THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 48

Appeal No. 2018/273

Birmingham P.
Baker J.
Kennedy J.

BETWEEN/

R. B.

APPELLANT

- AND -

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT delivered on the 26th day of February 2019 by Ms. Justice Baker

1. This is an appeal from the decision of Coffey J. given on 14 May 2018, [2018] IEHC 326, and order perfected on 1 June 2018 by which he refused the appellant judicial review by way of prohibition to restrain the prosecution of him on a single count of sexual assault alleged to have been committed between 1 January 1992 and 31 December 1993.

2. The applicant raised arguments of delay, lost and unavailable evidence, and general unfairness arising from the lapse of time.

Background
3. The alleged assault is said to have occurred when the accused was 18 or 19 and the complainant, a young boy, was between 8 and 9 years of age. The allegation is that the appellant sexually assaulted the complainant on an occasion when he stayed overnight in a mobile home in which the appellant and his family were then living. The complainant alleges that he fell asleep on a couch beside the appellant and that he was assaulted whilst he was on the couch. Following the alleged incident, the complainant alleges that he told the appellant's mother of the incident and that she shouted at him and asked him to leave her home. The appellant argues that evidence central to his defence relating to the incident, and to the living arrangements in the mobile home, have been irretrievably lost owing to the death of his mother in late 2015. The complainant stated that he told his own mother about the incident, but it is fair to note that the evidence proposed from the mother of the complainant is of an incident of a somewhat different nature from that the subject of the prosecution.

4. In February 2014, the complainant made a statement of complaint to the Gardaí and a file was then assembled. The Gardaí took statements from various potential witnesses and in late August 2014, invited the appellant's mother to make a statement in regard to the allegations that had been made against her son, but she declined to do so.

5. About a month later, in September 2014, the Gardaí interviewed the appellant and made him aware of the allegations made against him. On 19 February 2015, the Director of Public Prosecutions issued a direction that the appellant be charged with a single count of sexual assault. Thereafter, a period of more than a year elapsed when the Gardaí were unable to locate or contact the appellant with a view to an arrest by arrangement for the purposes of charging him.

The basis for judicial review
6. The appellant sought an order of prohibition on the grounds of delay, and argued that in addition to delay *simpliciter*, actual prejudice was been caused to him in the defence of the charge on account of the fact that his mother died on 15 November 2015, and that because she was the first person to whom the complainant is alleged to have communicated regarding the alleged incident and because she knew the living and sleeping arrangements in the house, the loss of her evidence is prejudicial in a material way to his defence.

The grounds of appeal
7. The notice of appeal identifies seven grounds of appeal which may usefully be summarised as follows:

> (a) the trial judge erred in failing to have regard to the prejudice to the appellant arising from the loss of the evidence of his mother who is now deceased, and further erred in concluding that other witnesses identified in the book of evidence could provide evidence to address any unfairness that might arise from the loss of that evidence;
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> (b) that the trial judge erred in failing to have regard to the fact that the indictment contains a single complaint only;
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> (c) that exceptional circumstances exist which make it unfair or unjust to put the appellant on trial, such exceptional circumstances being the combined effects of the death of an essential witness, that the alleged incident is not identified by reference to a single date, that the applicant is now in his mid-forties, and that the incident is alleged to have occurred twenty-five years ago or thereabouts.

8. The appeal is fully defended.

Legal principles
9. It is convenient to first outline the general principles which govern the exercise of the jurisdiction to prohibit a trial. The case law is unequivocal. The power of the High Court to order prohibition of a trial is an exceptional remedy, and there is no real contest between counsel regarding the exceptional nature of the remedy. Recent jurisprudence has shown a preference for leaving any matter that arguably might give rise to unfairness to the trial judge, and such an approach most accurately reflects the balance of interest

between the accused person and the administration of criminal justice.

