THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 12 J.R.]

BETWEEN

P.F.

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 15th day of February, 2016

1. The applicant states that he worked on a voluntary basis in a children's home run by a religious order in Dublin from 1974 onwards. His role in that home appears to have been facilitated by a particular nun. A number of complainants, who were children in that home, have come forward making complaints of sexual abuse against the applicant, including acts which would amount to oral, anal and vaginal rape.

2. The charge sheets in this case originally charged offences dating back to August, 1968, against three complainants, who I will refer to as A, B and C.

3. The applicant was returned for trial on 31st October, 2013. On the eve of the trial an indictment was furnished in which amended dates were charged. In relation to Ms. A, the offences which were originally said to have occurred in 1968 to 1974 were now charged as having occurred in 1974 to 1975, when she was 13 to 14 years old. In relation to complainant B, offences originally have said to occur in 1974 to 1977 were now charged as occurring in 1977 when she was 14. In relation to Mr. C, there was no change in dates, and the offences concerning him do not form any part of the present application.

4. The trial commenced on 9th July, 2015. Unusually, after the jury was sworn but before the applicant was put in charge of the jury, the defence applied for certain rulings from the trial judge, Her Honour Judge Codd, arising from the indictment.

5. The application made by the defence was summarised by Ms. Caroline Biggs, S.C., (who appeared with Mr. Rory Staines, B.L.) for the applicant as follows:-

> (i) to direct that the evidence of the complainants as set out in the statements in the book of evidence was inadmissible, because it referred to different dates to those in the indictment;
>
> (ii) alternatively to direct that the D.P.P. put before the court an indictment that reflected the statements in the book of evidence; or
>
> (iii) to make an order stopping the trial in order to protect the process of the court from abuse.

6. Those applications were refused and Judge Codd indicated that application could be sought for prohibition. The jury was discharged and a new trial date of October, 2016 was set.

Can an indictment differ from a complainant's statement?

7. Ms. Biggs submits that there is no basis for the Director to have charged offences on radically different dates to those set out expressly, or by implication, in the statements of Ms. A and Ms. B. She says that what the complainants say in their statement of evidence "*cannot be true*". Furthermore, the applicant says he had established that the original dates were incorrect, by reference to his not having worked in the institution until 1974, but that this defence had now been "*whipped away from us wholesale*".

8. That may be unfortunate from a defence point of view but as a legal objection to the indictment, it is wholly without substance. The Director is not obliged to swallow a complainant's statement whole. She is perfectly entitled and indeed required to take a view on the totality of the evidence as to what the particulars of the offending behaviour to be charged should be.

9. It is noteworthy that Keane C.J. in *J. O'C. v. D.P.P.* [2000] 3 I.R. 478 at 486, took the view that in a prohibition application "*the presumption of innocence does not apply*" and "*the court must proceed on the assumption that the allegations are well founded*". The allegation is that the applicant, while in a position of trust in relation to vulnerable children in a home run by a religious order, engaged in unlawful acts of sexual abuse with those children, at the ages of 13 to 14 years (and seven years in the case of Mr. C, although that does not arise in the context of these proceedings). Children in a care home are, in the nature of things, individuals with what Ms. Éilis Brennan, B.L. for the respondent, describes as a "*good amount of difficulties*", but this, she fairly says, is a "*frequent feature*" of such historic sex abuse cases. She submits that a vagueness about dates is also a common feature of such cases.

10. The really crucial aspect of this issue is that, as Fennelly J. stated in *People (D.P.P.) v. Farrell* [2010] IECCA 94 (Unreported. Criminal Court of Appeal, 13th October, 2010), *"it is well established in law that the precise date on which an offence took place is not of the essence of the offence unless be it a component of the offence itself which it can be."*

11. That proposition seems to me to be fatal to this prohibition application, and indeed to any submission to the trial judge that the prosecution must be stopped because of a mere inconsistency between the dates given by a complainant (assuming they were given in evidence) and the indictment.

12. That is not to say that a submission could not be made that, following the close of the prosecution case, particular evidence was so unreliable that no reasonable jury could convict on the basis of it. Nor is it to take from any point that could be made to a jury. However, all that needs to be said at this stage is that there is no obligation, whatsoever, on the Director to frame an indictment by reference to dates given by a complainant, if the Director is of the view, that taking the evidence as a whole, that other dates should be charged.

13. Admittedly this is a more unusual situation to one where an indictment is amended after a complainant's evidence. The more normal course arises where a complainant has given slightly different dates in evidence to those originally anticipated thereby necessitating an adjustment of the dates charged and a substitution of the indictment. However, either way there is no legal basis for the Director to be held to be bound by a complainant's recollection as to dates in such a way as to override all other considerations and all other evidence. Indeed, in many cases it is almost inevitable that some inconsistency of evidence will occur as between different prosecution witnesses.

