THE COURT OF APPEAL

CIVIL

[2022 No. 22]

The President **Neutral Citation Number [2022] IECA 251**

McCarthy J.

Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

M.N.

APPLICANT/APPELLANT

JUDGMENT of the President delivered on the 3rd day of November 2022 by Birmingham P.

1. Before the Court is an appeal from a decision of the High Court (Simons J.) of 13th August 2021, refusing to prohibit a criminal trial on grounds of delay. The application to prohibit had been brought by the appellant in circumstances where he was facing trial in the Dublin Circuit Criminal Court on some 18 counts of indecent assault. The alleged events giving rise to the charges were said to have occurred between 1984 and 1985. During those years, the appellant was 14 to 15 years of age, and the complainant was a child of between three and a half years and five years.

2. The judgment of the High Court addressed two issues. Firstly, the Court addressed an objection that the proceedings had been taken outside the three-month time limit prescribed for judicial review, and then considered whether the allegations of delay and prejudice were ones which should be left to the trial judge, or whether, alternatively, they should be dealt

with by way of an intervention by way of judicial review. In the High Court, the trial judge found that the application was not outside time and proceeded to address the merits of the application for judicial review (an application which he ultimately rejected). The judge's conclusion that the application was not out of time has been the subject of a cross-appeal on behalf of the Director.

3. For ease of reference, hereinafter the applicant/appellant MN will be referred to as "the appellant".

Background

4. The complainant made a complaint to Gardaí in June 2016. The appellant was invited to attend for interview; he did so and provided a cautioned statement. He was interviewed by Gardaí in September 2018, during which he made substantial admissions. However, the appellant has said that the admissibility of these admissions will be challenged at trial. Apart from saying that the admissions will be challenged at trial, there is no indication that the appellant resiles from what he said to Gardaí.

5. To provide context for this appeal, and the issue which is the subject of a cross-appeal on behalf of the Director, it is necessary to say more about the facts of the case. The appellant is now 52 years of age. In 1985, his mother was offering child minding services from her home. In 1985, issues arose about the actions of the appellant *vis à vis* two children who were being cared for: one, a boy, and the other, the complainant. It appears that in October 1985, the complainant's parents disclosed concerns. The issues were investigated under the auspices of the Eastern Health Board, and there was involvement at the time from the Sexual Assault Treatment Unit at a named hospital. It appears that in the aftermath of this issue coming to light, the appellant was "beaten up" (in the language of the conference notes) by his father. It also appears that the appellant engaged with a psychiatric service for therapy.

6. In seeking judicial review, the appellant points to the fact that the alleged incidents were known to the parents of the complainant, and he invites the Court to infer by reference to certain documentation that the Gardaí had also been notified of the alleged child sexual abuse relating to the complainant in 1985, and thus contending that there has been blameworthy prosecutorial delay associated with his prosecution.

The Director's Cross-Appeal

7. In relation to the time limit issue, this is a case where the appellant sought disclosure, including disclosure specifically by reference to an intention to seek judicial review. Disclosure was made in a number of tranches. The first tranche did not provide any particular indication of Garda involvement in 1985, but the appellant attaches significance to disclosures in June 2020, and in particular, to minutes of a case conference of 24th October 1985, which he invites the Court to rely on so as to draw an inference that Gardaí had an involvement in the case involving allegations relating to the complainant. The High Court judge's view was that while it might have been, indeed would have been, open to the appellant to have instituted judicial review proceedings prior to June 2020, and to have made a generalised allegation of delay, there was no doubt that the grounds for an application to prohibit the criminal proceedings were significantly strengthened by the ability to make an argument to the effect that a complaint had been made to Gardaí in 1985. Therefore, on balance, the judge concluded that the second tranche of documentation that was disclosed in June 2020 was critical to what was, in truth, the principal argument now advanced. It was only on receipt of that documentation that the appellant was in a position to formulate the claim in the way it was actually formulated. In these circumstances, the judge was satisfied that the application for judicial review had been made within three months of when the grounds of challenge first arose.

