real risk that the applicant will not receive a fair trial? The applicant has not proved on the balance of probabilities that there is a real risk that he will not get a fair trial, he has not distinguished his case from the growing body of case law which has permitted delayed prosecutions for child sexual abuse to proceed. No factor takes his case out of the norm of this common law, or establishes that a constitutional right will be breached. No single issue establishes that the applicant is in a worse position than he would have been in 1988. That being the case he has failed to prove that there is a real risk that he would not receive a fair trial.

On the matter of the book of evidence, while the learned trial judge did not decide the case on the issue I would agree with her views. The book of evidence should be withdrawn and a new

book of evidence served without prejudicial matter. This does not mean that relevant material is not furnished to counsel for the applicant. I would allow the appeal, for the reasons given.

Barrington J.

I also agree with the judgments of Denham, Keane and Lynch JJ.

Keane J.

The facts in this case are fully set out in the judgment of Denham J.

The right of an accused person to a reasonably expeditious trial has been recognised as an essential feature of the Anglo American system of criminal justice for many centuries. In *Klopfer v. North Carolina* (1967) [386 U.S. 213](#), Warren C.J. traced it to the assize of Clarendon in 1166, to chapter 29 of the Magna Carta and to Coke's Institutes. He pointed out that, not merely did it enjoy a prominent position in the sixth amendment as a discrete right "*to a speedy and public trial*": it was also expressly guaranteed by the constitutions of several of the individual states which formed the new union.

As to its constitutional status in Irish law, Lavery J. in *In the matter of Paul Singer* (1960) 97 I.L.T.R 130, declined to accept that the framers of the Constitution could ever have contemplated that the right of an accused person to be brought before the first available court - "a right enjoyed for centuries" - should be abridged. In *State (Healy) v. Donoghue* [\[1976\] I.R. 325](#), Article 38.1 of the Constitution, providing that "No person shall be tried on any criminal charge save in due course of law" was construed by Gannon J. as recognising the right of an accused person to a trial with "reasonable expedition", a view upheld by this Court in *The State (O'Connell) v. Fawsitt* [\[1986\] I.R. 362](#).

The modern jurisprudence of the United States Supreme Court on this topic has evolved in the context of the failure of the courts and the prosecuting authorities to ensure that cases are speedily brought to trial. A remarkable example is *Barker v. Wingo* (1972) [407 U.S. 514](#), which arose out of a murder committed in 1958, but was not disposed of by the Supreme Court until 1972. In such cases, considerations arise which are not relevant to the present case, *i.e.* the importance of preventing what was described in *Barker v. Wingo* as "oppressive pre-trial incarceration" and (in the same case) the mitigation of the anxiety and concern suffered by a person during the period between the charge being brought and ultimately dealt with by the court. Common to all cases where significant delay has occurred, however, is the possibility that

the ability of the accused person to defend himself or herself against the charge will be seriously impaired. As Powell J. put it in *Barker v. Wingo* at p. 532:-

"... the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defence witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown."

Unlike cases of summary jurisdiction where the application for a summons must normally be made within six months from the date of the offence, there is no time limit for the institution of a prosecution for a major offence. Accordingly, it is not possible to specify the lapse of time which must occur before a court will be put on inquiry as to whether the accused's right to a trial with reasonable expedition has been violated. In the present case, the delay was of the order of thirteen years from the time of the first alleged offence to the complaint and, in the absence of any other factors, would clearly justify an inference that the right had indeed been violated.

This case, however, belongs to a category of cases in which another factor is present. In *Hogan v. President of the Circuit Court* [1994] 2 I.R. 513, (where the charges were of larceny, forgery etc.) Finlay C.J. said at p. 521:-

"... cases consisting of charges by young children in regard to assaults on them at an early age which are not brought to the attention of the authorities by such children until very many years after they occurred involve wholly different considerations from those applicable to the present case."

