Neutral Citation Number: [2008] IEHC 232

THE HIGH COURT

2007 No. 848 JR

BETWEEN

P. Mc C.

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Mr. Justice Hanna delivered on Friday 11th day of April, 2008

1. The applicant P. Mc C. is charged with a very serious offence, namely, having sexual intercourse with a mentally impaired person, contrary to s. 5(1) of the Criminal Law (Sexual Offences Act) 1993. The alleged offence was committed on or about the first day of July 2001. If convicted, the person so convicted faces a term of imprisonment of up to ten years.

2. The alleged offence occurred when the applicant and the co-accused person were in Thomastown in the County of Kilkenny in connection with visiting a fun-fair or carnival. The relevant timeframe is, as follows. On the 2nd of July, 2001, that is the day after the alleged offence, the accused was arrested and interviewed by An Garda Síochána. He made a statement and voluntarily gave DNA samples.

3. In the statement, he admitted engaging in an act of sexual intercourse with the alleged victim. It should be observed and for the purpose of this judgment, the parties should note, that I am making no assumptions as to what might have happened had this matter proceeded to trial. It may well be that the applicant would have attempted to resile from that particular statement. As it happens, we do not know because of the events that came to pass.

4. On the 21st December, 2001, pursuant to s. 4(5) of the Criminal Justice (Forensic Evidence) Act 1990, an order was made to preserve certain material. On the 16th September, 2002, that is some 14 and a half months after the applicant made his statement, he was rearrested and formally charged. By the 4th November, 2002, the case had reached a stage where the book of evidence was served. The matter came before the court on the 20th of January, 2003. The applicant was not in court on that occasion, his mother was, sadly, *in extremis* at the time. A bench warrant was issued and this was executed on the 3rd March, 2003.

5. He was then sent forward for trial to the Circuit Criminal Court, sitting in Kilkenny. On the 11th March, 2003 he was remanded on bail until the 15th July, 2003. The case was then adjourned. On the 4th November, 2003, the case was listed for trial but it was adjourned on that occasion due to its position in the list and the unlikelihood of it being reached. Between March and July 2004, again, the case was adjourned as being unlikely to be reached. During this time the co-accused launched judicial review proceedings. Between the months of October 2004 and June 2004 the matter was adjourned in light of the judicial review proceedings taken by the co-accused.

6. In 2006, various applications were made on behalf of the applicant seeking to have the criminal case proceeded with separately, in other words, to sever the indictment. These applications were unsuccessful.

7. On the 22nd March, 2006, a trial of this particular charge commenced. However, the trial had to be aborted as a result of an extraneous matter which was introduced by the alleged victim and which was irrelevant and possibly prejudicial in light of the charge which the applicant was facing.

8. On the 25th April, 2006, the matter was again adjourned. This was on the application of the co-accused, Mr Dunne, due to the non availability of a defence witness. On the 7th November, the matter was again adjourned due to the absence of Dr Jennifer Ryan, a forensic scientist, called on behalf of the prosecution.

9. On the 23rd January, 2007 the absence of the transcript of the previous proceedings, caused a further adjournment. A trial commenced on the 1st May, 2007. It transpired that a juror knew the family of one of the parties. An application to discharge was unsuccessful but it transpired that a copy booklet, which had been given to the jury, contained potentially prejudicial matter and this caused the trial to be aborted yet again. I should observe that, at this point, I'm satisfied that both these cessations of the trial were caused, and I accept Ms. Phelan's argument, by a mishap rather than any wanton act on the part of the prosecution or indeed the defence. None of the parties were aware, for example, of the material which had gone into the jury and in that sense I do not think any great fault is to be attached to anyone.

