Neutral Citation: [2014] IEHC 410

THE HIGH COURT

2014 No. 360 JR

Between:

PM

Applicant

And

Director of Public Prosecutions

Respondent

Judgment of Mr Justice Michael Peart delivered on the 31st day of July 2014:

1. In these proceedings the applicant seeks to prohibit his retrial on a single offence of sexual exploitation of a child contrary to section 3 of the Child Trafficking and Pornography Act, 1998 (as amended), on the grounds that to retry him against the background which resulted in the jury being discharged after three days at his trial in May 2014 would expose him to a real risk of an unfair trial which would be oppressive, an abuse of process and in breach of the guarantee provided by Article 38.1 of the Constitution that "no person shall be tried on any criminal charge save in due course of law".

2. The facts are unusual. Towards the end of the prosecution's case on Day 3 of the trial, when the prosecution's final witness (Garda Meade) had been cross examined by Ken Fogarty SC for the applicant, Counsel for the prosecution, John Hayden SC was approached in court by another member of the investigating team, (Garda Browne), and was told about the existence of a large number of mobile phone messaging records which he (Garda Browne) believed had already been disclosed to the defence legal team and which might tend to confirm that there had been many text messages sent by the complainant to the applicant. Evidence up to this point had focussed on a single text message from the applicant to the complainant's phone received onto her phone on 20th May 2010 which was in fact after the phone had been seized by the Gardai. Mr Fogarty was exploring with Garda Meade during cross-examination the applicant's position that in fact the complainant had been sending him a great number of texts in the period prior to the date of the alleged offence, yet despite the thorough examination of the phones in question no records of such texting had been disclosed by the prosecution. The records to which Mr Hayden's attention was being drawn by Garda Browne covered the period 20th April 2010 to 18th May 2010. The date of the alleged offence was the 8th May 2010.

3. His belief that these records had been disclosed to the defence as part of the normal disclosure obligation was misplaced for reasons which I will come to. In fact, as I have said, the records disclosed to the defence showed only one record of a message from the complainant to the applicant, and that post-dated the date of this alleged offence by some twelve days. It appears that all prior messages had been deleted prior to it coming into the possession of the Gardai. This message may have been delayed in some way and came through only after the mobile phone had been seized by the Gardai, and before the SIM card had been removed and cloned for the purpose of analysis, and its content was therefore available on the phone..

4. The phone message records which were disclosed to the defence purported to cover a period from 30th January 2010 to 24th May 2010, but for some reason excluded dates from 20th April 2010 to 18th May 2010. Garda Browne in his evidence was not able to explain the gap in any definitive way. Garda Meade gave evidence about this also. It appeared from his evidence that any phone traffic between the 20th April 2010 and 18th May 2010 had been deleted and therefore no content was available for that period. But Mr Fogarty suggested to Garda Meade that if the mobile network service provider, in this case being 02 was contacted by Gardai it could be requested for the phone records, and if those were produced they would give details of contact between the two mobile phones, even if not the content of any text or other messages. Garda Meade agreed that this was so. He stated then at first that this had not happened in this case (Day 3, page 60, line 7-8), but immediately thereafter stated "Well, what I'll say is I didn't do it" (Day 3, page 60, line 10). Mr Fogarty put it to Garda Meade that if the applicant when being interviewed by Gardai following his arrest was making the case that in fact he was being inundated with text message requests from the complainant, and the truth of the matter was that it was he who was pestering her with requests, that would have been evident from the records if they had been obtained. Garda Meade agreed, and said that this was not done, or at least he did not do it. This cross examination terminated a short time later, whereupon Mr Hayden for the DPP asked the trial judge for 10 minutes as he wished to clarify a particular matter before proceeding further with the trial.

5. It appears that during that break Mr Hayden was handed a significant volume of documents by Garda Browne and, seeing these for the first time, they were the telephone records of the complainant's phone, albeit excluding content, which had in fact been obtained from the network service provider, O2, covering the missing dates. They had not been disclosed to the defence. It turns out that the O2 emailed these records to Garda Browne; Garda Browne in turn emailed them on to the State Solicitor who in turn emailed them on to Mr Hayden on the 26th September 2013, so some months before this trial. The records sent by way of attachment to the email comprised 348 pages of phone records. Mr Hayden's office does not have facilities to download and print off that quantity. Unfortunately while Mr Hayden accepts that they were emailed to his office, he never opened the email and therefore never saw these records until the third day of the trial. It follows of course that they never were transmitted to the applicant's legal team, who were completely unaware that they had been obtained - hence the line of cross examination pursued by Mr Fogarty with Garda Meade and Garda Browne. It is accepted by the DPP that these records should have been disclosed.

