Neutral Citation Number: [2012] IEHC 430

THE HIGH COURT

[2012 No. 703 JR]

BETWEEN/

G.C.

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 17th day of October, 2012

1. Given the vast number of cases which have raised the question of delay in the prosecution of sexual offences over the last twenty years, it may seem surprising that a case of this kind would raise new issues of some difficulty that have not been hitherto fully explored. This, however, is one such case because it concerns an applicant who departed Ireland for the United States for a nine year period after the complaints of sexual assault had been made against him, but before any charges could be proffered.

2. The applicant, GC, is a professional person who has been returned for trial on four charges of sexual assault contrary to s. 2 of the Criminal Law (Rape)(Amendment) Act 1990. It is alleged that on a date or dates unknown between June, 1996 and August, 1996 he indecently assaulted four young girls who were then aged between 11 and 13 years of age at the time. The young girls made detailed statements to the Gardaí at the time. All are now in their late twenties and are available to give evidence.

3. At the time the applicant's marriage was in some difficulty. His wife obtained a barring order in the District Court on 23rd August, 1996, which meant that he was precluded from entering the family home. On the 1Oth September, 1996, Mr. C. was arrested and questioned about these allegations. His employment was terminated on the same day by reason of these developments.

4. At this stage it was evident that he had lost almost everything: his marriage was effectively over, his employment had been terminated and he was barred from his family home. It appears that he moved back to stay with his parents for a few weeks in a completely different part of the country. He then left for the United States in October, 1996. It is not disputed but that Mr. C. visited Ireland on ten separate occasions between 1999 and 2005 and that he returned permanently to live in Ireland in 2005.

5. Following his return, the applicant applied for and obtained social security assistance. In July, 2007 he applied to his statutory regulatory body for registration. One requirement was that he be vetted by An Garda Síochána and in this he was successful in September, 2007. He then first obtained part-time and subsequently full-time employment. During this period some endeavour was made to contact his former wife and children, but this did not prove to be successful. It is clear, however, that his former wife was aware since at least December, 2007 that the applicant had returned to Ireland.

6. In February, 2011 one of the original complainants made contact with a Detective Sergeant Treacy to ascertain the status of the original complaint. Detective Sergeant Treacy - who, it may be emphasized, had no role in the original investigation- immediately researched the investigation file and he discovered that directions to prosecute had been received from the Director of Public Prosecutions in June, 1997. These directions had not been acted upon in the summer of 1997 because by that stage the Gardaí believed that Mr. C. had "fled" the jurisdiction.

7. Detective Sergeant Treacy then caused further inquiries to be made as to the then current whereabouts of Mr. C. He was ultimately located in December, 2011 and following further liaison with the Director of Public Prosecutions, the applicant was then arrested in February 2012 and charged before Cork District Court. He was ultimately returned for trial on indictment to the Cork Circuit Court, having been admitted to bail in the interval on condition that he surrender his travel documents in the meantime. It is understood that, subject to the outcome of these judicial proceedings, a trial date can be secured within a few months of today's date.

Whether there has been Culpable Prosecution Delay

8. The first question to be considered is whether there has been culpable delay on the part of the prosecution with regard to the prosecution of these offences. Here it is necessary to re-visit some of the details surrounding Mr. C's departure from Ireland in October, 1996. Mr. C. is certainly correct in pointing out that he was free to leave at the time and that no one has suggested otherwise. Nor does it appear that the Gardaí had ever taken any steps to inform any members of Mr. C.'s family (other than Mr. C.'s wife) that they wished to speak with him. Here it may be recalled that Mr. C.'s parents were living in Ireland up to the date of their respective deaths and that his siblings knew of his various addresses and whereabouts.

