Neutral Citation [2015] IEHC 494

THE HIGH COURT
JUDICIAL REVIEW

[2014 No. 421 J.R.]

BETWEEN

ANTHONY BABU VATTEKADEN

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered the 24th day of July, 2015.

Introduction
1. In the within judicial review proceedings, the applicant seeks an order prohibiting his trial on foot of Bill No. 28/13 before the Dublin Circuit Criminal Court where he stands charged with the offence of sexually assaulting one JO'B ("the complainant") on the 25th August, 2011 at Babu's Ayurvedick Rejuvenation Therapy Centre, 44 Westmoreland Row, Dublin 2, contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990 (as amended by s. 37 of the Sex Offenders Act 2001).

Background Facts
2. The female complainant alleges that during the course of receiving a massage from the applicant on the 19th August, 2011, he touched her vagina. She made a complaint to the Gardaí on the 25th August, 2011. The Gardaí subsequently obtained CCTV footage from the Centra Shop beside the Therapy Centre where the alleged sexual assault occurred. This footage is said to show the complainant and the applicant together on the footpath outside the premises in circumstances consistent with the prior statement of the complainant. The prosecution also alleges that the complainant's telephone number was found on the applicant's mobile telephone, saved under the name "Jason".

3. The applicant is further alleged to have made certain admissions when interviewed by the Gardaí. The complainant had alleged that following the assault, she telephoned the applicant to advise him that she was going to report the matter to the Gardaí and he offered her money not to do so. When asked about this, the applicant appears to have confirmed the complainant's version of events. Further, the applicant appears to have admitted that when he sat beside the applicant outside the Centra shop, he was crying. It is also alleged by the prosecution that the applicant furnished no satisfactory explanation for the apparent attempt to conceal the complainant's telephone number from his wife by saving it under "Jason".

The Proceedings
4. The book of evidence was served on the applicant on the 18th December, 2012. The matter was first listed before the Circuit Criminal Court on the 11th January, 2013 when it was adjourned to allow the defence to raise the issue of disclosure.

5. On the 14th January, 2013, the applicant's solicitors sought a number of matters by way of specific disclosure and in particular the following:

> "11. Details of any complaints of an indecent or sexual nature made against any other persons by the complainant".

6. On the 11th March, 2013, the court fixed the 14th November, 2013 as the trial date. Various reminders were sent by the applicant's solicitors including an urgent reminder on the 29th October, 2013 detailing the outstanding disclosure issues including that referred to at item 11. The DPP's office responded on the 7th November, 2013 saying, *inter alia*, with regard to item 11: "We are awaiting instructions."

7. On the morning of the trial, the 14th November, 2013, the prosecution indicated to the court that certain new matters had come to light which required a short adjournment and the matter was put back to the 18th November, 2013. When the matter came before the court again on the 18th November, 2013, the defence were served with a letter from the respondent enclosing new material including statements from the complainant and from the investigating Garda.

8. In essence, this material disclosed that the complainant alleged two prior incidents of sexual assault when she was a child. The first was alleged to have occurred in 1993 when the complainant was 11 years of age and a man who was a member of her extended family rubbed her genital area and tried to pull down her pyjama bottoms and underwear while she was asleep. She said that she did not tell anybody at the time. The second instance alleged was that in 1999, when the complainant was 16, she was raped in the stairwell of one of the Ballymun Towers by a "guy she knew" having consumed a large amount of vodka and some cannabis. She said that she reported this incident to the Rape Crisis Centre within a week of it allegedly occurring.

9. In a supplemental statement of the 14th November, 2013, the complainant said that she did not tell the investigating Garda about these incidents previously because she did not feel they were relevant to the case but she now realised they were important. Neither of the two prior alleged incidents had been the subject of a complaint to the Gardaí. When questioned further by the Gardaí about these matters, the complainant indicated that she did not wish to identify the men concerned nor did she wish to make any formal complaint in that regard. As well as enclosing the statements from the complainant and the investigating Garda, the respondent's letter of the 18th November, 2013 enclosed notes in respect of counselling received by the complainant relative to these matters in 2005. The applicant's solicitor sought details of the names and contact details of the two men involved so that they could be interviewed. Further disclosure was also sought in respect of any other counselling notes that might exist including from the Rape Crisis Centre. The respondent replied on the 15th January, 2014 stating that the Gardaí were not pursuing efforts to identify the persons allegedly involved in the prior incidents and that the respondent had been advised by An Garda Síochána that as the complainant was making no formal compliant about these prior incidents, the Gardaí had no grounds to institute a criminal investigation.

