Neutral Citation Number: [2009] IEHC 310

THE HIGH COURT

JUDICIAL REVIEW

2008 743 JR

BETWEEN

DENIS O'CALLAGHAN

Applicant

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Judgment of Mr. Justice Hedigan of the 1st day of July, 2009

Background

1. The applicant, who is charged with burglary and sexual assault arising out of an incident which occurred in Skibereen in County Cork on 13 November 2004, seeks a permanent injunction to restrain the respondent from taking any or any further steps in the prosecution of the applicant.

2. On 6 July 2006, the Circuit Court determined that the applicant was not fit to plead to the charges and adjourned the matter for mention during which time the applicant was to be examined by an approved medical officer. That examination was carried out by Dr. Harry Kennedy, Clinical Director of the Central Mental Hospital, who duly produced a Report dated 26 July 2006 wherein Dr. Kennedy expressed the view that the applicant was fit to plead. The matter was adjourned on a number of occasions from October 2006 to 22 November 2007 when the respondent entered a nolle prosequi and subsequently commenced fresh proceedings against the applicant some four months later on 25 March 2008.

3. The applicant claims that the bringing of fresh proceedings against him following the entry of the *nolle prosequi* was unfair and that the trial should be stopped.

The applicant's submissions

4. The applicant placed great emphasis upon the decision in *State (O'Callaghan) v. Ó hUadhaigh* [1977] IR 42. That case provides authority for restraining a prosecution where the Director has acted or would be acting oppressively or unfairly in his prosecutorial function. The Central Criminal Court had ruled that, in the case of an indictment containing ten counts, only one count was properly before the court. The DPP thereupon entered a *nolle prosequi* in regard to all of the counts. The prosecutor was then re-arrested and charged in the District Court with the same offences. In making absolute conditional orders of prohibition to prevent the District Court proceeding with the renewed charges, Finlay P, as he then was, said at pp. 53–54 that: -

> "If the contention of the respondent is correct the prosecutor, having undergone that form of trial (and a remand awaiting trial) and having succeeded in confining the issues to be tried, would be deprived of all that advantage by the simple operation of a statutory power on the part of the Director of Public Prosecutions. In this way, the prosecutor would have the entire of his remand awaiting trial set at naught and he would have to start afresh to face a criminal prosecution in which the prosecution, by adopting different procedures, could avoid the consequences of the learned trial judge's view of the law."

5. Counsel for the applicant argues that if the fresh prosecution is not restrained, the applicant will effectively lose the benefit of the finding of unfitness to plead reached in the last trial and is thereby prejudiced by the actions of the respondent in entering the *nolle prosequi* and the bringing of a fresh prosecution.

6. The applicant also alleges that counsel and solicitor acting for the respondent and Prof. Harry Kennedy of the Central Mental Hospital engaged in a private meeting wherein they discussed the contents of the Report prepared by Prof. Kennedy at the behest of the Court. The applicant contends that as a result of that meeting, a tactical decision was made by the respondent to enter a *nolle prosequi* or effectively "take the case away from" the trial judge. Counsel for the applicant says that this was a tactical manoeuvre on the part of the respondent which had the effect of wrongfully depriving the applicant of an opportunity to challenge the Report of Prof. Kennedy and depriving the trial judge of an opportunity to continue to deal with the case.

The respondent's submissions

7. In relation to the fitness to plead issue, the respondent made the point that as a person's mental health can improve or deteriorate with the passage of time, a person's fitness to plead can not be said to be static and it may in fact fluctuate over time so that a person judged unfit to plead on one occasion may be found on a later occasion to be fit to plead. Counsel for the respondent referred to Anne Marie O'Neill's textbook, *Irish Mental Health Law* (2005: First law), wherein she set out a helpful description of the position prior to the enactment of The Criminal Law (Insanity) Act 2006 in relation to the burden of establishing the accused's fitness or unfitness to plead. Adopting the arguments therein, the respondent submits that where the accused alleges that he is unfit to plead, he must prove that to be the case and the standard of proof is on the balance of probabilities. However, if the prosecution allege that the accused is either fit or unfit to plead, they must prove their contention beyond a reasonable doubt. The Act of 2006 is silent on who bears the burden of proof.

8. Counsel for the respondent referred to two helpful decisions on the circumstances in which a fresh prosecution will be

halted in cases where a *nolle prosequi* had been entered. The first case referred to in this regard was *O'C. v Judges of Dublin Metropolitan District* [1994] 3 I.R. 246 where O'Hanlon J. held that there was no difficulty with the prosecution withdrawing charges while leaving the matter open for renewal at a later date in a case involving rape and indecent assault charges in which the accused's fitness to plead was in issue due to his inability to instruct his legal team. The second case referred to was *Kelly v. DPP* [1997] 1 I.L.R.M. 69 where it was held that in order to succeed in getting an order of prohibition permanently barring a new prosecution, the applicant must prove that the prosecution of the applicant anew would involve such a degree of unfairness as to deprive him of the right to a fair trial.

9. Counsel for the respondent submits that some form of prejudice must be identified by the applicant to demonstrate the unfairness complained of before any order of prohibition could be made and that the applicant has failed to satisfy this test.

Decision
10. The threshold to be met by an applicant for a permanent injunction restraining any or any further prosecution in cases such as this may be described as being very high and the test to be applied by the Court is whether or not there is a real risk of an unfair trial. As Finlay C.J. stated in *Z v. Director of Public Prosecutions* [1994] 2 I.R. 476 ; [1994] 2 I.L.R.M. 481, at p. 506/498: -

> "This Court in the recent case of *D. v. Director of Public Prosecutions* 2 I.R. 465 unanimously laid down the general principle that the onus of proof which is on an accused person who seeks an order prohibiting his trial on the ground that circumstances have occurred which would render it unfair is that he should establish that there is a real risk that by reason of those circumstances… he could not obtain a fair trial."

