

THE HIGH COURT

[2014 No. 351 J.R.]

BETWEEN

J. H.

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice White delivered on the 29th of July, 2016

1. The applicant by order of this Court of 23rd June, 2014, was granted leave to seek an order by way of prohibition or injunction prohibiting the respondent from further prosecution of the applicant in criminal proceedings entitled *The People(at the Suit of the Director of Public Prosecutions) v. JH* pending before Dundalk Circuit Criminal Court on Bill No. 58/2014, together with ancillary reliefs sought.

2. The order was granted based on the statement to ground application for judicial review of 20th June, 2014, and a verifying affidavit of that date. The order of 23rd June, 2014, recites that: "time for the making of this application be extended to the date hereof".

3. The applicant issued a motion on 26th June, 2014, originally returnable for 7th October, 2014 and the prohibition application was heard on 1st and 2nd of March 2016 and judgment reserved.

4. The applicant alleges intolerable, culpable prosecutorial delay. He further alleges that the delay by the complainants in making the complaints was inordinate and inexcusable and he alleges that the lapse of time is so extraordinary and extensive as to give rise to an unavoidable presumption that he is prejudiced and that his defence will be impaired.

5. He also alleges specific prejudice by reason of the unavailability of material both oral and documentary and that evidence of witnesses relevant to credibility and reliability of the complainants are no longer available to him and the respondent has failed to seek out and preserve evidence which would have had a bearing on his guilt or innocence.

6. He alleges that he is further prejudiced by changes in layout of premises in which the alleged crimes occurred and that also in respect of two of these premises, a flat in which he resided in Co. Louth and his parents' property are no longer available to him and that the layout of the building in which he worked has altered since the dates of the alleged offences.

7. The defendant filed a statement of opposition on 16th June, 2015. By way of preliminary objection, the respondent alleges that the applicant has not made his application for prohibition within the time allowed by O. 84, r. 21(1) of the Rules of the Superior Courts.

8. The respondent denies culpable prosecutorial delay and has alleged that the applicant has failed to discharge the onus on him of demonstrating a real and/or serious risk of unfairness of his anticipated trial.

Preliminary Objection on Application for Leave being outside the Time Limitation

9. Order 84, rule 21 states:-

(1) An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose.

(3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:-

(a) there is good and sufficient reason for doing so, and

(b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either –

(i) were outside the control of, or

(ii) could not reasonably have been anticipated by the applicant for such extension."

10. The book of evidence was served on the applicant on 19th March, 2014. The application for leave was made on 23rd June, 2014, although the statement grounding the leave application was dated 20th June, 2014. The applicant argues that as the indictment has not been served on him, he is still within time. The time does run from the date of service of the book of evidence in this case, as the applicant was fully aware at that time of the detailed case against him.

11. The affidavit of Robert Eagar of 20th June, 2014, explained the delay, and Peart J. seems to have already made an order extending the time for the making of this application.

12. To the extent that there is some confusion, this Court is satisfied to rely on the matters set out in a sworn affidavit of Robert Eagar of 20th June, 2014, to extend the time pursuant to the provisions of Order 84, rule 21(3).

Prosecutorial Delay

13. The applicant alleges culpable prosecutorial delay in respect of the periods September 2010 to the date of service of the book of evidence on 19th March, 2014.

14. The chronology of the complaints are set out at para. 4 of the statement of opposition of the respondent on 16th June, 2016.

15. This was a complex investigation of alleged serious offences in which, in addition to the complaints of two complainants which are the subject of the charges. A further complaint was also received in 2011, in respect of an alleged sexual assault by the applicant on one BOC. I do not consider that there was any culpable prosecutorial delay between the date of the original complaint of the first complainant to An Garda Síochána in September 2010, up to receipt of the file by the respondent in February 2012, nor was there any culpable prosecutorial delay between 16th March, 2013, when there was a request from the respondent to the State Solicitor for Co. Louth for further information up to the date of charge of the applicant in January 2014, or up to service of the book of evidence on 19th March, 2014. The period for which the court has concern is the period from February 2012 to 16th March, 2013. The reason advanced for the delay by the respondent was that the file was under consideration while an unrelated historical sexual offence file received in 2011 from BOC was being considered. I would consider an appropriate time for a consideration of a file of this nature would be up to 5 months. The culpable delay was a period of eight months. I cannot see how that would have caused any consequential prejudice to the applicant. The applicant was interviewed on 14th July, 2011, and detailed questions were put to him about the nature of the allegations made against him by the two complainants.

16. In *P.M. v. Director of Public Prosecutions* [2006] IESC 22, [2006] 3 I.R. 172, Kearns J. stated at para. 36:-

"In conclusion, however, on this issue, I am satisfied that where blameworthy prosecutorial delay of significance has been established by the applicant, then that is not sufficient per se to prohibit the trial, but that one or more of the interests protected by the right to expeditious trial must also be shown to have been so interfered with such as would entitle the applicant to relief."