10. The applicant's solicitors responded to this correspondence on the 27th February, 2014 complaining that in the circumstances that had now arisen, the applicant could not get a fair trial and called upon the respondent to abandon the prosecution. No reply to this letter was forthcoming until the 27th May, 2014 when the respondent confirmed that the prosecution would be proceeding.

11. On the 21st July, 2014, the applicant applied for leave to seek judicial review which was granted by order of Hedigan J.

Submissions
12. Counsel for the applicant, Mr Rahn BL, submits that the refusal of the complainant to identify the perpetrators of the two prior alleged sexual assaults mean that the applicant cannot now obtain a fair trial. He says that in circumstances where the complainant's allegations of assault are absolutely denied by the respondent, the complainant's credibility is central to the prosecution. The complainant's refusal to name the two men in question means that the respondent has been deprived of the opportunity of pursing a line of cross-examination of the complainant which may, critically, undermine her credibility in the eyes of the jury.

13. The applicant contends that if his solicitors were afforded the opportunity of interviewing the two men involved, it might for example emerge from their evidence that they could not in fact have perpetrated the assaults complained of, thus undermining the complainant's credibility as a whole.

14. It was submitted that the foregoing was sufficient to satisfy the well established test for the grant of an order of prohibition of a criminal trial i.e. that there was a real risk of an unfair trial. In that regard, the applicant relied on *McFarlane v. DPP* [2007] 1 I.R. 134 and the dicta of Hardiman J. in *B.J. v. DPP* [2003] 4 I.R. 525 where he stated (at p.551):

> "The test of whether there is a real risk of an unfair trial must involve the question of whether the applicant has been deprived of the reasonable possibility of evidence, or of a line of defence, which could be of significant importance."

15. Reliance was also placed on *DPP v. Nora Wall* [2005] IECCA 140, where there had been a miscarriage of justice in circumstances where the defendant had been convicted on the evidence of two individuals who had made a number of prior complaints of assault, some withdrawn, that were not disclosed to the defence.

16. The applicant also relies on a number of well-known authorities on the right to cross examine one's accuser effectively, such as *Maguire v. Ardagh* [2002] 1 I.R. 385 and *O'Callaghan v. Mahon* [2006] 2 I.R. 32. The applicant also relied on the judgment of the Supreme Court in *J.F. v. DPP* [2005] 2 I.R. 174, where the court held that a complainant who accuses another of an offence upon which conviction would result in disgrace, loss of liberty, loss of reputation and professional oblivion, could not expect to control the degree to which relevant information about him would be shared with the person he has accused and by setting the criminal law in motion, the complainant forfeited a degree of privacy.

17. Ms Phelan BL, on behalf of the respondent raised a preliminary objection on the grounds of delay. She submitted that the cause of action arose in November, 2013 when the applicant was made aware that the complainant was refusing to divulge the identities of the alleged perpetrators of the two prior incidents of abuse and thus predated the leave application by some eight months, well outside the three month time limit specified by Order 84 of the Rules of the Superior Courts. It was submitted that the applicant had failed to identify a basis for extending time in accordance with Order 84, rule 21 because although the applicant contended that he was justified in awaiting disclosure of the Rape Crisis Centre's records before seeking leave, the application was in fact made before he was informed that those records were no longer available. It was submitted that in *Shell v. McGrath & Ors* [2013] 1 I.R. 247, the Supreme Court adopted a more rigid approach to time limits under Order 84 which the court said had the same status as time limits to be found in primary legislation and accordingly if an application was out if time, it must fail as a matter of law.

18. On the substantive issue, she submitted that there was no failure to disclose arising here as in some of the authorities relied upon by the applicant. The respondent had disclosed everything that was available to her and the Gardaí could bring matters no further in the absence of a complaint against a named individual. Accordingly, this case was not in the same category as those related to undisclosed evidence. *Maguire* was not relevant because in that case, no cross-examination at all was permitted, whereas here, the applicant has all the information necessary to challenge the credibility of the complainant.

19. No appropriate comparison could be drawn with the *Nora Wall* case which involved, *inter alia*, a failure to disclose a prior unreported rape allegation.

20. Here, the applicant has failed to discharge the burden on him of establishing that there was a real risk of an unfair trial. The trial judge bears the duty of ensuring the fairness of the trial by making appropriate rulings and giving the requisite directions to the jury as necessary. The respondent relied on *The People (DPP) v. P. O'C* [2006] 3 I.R. 238 and *Byrne v. DPP* [2011] 1 I.R. 346 in that regard.

