

THE HIGH COURT

JUDICIAL REVIEW

[RECORD NO. 2017 196 JR]

BETWEEN

R.B.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr Justice Coffey delivered on the 14th day of May, 2018

1. The applicant was granted leave, by order of Noonan J. on the 6 March 2017, to seek prohibition of the prosecution against him on a single count of sexual assault, alleged to have been committed between the 1 January 1992 and the 31 December 1993.

Factual summary

2. The applicant was born on the 4 November 1973 and is ten years older than the complainant who was born on the 17 April 1983. The complainant alleges that when he was about eight or nine years old he stayed overnight in a mobile home in which the applicant and his family were then living. He alleges that he fell asleep on a couch beside the applicant who was fully clothed. His complaint is that when he awoke he discovered the applicant both touching his genitalia and using the complainant's hand to touch his own genitalia.

3. Following the alleged incident, the complainant alleges that he went to the bedroom of the applicant's mother and told her that the applicant had been touching him. He alleges that the applicant's mother shouted at him to get out of the house.

4. The complainant further alleges that shortly afterwards, he told his own mother about the incident. The proposed evidence of the complainant's mother, however, is merely to the effect that the complainant told her that the applicant had put his hand on him "above" his genitals and that he denied that there had been any contact between the applicant and his pants.

5. The complainant's mother further alleges that in 1994 the complainant spoke to her at a christening and told her that he was going to "summons" the applicant. She alleges that the complainant told her that the applicant was "getting money" (he had apparently issued proceedings seeking damages for sexual abuse against his former school) and asked "why not me?" She alleges that it was in that context that the complainant told her that the applicant had touched him years previously.

6. On the 25 February 2014, the complainant made a statement of complaint to the Gardaí in Monaghan Garda Station. On the 6 March 2014, a file was forwarded to the Superintendent in Trim, County Meath. Between the 21 March 2014 and the 7 August 2014, the Gardaí took statements from persons who were of potential relevance to the case. Amongst these persons were the complainant's mother, the complainant's wife and the applicant's step-brother, all of whom were living in locations at some distance from each other. On the 27 August 2014, the Gardaí visited the mother of the applicant and invited her to make a statement in relation to the allegations that had been made against her son but she declined to do so.

7. On the 23 of September 2014, the Gardaí interviewed the applicant and made him aware of the allegations that had been made against him. There is no evidence as to whether the applicant thereafter discussed the allegations with his mother who subsequently died on the 15 November 2015.

8. Prior to this on the 19 February 2015, the Director of Public Prosecutions issued a direction that the applicant should be charged with a single count of sexual assault. On the 2 March 2015 the Gardaí contacted the applicant by telephone in order to arrest him by arrangement for the purpose of charging him with sexual assault. The applicant asked the Gardaí "for a few weeks" to get his affairs in order, to which they agreed. The Gardaí contacted him again approximately two weeks later and the applicant informed them that he had been admitted to the psychiatric unit at Roscommon General Hospital. Thereafter attempts by the Gardaí to contact the applicant in August 2015 and December 2015 were unsuccessful in circumstances where the applicant was no longer living with his wife and had left no contact details. The Gardaí eventually obtained an address for the applicant in Roscommon where they arrested him on the 1 March 2016. It is not in dispute that between the 2 March 2015 and the 1 March 2016 (when his whereabouts were unknown), the applicant made no effort to contact the Gardaí, either directly or through any third party on his behalf.

9. The applicant seeks prohibition on the following grounds: -

- 1) that there was a pre-complaint delay of 20 to 22 years approximately, which the applicant contends was inordinate and inexcusable having regard to the fact that the complainant first reported the alleged incident on the day it is alleged to have occurred;
- 2) that there was inordinate and inexcusable delay on the part of the Gardaí in investigating the matter and in charging the applicant;
- 3) that, as a result of the delay, the applicant's mother is no longer available to assist his defence by reason of the fact that she died on the 15 November 2015;
- 4) that the applicant is suffering from a severe psychological illness.

Relevant Law

10. In *S.H. v. DPP* [2006] 3 IR 575 Murray C.J. stated that in a case where prohibition is sought on grounds of delay to stop the prosecution of an alleged historic sexual abuse case: -

"47. The issue for the court is whether the delay has resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial."

11. In *Nash v. the Director of Public Prosecutions* [2015] IESC 32, Charleton J. stated: -

"23. The trial judge now has the primary role in decisions of this kind and judicial review is rarely appropriate. An application to the trial judge is an alternative to judicial review."

12. He went on to state: -

"23. An application to stop a trial before the trial judge may best be decided upon a consideration of all of the evidence and how the alleged defect, be it delay or missing evidence or unavailable witnesses, impacts on the overall case. Whether the real risk of an unfair trial that cannot otherwise be avoided then exists is, in such cases of an argument that justice has been diminished, often best seen in the context of such live evidence as has been presented and not through the contest on affidavit that characterises these cases on judicial review seeking prohibition in the High Court or on appeal."

