

THE HIGH COURT

2007 1617 JR

BETWEEN

DERMOT SPARROW

APPLICANT

AND

THE MINISTER FOR AGRICULTURE, FISHERIES AND FOOD

AND

JUDGE HAMILL

RESPONDENTS

JUDGMENT of Mr. Justice Sheehan delivered the 1st day of April, 2009

1. In this case the applicant faces two summary charges which are presently pending before Naas District Court. Essentially the applicant seeks to prohibit his summary trial in respect of these offences on the basis of medical evidence to the effect that his health is so precarious that proceeding with the trial will put his life at risk.

Background

2. The applicant is a 66 year old veterinary surgeon who is charged with the following two offences:-

(i) That he did grant or issue an instrument to wit a foot and mouth disease five form so issued on 9th April, 2001, at Jigginstown, Naas, County Kildare, in contravention of s. 49(1)(h) of the Diseases of Animals Acts 1966 to 2001 (as amended by s. 35 of the National Beef Assurance Act 2000) and

(ii) That the applicant did offer an instrument so issued on 9th April, 2001, at Jigginstown, Naas, County Kildare in contravention of s. 49(1)(i) of the Disease of Animals Acts 1966 to 2001 (as amended by s. 35 of the National Beef Assurance Act 2000).

3. These charges arose out of an investigation by agents of the first named respondent, four of whom attended at the applicant's veterinary practice on 18th April, 2001, where they seized documentation and machinery and questioned the applicant. At some point following this encounter with the agents of the first named respondent, the applicant suffered a heart attack and was admitted to the intensive care unit at Tallaght Hospital. The applicant was detained there for ten days. The applicant was subsequently interviewed by agents of the first named respondent at his solicitor's office in Dublin in December, 2001 and on 8th April, 2003, the two summonses were issued returnable for Dunlavin District Court on 27th May, 2003.

4. The summonses were adjourned from time to time and on 25th November, 2003, the issue of the applicant's ill health was raised. Subsequently the 29th and 30th March, 2004, were set-aside for the hearing of the case but these trial dates were adjourned and on 29th March, 2004, the matter was put in for mention on the 28th April, 2004, for the purpose of an up-dated medical report from Dr. David Moore, the applicant's cardiologist.

5. In due course the applicant's trial was again set down for hearing on 3rd and 4th August, 2004, but the matter was further adjourned as a result of judicial review proceedings initiated by the applicant on 26th July, 2004, which resulted in an order wherein the applicant was granted leave to apply for judicial review and a stay in respect of the said proceedings.

6. These proceedings culminated in a judgment of Mr. Justice de Valera, *Sparrow v. Connellan and Anor.* [2006] I.E.H.C. 231, delivered on 22nd June, 2006, in which he found that the applicant was not entitled to an order for prohibition on grounds of delay but was entitled to prohibition against a particular District judge presiding over the trial on grounds of perceived bias. The final sentence at p. 7 of that judgment reads: "[i]n reaching this decision I have considered the arguments concerning the venue for the proposed hearing and the applicant's stated medical condition both of which matters, among others, are matters for the judge eventually assigned to hear this matter".

7. Following this judgment the applicant next appeared at Naas District Court on 20th July, 2006, and the matter was before the District Court again on 20th September, 2006, the 8th November, 2006, the 15th November, 2006, and the 17th January, 2007, on which dated Judge Connellan directed the prosecution to seek a judge for the hearing which he fixed for the 29th and 30th March, 2007.

8. On the 23rd March, 2007, an application was made on consent to Judge Connellan sitting at Bray District Court to have the hearing dates of the 29th and 30th March vacated and the matter was further adjourned by consent on 29th March, 2007, to the 5th June, 2007, and then to the 20th June, 2007, when the case was listed for preliminary hearing for half a day in Naas District Court on 9th July, 2007, before Judge Hamill, the second named respondent in these proceedings.

9. According to the affidavit of Jennifer Clarke, solicitor for the applicant, preliminary matters including the evidence of the applicant's general practitioner, were heard by Judge Hamill on 9th July, 2007, on which date the applicant and the applicant's general practitioner attended at Naas District Court. The applicant's general practitioner attended with cardiac

resuscitation equipment. The applicant was subsequently excused from having to attend court and preliminary matters were further heard on 27th September, 2007. A letter from the applicant's consultant cardiologist furnished to the court stated that it would be seriously prejudicial to the applicant's health were he obliged to attend court in the foreseeable future. The first named respondent was afforded the opportunity to access all medical records and to have the applicant independently medically examined, but he subsequently indicated that he did not wish to do. On 25th October, 2007, the second named respondent made a legal ruling in relation to a preliminary point raised regarding the Disease of Animals Act 1966 (Restriction on Movement of Certain Animals) Order 2001 (S.I. No. 121 of 2001 and s. 49 of the Diseases of Animals Act 1966. On 26th October, 2007, the case was adjourned to 13th November, 2007, in order for the second named respondent to hear the evidence of the consultant cardiologist to the applicant.

