Neutral Citation Number: [2012] IEHC 295

THE HIGH COURT

JUDICIAL REVIEW

Record Number 2012/595 JR

Between

Eleanor Joel

Applicant

And

The Director of Public Prosecutions, The Garda Commissioner, Ireland and the Attorney General

Respondents

And

Jonathan Costen and The Health Service Executive

Notice Parties

Judgment delivered by Mr. Justice Charleton delivered ex tempore on the 9th day of July 2012

1. The background to this case is the unfortunate death on 7 January 2006 of a lady in Wexford who was called Mrs Evelyn Joel. Apparently, the applicant claims, the late Mrs Joel was a person of strong character, particularly as regards her family. She was also a person with a predilection for smoking, it is claimed. It appears that some years previously, in 2004, she had developed a severe condition. On her death, and following an autopsy, it became apparent that she suffered from a kind of multiple sclerosis that interferes with brain function. As I understand from the submissions that have been made to me, she was brought to hospital in 2004 but she had a problem with hospitals. There were two dominant reasons: firstly, she wanted to smoke 60 cigarettes a day, which is not allowed in hospital. One often sees patients outside hospital having a smoke; it is an odd thing to see but it nevertheless does happen. Secondly, she had a very strong desire not to remain in hospital; a kind of hospital phobia is alleged by the applicant. From what I have been told, it seems that what happened was that she subsequently moved back home with her partner, the first notice party, but in due course her partner decided that he could not take care of her; or perhaps the relationship went sour.

2. She left that place and then moved in with her daughter, the applicant, some time in 2005. Her daughter was thereby put in the situation of taking care of her mother. This was apparently difficult for the applicant as her mother, it is said on her behalf, was the kind of person who exercised dominance over her. In any event, what happened between that time on her death is really not a matter for me. On the 7 January 2006, this lady Mrs Evelyn Joel died in hospital, a doctor or an ambulance having been called some six days previously on the 1 January 2006. The lady in question, it is said, suffered from severe bed sores, perhaps leading to septicaemia, and the cause of death is one of the many things that is disputed in this case.

3. It appears to be claimed by the applicant that the deceased picked up pneumonia while in hospital and died of that. The relationship of the bedsores or the alleged neglect prior to that to the pneumonia is something that can be debated and no doubt will be debated at trial. And in addition to that, it is alleged by the prosecution in this case there was malnutrition; and again that may be disputed one way or another as to whether the lady wished to eat or not or wanted to be neglected or not, I do not know, in consequence of the severe brain pathology that arose from the condition, which I mentioned earlier.

This application

4. This is an application to prohibit a second trial of the daughter of the deceased, the applicant in these proceedings, and the application has been made on notice to the Director of Public Prosecutions, the Garda Commissioner, and Ireland and the Attorney General. Also on notice are the deceased's partner and the Health Service Executive (HSE). The test for prohibiting a criminal trial is a well known one and has been reiterated many times. As was said in the Supreme Court by Denham J in *DC v Director of Public Prosecutions* [2005] 4 IR 281 at 283, where an applicant seeks to prohibit a trial in which he or she is the accused:v DPP

> Such an application may only succeed in exceptional circumstances. The Constitution and the State, through legislation, have given to the [DPP] an independent role in determining whether or not a prosecution should be brought on behalf of the people of Ireland. The [Director] having taken such a decision, the courts are slow to intervene. Under the Constitution it is for a jury of twelve peers of the applicant to determine whether he is guilty or innocent. However, bearing in mind the duty of the courts to protect the constitutional rights of all persons, in exceptional circumstances the court will intervene and prohibit a trial.
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> In general such a step is not necessary as the trial judge maintains at all times the duty to ensure due process and a fair trial. The basic assumption to apply in relation to all pending trials is that they will be conducted fairly, under the presiding judge. However, in circumstances where there is a real or serious risk of an unfair trial, the courts will intervene so that a defendant may not be exposed to the commencement of the process, it being the assumption that should such a trial commence it will be stopped by the direction of the trial judge because of the real or serious risk of an unfair trial.

5. Now the grounds for the application that are laid out in the papers here are many. One of the main grounds is the issue of disclosure. In essence what is said is that the HSE had a responsibility in relation to this matter because this lady, the deceased Mrs Evelyn Joel, was a very ill woman, had been within the curtilage of the relevant department of the HSE for care purposes and that at the particular time they knew that she was living with her daughter they stopped visiting her, stopped phoning her and stopped taking any interest in her. And again as with the other facts in this case, I have no idea whether this is true or not and I certainly would not want to make any comment one way or the other. It so happens that the issue of disclosure became central to this case when the accused was returned to the Circuit Court for trial in early 2007. An application was then made before Judge Michael D White for disclosure against the Health Service Executive. Judge White ordered disclosure and then there was an appeal to the High Court.