The approach that must be adopted by a court asked to prohibit the trial of a person charged with such offences was dealt with comprehensively by Denham J., speaking for this Court in *B v. Director of Public Prosecutions* [1997] 3 I.R. 140, and has been considered by her again today. It is unnecessary to traverse that ground again in any detail. Clearly, the fact that the offence charged is of a sexual nature is not of itself a factor which would justify the court in disregarding the delay, however inordinate, and allowing the trial to proceed. Moreover, even in cases of unlawful carnal knowledge or sexual assault where the complainant is a girl under the age of consent, it is to be borne in mind that the alleged perpetrator may himself be a child. There are cases, however, of which this is one, where the disparity in age between the complainant and the person accused is such that the possibility arises that the failure to report the offence is

explicable, having regard to the reluctance of young children to accuse adults of improper behaviour and feelings of guilt and shame experienced by the child because of his or her participation, albeit unwillingly, in what he or she sees as wrongdoing. In addition, of course, in individual cases there may be threats, actual or implied, of punishment if the alleged offences are reported.

The delay may also be more readily explicable in cases where, not merely is the person concerned significantly older than the complainant at the time of the alleged offences, but occupies a particular role in relation to him or her *e.g.* as parent, stepparent, teacher or religious. In such cases, dominion by the alleged perpetrator over the child and a degree of trust on the part of the child may be more readily inferred.

This is not to say that the court in dealing with applications of this nature must disregard the presumption of innocence to which the accused person is entitled. But the issue is not whether the court is satisfied to any degree of proof that the accused person committed the crimes with which he is charged. The issue in every such case is whether the court is satisfied as a matter of probability that the circumstances were such as to render explicable the inaction of the alleged victim from the time of the offence until the initiation of the prosecution. It is necessary to stress again that it is not simply the nature of the offence which discharges that onus. All the circumstances of the particular case must be considered before that issue can be resolved.

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

If that stage has been reached, the final issue to be determined will be whether the degree to which the accused's ability to defend himself has been impaired is such that the trial should not be allowed to proceed. That is a necessary inquiry, in my view, in every such case, because, given the finding that the delay is explicable by reference to the conduct of the accused is necessarily

grounded on an assumption as to the truth of the complaint, it follows that, in the light of the presumption of innocence to which he is entitled, the court asked to halt the trial must still consider whether the degree of prejudice is such as to give rise to a real and serious risk of an unfair trial.

I now consider the application of those principles to the facts of the present case. The respective ages of the complainant and the applicant and the position occupied by the applicant at the time when the abuse was alleged to have taken place are clearly circumstances from which dominion on his part and a degree of trust on the part of the complainant can readily be inferred, assuming the truth of her complaints. He was a coach operator who was employed to drive a number of young school girls, including the complainant, to a swimming pool each Saturday, where they were learning to swim. According to her account, he would also join them in the pool on occasions and assist them in their swimming lessons. It was during those visits to the pool that the alleged abuse began and, in the main, continued. The complainant was then aged 13 and the applicant 38. All of those circumstances would point to the applicant being, not merely an adult, but one to whose care the complainant and the other pupils were entrusted on those excursions.

It was not indeed seriously contended on behalf of the applicant that, had the complaint been made when the complainant was approaching the age of 18, such a delay could, in the circumstances of the present case, be regarded as inexcusable or inexplicable. It is, however, urged on behalf of the applicant that different considerations apply to the failure of the complainant to report the matter to the gardaí until she was 26.

In that context, it is of critical importance, in my view, that the complainant says that, in her last year at school, she complained to her head mistress, the father of one of her schoolmates who was a garda sergeant and her parents. None of them, according to her account, thought it necessary to take any action. A senior clinical psychologist, Mr. Alex Carroll, swore an affidavit in which he said that he found it quite reasonable from a psychological point of view that a long period of time had elapsed between the last incident of abuse and the date of the complaint. While it was suggested that Mr. Carroll's affidavit was not entirely satisfactory, since it did not deal with the critical period from the age of 18 onwards, the affidavit exhibited a report by him in which he sets out the history of the matter, which I have endeavoured to summarise, in greater detail. It is clear from that report that he was of the view that the attitude of the complainant, when what she said as a 17 year old was not acted upon, in seeking to get on with

her life, go to university and become qualified was what might reasonably have been expected, in psychological terms, from someone in her position. There was also evidence on affidavit to the same effect from Ann Fitzmaurice, a psychotherapist, with whom the complainant had a number of counselling sessions on the recommendation of the garda to whom she first made a complaint of a non-specific nature.

