

THE HIGH COURT

2008 1990 P

BETWEEN

M. D. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND S. D.)

PLAINTIFF

AND

IRELAND, THE ATTORNEY GENERAL AND THE DIRECTOR OF PUBLIC PROSECUTIONS

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered the 21st April, 2009**1. Introduction**

1.1 The plaintiff ("Mr. D") is a minor who has commenced these proceedings for the purposes of challenging the constitutionality of certain provisions of the Criminal Law (Sexual Offences) Act 2006 ("The Act"). Mr. D currently faces charges under the Act on foot of which he has been returned for trial to the Circuit Criminal Court at Letterkenny. The trial is currently due to commence on the 28th April, 2009. It is in that context that Mr. D brings this application before the court seeking to have a stay placed on his trial until such time as the issues concerning the constitutionality of the relevant legislation have been determined.

1.2 In that context I should turn briefly to the relevant facts.

2. The Facts

2.1 It is alleged that Mr. D was, in the summer of 2006, guilty of certain sexual offences involving a female under the age of seventeen years contrary to the provisions of s. 3(1) of the Act. At the time of the alleged offence it would appear that Mr. D was, himself, fifteen years old and that the female in respect of which he is alleged to have committed the relevant offences was fourteen years old. The female in question was not charged with any offence under the Act. It is in that context that Mr. D alleges that the legislation in question is in breach of the Constitution.

2.2 On the 10th March of last year, Mr. D commenced these proceedings seeking a range of declaratory reliefs including a declaration that s. 3(1) and s. 5 of the Act are in breach of the Constitution or alternatively, in breach of Articles 6 or 14 of the European Convention on Human Rights. It is also alleged that the third named defendant ("the DPP") has acted in breach of Mr. D's constitutional rights by prosecuting him in all the circumstances of the case.

2.3 On the 8th May, 2008, a statement of claim was served. Thereafter, a defence was filed on behalf of the defendants.

2.4 In May and June of last year (after the issuing of these proceedings), the DPP informed Mr. D's solicitor that he intended to proceed with the criminal trial unless an injunction was given by this Court preventing the trial from going ahead. It should be noted in passing that it was not until the 20th January, 2009, that the defendants filed a defence to these proceedings. The filing of the defence arose in circumstances where Mr. D's solicitor had, on the 19th December, 2008, brought an application for judgment in default of defence. It follows that, had the defendants been more proactive in filing their defence, there is every chance that these proceedings could already have been listed for hearing.

2.5 In any event the criminal proceedings against Mr. D were listed before O'Hagan J. at the Circuit Criminal Court sitting in Letterkenny on the 3rd February, 2009. On that occasion, O'Hagan J. fixed the 28th April next for the trial and indicated that it was his intention that the trial would go ahead in the ordinary way, unless Mr. D should secure an order from this Court which would have the effect of preventing the trial from being proceeded with until after his constitutional challenge to the relevant provisions of the Act had been determined. On that basis, Mr. D brought this application before the court which came on for hearing on the 30th March. Having reviewed the basic facts it is also appropriate to indicate, at least in general terms, the nature of Mr. D's challenge to the legislation in question. I turn to the legislation and his challenge to it.

3. The Legislation and the Challenge

3.1 Section 3(1) of the Act provides as follows:-

"3.— (1) Any person who engages in a sexual act with a child who is under the age of 17 years shall be guilty of an offence and shall, subject to subsection (3), be liable on conviction on indictment—"

Section 5 of the Act provides as follows:-

"5.— A female child under the age of 17 years shall not be guilty of an offence under this Act by reason only of her engaging in an act of sexual intercourse."

3.2 It follows that the structure of the Act is to create a general criminal offence which arises in circumstances where a person engages in sexual acts with an underage person. That general offence is to be found in s. 3(1) which is not gender specific. Therefore, if s. 3(1) were the only provision in the Act relevant to such matters, it would follow that an offence could be committed by an underage female in having sex with an underage male.

3.3 However, as is clear from the above cited text, s. 5 provides for an exclusion in the case of sexual intercourse by an underage female person.

3.4 There can be little doubt but that the combined effect of s. 3(1) and s. 5 is that, in the event of there being consensual sexual activity between two underage persons the male is, by virtue of s. 3(1), guilty of an offence but the female is, by virtue of s. 5, not so guilty. In that context Mr. D argues that the Act is discriminatory and seeks to challenge its validity having regard to the Constitution, and also seeks declarations concerning the compatibility of the legislation concerned with the European Convention on Human Rights.

