

**THE HIGH COURT****JUDICIAL REVIEW****[2016 No. 338 J.R.]****BETWEEN****T.C****APPLICANT****AND****DIRECTOR OF PUBLIC PROSECUTIONS****RESPONDENT****JUDGMENT of Mr. Justice White delivered on 24th November, 2017**

1. The Applicant sought leave to apply for judicial review on 14th June, 2016, to prevent by prohibition or injunction his prosecution on offences of indecent assault which are alleged to have occurred between the years 1964 and 1984. The application for leave was heard on 3rd, 13th and 14th June 2016, when the court refused the application for leave. On appeal, the Court of Appeal, on 21st December, 2016, granted leave and remitted the matter for mention to the High Court.

2. The original application was grounded on the affidavit of Niall O'Connor, Solicitor, of 18th May, 2016, exhibiting the charges preferred against the Applicant and the book of evidence served on him. Mr. O'Connor deposed a further supplemental affidavit on 26th May, 2016, exhibiting a medical report from the Applicant's general practitioner. The Applicant deposed an affidavit on 12th June, 2016, confirming his medical condition. The Statement of Opposition was filed and served on 20th February, 2017. Brian McLoughlin, Principal Officer of the Respondent deposed a replying affidavit on 20th February, 2017. Niall O'Connor on behalf of the Applicant deposed a further affidavit on 24th March, 2017, exhibiting up to date medical evidence.

**Background to the prosecution**

3. The Applicant is a bachelor who has resided all his life at a farm in the North East. He is now 80 years of age. He lived on the family farm with his mother, M.B who died on 4th July, 1994. His nephews and nieces visited regularly when they were young

4. His nephews P and F K made a complaint to An Garda Síochána in early 2011. F made two statements to An Garda Síochána, the first on 1st and 2nd March, 2011 and the second on 9th March, 2011.

5. On 17th August, 2011, a file was sent to the Director of Public Prosecutions on the investigation of allegations of indecent assault by the Applicant on P.K and F K. The Director of Public Prosecutions on 29th September, 2011 directed no prosecution.

6. Further complaints against the Applicant were made in August 2014 by members of the H family. Eight members of that family, all nephews and nieces of the Applicant gave statements to An Garda Síochána alleging that they had been sexually abused by the Applicant over a period of time.

7. The first statement of complaint was made by M.H and D. H who made statements of complaint in August 2014. Subsequent statements were made by M H on 17th September, 2014, P H on 18th September, 2014, C.B (nee H) on 20th September, 2014, A.H on 20th October, 2014, M.L(nee H) on 20th October, 2014. G H made a statement of complaint on 10th November, 2014.

8. The Applicant was first arrested on 4th May, 2011 and questioned about the allegations of P K and F K and a memo of interview was recorded on 4th May, 2011. The Applicant was arrested again on 19th December, 2014, arising from the allegations of the H family. He was interviewed about these allegations and a memo of interview was recorded.

9. On 17th April, 2015, the Respondent received a second investigation file from the gardaí in respect of the allegations of indecent assault on eight members of the H family. Brian McLoughlin, the relevant official deposed that his file also had statements from other witnesses who gave accounts which supported the surrounding details given by the complainants about a family meeting and about schools attended. The gardaí were notified by the Respondent to put the Applicant on notice that she was reviewing the decision not to prosecute on the K allegations. On 23rd September, 2015, the Applicant attended voluntarily at his local Garda Station and in the presence of a solicitor was asked some further questions which were recorded by memo of interview. On 5th November, 2015, the Respondent directed that the Applicant be tried on indictment for the alleged offences.

10. The time span of the alleged offences and their number are set out as follows:-

- (i) Eight allegations of indecent assault on G.H between 1st January, 1964 and 31st December, 1965.
- (ii) One allegation of indecent assault on M.L (nee H) between 1st March, 1967 and 3rd March, 1969.
- (iii) Six allegations of indecent assault on P H between 1st January, 1968 and 30th September, 1973.
- (iv) One allegation of indecent assault on C.B (nee H) between 1st January, 1969 and 31st December, 1970.
- (v) Eight allegations of indecent assault on M H between 1st October, 1971 and 30th September, 1973.
- (vi) Ten allegations of indecent assault on D H between 1st April, 1974 and 30th September, 1976.
- (vii) One allegation of indecent assault on A H between 1st May, 1976 and 1st September, 1976.
- (viii) 28 allegations of indecent assault on P K between 1st January, 1978 and 31st December, 1984.
- (ix) Eighteen allegations of indecent assault on F.K between 1st June, 1978 and 31st December, 1982.