Ms. Fitzmaurice, unlike Mr. Carroll, was cross-examined on her affidavit and the learned trial judge, in her judgment, indicated that she was not inclined to attach much weight to her evidence. The trial judge also said she had reservations as to the weight to be attached to Mr. Carroll's affidavit and, in these circumstances, concluded that the delay, however understandable, from 1988 onwards was attributable to the complainant and, to a lesser extent, to the persons to whom she had made the complaint in 1988.

This Court manifestly is not in the same position as the trial judge was in assessing the credibility of the evidence of Ms. Fitzmaurice. That does not, however, apply to Mr. Carroll's evidence. This Court is in the same position as the trial judge in concluding what inferences could properly be drawn from that evidence. In my view, it was not open to any inference other than that the delay of the complainant from 1988 to 1995, in reporting the matter to the gardaí was, in the view of an experienced psychologist, what might reasonably have been expected of someone in her position, who had been repeatedly sexually abused as a young girl, on her account, and whose complaints when she reached her late teens were not acted upon by the adults to whom she complained. No evidence in rebuttal was adduced on behalf of the applicant. In these circumstances, I would respectfully disagree with the conclusion of the trial judge, the case should have been approached on the basis that, while the delay was of an extent which plainly required explanation, the evidence established that, on the assumption that the complaints were true, the delay was explicable and was ultimately the result of the applicant's own actions.

There is finally the question of prejudice. In cases of this nature, where the allegation is not of an isolated incident or even a relatively small number of incidents, but of a repeated pattern of sexual abuse over a number of years, the charges, of necessity, will be lacking in particularity as to dates and times. That undoubtedly creates difficulties for the applicant in defending the charges but he would have been in a broadly similar position had the complaint been made ten years ago, they would similarly have been lacking in such detail. There is no specific prejudice

alleged peculiar to this case and deriving from the delay which might have to be weighed in the balance against the reasons for the delay in making the complaint.

In common with other cases of this nature, the acts complained of are alleged to have been committed in private and the applicant cannot point to any witness or witnesses whose evidence might have been available to him were it not for the delay but are no longer available. Had this case been tried ten years ago, the issue for the jury would essentially have been one as to the credibility of the complainant and, if he gave evidence, of the applicant. The position will be the same when the present case comes to trial. As Denham J. observed in *B. v. Director of Public Prosecutions* [1997] 3 I.R. 140, the delay in such cases presents difficulties for the prosecution as well as for the defence. I am satisfied, however, that no prejudice, other than that which inevitably flows from a delay of this nature, has been shown in the present case which justified the High Court in prohibiting the continuance of the prosecution.

I would allow the appeal.

Lynch J.

This is an appeal by the Director of Public Prosecutions against an order of the High Court (McGuinness J.) made on the 27th July, 1997, prohibiting the respondent from further dealing with the prosecution of the applicant on five charges of indecent assault and three charges of unlawful carnal knowledge on dates unknown between the 1st September, 1982, and the 12th December, 1984, and injuncting the respondent, his servants or agents, from taking any further steps in that criminal prosecution.

The facts

The complainant is a woman now aged 28 years having been born on the 12th December, 1969. The applicant is and at all material times was a married man with a family who is now almost 54 years of age having been born on the 21st June, 1944.

The complainant started in secondary school in her local town in September, 1982, when she was 12 years and 9 months old. About the same time she commenced attending swimming lessons in the swimming pool of a neighbouring town between 20 and 30 miles from her home. She and other school girls were driven there and back by the applicant who owned and drove private buses for hire. The complainant alleges that arising out of this association with the applicant and the fact that she was often the first to be picked up and the last to be dropped off

the bus the applicant commenced to indecently assault her and continued doing so on a habitual basis and that this progressed to unlawful sexual intercourse with her also, but to a somewhat lesser extent, on a habitual basis.

The complainant also alleges that more often than not the applicant joined the girls in the swimming pool and purported to teach them how to swim. She alleges that in the course of so teaching her how to swim and physically supporting her in the water some of the acts of indecent assault by the applicant occurred.