9. It is also to note that Mr. C. did make (or, at least, attempt to make) some contact with his estranged wife and (then) young children following his departure to America. While these endeavours were rebuffed, one cannot overlook the fact that on a few occasions he sent the children presents. It is clear from the waybills exhibited in evidence that the parcels did contain his address in the United States. Counsel for the Director, Ms. Phelan, makes the point that Mr. C. changed his address frequently and that he did not advise his former wife and children of these changes of address. While this is correct, there was nonetheless sufficient material in respect of his whereabouts to enable the prosecuting authorities to locate him had they been so minded to do so. What seems to have happened is that the Gardaí assumed in 1996-1997, following discussions with Ms. C. in particular that Mr. C. had fled the jurisdiction and simply vanished.

10. Yet, viewing the matter objectively, it is hard to avoid the conclusion that the Gardaí overlooked potentially important leads as to his whereabouts. The Gardaí could easily, for example, have located his parents and inquired of them if they had a current (or even past) address for their son in the United States. But there is no evidence that this was ever done. Nor was Interpol contacted and it is accepted that the Gardaí never made inquiries with the US authorities.

11. One might also observe that the applicant had several encounters with the Gardaí of a perfectly legitimate nature after his return to Ireland in 2005 without any action having been taken. One might have assumed, for example, that the Garda Vetting Unit would have been alerted to the existence of pending charges when he applied for Garda clearance for professional purposes, but it appears that the database then in use did not facilitate this disclosure. It further appears from Detective Sergeant Tracey's affidavit that this particular aspect of the database has since been amended and updated.

12. In these circumstances, it is impossible to avoid the conclusion that the prosecuting authorities failed to act promptly and with diligence in the prosecution of these offences. One must nevertheless accept that Mr. C. contributed in some measure to these difficulties by the manner in which he departed from the State in October, 1996. While he was free to go to the United States, it is quite unrealistic to suggest that his departure did not complicate considerably the task of the prosecuting authorities. He knew- or, at least, must have known - that the question of a prosecution was under active consideration. He had, after all, been previously been the subject of a separate charge of sexual assault before in 1993. While in that case a *nolle prosequi* was ultimately entered following a jury disagreement at the original trial, his encounter with the criminal justice system must have made clear to him that there was a real possibility of a subsequent prosecution following the making of these complaints.

13. Here the present case may be contrasted with the actions which were taken by the respondent in *Minister for Justice, Equality and Law Reform v. Tobin (No. 1)* [2008] IESC 3, [2008] 4 I.R. 82. In that case the respondent, while under investigation in respect of the tragic death of two young children following a traffic accident, arranged to leave Hungary to return to Ireland with the consent, knowledge and agreement of the Hungarian authorities. It was for that reason that the Supreme Court concluded that the applicant had not "fled" Hungary within the meaning of the then extant provisions of the European Arrest Warrant Act 2003. One could not fairly compare the position of the applicant with that of the respondent in *Tobin*. Even if it be said that Mr. C. left the jurisdiction for reasons other than fleeing the imminent threat of an arrest, charge and prosecution, it is difficult to avoid the impression that he also calculated that the manner of his departure would frustrate the prosecution.

14. These considerations notwithstanding, one must nonetheless conclude that the delay here in bringing the applicant for trial objectively amounts to a denial of his constitutional right to an early trial as guaranteed by Article 38.1, even if the applicant through his own conduct has contributed to that delay. Detailed allegations had been made against him in August 1996 and this matter has not come to trial some sixteen years later even though any such trial would at best have been of moderate complexity. One must here accept the substance of the submission made by counsel for Mr. C., Mr. McGrath S.C., to the effect that had the authorities exercised reasonable diligence in the matter Mr. C could - and should have been brought to trial at a much earlier stage. The delay here must accordingly be adjudged to be both inordinate and blameworthy in the sense described by Keams J. in *Devoy v. Director of Public Prosecutions* [2008] IESC 13, [2008] 4 I.R. 235, 256.

