Neutral Citation Number: [2014] IEHC 5

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 57 JR]

BETWEEN

J. (S). T.

APPLICANT

AND

THE PRESIDENT OF THE CIRCUIT COURT AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Kearns P. delivered on the 17th day of January, 2014.

The applicant in this case is a former Christian Brother, who was born on the 15th April, 1942 and is now 71 years of age. In these proceedings the applicant seeks to prohibit his trial on 112 counts of indecent assault in respect of four complainants in Limerick Circuit Court (Bill No. 93/2010) and a further 139 counts of indecent assault in respect of thirteen other complainants, also in Limerick Circuit Court (Bill No. 190/2012). The alleged offences relate to the time period from 1979 to 1981 when the applicant was teaching fifth and sixth class pupils in a school in Limerick. The incidents are alleged to have taken place in the classroom, the environs of the school and in the swimming pool where the applicant assisted in the teaching of swimming.

The applicant is seeking to prohibit his trial on two grounds. The first is that the delay in instituting the criminal proceedings has prejudiced him and has led to a real risk of an unfair trial. In this regard, he complains of blameworthy prosecutorial delay. He also seeks relief on a second ground that it would be unfair or unjust in all the particular circumstances of this case to put him on trial at all.

By way of opposition, the second respondent contends there has not been any blameworthy prosecutorial delay in the circumstances of this case, particularly having regard to the large number of complainants and the complex nature of the garda investigation. Alternatively, if there has been some blameworthy prosecutorial delay, it is contended that, in adopting a balancing exercise, this Court should find that the public interest in having the multiple allegations prosecuted outweighs the effect of any delay in the case. In relation to the second ground, the respondents contend that there are no exceptional circumstances which would warrant any finding by the Court that it would be unfair or unjust to put the applicant on trial.

In an effort to simplify matters in this case, I feel the Court should at the outset address two aspects of this case upon which reliance has been placed by the applicant to argue for the existence of exceptional circumstances which would make or render it unfair or unjust to put the applicant on trial at all.

These derive from the fact that the applicant has previously faced trial on six occasions in respect of other similar allegations and has not been convicted. He has also previously spent over four years in custody while awaiting trial for those other matters.

Stated in such bald terms, it might well be thought that these considerations should weigh heavily in the Court's consideration on that issue. Such a perception would, in my view, be gravely mistaken. The "other offences" relate to totally different charges, 104 in number, allegedly committed by the applicant between September 1969 and June 1972 while he was a teacher at another school in Dublin. The applicant also sought to prohibit his trial on those charges, an application which was rejected first by the High Court and subsequently by the Supreme Court. In his High Court application to prohibit his trial for those offences, the applicant alleged prosecutorial delay from 1998 (when the complainants in that case came forward), and April 2003 during which the garda investigation was carried out. Hanna J. found however that the garda investigation was a complex, detailed and methodical investigation and declined to attach any blameworthy delay to An Garda Síochána in that regard. However he found there had been some blameworthy delay on the part of the prosecuting authorities and proceeded to apply a balancing test, noting in particular in this regard that the applicant had offered no medical evidence whatsoever to support his claim that he had endured severe stress and anxiety as a result of delay.

The issue of his time in custody was also addressed in the hearing before Hanna J. The applicant had in fact been granted bail but opted to remain in custody rather than face what he expected would be significant harassment and vilification from the media if he were to return to the outside world where, he said, he could no longer function. Other complaints about prejudice suffered by reason of adverse media reports were rejected by Hanna J. on the basis they ceased over three years before he gave judgment in 2007.

The applicant appealed to the Supreme Court from this decision. That appeal was refused in a judgment (*J.T. v. Director of Public Prosecutions* [2008] IESC 20) delivered on the 17th April, 2008.

This Court is of the view that the "Dublin offences" or his period of freely chosen time in custody are not matters relevant to the present application. To hold otherwise would ineluctably lead to the position that the longer the list of offences with which a person was charged the less likely it would become that he would ever have to stand trial for those later uncovered and made the subject of further criminal charges.

ALLEGED PROSECUTORIAL DELAY ON THE FACTS OF THE PRESENT CASE

The Court would begin by noting that the application in this case for judicial review was brought on the 30th January, 2013, five days before the trial of the applicant was due to begin. That background must be borne in mind when considering the whole issue of blameworthy delay alleged by this particular applicant against the respondents. Both this Court and the Supreme Court have

repeatedly condemned and deprecated applications for judicial review brought at the last moment which have the effect of delaying a trial (in some cases for years) when all the preparatory work for the trial has been completed and when the costs associated with trial preparation have been incurred. This is another such case.

