

Chapter 5 Investigation and prosecution of child sexual abuse

Introduction

5.1 Allegations of child sexual abuse, like all allegations of breaches of the criminal law, are investigated by An Garda Síochána. The decision to prosecute in child sexual abuse cases is made by the Director of Public Prosecutions (DPP).

An Garda Síochána

5.2 The Garda Commissioner as head of An Garda Síochána is responsible to the government through the Minister for Justice, Equality and Law Reform. The commissioner has two deputy commissioners. In addition, there are ten assistant commissioners; four have responsibility for issues that concern the force on a national basis while each of the remaining six has responsibility for a designated region within the State. One of those regions is the Dublin Metropolitan Region.

The Dublin Metropolitan Region

5.3 The Dublin Metropolitan Region (DMR) is made up of Dublin City and County and also includes small portions of counties Kildare, Meath and Wicklow. The boundaries of the DMR have changed only minimally since 1975. In 1998 Rathcoole Garda Station was subsumed into the DMR. In 2002, the Leixlip Garda sub district extended the boundaries of the DMR slightly into counties Kildare and Meath. Leixlip became a garda district in 2008. The DMR is divided into six divisions, each of which is commanded by a chief superintendent. These divisions are subdivided into districts commanded by a superintendent who is assisted by Inspectors. The DMR contains 18 garda districts and a total of 45 garda stations.

Investigation of complaints

5.4 The normal procedure of investigation by the Gardaí begins once a formal complaint is received by a member of An Garda Síochána from a person claiming injury. This usually involves the provision of a statement of the allegations by that person. It is apparent, from many of the complaints considered by the Commission, that historically a single garda often conducted the entire investigation. Today, however, it is likely that, in the case of clerical child sexual abuse, an investigation team is formed to assist in the

investigation. That team then normally seeks out corroborating evidence to substantiate matters arising from the complainant's statement. During the course of the investigation, the priest concerned would, at some stage, be invited to attend the garda station for questioning or be arrested for that purpose. The file containing the various statements and any other evidence would in normal circumstances be reviewed by a superintendent or an inspector acting for a superintendent. Arising from that review, further work might be directed prior to submission of the file to the DPP.

5.5 Prior to 1980, the usual protocol was that a superintendent decided whether or not to refer the file to the DPP. In April 1980, the Garda Commissioner sent a directive to garda officers that in cases of murder, attempted murder, manslaughter and sexual offences, the file must in all cases be sent to the DPP for directions. This practice remains in operation but has now been put on a statutory footing. Under section 8 of the *Garda Síochána Act 2005*, the DPP may issue general or specific directions to An Garda Síochána in relation to prosecution work. The DPP issued a general direction under this section in January 2007. This general direction provides, among other things, for a continuation of the requirement that decisions on prosecution in cases of sexual offences must be taken by the DPP. Once a garda investigation is completed and a file is sent to the DPP, all further action in relation to the criminal investigation and prosecution is done at the direction of the DPP.

5.6 A detective superintendent from the Domestic Violence/Sexual Assault Investigation Unit (DVSAIU) in the National Bureau of Criminal Investigation (NBCI) confirmed to the Commission that all child sexual abuse cases are now sent to the DPP.

5.7 In 1999, the Department of Justice, Equality and Law Reform published a victim charter. This charter calls for the notification to all complainants of the decision of the DPP and of the need to keep complainants updated with the progress and outcome of the criminal investigation.

PULSE

5.8 The computer system known as 'PULSE' electronically records all work carried out during the course of an investigation. In June 2006, following the publication of the *Ferns Report*, a directive was issued from garda headquarters requiring that all complaints of child sexual abuse must be recorded on the PULSE system and that the investigation of such cases was to be subject to review and scrutiny by supervisory ranks.

The Woman and Child Unit

5.9 The Woman and Child Unit was set up in March 1993 within the Central Detective Unit (CDU). It was run by a sergeant and assisted by three gardaí at the Serious Crime Section, Harcourt Square. The Woman and Child Unit was under the control of a detective chief superintendent. The purpose of the Woman and Child Unit was to oversee cases of sexual violence or assaults and to assist, when necessary, in the investigation of more complex cases. A decision to take over the investigation of a particular case rested with the detective chief superintendent in the unit. The CDU subsequently became the National Bureau of Criminal Investigation (NBCI). The role of the Woman and Child Unit is now undertaken by the Domestic Violence/Sexual Assault Investigation Unit.