8. In my view, the judge in the High Court was entitled to conclude as he did in relation to the time limit point. It is clear that from an early stage, the appellant and his advisers had taken the view that this was a case for seeking judicial review. In the circumstances of this case, I think it is understandable that the appellant did not proceed with what would have been, in effect, a standard form delay application for judicial review, but instead sought further information from the prosecution authorities. I think it is significant that discovery was sought specifically by reference to the intention to seek judicial review, and while what emerged as a result of the exercise was, certainly in the view of the trial judge, not unambiguous, the appellant was assisted in advancing an argument relating to Garda involvement, and by extension, an argument in relation to prosecution delay.

9. Order 84, rule 21(1) of the Rules of the Superior Courts ("RSC") states unequivocally that an application for leave shall be made within three months from the date when grounds for the application first arose. Order 84, rule 21(3) RSC again states clearly that while the court may, on application, extend the period within which an application for leave to apply for judicial review may be made, the court shall only extend such period if it is satisfied that there is good and sufficient reason for doing so, the circumstances that resulted in the failure to make the application for leave within the period mentioned, either: (i) outside the control of; or (ii) could not reasonably have been anticipated by the applicant for such extension. Undoubtedly, it is the case that grounds could have been formulated before additional disclosure material came to light. The grounds would probably not have included prosecutorial delay, which was the argument that ultimately took centre stage in the challenge. In those circumstances, while I can see how a contrary view might have been reached, I would not interfere with the decision of the trial judge and so I would dismiss the cross-appeal.

The Merits of the Application

10. The hearing in the High Court, and in this Court, proceeded on the basis that modern case law establishes that it is the Court of trial, as opposed to a Court of judicial review, that is usually best placed to make an assessment as to whether there is a real and unavoidable risk of an unfair trial. The substantive points made by the appellant in his application for judicial review cover *inter alia* blameworthy prosecutorial delay and the unavailability of certain evidence, which will be considered here.

Blameworthy prosecutorial delay

11. The argument that there was blameworthy prosecutorial delay going back to 1985 is based on a contention that a Court should draw an inference from the case conference notes, to which there had already been reference, that there was Garda involvement at that stage *vis à vis* the complainant in this case. For her part, the Director has contended that the relevant date for assessing delay is June 2016, when the complainant, then an adult, made a formal complaint to Gardaí. The trial judge was prepared to concede, and expressly did, that there was no doubt that were the appellant in a position to satisfy the Court that a complaint had been made in October 1985 to Gardaí, there would be strong grounds for saying that any trial, due to take place some 35 years later, would be unfair. However, the judge was not satisfied that the appellant had established this on the balance of probabilities. Contemporaneous documentation was, at best, from the perspective of the appellant, ambiguous as to whether a complaint had been made in respect of this specific complainant.

12. The minutes of the case conference to which there has been reference included the following passages quoted by the trial judge in the course of his judgment:

> "Sr. Peggie asked what was being done about [M.N.], the abuser. Dr. Woods said that he had been sent to John of Gods for therapy. He was badly beaten up by his father

when his father was told about what [M] had done. Dr. Woods said that [M] was very reluctant to admit anything at all.

Dr. Murphy then discussed the future work in relation to both children.

Dr. Woods informed the Conference that 'sexual abuse' is a misdemeanour in the eyes of the Law, therefore, the Police are under no obligation to prosecute offenders and it is therefore hard to get offenders to get treatment. Also, there is no therapeutic resource for offenders as yet in Dublin. It was generally agreed that the laws needed changing and that a treatment centre for abusers should be acquired."

The minutes also contained the following summary of interviews with the complainant:

"[Name redacted] subsequently saw Dr. Woods three times. Initially, it was hard to get information from her but finally she spilt the beans. Dr. Woods described [name redacted]'s mother as very sensible and matter-of-fact and someone who was coping very well with the difficulties.

[Name redacted] had also mentioned that [M] was 'mean' to her, but hasn't yet disclosed how or what this means".