14. The core issue in the trial will be whether the sexual abuse in fact occurred. The question of when it occurred is secondary. The applicant is, of course, at liberty to contend that the uncertainty about dates undermines the evidence that the abuse occurred at all, but that is primarily a jury point. For Ms. Biggs to dismiss, for example, Ms. B's evidence as something that "*cannot be true*" is to significantly underestimate the capacity of a jury to distinguish between the veracity of her recollection that the abuse occurred and the accuracy of her recollection as to when it occurred.

Allegation that the evidence of the complainants was inadmissible
15. As referred to above, the first defence application to Judge Codd was for a direction that the evidence of the complainants, Ms. A and Ms. B, was inadmissible. The refusal to give such a direction was clearly correct. There is no precedent for an application of this kind. The fact that the proposed statement of evidence of the complainants suggests different dates does not make that evidence inadmissible in relation to a charge relating to other dates. It is admissible if the director intends to contend that the offence actually occurred on a date different to that recalled by the complainant. Otherwise, the entire criminal process would become a hostage to a failure in recollection by an individual complainant on a peripheral issue such as a date, as opposed to a core issue of substance, such as whether the abuse occurred.

Are there arguable grounds to contend that the Director should have been compelled to deliver an amended indictment?
16. The second application was for direction that the prosecution be required to deliver a substituted indictment that reflected the original evidence of the complainants. The court has jurisdiction under s. 6(1) of the Criminal Justice (Administration) Act 1924, to direct the amendment of an indictment (see *The People (D.P.P.) v. Walsh* [2010] 4 I.R. 746; *Radford v. D.P.P.* [2015] IEHC 434 (Unreported, High Court, Noonan J., 7th July, 2007)) but the proposed exercise of that power, as urged on the court by the defence, was entirely inappropriate. The prosecution had taken a considered view that the offences had occurred at a different date than that recalled by two of the complainants. The Director, under those circumstances, should not be compelled to submit an indictment charging offences as having been committed on dates which she did not agree with, and indeed to do so would be completely contrary to the requirement of fairness and accuracy laid upon her. Such an order would also be likely to have the effect of completely de-railing the trial and resulting in directed acquittals. It would essentially deprive the prosecution of its legitimate entitlement to make the case that while the central recollection of the complainants could be relied on, their recollection as to dates might not be altogether accurate.

17. The European Court of Human Rights in *Söderman v. Sweden*, Application No. 5786/08, 12th November, 2013, as referred to the "*duty to conduct an effective prosecution*". This is an obligation on the State collectively and not simply on the Director of Public Prosecutions. A trial judge should not make orders that have the effect of upending prosecutions unless there are considerations as to the merits which have the effect that significant and irremediable injustice would be caused to a defendant. This is not the case here. There is no basis in law for the argument being advanced by the applicant.

Application to halt the trial
18. The third defence application was an order halting the trial in order to protect the process of the court from abuse and protect the rights of the defendant. As regards abuse of process, there is absolutely no basis for such a claim here. As stated above, the Director was entitled to take a different view from the complainant's recollection and therefore was entitled to deliver the indictment which she did. There is no abuse of process.

19. Overall, the case comes no where near circumstances in which it would have been appropriate to stop the trial, but even if it was, that could not have been done by way of preliminary application, as proposed by the applicant, for reasons discussed below.

Any unfairness to applicant was capable of being dealt with by adjournment
20. In declining to make any of the orders sought by the defence, Judge Codd commented that there may have been a potential unfairness to the defence, but that prohibition was the appropriate remedy.

21. It is far from clear to me how there is any real unfairness to the applicant other than the element of surprise as to the changed dates, which is fully capable of being dealt with by affording time to adjust to those new dates. Indeed, the trial has now been adjourned to October, 2016, so the applicant has ample opportunity to consider the question of his whereabouts during the periods now charged.

22. Ms. Biggs submits that the Director cannot take a complainant's statement and "*rip it up and disregard it*". This is not what has been done, for the reasons explained. The change in dates does not in itself amount to an unfairness. While it might be too bad for the defendant that any original defence he intended to mount as to dates cannot now be relied upon, this does not constitute unfairness. Ms. Biggs' complaints as to a lack of correspondence between the statements on the indictment, the lack of notice as required by the Criminal Procedure Act 1967, the fact that the original defence is no longer relied on and the fact that the change of dates is not in any way connected with what the complainants says, whether taken individually or collectively do not amount to any real or certainly any remediable unfairness. It might not suit the applicant to have to defend these charges but the interests of justice strongly militate in favour of the requirement that he must do so. Certainly there is nothing to allow either this court or the trial court to prevent that process from taking place.