21. It was contended by the respondent that this matter could not be viewed as being the category of case where it was simply the word of the complainant against the accused party. There was significant additional evidence in this case of the kind referred to above and important admissions or partial admissions made by the applicant in the course of a number of interviews with the Gardaí. It was said that this was a matter that required the assessment of a jury for determination.

22. It was further submitted that it was relevant to have regard to the fact that the alleged previous assaults occurred during the complainant's childhood and it was settled since *H v. DPP* [2006] IESC 55 that there is no onus on the prosecution to explain delay in child sex abuse cases. It would thus be contrary to the requirements of justice if childhood events could be considered to preclude the trial of an event that befell the complainant as an adult.

Discussion
23. Dealing first with the delay point, the respondent says that time began to run against the applicant from November, 2013 when he was informed that the complainant had declined to name the alleged perpetrators of the earlier assaults. Whilst that might be strictly true, the applicant was not told until January, 2014 that the Gardaí were not pursuing the identities of the persons in question. Arising out of this, the applicant's solicitors wrote in February, 2014 asking the respondent to confirm whether the prosecution would now proceed and sought confirmation in this regard before the issue of judicial review was considered. A response to that letter was not received until the 27th May, 2014 and thereafter the court was moved within a period of three months from the latter correspondence.

24. In my view, it was reasonable for the applicant to await the confirmation sought before applying to the court as if the confirmation was forthcoming, this would obviate the necessity to apply for leave to seek judicial review. The delay in reverting regarding the applicant's request may well have been taken as an indication that the matter was being actively considered by the respondent and possibly that advice was being taken.

25. I think the applicant's approach was not unreasonable in all the circumstances. More often than not, applicants are criticised for making applications too quickly when no real opportunity is afforded the relevant party to respond before making court applications which not infrequently turn out to be entirely unnecessary.

26. I am therefore satisfied that even if it could be said that time began to run in November, 2013, the applicant has shown a good and sufficient reason for not applying within three months of that date and further the failure to do so was outside his control to the extent that he was in effect awaiting a determination from the respondent. Accordingly it seems to me that the requirements of Order 84, rule 21(3) are satisfied in this case and the interests of justice require that the time for applying for judicial review should be enlarged.

27. Turning now to the substantive issue, it is well settled since *Z v. DPP* [1994] 2 I.R. 476 that in applications for prohibition of a criminal trial, the onus rests upon the applicant to show that he faces a real or serious risk that he will not have a fair trial. Further, the risk has to be one which could not be avoided by the trial judge by means of appropriate directions and rulings.

28. In *Savage v. DPP* [2009] 1 I.R. 185, the Supreme Court considered an application for prohibition of a criminal trial where the accused was charged with using a vehicle without the consent of the owner and dangerous driving causing serious injury. The vehicle in question was seized by the Gardaí but subsequently lost. The applicant claimed that an expert examination of the car could have assisted his defence but he was now deprived of that opportunity. The High Court refused the application and the Supreme Court upheld the refusal. In the course of delivering his judgment, Fennelly J. said (at p. 208):

"5. The following is an attempt to summarise the principal points relevant to whether a court will make an order prohibiting a trial.