10. In the Supreme Court decision of *Nash v. DPP* [2015] IESC 32, at para. 4.3, Clarke J. pointed out that:

> "A trial should only be prohibited from going ahead where it is clear that such balance lies against a full trial on the merits being permitted. I was not satisfied that it was at all clear that such is the case here. It will remain, of course, a matter for the trial judge to form a judgment (which judgment the trial judge will be in a much better position to exercise) whether that balance tips against allowing a final determination of Mr. Nash's guilt or innocence to be determined by a decision on the merits. In particular the trial judge will be in a much better position than this Court to assess the state of the evidence in that regard not least because there are many issues of admissibility which may have a significant impact on the extent to which Mr. Nash may be able to place before the Court any defence which he wishes".

11. The point is so well established in the authorities that it is not necessary to consider it further and both counsel accept that the starting point must be that the prohibition of a trial will be granted only when the circumstances are exceptional, and that each case is decided on its own merits.

12. In order to succeed in an application for prohibition, an applicant must show that there is a real risk of an unfair trial, and that that risk is not one that can be fairly dealt with by the trial judge in the giving of directions and in the management of the trial. There has been an increased emphasis on the centrality of the role of the trial judge in achieving fairness, and for the purpose of the present appeal, I adopt the statement of Charleton J. in his concurring decision in *Nash v. DPP*, where he explained the approach of recent jurisprudence, at para. 23:

> "It will be noticed that the law has moved on since those decisions. 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. As Clarke J states in his judgment on this appeal, if the case is one that there has been a diminishment in the availability of a trial that would be otherwise complete in every respect due to the factors complained of, then this judgment would concur that since the appropriate balance may best be seen by the trial judge in the context of a complete analysis of the facts of the case, it is preferable that an application to halt the trial be made to that forum. Where however, as Clarke J states, the case is one of a clear denial of justice resultant upon the factors found to be culpably wanting, prohibition by the High Court should be granted. 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. The trial judge quoted that statement with approval.

14. The reason for this approach to the respective roles of the trial judge and the High Court hearing an application for prohibition bears reflection. A court hearing an application for prohibition must have regard to the constitutional imperative that the proper forum for the determination of criminal matters is a trial by judge and, where appropriate, judge and jury. The trial court is uniquely competent to determine questions of guilt or innocence, and processes and procedures founded in the presumption of innocence and the nuanced respective roles of the prosecution and defence and of the trial judge have evolved to respect each of these interests.

15. In recognition of the uniquely complex and evolved practice in the trial courts, particularly that which has evolved in the context of historic sexual assault cases, an application for judicial review to prohibit a trial of a person accused of such assault is established only in what Charleton J. described, at para. 9 of his judgment in *K. v. Moran* [2010] IEHC 23, as "wholly exceptional circumstances" where, as a matter of fact, and not hypothetically, circumstances have come to render unfair and unjust the continuation of the trial process.

16. Therefore, while a trial may be rendered more difficult as a result of the loss through death of possible witnesses, the trial court has the ability and obligation to ensure that fairness can be achieved in the process by excluding evidence, giving directions and warnings to the jury, and other steps of procedural nature uniquely available to that court.

17. To prevent the trial on the basis of unavailable witnesses or documentary evidence would be an unwarranted interference with the rights of the parties, and with the public interest in the prosecution of crime.

18. For that reason, for an applicant who seeks prohibition on the grounds of delay, whether the argument be regarding delay *simpliciter* and the inevitable frailty of recall that arises from the passage of time, or because, as a result of delay, specific prejudice can be shown by reason of the unavailability of witnesses, the test remains one which must be focussed on the individual facts of the case and whether an applicant can show real risk of unfairness in the light of those facts. The statement of Murray C.J. in *S. H. v. DPP* [2006] IESC 55, [2006] 3 IR 575, at para. 47, explains the test:

> "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."

19. O'Malley J. in *S. Ó'C. v. DPP* [2014] IEHC 65 refused to grant prohibition, and considered that where what was alleged was the absence of evidence, an applicant must point to "a real possibility that the witness or evidence would have been of assistance to the defence", at para. 65, and rejected the suggestion that it was sufficient to point to the theoretical possibility that something might emerge from the evidence of a missing person that would contradict the account of the complainant or of another witness. She explained the matter at para. 67 of her judgment:

> "The question is, I consider, whether there is a real possibility that the missing material would reveal a material inconsistency which would be of benefit to the applicant. In my view, there is nothing in the evidence to suggest that this is a realistic possibility as might be the case if, for example, it was shown that she [the complainant] had given materially inconsistent accounts in other instances."