On the 21st August, 1995, the applicant was arrested and charged with indecent assault contrary to common law and with unlawful carnal knowledge of a girl under the age of 15 years contrary to [s. 1\(1\) of the Criminal Law Amendment Act, 1935](#), as follows:-

"Indecent assault on a date unknown:

1. between the 1st September, 1982, and the 28th February, 1983,
2. between the 1st January, 1983, and the 31st August, 1983,
3. between the 1st June, 1983, and the 31st August, 1983,
4. between the 1st September, and the 30th September, 1983,
5. between the 1st September, and the 30th September, 1982."

Unlawful carnal knowledge on a date unknown:

"6. between the 1st September, and the 31st December, 1983,

7. between the 1st September, and the 31st (sic) September, 1984,
8. between the 1st September, and the 12th December, 1984."

During the period between the 1st September, 1982, and the 12th December, 1984, the complainant was aged from 12 years and 9 months to 15 years the last mentioned date being her 15th birthday. During the same period the applicant was aged from 38 years and 3 months to 40 years and 6 months. In his affidavit grounding these proceedings and sworn on the 20th May, 1996, the applicant swears that he is not guilty of any of the allegations being made against him and that he has at all stages protested his innocence.

As will be seen from the foregoing dates a period of 12 years and 11 months elapsed from the earliest date, the 1st September, 1982, and a period of 10 years and 8 months elapsed from the latest date, the 12th December, 1984, before the applicant heard of any such complaint being made against him by the complainant. In these circumstances the applicant commenced these proceedings by way of judicial review seeking the orders ultimately made by the High Court on the grounds that:-

1. The delay in the institution of the proceedings:
 - (a) has prejudiced the applicant in his defence of these proceedings;
 - (b) is unfair and unjust to the applicant;
 - (c) violates the applicant's right to a trial with reasonable expedition;
 - (d) has prejudiced the applicant's chance of obtaining a fair trial;
 - (e) has been excessive and prejudicial;
 - (f) has violated the applicant's right to a trial in due process of law.
2. The lack of specificity in the charges:
 - (a) has prejudiced the applicant in his defence of these proceedings;
 - (b) is unfair and unjust to the applicant;
 - (c) has prejudiced the applicant's chance of obtaining a fair trial;
 - (d) has violated the applicant's right to a trial in due course of law.
3. The documents served on the applicant pursuant to the [Criminal Procedure Act, 1967](#), contain statements from proposed witnesses which could never be admissible at the trial of the applicant and contain an exhibit which could never be admissible in evidence at the trial of the applicant and
 - (a) violate the applicant's right to a preliminary examination in accordance with law;
 - (b) constitute an unfair procedure.

At the hearing in the High Court and in this Court it was not seriously contended that the applicant could complain of delay prior to the complainant's leaving school in the summer of 1988. It was in respect of the extra 7 years delay from the summer of 1988, until he heard of the complain in August, 1995, that the applicant contended that he had been prejudiced in his defence as aforesaid and that no valid reason to excuse that delay had been demonstrated.

The complainant gave evidence by affidavit verifying her statement in the book of evidence served on the applicant in the criminal proceedings against him and she was not cross-examined on her affidavit. The complainant further stated that when eventually she decided to make a complaint she found it very difficult to discuss the matter and she was accordingly referred for counselling in February, or March, 1995, and it was only thereafter that she made a formal complaint in July, 1995. She also verified what she had told a clinical psychologist to whom she

was referred in 1996, as to why she had not complained earlier of the abuse of which she then complained. She explained that in early 1988, following a discussion with some friends in the course of which she revealed in part what she alleges had happened to her she told a teacher and then as advised by the teacher she told the head of the school that she had been abused by the applicant and then told her parents though not in detail and that she found it impossible to discuss the matter in detail. She explained that nothing really happened as a result of these reports by her even though one of the school friends to whom she revealed the abuse was the daughter of a garda sergeant who heard of the matter through his daughter and in those circumstances she just tried to get on with her life. She passed her leaving certificate and succeeded in obtaining a science degree in college and a post graduate degree. As time went by she became more aware of the seriousness of what had happened to her and how it had affected her with feelings of shame and guilt and difficulty in trusting other people and relating to other people in general. Eventually, with more publicity in the media about such matters, she decided to make a complaint. Both the counsellor and the psychologist averred that the reactions of the complainant in trying to get on with her life and put the matter out of her mind were a normal result of sexual abuse of children and that these results can continue to inhibit abused people from complaining and revealing what had happened to them in childhood for a very long time and that the psychological detrimental effects of the abuse persist unabated indefinitely until counselling and therapy is sought and obtained.