6. Mr Hayden informed the trial judge of these events, and stated also that the records do show phone traffic from the complainant's phone to the applicant's mobile phone. In fact it shows a great number of such contacts during this missing period, including on the date on which the offence is alleged to have taken place.

7. Thereafter, Mr Fogarty made submissions to the effect that his cross-examination not only of the complainant but also the Garda witnesses had been severely hampered by not having these records, and he explained the assistance they would have been. Mr Hayden's view, briefly, was that the records were not of great assistance to the applicant in his defence given that the complainant was a child, and would not provide a defence to the charge, even though he accepted that cross-examination was hampered to a degree. He felt that the records went merely to credibility, and that the trial could proceed and any witness could be recalled to be

asked about these records if that was required. Mr Fogarty had wanted the prosecution to close its case so that he could seek to have the case withdrawn from the jury, and he says now that he was deprived of that opportunity. The DPP on this application before me submits that there could have been no reality to such an application given the admissions which were made by the applicant in his interview statement, which was put before the jury.

8. At any rate, the trial judge considered the matter overnight and on the following day indicated that her decision was that the jury should be discharged, so that the DPP could then make a decision as to whether or not to have a re-trial. That decision was in due course made, whereupon the applicant has sought to prohibit that trial by way of these judicial review proceedings.

9. Those then are the facts which have given rise to the present application. Mr Fogarty for the applicant characterises what happened as "prosecution misconduct", whereas Siobhan Phelan BL for the DPP considers the chain of events to be simply an unfortunate human error. Mr Fogarty submits that there are two elements to that prosecution misconduct upon which he relies - firstly the concealment of the phone records and the fact that it was not until Day 3 of the trial that somebody reacted and took up with Mr Hayden the fact that the so-called missing records had in fact been provided to the State Solicitor for the purpose of disclosure; and secondly the fact that the prosecution refused to close its case thereby depriving the defence of an opportunity to make an application for a direction.

10. It is important to distinguish this case from one such as *RC v. DPP* [2009] IESC 32 when a prosecution was prohibited by the Supreme Court where phone records belonging to the accused's phone had been procured and disclosed, but the State had not sought out the complainant's records. The accused man, in answer to the complainant's case that he would call and text her and ask her to visit him in his apartment, was making the case that in so far as that was so, his calls were always in response to a call or text message from her. The Supreme Court held that the prosecution had a duty to obtain the records of both the complainant and the accused. In the present case of course, both sets of records were sought and obtained, and it was simply through error that some of the records relating to the complainant's phone usage were not handed over to the defence. Mr Fogarty nevertheless emphasises that at all times during the trial it was represented to the Court during pre-trial disclosure hearings that all disclosure had been made, and during the trial itself when various witnesses stated that these particular records were not available.

11. This case, however, is not about the fairness of the trial which occurred in May last. It was entirely appropriate that the jury be discharged in the light of what occurred. Clearly the defence was seriously hindered by the absence of the records which ought to have been disclosed as was the intention. The trial judge acted entirely appropriately in discharging the jury. Any other course would have rendered the trial unsatisfactory in a number of aspects no matter what directions the trial judge might give to the jury to explain how matters had arisen.