3.5 The defendants oppose Mr. D's challenge basing their opposition on two general sets of grounds.

3.6 Firstly, it is said that the State is entitled to make a distinction between male and female persons in this area. Thus, the defendants will seek to justify the distinction made in the legislation concerning sexual activity by, on the one hand, underage males and, on the other hand, underage females.

3.7 Secondly, the State defendants draw attention to the fact that s. 3(1) itself is not discriminatory in that it applies to all underage persons, both male and female. Thus, it is said, the only potentially discriminatory aspect of the legislation is to be found in the exclusion of underage females from criminal liability that is contained in s. 5. On that basis the State argues that, even if this Court were satisfied that the distinction contained in the Act as and between underage males and underage females amounted to unjustified discrimination, it could not, it is said, avail Mr. D because the only consequence of such a finding would be to strike down s. 5. The result of s. 5 being struck down would not, it follows, be that Mr. D would be immune from prosecution, but rather that the female involved would herself also be exposed to prosecution. On that basis it is said that, even if Mr. D were able to establish that the Act as a whole was impermissibly discriminatory, it would not avail him in being able to prevent his prosecution.

3.8 Against that background it is next necessary to turn to the relevant principles by reference to which this Court should exercise its power to prevent a criminal trial from proceeding, pending a challenge to the constitutionality of the legislation on foot of which the relevant criminal charges are being mounted. I now turn to the relevant jurisprudence.

4. The Jurisprudence

4.1 Counsel on behalf of the defendants accepted that this Court has a jurisdiction, at the level of principle, to grant an injunction which would have the practical effect of preventing the operation of a statute pending the determination by the court of proceedings in which the validity of the statute concerned was under challenge. That this is so is clear from the decision in *Pesca Valentia Ltd v. Minister for Fisheries* [1985] I.R. 193. That being said it was argued, correctly in my view, that the relevant jurisdiction is one which must be most sparingly exercised. The reasons for this are obvious. Legislation which has been passed into law by the Oireachtas enjoys a presumption of constitutionality. If it were to be the case that persons who were able to establish a fair case to be tried concerning the validity of the relevant legislation having regard to the provisions of the Constitution (which is not a particularly high threshold) were able to obtain an injunction preventing, in practice, the application of the legislation to them until the proceedings had been determined, then it would follow that legislation could, in practice, be sterilised pending a final determination of the constitutional issues raised. Those considerations apply with equal force where the statute concerned is one which creates a criminal offence.

4.2 While, in general terms, the principles applicable to the grant or refusal of an interlocutory injunction in a case such as this are no different from those which apply in the case of any other interlocutory injunction, it has to be emphasised that a very significant weight indeed needs to be attached, in considering the balance of convenience, to the desirability that legislation once coming into force should be applied unless and until such legislation is found to be invalid having regard to the Constitution. It should only be where significant countervailing factors can be identified or where it is possible to put in place measures which would minimise the extent to which there would be any interference with the proper and orderly implementation of the legislation concerned, that a court should be prepared to grant an injunction which would have the effect of preventing legislation which is *prima facie* valid from being enforced in the ordinary way.

4.3 It is also necessary to consider *C.C. v. Ireland & Ors* (Unreported, Supreme Court, 12th July, 2005) in which the Supreme Court indicated that it was, in the unusual circumstances of that case, prepared to entertain a debate as to the interpretation of criminal legislation in advance of the criminal trial which the plaintiff in those proceedings was facing. It is clear that the Supreme Court was of the view that the normal and ordinary course of events in such circumstances is that the criminal trial concerned should proceed and that a determination of any legal issues (including the validity of any legislation relevant to the criminal trial) should follow but only, of course, in the event that the accused concerned was convicted as otherwise that person would have no standing to challenge the legislation in any event.

4.4 *C.C.* is, therefore, more concerned with the question of whether, and in what circumstances, it is appropriate for the court to entertain issues (including constitutional issues) in advance of a criminal trial rather than whether it would be appropriate to stay a criminal trial pending a resolution of such proceedings. There is, however, a similarity between that question and the one with which I am faced so that the comments of the Supreme Court in *C.C.* are relevant to the issue which I have to decide. It is clear that the court retains a jurisdiction, in an appropriate case, to entertain such proceedings in advance of the criminal trial to which it is, principally, directed but that this practice should not be the norm and should only be followed in appropriate cases.