Domestic violence /sexual assault investigation unit (DVSAIU)

5.10 This unit was established in 1997 and is based in Harcourt Square in Dublin. It is attached to the NBCI. The unit is supervised by a detective superintendent, managed by a detective inspector and is staffed by three detective sergeants and 12 detective gardaí. The Commission has been informed by An Garda Síochána that many of the officers in the unit have been sponsored by the force to complete a diploma in child protection and welfare at Trinity College Dublin.

5.11 The Commission has been told that this unit operates as a central unit and is available to assist gardaí nationwide, giving guidance and assistance on complaints of a sexual nature. The unit works in conjunction with the local gardaí. The unit may also offer guidance and assistance by way of the supply of members to assist with an investigation (for example making inquiries, taking statements). In exceptional circumstances, for example, if a complainant does not want local gardaí to become aware of his or her

complaint, this unit may carry out its own investigation while only notifying the local superintendent of the progress. The unit is also in a position to refer cases to the DPP for decisions on prosecutions.

5.12 Following the Prime Time programme, *Cardinal Secrets*, on RTE television in October 2002, a major investigation was undertaken by the DVSAIU into all clerical child sexual abuse complaints including those relating to clerics in the Archdiocese of Dublin. Details of this investigation are set out below.

Contact between the Archdiocese and An Garda Síochána

5.13 Although the documents considered by the Commission illustrate many instances of contact between members of the Gardaí and the Dublin Archdiocese relating to specific allegations against priests of child sexual abuse, the first formal structured and non-case specific contact between the Archdiocese and An Garda Síochána was in 1995. In January and February of 1995, the Irish Catholic Bishops' Advisory Committee on Child Sexual Abuse by Priests and Religious held a number of 'listening days' for statutory sectors involved in child protection and welfare. The Commission understands that An Garda Síochána sent a representative to at least one such meeting. The product of this advisory committee was a document entitled *Child Sexual Abuse: Framework for a Church Response* published in early 1996 (generally described in this report as the *Framework Document* – see Chapter 7).

5.14 The *Framework Document* contained detailed provisions relating to the manner in which child sexual abuse complaints should be handled by the Church. The *Framework Document* states:

*“2.2.1 In all instances where it is **known or suspected** that a child has been, or is being, sexually abused by a priest or religious the matter should be reported to the civil authorities. Where the suspicion or knowledge results from the complaint of an adult of abuse during his or her childhood, this should also be reported to the civil authorities.*

2.2.2 *The report should be made without delay to the senior ranking police officer for the area in which the abuse is alleged to have occurred...* (Emphasis added).

5.15 In anticipation of the publication of the *Framework Document*, a meeting was arranged at the request of Archbishop Connell with a representative of An Garda Síochána. A detective inspector and a detective garda met a representative of the Archdiocese at Archbishop's House on 17 November 1995. The representative delivered details of "*all persons who had made allegations of sexual abuse against members of the clergy that were in his possession*". These details comprised the names of 17 alleged clerical abusers together with the names of each complainant and brief details of the allegations. The Commission does not consider that the reporting carried out in this instance by the Archdiocese was in fact in compliance with the standards of the *Framework Document*. Within the collective knowledge of priests and officials of the Archdiocese, there was an awareness of complaints concerning a total of at least 28 priests or former priests (at least 12 more than were named on the list).

5.16 When Cardinal Connell was asked by the Commission about the absence of any reference on this list to a particular named priest, his reply was that this priest's name was possibly not on the list because he had been laicised at the time the list was produced and consequently was not a member of the clergy. In further evidence before the Commission, the Cardinal responded that the disclosure "*was a beginning and it was a very big beginning because nothing of the kind had ever happened before*".

5.17 Six of the cases referred to on the list supplied by the Archdiocese were the subject of ongoing investigations. In other cases, investigations or prosecutions had been concluded. Five new statements were obtained from complainants and nine new investigations were commenced following receipt of this notification.