23. While in previous cases, the rights of the applicant have been contrasted with, and generally categorised as superior to, the entitlement of the prosecution on behalf of the community to proceed with a charge, I do not consider that this can now be viewed as a complete statement of the competing interests involved. The legal, constitutional and ECHR rights of victims have been increasingly emphasised in recent years, as acknowledged by the European Court of Human Rights in *Söderman* and as reflected in Directive 2012/29/EU of 25th October, 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (the victims directive) (see my judgment in *Nulty v. D.P.P.* [2015] IEHC 758).

24. The State is under a constitutional obligation to vindicate the personal rights of injured parties pursuant to Article 40.3.1°. Having regard to the standards now being set at ECHR and EU level, and on a holistic and developing view of the overall objective interests involved in the criminal process, it seems to me that this obligation must include recognition of a constitutional right of an injured party to have an effective investigation and, if appropriate, prosecution, conducted, at least in the absence of any sufficiently weighty reason to the contrary. Otherwise, the State would be failing to take the positive measures that are necessary to vindicate those personal rights in the circumstances.

25. In *D. v. D.P.P.* [1994] 2 I.R. 465, 474, Denham J. commented (in the context of refusing prohibition in that case) that the right to fair procedures of a defendant is a superior right in the hierarchy of rights to the community's right to prosecute. But that is simply another way of saying that this country does not subject people to unfair trials. It is not to be taken, as it occasionally seems to be by defendants, as a statement that the rights of the accused are a trump card which can outbid any competing interest of victims of crime or the Director as a prosecutor on behalf of the People. A court faced with a conflict of rights must first seek to balance and accommodate all sets of interests in a proportionate manner as appropriate to a democratic society. In contexts such as this, that can readily be done with, for example, appropriate jury instructions as to caution to be applied if significant elements of witness recollection are shown to be incorrect, with due regard to the distinction between recollections as to central and peripheral matters. It is only in limited and in practice exceptional circumstances where such a balance cannot be arrived at that the prevention of significant and irremediable unfairness would require a trial to be stopped either by the trial judge or on prohibition. The "hierarchy of rights" issue is not an answer to a criminal charge except in those very limited circumstances.

The appropriate venue for complaints regarding fairness is the trial, not the High Court on prohibition

26. Independently of whether there is any real unfairness to the applicant that has not been addressed by the adjournment, which I do not accept, I must now consider whether judicial review by way of prohibition is the appropriate mechanism to ventilate the applicant's complaint, or whether that complaint should be presented to the trial judge at the appropriate stage of the trial.

27. The conception that prohibition is the appropriate route appears to originate from the Supreme Court decision in *The State (O'Connell) v. Fawsitt* [1986] I.R. 362 at 379, in which Finlay C.J. disagreed with a finding by Murphy J. in the High Court, that a trial judge would have power not only to give "*appropriate warnings or directions to the jury*", but also if necessary, as a result of "*unduly prejudicial*" delay and power "to dismiss the pending charges" (see the judgment of Murphy J. at pp. 374-375). Finlay C.J. held that this portion of the judgment was *"in error"* and that if delay is such "*as to prejudice [the applicant's] chance of obtaining a fair trial, the appropriate remedy by which his constitutional rights might be defended and protected was by order of prohibition. Such a person should not be put to the risk of being arraigned and pleading before a jury.*" (See p. 363).

28. In *The People (D.P.P.) v. P.O'C.* [2006] 3 I.R. 238, this passage was further considered by Denham J. (as she then was) for the Supreme Court. While Denham J. followed the finding that "*the appropriate remedy*" for an allegation of delay is judicial review, she went on to say that whether an application for judicial review is made or not, "*the trial court retains at all times its inherent and constitutional duty to ensure that there is due process and a fair trial*". To that extent, the decision in *The People (D.P.P.) v. P. O'C* displaces the approach taken in *The State (O'Connell) v. Fawsitt* where doubt was cast on the jurisdiction of the trial judge in this regard. Denham J. also relied on *G. v. D.P.P.* [1994] 1 I.R. 374 in support of the proposition that simply because the remedy of prohibition existed, that did not oust the fundamental jurisdiction of the trial court to protect due process.