Pre-Complaint Delay

17. The applicant makes two types of complaints about this delay. The first is the actual delay between the time of the alleged offences and the initial statement of complaint to An Garda Síochána.

18. The second type of delay is that in respect of the first complainant from his initial complaint to a counsellor in December 2009, until his formal statement to the gardaí on 24th September 2010 and in respect of the second complainant his original complaint to a religious order in September 2003, approximately seven years and eight months prior to his formal statement to gardaí on 7th May 2011.

19. The approach to the delay in reporting allegations of sexual abuse of a minor, changed substantially on the delivery of the judgment in *S.H. v. Director of Public Prosecutions* [2006] 3 I.R. 575., Murray C.J. in his judgment stated:-

37 "Over the last decade the courts have had extensive experience of cases where complaints are made of alleged sexual abuse which is stated to have taken place many, many years ago. It is an unfortunate truth that such cases are routinely part of the list in criminal courts today.

38 At issue in each case is the constitutional right to a fair trial. The court has found that in reality the core inquiry is not so much the reason for a delay in making a complaint by a complainant but rather whether the accused will receive a fair trial or whether there is a real or serious risk of an unfair trial. In practice this has invariably been the essential and ultimate question for the court. In other words it is the consequences of delay rather than delay itself which has concerned the court.

39 The court approaches such cases with knowledge incrementally assimilated over the last decade in some of which different views were expressed as to how these issues should be approached. In such cases when information was presented concerning the reasons for the delay it was invariably a preliminary point to the ultimate and critical issue as to whether the accused could obtain a fair trial. In all events, having regard to the court's knowledge and insight into these cases it considers that there is no longer a necessity to inquire into the reason for a delay in making a complaint. In all the circumstances now prevailing such a preliminary issue is no longer necessary.

40 This particular case illustrates the extensive affidavits and oral evidence along with psychological and medical reports which have come before the court for the purpose of explaining the reason for a lapse of time between the alleged offence and the making of a complaint. Yet, in the end, what concerns the court is whether an accused will receive a fair trial or whether there is a real or serious risk of an unfair trial.

41 These cases have come before the court after a decision to prosecute has been made by the respondent. The respondent is independent in the performance of his functions. The decision to prosecute may be a complex decision involving the balancing of many factors.

42 Article 30 of the Constitution of Ireland 1937 specifies that prosecutions for serious crimes "shall be prosecuted in the name of the People". This provision reflects the fact that the prosecution of serious crimes is vital to the public interest. The State can only initiate a prosecution when it is aware that a crime has been committed and there is sufficient evidence available to charge somebody with it. Once that happens the State has, in principle, a duty to prosecute. Although the bringing of a prosecution may undoubtedly be central to vindicating the rights or interests of a victim of a crime, the interests of the People in bringing a prosecution is, in the interest of society as a whole, of wider importance. The fact that a person who was the victim of a serious crime had delayed in bringing the commission of that crime to the notice of the State authorities is not of itself a ground upon which the State should refuse to bring a prosecution or the courts to entertain one. In particular circumstances delay in reporting such a crime, because of its extent or in combination with other factual matters, may be considered to affect the credibility of a complainant. That could not in general be a ground for prohibiting a trial proceeding. It is a matter in the first instance for the prosecuting authorities in deciding whether there is evidence of sufficient weight to warrant a charge being preferred. It is also the duty of the respondent, in exercising his independent functions with regard to the bringing of a prosecution, to consider whether, in all the circumstances, a fair trial can be afforded to an accused. This is an onerous and strict duty since, as some of the decisions of this court demonstrate, there are circumstances in which the bringing of a prosecution in respect of offences that are alleged to have happened very many years ago would be to visit a serious injustice on the person accused of them. Where a prosecution is in fact brought following a complaint made after a long lapse of time since the alleged offence, any issue concerning the credibility of a complainant by reason of a lengthy delay is a matter to be considered at the trial should the defence raise such an issue. There is no reason why the prosecution of serious offences involving sexual abuse of minors should be treated differently from other serious offences in this regard.

43 The test to be applied by a court in such an application has been an evolving one. In *B. v. Director of Public Prosecutions* [1997] 3 I.R. 140, the test was described by Denham J. at p. 196 as:-

'The test is whether there is a real risk that the applicant, by reason of the delay, would not obtain a fair trial, that the trial would be unfair as a consequence of the delay. The test must be applied in light of the circumstances of the case and the law.

The extant case law on the constitutional right to reasonable expedition, as developed, applies to this case. However, in addition there must be analysis of new factors.'