I quote as follows from the concluding paragraphs of the report of the clinical psychologist which was verified by him on affidavit and he was not cross-examined on his affidavit:-

"In common with many victims of child sexual abuse, [the complainant] has feelings of stigmatisation betrayal and inability to trust. The effects of her childhood experiences have been enduring and she feels bitter and angry towards her abuser. [The complainant] has also developed a serious eating disorder and has also developed agoraphobia.

Children outside their homes are usually under the authority of adults who temporarily occupy care taking or guardianship roles. The dynamics of child sexual abuse most often involve a known adult who is in a legitimate power position over a child and who exploits accepted societal patterns of dominance and authority to engage the child in a sexual activity. This usually entails misrepresentation of moral standards either verbally

or implicitly. Power and authority of adulthood convey to the child that the proposed behaviour is acceptable and sanctioned.

In this case, the premature introduction to sexuality by a known and valued perpetrator, a person who is a significant other for the child, may feel good on several levels. Pleasurable sexual stimulation, enhancement of self esteem, feeling important to another person in a special grown up fashion and so forth. Although not especially pleasing to contemplate, to deny that the pleasurable aspects of this sexual behaviour may be self reinforcing for the child, is to ignore the obvious and neglect to consider one of the most important dynamics of child sexual abuse.

It is not surprising, in my opinion, that [the complainant] did not disclose to her parents or to anyone else at the time these incidents were taking place. The abuse as described by [the complainant] commenced in a low key non-forcible fashion and progressed over a considerable period of time to more serious involvement. Also according to [the complainant] she was unaware that the activity involved was wrong and the power and authority of adulthood had the effect of conveying to her that the behaviour was acceptable."

In his affidavit sworn on the 20th May, 1996, the applicant avers as follows:-

"4. The lapse of time between 10¹/₂ and 13 years between the alleged incidents occurring and me being notified of them has the effect that, if a criminal trial were to take place, I would be severely handicapped in my ability to prepare and present my defence. Despite the efforts of myself, my solicitor and my family I have been unable to ascertain either accurately or with any degree of precision the circumstances of my whereabouts during the period in which it is alleged these offences were committed.

5. I am unable to identify any witness who may have material evidence concerning my presence or conduct during the relevant period or even to identify the parameters of any evidence they maybe in a position to give. The alleged charges occurred over a long and indeterminate period and in the book of evidence there is no specific date mentioned for any one charge.

8. I understand from the book of evidence that the complainant in this case is now 26 years of age and that she has a master's degree together with a postgraduate qualification. I have not been in a position, nor have I sought, to

exercise any influence over her and I understand from the book of evidence that she has been residing in Dublin and away from my locality for the past 8 years.

9. I say and believe that the delay in instituting these proceedings and the manner in which the book of evidence has been prepared has caused unfairness to me and that as a result it would not be possible for me to obtain a fair trial in accordance with law."

The submissions

Counsel for the respondent submitted:-

1. The learned trial judge was in error in discounting the evidence of the counsellor or psychotherapist and also in discounting the evidence of the clinical psychologist.
2. The learned trial judge misconstrued the role of the counsellor in referring to validating inquiries. The counsellor was engaged to assist the complainant in getting over the difficulty of discussing what she alleged had happened to her and the counsellor was successful in that task resulting in the complainant becoming enabled to make a detailed statement to the gardaí.
3. The clinical psychologist's evidence was not challenged in any way and the fact that his evidence was similar to that in previous cases is not a reason for disregarding it. It had to be similar in cases of similar facts and it would be strange if it were otherwise.
4. No actual prejudice is shown by the applicant by reason of the lapse of time and the onus is on him to establish such if he so alleges.
5. As regards the lack of specificity in the charges this is inevitable in these sort of cases and the charges adequately conform to the guidelines laid down by the Supreme Court and in particular by Egan J. in *Director of Public Prosecutions v. E.F.* (Unreported, Supreme Court, 24th February, 1994). In the case of alleged habitual sexual offences over a prolonged period there is no reality in the submission that alibi witnesses might have been available and no longer are.
6. It is accepted that the book of evidence is unsatisfactory in containing much inadmissible hearsay material. That can easily be rectified and in any event the District Judge would know that he should ignore such inadmissible evidence and the trial judge would know that he should exclude it from the jury.

