

**THE HIGH COURT  
JUDICIAL REVIEW**

**[2014 No. 641 J.R.]**

**BETWEEN**

**J.J.P.**

**APPLICANT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**JUDGMENT of Mr. Justice Eagar delivered on the 19th day of January 2015**

1. This is an application by the Applicant by way of Judicial Review for an order of *prohibition* prohibiting the Respondent from prosecuting the Applicant on counts 1 to 64 in Bill of Indictment Number TYP0028 of 2013 before Tipperary Circuit Criminal Court.
2. The grounds upon which this relief is sought can be summarised under the following headings.
  - i. The blameworthy or inexcusable or inordinate prosecutorial delay in the prosecution of the Applicant
  - ii. The second complainant had made a complaint to the Garda Síochána in 2001 that the Applicant had assaulted her in 2001 and the Garda file in relation to the investigation of this complainant has been lost. No prosecution was taken on foot of that complaint and there was a delay in excess of 12 years from the time when the second complainant made her original complaint.

**Background**

3. On the 13th July 2010 the three complainants made complaints of sexual assault with regard to the alleged actions by the Applicant. The Applicant was arrested and interviewed on the 20th April 2011.
4. Counts 1 to 3 in this indictment refer to the first complainant alleging sexual assault on her between the 1st September 2001 and the 30th September 2005. Counts 4 to 25 refer to 22 counts of sexual assault between the 1st April 1996 and the 31st August 2001 relating to the second complainant and counts 26 to 64 relate to 39 counts of sexual assault on the third complainant between the 1st October 1996 and the 30th June 2006.
5. The affidavit of John Fitzgerald, Solicitor grounding the Statement of Grounds states that the Applicant entered into a relationship with the mother of the three complainants in 1994. The three complainants were respectively born on the 4th February 1991 (first complainant), 1st October 1984 (the second complainant) and 21st September 1987 (the third complainant).
6. The Applicant had four children from a previous relationship, two girls and two boys. He and the mother of the complainants had two further children, both boys, between April 1996 and October 2002.
7. In August 2001 the second complainant left home and around that time made a complaint to An Garda Síochána that the Applicant had sexually assaulted her. Garda Sergeant Frances Fitzgerald interviewed the third complainant and the Applicant was arrested and detained and interviewed. Certainly no charges were brought against the Applicant. All the documents relating to the Garda investigation appear to be missing save for a copy of the custody record. Neither the statement of complaint of the second named complainant nor the statement of the third named complainant or the interviews with the Applicant were available.
8. In July 2010 the three complainants made complaints to An Garda Síochána alleging numerous incidents of sexual assault by the Applicant. The Applicant was arrested and detained by An Garda Síochána on the 20th April 2011. There were six interviews in the course of that detention. It is noteworthy that in the course of that detention there were certain admissions made by the Applicant in respect of sexual assaults committed on the third complainant from when she was 10 years of age.
9. The Applicant was charged with the offences in the indictment on the 5th February 2013. The Book of Evidence was served on the 5th March 2013 and on that date the Applicant was returned for trial to Nenagh Circuit Criminal Court.

**Circuit Criminal Court Proceedings**

10. On the 28th January 2014 an application was made by counsel instructed by the Applicant's then solicitor for separate trials in respect of the three complainants. This was refused by the presiding judge, Teehan J.
11. On the 8th October 2014 counsel for the Applicant instructed by the Applicant's then solicitor applied to have the charges prohibited from proceeding or for a direction of Teehan J directing the acquittal of the Applicant. The application was based on the missing evidence and also the delay. In the course of this application reference was made to detailed social worker notes of the Social Work Department in the Mid-Western Health Board for the periods from June 2001 to May 2003 relating to the welfare of the children living with the Applicant and the mother of the complainants and also the second complainant. These disclosed details of what the third complainant had said to social workers and to third parties however it appears from these notes that no complaint was made by the third complainant to An Garda Síochána although it is clear she made many complaints to social worker staff and others.

12. Counsel for the Applicant further indicated that the solicitors for the Applicant had sought details by way of disclosure of the arrest and detention of the Applicant in 2001 and that all that he received was the first page of the custody record relating the detention of the Applicant in 2001.

