

THE HIGH COURT

[2016 No. 842 JR]

BETWEEN

J.D.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Eagar delivered on the 20th day of October, 2017.

1. This judgment concerns an application for an order of prohibition, prohibiting the Director of Public Prosecutions (hereinafter 'the DPP') from prosecuting or taking any further steps in the criminal proceedings entitled *The DPP v. J.D.* on bill of indictment DUDP 913/2016, and a declaration that the applicant's right to a fair and expeditious trial in the said prosecution or in any prosecution arising from the allegations in question has been irretrievably prejudiced.

Facts

2. On an unknown date in or around 1998, the Eastern Health Board reported to the An Garda Síochána a complaint of alleged sexual assault on Ms. C.D., the applicant's adopted daughter. The allegation made by Ms. D. had been disclosed in the course of counselling. An Garda Síochána created an active file in relation to the matter and conducted investigations in or around 1998 in respect of the complaint received from the Eastern Health Board. Nothing occurred on foot of these allegations, and they remained in abeyance until in or around September or October 2014.

3. Garda Mary Sharkey who was initially assigned to the investigation is now deceased. There is no record of any investigation by Garda Sharkey in relation to the allegations in 1998. Garda Sharkey went on sick leave in August 1998, and later resigned from An Garda Síochána on 13 November, 1998. The file was not reassigned to another Garda at this time.

4. Garda Jeannette Power states that the investigation into sexual abuse began on 30th October, 2014, when the file was reassigned to her as a result of C.D.'s enquiring at Wexford Garda Station. Garda Power contacted Ms. D. and made arrangements to take a formal statement from her. A statement of complaint was made on the 20th November, 2014.

5. Garda Power states that Ms. D. disclosed to her that the applicant, Mr. D. had admitted to sexual abuse within the course of counselling. Garda Power subsequently contacted TUSLA to obtain Ms. D.'s records, and took a statement from a former counsellor who had been involved with the D. family regarding the abuse allegations.

6. The applicant was subsequently arrested by Garda Jeanette Power on the 12th March, 2015 at his home and conveyed to Blackrock Garda Station for the purposes of interview. The applicant was detained, interviewed and subsequently charged and released on station bail for alleged offences contrary to section 2 of the Criminal Law (Rape) (Amendment) Act 1990 as set out on the charge sheets, numbers 16954438 and 16954421.

7. Garda Power obtained a copy of the Applicant's file with TUSLA on the 14th May, 2015, and took a statement from a counsellor involved with the family in July, 2015. She obtained Ms. D.'s school records in June, 2015. She also took statements from various members of the family between August and October, 2015. A statement was taken from a social worker from the Eastern Health Board that had dealt with the family after the disclosure of sexual abuse, on 25th January, 2016, and on 3rd February, 2016.

8. Garda Power states that she compiled a detailed investigation file and forwarded it to her superior officers on 5th March, 2016, and this file was subsequently sent to the Respondent on 7th April, 2016. On 1st August, 2016, Garda Power states that she received directions from the Respondent to prosecute the Applicant on two counts of sexual assault and that the prosecution was to proceed on indictment. On 2nd August, 2016, she arrested the Applicant and he was charged with two counts of sexual assault and released on station bail to appear before Dublin District Court. The applicant was remanded to appear in Dublin Circuit Criminal Court on 17th January, 2017 for arraignment, however, these judicial review proceedings were instituted in the interim on 7th November, 2016, and no further steps have been taken in the prosecution since that date.

Has there been Blameworthy Prosecutorial Delay?

9. The applicant's case centres on his claim that he has been denied his right to a fair trial as enshrined under Article 38.1 of the Constitution, as a result of blameworthy prosecutorial delay, for which there is no legitimate excuse or explanation. Counsel for the applicant stated that the applicant has suffered significant prejudice in defending this case in circumstances whereby the carriage and disposal of the prosecution against the applicant was processed and completed in full in or around 1998 – 1999 by the prosecuting member of the Gardai.

10. Further, all relevant information including the original case file has been mislaid, lost, destroyed or is unavailable, and the original investigating member has since passed away. Garda Power has opened a new file pertaining to a claim which had been previously finalised.