Counsel for the applicant submitted:-

1. The lapse of time is of deep concern in relation to obtaining a fair trial. If the applicant had heard of the allegations promptly, say not later than 1988, he would know more exactly when the events are alleged to have occurred and would have had an opportunity of reconstructing his own movements during the relevant period.

2. For example the charges are so vague as to times that they might equally relate to school terms or vacations. If the applicant could show that even one date was wrong, by reference to records of what children he brought to swimming on a particular day or otherwise, that would throw doubt on all the charges. The delay in complaining and the lack of specificity in the charges makes this impossible.
3. The learned trial judge found the evidence of the counsellor unreliable. She heard the counsellor cross-examined orally and it was for her to accept or reject the evidence of the counsellor and she was entitled to reject it as she did.
4. The learned trial judge was also entitled to conclude, as she did, that the complainant decided to delay making a complaint to suit her own convenience in relation to her career and studies and that the applicant did not influence that decision.
5. In the absence of a proper explanation for the delay, the learned trial judge was entitled and was right to prohibit the further prosecution of the applicant.
6. The book of evidence is a disgrace and creates another prejudice in the District Court in a highly emotive case.

Conclusions

It is important to bear in mind that these are civil proceedings in which the applicant seeks to prohibit a criminal prosecution against him on the grounds that there is a real risk that he could not get a fair trial of the charges against him in due course of law in accordance with Article 38.1 of the Constitution. If this prosecution were to proceed, it would first be considered by a District Judge and if he were of opinion that a prima facie case was made out on the book of evidence, it would then go for trial before a judge and jury. It must be assumed that both the District Judge and the trial judge would conduct the proceedings before them with all due propriety and in accordance with the Constitution and the law. If therefore those normal procedures are to be prohibited the onus of proving that, despite the intervention of these judges duly appointed under the Constitution and the law, it is probable that the trial would be unfair and not in due course of law, having regard to matters which happened prior to the prosecution coming before the District Judge, rests fairly and squarely on the applicant.

This imposition of the onus of proof on the applicant does not impinge in any way on the presumption of innocence which applies on the trial of criminal proceedings and which will of course apply in favour of the applicant if this prosecution is permitted to proceed. See *The People (Director of Public Prosecutions) v. Pringle (No. 2)* [1997] 2 I.R. 225 at pp. 243 to 244.

In considering this application to prohibit the respondent from proceeding with the prosecution of the applicant, the court must first look at the circumstances from the applicant's point of view and on the assumption that the applicant is innocent of the charges preferred against him. On

that assumption the court should consider to what extent delay or other circumstances may create difficulties for the applicant in defending himself over and above what would be the normal difficulties to be expected in meeting charges such as those preferred against the applicant in this case. If the court finds that there are such added difficulties, then the court should consider the case on the assumption that what the complainant says is true and, if so, who has really caused the added difficulties for the defence. On that assumption if it appears that it is really the applicant who is responsible for the circumstances giving rise to the added difficulties then the applicant cannot validly complain of these difficulties in these proceedings and the prohibition should be refused. See the judgment of this Court (*per* Denham J.) in *B. v. Director of Public Prosecutions* [1997] 3 I.R. 140 at p. 200 as follows:-

"Viewed from the applicant's point of view

From the point of view of the applicant, if the allegations against him are proved, his actions of control and subjugation of his family must be viewed as actions by him which delayed the trial. As such they should not entitle him to a form of immunity which would be to the detriment of the complainants and society in general."

I come back now to the question of added difficulties for the defence. It has to be recognised that allegations of habitual sexual abuse of children over a prolonged period create difficulties for the defence of their very nature. Such offences usually take place in private with only the two parties present, the abuser and the abused. It is most unlikely that alibi evidence could not be adduced by the defence. Generally speaking the charges are necessarily made as in this case, on a date unknown between two specified dates and the case is resolved on a direct conflict of evidence and credibility between the complainant and the accused.