5.18 More recent Church guidelines that have been published on behalf of the Catholic Church in Ireland are set out in the document entitled *Our Children Our Church*. While not altering the imperative of reporting all complaints of child sexual abuse to the civil authorities, a small change to the

requirement of reporting to An Garda Síochána and the health authorities was made in this document. These guidelines direct the Church, in circumstances where it is established that there are “*reasonable grounds for concern*”, to report the allegation to the civil authorities immediately. Paragraph 6.5 gives a number of examples that would constitute reasonable grounds for concern. One of those grounds is “*specific indication from the child that (s)he was abused*”.

Continued inter agency cooperation

5.19 The Commission understands that, as a result of recommendations in the *Ferns Report*, a committee was established by the HSE to implement the formation of inter agency review committees. A committee was convened in October 2005 and included representatives of the Health Service Executive (HSE), the chief superintendent of crime policy and administration on behalf of the garda commissioner and representatives of the Catholic Church. The proposal was to begin the process of setting up inter agency review committees on a national basis. The Commission has been advised by An Garda Síochána that they nominated and forwarded to the HSE a list of superintendents to sit on the proposed committees but that the HSE has informed participants that it was not proceeding with the committees due to difficulties that arose surrounding the legality of the discussion and use of information that amounts to rumour, suspicion, innuendo or allegations of abuse (so called ‘soft information’).

5.20 Separately, in accordance with the terms of *Our Children Our Church*, the Archdiocese appointed a liaison person to communicate directly with An Garda Síochána on matters of alleged abuse of children by clerics.

The HSE and the Gardaí

5.21 Under the child abuse guidelines issued by the Department of Health in 1987 (see Chapter 6), a health board was expected to notify the Gardaí of any alleged case of child abuse where it was suspected that a crime had been committed. Those guidelines were not specific as to when the referral ought to be made. The 1995 guidelines published by the Department amended the 1987 guidelines in relation to the circumstances requiring notification. The 1995 guidelines established a procedure in line with a recommendation of the *Report of the Kilkenny Incest Investigation*. The

process required that where either agency suspected that child abuse has taken place, it must notify the other in accordance with the specific terms of those guidelines. The procedure involved the use of notification forms by the health boards to the local garda superintendent. Once that notification form is received, the Superintendent is required to assign the case to a garda and to notify the designated officer in the health board of the details of that garda. The Garda in charge is, in turn, obliged to make early contact with the social worker handling the case in order to obtain details of the case. The guidelines also detail when the Gardaí must notify the health boards, namely in circumstances “*where the Gardai suspect that a child has been the victim of emotional, physical or sexual abuse or neglect (whether wilful or unintentional)...*”. It is specifically stated that the Gardaí need not have sufficient evidence to support a criminal prosecution before notifying the health board. The notification procedure is similar to the health board notification procedure: the garda superintendent sends a notification form to a designated officer in the health board which in turn appoints a social worker. The social worker then makes direct contact with the garda in charge of the case. The guidelines envisage both the garda in charge and the social worker agreeing a strategy for the investigation and an ongoing liaison in the matter.

5.22 The *Children First* guidelines published by the Department of Health and Children in 1999 restate the necessity for early notification between the Gardaí and the health boards. The guidelines revised the procedures to a degree. The changes included the introduction of new forms for notification. The Commission was advised by An Garda Síochána that specialist training in relation to the *Children First* guidelines is undertaken by trainees at Garda College.

5.23 An Garda Síochána has indicated to the Commission that it has sought to operate in accordance with the various guidelines referred to above in its relations with the health services.

Garda Investigations from 2002

5.24 The management of some of the individual garda investigations is referred to in the individual chapters on the representative sample of cases selected by the Commission in this report. Up until 2002, so far as the Commission can ascertain, the general practice was that most investigations

into child sexual abuse allegations against priests in the Archdiocese of Dublin were handled by gardaí local to the complainant or at the garda station where complaints were made.

5.25 In October 2002, following the Prime Time broadcast on RTE which referred to nine priests in the Dublin Archdiocese, the Gardaí established an incident room at the NBCI. A dedicated hotline was allocated to receive complaints. The incident room was managed by an inspector and staffed by other senior gardaí.

5.26 In October 2002, Detective Chief Superintendent Sean Camon was appointed to head a team to conduct what was termed an “*analytical overview*” of clerical abuse cases previously investigated by An Garda Síochána. The task assigned by garda headquarters to the team was both to review all clerical sexual abuse cases previously investigated and to carry out a comprehensive investigation of all new complaints of clerical sexual abuse wherever they occurred. The instructions were to:

“review the cases and establish if further lines of inquiry were available which could lead to the preferring of criminal charges; pursue additional evidence; fully investigate new complaints ; establish the number of cases investigated by the Garda, the number of cases where no further action was taken and the results of those investigations”.

