THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 745 J.R.]

BETWEEN

K.D.

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

ATTORNEY GENERAL

NOTICE PARTY

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 15th day of January, 2016

1. The applicant was born in 1993 and is now 22. She is alleged to have committed certain sexual offences against two children, who I will refer to as A. and B. The offences against A. are alleged to have been committed, at the earliest, on a range of dates between 2010 and 2011, when she was aged between 9 and 10 years of age. She is now 15 years of age. The offences against B. date back, at the earliest, from the range of dates in 2010, when she was 9. She is now 14 years of age.

2. The trial of the applicant began before Her Honour Judge Greally on 3rd December, 2015.

3. There appear to have been three significant issues that were raised immediately before Judge Greally. Firstly, whether she had jurisdiction to direct the discontinuance of the proceedings by reason of delay, in particular alleged blameworthy prosecutorial delay. She ruled that she did not have such jurisdiction.

4. Secondly, an issue arose as to whether video recorded interviews with the complainants were admissible under s. 16(1)(b) of the Criminal Evidence Act 1992. The complainants were under 14 years of age when the recordings were made, but were 14 and 15 respectively as of the date of the trial. Judge Greally ruled that the operative date for the purpose of s. 16 was the date on which the interviews took place and that those recordings were therefore admissible.

5. A third issue arose as to whether the EU Victims' Directive 2012/29/EU has direct effect, given that Article 24 of the directive allows any injured party under the age of 18 to give evidence by means of an audio-visually recorded interview. The directive should have been transposed by 16th November, 2015, but it is said that this has not been done. Judge Greally ruled that the issue of the direct effect of Article 24 did not arise by reason of her ruling in relation to the interpretation of s. 16.

6. Following these rulings, due to circumstances not related to the current application, the jury was discharged, and a new trial date fixed for 18th January, 2016.

7. The applicant now seeks leave to apply for a prohibition of the second trial, and related reliefs including a declaration that s. 16(1)(b) of the Criminal Evidence Act 1992 is unconstitutional. I directed that the State be put on notice, and Ms. Éilis Brennan B.L. for the Director and Mr. Michael O'Higgins S.C. (leading Ms. Brennan) for the Attorney appeared and assisted the court without formally opposing the application as such.

The jurisdiction of the trial court

8. Having regard to the recent decision of the Court of Appeal in *M.S. v. Director of Public Prosecutions* [2015] IECA 309 (Hogan J.), it is clear that Judge Greally was correct in holding that she did not have jurisdiction to stop the prosecution on the grounds of delay alone (see para. 67: "*the mere fact of a long delayed complaint is not in itself a reason by which a criminal charge of this nature should be dismissed*.")

9. A trial judge can only stop a trial if an irremediable injustice would be caused to a defendant of such gravity that it would be fundamentally unjust to allow the matter to go to a jury. Of necessity, this is an exceptionally high test, and one that will only rarely be met, if for no other reason than that the State is under important legal obligations to victims of crime, pursuant to the Constitution, EU law and the ECHR, including the "*obligation to conduct an effective prosecution*" (*Söderman v. Sweden*, Application No. 5786/08 (European Court of Human Rights, 12th November, 2013) para. 88). As Hogan J. pointed out in *M.S.*, the system of criminal justice envisaged by the Constitution, as far as the trial of serious offences in the ordinary courts is concerned, "*involves trial by jury and not by judge alone*" (para. 67). A judge should not prevent that system of jury trial from operating unless the level of injustice being caused to a defendant is severe and inevitable, and cannot be addressed in any other way such as by appropriate warnings to the jury.

10. Mr. Colman Fitzgerald, S.C., on behalf of the applicant, submits that the applicant has suffered stress and anxiety going well beyond what would have been the case had the charges been prosecuted expeditiously. But it will always be the case that additional delay will produce additional difficulties for a defendant. If delay in itself is not a ground to stop a trial, as the Court of Appeal have clearly said, the inevitable additional stress and anxiety that is inextricably linked with such delay could not logically be such a ground either. Even assuming in favour of the applicant that all of her complaints could be taken into account, subject to an assessment of gravity, and taking them at their highest, those complaints come nowhere near the level required.