These complaints ranged over a period of 20 years from 1st June, 1964 to 31st December, 1984.

11. The K complaints were made on 28th February, 2011, 26 years after the last date on the charges and the H complaints were made in August 2014, approximately 30 years after the last complaint on the charges.

12. These allegations range over a substantial period of time and are very old complaints. They are very serious, alleging indecent assault on close family members, nephew and nieces when they were children over a lengthy period of time and with some frequency. There is an important public interest in an accused person facing charges of that scale and frequency.

13. In 2003, D.H. a member of the H family, called a family meeting when the whole family met, and discussed the issue of sexual abuse and agreed to confront the Applicant, which they did. The members of the family who subsequently made complaints in 2014 were mature adults in 2003, and there does not seem to have been any impediment at that time to the making of complaints to an Garda Síochána. The Applicant would have been 66 at that time, and probable in much better health.

14. The charges present significant challenges to the Applicant in his defence because of the time span of the allegations and their antiquity. There is no statute of limitations in Irish law for the prosecution of these types of crime.

#### **The Medical State of the Applicant**

15. The medical evidence furnished to the court was deposed in the affidavit of Niall O'Connor, Solicitor, on 24th March, 2017, exhibiting the medical report from Prof Brian Hennessy, Consultant Medical Oncologist at Our Lady of Lourdes Hospital, Drogheda and a letter of 27th February, 2017, from Dr. Niamh Murphy, Consultant Cardiologist at Our Lady of Lourdes Hospital, Drogheda. His GP in a report of 22nd May, 2016, also referred to the Applicant's significant deafness. There are some issues arising in relation to loss of memory but these have not been confirmed by expert medical opinion.

16. The Applicant has been diagnosed with bowel cancer. He was diagnosed in 2014 and deemed not fit for chemotherapy. In 2015 he was diagnosed with lung spread from his cancer and this was discussed at a multidisciplinary medical conference in October 2015 where the consensus view was that he be managed by the palliative care team. His present diagnosis is of metastatic bowel cancer which is an incurable and terminal disease. He has had two C.A.T. scans approximately six months apart, the most recent being in late 2016 which revealed some progression of the areas of lung spread from his cancer. It is not possible to give an exact life expectancy but in general metastatic bowel cancer would be associated with a life expectancy at best measured in a short number of years and possibly less than this of somebody who is being managed by palliative care without chemotherapy.

17. Dr. Murphy in her report indicated that he was managed on an annual basis for his cardiac condition but this would not generally affect his general prognosis.

18. The Applicant has alleged pre-complaint delay and also prosecutorial delay. The prosecutorial delay arises from the original date of complaint of F and P K on 28th February, 2011, to 5th November, 2015, the date of directions to charge, a period of four and a half years. There is no doubt there has been prosecutorial delay in the K cases and substantial pre complaint delay on all charges. The Applicant alleges general prejudice and also specific prejudice as his mother, M died on 4th July, 1994 who lived in the family home with him during all of the periods when sexual abuse is alleged. In the affidavit of Niall O'Connor, he refers in particular to statements of F K and P K in respect of specific incidents on which his mother M B's evidence would have been relevant.

19. Detailed submissions have been furnished to the court on behalf of the Applicant and a number of substantial judgments opened. Likewise, the Respondent had furnished written submissions to the court and relied on substantial case law.

This Court dealt with the issue of substantial delay in the prosecution of allegations of sexual assault and the issue of general prejudice and individual prejudice, in a judgment *JH v DPP* of 29th July 2016, [2016] IEHC 509, The Court noted the developing jurisprudence of the Superior Courts indicating that these matters are more appropriately dealt with at the trial rather than by prohibition. In that case the Applicant was a younger man and in good health. The judgment stated at paras 26 to 31 as follows

26. "The jurisprudence of the Superior Courts would now indicate that these are matters more appropriately dealt with at the trial process itself rather than by way of prohibition.

27. This has been aptly demonstrated in two recent decisions, the first being a High Court decision of O'Malley J. of 6th September, 2013, in *P.B. v. Director of Public Prosecutions* [2013] IEHC 401, and the second by the Court of Appeal decision of *M.S. v. Director of Public Prosecutions & Ors* (judgment of Hogan J. delivered on behalf of the court on 22nd December, 2015) [2015] IECA 309.