This initiative set up what was most probably the most comprehensive Garda investigation into clerical child sexual abuse ever undertaken in the State.

5.27 The strategy proposed obtaining all files previously forwarded to the DPP in order to review them. A designated telephone number was set up to receive new complaints. An analysis of the recent media programmes, Prime Time and Liveline, and all calls to the media was undertaken with all callers to be identified and complaints to be investigated. Inquiries were then to be carried out to establish if there was evidence to substantiate the complaints. This process involved looking at the Church files, interviewing the hierarchy of the Church, checking health board records and interviewing gardaí who had previously investigated complaints.

5.28 A request was made shortly thereafter by Detective Chief Superintendent Camon to Archbishop Connell seeking access to archdiocesan files on named individuals and on other clerics against whom allegations had been made to the Archdiocese. Copies of the relevant programmes were obtained from RTE and transcribed.

5.29 In December 2002, following a meeting between garda officers and legal representatives from the Archdiocese, the Archdiocese's solicitors outlined the basis on which access to the diocesan documents would be permitted.

Legal privilege

5.30 The Archdiocese was prepared to allow the Gardaí access to all files with the exception of documents that it asserted were legally privileged. Legal privilege is a long standing legal status that is given to certain documents that were created in the context of giving or receiving legal advice or in anticipation of formal court proceedings. The law has traditionally regarded those documents as private to the person who sought the advice as it is considered by the courts that it is in the common good that people can freely seek legal advice without having to be concerned that the written record of the advice sought will ever be seen by anyone else. It is however always open to the person or organisation for whose benefit those documents were created to waive their legal privilege.

5.31 A barrister was appointed by the Archdiocese to decide which documents were legally privileged. Detective Chief Superintendent Camon recalls that there were over 1500 documents over which privilege was claimed. Following a review by lawyers for the Archdiocese of the claims of legal privilege, additional documents were delivered to the Gardaí, the claim for privilege having been withdrawn with respect to those documents. Privilege was however still being asserted over "*a considerable number of documents*" and he recalls that the issue of privilege was always a "*live one*" throughout the investigation. The records discovered to the Gardaí illustrate this to some degree as Archbishop Martin agreed in 2004 that a description of each document over which privilege was being claimed would be provided by the Archdiocese by way of justification for any continuing claim.

Material considered

5.32 In January 2003, members of the garda investigation team started reading the Archdiocese's files in a room set aside at church property at Clonliffe in Dublin. Synopsised files were created and stored at the incident room at the NBCI. By January 2004, the files were still being considered by the Gardaí.

5.33 Cardinal Connell wrote to all former chancellors, bishops and priests who had dealings with chancellery files to check if they had any documents that could form part of the Archdiocese records. Records from the secret archives of the Archdiocese were produced. Retired Detective Chief Superintendent Camon confirmed to the Commission that he found the Archdiocese of Dublin co-operative throughout this investigation and that the Gardaí did not feel in any way obstructed in their investigation. The Archdiocese assisted the Gardaí in locating a number of priests against whom complaints had been made.

5.34 In May 2004, a detective garda forwarded an analytical overview of RTE's Prime Time and subsequent Liveline programmes to a detective superintendent in the NBCI. This report focused on the detail contained in the TV programmes. The author of the report concluded that the Prime Time programme left viewers with the impression that the Archdiocese had not properly dealt with complaints of child sexual abuse and that the Archdiocese had, in letting the priests return to ministry, facilitated further access by these priests to children and that some of them continued to abuse children. The analysis included an overview of the Liveline programmes on RTE radio and the calls that were made to the radio station following the Prime Time programme. Many of the callers identified the priests who, they said, had abused them.

Misprision of felony investigation

5.35 In addition to investigating the individual complaints, the investigating Gardaí were requested to consider the possibility of bringing a charge against any relevant people in the Archdiocese for the offence of 'misprision of felony' arising out of the alleged abuse by the nine priests to whom reference was made in the Prime Time programme.

5.36 The offence of misprision of felony was an offence at common law.²¹ Briefly described, a person who knew that a felony had been committed and, although not a party to it, concealed it from the authorities, was thereby guilty of misprision of felony.