11. Andrew Vallely, solicitor for the applicant stated on replying affidavit that no reason has been proffered by the Respondent as to why the delay of 18 years does not constitute blameworthy prosecutorial delay, nor is there any explanation in relation to the tardiness of the whole investigation, the mislaying or non-recording of information, or the missing, lost or unavailable original file.

12. In response, counsel for the respondent accepts that this case involves prosecutorial delay. However, she states that the applicant can point to no precedent that establishes that prosecutorial delay *in and of itself* (this Court's emphasis) is sufficient to render the prohibition of a trial. Once delay is established, this is to be balanced against other factors.

Does the Right to a Reasonably Expeditious Trial Justify the Prohibition of a Trial?

13. In *Devoy v. The Director of Public Prosecutions* [2008] 4 I.R. 235, it was held by the Supreme Court that blameworthy prosecutorial delay if established was not sufficient *per se* to prohibit a trial. In addition to the finding of prosecutorial delay, one or more of the interests protected by the right to an expeditious trial must be shown to have been so interfered with so as to entitle an

applicant to relief – the bar set is a high one for an applicant to meet. In each case, the court should engage in a balancing exercise, considering the nature of the offence, the extent of the delay, and the particular circumstances of the case at hand. The delay in *Devoy* was found to be inordinate and blameworthy but in light of the factual matrix of the case, it was not proportionate to prohibit the trial of the applicant.

14. In *P.M. v. The Director of Public Prosecutions* [2006] 3 I.R. 172, the Supreme Court held that, in applying the balancing test, the significantly increased anxiety of the applicant arising from the blameworthy prosecutorial delay was sufficient to outweigh the public interest in having the charges prosecuted. Moreover, it was held that in a case where serious prosecutorial delay was established, the D.P.P. ought not be allowed to say that the extra delay caused no provable actual prejudice, and that serious blameworthy prosecutorial delay was a factor in itself when the balancing exercise was being considered.

Role of the Trial Judge

15. In *Nash v. the DPP* [2015] IESC 32, Clarke J. emphasised the constitutional imperative, that all issues of justiciable controversy be determined by a trial on the merits. For a trial to be prohibited, the culpability of the prosecuting authorities in delaying in bringing a case had to be so serious such that the effect was to disturb this important constitutional value, that the guilt or innocence of persons accused of crime should be determined by a full trial on the merits (this Court's emphasis). Clarke J. commented that a trial judge would be in a much better position to assess the state of the evidence and issues of admissibility. Charleton J. noted that when an applicant seeks to prohibit a trial on the grounds that circumstances have occurred that would render the trial unfair, "the trial judge now has the primary role in decisions of this kind and judicial review is rarely appropriate". Hardiman J. expressed his reservations in trials proceeding in sexual cases involving children after lengthy periods of time after the alleged offence had lapsed. He questioned the justice of such trials, where the case often turned on bald assertion versus bare denial. If the defendant can establish a real risk of an inescapably unfair trial, i.e., one in which the unfairness cannot be avoided by the appropriate rulings and directions of the trial judge, the trial ought to be prohibited.

Decision

16. Whilst it is admitted by counsel on behalf of the respondent that there has been prosecutorial delay, this Court finds that it is not manifest, upon analysis of the particular factual matrix of this case, that Mr. D.'s defence is inevitably prejudiced. Often in cases of sexual abuse, where there has been a long delay in prosecution, there are unsurprisingly missing witnesses and documentation. Garda Sharkey is now dead, and original files are now missing, however, these absences do not give rise to a specific ground for this Court to hold that the trial will be inevitably unfair.

17. What has now taken place is that new evidence has become available, under the investigation of Garda Power. Of serious significance is the fact that an admission was made by the applicant within the course of counselling, and that the former counsellors involved with the family in the wake of the alleged abuse have given statements. Ms. D. herself has come forward to make a statement. This Court holds in accordance with *Nash v. the D.P.P.* [2015] IESC 32, in that the guilt or innocence of persons accused of crime should be determined by a full trial on the merits. Following *Devoy v. The Director of Public Prosecutions* [2008] 4 I.R. 235, the prosecutorial delay in this case is not sufficient to prohibit a trial, considering the particular factual matrix of this case, the fact that Ms. D. has given a formal statement to the Gardaí, and the fact that relevant evidence regarding admissions later came to light.

18. The Court as such refuses the reliefs sought herein.