> (a) It is the duty of the prosecution authorities, in particular An Garda Síochána, to preserve and retain all evidence, which comes into their possession, having a bearing or potential bearing on the issue of guilt or innocence of the accused. This duty flows from their unique investigative role as a police force (see [*Braddish v. Director of Public Prosecutions* [2001] 3 I.R. 127] at page 133). The extent to which that duty extends to seeking out evidential material not in the possession of the Gardaí does not arise in the present case (but see [*Dunne v. Director of Public Prosecutions* [2002] 2 I.R. 305]).
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> (b) The missing evidence in question must be such as to give rise to a real possibility that, in its absence, the accused will be unable to advance a point material to his defence. This is, like the Garda obligation to retain and preserve evidence, to be interpreted in a practical and realistic way and 'no remote, theoretical or fanciful possibility will lead to the prohibition of a trial' (see *Dunne v. Director of Public Prosecutions* [2002] 2 I.R. 305 at p. 323).
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> (c) The fact that the prosecution intends to rely on evidence independent of the missing evidence at issue in order to establish the guilt of the accused does not preclude the making of an order of prohibition. In *Dunne*, the prosecution intended to rely on a confession. This did not defeat the applicant's complaint of the failure of the gardaí to take possession of a video tape covering the scene of the robbery.
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> (d) The application is considered in the context of all the evidence likely to be put forward at the trial. The court will have regard to the extent to which aspects of the prosecution case are contested. In [*Bowes v. Director of Public Prosecutions* [2003] 2 I.R. 25], the fact that the motor car in which the applicant was alleged to have been travelling had been lost by the gardaí was insufficient, when the applicant did not contest the fact that he was driving it and the charge related to possession of drugs found in the boot of the car. In [*McGrath v. Director of Public Prosecutions* [2003] 2 I.R. 25], the court had regard to the "circumstantial" character of the prosecution case of dangerous driving. In [*McFarlane v. Director of Public Prosecutions* [2006] IESC 11, [2007] 1 I.R. 134], the existence of photographic evidence of the missing fingerprints was highly material to the complaint that the original items had been lost by the gardaí.
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> (e) The applicant must show, by reference to the case to be made by the prosecution, in effect the book of evidence, how the allegedly missing evidence will affect the fairness of his trial. Hardiman J. said in *McFarlane* at p. 144, that:
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> > "In order to demonstrate that risk there is obviously a need for an applicant to engage in a specific way with the evidence actually available so as to make the risk apparent."
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> (f) Whether the applicant, through his solicitor or otherwise makes a timely request of the prosecution for access to or an opportunity to have the articles at issue expertly examined may be highly material. In *Bowes*, the "very belated" request was critical to the refusal of relief. On the other hand, in *Dunne*, no request was made until some five months after charge, and long after there was any possibility of producing the video tape. In that case, however, Hardiman J. stated at p. 325:
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> > "There is … a responsibility on a defendant's advisers, with their special knowledge and information, to request material thought by them to be relevant."
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> However, a suspect or an accused person will be unable to make a timely request, if the Gardaí have destroyed or parted with possession of the material. Thus, they must give consideration to the likely interests of the defence before making such decisions.
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> (g) The essential question, at all times, is whether there is a real risk of an unfair trial (see [*Scully v. Director of Public Prosecutions* [2005] IESC 11, [2005] 1 I.R. 242]). The court should focus on that issue and "not on whose fault it is that the evidence is missing, and what the degree of that fault may be." (see Dunne at p. 322)."

29. The primary onus of ensuring a fair trial for an accused rests upon the trial judge. Accordingly, it is normally only in exceptional circumstances that the court will intervene by way of prohibition. In *Devoy v. DPP* [2008] 4 I.R. 235, Kearns J. (as he then was) speaking in the Supreme Court said (at p. 255):

> "61. In the context of prohibition this is not to say that an Irish court must readily or too easily resort to prohibition, whatever about other remedies, when vindicating rights under Article 38.1. Under our jurisprudence, as noted by Denham J. in *D.C. v. Director of Public Prosecutions* [2005] IESC 77, [2005] 4 I.R. 281 prohibition is a remedy to be granted only in exceptional circumstances."

30. This approach was restated by the Supreme Court in *Byrne v. DPP* [2011] 1 I.R. 346. In the course of delivering the court's judgment, O'Donnell J. said (at p. 356):

> "[19] In my view, having considered the decided cases, the position has now been reached where it can be said that, other than perhaps the very straight forward type of case as in *Braddish v. Director of Public Prosecutions* [2001] 3 I.R. 127, it would now require something exceptional to persuade a court to prohibit a trial. This, in my view, is in accordance with principle …
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> [20] This, in my view, is an important observation. The constitutional right, the infringement of which is alleged ground an applicant's entitlement to prohibit a trial, is the right to a fair trial on a criminal charge guaranteed by Article 38 and 34 of the Constitution. The manner in which the Constitution contemplates that a fair trial is normally guaranteed is through the trial and, if necessary, appeal processes of the court established under the Constitution. The primary onus of insuring that that right is vindicated lies on the court of trial, which will itself be a court established under the Constitution and obliged to administer justice pursuant to Article 34. It is, in my view, therefore, entirely consistent with the constitutional order to observe that it will only be in exceptional cases that superior courts should intervene and prohibit a trial, particularly on the basis that evidence is sought to be adduced (in the case of video stills), or is not available (in the case CCTV evidence itself)."

