



THE COURT OF APPEAL

Record No. 249/2015

**Mahon J.  
Edwards J.  
Hedigan J.**

**BETWEEN/**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**- AND -**

**JG (No. 2)**

**APPELLANT**

**JUDGMENT of the Court delivered on the 8th day of June 2018 by Mr. Justice Mahon**

1. This judgment relates to the application by the respondent for a re-trial in circumstances where this court, in its judgment of the 23rd February 2018, allowed the appellant's appeal against conviction. The background facts are set out in detail in that judgment and it is unnecessary to repeat them again. The conviction of the appellant following an unanimous jury verdict at the Central Criminal Court on the 8th July 2015 was in respect of fourteen offences, one of indecent assault, eight of sexual assault and five of rape. The appellant was sentenced on the 9th October 2015 to thirteen years imprisonment with the final five years suspended on certain conditions. To date the appellant has served a period in custody approximately equating to a prison sentence of three years and six months (with normal remission), or almost half the sentence originally imposed. The offences were committed between September 1990 and July 1994 when the complainant was aged between four and eight years old, and the appellant was in his early fifties. The first complaint made by the complainant to gardaí was in July 2010, when he was twenty four years old and some sixteen years after the last offence was committed. An unusual feature in the case was the fact that the appellant had pleaded guilty to sexually assaulting the complainant's two sisters in 1994. He pleaded guilty in respect of those offences and was sentenced in January 1995, and released from prison in May 1997.

2. The trial, which concluded on the 8th July 2015, was the appellant's second trial for these offences. His first trial, also in the Central Criminal Court, took place in November 2013 and concluded with a jury disagreement.

3. The respondent maintains that a re-trial is appropriate and in the public interest. Her counsel, Ms. Gearty SC has submitted that a number of factors support her contention that there should be a re-trial including:-

- (i) the seriousness of the offences;
- (ii) the right of the complainant to see justice done;
- (iii) the lack of any material prejudice to the appellant;
- (iv) the lack of any significant lapse of time since the last trial, and since the conclusion of the successful appeal against conviction;
- (v) the lack of the risk of an unfair trial, and that
- (vi) there has been no unconscionable or unreasonable delay in a complaint being made to the gardaí.

4. For his part, Mr. McGuinness SC on behalf of the appellant emphasised the fact that a re-trial would mean a third trial for the appellant within a period of five or six years. He submitted that there had been significant delay in the making of a complaint by the complainant and in the matter coming to court, although no blame could be attributed to any party for such delay. He pointed to the fact that the first offence occurred almost twenty eight years ago, with the last offence occurring almost twenty four years ago. Complaints were made to the gardaí sixteen years after the last complaint. Mr. McGuinness also submitted that the appellant was, at seventy four years, elderly and has very serious health issues. With a likely delay of eighteen months for a re-trial to take place the appellant would be seventy six years old at the time of what would then be his third trial for the same offences. He also pointed to the fact that the appellant had effectively already served almost half the original sentence imposed on the 9th October 2015. He was also publicly named at the time of his original conviction and has been shamed in his own community.

**Section 4(1)**

5. Section 4(1) provides for re-trials. It states:-

*"where a person is ordered under this Act to be re-tried for an offence he may, notwithstanding any rule of law, be again indicted and tried, and if found guilty, sentenced for that offence".*

6. This court has a discretion as to whether or not to order a re-trial. It exercises that discretion having regard to all the circumstances in any particular case. Included in the factors which the court will consider in particular cases will be the extent to which the deficiency which occurred in the previous trial leading to the verdict being quashed on appeal is capable of being corrected in a new trial, the age and health of the appellant, the nature of the offences, the length of time since the offences were committed and the number of previous trials which have occurred in relation to the same matter. In his book *The Criminal Process* Professor Tom O'Malley states (at pp 939-940):-

*"...Factors which may influence the court in deciding whether to order a re-trial include the number of times the person has already been tried, the sentence originally imposed and the amount of that sentence already served and perhaps, the length of time since the offence was allegedly committed. In relation to the last mentioned factor, regard should be had to the prejudice, if any, the accused may suffer because of the absence of evidence, the death or unavailability of witnesses or similar matters.*

7. In *DPP v. Hayes and O'Leary* [2014] IECCA 5, the Court of Criminal Appeal in a judgment delivered by Clarke J. (as he then was) said the following on the issue of delay emphasising that different considerations may be relevant on that subject in relation to an application for a re-trial as against an application to prohibit a trial. He said:-

*"It follows that this is not a case where any material or significant blame can attach to either the prosecuting authorities or the courts system concerning lapse of time. It should be said that this Court is of the view that lapse of time, insofar as it may be a factor in determining whether it is in the interests of justice to direct a retrial, should not necessarily be considered in quite the same way as delay in the context of an application to prohibit a trial. It may be that lapse of time, in the circumstances (including any established prejudice) of a particular case, can properly be taken into account in the balance as to whether a retrial should be directed even where the lapse of time and other circumstances concerned could not justify the prohibition of the trial. It should be emphasised that prejudice will always be an important factor and that a level of prejudice which might fall short of that which could justify prohibition may nonetheless be a weighty factor in considering where the balance of justice lies when considering whether to direct a retrial. Clearly if, in all the circumstances, lapse of time and the circumstances giving rise to it, were such as would justify the prohibition of a trial, then a retrial could not be directed."*

8. The reason for this court's decision to allow the appellant's appeal in relation to his second trial on these offences concerned the introduction into evidence in the course of trial of the fact and detail of the appellant's admitted sexual abuse of the complainant's sisters in the early to mid 1990s. A re-trial of the appellant absent that evidence would, while not necessarily fatally undermining the prosecution case, would nevertheless significantly weaken it. This fact, while it does not in any way exclude the possibility of a fair re-trial of the appellant, is nonetheless a material factor for consideration.

9. The factors which primarily concern the court and which, in its view, militate against a re-trial are the age and poor state of health of the appellant, the fact that the undoubtedly serious offences were committed a long time ago and that a re-trial would be the third trial of the appellant for the same offences and that the first of these trials ended in a jury disagreement, and the fact that a lengthy period in prison has already been served.

10. For these reasons in particular, the court will refuse the application for a re-trial.