Neutral Citation Number: [2011] IEHC 238

THE HIGH COURT

2010 1308 JR

BETWEEN

O'D

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS AND JUDGE PATRICIA RYAN

RESPONDENTS

JUDGMENT of Kearns P. delivered the 28th day of February, 2011

This is a case where the applicant seeks an order of *certiorari* in respect of order of the second respondent, a Circuit Court judge, dated 23rd July 2010, directing that evidence be given by way of video link in the course of a prosecution in respect of allegations of sexual abuse. The applicant is the defendant in proceedings brought in the Circuit Court concerning allegations made by two complainants contrary to section 5 of the Criminal Law (Sexual Offences) Act 1993.

I will turn briefly to that particular section. Section 5 provides as follows:

> *"5. – (1) A person who –*
>
> *(a) has or attempts to have sexual intercourse, or*
>
> *(b) commits or attempts to commit an act of buggery,*
>
> *with a person who is mentally impaired (other than a person to whom he is married or to whom he believes with reasonable cause he is married) shall be guilty of an offence and shall be liable on conviction on indictment to –*
>
> *(i) in the case of having sexual intercourse or committing an act of buggery, imprisonment for a term not exceeding 10 years, and*
>
> *(ii) in the case of an attempt to have sexual intercourse or an attempt to commit an act of buggery, imprisonment for a term not exceeding 3 years in the case of a first conviction, and in the case of a second or any subsequent conviction imprisonment for a term not exceeding 5 years."*

Now the grounds upon which relief was sought and granted included, specifically, the ground that the making of such an order breaches the applicant's right to a fair trial as it predetermines a central issue in the case and thereby disproportionately interferes with the course of any such trial. A number of legal decisions have led the debate on the relevant provisions in directions which would benefit from clarification. However, for reasons which will become apparent these complications should not be revisited on the facts of this particular case.

Another ground put forward is that the Circuit Court judge had regard to the fact of a mental handicap on the part of the complainants notwithstanding that the order was made under s. 13 (1)(b) of the Evidence Act which confines the making of such orders to circumstances other than those provided for by s. 13 (1)(a) which specifically covers witnesses who have such a mental handicap. As such the applicant argues that the order was made *ultra vires*, in that the wrong part of the section was applied in seeking the order.

We have had a long discussion, and it is only this afternoon, that it became evident that in the earlier judicial review proceedings this point was raised, involving precisely the same issue between exactly the same parties. Leave to apply for judicial review in respect of the earlier proceedings was granted on 2nd March 2009, at para. D.5 where it was pleaded that "*further or in the alternative the second respondent purported to make the said order pursuant to the provisions of s. 13(1)(b) of the Criminal Evidence Act 1992, when the second respondent ought to have considered the matter pursuant to the provisions of s. 13(1)(a)* …". It is the very same point that is raised here today.

It seems to me this is the clearest scenario for the rule in *Henderson v. Henderson* to apply. It was open to the applicant to advance this argument in the first judicial review proceedings. In fact he had an obligation to do so. Instead, the applicant informed the court during the first judicial review proceedings at some stage, that this ground was not being pursued. This is a clear case where there was a prior set of proceedings which presented an adequate and appropriate opportunity to argue this issue.

In *Henderson v. Henderson* (1843)3 Hare 100 at 115 Wigram V.C. stated:

> *"I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."*

This has been applied in *Carroll v. Ryan* [2003] 1 I.R. 308 and *A.A. v. The Medical Council* [2003] 4 I.R. 302.

I believe I state the rule correctly when I say that it is up to a litigant to bring forward their whole case at the appropriate point and the court will not accept the same parties bringing the same case again, only because they have, through negligence or some other reason omitted to argue a point that could have been argued in the earlier proceedings.

In the case of *Henderson* it was said that there is an obligation to bring forward issues which might sensibly be argued in litigation rather than arguing the same issues in subsequent litigation that could have been argued in previous litigation. This is a matter of public policy. Also litigation should not drag on forever. It seems to me that these sentiments apply with particular force in this case. The effect or result of judicial review can often be the stalling or delaying of criminal trials. The fact that a stay is automatically granted can be seen as an incentive to bring a judicial review.

I am not suggesting that there is a deliberate attempt in this case to delay or stall the criminal trial. Whilst judicial review is a valuable and important tool there is an obligation to bring forward every point since the effect of repeated judicial reviews in the same criminal case is very damaging to the criminal justice system.

I refuse the application.