One can reasonably ask in this case what difference would it make to the defence if the complaint had been made in August, 1988, instead of August, 1995, that is to say nearly four years after the date of the last charge instead of nearly eleven years. Theoretically, I suppose one could say that whatever slim chance of turning up helpful independent evidence might have existed in 1988, was well and truly lost by 1995. This is a possibility, but rather a slim possibility, of added difficulty for the defence by the added delay. It is the only added difficulty that I can perceive.

I turn now to the question as to who is really responsible for this added difficulty such as it is. In this regard I think that the learned trial judge underestimated the weight to be attached to the

relationship between the applicant and the complainant. It is true that the applicant was not in as dominant a position as would be a parent or other near relative living in the same house as the complainant, but he was nevertheless a mature adult entrusted with the care of young school girls to drive them safely to and from the swimming pool in the other town. According to the complainant he sought to inhibit her from mentioning to her parents what was going on by flattery, telling her that she was superior to other girls in that she would not go telling her mother about these things which were a secret just between the two of them.

In cases of sexual abuse of children under the age of 15 years, the mere fact that the accused is a mature adult of normal intelligence gives rise to a *prima facie* presumption of dominion by the adult over the child. This would be so in any event as a matter of common sense, but it is given emphasis by s. 1(1) and s. 14 of the Criminal Law (Amendment) Act, 1935.

Active dominion in this case may have ceased as early as December, 1985, when the complainant attained 16 years of age because according to the complainant the applicant let slip about that time that what they were doing was illegal. Therefore the complainant sought to avoid the applicant. Active dominion certainly ceased in the Autumn, 1988, when the complainant moved to Dublin to embark on third level education. However while active dominion may have ceased, this does not mean that the complainant became freed from the harmful and inhibiting effects of the sexual abuse on her. The learned trial judge seems to have misunderstood the role of the counsellor/psychotherapist in this case. The counsellor was not seeking to validate the complaints of the complainant. She was trying to counsel and assist the complainant in coming to terms with what had happened to her to enable her to discuss those matters more freely and make a detailed statement to the gardaí.

I have already quoted in this judgment the concluding paras. of the clinical psychologist's report as verified by him on affidavit. The applicant did not seek to cross-examine the clinical psychologist nor was any evidence adduced to challenge his conclusions. In these circumstances an inevitable inference follows that on the assumption that what the complainant says is true the applicant himself is at least largely responsible for the delay by the complainant in making the complaint and the applicant cannot therefore rely on such delay as a ground for prohibition in the circumstances of this case. This is not to say that there may not be cases of extreme delay, some of most of which may be attributable to the applicant himself, where nevertheless prohibition might be granted, but this is not such a case.

One further point of relevance to the grant or refusal of an order of prohibition. In *B. v. Director of Public Prosecutions* [1997] 3 I.R. 140 at p. 202 the following passage occurs:-

"(G) Admission of Guilt

If there has been an admission by the accused of all or any of the alleged crimes this will be a factor for consideration. If the admission is contested that is also a matter to be considered by the Court on an application to prohibit the trial on the ground of delay."

According to the statement of evidence in the book of evidence of the investigating detective sergeant he spoke to the applicant on the 21st August, 1995: he outlined the nature of the complaint, he cautioned the applicant and asked him did he know the complainant to which the applicant replied that he took her swimming in the neighbouring town and then he said:-

"I am not going to run away from this lads, but what is my best way out of this."

While the applicant has sworn that he always protested his innocence the foregoing statement is capable of being construed as an admission of guilt.

I have already dealt with the objection taken on behalf of the applicant to the lack of specificity in the charges. That is not a valid cause of complaint in the case of charges of child sexual abuse.

The final matter relied upon by the applicant is the nature of the book of evidence served on him. While the book of evidence leaves a lot to be desired its inadequacies are not a ground for prohibition and can easily be rectified. The Director of Public Prosecutions should, however, serve a revised book of evidence as soon as possible setting out fully the admissible evidence upon which he will rely and excluding manifestly inadmissible statements and reports.

For all the foregoing reasons I would allow the appeal, reverse the order of the learned trial judge and dismiss the application by way of judicial review for the prohibition and injunctions.