Edwards J ruled that he had to overturn that decision. Then there was a further appeal to the Supreme Court. In the meantime, while the appeal was listed, the parties had sorted out matters apparently to their own satisfaction. The Health Service Executive gave disclosure to the Director of Public Prosecutions who in turn passed it on to the accused. So when, on 25 May 2011, the Supreme Court disposed of the appeal they did so on the basis that the parties had made an arrangement and that therefore the appeal was now moot. Perhaps one unfortunate result of the parties sorting matters out in that way is that, in effect, by agreement of the parties the order of Edwards J, was overturned by consent of the parties. That is how the matter was presented on behalf of the applicant to me. If that be the case, and I do not know, it would be disturbing and I am sure, if that is so, that this was not what the Supreme Court intended to countenance when they were presented with an application on consent to dismiss the appeal.

6. The matter then proceeded back to the Circuit Court for trial, with a jury being sworn in October 2011. A debate took place both prior to and after the date of trial and also during the trial in relation to the issue of disclosure. That happened in front of Judge Gerard Griffin. As I understand it, at one point Judge Gerard Griffin did something which shows his commitment, and I am not sure I would do it myself; he took home six boxes of material, went through the boxes of material and decided that a certain number of documents beyond those that had already been disclosed should be given to the defence. The trial then started on 25 October 2011. By direction of the trial judge, one of the two charges had not a guilty verdict entered by the jury against it. One charge was manslaughter, the other was reckless endangerment. The charge of reckless endangerment was directed by order of the trial judge. The manslaughter matter went to the jury. The defence gave evidence, as I understand it, through various witnesses and on the 6 December 2011 after a six week trial and considerable deliberation, the jury announced that they were deadlocked.

7. It is said in the papers that are before me that there are still disclosure issues. In particular the statement of grounds which has been prepared with meticulous care sets out a number of documentary matters which the accused would like to see in the event that the trial proceeded. It is said on the accused's behalf that these matters are essential to a fair trial. Having read through those matters and listening to the submissions that have been eloquently made on behalf of Eleanor Joel, it is clear to me that there are matters in respect of which there can be a debate as to has disclosure been made correctly or not? Do the defence have what they reasonably need or do they not?

8. It occurs to me that perhaps one of the problems in this case is a lack of focus. The case for the prosecution is that there was gross neglect amounting to gross negligence manslaughter whereby the deceased died. So was there that neglect? Secondly did anything else contribute so that the relevant tests as to causation were displaced: namely was there some other party who intervened in the causative effect leading to the death of the victim or was it the case that the negligence of the accused was a substantive causative effect to the death of the victim? And if the negligence of the accused made a substantive causative effect to the death of the victim, is that sufficient to establish causation? In response, what the accused is saying is that the HSE neglected the deceased and that the HSE made a substantial causative effect to the death of the deceased. That is a matter for the criminal trial. In the event that focus is brought to bear on this case, in other words on the question of whether the alleged substantial neglect caused the death of the deceased and whether that death was caused by the accused or by the Health Service Executive, no doubt the trial would be conducted more quickly.

9. In the context of disclosure in the course of an on-going prosecution, it has been made perfectly clear by the Supreme Court, in *PG v Director of Public Prosecutions* [2007] 3 IR 39, that the matter of disclosure is one which is the responsibility of the trial judge. It is fair to say that over the course of the last four or five years the High Court has emphasised again and again that it is only in exceptional circumstances that the High Court will assume that the trial judge is going to do something unfair and it is also only in exceptional circumstances that the remedy of judicial review to prohibit a trial is available. Prohibition is only open to the High Court in circumstances where a real risk of an unfair trial is pinpointed and is shown to be so strong that the ordinary care of a trial judge and ordinary directions to the jury and a charge, perhaps specifically tailored to a particular circumstance, cannot overcome it. In the course of that decision, at page 55, Fennelly J said that:

> I am sure that this problem can be resolved through the good offices of the respondent. If the matter is not resolved in this way, it will be a matter for the trial judge to deal with it. Presumably the complainant can be asked about it in his evidence. The trial judge must be, and is in law, bound to arrange the progress of the trial so as to render justice and to guarantee fair procedures to all parties, especially the accused. I agree with the submission of the respondent that matters of disclosure are within the province of the trial judge. They are not matters for judicial review except to the extent that an accused person can show that, having taken all reasonable steps to obtain disclosure, necessary material is being withheld from him to such an extent as to give rise to a real risk of an unfair trial.

10. The next issue that arises is under Article 40 of the Constitution and under Articles 2, 6, 8 and 14 of the European Convention on Human Rights. Basically the ground argued in both cases is the same, although to be specific, under the European Court of Human Rights case law it is argued that in the event of a wrongful death there should be a fair investigation. What is said here is that there has not been a fair investigation, in that the Gardaí neglected to investigate the Health Service Executive and instead focussed on the accused, the applicant herein Eleanor Joel, to the neglect of focussing instead on some 13 to 20 nurses who the applicant wishes to accuse of neglect. I note also that various figures have been mentioned during the course of the case who either had contact with the applicant or should have had contact with her and that this situation is alleged to have infringed her right to a fair trial, to respect for her family rights and operated as discrimination.