10. On 13th November, 2007, the applicant's cardiologist, Dr. David Moore, gave evidence. He first stated in answer to a question from the applicant's counsel that it was difficult to quantify the health risks faced by the applicant. He then stated that the applicant had significant heart problems since 1992, when he first had a heart attack. He further stated that in April, 2001 the applicant suffered severe chest pains and as result of which he was admitted to the cardiac unit in Tallaght hospital. He stated that the applicant had significant coronary artery disease and had unusual complications in this regard. He stated that the applicant had spontaneous dissection, meaning that the internal lining of his heart had torn, that this was a very rare condition in adult males and was strongly associated with intense distress. Dr. Moore said that the applicant was treated and again seen by him in February, 2007 when he noted that there had been a progression of the applicant's coronary disease and that the applicant had developed florid diabetes. Dr. Moore further stated that the applicant was then exhibiting all the signs of an acute stress disorder.

11. When asked if he could explain what might happen if the applicant was to attend court for trial, Dr. Moore stated that, given the unexplained collapses of the applicant, his assessment was that the risk of sudden death was very high. Dr. Moore said that while he could not put a percentage on that risk he was in no doubt at all that this case and associated court appearances had been the cause of stress to the applicant and in his view any further court appearances could result in the sudden death of the applicant. Dr. Moore further stated that when the applicant had been admitted to University College Hospital, Galway, earlier in the year following a collapse, the doctor dealing with the applicant felt that the likely cause of the applicant's collapse was arrhythmia and as a result of this diagnosis a coronary recorder device, commonly known as a pacemaker, was implanted. Dr. Moore stated that there had been no successful recording since that time and explained that a recording would be activated after an event.

12. Dr. Moore was asked if he had been aware of any further collapses since July, 2007. He said that he was not.

13. Dr. Moore also subsequently confirmed in an affidavit sworn on the 29th April, 2008, that he had advised the applicant's counsel that the applicant would not be in a position to give instructions for the purposes of cross examination during a trial, and further confirmed para. 35 of the grounding affidavit of Jennifer Clarke in which she had confirmed medical advice received to the effect that there was a serious risk of a fatal incident occurring if the applicant were to give instructions during the trial.

14. In the course of the District Court hearing relating to the applicant's health, Judge Hamill asked Dr. Moore to comment on the following passage from the judgment of Denham J. in *P.T. v. Director of Public Prosecutions* [2007] I.E.S.C. 39:-

"At present he is quite short of breath on pretty minimal exertion and has great difficulty in moving around. When I last saw him on [the 21st December, 2006,] he had heart failure, but his heart failure is well controlled on his medication. He also suffers quite a bit from stress and given the unstable nature of his cardiac condition, I feel that the stress associated with a criminal trial could have a major effect on his health and possibly precipitate heart failure or acute myocardial infarction."

15. The quotation read by Hamill J. to Dr. Moore is a direct quotation of the medical evidence of a Dr. John Kenny relating to the applicant's health in *P.T.* Replying to Judge Hamill, Dr. Moore stated that the evidence in the applicant's case was more compelling in that he already had a track record of acute cardiac syndrome in relation to the events being considered by the court. He stated that there was a stronger evidence base than that presented to Dr. Kenny, and stated that the risk of the applicant suffering heart failure was 50%. Hamill J. was also told that day (?) that the applicant had bronchitis.

16. Having heard the medical evidence and submissions, Hamill J. put the case back to the following day to consider the matters that had been raised and to give the first named respondent an opportunity to consider his position.

17. The following day, counsel for the prosecutor stated he had no application to make. Hamill J. then gave his ruling stating that having considered the medical history of the applicant in light of the Supreme Court decision in *P.T. v. Director of Public Prosecutions*, he was not satisfied that exceptional circumstances existed as they did in that case, and he proposed to proceed with the trial of the applicant.

18. Shortly thereafter, the applicant instituted these judicial review proceedings, and on the 3rd December, 2007, Peart J. gave the applicant leave to apply for an order of prohibition against the first named respondent prohibiting him from proceeding further with the prosecution of charges against him and, for an order of *certiorari* in respect of the decision of the second named respondent to proceed with the trial. Peart J. also granted a stay on the District Court trial pending the determination of the application for judicial review.