5.37 The expression 'felony' was used to distinguish very serious offences from lesser ones and was originally applied to offences that carried the death penalty such as murder, treason, rape and kidnapping. The term 'misdemeanour' was then used to describe lesser offences that carried penalties of imprisonment or fine. Aside from the penalty, an important distinction between felonies and misdemeanours was that one could be arrested for a felony without a warrant. Furthermore, misprision of felony (referred to above) and compounding a felony (inducing someone not to prosecute a felony in return for a bribe) were two offences that could only occur once a felony had been committed.

5.38 There were some problems with the prospect of such a charge. In the first instance, relatively few of the complaints related to criminal charges that were classified as felonies at the time of the alleged commission of the offence. Furthermore, the distinction between felonies and misdemeanours had been abolished by section 3 of the *Criminal Law Act 1997*.

5.39 In the event, no file was sent to the DPP recommending prosecution for this offence. The charge of misprision of felony was rare in occurrence and one that would have been unlikely to have been previously encountered to any significant degree by the investigating gardaí. There would have been some legal difficulties caused by the abolition of the distinction between felony and misdemeanour. No legal advice was sought on the matter. No recommendation to prosecute anyone within the Archdiocese was made, nor was any file submitted to the DPP recommending prosecution for this offence. Finally, as previously stated, the vast majority of complaints related to alleged offences that were misdemeanours rather than felonies. In all the circumstances, it is considered by the Commission that the misprision of felony investigations were carried out more for the sake of completeness than from any substantial belief that there would ever be such a prosecution.

²¹ That is, behaviour that has always been regarded by the courts as an offence, as opposed to an offence that was created by a statutory provision.

The outcome of the investigations

- 5.40 The garda database established at the incident rooms recorded over 800 incidents of a sexual nature nationwide where the suspect is or was a cleric or connected with a religious community.
- 5.41 By January 2006, the investigation unit had forwarded 40 files regarding clerics to the office of the DPP. Twenty five of those related to the Dublin Archdiocese.
- 5.42 Prior to 2002, complaints into child sexual abuse were handled locally by the Gardaí. Consequently, there was no co-ordinated approach taken by the Gardaí in relation to the investigation of complaints of child sexual abuse by clerics. There is therefore considerable variation in the manner in which those investigations were undertaken and in the results achieved. Some of those garda investigations have been considered as part of the representative sample of cases outlined in this report. To the extent possible from a consideration of the evidence received, comments have been made on the quality of those investigations in the relevant sections of the report.
- 5.43 The garda investigation undertaken into clerical sexual abuse in the Archdiocese of Dublin which commenced in October 2002 was, in the opinion of the Commission, an effective, co-ordinated and comprehensive inquiry. It established a database recording complaints and valuable information which continues to be maintained. The concentration of the investigation in a centrally based team in itself equipped those investigators with the knowledge and skills necessary to properly investigate complaints of child sexual abuse. The Commission would like to note the considerable praise heaped by many of the complainants who came forward to the Commission on members of the specialist unit in the NBCI who carried out individual investigations.

Director of Public Prosecutions

- 5.44 The role of the Director of Public Prosecutions (DPP) is to decide whether or not a person is to be prosecuted in respect of an alleged criminal offence. The DPP makes that decision after receiving a file on the matter from the Gardaí.

5.45 Many victims of child sexual abuse have expressed concern about the failure of the DPP to prosecute in certain cases. During the period covered by this report, the DPP, as a matter of policy, did not explain to the alleged victims his reasons for deciding not to prosecute.²² The DPP's decision is issued to the investigating gardaí. Reasons for the decision are almost invariably given to the gardaí; these reasons are quoted in a number of cases described in this report. The DPP has pointed out to the Commission that these reasons are almost always expressed in legal short-hand because they are being issued to the gardaí and not to the public.

5.46 In examining these cases, the Commission noted that the most frequent reason for deciding not to prosecute was the perceived delay in making the complaints. The Commission also noted that the DPP's approach to the time period that would be regarded as undue delay changed considerably over the period. In the 1980s, a delay of as little as a year might be considered to be a bar to prosecution whereas, in the 2000s, delays of up to 40 years are not considered a bar to prosecutions. The DPP and his Deputy gave evidence to the Commission which explained the evolution of the Office's approach to the question of delay.