11. Furthermore, as held by the Supreme Court in *S. v. The Judges of the Cork Circuit Court* [2009] 1 I.L.R.M. 16, the court must exercise its discretion to prohibit a trial with caution, given that the power to make a decision to prosecute has been given to the respondent by the Oireachtas. In the S case, the Supreme Court ultimately dismissed the respondent's appeal and affirmed the High Court order prohibiting the applicant's trial in circumstances where there had been a considerable delay in bringing the matter to a conclusion by the prosecuting authorities. While the applicant was successful in having the trial prohibited, Kearns J. in the Supreme Court emphasised the cautious approach that must be brought to bear on any such applications. Referring to the decision of the Court of Appeal in the case of *R. v. Henworth* [2001] 2 Cr. App. R., Kearns J. said: -

> "…when a serious crime is committed and a clear case to answer as far as a defendant was concerned is established, the clear public interest lies in having a jury decide positively one way or the other whether that case was established."

12. While approaching any question of halting a prosecution with caution, the court may invoke the concept of fair procedures in order to halt a prosecution in particular circumstances as is evident from the Supreme Court decision in *Eviston v. Director of Public Prosecutions* [2003] I.L.R.M. 178. In that case, the court intervened to prohibit a prosecution in circumstances where the respondent had decided, with ample grounds for doing so, not to prosecute Mrs. Eviston in relation to a driving offence. The Director later changed his mind and decided to prosecute after the family of the deceased victim of the accident in which Mrs. Eviston had been involved made representations by letter to the then Minister for Justice. The respondent went on to reverse his original decision not to prosecute without having any new or additional evidence on which to base that decision and having already notified Mrs. Eviston of his intention not to prosecute her. Both the High Court and the Supreme Court readily acknowledged the basic unfairness of allowing a prosecution to be brought in such circumstances. Keane C.J. held: -

> "Viewing the matter objectively, and leaving aside every element of sympathy for the applicant, I am forced to the conclusion that in circumstances where the respondent candidly acknowledges that there was no new evidence before him when the decision was reviewed, the applicant was not afforded the fair procedures to which, in all the circumstances, she was entitled."

13. No such unfairness as identified by the applicant in Eviston is to be found in the instant case. Here, the respondent simply entered a *nolle prosequi,* which he was entitled to do, and subsequently entered fresh proceedings. No representations of any kind were ever made to the applicant in this case that a fresh prosecution would not be brought.

14. In *S. v. The Judges of the Cork Circuit Court* [2009] 1 I.L.R.M. 16, referred to above, the Supreme Court dismissed the respondent's appeal and affirmed a High Court order prohibiting any further trial of the applicant in circumstances where he had already been through two trials and both the High Court and the Supreme Court were satisfied that, viewing all of the issues raised in the case as a whole, there was an abuse of discretion and fair procedures. However, the facts of that case also differ significantly from the facts of the present case. The facts relevant to the prohibition application in the S. case were described by Kearns J. in the Supreme Court in the following terms: -

> "On the scale of gravity of sexual offences… the surviving charges in this case can only be described as being at the less serious end of the spectrum. In so saying I do not ignore the huge distress described by the complainant. However the offences occurred many years ago, mainly between 1993 and 1994 and there has thus been considerable delay in bringing this matter to a conclusion. This court has frequently commented upon the deleterious effects of delay in the context of criminal prosecutions."

15. No such delay has occurred here in the prosecution of these offences. Nor can it be said that the relevant charge in this case belongs in the less serious end of the spectrum on the scale of gravity of sexual offences.

16. I am satisfied that facts in the *State (O'Callaghan) v. Ó hUadhaigh* [1977] IR 42 can be distinguished from the facts of the instant case. In that case, the Court formed the view that the prosecution had entered a *nolle prosequi* for the purpose of avoiding the consequences of a ruling by the trial court in the accused's favour. There is no evidence before the Court upon which I could make such a finding in this case.

17. As regards the applicant's contention that if the new proceedings are not halted, he will lose the benefit of the previous finding of unfitness to plead, I cannot accept that point. The finding of unfitness to plead cannot properly be described as a "benefit" the loss of which gives rise to a prejudice. It is a finding of fact in relation to a persons mental state which, by its very nature, may change over time and be the subject of further applications. As the finding of unfitness to plead cannot be properly or appropriately described as a "benefit" which the applicant can be said to have lost if a fresh prosecution is brought, I can find no evidence of any prejudice to the applicant if the proceedings the subject matter of the application are to go ahead.

18. On the subject of the "secret meetings" alleged to have taken place between the respondent and Prof. Kennedy of the Central Mental Hospital regarding the applicant's case, I can find no fault or wrongfulness on the part of the respondent in any of what is complained of here. The respondent was entitled to have a private meeting with Prof. Kennedy to discuss the contents of his report. There was nothing untoward in that. Furthermore, a copy of Prof. Kennedy's report was furnished to the applicant immediately upon it having been made available. I am not convinced that there is any substance in the applicant's argument that the entry of the *nolle prosequi* was merely a tactical manoeuvre designed to rob the applicant of the opportunity to cross-examine Dr. Kennedy on the basis of his Report. In any event, the respondent was entitled to make the decision to enter a *nolle prosequi* and there is no general obligation or duty on the respondent to give reasons for why it chose to do so.

19. For the above reasons, I can find no grounds to justify the Court in exercising its jurisdiction to prohibit the prosecution of the applicant and consequently I refuse the relief sought.