13. The High Court judge indicated that video recordings were made of a number of interviews with the complainant, conducted by a specialist in this area, the abovementioned Dr. Maura Woods. Those video recordings are no longer available, and it was unclear as to whether they had been lost, misplaced or destroyed. The High Court judge was not prepared to draw the inference contended for by the appellant. He commented that it did not necessarily follow from the fact that a complaint had been made by or on behalf of the parents of the other child victim to Gardaí, that a complaint was also made in respect of the victim in this case. He felt that, given the unsatisfactory nature of the evidence before the Court, the Court of trial was best placed to determine the issue of prejudicial delay. He felt that there would be an opportunity for the appellant's legal team to interrogate further the

question of whether or not a complaint had been made to Gardaí in 1985, and that the Court of trial would be best placed to address the prejudicial effect, if any, of the absence of video recordings of contemporaneous interviews with the victim. He also pointed to the fact that the Court of trial would be best placed to address the question of the admissibility of the admissions made by the appellant in his cautioned interview in 2018. He did observe that if the Court of trial was to rule the appellant's statements to be inadmissible as evidence, then the absence of contemporaneous records, and in particular, the absence of video recordings, would assume a greater significance. The High Court judge went on to refuse the application for judicial review, being of the view that this was not one of the exceptional cases where there is cogent evidence demonstrating the real risk of an unfair trial such as to justify an order of prohibition.

14. The High Court judge was not prepared to draw the inference from the contents of the disclosed case conference that Gardaí had been involved in the complaints relating to the complainant. For my part, neither would I have been, and indeed, I think there are some clues and hints in the conference note to suggest that different routes were followed in respect of the male complainant and the complainant herein. In that regard, I draw attention to paragraph 3 of the document which is in these terms:

> "Nurse Ross told the conference initially about the case of [name redacted]. Apparently, on 19th September, [name redacted] contacted Ms. McGovern [a Public Health Nurse] well known to her, to tell her that her son had been sexually abused by [MN], 15-year old son of the babysitter. The Public Health Nurse referred this on to the general practitioner and police, and police visited her on 23rd September 1985. Ms [name redacted] also went to her General Practitioner and made contact with the Rape Crisis Centre who advised her to go to the Sexual Abuse Centre at [named hospital]. However, it transpired that the child had already been seen one by Dr. Woods at this

stage in [named location]. The reason for this was because the other child in question's mother had informed Ms. [name redacted] of the babysitter's act."

15. The narrative in relation to the action taken in this case involving the young boy is quite detailed. There is reference to contact with the Public Health Nurse, and then the Public Health Nurse referring the matter on to the General Practitioner and "the police", the visit by "police", contact with the general practitioner, with the Rape Crisis Centre and then with the Sexual Abuse Centre at the named hospital.

16. When it comes to the complainant in this case, the narrative does not detail anything like the same level of contacts. The relevant paragraphs are as follows:

> "[Name redacted] was then discussed. She too attended Mrs. N and one day asked her mother about a game she played with MN where she had to measure 'his ruler' (penis). Once [name redacted] referred to the game when MN was in the room. [Name redacted] subsequently saw Dr. Woods three times. Initially, it was hard to get information from her, but finally she spilt the beans. Dr. Woods described [name redacted]'s mother as very sensible and matter-of-fact and someone who was coping very well with the difficulties."

17. As to the question of Garda involvement in 1985, I cannot but draw attention to the fact that while the complainant and his advisers were engaged in the exercise of parsing and analysing health authority documentation to see what clues it might provide on the question of Garda involvement, no information was put before the High Court or this Court on his behalf as to what recollections the appellant has in this regard, or as to what recollection his parents have. Who better to cast light on whether there was interaction between the appellant and Gardaí in relation to the complaints centred on this complainant than the appellant and his parents; however, no information is provided.

Unavailability of videos of interview

18. Insofar as reliance is placed on the fact that the videos of the interviews of the complainant by Dr. Woods were not available, I would not be disposed to attach the same significance to this as the appellant does. I do acknowledge that the terms of a first complaint, or certainly the first recorded complaint, would generally be of significance. However, here the complainant was so young that I find it hard to believe that any significance could be attached to any divergences that might emerge between the account given by a very young child aged approximately four years and the account given many years later by a mature adult. I also believe it is not possible to lose sight of the fact that while videos of the interviews conducted by Dr. Woods may not be available, there is an amount of information available as to what else was happening at this time, such as the reaction of the appellant's family, in particular, his father, and the fact that MN was in contact with a psychiatric service for therapy and it appears may also have been in contact with Dr. Woods.

19. So far as the missing videotapes of the interviews are concerned, again the point has to be made that it does not seem to be envisaged that Dr. Woods would be a witness at trial. It also seems to be the case that, in reality, the scope for benefitting from highlighting any divergence between what the complainant said in 2018 as an adult and what she had to say when an adult, a professional, was seeking to elicit information from her at a time when she was four or five years of age, seems very limited.