12. This case is about whether there is now a real risk of an unfair trial if the applicant is put on trial again. The onus is upon the applicant to show such a real risk exists in all the circumstances of this case. Mr Fogarty accepts that the onus is upon the applicant but relies on the judgment of O'Donovan J. in *Halpenny v. DPP* [2006] IEHC 244 when he submits that the onus of proof is not "a burdensome one", and that he does not have to show a certainty or even a probability of an unfair trial "but merely a real risk that the applicant could not obtain a fair trial". Nevertheless, I have to say, I consider the concept of a real risk to amount to more than a mere possibility. For it to be a real risk, there must be some reality to the prospect when all the facts of the case are considered. For a risk to be real the applicant must point to something tangible in the facts of the case which could realistically constitute an unfairness. In that way, he must, as O'Donovan J. said also in Halpenny *"engage in a specific way with the evidence which is actually available against him".*

13. Mr Fogarty has submitted that this case is different from the cases where phone records have simply not been obtained by the prosecution at all, and where the Courts have stated that in general the absence of phone records is not a reason to prohibit a trial, but that there may be circumstances arising from the nature of the investigation and the questions asked and answered regarding phone use, that might lead the Court to conclude that there was a real risk of an unfair trial where the phone records were not sought out and disclosed.

14. Much is made by the applicant of the fact that he was deprived of an opportunity to seek a direction at the close of the prosecution case, because the prosecution never in fact closed its case in the circumstances that arose. He submits that the complainant failed during her evidence to give any evidence capable of being interpreted as constituting 'grooming' by the use of his mobile phone. He points also to the evidence of two civilian witnesses which, he submits, was inconsistent with the complainant's testimony. Up to the discharge of the jury it had been the intention of the applicant that a direction would be sought on the basis of no case to answer. He has been deprived of that opportunity now, and it is submitted that to permit the prosecution to have another attempt to present its evidence, having had by now what Mr Fogarty has referred to as "a dress rehearsal", amounts to a real risk of unfairness such that a retrial should be prohibited. He submits that the prosecution are in effect being allowed an opportunity to mend its hand in circumstances where a serious mistake amounting to prosecution misconduct has occurred, and to the serious prejudice of the applicant.

15. It has been submitted that it is unfair that the applicant, having been put through the rigours of a full trial and all that precedes it, including the obvious stress associated with such a trial, should not be expected to have to go through it all again, simply because the prosecution slipped up seriously in relation to disclosure in the first trial. In circumstances where disclosure was not properly made, despite assurances to the contrary given to the defence and the Court, any retrial would amount to an abuse of process, and is oppressive. It is submitted that this unfairness through oppression is not answered by saying that there have been many instances where a person has been faced not simply with a retrial, but maybe a second or even a third in circumstances, by way of example, where a jury has disagreed and a retrial takes place.

16. Some reliance was placed by Mr Fogarty on the fact that a print-out of the complainant's Bebo page as it existed as of the date of the applicant's first contact on Bebo with the complainant was not available. This would have had some relevance in relation to the state of knowledge of the applicant as to the age of the complainant, and the applicant says that he is disadvantaged in that regard also. But this was not a ground upon which leave was granted to seek prohibition. It is not included in the Statement of Grounds, and is not therefore something upon which the applicant can now rely in submissions.

17. Ms. Phelan has submitted that there is no substance or reality to the fact that the applicant was deprived of an opportunity to seek a direction, if the prosecution had in fact closed its case. She submits that if one looks at all the evidence that was before the jury, including the inculpatory statements made by the applicant at interview, which were before the jury, there could be no prospect of such a direction application being successful. That feature of the case, in her submission, gives no basis for a contention that a retrial would be unfair on the applicant. In any event she does not accept that the prosecution should be characterised as having "refused to close its case", and it is submitted that the requirements for a successful direction as set forth in R v. Galbraith [1981] 1 WLR 1039 could not have been met in the light of the evidence given for the prosecution. In any event she submits that it was the

trial judge herself who decided that in the events that had occurred the jury should be discharged when that occurred.

18. Ms. Phelan has referred to the judgment of O'Neill J. in McGealy v. DPP in which he commented upon his earlier judgment in DS v. Judges of the Cork Circuit Court, prior to its appeal in the Supreme Court. He explained his decision in DS as being:

> *"A balancing of two competing interests; the right of the applicant not to be subject to trial which is not in due course of law and the rights of the public to prosecute offences. The core principle is that the public have a fair opportunity to prosecute a criminal case to its final conclusion. Mishaps can occur which may result in a re-trial, for example if a jury is discharged. Where the Director of Public Prosecutions in a case which has no mishap and which goes all the way, on two occasions to a jury, the balance tilts in favour of the applicant who may face risks. Here, unlike DS, the applicant faces similar offences in relation to other complainants. As of this point in time the public's right to prosecute has not been fully vindicated yet. Cases similar to DS are rare where there are two jury disagreements after two satisfactory jury trials. "*