11. Paragraph 7 of the applicant's affidavit sets out various matters relating to stress, strain, worry and anxiety and other related difficulties, including active investigations of her family by the HSE. It seems to me that most of these difficulties arose from the nature of the serious allegations made against the applicant in the first place relating to defilement and sexual assault of children, rather than the delay as such. For example, the HSE (and now the Child and Family Agency) would have been entitled, if not required, to investigate the applicant, possibly at some length, in relation to this matter in any event. If and to the extent that any additional difficulties have been experienced by the applicant as a result of the delay, they are nowhere near the level at which it can be said to be arguable that the applicant has experienced the kind of severe and inevitable prejudice that would have warranted the stopping of her trial, even if all of the matters relied on by the applicant were entirely attributable to the delay, which they are not.

Does section 16 cease to apply when an injured party turns 14?
12. In *People (D.P.P.) v. J.P.R.* (Unreported, Central Criminal Court, 1st May, 2013, ex tempore, not circulated), O'Malley J. ruled that s. 16 did not cease to have effect once the child concerned had turned 14 (see Garnet Orange, *Police Powers in Ireland* (Bloomsbury Professional, Dublin and West Sussex, 2014) para. 7.38).

13. This decision was binding on Judge Greally. Furthermore, it is clearly correct.

14. Section 16(1) envisages two situations where a video recording can be used as evidence in chief. Paragraph (a) as substituted by s. 20 of the Criminal Justice Act 1999, provides that such a procedure may be followed in relation to a video recording of evidence given, in relation to an offence which that part of the 1992 Act applies, "*by a person under 18 years of age through a live television link in proceedings under Part IA of the Criminal Procedure Act 1967*". The natural and ordinary meaning of this paragraph is that the calculation of the person's age is to be measured by reference to the date of the video recording in those proceedings.

15. A similar position applies in relation to para. (b) , as substituted by s. 4(b) of the Criminal Law (Human Trafficking)(Amendment) Act 2013, which provides for the admission of:-

> *"a video recording of any statement made during an interview with a member of An Garda Síochána or any other person who is competent for the purpose –*
>
> *(i) by a person under 14 years of age (being a person in respect of whom such an offence is alleged to have been committed), or*
>
> *(ii) by a person under 18 years of age (being a person other than the accused) in relation to an offence under [certain specified provisions]."*

16. Again, the natural and ordinary meaning of this provision is that the determination of the age of the person in question is to be had by reference to the date of the video recording of the interview. There is no reference in either paras. (a) or (b) to the date of the trial.

17. The only reference to the trial comes later in subs. (1), which provides that a video recording under (a) or (b) "*shall be admissible at the trial of the offence as evidence of any facts stated therein of which direct or oral evidence by him would be admissible".* Thus, the section draws a clear distinction between the proceedings or interview referred to at paras. (a) or (b), and the trial, referred to in the concluding clause of the subsection. That clause does not even refer to the trial by reference to any particular date, or in a manner in which it could be inferred that the ages of the children must be calculated by reference to such date.

18. Furthermore, to construe the subsection in the manner contended for by the applicant would create a host of anomalies. For example, the admissibility or otherwise of the video recording, and the necessity for a child witness to have to give evidence in chief in the normal manner, would hinge of the happenstance of when the trial date happened to be fixed, or whether a particular trial ran to its conclusion or had to be recommenced or even the precise date during a particular trial on which it was sought to introduce the video evidence. To construe the section in this manner would place an enormous and irrational premium on the generation of delay on behalf of an applicant. If an applicant only had to hold up the trial until an injured party's 14th birthday in order to prevent a video recording from being admitted, the door would be opened to all manner of abusive tactics to achieve this end. This would not be justice in any recognisable sense.

19. It is not arguable to contend that the section should be read as prohibiting the admission of a video recording after the date on which the injured party turns 14. The age of 14 is relevant to the date on which the video recording of the interview is originally made, not to the date of the trial. The applicant's interpretation is unacceptable at every level of analysis. It is not arguable that the natural and workable meaning of the section should be rejected in favour of an entirely unnatural and unworkable meaning which has no basis in the text. The principle that penal statutes should be construed strictly does not assist the applicant in rewriting s. 16 in order to tie the ages referred to the date of the trial. There is simply no such provision in the section. Furthermore, this matter has already been the subject of a decision of the High Court in *J.P.R.*, already referred to, which for good measure was binding on the learned trial judge.