15. Here it may also be recalled that in *Noonan (Hoban) v. Director of Public Prosecutions* [2007] IESC 34, [2008] 1 I.R. 445 Hardiman J. observed that "something quite extraordinary would be required to justify a case where virtually a whole decade had elapsed between complaint and return for trial." In that case the delay was said to have been caused by the complexity of a fraud investigation into the affairs of a building society, whose affairs were said to be in a chaotic condition. Yet the undeniable fact was the period between the date of the complaint and the return for trial was ten years. Here the period is appreciably longer, albeit that the underlying facts are very different to Noonan and the applicant by his own conduct may be said to have contributed to the delay.

16. It may also be noted that in not altogether dissimilar circumstances the US Supreme Court concluded in *Doggett v. United States* 505 U.S. 647 (1992) that the failure of the prosecuting authorities to act on federal drugs charges following the departure of the applicant from the United States to Panama and then subsequently to Colombia amounted to a breach of the speedy trial clause of the Sixth Amendment. The applicant had been unaware of the charges and had re-entered the United States some six years previously, thereafter living openly under his own name. The total delay amounted to some 8 years and six months. Just as in the present case the authorities had effectively (but wrongly) concluded that the applicant had fled the jurisdiction and was untraceable. He was eventually located following a simple credit check in respect of persons with outstanding warrants.

The remedy in respect of a breach of Article 38.1

17. The issue of how this breach of Article 38.1 should be remedied is an altogether different question. It is true that there is running through some of the Article 38.1 case-law the unspoken assumption that a breach of the early trial guarantee will *automatically* lead to the grant of an order of prohibition. Yet cases such as *PM v. Director of Public Prosecutions* [2006] IESC 22, [2006] 3 I.R. 172 and *Devoy* demonstrate that this is a fallacy. As Kearne J. observed in *P.M* ([2006] 3 I.R. 172, 185-186):

> "As part of the balancing exercise it should also be borne in mind that an order of prohibition may not be the only remedy available in such circumstances. A court may have the ability to direct that a particular trial be brought on speedily and be given priority, although precisely how this would be policed or operated in practice may be problematic.....
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> In conclusion, however, on this issue, I am satisfied that where blameworthy prosecutorial delay of significance has been established by the applicant, then that is not sufficient per se to prohibit the trial, but that one or more of the interests protected by the right to expeditious trial must also be shown to have been so interfered with such as would entitle the applicant to relief."

18. One must here rather distinguish between those cases where the breach of constitutional rights has caused undue delay which is prejudicial and that which is not. If the breach has brought about specific prejudice which may be thought to jeopardise a fair trial, then prohibition will generally be the appropriate- perhaps even the invariable- remedy. In other cases, however, it may be said that the accused will get a perfectly fair trial even though his constitutional right to an early trial may have been infringed.

19. In the latter type of case, it may well be appropriate to give the prosecuting authorities the opportunity of addressing the breach of constitutional rights in ways which do not necessarily involve the drastic step of actually prohibiting a trial. I may venture here a comparison with the approach which I took in *Kinsella v. Governor of Mountjoy Prison* [2011] IEHC 235. In that case I held that the applicant's conditions of custody were so unacceptable that they amounted to a breach of his constitutional right under Article 40.3.2 to the protection of the person. But this did not necessarily mean that he was entitled to be released by means of an application under Article 40.4.2. I instead gave the prison authorities one final opportunity to address and rectify these conditions of detention.

20. The same can broadly be said by analogy of a case of this kind. Apart from declaring the right to an early right to have been breached- an important consideration in itself- there are a range of other potential options open to this Court as a means of vindicating such a breach of constitutional rights. As Kearns J. hinted in *P.M.*, this might include granting an additional declaration that it was incumbent on the prosecuting authorities to take steps to ensure the applicant's trial within a reasonable time thereafter. Of course, if the prosecuting authorities failed to act on such a declaration, then at that point the further remedy of prohibition would come squarely in view.