11. The position under the European Convention on Human Rights is made clear, it seems, to me by the decision of MacMenamin J in *Kennedy v DPP & Anor* [2007] IEHC 3 where, quoting from s. 3 of the European Convention on Human Rights Act 2003, he said at para. 45 that:

> There is thus first of course an obligation on an organ of the State (including this court and the court of trial) to observe the provisions of the Convention in its proceedings and to act in a manner compatible therewith.
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> But in order to invoke Convention remedies there must be a factual determination which gives rise to prejudice. Only thereby can there be an entitlement to raise the question of a remedy under the Act of 2003. These principles are clearly to be seen in the express terms of s. 3 of the Act of 2003. To seek a remedy the provisions of the Act a person must have suffered injury, loss or damage. This provision does not allow for anticipated, breach of Convention rights or on the basis of a hypothesised set of facts. Thus at present the question of compatibility with the Act of 2003, must also be seen as being moot, premature or hypothetical.

My view in relation to both the investigation and to the continuing disclosure issues is that, again, focus is necessary in this case. What is the defence? The defence are not at large as to what their defence is. It is clear what the prosecution case is, namely that there was neglect, there was starvation, there were bed sores and in consequence of those the death of the accused's mother occurred. It is becoming increasingly clear that the defence of the accused is that co-responsibility, of substantial responsibility, for

that death rested with the Health Service Executive, (whether that is true or not, I have no idea) and that in consequence of their neglect, this unfortunate deceased met her death in the house of the accused and applicant in this case; the house of her daughter.

12. The responsibility for determining the responsibility for that death is one for the jury because it is a question of causation and it is therefore a jury question and should be focussed on that; it is not a matter for judicial review. Before dealing with the last point, I should note that I am dealing here only with the substantial points and I am not dealing with any rhetoric, either around it or against it, such as the claims that the Gardaí could have conducted their enquiries better or that some nurses were unable to gain access to the house of some nurses during some time alleged to be relevant. I am saying nothing about those allegations, one way or another. But the last substantial argument that arises is in relation to criminally negligent manslaughter. It is said that this kind of manslaughter is unconstitutional because it is vague. I do not agree. Criminally negligent manslaughter arises where the death of another person is caused in circumstances which objectively amount to a very high degree of negligence and which, in the circumstances in question, to any reasonable person the fact that a serious risk was unjustifiably taken with the life of another would be apparent. That emerges clearly and not as a matter of vagueness from the decision of the Court of Criminal Appeal in *The People (Attorney-General) v Dunleavy* [1948] IR 95 where in his judgment for the court, Davitt J said, at page 102, that:

> If the negligence proved is of a very high degree and of such a character that any reasonable driver, endowed with ordinary road sense and in full possession of his faculties, would realise, if he thought at all, that by driving in the manner which occasioned the fatality he was, without lawful excuse, incurring, in a high degree, the risk of causing substantial personal injury to others, the crime of manslaughter appears clearly to be established.

That test has been applied in other cases such as in *The People (DPP) v Cullagh* (Unreported decision of Murphy J, Court of Criminal Appeal, delivered on the 15 March 1999). The issue there was of a child being killed in consequence of a chairoplane at a funfair getting so rusty with that it snapped and the unfortunate child was thrown off the ride and later died as a result of her injuries. Murphy J said in the course of that decision that nobody was suggesting that Mr Cullagh, who was the accused, was conscious of the fact that rust was eating away at this particular bolt, so that it was likely to come undone at any given moment and that Mairead Egan, the deceased, was in jeopardy. What the jury was asked to consider was, having regard to all of the facts of which they had evidence and all of the circumstances, whether Mr. McCullough so failed in the duty which he owed to Ms Egan as to be criminally liable for her death. This was essentially a matter of degree on which the jury had evidence and a matter in which they were entitled to reach a conclusion, which they did. This jury on this proposed trial can do so as well.

Conclusion

13. Lastly, I just want to make one further comment; obviously I am grateful to all parties for the submissions that have been made. The courts in judicial review in recent years have emphasised the primary responsibility of the trial judge and part of the reason is this; it is now said there has been terrible delay. It is correct that is now six years and half since the death of Mrs Evelyn Joel. Three years of that were taken up in appeal before Edwards J and then on a further appeal to the Supreme Court. I am now being asked to initiate yet another appeal by way of judicial review in the High Court. I do not think that the law in relation to criminally negligent manslaughter is in any way unclear, in fact its clarity is in contrast to some other areas of the law with which the courts have to deal from time to time. It is said, and it is correctly argued on behalf of the applicant, that the test for initiating a judicial review is based on the decision in *G v Director of Public Prosecutions* [1994] 1 IR 374 that there are arguable grounds. Anything can be argued, that is the reality but the courts have said that, where other parties are on notice of the application, the court is also entitled to look at any answers that are given to any points that are made and to assess on that basis as to whether arguable grounds have been made out. That is what I have done in the course of this decision, having heard all sides, and I think that I am required to refuse this application.

14. I also feel that by far the best way of dealing with this matter into the future and the way that it should have been dealt with right from the very start, is by application to the trial judge to ensure that the rights of Eleanor Joel, the accused, are properly had regard to.