29. In the subsequent Supreme Court decision in *P. O'C. v. D.P.P.* [2008] 4 I.R. 76 at p. 83, Finnegan J. for the Supreme Court (Denham and Fennelly JJ. concurring) took the view, having considered *The People v. P. O'C.* took the view that "*…in this case it is not possible to form a judgment in advance as to whether a potential trial would be fair or unfair. Accordingly the applicant's trial should not be inhibited on grounds of presumptive prejudice*." In this passage, one can discern the formulation of the risk of "inevitable" prejudice, which has become so central to Supreme Court case on the issue of prohibition in more recent cases. Finnegan J. also relied on a similar approach taken in *P.L. v. Buttimer* [2004] 4 I.R. 494 at p. 520 (*per* Geoghegan J.).

30. In *Byrne v. D.P.P.* [2011] 1 I.R. 346, the Supreme Court returned to the issue of prohibition, and in this case holding that the primary onus of insuring that the right to a fair trial was vindicated lay on the court of trial. In that case, O'Donnell J. commented at p. 360 that much of the jurisprudence on prohibition, at least with regard to delay and missing evidence "*can be traced back to a single observation, itself not apparently the subject of any detailed argument, in* The State (O'Connell) v. Fawsitt *to the effect that judicial review is the appropriate remedy where a challenge is brought (in that case on grounds of delay) to an anticipated trial on indictment in the Circuit Criminal Court"* (citation omitted). O'Donnell J. further commented that whether this is necessarily so, and whether the appropriate test should be the "*real risk*" of an unfair trial, might deserve further consideration.

31. Notwithstanding that on one view the matter was thus left for further consideration, it seems to me that the central holding of *Byrne*, that "[*t*]*he primary onus of insuring that [the right to a fair trial] is vindicated lies on the court of trial*", is just not possible to reconcile with the proposition in *The State (O'Connell) v. Fawsitt* that the primary remedy should be by way of prohibition application to the High Court in respect of any complaint as regards delay.

32. O'Donnell J. in *Byrne* was critical of the fact that the judicial review on a missing evidence point in that case had held up the trial of the offence for more than six years (at p. 360). As I said in *Nulty*, the expression of such a concern must have an impact on how the court should approach a prohibition application even at the leave stage, and perhaps particularly at that stage.

33. The Supreme Court returned to the issue again more recently in *Kearns v. D.P.P.* [2015] IESC 23 (Unreported, Supreme Court, 6th March, 2015), in which Dunne J. cited with approval the approach taken in *Byrne*, and commented that "*the jurisdiction to prohibit a trial is one which should only be exercised in exceptional circumstances*" and that "*it is for the trial judge to ensure that the appellant's right to a fair trial guaranteed by the Constitution will be vindicated by making appropriate rulings on the issue before the court of trial"*.

34. Again, I am compelled to the view that an approach that prohibition should only be granted in exceptional circumstances is simply not capable of co-existing with the previous approach in *The State (O'Connell) v. Fawsitt* that prohibition is "*the appropriate remedy*" for a complaint in relation to unfairness caused by delay.

35. A review of the authorities was recently engaged by the Court of Appeal in *Sirbu v. D.P.P.* [2015] IECA 238 (Unreported, Court of Appeal, 9th November, 2015) with particular reference to the observation of Dunne J. in *Kearns* that prohibition required a genuine risk of an "*unavoidably unfair trial*". Hogan J. for the Court of Appeal held that despite the unfortunate loss of evidence in that case, there was not such a risk of an "*unavoidably unfair trial*" (para. 20), but rather that "*the present case is one where any potential prejudice to the accused is best assessed by the trial judge*" (para. 21). He concluded by saying that "*I am not persuaded that the missing evidence in the present case means that the trial will inevitably be unfair or that such potential unfairness cannot be satisfactorily addressed by means of appropriate judicial rulings"* (para. 24).

36. A similar approach was taken by the Court of Appeal in relation to allegedly prejudicial delay, rather than missing evidence in *M.S. v. D.P.P.* [2015] IECA 309 (Unreported, Court of Appeal, 22nd December, 2015).

37. In the recent case of *M.L. v. D.P.P.* [2015] IEHC 704 (13th November, 2015) , referring to Z. v. D.P.P. [1994] 2 I.R. 476, Noonan J. stated that "*only in exceptional circumstances will the court intervene to prohibit a criminal trial*" (para. 22) and "[*a*]*s has been stated time and again, the fairness of the trial is primarily a matter for the trial judge*" (para. 25).

38. In my view, on a reading of the foregoing authorities, it is not possible to escape the conclusion that the law in relation to prohibition has significantly evolved, but perhaps without an express abandonment of the previous approach. However, given that in the present case the applicant has relied on the previous case law, it is simply not possible to address this application without squarely facing the question of whether the previous approach is still a current statement of the law.