The applicant's submissions to this Court began by focusing on the antiquity of the complaints, dating back as they do to the years 1978–1980. Most of the complainants alleged that the applicant on regular occasions during the school year sexually assaulted them by putting his hand in their trousers while in class and fondling their genitalia. Two complainants, R.C. and M.C. made allegations of a more serious nature and describe being buggered by the applicant. R.C. made his complaint to the gardaí in 2005. Over the following two years the gardaí contacted classmates of R.C. and proceeded to take statements from four other complainants. The applicant was eventually charged on the 11th February, 2010 with the offences the subject matter of Bill No. 93/2010. He was served with a book of evidence in those cases in September 2010.

The second set of complaints emerged in 2010 and formed the subject matter of Bill 109/2012. Thus from the time of R.C.'s initial complaint to the date of charge in relation to the second series of charges, some seven years elapsed. While it has been described as a complex investigation, it involved in reality the gardaí contacting a number of people whose names appeared on a roll book and taking statements from as many of them as possible. It was a particular feature of this case that the gardaí were proactive in approaching complainants who might not otherwise have come forward at all.

In R.C.'s case it took five years for the case to come before the courts and another two years before the prosecution were in a position to ask for a trial date. This trial date was subsequently vacated on the application of the prosecution. The book of evidence in relation to R.C. contained a number of witnesses, including a Dr. Little who gave medical treatment to R.C., and three others, all based then – as was R.C. - in the United Kingdom, who provided counselling about the matters which are the subject matter of his complaints. Dr. Little is now deceased and the other three witnesses cannot be located and all records made by them have been destroyed.

The affidavits of Garda Bourke and Garda Foley set out the history of the investigation in relation to the charges in Bill No. 93/2010. They confirm that R.C. came forward in November 2005 and made an allegation of sexual assault and buggery against the applicant while he was in fifth class between the years 1978–1979. While the gardaí spoke to a number of persons in connection with the allegations, some made witness statements, while others made additional statements of complaint. The school roll book was then sought to trace witnesses that were mentioned in statements taken and again some of these witnesses became complainants against the applicant. Any suggestion that the gardaí had "encouraged" persons to come forward, were vehemently rejected by counsel for the respondents.

Part of the difficulty, as deposed to on affidavit, in relation to R.C. was that he was living in London and a medical report was not available until January 2008. By that time further complaints were coming to light from additional complainants, culminating in 100 charges being laid against the applicant in February 2010. Further, a number of complaints came forward from the sixth class (1980-1981) and the same procedure was followed whereby the roll book was sourced to trace witnesses, some of whom became complainants themselves. Some of these potential witnesses lived abroad and many more were difficult to trace. The garda witnesses aver that it was a complex case and preparation of the book of evidence required a great deal of time and effort. The applicant was sent forward for trial to the Circuit Court in early September, 2010 in relation to the offences alleged in Bill No. 93/2010.

With respect to the matters the subject matter of Bill No. 190/2012, the chronology was that a complainant, M.C., from fifth class in 1978-1979, only came forward to make a complaint in September 2010. Other former pupils then started to ring the garda station requesting to speak to the gardaí. After four or five such approaches, a decision was taken that all class members should be contacted. This investigation was concluded in the first half of 2011 and the applicant was charged with 138 counts of indecent assault on the 21st June, 2012.

In his affidavit, the State Solicitor for Limerick, Mr. Michael Murray, sets out the progress of both Bill numbers at Limerick Circuit Court. With respect to Bill No. 93/2010, the prosecution could not proceed because of a legal challenge to the status of the offence of buggery that was then pending before the Supreme Court. As the applicant had been charged with the offence of buggery in respect of R.C., the prosecution could not proceed until this issue had been decided. The defence did not object to the adjournment of the case until the issue had been decided. Further, counsel on behalf of the applicant advised the prosecution that, in any event, the defence was anxious that other matters in respect of which the accused was facing trial in Dublin should be disposed of prior to the trial in Limerick. The Dublin matters were finally concluded on the 4th July, 2011.

On the 8th February, 2012, the Supreme Court held that the offence of buggery had been abolished and the second respondent then proceeded to quash that part of the order in Bill No. 93/2010. This required the second respondent to bring judicial review proceedings to quash that part of the return for trial and to obtain a court order which was duly made on the 3rd May, 2012. In June 2011 the State Solicitor received the new file which became Bill No. 190/2012 and, in view of the fact that both sets of proceedings were inextricably linked, it was felt that the charges should be tried together.

The submissions filed on behalf of the respondents record that, in light of the jury acquittals in the Dublin cases, which concluded in July, 2011, and during the period while the Supreme Court buggery case was pending up to February, 2012, the second respondent gave a very detailed consideration to all of the outstanding prosecutions against the applicant. This consideration was carried out at the highest level within the office of the second named respondent, culminating in a decision in March, 2012 to proceed with the existing prosecutions in the public interest. Directions were given by the second named respondent on the 7th June, 2012 to bring charges in relation to 138 counts involving thirteen different complainants, the subject matter of Bill No. 190/2012.