13. Similarly, in *M.S. v. Director of Public Prosecutions & Ors* [2015] IECA 309 Hogan J. noted that: -

"49. [T]he contemporary case-law stresses the power – and, perhaps, even in some exceptional cases, the duty – of the trial judge to intervene to stop the prosecution of some or all charges in the light of the run of the evidence."

14. Hogan J. went on to state that: -

"49. This ... is a decision which is *generally* best left to the court of trial which is again generally better placed than the judicial review judge to assess potential fairness having regard to the *actual conduct* of the trial and the run of the evidence which has been actually tendered by the prosecution."

15. It seems to me that the effect of the modern jurisprudence relating to allegations of undue delay in historic sexual abuse cases is to postpone the issue of prejudice to the trial itself so that it can be assessed by the trial judge having regard to the granular detail of the actual evidence that is to go to the jury with the result that prohibition should only be granted in advance of a trial where the prejudice complained of is manifest, unavoidable and of such significance as to give rise to a real or serious risk of an unfair trial.

Discussion

16. The only prejudice that the applicant can identify is the fact that his mother is no longer available to assist his defence at trial. Senior Counsel on behalf of the applicant suggested that if she was still alive, the applicant's mother would be able to confirm all of the following:

- (1) whether a complaint was made by the applicant;
- (2) the layout of the mobile home;
- (3) whether the applicant ever slept on the couch on which it is alleged the incident occurred;
- (4) the identity of the other persons in the mobile home at the relevant time.

17. The applicant was made aware of the allegations against him when he was interviewed at some length by the Gardaí on the 23 September 2014. No evidence has been put before this Court to suggest that the applicant thereafter discussed the matter with his mother or that she had any recall of the incident or that her recall of the incident was of assistance to the defence of the case. It follows that this Court is in effect being asked to speculate and to make an unwarranted inference that, if the applicant's mother was still alive, she would be in a position to materially assist the applicant's defence at his trial.

18. It is clear that the hypothetical relevance of a missing witness is not a sufficient ground for granting prohibition in a case of this nature. In *S. O'C. v the Director of Public Prosecutions & Ors* [2014] IEHC 65 O'Malley J. stated: -

"65. [W]hen an applicant seeks to establish that the absence of a specific witness or piece of evidence has caused prejudice, he or she must be in a position to point to, at least, a real possibility that the witness or evidence would have been of assistance to the defence. In other words, I do not believe that it is sufficient to point to a theoretical possibility that an unavailable witness might have had something to say that would contradict the complainant's account and that of other witnesses."

19. Even if I am incorrect in so concluding, I am nonetheless satisfied that the evidential context in this case is such that the issue of prejudice is one that can only be decided by the trial judge with knowledge of the actual evidence that is to go to the jury. Senior Counsel on behalf of the applicant accepted that, having regard to the law relating to recent complaint, there is a distinct possibility that the prosecution may not be in a position to prove either the alleged complaint made by the complainant to the applicant's mother or the alleged complaint made by the complainant to his own mother. It follows that even assuming without deciding that the unavailability of the applicant's mother is relevant to the issue of whether a complaint was made at the time of the incident, it is quintessentially an issue for the trial judge that can only be properly addressed after the issue of the admissibility of the complaint evidence has been argued and adjudicated upon. This Court notes that there are other witnesses in the Book of Evidence who are available to assist the jury in relation to the remaining issues of alleged relevance including at least two witnesses whose proposed evidence supports the applicant in his contention that he never slept on the couch upon which it is alleged the sexual assault occurred.

20. If prejudice does arise from the sworn evidence that is actually given at the trial, the applicant can apply to the trial judge to exercise the court's residual discretion to withdraw the case from the jury on the basis that "the difficulties for the defence are such that it is not just to proceed" (see *P.B. v. Director of Public Prosecutions* (Unreported, High Court, O'Malley J., 6 September 2013) at para. 59). In the event that the case does go to the jury, it is not in dispute that the trial judge will be obliged to give a lapse of time warning to the jury to deal with any difficulties created for the applicant arising from such delay as has occurred including the issue of alibi.

21. Senior Counsel on behalf of the applicant further relies on the fact that the applicant is suffering from a severe psychological

illness, albeit one which he accepts predated the applicant's knowledge of the allegations in this case. It is the view of this Court that the applicant's psychological complaints and symptoms are of no relevance at this juncture by reason of the fact that there is no medical evidence to suggest that his current psychological illness or its severity has in any way been caused or contributed to by any culpable delay on the part of the respondent. Moreover, it is common case that whatever they are, his current psychological difficulties are not of such severity as to deprive the applicant of his capacity to plead.

Conclusion

22. For the foregoing reasons, I refuse the reliefs sought.