

THE HIGH COURT

[2004 No. 640 JR]

BETWEEN

T.O'B.

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Mr. Justice Roderick Murphy dated the 17th day of January, 2006.**1. Background**

1.1 The applicant is seeking to restrain the respondent from taking any further steps to prosecute him for sexual offences which are alleged to have taken place between 24 and 30 years ago.

The applicant is an 86 year old Roman Catholic Priest and former secondary school teacher. On 28th November, 2003, he was charged with certain offences in relation to three male students, two of whom were brothers. There were nineteen accounts of indecent assault on the first complainant at both the swimming pool and the library on dates between 3rd June, 1977 and 1st September, 1981; eleven counts also of indecent assault on the second complainant at the swimming pool between 3rd June, 1977 and 31st January, 1980 and seven counts of indecent assault on a third, the brother of the first complainant, at the swimming pool and library on dates between the 4th September, 1974 and 5th June, 1976.

1.2 A complaint was made at the time of the alleged abuse by a parent of one of the complainants to the principal of the school. The applicant was allegedly referred for counselling.

Complaints were made by the three complainants on and after 4th May, 2002, at a time when the eldest complainant was 40 years old, his brother 38 years old and the third complainant 37 years of age. At the time of the complaints over twenty years had elapsed from the latest alleged assault.

The applicant was interviewed by the Gardaí on 29th June, 2002 and, in the presence of his solicitor on 18th October, 2002.

The applicant was charged with the offences over a year later on 28th November, 2003 and served with a book of evidence on 28th March, 2004. The last disclosure was made by the respondent in November, 2004.

Another priest referred to by one of the complainants as participating in the commission of one of the alleged offences died on 4th January, 1990.

An allegation had been made by one of the complainants in respect to an assault by a caretaker. No charge was preferred in relation thereto.

2. Evidence

2.1 Evidence had been given on affidavit by:

Robert Eager, solicitor for the applicant, who referred to forensic delay and to the difficulty in getting information;

Ruth Yoder, psychologist;

Sergeant Mullaly;

Fr. M. H., who averred to certain complaints by parents at the time of the alleged abuse and to referring of the applicant for counselling;

The three complainants.

Notice of cross-examination was served on Sergeant M., Ms. Yoder and each of the three complainants.

2.2 Sergeant Mullaly was aware of the complainant delay and had completed his investigation with dispatch by September, 2002. Fourteen witnesses statements were taken. The file was sent to the DPP on 11th November, 2002. On 7th January, 2003 the DPP informed him that no charges would be preferred against the caretaker. It was a difficult case and psychological assessment was directed which was not part of the investigation. The complainants returned from abroad.

The requests for disclosure were made to the applicant's solicitor. The waiver of hospital confidentiality which were given in May, 2002 were not relevant to the charges but were provided on 7th July, 2004 after correspondence.

The witness had met the applicant in the presence of Mr. Eager. The applicant understood the procedure each time Sergeant M. had met him on every remand date.

2.3 The first complainant cross-examined had told his mother at the time, when he was twelve. She did not believe him at the time. She had trust in the school and the Church. He felt upset about not being believed.

The complainant said that the delay in complaining to Gardaí was that he wanted to get on with his life and decided, for other reasons of his emerging homosexuality, not to pursue the matter further. He did not want to upset his parents. He felt powerless. He was afraid that his parents would connect paedophilia with homosexuality. He stated that he had a shut-down reaction.

In cross-examination he said that he muddled through, coping academically and professionally but not coping emotionally, and had not overcome the serious effect on his life.

2.4 Ruth Yoder, psychologist, explained the procedure and time taken in interviewing each of the complainants.

She believed that sexual orientation of the first complainant cross-examined was due to his sexual abuse though this was not referred to in her reports. It was a difficult matter in 1980. His reaction with his mother was sufficient to prevent him from reporting the abuse.

She was cross-examined extensively in relation to the younger of the two brothers (born in 1964) who had some learning difficulties. She was unaware that he had had counselling before the alleged abuse. She did not interrogate nor needle the complainant who had manifested shame, guilt and self-blame. He had been unable to report the matter to the Gardaí until the younger brother revealed that he had been abused.

The older brother (born 1961) told Ms. Yoder that he had told his then girlfriend in 1992, and two of his friends in 1998 and 2000, but was concerned about the detail he would have to disclose to the Gardaí. She did not include all matters discussed in her reports. She believed that she had adequate time in her assessment to make the analysis.

On re-examination she said that, while she would change her report to consider the supplemental statement of the brother and include the effect of the abuse on the homosexuality of the second complainant, her conclusions would remain the same.