19. The five grounds on which the applicant sought relief all relate to the precarious state of his health and the effect that a trial would have on him.

20. The grounds read as follows:-

1. The wholly exceptional circumstances of the case make it unfair or unjust to put the applicant on trial in that there is a very high risk of sudden death at trial.
2. The very high risk of sudden death at trial in itself constitutes a real risk of an unfair trial.

3. The constitutional right of the applicant for trial in accordance with law is breached in that, his ability to properly defend himself has been severely prejudiced in that this case, and associated court appearances, have been the cause of stress to the applicant and any other further court appearances could result in the sudden death of the applicant.

4. The constitutional right to life of the applicant outweighs the community's right to prosecute, when the applicant already has a track record of acute cardiac syndrome in relation to the events being considered by the District Court, and where the risk of an incident being fatal is approximately 50%.

5. The decision of the second named respondent is irrational and flies in the face of the uncontested and accepted expert evidence of the consultant cardiologist in that, the second named respondent decided:-

(1) To adjourn only on the grounds of bronchitis.

(2) To try to separate the applicant's bronchitis condition entirely from his underlying heart condition.

The applicant also relies on the fact that:-

(3) When the risk assessment of the consultant cardiologist was that any further court appearances could result in the sudden death of the applicant, and,

(4) Having accepted the risk assessment of the consultant cardiologist that the fact the applicant has had more cardiac incidents in relation to the case, means he is more likely to have another one.

Submissions

21. The central submission made by Mr. Hogan for the applicant, was that the un-contradicted medical evidence before the learned District Judge clearly established that if the trial proceeds, the risk to the applicant's health is so considerable that as a matter of basic constitutional fairness the court should intervene to restrain the trial. In reviewing the medical evidence in support of the applicant, Mr. Hogan drew the court's attention to Dr. Moore's response when he was asked at the District Court if there was any difference between the potential problems arising when the applicant was driving and when the applicant was sitting in court. Dr. Moore stated:-

"The answer to that question is based on the applicant's medical history; there is a strong temporal association with this case, both incidents, in April, 2001 and July, 2007 are connected in time with issues concerning this case."

Mr. Hogan also pointed out that the evidence established a further medical incident in February, 2007 related to this case, and that the applicant's willingness to undergo a medical examination by a consultant nominated by the prosecutor had been refused.

22. He invited the court to conclude following an analysis of the Supreme Court judgment in *P.T.*, that the applicant's case was one which was on all fours with this case and this being so, that the District Judge could not have arrived at his decision in a manner which was consonant with the applicant's constitutional rights and in those circumstances this Court should restrain the criminal trial.

23. He further submitted that the dominant factor influencing the Supreme Court in *P.T.* must have been the health of the applicant, and that when one compared the medical evidence of the applicant with that relied on in *P.T.* it followed that the present case was far more exceptional. In the course of his submissions on behalf of the respondents, Mr. Walsh submitted that District Judge Hamill was entitled on the basis of the law and the evidence to come to the conclusion that he did. He referred to the fact that the applicant, despite his health problems, continued to work part-time, give evidence in court cases and continued to drive. He pointed out that the second named respondent had heard the cardiologist give evidence, ask questions in relation to the applicant's ability to drive and took time to consider his decision.

24. He referred to the applicant's affidavit sworn in the first judicial review proceedings, and submitted that this disclosed that the applicant's ability to instruct counsel or have a recollection of events had not been inhibited. Regarding this last point he relied on a detailed account given by the applicant concerning the visit to his premises by four officials from the Department of Agriculture, which subsequently led to the charges being brought against the applicant.

25. With regard to that aspect of the applicant's case which emphasised the stress that would be brought on by a criminal trial, he relied on a passage of the judgment of Hardiman J. in *J.B. v. Director of Public Prosecutions* [2006] I.E.S.C. 66. This was a case involving sex abuse allegations against the applicant, and the prospect of a trial some twenty years after the last date when alleged offences occurred. In that case the applicant suffered, what Hardiman J. described as "an acute stress reaction after being interrogated (perhaps inconsiderately) by the gardaí leading to his admission to hospital for a period of ten days". Mr. Walsh relied on the following further quotation from the judgment of Hardiman J. at pp. 6 to 7 of that case:-

"I am, however, bound to agree with Mrs. Justice Denham that this feature was simply not put far enough on the applicant's evidence to justify granting him relief. There was talk during the District Court proceedings and in the affidavits in these proceedings of comprehensive medical reports from named specialist doctors, but they were simply not put before the Court.