13. Counsel further indicated that the State Solicitor, Mr O'Brien, had indicated that the complaint was made to Thurles Garda Station in approximately August 2000 and that a Sergeant Frances Fitzgerald began a subsequent investigation and that no Garda investigation file had been located following searches at all the local Garda Stations and the offices of the Respondent. He also said that Sergeant Fitzgerald had been on long term illness and was now retired from An Garda Síochána.

14. Counsel for the Applicant further argued that the defence of the Applicant was prejudiced by the missing file. Further what was contained in the statement of the second complainant in the Book of Evidence appeared to contain longer and more serious incidents. He also referred that it was his instructions that this was the case. He also referred to the prejudice of not having a record of what was alleged to have happened in 2001 and that Superintendent Cogan who was the Superintendent in charge of the area was now deceased.

15. Counsel for the Respondent agreed with counsel for the Applicant in relation to the jurisdiction of the trial judge with regard to making a ruling. However he did state that it would not be appropriate or competent for the Circuit Court to entertain any application in relation to the decision by the Respondent to prosecute the Applicant and that this would be a matter for the High Court. Counsel for the Respondent indicated that the onus was on the Applicant to engage with the facts of the case. The alleged prejudice, if such prejudice is established, must be married to the facts of the case in order to demonstrate that the judge's rulings or directions of the trial judge might be insufficient to ensure a fair trial. Counsel for the Respondent further indicated that the Applicant appeared to have been capable of furnishing instructions in relation to his detention in 2001. He also stated that it was clearly unsatisfactory that the documents were not available.

16. Teehan J ruled in the matter that the onus was on the defence to satisfy the court that there is a reasonable, real and unavoidable risk of an unfair trial for the accused and he was not satisfied that what was submitted was sufficient to demonstrate that this was the case. He did say that if he became satisfied during the trial that there was a real possibility of prejudice arising that he would not let the matter go to the jury.

17. In this judgment I have gone into the details of the arguments made by counsel for both sides and the judge's ruling as it appears to me that part of the role of this court is to review what was put before the Circuit Court bearing in mind that Teehan J. is a very experienced trial judge.

18. On the 9th October 2014 the court was told that the Applicant had changed his legal team and that the trial was adjourned until the 10th October 2014. Then a jury was sworn and trial commenced on the 14th October 2014. Over the following days the second complainant and the third complainant were examined in chief and cross examined by Mr Sheehan on behalf of the Applicant. On day 4 of the trial the third complainant gave evidence and was cross examined by Mr Sheehan. On the 5th day of the trial, the 20th October 2014, the Respondent disclosed to counsel for the Applicant defence material which had not been disclosed previously. This was a report to a Garda McCarthy which was submitted to the Sergeant in charge of Thurles Garda Station with a PULSE indication number indicating that the mother of these three complainants and the third complainant had reported to Garda McCarthy nuisance calls alleged to have been made to the third complainant by her father and her elder sister, the second complainant, suggesting that the third complainant could be taken into care. This document was dated a date in 2003. The Gardai contacted the second complainant and the father of the complainants in this regard.

19. As a result of this disclosure Teehan J discharged the jury on the application of the defence as this would have required further cross examination of the complainants who had already given evidence. The prosecution is now listed for the sittings in February 2015 in Nenagh Circuit Criminal Court.

#### **Delay**

20. The complaint is made by the Applicant of prosecutorial delay in that the second complainant made a complaint in 2001 and the Applicant was only charged in February 2013. Further there was a delay from the complaints made in 2010 to the charging of the Applicant in 2013. A complaint was also alleged in respect of the delay in the three complainants making complaints in 2010 from the dates of the alleged offences.

#### **Prejudice**

21. The Applicant complains that his right to a fair trial has been irretrievably prejudiced on account of the delay coupled with the failure on the part of the Respondent to maintain the original investigation file relating to the complaint in 2001 and that the Applicant is now unable to cross examine her in respect of her statement of complaint made in 2001. He also complains that the death of Superintendent Cogan and the unavailability of Sergeant Fitzgerald has caused significant prejudice.