10. These proceedings were commenced following an application for leave on the 9th July, 2007 and they were grounded on the affidavit of Ms. Niamh Moriarty, the solicitor for the applicant, sworn on 5th July, 2007. A short affidavit supportive of what the applicant's solicitor says was sworn by the applicant. It is terse and goes into little or no detail as to the state of mind of the applicant. A statement of opposition was filed on the 27th November, 2007 and subsequent to that an affidavit was sworn by Mr. Gerard Meaney, the State Solicitor for County Kilkenny and duly filed.

11. The law in this area has been visited on a number of occasions by the Supreme Court and one is indeed grateful that matters have been clarified. One thinks in particular of the seminal judgment of Kearns J. in *P.M. v. DPP* [2006] 3 I.R. 172 and as good fortune would have it a decision, was handed down only this week, by the Supreme Court in the case of *Devoy v. The Director of Public Prosecutions* [2008] I.E.S.C. 13. The matter has again been clarified and this is of great assistance to this court in approaching this type of case.

12. Referring to *P.M. v. The Director of Public Prosecutions*, Kearns J. summarises the material principles in his decision in *Devoy v. The Director of Public Prosecutions* and at page 14 of his judgment and he says as follows:

> "The principles governing prosecutorial delay in Irish Law have been laid down in a number of Irish cases including *P.M v. Malone* [2002] 2 I.R. 560 and *P.M. v. The Director of Public Prosecutions* [2006] 3 I.R. 172 and may be summarised as follows:-
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> (a) Inordinate, blameworthy or unexplained prosecutorial delay may breach an applicant's constitutional entitlement to a trial with reasonable expedition.
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> (b) Prosecutorial delay of this nature may be of such a degree that a court will presume prejudice and uphold the

right to an expeditious trial by directing prohibition.

(c) Where there is a period of significant blameworthy prosecutorial delay less than envisaged at (b) and no actual prejudice is demonstrated, the court will engage in a balancing exercise between the community's entitlement to see crimes prosecuted and the applicant's right to an expeditious trial but will not direct prohibition unless one or more of the elements referred to in *P.M. v. Malone* [2002] 2 I.R. 560 and *P.M. v. The Director of Public Prosecutions* [2006] 3 I.R. 172 are demonstrated.

(d) Actual prejudice caused by delay which is such as to preclude a fair trial will always entitle an applicant to prohibition."

13. It seems to me that there are a number of features in this case to which one must attend. In the first instance, some fourteen and a half months passed from the date of the complained of act and the initial arrest of the applicant and the laying of the against him of the charge. Nearly five years elapsed from the date of the alleged incident and the commencement of the first aborted trial. Nearly six years elapsed when we get to the time at which the second attempted trial had to be abandoned. We now stand at a remove of almost seven years from the date of the alleged offence and apart from the incident brought about by the unfortunate illness of the applicant's mother, none of the delay in this case can be laid at the applicant's door.

14. I am satisfied that much of the delay in this case was caused by the unfortunate reality of over-crowded court lists. These are matters which must count against the State but in fairness these are neutral factors, and one has to be conscious of the fact that they are, unfortunately, a feature of life where indictable offences are dealt with on circuit in what one might term country venues. I also take account of the fact that some of the delay in this case was caused by the judicial review proceedings taken by the applicant's co-accused.

15. It could have been the case that the prosecution could have proceeded individually against the applicant. Ultimately, the prosecution did so against the co-accused. However, a policy decision to try both together was arrived at locally rather than in the office of The Director of Public Prosecutions and this position obtained up to the time that the applicant commenced his judicial review proceedings.

16. I have read the book of evidence and given the overall circumstances of the alleged offence and the manner in which it was alleged it was committed, it is, in my view, difficult to disagree with the decision to try the two accused jointly. There is, after all, an admission of an act of sexual intercourse, qualified, as I have already noted. There was substantial evidence as to the mental and personal fragility of the alleged victim. There was also the matter of the decision of the learned trial judge where applications for separate trials were refused.