2.5 The younger brother (born 1964) was cross-examined at length about the complaints he had made against the applicant and against the caretaker, the latter of which was not proceeded with by the Director/respondent. He was afraid, petrified, of the latter, who had followed him once. He did not remember the civil proceedings issued on 13th December, 2002. He had attended a psychologist during his teenage years.

2.6 The older brother (born 1961) was asked only one question, that is why he had made a second statement to the Gardaí to confirm his first statement.

Counsel for the respondent expressed concern at this witness not being cross-examined but being required to be available for several days.

3. Applicant's submissions

The applicant relied on the right to a trial with reasonable expedition and submits that, given the delay in making the complaints that there was presumptive prejudice in relation to his trial.

Moreover the stress and anxiety occasioned to an accused by virtue of the violation of his rights to an expeditious trial was such as to justify the prohibition of further proceedings. The age and medical condition of the applicant is relevant in this context.

Counsel submitted that, in addition to the delay in making the complaints that there was prosecutorial delay. The delay was not referable to the applicants actions. Even if this were so the accused's ability to defend himself has been impaired to such an extent that the trial should not be allowed to proceed. The court should have regard to the totality of the circumstances surrounding the proposed prosecution.

Counsel for the applicant submitted that the court should have regard to all the circumstances, including but not limited to, the following matters:

The undoubted lapse of time, between 23 and 30 years, before the applicant was returned for trial on the alleged offences.

The fact that there was no relationship of dominance between the complainants and the applicant and no communication between the complainants and the applicant after the dates of the alleged offences.

The applicant's at that stage deteriorating mental and physical condition.

The decision not to prosecute the caretaker against whom the first complainant made specific allegation/s of sexual abuse from which the only reasonable inference is that his complaint in that regard was not considered credible.

The actual prejudice arising from the death of the other priest.

The fact that prior to their making complaints to An Garda Síochána both the second and third complainant had discussed the complaints with the first complainant.

The stress and anxiety occasioned to the applicant by reason of the delay.

The presumed prejudice which inevitably flows from the antique nature of the events now sought to be litigated.

It was submitted in the circumstances that the respondent's continued prosecution of the applicant would constitute a breach of his constitutional rights to a trial in due course of law, a trial with reasonable expedition, and basic fairness of procedures and natural and constitutional justice.

4. Respondent's submissions

The respondents identified the key factors of the case as follows:

The applicant was a priest and teacher at the complainants' school and was in a position of dominance over them.

The alleged abuse occurred when the applicant was an adult and the complainants were minors between 12 and 17 years of age.

In addition to the testimony of the three complainants there was also a corroboration provided by relatives and friends of the complainants and, indeed, of the principal of the college who noted a complaint against the accused and who had referred the applicant for counselling.

The death of the other priest, who was allegedly present for one of the alleged incidents would not have been an independent witness but rather a co-accused of the applicant.

The health of the applicant was a matter the court should take into account. The evidence of the Gardaí is to the effect that the applicant appeared in good health and was alert and aware of his dealings with the Gardaí. This is a matter which relates to the fitness to plead which can be dealt with by the trial judge. An elderly person does not enjoy any special immunity from criminal law.

The memoranda of interviews did not suggest that the applicant had any particular difficulty with his memory of the events in question. An associate of the applicant states that while the applicant's memory is still quite good and he can be quite specific about certain past events, he becomes confused when pressed by details.

The memoranda of interview do not contain any express admission of guilt but are ambiguous with regard to the applicant's innocence insofar as when asked if he was denying the allegations he replied "virtually, yeah". He accepted that he had taken photographs of the complainants in their swimwear.

Garda investigation was completed in an expeditious manner. The Director of Public Prosecutions decided to have the complainant psychologically assessed and sought an opinion from counsel. It was possible to deal with the judicial review in a more expeditious manner as a result of this decision.

The applicant did not discharge the burden of proof in showing that there was a real risk of an unfair trial.

The evidence, including the psychological evidence, suggested that the complainants were still suffering from the effects of the abuse up to and including the time when they made their complaints to the Gardaí.

The reasons for the delay were explained by the evidence of the complainants and the impact that that had on them together with the expert evidence of the psychologist. The complainants, in the circumstances of their lives, were inhibited from making a complaint. Both brothers experienced symptoms of post traumatic stress.

The presumption for the purpose of judicial review applications is that the allegations were true. The truth or otherwise of the complainants is to be tested at the trial of the applicant. It is not the task of the expert witness to assess the credibility of the complainant or the guilt or innocence of the applicant.

It is submitted that in relation to prejudice that the applicant had not identified any material or document which would have been available at an earlier stage but which is now missing or identify a single physical location which had altered. At no stage had the applicant referred to any other person who might be in a position to assist him or to whom the Gardaí should speak.