20. Further, the onus is on the applicant for prohibition to establish a real risk. Having considered the evolution of the jurisprudence and having also noted the difficulties faced by an accused in defending himself against allegations of sexual assault of some antiquity, O'Malley J., in *S. Ó'C v. DPP*, at para. 60, noted that:

> "[…] the onus is nonetheless on the applicant to show that there is a real risk of an unfair trial, bearing in mind the obligations of the trial judge."

21. In the light of those general propositions, I turn now to examine the specific factors in respect to which the appellant appeals which are alleged to cause prejudice such that the threshold of establishing that the exceptional remedy ought to be granted is met.

The loss of the evidence of the mother of the appellant
22. Counsel for the appellant argues that the loss of this evidence is crucial and prejudicial in a real and substantive way to the defence of the charge. The offence is alleged to have occurred in the home of the appellant's mother, and the complainant alleges that he spoke to her on the following morning. Coffey J., having considered the absence of this evidence, came to the following conclusion, at paras. 17 and 18 of his judgment:

> "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.
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> 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."

23. The appellant argues that the trial judge fell into error in his conclusion that the applicant was asking him to "speculate and to make an unwarranted inference" as to the evidence that would be given by the appellant's mother. It is asserted that the contrary is the case and that the appellant's mother would have been in a position to give very specific evidence, either to confirm the complainant's account of the alleged incident or whether, as alleged by the complainant, the appellant was still asleep on the couch in the living room on the morning in question. It is argued that the appellant's mother could have given evidence that the accused never slept on this couch and that he was not on the couch on the morning in question.

24. The trial judge regarded this engagement with possible evidence as mere hypothesis and I consider that in this, he was correct. In the first place, it seems to me that the evidence that the appellant's mother might have given cannot be considered in a binary way, either that she did or did not recall the incident, or that the complaint was made to her of a specific incident by the complainant. She could have said that she had no memory of the incident, and what she might have said regarding the sleeping habits of the complainant could never have been more than evidence regarding what she knew of those sleeping habits. The most she could have said is what she herself knew of his sleeping arrangements, and not evidence of what they actually were.

25. Of more consequence is the fact that the appellant has not himself said, on the affidavits grounding the application, that he discussed the matter with his mother before she died, that she confirmed to him that she could give evidence which would support his defence and what that evidence might have been. It may be dangerous for me to speculate that the appellant's mother would have volunteered a statement to the Gardaí had she been in a position to offer a statement in support of her son, as that proposition too enters the realm of speculation. The appellant is uniquely placed to identify what evidence his mother had told him she might have been in a position to offer, and more than fourteen months elapsed between the first interview by the Gardaí of the appellant and the death of his mother and no evidence was before the High Court that she was unwell in that period.

26. To say that evidence must raise a real possibility that the missing evidence would assist in the defence means that an applicant for prohibition must engage in a real way with that potential evidence and identify how and why it might assist in defending the charge. A hypothesis that evidence might have been available from a now unavailable source and that that evidence might have been useful in defence is not sufficient. There must be a link, in the words of O'Malley J., a "real" link between the evidence that could have been given by the unavailable witness and the facts in issue, or likely to be in issue, at trial.

27. The mere fact of delay, therefore, is not, of itself, sufficient, and there must be real and concrete unfairness arising from the delay in the light of the circumstances of the case.

28. I consider that the trial judge was correct and that the argument that the appellant's mother might have offered exculpatory evidence is mere speculation and does not meet the test identified in the case law that there would be a real and not hypothetical possibility that the witness would have been of assistance. It seems to me that the argument of the appellant falls within precisely the category identified by O'Malley J. at para. 65 of her judgment in *S. Ó'C v. DPP*:

> "[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."

29. The trial judge quoted that dictum as authority for the proposition that the "hypothetical relevance of a missing witness is not a sufficient ground for granting prohibition", at para. 18 of his judgment, and he was, in my view, correct in doing so.