#### **Statement of Opposition**

22. The first objection of the Respondent to the Judicial Review is on the basis of the time limits set out in O. 84 of the Superior Court Rules (as amended by S.I. 691 of 2011) in that the proceedings had not been brought in accordance with the requirements that an application was not brought within three months of the grounds for applications to arise.

#### **Delay**

23. Explanation was given for the delay in processing the complaints in 2011 as a search had to be undertaken to locate the missing files of 2000-2002 including correspondence between the present investigating Gardai and the Respondent.

#### **Risk of Fair Trial**

24. The Respondent contends that the trial judge had all the necessary powers to ensure that the retrial is conducted with due regard to the constitutional rights of the Applicant.

#### **Prejudice**

25. The Respondent contends that the unexplained delay alone does not ground an application for prohibition in cases arising from the sexual abuse of children and it is necessary for the Applicant to demonstrate prejudice. The Respondent points to the statement made in the course of the social work engagement with the family to deal with the failure to preserve the 2000-2002 Garda investigation.

26. Helpful written submissions were prepared by the Applicant and the Respondent which dealt with in useful detail with the grounds of the Judicial Review. I would first of all deal with the issue of the time limits provided by O. 84 of the Superior Courts (as amended

by S.I. 691 of 2011). It appears that the final disclosure of loss of the investigation file occurred at the trial which commenced on the 8th October 2014 and in those circumstances it seems to me to be reasonable that this application was made within the time limits.

27. It is also my view that it is necessary to look at the prosecution of these cases as three prosecution cases with each of the complainants making complaints. Each of the complainants form a separate and distinct case and the trial judge in instructing a jury must charge the jury on this issue. It appears to me that prejudice may arise in respect of one or more of the complainants and may not arise with another complainant.

28. Complaint is made of the complainant delay by each of the three complainants in respect of their Statements of Complaint in 2010. That is that in making the complaint in 2010 in relation to allegations relating back to the dates of the charges this was an inordinate delay.

29. I am quite satisfied that the decision of the Supreme Court in *S.H. v. The Director of Public Prosecutions* [2006] 3 IR 575 deals with this issue. Murray C.J. (as he then was) referred to the affidavit sworn by Dr. Harry Ferguson who was cross examined on his reports and affidavit and referred to Dr Ferguson's indication from his research that the fact that from the 1930's until the 1980's child sexual abuse was not reported. In summing up Murray C.J. said:-

*"In this case the developing jurisprudence as to delay in bringing a prosecution for offences of child sexual abuse was considered by the court. I am satisfied that in general there is no necessity to hold an inquiry into, or to establish the reasons for, delay in making a complaint. The issue for a court is whether the delay has resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial. The court does not exclude wholly exceptional circumstances where it would be unfair or unjust to put an accused on trial."*

30. I would adopt the conclusions of Murray C.J. (as he then was) where he said:-

*"..no wholly exceptional circumstances arise in this case whereby it would be unfair to put the Applicant on trial.."*

I certainly say that that is the position with regard to the complainant delay in relation to this matter.

31. The decision of the Supreme Court in *P.M. v. The Director of Public Prosecutions* [2006] IESC 22 lays down the issues with regard to blameworthy prosecutorial delay. Blameworthy prosecutorial delay of significance, if established, was not sufficient per se to prohibit a trial but that one or more of the interests protected by the right to expeditious trial must be shown to have been interfered with such as would entitle the plaintiff to relief. In order words the Supreme Court in quoting Kearns J (as he then was) :-

*"The issue to be decided in this appeal is whether, in cases where a considerable period of time has elapsed between the dates of alleged offences and the making of an initial complaint by the victim and where, in addition, there has been blameworthy delay thereafter by the prosecution, the trial should be prohibited by reason of that blameworthy delay alone, or whether the accused person should also be required to demonstrate that some interest protected by the right to an expeditious trial has been so interfered with as to entitle him to the relief sought."*

I adopt the conclusions of the decision in this case on the basis of blameworthy prosecutorial delay.