Contemporaneous allegations

20. The appellant has drawn attention to the fact that somewhat unusually in this case, allegations emerged contemporaneously with the incidents the subject matter of the complaints and draws attention to that fact and places reliance on it. In my view, the fact that there was more or less simultaneous disclosure of abuse militates against rather than in favour of the application. There are other cases where an accused is able to make the argument that

he is presented, for the first time out of the blue, with allegations at a remove of many years from when matters are alleged to have occurred and that he is completely disadvantaged in investigating the allegations and responding to them. It seems to me the fact that there was an issue in relation to the allegations back in 1985, that there was an involvement with authorities in some form, that the appellant had interaction with his father and with the psychiatric services in relation thereto, means that he is better positioned to respond than complainants in other situations might be.

The appellant's admissions

21. In relation to the admissions of the appellant in September 2018, it is not in dispute between the parties that the fact of admissions is a matter of some significance in the context of an application for judicial review. The admissions are dealt with to some extent by both the appellant and his solicitor in the course of affidavits sworn by them. Mr. Hennessy, the appellant's solicitor, comments "the [appellant] reserves the right to challenge the admissibility of such admissions at trial". The affidavit of Mr. Hennessy deals with Garda efforts to contact his client and he deals with it in these terms:

> "I say that I am instructed that the applicant was made aware that Gardaí wished to speak with him after Gardaí left a message at his mother's address – which was easily ascertainable to the Gardaí and that he rang them shortly thereafter, and that he was under the impression arising from what had been said by Gardaí that he would not be prosecuted arising from the said allegations."

22. While it has been stated that the appellant challenged the admissibility of the admissions made by him in 2018, he has not sought to resile from what he said. He has not sought to suggest that he made admissions that were untrue because he was coerced or induced into doing so. I regard the fact of the admissions as significant while recognising that

if this matter goes to trial, it will be open to the appellant to challenge the admissibility of the admissions, and he has indicated an intention to do so.

The extent to which the child was forthcoming in making allegations

23. It has been suggested also that significance is to be attached to the fact, and the appellant would benefit from the fact, that the young complainant was not forthcoming and had to be encouraged to "spill the beans". That a very young child would not be forthcoming does not seem in the slightest bit surprising. There does not seem to be any indication of an intention to put before the Court what the complainant had to say to Dr. Woods by reference to the doctrine of recent complaint, and that being so, the extent to which the young complainant was forthcoming or not seems of marginal significance.

Discussion and decision

24. On a number of occasions in the course of the appeal hearing, counsel on behalf of the appellant, in the course of what at times appeared to involve an *ad misericordiam* plea, contended that prosecuting his client, now aged 52 years, for events alleged to have occurred when he was aged 14/15, was unfair. While unfair was the word used by counsel, perhaps with one eye on the authorities, it seems that really his complaint was that prosecuting at this stage would be harsh or oppressive. In many delay cases, the argument is made that, by reason of delay, justice is put to the hazard. The argument is advanced that because of delay and/or missing evidence, an unjust verdict might result. Really, I do not see such concerns as to the fore in the present case. I do not believe that the appellant has gone anywhere close to establishing the real risk of an unfair trial in that sense. There remain the arguments that prosecuting at this time remove would be harsh or oppressive. This is not an argument that can be dismissed out of hand. No doubt these are consideration that will have had to have been weighed by the Director. However, the Director will also have to have had regard to the seriousness of the offending behaviour that is alleged. The offending, as reported by the

complainant, include incidents of digital penetration and what would now be charged as s. 4 Criminal Law (Rape) (Amendment) Act 1990 oral rape. The manner in which the appellant is alleged to have sought a position of influence or dominance over the complainant is also concerning; *i.e.*, tempting her with sweets and coke, and then, when she took some, telling her that she was evil and would go to hell and that her parents would not want her any more because she stole, adding that he would not tell them because maybe there was something she could do for him to make up for stealing.

25. It does seem to me that the seriousness of the offending has to be weighed in the balance against the passage of time. It does not seem to me to be so clear that the balance is against prosecution that a judicial review Court should intervene. On the contrary, I am firmly of the view that this is one of those cases where the questions around delay and related issues are best left to the trial judge.

26. Accordingly, I would dismiss the substantive appeal.