As previously noted, the trial date was fixed for the 5th February, 2013 in relation to all matters pending before the Circuit Court. The judicial review proceedings were instituted on the 30th January, 2013, less than a week before the scheduled trial date.

In relation to any possible question of prejudice to the applicant arising from the death or unavailability of certain witnesses, the applicant contends that R.C. believes he made his complaint about him to the then principal, Brother S. The applicant does not believe that Brother S. was a principal at the school at the relevant time. At this remove, he contends it is impossible for him to establish whether or not any complaint was made as that person is now deceased. By way of response, it is submitted that any delay in prosecuting the case has not caused any such prejudice in circumstances where the missing person had died many years before any complaint was made. In any event, no line of defence and no line of cross-examination had been closed off to the applicant as a result of the death of the principal of the school, given that R.C. states in his statement that when he made the complaint to the principal two other persons were with him, M.R. and E.P. These two persons are actually witnesses in the book of evidence. The applicant further alleges that a teacher, F.K., who taught in the classroom next to his at the time of the alleged sexual abuse, is now deceased also but may have been able to aid the applicant in his defence. He states this on the basis of his assertion that the

teacher in question often came into the applicant's classroom and the doors between the two classrooms were often left open, so that if anything untoward had been taking place the same would have been apparent to the other teacher. However, Garda Foley in her affidavit confirms that while F.K. did teach in the school, he was not teaching in the school during the years that the applicant is accused of abusing the pupils so that his death has not in any way prejudiced the applicant.

Insofar as the death of Dr. Little is concerned, he appears to have examined R.C. in relation to an allegation that the applicant caused cigarette burns to his penis and found scar tissue consistent with the allegations of buggery made by R.C. His absence would appear to prejudice the prosecution rather than the defence. In relation to the counsellors, they all lived in England and cannot now be located by the prosecution authorities. While it is asserted they cannot be cross-examined as to any previous inconsistent statements made by the applicant, there is no indication or evidence that there were any such inconsistent statements, and it is pure speculation as to what these witnesses would have added in terms of evidential value to the defence of the applicant. It is suggested on behalf of the prosecution that these witnesses were more likely to have been helpful to the prosecution than to the defence, given that their statements as set out in the book of evidence appear to corroborate the account of R.C. that he was abused by the applicant.

CONCLUSION ON THIS ASPECT OF THE CASE
Virtually all of the considerations which prompted Hanna J. in the High Court and the Supreme Court also in the same case to reject complaints of prosecutorial delay exist in this case also.

This was undoubtedly an old case, in the sense that the matters complained of went back many years. It was a complex and detailed investigation, a fact not really challenged by counsel on behalf of the applicant in the hearing before this Court. Rather he focussed on suggestions to the effect that this was a garda driven investigation in which the gardaí sought to interview more people than perhaps was necessary.

The Court finds this line of attack difficult to comprehend given that in this kind of application the gardaí are frequently the subject of criticism for "lackadaisical" or "slovenly" investigations which do not manifest the degree of thoroughness which was present in these cases.

This was not a case which lent itself to a speedy process. The very number of complaints made that impossible.

The chronology of events from the time complaints were first brought forward satisfy me that this is not a case where it can truly be said that blameworthy prosecutorial delay has occurred. Indeed, some of the delay was undoubtedly brought about to facilitate the applicant in that both sides were content to abide the outcome of the Supreme Court adjudication on the status of the offence of buggery in 2012.

Even if I am mistaken in this view, and there has been blameworthy prosecutorial delay, that would not dispose of the matter because I would then have to apply a balancing test as set out in *P.M. v. DPP* [2006] 3 I.R. 172, and *Barker v. Wingo* (1972) 407 U.S. 514 to ascertain if the applicant had put in the balance something additional, by way of stress and anxiety or other consequence, to establish that it would be unfair to put him on trial. As this consideration overlaps with the second ground upon which the applicant seeks relief, I will deal with both as a single argument relevant to both grounds.

EXCEPTIONAL CIRCUMSTANCES WHICH WOULD RENDER IT UNFAIR OR UNJUST TO PUT THE APPLICANT ON TRIAL AT ALL
The applicant bases this part of his submission on the observations of Murray C.J. in *S.H. v. Director of Public Prosecutions* [2006] 3 I.R. 575 where he stated as follows (at p. 620):

> "…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 …'"

Murray C.J. also stated at p. 622:-

> " … the Court does not exclude wholly exceptional circumstances where it would be unfair or unjust to put an accused on trial." (Emphasis added)

Relying on this latter dictum, the applicant contends that, because of the applicant's age, and his multiple present health problems, it would be an unfairness in itself to put him on trial. Implicit in this submission is the notion that a point may come in the case of any litigant where the courts will impose a limitation on the respondent's right to bring and maintain a prosecution.