30. Further, he was correct to take the view, by way of alternative proposition, that the evidential matters were more properly left to the trial judge as he did in para. 19 of his judgment:

> "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."

31. The appeal on this ground must fail.

The second ground: A single incident
32. The charge relates to a single incident. Counsel for the appellant argues that the fact that the accused is charged in respect of a single incident that occurred almost a quarter of a century ago is, in itself, sufficient to establish a degree of prejudice sufficient to justify the prohibition of his trial. It is argued that a single incident prosecution must be seen as different in its character from many historical sexual assault cases where an accused might have some possibility of obtaining alibi evidence or useful exculpatory witnesses. It is argued that the appellant would have great difficulty establishing even a basis for cross-examination when there is

nothing to link the alleged dates of the assault to any matter that might trigger the recall of any potential witness or his own memory.

33. No authority was advanced in support of that general proposition. Because the tool of cross-examination is available to challenge any possible frailties in the memory of the prosecution witnesses, the fact that the appellant is charged on a count relating to a single incident could, and often will, benefit an accused person and make the prosecution evidence vulnerable to challenge. The fact that the complaint relates to a single incident is not, in itself, an exceptional circumstance, and the balance of justice is not tipped in favour of the prosecution in any generalised way merely on account of the fact that the charge relates to a single incident. The weight and the credibility of the evidence is a matter for the trial judge, and ultimately for the jury whose task will be to weigh the evidence in the light of the criminal standard of proof and to make findings of fact. That an accused is charged in respect of a single incident, without the other material elements identified in the authorities, does not tip the balance in favour of prohibition.

34. I reject the argument of the appellant that he will be unable to rely on what MacMenamin J. called in *M. U. v. DPP* [2010] IEHC 156, at para. 89, an "island of fact" which might usefully test the evidence of the prosecution witnesses. The "island of fact" in that case was a garden shed and certain objective contradictions could be said to be apparent or arguable on account of the fact that it no longer was in existence. No equivalent "island of fact" has been identified in the present case.

35. The appellant argues that the High Court failed to articulate or adjudicate on his argument relating to the fact that he is to be tried in regard to one single incident, and while I accept that the trial judge did not deal with this as a separate argument, his judgment deals with the nature of the evidence and the way in which any prejudice alleged to arise may be dealt with at trial in a way that, in my view, sufficiently deals with that argument.

36. Applications in the course of a trial on the ground of prejudice are common, and the fact that those applications are made in the light of the evidence adduced means that the application is made to the person best fixed to form a view as to whether actual prejudice exists or is likely. The fact that what is alleged relates to one incident only is a matter that will no doubt form a part, and maybe even a central part, of the defence and the cross-examination of the prosecution witnesses, and I cannot agree that the trial judge fell into any error in failing to grant prohibition on this ground.

Are the circumstances exceptional?

37. By way of a general proposition, the appellant argues that the circumstances are exceptional and relies on the very recent judgment of the Court of Appeal in *B. S. v. DPP* [2017] IECA 342, where a trial was prohibited in regard to one count of alleged rape which had occurred some forty-six years before. The appellant had argued that the loss of three witnesses who could have been of assistance to him, that there was inherent prejudice having regard to the extreme lapse of time, and that the accused was a minor at the time of the incident gave rise to a cumulative prejudice such that the threshold was reached.

38. The judgment of the Court of Appeal was given by Sheehan J. who summarised his conclusion at paras. 24 and 25:

> "24. The appellant in this case has engaged with the evidence and his belief that the 3 deceased witnesses could have been of assistance to him goes beyond mere assertion. If he is not prejudiced according to the dicta of O'Malley J. in S. O'C v DPP [2014] IEHC 65 then he has at least established "moderate prejudice". Further, there is in my view inherent prejudice in a delay of what will now be 47 years if this trial is allowed to proceed. This is particularly so in a case that is wholly dependent on oral testimony of the complainant and the appellant. Two separate tests arise following the judgment in the H. case. With regard to the first test I hold that the appellant has established sufficient prejudice which gives rise to a real risk of an unfair trial which cannot be overcome by any delay warning.
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> 25. Having considered all of the particular facts and circumstances of this case and looking at them cumulatively I hold that this case comes within the 'wholly exceptional circumstances category' as a result of which it would be unfair and unjust to put this specific accused on trial. I therefore allow this appeal on the 2 separate grounds envisaged in 'H' whereby a trial should be prohibited. Accordingly, I grant the application for an injunction restraining the Director of Public Prosecutions from proceeding further in this matter."