5.47 Before examining the issue of delay in child sexual abuse cases, it is important to understand the status of the DPP and the general effect of delay on fair procedures.

Independence

5.48 The office of the DPP was established under the *Prosecutions of Offences Act 1974*. Under section 2 of the Act, the director is independent in the performance of his functions. Because of that independence, neither the Government nor the Garda Síochána nor, indeed, any other person or organisation, can either force the DPP to prosecute a particular case or prevent him from doing so. The DPP is a statutory officer so his actions may be subject to judicial review by the courts. However, where the courts have intervened in the decision making process of the DPP, they have done so

²² The reasons for this policy are explained on the DPP's website. In October 2008, the DPP announced the introduction of a gradual change in that policy: www.dpp.ie.

only when satisfied that there has been a breach of fundamental fairness or a breach of some other constitutionally enshrined principle.

Decision to prosecute

5.49 Once a garda investigation is completed, a file is sent by the investigating garda or his superior officer to the DPP. A legal officer in the office of the DPP considers the file and may recommend that further investigative steps be undertaken by the Gardaí. Alternatively, the legal officer may make a decision to prosecute or not to prosecute or submit the file to a more senior officer for a second opinion. Once a decision to prosecute has been made, the DPP's office also directs what charges are appropriate. Once a direction to prosecute has been issued, the DPP's office is in charge of the prosecution case from then on.

Delay and fair procedures

5.50 It is a firmly established principle of Irish law that fair procedures require that an accused person ought to be brought to court at the earliest opportunity. If there has been a delay in bringing an accused person to court, the accused can, in appropriate cases, apply to the High Court to stop the prosecution. While the Constitution of Ireland does not expressly state that there is a right to a speedy trial, our courts have held that such a right is implicit in Article 38.1 of the Constitution which provides that no person shall be tried on any criminal charge except "*in due course of law*". A trial in due course of law entitles any person charged with a criminal offence to a trial with reasonable expedition. Furthermore, Article 40.3 of the Constitution imposes certain other duties on the State, such as the duty to afford any accused person fair procedures.

5.51 There are essentially two types of delay which can affect the fairness of a criminal trial – complainant delay and prosecutorial delay. Complainant delay means that the alleged victim delayed in making a complaint to the Gardaí. Where a person delays in reporting an alleged crime, valuable evidence relating to the crime may be lost. If this occurs, it may well be unfair to the accused person to put him on trial when important evidence is missing through no fault of his own. Prosecutorial delay is delay by the authorities in either the investigation or the prosecution of offences after a complaint has

been made. Such delays can also result in evidence being lost or mislaid such as to make it unfair to put an accused person on trial.

Complainant delay in child sexual abuse cases

5.52 The DPP explained to the Commission that, prior to the mid 1990s, when considering whether or not there was a delay by a complainant such as to lead to a decision not to prosecute, his office and the courts treated all alleged offences in the same way. In effect, the DPP and the courts applied the same principles to all cases without any special treatment of child sexual abuse cases.

5.53 That policy changed in the mid 1990s when it was accepted by the courts that delay in bringing a complaint of sexual abuse relating to incidents that occurred when the complainant was a child was in a different category to delay in making a complaint in other types of cases.

5.54 The issue of delay by a child sexual abuse complainant was considered by the Supreme Court and a decision was delivered in February 1997.²³ The accused had sought a judicial review seeking to stop the DPP from proceeding further with a criminal prosecution against him. The charges concerned related to alleged sexual abuse by the accused against three of his daughters. The alleged offences occurred in 1963 and the complainants first approached the authorities in 1992.

5.55 The court considered that statute law had put no time limitation on the prosecution of the alleged offences but the Constitution of Ireland did place certain restrictions on a criminal trial in cases where there was unreasonable delay. The court held that it must look at the circumstances in each individual case, including the constitutional issues at stake, in order to determine whether it was appropriate to proceed with a trial. The court indicated that there was no definitive time limit or indeed any exhaustive list of factors that were to be taken into account in reaching a decision on whether or not it was appropriate to allow a prosecution to proceed. Delay and the reasons for it were factors to be taken into account, but so also were the actual prejudice to

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B v DPP [1997] 3 IR 140; Supreme Court Decision of Denham J delivered 19 February 1997.

the accused, any special circumstances and the community's right to have offences prosecuted.