The applicant is now 71 years of age. His doctor has described him as being "quite frail owing to a number of chronic medical illnesses and not to mention the extreme stress he has been placed in when trying to defend himself from numerous allegations". He has had difficulties with chronic acute depression and anxiety and has been admitted on occasion into St. John of God Hospital in Stillorgan, Co. Dublin. He is on medication for depression. In fact, on a daily basis, he takes a total of eighteen different types of medication. He also suffers from Type 2 Diabetes and has been under the care of a diabetic specialist at Beaumont Hospital since 2009. In 2011 he underwent surgery in order to remove a pancreatic lesion. He has also suffered from anaemia and diarrhoea. Since February 2012 he has been under the care of Dr. Mark Denton for the management of chronic kidney disease. He has approximately 30% of normal kidney function only. He also attends at the Mater Hospital as he suffers from Barretts's Oesophagus, a condition which can lead or develop into cancer of the oesophagus.

Counsel for the applicant referred to two cases where a trial had been stopped on the basis that it would be unfair to put the accused on trial. In *J.M. v. Director of Public Prosecutions* [2004] IESC 47 (Unreported, Supreme Court, 28th July, 2004), the applicant claimed prejudice on the grounds of complainant delay and prosecutorial delay and sought to prohibit his trial. McCracken J., in delivering the judgment of the Supreme Court, held that the applicant had not established the existence of any specific prejudice. However, while the overall delay was not sufficient to require the trial to be prohibited, the delay should be taken into account with the other circumstances of the case, which included the totality of the delays which took place in the prosecution, inconsistencies in statements by the complainant, the risk that the complainant had been influenced in his recollection by another person, an unreliable co-complainant and the absence of relevant records. The Supreme Court granted prohibition on the basis that it would be unfair to permit the applicants trial to proceed having regard to the cumulative situation.

Counsel for the applicant argued that when the weaknesses in the prosecution case in this instance were taken into account, combined with the fact that the charges relate to events alleged to have occurred 32-34 years ago, and further that the prosecution are unable to locate witnesses and that counselling records have been destroyed and, more particularly, that the applicant is now an elderly man in bad health, the applicant should not have to face a trial against such a background.

The applicant also relied on the case of *P.T. v. Director of Public Prosecutions* [2008] 1I.R. 701, where a similar view was taken by the Supreme Court, albeit that the applicant in that case was 87 years of age and in poor health.

Counsel for the respondents argued that both of these cases turned on their own particular facts which were quite different from those of the present case and further, beyond illustrating that there had been and could be cases where the Court might intervene to prevent a person being put on trial, they did not in any way detract from the proposition that there must be wholly exceptional circumstances present before the courts would take such a draconian step.

CONCLUSION
The Court believes it can be fairly stated in this case that the dearth of medical evidence which characterised the applicant's previous judicial review ventures in the Four Courts has now been addressed for the purpose of this further attempt to prohibit his trial in relation to multiple other charges.

However, that medical evidence does not suggest that the applicant is incapable of participating in the trial process and while it will undoubtedly be a cause of significant stress and anxiety for him, the same may be said of any citizen facing into multiple charges of this nature. I believe the evidence would have to go considerably further before the Court could ever legitimately take the view that the applicant was to be regarded now as a person beyond the reach of justice.

Undoubtedly a point in time must come where the prosecution of a person of significantly advanced years and significant poor health ceases to be a trial in any meaningful sense if that person is now at a stage where he is effectively incapable of defending himself. The justice system itself might become a target for criticism for permitting a trial in such circumstances as it would be difficult to see how the public interest would be served by maintaining a prosecution in an extreme situation of that nature.

In this case, however, and quite apart from being satisfied that the various ailments of which the applicant complains do not render a trial unjust, I also do not regard his age as one which contra-indicates a trial either. The days are long gone when man's allotted lifespan was "three score and ten". Many men, and indeed many more women, continue to thrive and prosper to a much more advanced age, so that there can be no sweeping assumptions that a person who the week before a milestone birthday was fit to stand trial becomes unfit a week later. Every case turns on its own particular facts and I see nothing in the instant case arising from the applicant's age or medical problems which would render it unjust or unfair to put him on trial. None of the medical evidence suggests that he is unable to stand trial or that his mental faculties are impaired.

Further, insofar as my ultimate decision in this regard is based on discretionary considerations, I take very much into account the fact that this application was brought only days before a complex and difficult trial was due to get under way. I have elsewhere in this and in other cases deplored the frequency of this form of resort to the courts which seems more often designed to put off and delay the trial rather than anything else.