I am far from belittling the stressing effect on a man of seventy, previously of good character, of the sudden production against him of allegations relating to a period up to half a lifetime ago. I am equally aware of the exacerbating effect, in terms of stress and anxiety, of the gradual realisation that, by reason of the lapse of time, there is little enough one can do to rebut these allegations except to deny them. The experience of anyone who has defended or prosecuted such cases leads to the conclusion that there is a practical necessity for the defendant to do more than that, positively to undermine the complainants account, but this will often be impossible or barely possible. The defendant's position is a perilous one, even if he is entirely innocent.

However, as Mrs. Justice Denham observes, there is an element of stress and anxiety inherent in any criminal charge and its mere existence cannot be a ground for preventing a trial. There is an absence in this case, as in many other such cases, of evidence, carrying an allegation of unnecessary stress and anxiety beyond the level of generality and beyond the time of the 1996 hospitalisation. Just how stressful is a criminal trial, compared with other well known stressors? What, if any, is the exacerbating effect of a defendant's age and state of general health, or of the particular difficulties which beset the defence of an old allegation? In what circumstances, if any, can the stress and anxiety prejudice the defence by undermining the capacity, or the affect, of the defendant? These are all factors wholly unexplored in general or on the particular facts of this case. It is by reason of this lack of specificity, lack of engagement to the actual facts, that I would refuse relief."

26. Mr. Walsh then went on to refer to the judgment of Denham J. in *D.P.P. v. O.C.* [2006] 1 IESC 54, where she stated at p.11:-

"[W]hether an application for judicial review is made or not, the trial court retains at all time its inherent and constitutional duty to ensure that there is due process and a fair trial. Thus, in the course of the trial matters may arise, evidence may be given, which renders a trial unfair, or the process unfair. In these circumstances the trial judge retains the jurisdiction of preventing the trial from proceeding. The jurisdiction is exercised in the course of a trial, but does not enable, or relate to, a preliminary hearing at the commencement of a trial on the issue of delay."

27. Should matters emerge in the course of a trial it clearly follows that the trial judge retains the jurisdiction to discontinue or postpone the trial at that stage.

Conclusion

28. While Mr. Hogan has argued that the health factor was the dominant one in the Supreme Court's decision in *P.T.*, it is in the first place important when considering that judgment to note the following remarks of Denham J. at para. 17:-

"In issue is the exception referred to in *H. v. Director of Public Prosecutions*: whether it would be unfair or unjust to put the applicant on trial. Thus the relevant factors require to be identified and then a balancing exercise undertaken by the court.

In this case the factors relevant to the applicant's position are: (i) it is an old case, while this is not unusual in such a prosecution it is a factor, (ii) the applicant is elderly, in his 87th year, and (iii) the ill-health of the applicant."

29. Denham J. then went on to consider the factors relevant to the prosecution which required to be considered including that, prosecutions are taken on behalf of the people of Ireland by the Director of Public Prosecutions, the public nature of criminal law and the fact that the court does not interfere lightly with the decision of the Director of Public Prosecutions. She said that no single factor rendered *P.T.* an exception.

30. The health of *P.T.* in that case must be looked at in the light of those factors. *P.T.* was in his 87th year and facing charges in respect of events alleged to have occurred more than 36 years previously. One does not need to be a forensic psychologist, or a neurologist, to realise the memory difficulties that arise in such cases, not only for an accused but for any potential witnesses who might be relevant to such a trial. It is also probable in such cases that relevant witnesses to events over 35 years ago may be deceased. The remarks of Hardiman J. in *J.B. v. Director of Public Prosecutions* in relation to the difficulties of an accused person in these circumstances, which I have quoted above, are particularly apt.

31. On the other hand, in the present case, the applicant is 66 (?) years old, some 20 years younger than *P.T.* was when he made his application. While the applicant has undoubtedly serious health problems, he nevertheless continues to work, to drive and to give evidence in court cases. Although he is not in full time employment his health problems must be viewed in the light of this activity.

32. Also the memory problems that I have referred to, which arise in old cases, do not arise in this case. It is clear from the grounding affidavit of the applicant's solicitor that events complained are alleged to have occurred in or about the time of the search of the applicant's premises. The applicant's grounding affidavit in his first application for judicial review referred in some detail to events that occurred at the time his premises were searched. And while there is some delay in this case there is no prosecutorial delay, and charges were brought within a period of two years of the events complained of.

33. It is also relevant that the second named respondent heard and considered the evidence of the applicant's medical consultant, Dr. Moore, and adjudicated thereon.

34. I hold that the above matters not only distinguish the present case from that of *P.T.*, but are of such significance that it would not be appropriate for me to exercise my discretion in favour of the applicant. Accordingly, I refuse the reliefs sought.