4. Decision of the Court

4.1 The applicant seeks to restrain the Director of Public Prosecutions from taking any further steps to prosecute him for sexual offences which are alleged to have taken place in the late 1970s, up to September, 1981. It is clear from the many cases that the judicial review of prosecutions for such alleged offences on the ground of delay raises contentious issues.

It is clear that the court has to look at the totality of the evidence before it. The court is entitled to presume, for the purpose of this judicial review application, that the allegations are true. The truth or otherwise of the complaints is, of course, a matter to be tested at the trial of the applicant should the court refuse the application for judicial review.

While the applicant's counsel submitted that, in addition to the delay in reporting the complaints, there was prosecutorial delay. Complaints were made in May, 2002; the applicant was interviewed by the Gardaí in June and October of that year and charges were preferred a little over a year later. The delay in the service of the book of evidence until 28th March, 2004 further delayed the matter coming to trial but it does not seem to this Court, having regard to the necessity for a thorough investigation and the need for psychological assessments in relation to the sensitive matters, and in relation to the decision of the DPP not to proceed with charges against the caretaker, that even if this delay were considered to be somewhat inordinate, it was excusable in the circumstances.

4.2 The issue is, accordingly, that of complainant's delay.

The law in relation to complainant's delay has evolved since *P.C. v. D.P.P.* [1999] 2 I.R. 25 2, *P.M. v. Malone* [2002] 2 I.R. 560 and *P.L. v. D.P.P.*, Supreme Court, unreported, 20th December, 2004. In the case of *Malone* the Supreme Court was of the view that a prohibition order could be granted in a case where there had been a long period of delay that where inordinate delay did not jeopardise the accused's right to a fair trial but had caused unnecessary stress and anxiety, the court had to engage in a balancing process between the accused's right to be protected from such stress and anxiety and the public interest in the prosecution and conviction of those guilty of criminal offences. Moreover, in determining whether the concern and anxiety caused to an accused person was such as to justify the prohibition of his trial, the court, depending on the circumstances of the case, might be entitled to take into account not merely delay subsequent to the accused being charged and brought to trial, but any delay prior to the formal charge.

The court has, of course, to distinguish between the level of stress and anxiety caused to an applicant by the notification of complaints and the greater level caused after charges have been preferred.

In *Malone* the complainant's conscious decision, as an adult, not to proceed with her complaint against her brother, the applicant, for reasons which seemed good to her at the time but which were not as a result of dominion exercised over her by her brother, did not constitute an appropriate ground for denying the applicant his right to a reasonably expeditious trial. The Supreme Court held that delay of itself, even where neither actual nor presumptive prejudice to the accused was demonstrated, may be a ground for restraining the continuance of a trial. However, by way of *obiter dictum* the court held that the supposed existence of unexpressed suspicion of criminality could not confer rights cognisable by the law on the suspect.

In *P.L. v. D.P.P.* Fennelly J. argued that no trial could be restrained on the basis of pure delay alone. In *D.S. v. D.P.P.*, Supreme Court, unreported, 22nd June, 2005, Hardiman and Fennelly JJ. agreed with McCracken J. who had rejected the proposition that the passage of time alone would be grounds for the prohibition of a trial.

Clearly, if the delay is referable to the applicant's own actions, then such delay could never be a ground for prohibition of a trial. Such dominion can be presumed in the case of the dominion of a father over his daughters (*B. v. D.P.P.* [1997] 3 I.R. 140 where expert evidence showed that the applicant had exercised such dominion).

4.3 Expert psychological evidence has, as in this case, has been deemed by the Director to be necessary. The expert was subject to

extensive cross-examination in relation to her reports. Moreover, each of the three complainants were cross-examined, two at length, in relation to the delay, the conferring among themselves and the decision to make a complaint about the same time.

In *J.O'C v. D.P.P.* [2000] 3 I.R. 478 the Supreme Court, in a majority decision, refused the order of prohibition of the High Court as, on the facts, there was not sufficient evidence that a result of the delay, the applicant was impaired in his defence to such an extent that there was a real and serious risk of an unfair trial. The applicant had not discharged his onus in that regard. The court found that, on the facts, there was not sufficient psychiatric evidence that the delay in making the complaint was excusable. Hardiman J., though dissenting to refuse the prohibition order, held that it was unacceptable for an expert witness to refrain from exploring other experiences or conditions of a complainant capable of causing or contributing to the factors which were a significant part of that expert's opinion.

The overriding principle would appear to be that, where there is a real or serious risk of an unfair trial, then prohibition should be granted *P.O'C v. D.P.P.* [2000] 3 I.R. 87 and *P.P. v. D.P.P.* [2000] 1 I.R. 403.