44 The 'new factors' referred to became issues such as dominion, inhibition, disparity between the ages of the accused and the complainant, etc. In view of the knowledge and experience gained over the past decade these 'new factors' are now well recognised. A very considerable volume of evidence has been given and case law made explaining circumstances and reasons for delay in making complaints by victims of child sexual abuse.

45 As I stated in *P.O'C. v. Director of Public Prosecutions* [2000] 3 I.R. 87 at p. 105:-

'Expert evidence in a succession of cases which have come e High Court has demonstrated that young or very young victims of sexual abuse are often very reluctant or find it impossible to come forward and disclose the abuse to others or in particular to complain to gardai until many years later (if at all). In fact this has been so clearly demonstrated in a succession of cases that the court would probably be entitled to take judicial notice of the fact that this is an inherent element in the nature of such offences.'

46 The court's judicial knowledge of these issues has been further expanded in the period since that particular case. Consequently there is judicial knowledge of this aspect of offending. Reasons for such delay are well established, they are no longer 'new factors'.

47 Therefore, I am satisfied that it is no longer necessary to establish such reasons for the delay. The issue for the 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 would thus restate the test as:-

The test is whether there is a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay. The test is to be applied in light of the circumstances of the case.

48 Thus, the first inquiry as to the reasons for the delay in making a complaint need no longer be made. As a consequence any question of an assumption, which arose solely for the purpose of applications of this nature, of the truth of the complainants' complaints against an applicant no longer arises. The inquiry which should be made is whether the degree of prejudice is such as to give rise to a real or serious risk of an unfair trial. The factors of prejudice, if any, will depend upon the circumstances of the case.

49 There is no doubt that difficulties arise in defending a case many years after an event. However, the courts may not legislate, the courts may not take a policy decision that after a stated number of years an offence may not be prosecuted. Also, as the legislature has not itself established a statute of limitations that itself may be viewed as a policy of the representatives of the People. Thus each case falls to be considered on its own circumstances."

20. The delay on its own and an allegation of general prejudice based on such delay, does not ground an application for prohibition.

21. The test as laid down in this case still applies even though the first complainant made a complaint to a counsellor within a relatively short time before the formal complaint of 24th September, 2010, and also applies to the second complainant who made a complaint to the order in 2003, but did not make a formal complaint until 7th May 2011. The fact that complaints were made to persons and other institutions other than a formal complaint to an Garda Síochána are issues of credibility of the complainants.

22. In respect of the second complainant's allegations against the applicant they relate to two charges of indecent assault which are alleged to have occurred between 1st November, 1987 and 31st December, 1987, a period of two months at a location where the applicant was employed in a position of authority.

23. There are specific allegations that the applicant befriended the complainant, invited him to his room and sexually assaulted him.

24. The alleged prejudice alleged by the applicant in respect of the two charges of assault on the second complainant is that the layout of the location where the offences are alleged to have occurred has changed significantly which makes it impossible for the applicant to demonstrate how unlikely matters alleged by the second complainant could have happened there in the manner described or at all. As to the list of witnesses he states are unavailable to him, he has not connected any of these to the allegations of the second complainant.

25. This does not seem to the court to be a sustainable ground for prohibition of his trial on these two allegations of assault. This was a public building, the applicant was in a position of authority at the time, and the complainant was sixteen. There is nothing to suggest that the applicant cannot accurately recall what type of accommodation he resided in, and to put any inconsistency to the complainant. It would seem unusual that there would be no witness available to the applicant to describe the relevant layout at that time.

26. In respect of the seven charges against the first complainant spanning a period from 1st October, 1972 to 30th June, 1973, and alleging three different locations, the applicant has certainly raised the possibility of actual prejudice arising. 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.

32. There may well be concerns that a trial judge may not take into consideration the inability of an accused person to call witnesses in his defence to deal specifically with allegations by a complainant or to challenge collateral facts, or to take into consideration the absence of documentary evidence due to the long delay in making the complaints the subject of the indictment

33. In the light of the developing jurisprudence it is the duty of the trial judge at the conclusion of the evidence for the prosecution or at the conclusion of all the evidence and in the context of an application to withdraw the case from the jury to take into consideration both general and specific prejudice to the accused, which may have arisen because of substantial delay in bringing the prosecution.

34. In summary, this Court does not have concerns about the allegations made by the second complainant which would give rise to prohibition. The concerns expressed by the court in respect of the charges relating to the first complainant are best dealt with by the trial judge in the manner as outlined. At this point in the process, I cannot see that there would be irredeemable prejudice to the accused in respect of those complaints, but it may well be that the trial judge will have to give serious consideration to the issues raised in this Court, which will, no doubt, be issues in the trial of the applicant.

35. I, accordingly, refuse the relief of prohibition or injunctive relief.