39. Having regard to the most recent consideration of this issue by the Supreme Court and the Court of Appeal, I must come to the conclusion that the previous approach whereby prohibition is seen as the "*appropriate remedy*" for delay (or indeed missing evidence or other unfairness) no longer prevails as a statement of the current law. The Supreme Court has more recently laid down that prohibition is an exceptional remedy, and that the primary onus of vindicating the rights of the applicant falls on the trial judge. Prohibition should only be granted in the event of a genuine risk of an "*inevitably unfair trial*", rather than merely a risk to fairness which the trial judge can deal with, if it arises. If, and to the extent that, *The State (O'Connell) v. Fawsitt* as relied on in *G. v. D.P.P.,* and *The People v. P.O'C.* contains an approach to the contrary, I consider that this is not a statement of the current law and has been displaced by the more recent decisions in *Byrne v. D.P.P.* and *Kearns v. D.P.P.* in particular, as reinforced by the Court of Appeal decisions in *Sirbu v. D.P.P.* and *M.S. v. D.P.P.*

40. It is clear from *G. v. D.P.P.* that the requirement at the leave stage that judicial review be an appropriate remedy is separate from the question of arguability. Whether or not the applicant meets the latter threshold, I am of the view, having regard to the foregoing case law, that he has not met the former threshold. The appropriate remedy lies in an application to the court of trial if unfairness can be shown and not by way of prohibition in advance, in the circumstances of this case.

Was the applicant correct to apply at the outset of the trial to halt the prosecution?
41. Ms. Biggs states that the reason why the application was made at the outset of the trial was to avoid prejudice to the applicant. It is submitted that if the jury had heard details of all three complainants, and if at a later stage, one of the complainants was essentially knocked out of the proceedings, severe prejudice would be caused to the applicant. While perhaps attractive at a superficial level, this approach does not withstand analysis. If prejudice is thereby caused, it is not irremediable because it can be cured either by appropriate directions, or by discharging the jury following a directed acquittal in relation to any individual aspect of any particular case. The possibility of prejudice is not a reason to make an application at the outset of a trial.

42. In *The People (D.P.P.) v. P.O'C.*, Denham J. emphasised that any application to the trial court should be made at the appropriate stage of the trial, and not as a separate motion at the commencement of the trial (at p. 248). That aspect of the case has not been challenged in any subsequent decision.

If an application regarding unfairness should not be made at the outset, when should it be made?
43. Judge Codd in this case expressed concern that the appropriate mechanism and procedure whereby the trial judge would determine such issues had not been clearly laid down. It is important to recognise that this applicant, like others similarly situated, has multiple opportunities to redress any unfairness that he says exists, without it being appropriate to seek prohibition. He can ventilate his point through:

(i) Cross-examination of the complainants;

(ii) Application for a direction on the close of the prosecution case;

(iii) Speech to the jury;

(iv) Application for appropriate directions to the jury.

44. In terms of when to make an application of the kind made to Judge Codd, in my view, in almost all cases, the appropriate time to make that submission is at the close of the prosecution case. If the trial judge is satisfied at that point that no jury properly instructed could fairly convict the applicant, having due regard to all relevant considerations, then the trial judge has jurisdiction to stop the trial. It will however normally be possible to remedy any unfairness by way of appropriate directions to the jury. There may be circumstances in which there is an unfairness which can be remedied by a discharge of the jury with retrials on a severed indictment, or even a directed verdict on certain counts, the court is not without options.

45. The requirement to have regard to all relevant circumstances must however include, first and foremost, the essential point made by the Court of Appeal in *M.S. v. D.P.P.* [2015] IECA 309 (Unreported, Court of Appeal, 22nd December, 2015), at para. 49, where Hogan J. emphasised that the system of constitutional justice was, apart from minor offences and special courts, one of trial with a jury, and not by judge alone. A trial judge must be vigilant not to usurp the role of the jury, either at the direction stage or any other stage of the process. It is only if serious prejudice is inevitable and irremediable to the extent that no properly directed jury could lawfully and fairly convict the accused that the intervention of the trial judge is warranted. In the absence of that hurdle being crossed, the trial judge must allow the jury to perform its role.

46. If an application to stop a trial is refused at the direction stage, the points made by a defendant do not always become irrelevant but may be relied on for what they are, namely as jury points. In the present case, it seems to me that the applicant's complaints are very firmly in the territory of jury points, as opposed to those demonstrating any inevitable unfairness for the purposes of a direction application or more specifically and immediately, an application for leave to seek prohibition.

Order
47. Having regard to the foregoing I will order that the application for leave to seek prohibition be refused.