19. Ms. Phelan has referred also to the principles to be applied and the factors to be considered as set out by the Supreme Court in *DS v. Judges of Cork Circuit Court* [2008] 4 IR. 379 including that the Oireachtas has not provided for any limit on the number of times a person may be tried on indictment, the decision to try or retry a person is a decision to be made by the DPP, an independent office, the reasons why a re-trial has become necessary- in other words why, and at what stage of the trial did the first trial fail, or is it after a conviction has been quashed, or did the jury disagree. It was stated that there were no hard and fast rules, the Court had a discretion, and each case and its individual circumstances must be considered.

20. Other factors identified which the Court should have regard to were delay, the stress and anxiety of the applicant and/or his family, the position of the victim, whether there was any change in the evidence being adduced, and the Court should exercise its discretion with caution in view of the independence of the DPP in her decision-making, and the absence of any statutory prohibition on the number of re-trials, and the duty of the court to protect due process. All these factors should be regarded cumulatively so that the decision was proportionate in the light of all the facts and circumstances of the case.

21. Ms. Phelan distinguishes the present case from DS on its facts, since in the present case there has been but a single trial, and therefore any re-trial will be the first re trial. She also refers to the fact that there is no significant delay in the present case. She submits also that the applicant ahs not put forward any evidence of any particular stress and anxiety being endured by the applicant over and above what is to be expected of any person who is facing a trial on a criminal charge. She submits that in such circumstances there is nothing in the present case to bring the applicant's case anywhere what Kearns J. in his judgment in DS referred to as "the breaking point" in deciding whether a point had been reached where any re trial must be seen to be unfair.

22. As for the applicant's submission based on a contention that the error made in relation to the disclosure of these records amounts to 'prosecution misconduct', she rejects that as a correct characterisation. She submits that there is nothing egregious in what occurred, and no suggestion that it was other than an error. She refers to Mr Hayden's own explanation given honestly and openly to the trial judge in the immediate aftermath of his discovery that records had come to his office, that he had not seen them, and that they had not gone to the defence. She refers also to a supplemental affidavit sworn on the present application by the State Solicitor which confirms that account. In her submission the submission that this amounts to prosecution misconduct is misplaced, and that it was simply an error, and nothing more sinister. She has provided a useful case, albeit one from the UK Supreme Court, rather than from this jurisdiction, where the question of prosecution misconduct was considered. The Court recognised that there was clearly a jurisdiction to prohibit a re-trial (a) where it will be impossible to give the accused a fair trial, and (b) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. The facts of that case need not be set out, nor any of the principles discussed. But it was a case where prosecution misconduct had occurred, and which only came to light much later after conviction. The case is of assistance in that what constituted misconduct on the part of the prosecution was, according to the headnote, that "*the police had misled the court, the Crown Prosecution Service and counsel by concealing and lying about the various benefits received by C, and had also died at the ex parte hearing before the Court of Appeal. Those benefits included financial benefits as well as visits to brothels, permission to consume drugs in police company and failure to investigate or prosecute C's violent conduct*."

23. Ms. Phelan refers to this case for the obvious reason that the sort of egregious behaviour on the part of the police in that case is entirely absent from the present case, and she submits that there can be no question of a simple, albeit serious, error in failing to disclose the particular records, being classified as prosecution misconduct.

24. I conclude first of all that no unfairness arises merely from the fact that in the events that occurred the applicant was deprived of making an application to the trial judge for a direction in the light of the evidence which had been given by the prosecution. That alone would be insufficient, even where the prospect of success on such an application might be been good. In the present case, I am satisfied that there could not have been any great optimism for success on that application. I appreciate that the applicant's knowledge of the age of the complainant is something which he may have been able to make some headway with, but there was other evidence as to how he could have been expected to know that she was only 15 years of age, and that must be taken into account too. But in any event I attach no weight to the fact that he was unable to seek a direction, when considering how to weigh up the competing interests in this case, namely the applicant's undoubted right to a fair trial in accordance with law, and the public's interest in seeing that persons accused of offences are prosecuted.