The next item I will deal with is the Applicant's complaint that his right to a fair trial has been irretrievably prejudiced on account of the failure on the part of the Respondent to maintain the original investigation file relating to that complainant in 2001. With great reluctance I find that the loss of the statement of complaint of the second complainant together with the responses of the questioning by the Applicant (at his first arrest) gives rise in my view to a real or serious risk of an unfair trial the statements made by that complainant together with the response made by the Applicant are not available to the defence for cross examination of the complainant.

32. However different issues arise in relation to the first complainant and the third complainant. The only complaint levelled by the Applicant in relation to the first complainant was that of the delay in her coming forward to make a Statement of Complaint and I have already ruled that that issue cannot succeed on the part of the Applicant.

33. I say in relation to the third complainant that there is sufficient material in the social work notes to provide for the proper cross examination by the Applicant of this complainant. It is also worthy of note that the Applicant has made admissions of sexual assault on the third Applicant from the time that she was 10 years of age to a time when she was 17 years of age. I would like to refer to *S.A. v. The Director of Public Prosecutions* [2007] IESC 43 a Supreme Court Judgment of the 17th October 2007 in relation to an appellant's appeal against the judgment of the High Court where the appellant was refused relief to seek to prohibit a trial. Hardiman J stated:-

*"Although the periods of delay in this case are very long, there are certain features which tend to mitigate their effect. The appellant gave extensive interviews to members of An Garda Siachana and, as the learned trial judge (O'Neill J) has found, these appear to demonstrate that his memory is functioning and accurate and that he shows quite a marked instinct for precision. There is another aspect to these interviews as well."*

*In the course of interviews with the gardai the Applicant is alleged to have made certain admissions. These are admissions to actions which would amount to indecent assault (now described as sexual assault) but do not extend to the crime of buggery, which he stoutly and consistently denied. The conduct to which he admitted, which was in the nature of inappropriate touching, occurred, he said, "in moments of human weakness". He also said, speaking of the allegations made against him, that "if the boys have said this, he must accept it, but he has no recollection of it. He must accept what they have said on trust. His memory is not as good as it used to be..something must have taken place".*

Further on Hardiman J said:-

*"It appears to me that these admissions are a significant factor in the present case. Admissions, depending on their context, may vary greatly in their significance on an application like this. An unrecorded and disputed allegation may be of little or no significance unless its terms or context make it very compelling. A disputed allegation of admissions to Gardai will normally be verified by recording... in the present case the admissions do not appear to have been denied or glossed in any way so that it seems reasonable to take them at face value."*

Further on Hardiman J said:-

*"To look at these admissions from another point of view, it would in my opinion be extraordinary to prohibit a trial in circumstances where the defendant admits a significant amount of behaviour of a criminal nature... In those circumstances I do not consider that the demands of justice or the requirement of a fair trial require that the Respondent be prohibited from prosecuting any of the charges against the Applicant."*

I adopt the reasoning of Hardiman J in that case.

34. In those circumstances the Respondent will be prohibited from prosecuting the counts in the indictment 4 to 25 and I refuse prohibition in relation to counts 1 to 3 and 26 to 64 in the indictment.

35. I would make a comment in relation to the time between the complaints of the complainants on the 13th July 2010, the time it took for the Applicant to be arrested and interviewed on the 20th April 2011 and in particular the time it took the Respondent's office to direct the prosecution of the Applicant (on the 31st August 2012) and the delay in charging the Applicant in February 2013. There appears to me to be a consistent pattern of delay in directing prosecutions by the Director of Public Prosecutions in offences of historic sexual assault. While the issue of the missing file was undoubtedly a relevant factor, the experience of this court, the Central Criminal Court and the Circuit Criminal Courts are of unreasonable delays on the part of the Director in giving directions in these cases.

36. I would ask that counsel for the Director of Public Prosecutions would communicate these views to the Respondent. Such delays inevitably prompt applications of this nature and there is no doubt that prejudice will almost certainly arise for a complainant and for an accused person having regard to the delay in directing prosecutions. These delays appear to be in cases where there are clear admissions of guilt as well as denial.