17. I do not think this case is in the same league as in the decision of the late O'Leary J. in *Guihen v. The Director of Public Prosecutions* [2005] 3 I.R. 23. The nature of the case and the timeline involved are quite different. It seems to me that Ms. Phelan is correct in saying that, if anything, the State has complied with such strictures as can be gleaned from O'Leary J.'s decision. I should also note that I take account of the fact that there were two adjournments, as I say, one at the behest of the co-accused and one at the request of the State.

18. Such delay as arose in this case, therefore, was significant. It is not of the scale as envisaged by Finlay C.J., in *The Director of Public Prosecutions v. Byrne* [1991] 2 I.R. 236 which would effectually scream out a violation of the applicant's constitutional right to an expeditious trial. But, is there significant blameworthy delay on the part of the prosecution of a lesser degree but to such extent as to trigger the balancing exercise as envisaged by the Supreme Court?

19. One has to consider the various aspects of the delay and where fault, if any, should lie. As I say, the over crowded court lists contributed to the overall delay and to some extent should count against the respondent but would not, in my view, in the circumstances of this case, amount to sufficient blameworthy delay. I must be mindful of the reality of the criminal court lists.

20. As already observed, fourteen and a half months passed between first arrest and charge. There has been no real attempt by the applicant to identify what the norm ought to have been. This is a matter that is canvassed by Kearns J. in *Devoy v. The Director of Public Prosecutions* and the reality is that the applicant should make some effort to point to what the appropriate time scale for the bringing of these proceedings should be. This was a criticism levelled against the applicant's case by Ms. Phelan. It is somewhat ironic that, having so criticised Ms. Boyle S.C., Ms. Phelan then proceeded to say that 14 and a half months was perfectly normal without any supportive evidence. How do we know?

21. Ms. Phelan argued that this was a complex case. I do not agree. It was not complicated in the sense intended to be conveyed. The book of evidence comprises of 24 witnesses, including Dr. Ryan. The garnering of this evidence would not appear to have presented any major challenge to the skilled investigating gardaí. The factual matrix could scarcely be more limited. Undoubtedly, the case is complex in the sense that counsels' forensic skills would have to be to the forefront and seriously engaged in the conduct of both prosecution and defence. But this in itself would have no bearing on the investigation. In the absence of any guideline as to what an appropriate time scale would be, and even being reasonably generous to the prosecution, the unexplained fourteen and a half months delay in charging the applicant is, in my view, excessive. In the absence of a suggested timeline taking all matters into account, including the admission of the sexual act or acts and the nature of the evidence involved and allowing the matter to be considered by the Director of Public Prosecutions, in my view, a period of culpable delay is to be identified in the delay in charging the applicant. This, in turn, infects the lesser periods of culpable delay which occurred.

22. The fact that delay was not raised before the learned trial judge, should not in the circumstances of this case militate against the applicant. I take account of the pressures and the duty imposed upon counsel in conducting of the defence. Decisions as to what applications to make, when to make them and the nature of such applications are matters that are uniquely within the purview of the trial counsel. These are tactical decisions which one should be slow to scrutinise at a remove from the "heat of battle". I would incline to accord great latitude to counsel as to when matters such as applications of this nature should be made or whether the issue of delay should be raised before the trial judge. I certainly would not seek to preclude this applicant from complaining of prosecutorial delay in judicial review proceedings solely on the grounds that that issue had not been raised earlier. It would, of course, be more convenient had that been done.

23. I am satisfied that the applicant has established culpable delay but I now have to address the question of whether or not there is a real and serious risk that the applicant will, in the fullness of time, not face a fair trial. I have to engage now in the balancing exercise and I have to identify any area of prejudice which might trump the right of the public to prosecute offences.