Delay can never give rise to an irrebuttable presumption of prejudice which would lead to an unfair trial. Prosecutorial delay is clearly in a different category insofar as stress and anxiety are concerned. This has, however, no application to the present case. Indeed, the right to an expeditious trial would seem only to apply where there is forensic delay as, at that stage, the accused is confronted with a criminal charge. At such stage the age and medical condition of an accused is relevant to the level of stress and anxiety and the real risk of an unfair trial caused by any undue forensic delay.

4.4 While the lengthy lapse of time, before complaints were made does not, of itself, justify prohibition, the issue of dominance is more problematic. There was no communication between the complainants and the applicant after the date of the alleged offences. Nonetheless, Ms. Yoder's evidence was that the complainants, in the circumstances of their lives, were inhibited from making a complaint. Both brothers experienced symptoms of post-traumatic stress. The psychological evidence suggested that the complainants were still suffering from the affects of the abuse up to and including the time when they made their complaints to the Gardaí. This was particularly so in relation to the younger of the brothers who had had learning problems and had been previously referred to a psychologist.

4.5 I have considered the report of Ms. Yoder together with her evidence on cross-examination together with the evidence of the complainants themselves. The court considers that the evidence of the complainants themselves is, of course, primary evidence. In relation thereto the first complainant cross-examined gave credible evidence in relation to his reaction to his mother's disbelief, to his own homosexuality, to the difficulties posed in the early 1980s. It seems to me that his evidence in relation to his inability to cope emotionally as a result of the alleged abuse has contributed to a significant degree in his not reporting the matter.

The elder brother had disclosed the matter to his girlfriend in 1992 and to two friends in 1998 and 2000. He was concerned, nonetheless, with the detail that he would have to disclose to the Gardaí. He complained as a result of his younger brother's decision to complain and, indeed, was supported by the complainant first cross-examined.

The younger brother was confused in relation to the taking of civil proceedings and, indeed, in relation to the caretaker whom he feared.

The reasons given by Ms. Yoder in relation to her assessment of the complainants was based on the answers given to her. It does not seem to me that it is necessary for her to interrogate or cross-examine persons she interviews. Her conclusions seem to me to be reasonable in the circumstances.

Murphy J. in his Supreme Court decision in *J.O'C v. DPP* [2000] 3 I.R. 478 at 488 held in relation to the reporting of child sexual abuse that:

"What is less widely understood was the dominion which a wrongdoer may achieve over his victim and which can survive over a lengthy period of time and that notwithstanding the maturity of the victim and the acquisition of a charged and seared environment by her."

In conclusion, it does seem to me that, while there was no actual dominance of the applicant and the complainants, that the alleged abuse did have a very significant affect on each of the complainants to a varying degree which would appear to justify the long delay in reporting the matter to the Gardaí.

The submission of counsel for the applicant in relation to the decision not to prosecute the caretaker does not appear to me to render his evidence in relation to the applicant less than credible in relation to the allegations against the applicant.

There seems to me to be no actual prejudice arising in relation to the delay, either because of the death of the other priest who may very well have been a co-accused.

Counsel for the applicant raised an issue regarding the complainants discussing the matter among themselves before making their complaints to the Garda Síochána. It does not seem to me that this necessarily lessens credibility. It is, of course, a matter than can be explored in a trial.

The stress and anxiety occasioned to the applicant by reason of the delay can, in my view, be only limited to the forensic delay from the time the applicant was interviewed by the Gardaí in July and September of 2002 but not in relation to the complainants' delay.

4.6 The court is also mindful that the alleged abuse occurred when the applicant was an adult in his late 50s and the complainants were minors between the ages of 12 and 17 and has also considered the effect of the alleged abuse on each of the complainants.

The court also takes into account that there is corroboration provided by relatives and friends of the complainants, one of whom made a complaint to the principal of the college at the time. The court notes the relevance of the affidavit of Fr. M. H. in this regard.

While the court has some sympathy for the applicant in relation to the charges, given his age and health, it is clear that this does not provide any special immunity. The evidence of Sergeant M. does not suggest that the applicant has difficulties with his memory. He was aware of the procedure involved.

In his statement to the Gardaí the applicant had accepted that he had taken photographs of the complainants in their swimwear. While that is, of course, not relevant to any abuse, it places the applicant at one of the places and at the approximate time of the

alleged incidents complained of.

4.7 On balance, it seems to me that the evidence of each complainant as to the reason for the delay was, in the circumstances, justified. If I am wrong in coming to such conclusion there remains a further hurdle for the applicant. The onus is on the applicant to prove affirmatively that a fair trial is impossible. While counsel for the applicant has indicated some difficulties, they fall short of establishing that a trial in these circumstances would not possess the character of a fair trial as required by the Constitution.

It seems to the court that the applicant has not discharged the burden of proof in showing that there was a real risk of an unfair trial.

For these reasons the court refuses the application.