20. If I were in any doubt on this matter, which I am not, the Victims' Directive is of relevance in this context. While no specific transposing legislation has been introduced, existing Irish law must be construed in a manner compatible with EU law. Thus s. 16 must be construed in a manner consistent with the directive insofar as that is possible. To afford the section the interpretation I have set out is consistent with the directive insofar as children under 14 as of the date of the recording are concerned. To uphold the applicant's interpretation would cut across rights conferred by the directive and give it a less effective level of transposition. Given the clear supremacy of EU law, it is not arguable that s. 16 should be afforded an interpretation that limits the effectiveness of rights for injured parties that are protected by an EU directive.

Direct effect of the Victim's Directive
21. In the light of my conclusion that Judge Greally was correct in her approach to s. 16, I must also decide that she was correct in holding that the question of whether the Victim's Directive has direct effect does not arise, as it is not necessary to resolve the matter. The question of reading existing Irish law including s. 16 in the light of the directive is not a matter of direct effect but rather of giving effect to the supremacy of EU law. I would however observe that it is a matter of some concern that the directive has not yet been more comprehensively transposed, despite the fact that it was adopted on 25th October, 2012 and that therefore more than three years has passed since its enactment. There are few areas of law in which the requirement of legal certainty is as pointed as it is in relation to the criminal process. The interests of legal certainty are clearly not served by a failure to transpose a criminal law directive in a timely manner, thereby giving rise to issues such as that in the present case. The directive should be transposed urgently.

The constitutionality of section 16 of the 1992 Act
22. Mr. Fitzgerald argues as a fall-back position that s. 16(1)(b) of the 1992 Act is unconstitutional. The fundamental problem with this argument is that the section protects rights conferred by the directive insofar as persons under 14 are concerned. It is therefore not unconstitutional by virtue of Article 29.4.6° of the Constitution.

23. Apart from the directive, there are significant safeguards in the section. Firstly, the child must be available at the trial for cross examination (see proviso to sub-s. (1)). Secondly, the court has a discretion not to admit the evidence in the interests of justice (sub-s. (2)).

24. In the course of the application, I sought clarification from Mr. Fitzgerald as to why the section was unfair. He replied that "*I am not saying it's unfair*", but rather that a penal statute should be construed strictly, and that there was a potential for unconstitutional inequality given that two compatible offences could be tried in a different manner depending on the level of delay if any affecting each one.

25. While the statement of grounds alleges that s. 16(1)(b) of the 1992 Act is "*a significant departure from the requirements of orality*", that does not make it unconstitutional. The allegation that to depart from the alleged requirement of orality is "*a breach of the applicant's rights, pursuant to Article 38.1 of the Constitution, to be tried in due course of law and her rights pursuant to Article 40.3 of the Constitution*" (ground 12 of the statement of grounds) is not particularised or intelligibly explained. Given the court's supervision of the admission of the recording and the express preservation of the right to cross-examine, no arguable case as to unfairness arises and, as I have observed, Mr. Fitzgerald did not make such a case at the hearing of the application.

26. As regards discrimination, it may be true that different procedural features may occur in cases that are otherwise similar, due to issues such as delay or any other quirk of the criminal justice system. Such differences are unavoidable in any system, even if the particular problem alleged by the applicant did not arise. Indeed one could turn the argument on its head, and say that to tie the admission of a video recording of the evidence of a child to the date of the trial rather than the date of the interview would create an unconstitutional discrimination in terms of the rights of injured parties, who might be subjected to different processes due to factors outside their control.

27. Fundamentally, it is not arguable to contend that anomalies in the application of the section, if such exist, render the section unconstitutional unless some unfairness is caused to the applicant in that regard. Leaving aside the fact that the applicant is mounting a discrimination argument by reference to an entirely hypothetical comparator, which she is not entitled to do in this context, no such unfairness has been shown, even to the level of arguability.