24. In this case the reality is that stress and anxiety, which are identified in the authorities as being matters which are capable of being prejudicial to an applicant, constitute the principal prejudice to which the applicant points. In the context of prejudice, reference was made to the fact that a jury member knew the family of one of the parties. Further, since the matter has so often come before the courts in Kilkenny it would be impossible to get a fair trial because everyone knew about the case. I do not accept either proposition. One could make the same assertion with virtually any country/circuit venue outside Dublin. People do tend to know each other, and some cases may have a certain notoriety. It's a matter for the learned trial judge to regulate the proceedings, issue appropriate warnings where required and assess whether these matters should proceed. In extreme circumstances, of course, this court is available to prohibit a trial. The fact that somebody on the jury knew a particular family is the sort of occasional occurrence that from time to time will arise. Anyhow, the problem was identified. I should observe that that was not the reason for the discharge of the jury. It was the extraneous material exposed to the jury which caused it.

25. The stress and anxiety in this case is deposed to not by the applicant, but by the applicant's solicitor and while there's nothing improper in this, I simply cannot glean from the evidence before me that the stress and anxiety complained of by the applicant, is any greater than that which would understandably be suffered by any person facing serious criminal charges, any serious criminal charge. There was at one stage reference to a medical report which never materialised. The potential assistance this might provide has been referred to by this court and the Supreme Court. One would welcome the intervention of a medical expert. It cannot be beyond the wit of man if somebody alleges he or she is suffering from overwhelming stress and anxiety to obtain a medical report. The absence of one does not disqualify the applicant from making the case but it seems to me there is nothing from which I can hold that what this applicant is suffering is necessarily greater than the norm and the norm indeed would be great for any presumed innocent person facing a charge of this particular nature. So, I'm not satisfied that the level of stress and anxiety in this case is more potent than that which would ordinarily and understandably be experienced by an innocent person facing this charge.

26. The applicant does not leave matters there. The applicant relies on the decision of O'Neill J. that I understand is under appeal, in *D.S. v. The Director of Public Prosecutions* (Unreported, High Court, O'Neill J., 16th October, 2006) and he points to the fact that there were two trials in the *D.S.* case and for that reason O'Neill J., for detailed reasons he set out in D.S. decided to prohibit the trial. But it seems to me, this is not a case of the same colour at all because there has been no trial in this case to date and the public's right to prosecute has not yet been vindicated. There has not been, if I might use a colloquialism, "a bite of the cherry" at all and I think the views of O'Neill J. were clarified in the short ex-tempore judgment that he delivered in the case of *Michael McGealy v. The Director of Public Prosecutions* [2007] I.E.H.C. 472, when someone sought to rely on the principles in *D.S.* in his judgment O'Neill J says:

> "The applicant seeks to rely on the case of *D.S. v The DPP*, (Unreported, High Court, O'Neill J., 16th of October, 2006).
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> The applicant stresses various passages in that judgment and says that the inherent dangers of repetitive clauses referred to in that Judgment apply here. I disagree with the applicant in such regard. The essence of the *D.S.* case is a balancing of two competing rights; 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.
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> The core principle is that the public have to have 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 *D.S.* the applicant faces similar offences in relation to two other complainants. As of this point in time the public's right to prosecute has not been fully vindicated yet. Cases similar to *D.S.* are rare where there are two jury disagreements after two satisfactory jury trials."

27. I think, that eloquently identifies the situation in this case. There has been no vindication of the public's right and accordingly I reject that argument advanced on behalf of the applicant.

28. Finally, there is the matter of the European Court of Human Rights. Of course, the fact that the convention is part of domestic law is most certainly an added spur, or an incentive to supplement the already strenuous constitutional and common law protections to accused persons to make sure there are speedy and expeditious trials. But as identified by Fennelly J in the *T.H.* decision, rather than intervening directly in the criminal process in this country, the European Court of Human Rights in some circumstances would afford a remedy in damages as was the case in the *Barry* case. But, I think, the applicant is perfectly correct to point to this added and reinforced commitment, to ensure that persons get fair and speedy trials.

29. In all the circumstances of the case, therefore, I must dismiss the application and I refuse to prohibit this trial.