39. A number of observations are to be made in regard to the judgment of Sheehan J. in *B. S. v. DPP*. First, and importantly, the Court of Appeal restated existing jurisprudence, the broad tenor of which has been outlined above, and the fact that to prohibit a trial requires "wholly exceptional circumstances", the language used by the Supreme Court in *P. T. v. DPP* [2007] IESC 39, [2008] 1 IR 701, at p. 708.

40. Second, the Court of Appeal considered that the appellant had engaged with the evidence and had identified matters that the three deceased witnesses could have offered in support of his defence. This distinguishes the facts of that case from those in the present case.

41. Further, the delay in that case is almost twice the delay in the present case, but more especially, the appellant in *B. S. v. DPP* was a minor at the time of the alleged offence and the Court of Appeal regarded that as being "a specific factor to be taken into consideration", at para. 22.

42. Another factor in that case was that the interview of the appellant took place without the presence of a solicitor and when the appellant had said to the Gardaí that he could not afford a solicitor. Whilst the appellant in his affidavit of 2 March 2017 avers to having found the interview under caution "a very intimidating process", he had taken legal advice before the interview and for reasons of logistics his solicitor was unable to attend with him at the Garda station on the day in question. His then wife was present.

43. Finally, the delay in the present case is of a lesser magnitude, albeit the incidents are alleged to have occurred a long time ago. He was of age at the time of the alleged incidents.

44. It was the combination of factors that led to the conclusion of the Court of Appeal in *B. S. v. DPP*. That combination is not found in the present case, and in that regard, it is important to again note that each case is to be decided on its own facts, and there is no formula by which an application for prohibition is to be assessed.

45. A number of material differences between the facts of the present case and those in *B. S. v. DPP* are not sufficient to form a basis on which the present appeal should be allowed.

46. When the Supreme Court was asked to hear an appeal from the decision of the Court of Appeal on stated grounds that it expressed a departure from existing jurisprudence, the Supreme Court refused to grant leave to appeal as no departure from existing principles was evident in the decision. In its determination, [2017] IESCDET 134, the Court took the view that the decision of the

majority of the Court of Appeal, Hedigan J. having dissented, did not involve anything other than the application of established principles to the facts of the case.

47. In those circumstances, I am not persuaded by the argument of the appellant that the judgment of the Court of Appeal did involve a departure from existing jurisprudence and suggests a new willingness on the part of the Court of Appeal to grant prohibition on the grounds of delay.

Psychological difficulties of the appellant

48. I am satisfied that the trial judge was correct in his determination that the evidence of psychological difficulties of which the appellant suffers are not sufficient to deprive him of the capacity to plead and that there was no medical evidence to suggest that "his current psychological illness or its severity has been caused or contributed to it by any culpable delay on the part of the respondent", at para. 21 of the judgment of Coffey J. It is well settled law that the question of fitness to plead is one for the trial court and it is not for a High Court or for this Court on appeal to depart from that approach which is one derived from s. 4 of the Criminal Law (Insanity) Act 2006, as amended, by which the question of fitness to be tried is one to be determined "in the course of criminal proceedings". The Oireachtas has firmly positioned to the question of fitness as a matter for the trial judge: See Charleton J. in *K. v. Moran*, who said that the matter was "fully governed" by s. 4 and that there was no possible basis for substituting any inquiry on judicial review for this comprehensive statutory code.

49. I am satisfied, for the reasons stated in this judgment, that the appellant has not made out any basis on which Coffey J. failed in his application of established legal principles and that, accordingly, the appeal is to be dismissed.