21. It is true that the response of the US Supreme Court in *Doggett* was to hold that the breach of the Sixth Amendment barred the trial. But quite independently of the views expressed by our own Supreme Court on this issue in cases such *PM* and *Devoy* (which bind me), other courts have drawn attention to the difficulties involved where a breach of the constitutional (or, for that matter, Convention) provision guaranteeing a speedy trial brings about the automatic termination of the proceedings. Thus, in *Attorney General's Reference (No.2)* [2003] UKHL 69, [2004] 2 A.C. 72 Lord Bingham observed in the context of a supposed automaticity rule and a breach of Article 6(1)ECHR:-

> "...a rule of automatic termination on proof of a breach of the reasonable time requirement has been shown to have the effect in practice of emasculating the right which the guarantee is designed to protect. .....There is, however, a very real risk that if proof of a breach is held to require automatic termination of the proceedings the judicial response will be to set the threshold unacceptably high since, as La Forest J put it in *Rahey v The Queen* (1987) 39 DLR 481, 516, "Few judges relish the prospect of unleashing dangerous criminals on the public". La Forest J drew attention to the compelling observation of Professor Amsterdam, written with reference to American experience following the Supreme Court's decisions interpreting the Sixth Amendment to the United States Constitution in *Barker v Wingo* (1972) 407 US 514 and *Strunkv United States*(1973) 412 US 434:-
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> > '[T]he spectre of immunizing, of 'turning loose', persons proved guilty of serious criminal offenses has been thoroughly repugnant to judges, and they have accordingly held that shockingly long delays do not 'violate' the Sixth Amendment. The amendment has thereby been twisted totally out of shape - distorted from a guarantee that all accuseds will receive a speedy trial into a windfall benefit of criminal immunity for a very few accuseds in whose cases the pandemic failure of our courts to provide speedy trials has attained peculiarly outrageous proportions'": Anthony G Amsterdam, "Speedy Criminal Trial: Rights and Remedies" (1975) 27 Stan L Rev 525, 539.'"

22. These are practical reasons for following the approach already signalled by Kearns J. in *PM*. The guarantee of speedy trial in Article 38.1 should not be devalued by the prospect that judges would be dissuaded from upholding that right if the inevitable and invariable consequence was that the trial would be automatically terminated as a result.

23. In addition to declaratory relief, I see no reason at all why the court should not be able to make an award of damages in appropriate cases as a remedy for such a breach. It is true, that as Fennelly J. noted in *TH v. Director of Public Prosecutions* [2006] IESC 48, [2006] 3 I.R. 520, 540, in nearly all such cases "the principal objective has been to seek to prevent his trial from proceeding", so that in practice claims for damages are either not made or not pressed. That is the case here, where the relief claimed is that of prohibition and there is no separate claim for damages. Yet it is not in doubt but that an accused has a constitutional right to an early trial by virtue of Article 38.1. It is equally clear that at common law there was no power to award damages for a breach of the constitutional right to an early trial.

24. The purpose of the action for damages for breach of constitutional rights is to supply a remedy for such breach where none has otherwise been provided either by common law or by statute (cf the comments of Henchy J. in *Hanrahan v. Merck, Sharp & Dohme Ltd*. [1988] I.L.R.M. 629, 636). In those circumstances, applying standard Meskell principles *(Meskell v. Coras Iompair Eireann* [1973] I.R. 121), the existence of a jurisdiction to award damages for a breach of this constitutional right would not seem to be in doubt, at least as a matter of principle in an appropriate case. If the jurisdiction has not been availed of to date, it is because in truth applicants in cases of this kind are determined to secure an order of prohibition rather than damages.

Whether it is appropriate to grant an order of prohibition in the present case

25. In assessing this question, it may first be observed that the applicant has specifically disclaimed any suggestion that he suffered specific prejudice as a result of the delay. While the delay here is long and unacceptable, unfortunately time lags in cases of this kind are not uncommon, although this is mainly because in other types of cases of this kind, complainants have felt psychologically inhibited from coming forward to make complaint until they reached their adulthood and beyond. But the present case is far removed from the type of endemic delay involved in cases such as *P.T v. Director of Public Prosecutions* [2007] IESC 39, [2008] 1 I.R. 71 where allegations of this nature relating to events said to have happened between 1965 and 1970 were first made in May, 2002. In the latter kind of case, the delay may be so gross that prejudice may be presumptively presumed, although this is not always the case: see *SH v. Director of Public Prosecutions* [2006] IESC 55, [2006] 3 I.R. 575.