4.5 In summary, I am satisfied that a court, asked to stay criminal proceedings pending a constitutional challenge, must consider the following matters:-

- (a) Whether a fair case to be tried has been made out as to the validity of the statute concerned including a consideration of whether any successful challenge would materially affect the pending criminal proceedings;
- (b) If so (given that it is difficult to see that damages could be an adequate remedy) where the balance of convenience lies affording a very significant weight indeed to the need to ensure that laws enjoying the presumption of constitutionality are enforced; but
- (c) Also considering any special or unusual countervailing factors which might render it disproportionate to require the criminal trial concerned to go ahead immediately, including having due regard to the possibility of minimising any effect on the proper progress of criminal litigation.

4.6 I now turn to the application of the principles to the facts of this case.

5. Application to facts of case

5.1 As in all cases in which a party seeks an interlocutory injunction, the first question to be considered is whether the party concerned has established a fair case to be tried. Counsel for the D.P.P., quite properly, accepted that there might well be a fair case to be tried concerning the question of whether it is permissible for the State to distinguish between underage male and underage female persons who engage in consensual sexual activity. That s. 5 discriminates as and between males and females is without doubt. The question will be as to whether that discrimination can be justified. There is, undoubtedly, in my view, a fair issue to be tried on that question.

5.2 However Counsel for the D.P.P. argued that Mr. D. had not shown how he could get round the second leg of the State's defence. It seems likely that the way in which the relevant legislation was crafted was designed precisely to deal with a situation where it might be determined that it was impermissible to discriminate between underage males and underage females in the way in which this legislation does. In those circumstances it is at least arguable that the appropriate order for the court to make would be to declare s. 5 inconsistent with the Constitution and thus leave s. 3(1) intact. In those circumstances the legal position would be that both underage males and underage females would be capable of being prosecuted. That, in itself, would not avail Mr. D.

5.3 However it seems to me that there are possible outcomes of this litigation which could avail Mr. D. If, for example, s. 5 was found to be impermissibly discriminatory, it might well then be the case that Mr. D. would be entitled, at least in some circumstances, to question criminal proceedings in which one only of the two parties to a consensual sexual act (both being underage) was prosecuted. While in general terms it is no answer to a criminal charge to complain that others too have committed the same offence but have not been prosecuted, it is at least arguable that there may be limited circumstances where a party may be able to claim that a prosecution of one but not all of the participants in a single act is discriminatory unless there are good grounds for not prosecuting other parties. In those circumstances I have come to the view that Mr. D. has made out a fair case to be tried.

5.4 However, as pointed out earlier, that is far from the end of the matter. A very heavy weight needs to be attached to allowing legislation, which is *prima facie* valid, to be enforced unless and until it is found to be inconsistent with the Constitution. However it seems to me that on the particular facts of this case it should be possible to do justice to all concerned in a way that does not significantly impair the imperative that legislation be enforced. Provided that a very early trial can be arranged (and I believe this can be done, and propose discussing the matter further with counsel after this judgment has been delivered), then it seems to me that a very short adjournment of the criminal proceedings pending against Mr. D. would not involve any significant interference with the ordinary operation of the criminal process. In particular, in coming to that view, I have taken into account the fact that Mr. D. did, in my view, commence these proceedings in a timely fashion. While the delay on the part of the defendants in filing their defence was not extreme, it nonetheless is the case that, if the defendants had filed their defence in a more timely fashion, it is likely that these proceedings could have been determined in advance of the criminal trial. It would seem to me to be potentially unfair that Mr. D. should be exposed to a criminal trial which, on one view, might be constitutionally inappropriate, at least in part because these proceedings, through no fault of his or his advisors, took somewhat longer to come to trial than might otherwise have been the case. I should emphasise that nothing in this judgment should be taken as implying that that fact, of itself, would justify an injunction. However, when coupled with the fact that it is possible, in my view, to ensure that any delay in the pending criminal trial would be minimal, it seems to me that the balance of justice and convenience leans in favour of placing a stay on the criminal trial provided that measures can be put in place to ensure that these proceedings can be brought to hearing in the shortest possible time.

6. Conclusions

6.1 Subject, therefore, to my being satisfied that it will be possible to ensure that these proceedings are heard in very early course, I would propose making an order placing a stay on the conduct of the criminal trial currently listed for Letterkenny next week. That stay will be strictly conditional on Mr. D. and his advisors complying with all reasonable procedural requirements to ensure that this case is heard at the earliest possible date. The defendants will have liberty to apply in the event that there is any delay on Mr. D.'s part in ensuring such an early trial date.

6.2 I propose hearing counsel further on any measures which are necessary to ensure such an early trial and on the time scale within which any such procedural steps should be taken.