28. If, which is not the case, I was of the view that there was an arguable issue as to the constitutionality of the section, it is important to recall the view of Clarke J. in *Nawaz v. Minister for Justice Equality and Law Reform* [2013] 1 I.R. 142 at p. 161 that "*the normal procedure by which a case, in which the primary relief claimed concerns a declaration of invalidity of an Act having regard to the Constitution, should be brought by plenary proceedings rather than judicial review*". Even accepting the point that the declaration of unconstitutionality is not the primary relief being sought in these proceedings, having regard to the approach in relation to constitutional challenges in the criminal context which I discussed in *Casey v. D.P.P.* [2015] IEHC 824, it seems to me that judicial review at this stage of the process is inappropriate.

29. As discussed in *Casey*, the principle that constitutional issues should be reached last militates in favour of requiring the applicant to submit to the criminal process and pursue any criminal appeal before being permitted to have proceedings challenging a duly enacted statutory provision listed for hearing. To do otherwise would be to put an Act of the Oireachtas to the test in circumstances where it had not yet been determined whether and to what extent that was necessary, and also in circumstances where the factual matrix for the application of the Act had not been finally determined in the criminal proceedings. As Easterbrook J. put it in *Alliance for Water Efficiency v. Fryer* (U.S. Court of Appeals for the Seventh Circuit, Appeal Number 15-1206, 22nd December, 2015), "*courts should not decide constitutional issues unnecessarily*" (at p. 7).

30. I would refuse judicial review in relation to the constitutional issue at any event at this stage having regard to the principles discussed in *Casey*.

The exceptional nature of prohibition
31. Dunne J. in *Kearns v. DPP* [2015] IESC 23 emphasised that prohibition should not be granted save in exceptional circumstances. O'Donnell J. in *Byrne v. D.P.P.* [2011] 1 I.R. 346 was critical of the fact that the judicial review on a missing evidence point in that case had held up the trial of the offence for more than six years (at p. 360). As I said in *Nulty v. D.P.P.* [2015] IEHC 758, the expression of such a concern must have an impact on how the court should approach a prohibition application even at the leave stage, and perhaps particularly at that stage. The grant of leave in this case would mean that the trial could not take place for a substantial further period. At that time, the injured parties would be that much older, and the applicant would presumably then advance an argument that the video recordings should not be admitted by reason of their advanced age. As I have already made clear, such an argument is wholly lacking in merit. The crucial age is the age of the complainant as of the date of the video recording. The inevitability that they may be older as of the date of the trial, or even that they may have attained adult status, does not prevent the admission of the video recording, or in any way make it unfair for such recording to take the place of evidence in chief. Indeed the fact that s. 16(1)(b) is capable in certain circumstances of operating up to the age of eighteen years makes it inevitable that some persons to whom the section is applied will be adults by the time the trial occurs. This does not mean that a trial judge is obliged to refuse to admit the video recording.

32. Despite the lack of merits of the argument, the forensic gamesmanship of the criminal process means that an argument does not have to have a great deal of merit in order to have an influence on how a trial is conducted, or what form of resolution of the proceedings might be acceptable either to the prosecution or to the court. To delay a trial in the circumstances would cause injustice to the complainants and would create potential for the applicant to advance arguments as to further delay and as to the current age of the injured parties, even though such consequences flow from her own decision to seek prohibition.

33. It is well established that an application for prohibition must "*engage with the facts"*, per Hardiman J. in *Scully v. DPP* [2005] 1 I.R. 242 (at p. 252); *per* O'Donnell J. in *Byrne* (at p. 352). The applicant has not stated in her affidavit what the defence case actually is. In the absence of such a clear statement, the applicant does not get off the ground in terms of showing unfairness, let alone inevitable unfairness.

Time
34. Leave should only be granted if the application is brought within 3 months of the grounds first arising. Having regard to the decision in *Coton v. D.P.P.* [2015] IEHC 302 (Kearns P.), that would appear to be the later of the return for trial and the date on

which the oldest complainant turned 14. Both events are more than 3 months ago. The ruling of Judge Greally did not somehow re-set the clock for the purposes of prohibition, so as to enable the present application to be made. Even apart from all other considerations, the application would be refused as out of time.

35. This trial should proceed on 18th January, 2016.

Order

36. For the foregoing reasons I will order:

(i) that the application be dismissed; and

(ii) that the applicant be granted a recommendation under the Custody Issues Scheme for the costs associated with the leave application, in respect of her solicitors and two counsel.