26. Second, it is clear from the book of evidence that the applicant was made immediately aware in August and September 1996 in the aftermath of the complaints of the specific nature of the allegations that he has to meet. The present case is therefore far removed from the type of case with which the courts have often been confronted, namely, allegations of sexual abuse made by a complainant, often after a lapse of an inordinately long time, where memories have dimmed, witnesses have died or gone missing. In such circumstances, the prospects of a fair trial are often completely compromised because the accused is often faced with mere bald assertions which have been advanced *for the first time* after decades have passed. The facts disclosed in my own judgment in *II v. JJ* [2012] IEHC 327 provide a good illustration of this phenomenon, albeit in a civil context. Here, of course, by contrast Mr. C. was advised almost immediately of the nature of the allegations he had to face.

27. Third, if the prosecution were halted or prohibited, it would mean that the complainants' allegations could not be adjudicated on their merits, even though no part of the delay can be attributed to them. The complainants have, of course, a vital interest in this matter, since the allegations are of a serious nature and not least given that they concern the protection of the person. Here it may be recalled that by Article 40.3.2 the State has given a solemn obligation by its laws to vindicate and protect this express constitutional right.

28. Fourth, the breach of constitutional rights occasioned by this delay can in the first instance be addressed by other means apart from the exceptional remedy of prohibition. Given that this Court has upheld the breach, it may be expected that the prosecuting authorities will act quickly to secure the right by arranging for a trial in very early course. One might expect, for instance, that this matter will be mentioned within a week or so of the delivery of this judgment to the appropriate judge presiding at the Circuit Court in Cork for the purpose of securing an immediate trial date. If this were not done or if an early trial date could not be secured within at most a matter of a few months, then the applicant would be fully within his rights in re-applying to this Court at that stage for an order of prohibition in much the same manner as happened in *Kinsella* when I held that the applicant would have been entitled to re-apply for release under Article 40.4.2 if the prison authorities did not act to ameliorate the breach of constitutional rights by transferring him from the squalid conditions in which he had been held in custody.

29. As I have already noted, the applicant has made no application for an award of damages in his grounding statement. Beyond expressing the view that *Meskell*-style damages might well be available in principle to remedy this breach, I would further add that I would not be adverse even at this late stage to an application to amend the pleadings to include a claim of damages for breach of his constitutional right to an early trial. Such an award might - or might not- be ultimately be adjudged to be necessary to give full

protection to and recompense for this breach of this constitutional right short of an actual order of prohibition. Conclusions

30. In summary, therefore, I have concluded as follows:-

A. While the applicant contributed to the delay by his sudden departure to the United States, the major reason for the delay was the failure by the prosecuting authorities to follow-up the many leads and indications as were present as to his whereabouts. Had, moreover, the computer systems at the Garda Vetting Unit been fully operational, the existence of outstanding charges would have come to their attention when he applied for vetting some five years ago.

B. Viewed objectively, there was culpable delay on the part of the prosecuting authorities which amounted to a breach of his constitutional rights to an early trial as guaranteed by Article 38.1.

C. The appropriate remedy in respect of this breach of his constitutional rights is a different matter. As the Supreme Court has recently stressed in cases such as *Devoy* and *PM*, the remedy of prohibition is exceptional and not yet appropriate to the present case. The breach can be remedied by an open acknowledgment of the breach via this judgment and by the prosecution taking immediate steps to ensure an early trial for the applicant. If no adequate steps are taken in that regard, the applicant can re-apply to this Court for an order of prohibition.

D. If necessary, I will also give the applicant liberty to amend his pleadings in order to permit him to seek damages in respect of this breach of his constitutional right.