28. In the *P.B.* case, the applicant sought injunctive relief in respect of a prosecution of 67 counts of indecent assault dating back to 1965.

29. At para. 59 of her judgment, O'Malley J. stated:-

"The point of the decision in *S.H.* and the authorities that followed is that the difficulties caused to a defendant in cases of old allegations (and I do accept that there can be very real difficulties) are best dealt with in the court of trial. Trial judges are now accustomed to dealing with such cases and using such powers as are necessary to prevent injustice to accused persons. It is perfectly clear that a trial judge is not restricted to simply giving warnings to the jury but may, where necessary in exceptional cases, withdraw the case from the jury on the basis that the difficulties for the defence are such that it is not just to proceed. Such a decision, in the normal course of events, will often be better taken in the light of the evidence as actually given rather than as speculated about in judicial review proceedings."

The Court of Appeal decision of *M.S.* related to the application of an 83 year old man charged with a multiplicity of allegations of assault by 22 separate complainants over a period on various dates between 1964 and 1991, where the oldest of the allegations were 40 years before the date of charge in 2012. The court declined to prohibit the trial.

30. Historically there were certain concerns that a trial judge was prescribed from withdrawing a case from the jury on grounds of either general or specific prejudice to an accused where the allegations were of considerable antiquity, on the basis that it was more appropriate to seek to prohibit the trial.

31. There is now much greater emphasis on the role and onus on the trial judge to ensure that if this type of prejudice arises, he or she can withdraw the case from the jury and that that decision is better taken in the light of evidence tendered at the trial rather than as speculated on in judicial review proceedings."

20. The Applicant has raised the possibility of actual prejudice arising. This Court in *J.H.* approved the statement of O'Malley J. in *P.B. v. Director of Public Prosecutions* that these matters were best dealt with the court of trial and also confirmed a wide discretion vested in a trial judge to ensure that an accused person receives a fair trial.

21. The Applicant submits that "the omnibus "principle applies. Counsel for the DPP submits that it is no longer applicable and the Court should deal with each issue in isolation At para 50 of the Applicant's submissions it states,

"The Applicant also relies on the dicta of the Supreme Court in *P.T. v. DPP* [2007] IESC 39, where although the Applicant was unable to show specific prejudice, nonetheless he obtained an order of prohibition primarily because of his age and state of health. The court acknowledged that there may be cases of an exceptional nature where it would be unfair and unjust to put the accused on trial. Relevant factors identified by the court included a lengthy lapse of time, old age, the sudden emergence of extreme stress in consequence of the charges, beyond that associated with the enormous stress that a person would feel when facing a criminal offence and lastly severe ill health. This approach was adopted by Charleton J. in *Eamonn K v. His Honour Judge Moran & DPP* (Unreported, 5th February, 2010). In that regard, the Applicant in the within proceedings points to the medical reports in relation to his terminal poor health, his declining memory and antiquity of the alleged offences, the lack of specificity as to the alleged circumstances, a lapse of time between the interview in the decision to bring charges.

22. The Applicant further relies on the dicta in *B. v. DPP* [1997] 3 I.R. 140, when Denham J. stated at p. 195:-

"The community's right to have offences prosecuted is not absolute but is to be exercised constitutionally, with due process. If there is real risk that the applicant would not receive a fair trial then, on the balance of these constitutional rights, the applicant's right would prevail."

23. This Court would generally be very reluctant to prohibit a trial on such serious charges where there is an overwhelming public interest that this trial should take place. However, the court does accept that the omnibus principle which the Court does not generally favour, still applies. There are exceptional circumstances where a court should intervene to prohibit a criminal trial.

24. Very exceptional circumstances arise in this case. The Applicant is 80 years of age. He is terminally ill with bowel and lung cancer. His medical professionals have advised that intervention is not warranted except with palliative care. They cannot predict the date of his death but have given a reasoned opinion that it is best measured in a short number of years and possibly less. In addition the Applicant has other general health problems which would not ultimately prevent his trial but he has poor hearing and possible memory loss. The antiquity of some of the alleged offences is also exceptional, and while delay on its own would not prevent the trial, a significant portion of the delay could have been avoided if complaints had been made by the H family after their meeting in 2003 when the behaviour of the Applicant was discussed. While the public interest would strongly dictate that the prosecution should continue it is the view of the court that in all the circumstances, due to the exceptional circumstances of this case the court should prohibit any further proceedings in the trial of the Applicant.