25. It is also an undoubted feature of the present case that he has been faced a trial on just one occasion for this offence, and that the jury was never required to reach a verdict. In other words, it is an unconcluded trial in the sense that he was neither convicted nor acquitted. The jury never reached the point of considering its verdict or even disagreeing. This distinguishes this case from many other applications for prohibition where an accused person has already faced a number of trials and faces yet another unless it is prohibited on the grounds that it is unfair on the basis that it is oppressive to have to face such a number of trials for the same offence. The jurisprudence in that regard is clear. The Court undoubtedly has a discretion to prohibit any trial that gives rise to such a real risk of unfairness, and the basis for the exercise of that discretion has been set forth in the cases referred to. The fact in the present case that any re-trial will be the first such re trial is something to be taken into account in striking the balance referred to. Of itself it would not be sufficient to tilt the balance in favour of prohibition. Many trials collapse for many and various reasons which all lawyers dealing with such cases will be familiar with, including where some error has been made along the way, or some matter is accidentally referred to in the presence of the jury, leading to the discharge of the jury. These things happen all the time.

26. It really is necessary for this applicant to succeed in satisfying the Court that what occurred amounts to prosecution misconduct, if he is to have any chance in tipping the balance in favour of prohibition. It is noteworthy that even in the face of such egregious behaviour of the police in the Maxwell case referred to, the Court of Appeal's decision not to prohibit a re-trial was upheld by the Supreme Court. A factor in that regard was that in the re-trial none of the evidence that emanated from the contaminated witness

would be adduced.

27. In the present case, any re-trial will take place without the deficiency in disclosure which put an end to the earlier one. The applicant will have had all the records obtained, and which ought to have been disclosed a long time ago. So, there is no risk that on that account the trial will be unfair as far as process is concerned. He will receive a fair trial in that sense. It will be in accordance with law.

28. I do not consider there is real risk of an unfair trial taking place based on the fact that certain records were not disclosed in the earlier trial, and which have now been disclosed, and in the light of the circumstances in which that occurred. I regard those circumstances as amounting to an error, and not to prosecution misconduct. It is an unfortunate error, like a not uncommon error whereby Counsel for the prosecution in his opening or closing speech to the jury might inadvertently say something which ought not to be heard by the jury, and where this leads to the discharge of that jury. Such an error is not to be characterised as prosecution misconduct, and neither is a mishap such as happened in this case where inadvertently material intended to be disclosed was not in fact handed over. I am not for a moment to be taken as condoning any failure on the part of the prosecution to observe scrupulously its disclosure obligations prior to the commencement of the trial. Those obligations are a vital part in ensuring that a fair trial takes place. If there was room for any real suggestion in this case that the failure to hand over the materials in this case was deliberate and intended to disadvantage the applicant in his defence of the charge, that would be heinous and egregious, and to be condemned in the strongest possible terms. It would bring the matter clearly within the realm of prosecution misconduct, and a case might be made, that apart from any disciplinary steps that might be taken against the person found to be responsible, the re-trial of the applicant should be prohibited. However, as the Maxwell case shows, there is no hard and fast rule even in such egregious cases. The case for prohibition might not, when all the facts and circumstances are taken into account, may not outweigh the public interest in ensuring that offences are properly prosecuted. That is an important interest and one not to be too easily or readily trumped. It will inevitably be the exceptional case where a trial is prohibited, and in a clear case that there is a real risk of an unfair trial.

29. The present case is not such an exceptional case, even if it is accepted that the facts are somewhat exceptional, given that they may not have previously occurred in quite the same way. There is no unusual or special element of stress or anxiety on the part of the applicant or his family that has been pointed to. It is to be expected that the applicant will endure the sort of normal stress and anxiety that any accused person will suffer, but nothing out of the ordinary has been put forward.

30. The applicant will receive a fair re-trial. He will be possessed this time of all relevant material which has been disclosed. In so far as the applicant has referred to the fact that the requisite Bebo page was not disclosed, he may if he so chooses make what he will of that before the trial judge and the jury. It was not a ground contained in the Statement of Grounds in any event. His re-trial will be only the second trial which he will have faced. There have been many cases where a second and even a third re-trial has been permitted without it being considered to be so oppressive upon the accused as to constitute an unfair trial or an abuse of process.

31. For these reasons I refuse an order of prohibition as sought in these proceeding.