31. O'Donnell J. went on to set out with approval the dicta of Fennelly J. in *Savage* above referred to.

32. The comments of Fennelly J. in *P.G. v. The Director of Public Prosecutions* [2007] 3 I.R. 39 are also apposite in the context of the complainant's counselling notes, since destroyed, from the Rape Crisis Centre, where he said (at p. 55):

> "[52] I accept, nonetheless, that in the ordinary way the applicant would normally, as a matter of fairness, be entitled to disclosure of Mr. Hopper's [*the complainant's counsellor*] clinical notes for the purpose of cross-examination, if they were in the possession of the prosecution. However, the respondent is not in possession of these notes and has made reasonable efforts to obtain them.
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> [53] That need not be the end of the matter. This court cannot direct the respondent as to how to perform his function. Still less can it direct the complainant. Nor can it direct Mr. Hopper, who, in any event, is outside the jurisdiction. It can, however, draw attention to the fact that it is the fundamental obligation of a trial judge to ensure that a trial is fair. There is no reason whatever to assume that the trial judge, in either case, will not address the issues raised and rule upon them appropriately. It is obviously desirable that the apparent blockage to the disclosure of Mr. Hopper's notes would be removed, if that is possible. Mr. Hopper's duty of confidentiality is owed to his client, in this case, the nephew. If the nephew agrees to the disclosure of Mr. Hopper's notes for the purposes of the prosecution, it is difficult to envisage any responsible professional person continuing to detain them. I am sure that this problem can be resolved through the good offices of the respondent. If the matter is not resolved in this way, it will be a matter for the trial judge to deal with it. Presumably the complainant can be asked about it in his evidence. The trial judge must be, and is in law, bound to arrange the progress of the trial so as to render justice and to guarantee fair procedures to all parties, especially the accused. I agree with the submission of the respondent that matters of disclosure are within the province of the trial judge. They are not matters for judicial review except to the extent that an accused person can show that, having taken all reasonable steps to obtain disclosure, necessary material is being withheld from him to such an extent as to give rise to a real risk of an unfair trial."

33. It is clear therefore that for the applicant to succeed in this case, he must establish that the refusal of the complainant to identify those who abused her as a child is an exceptional circumstance that gives rise to a real risk of an unfair trial. In dealing with this, the applicant says that if the names were made available to him, his solicitors would be able to interview the individuals concerned and this in turn might result in information coming to light which could potentially undermine the complainant's credibility. Underlying this assertion is the assumption that the individuals in question would agree to be interviewed at all by the applicant's solicitors in the first instance. Having regard to the fact that the complainant never made any formal complaint to the Gardaí about these instances which occurred many years ago, it must be open to considerable doubt as to whether consent would be forthcoming to such interviews. Even if it were, one must assume that the interviewees are likely to deny any involvement in the matters in issue. If they admitted involvement, that could clearly not benefit the applicant. Assuming however a denial, it is not immediately obvious to what extent that will facilitate cross-examination of the complainant as to credit any more than, for example, suggesting that if the allegations were true, the applicant would be likely to have reported them to the Gardaí, a suggestion the applicant is perfectly free to make as matters stand.

34. The applicant submits that were it to transpire from interviewing these individuals that, say for the sake of argument, one or other or both were in a position to prove conclusively that they could not have abused the complainant, this would be powerful evidence to put before a jury. It seems to me however that this is moving the case into the realms of total speculation and into the area of remote, theoretical or fanciful possibility of the kind that the Supreme Court expressly found in both Dunne and Savage could not give rise to a right to prohibition.

35. Further, in my view the applicant has not sought to engage with the facts of the prosecution case as they arise here. There is considerable evidence in the case beyond a mere or bare assertion by the complainant of an assault having taking place. I have alluded to this already. Nor is this a case in which there has been a failure to make disclosure by the prosecution. This is not alleged and accordingly the line of authority on failures to make disclosure is of limited relevance. There is a clear public right in pursuing a prosecution and I am not entitled to ignore the potentially significant evidence in this case beyond that of the complainant alone.

Conclusion

36. Accordingly, I am satisfied that the applicant has not discharged the onus of establishing that there is a real risk of an unfair trial or less still that there is anything particularly exceptional about the facts of this case that would warrant the intervention of this court. It seems to me that the applicant has ample material available to him with which to conduct a meaningful cross-examination which is unlikely to be inhibited to any significant degree by the non-availability of the names of the alleged perpetrators of the abuse. Even if that could be said to give rise to any unfairness, I can see no reason why that could not be adequately dealt with in an appropriate fashion by the trial judge.

37. Accordingly, I must dismiss this application.