5.56 The court held that the key factor in this particular case was the relationship between the accuser and the accused. The court found that the reason for the delay in reporting the alleged crime was the dominion exercised by the accused over his three daughters, and that that dominion existed until the complainant's mother died.

5.57 Following that case, prior to deciding whether or not to prosecute where there had been complainant delay in reporting the alleged offence, the DPP developed a policy of assessing the state of mind of the complainant during the period of delay. The analysis considered whether or not, during that period, there were any factors that existed which prevented the complainant from coming forward.

5.58 That approach remained a significant factor in the deliberations of the DPP in sexual abuse cases until 2006 when the Supreme Court delivered a further judgement on the issue.²⁴ In the 2006 case, the Supreme Court reviewed the extensive case law which had evolved since the mid-1990s around the issue of delay by complainants in reporting child sexual abuse to the Gardaí. In reaching its decision, the court recognised developments in the 1990s which reflected changes in society. The issue of child sexual abuse was discussed widely and openly for the first time. As a result, prosecutions were brought in great numbers in relation to events which had occurred many years previously. The Supreme Court considered, in the context of cases of alleged abuse when the complainant was a child, that there was no longer a necessity to inquire into the reason for the delay in making a complaint. The court took judicial knowledge of the fact that young victims of sexual abuse were reluctant, or found it impossible, to come forward to disclose the abuse to others. The court was satisfied that, in future, it would no longer be necessary to establish the precise reasons for the delay in making the complaint. The issue for a court to determine is whether or not the delay has resulted in prejudice to an accused – that is, whether or not the delay gives rise to a real or serious risk of an unfair trial.

²⁴ *H v DPP* [2000] IESC 55; Supreme Court decision of Murray CJ delivered 31 July 2006.

5.59 The court indicated that the proper test to be applied was “*whether there is a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay. The test is to be applied in light of the circumstances of the case*”.

5.60 Following that case, therefore, the DPP no longer considers the mere fact of delay as a reason that might inhibit a prosecution for child sexual abuse. The Commission was told that the DPP now analyses in each case whether or not there is any prejudice caused to the accused in conducting his defence arising from the delay.

Prosecutorial delay

5.61 Prosecutorial delay can also affect the fairness of a trial. The Supreme Court has stated:²⁵

“[It] ... is not acceptable and in my view is a breach of the defendants’ rights under Article 38.1 of the Constitution for the prosecution authorities to allow unnecessary delay to occur. In a case such as this, involving sexual offences many years ago, the unnecessarily delayed trial is most unfortunate, but it is wholly intolerable that it should be postponed still further due to unnecessary delays on the part of the prosecuting authorities. I’m using this expression ‘prosecuting authorities’ to cover the Director of Public Prosecutions and the Garda Síochána.

...

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

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In *PP v DPP* [2000] 1 IR 403.

5.62 The DPP told the Commission that when an issue of alleged prosecutorial delay is raised, an analysis of the delay and the reasons for it are carried out. The deputy director of the DPP's office stated that it is very difficult to be definitive about the length of time that would be regarded as so excessive that it would lead to a case being stopped. He indicated that it is very difficult to predict what cases would ultimately be stopped by the courts on account of prosecutorial delay.

Other causes of prejudice

5.63 The DPP must also decide before prosecuting whether or not an accused person is prejudiced in his defence for any other reason. An example of this type of prejudice could be where a witness has died or there is some other factor which results in the accused being inhibited in conducting a full defence to the charge brought against him.

5.64 The DPP told the Commission that sometimes it is difficult to make an assessment of actual prejudice as, very often, an accused person does not indicate, when interviewed, what the nature of his defence will be. It is therefore very often the case that the DPP will only become aware of issues of potential prejudice when or if the accused applies to the courts to try and prohibit the trial from taking place.

Change of mind by the DPP

5.65 Depending on the circumstances, it is possible for the DPP to reverse an earlier decision not to prosecute in a particular case. Complainants may ask the DPP to review a previous decision. Ultimately the DPP must decide whether or not it would be fair and in accordance with fair procedures to proceed to charge the accused with an offence in circumstances where the accused may have previously been advised that he would not be so charged. The Commission was told that, in general, it is unlikely that the DPP would change his mind in a particular case in the absence of new evidence.