Neutral Citation: [2015] IEHC 749

THE HIGH COURT

JUDICIAL REVIEW

[Record No. 2015/652 JR]

BETWEEN

M. A.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

EX TEMPORE JUDGMENT of Mr. Justice Richard Humphreys delivered on the 23rd day of November, 2015

1. The applicant has applied ex parte for leave to seek prohibition of a criminal trial. The trial in question is due to commence in Trim Circuit Court tomorrow, 24th November 2015, and relates to the alleged sexual assault of a named complainant in September 2010. The applicant maintains his innocence and applies for prohibition for reasons associated with the apparent disappearance of evidence or failure of the prosecution to disclose such evidence.

2. Given the nature of the trial, I made an order under section 45 of the Courts (Supplemental Provisions) Act 1961 that there be no identification of the parties.

3. The Applicant is alleged to have performed oral sex on the complainant without her consent while she was in bed following the consumption of alcohol.

4. Following the alleged incident, the complainant was brought by Gardaí to the Sexual Assault Treatment Unit in the Rotunda Hospital to be examined and have tests conducted. Counsel for the applicant stated that the prosecution have failed to produce the results relating to these tests and examinations.

5. On 27th October, 2015, it appears that the solicitor for the applicant knew that the results of the kit were not available despite the trial date having been fixed based on previous assurances.

6. Following this, the Applicant sought the opinion of an expert, Dr Reich, rather than making application to court at that point. The report is dated 11th November, 2015. The applicant says that it was not received until 16th November, 2015. Dr Reich confirmed that the test that would have been used would have confirmed or denied the presence of saliva and that this forensic evidence could be analysed for the presence of DNA. The applicant has alleged that this evidence being lost means that the fairness of his trial has been prejudiced and he will not receive a trial in the due course of law.

7. It was argued by the applicant that this application is timely, albeit that it is accepted that the timing is unsatisfactory given that the trial due to start tomorrow. The applicant made reference to the fact that O. 84 of the Rules of the Superior Courts allows for three months to make such an application and there is no longer a promptness requirement in the amended O. 84. In the alternative, the applicant argues that even if there were a promptness requirement, it is met. It was argued that to have come to court sooner following the 27th October, 2015, without hearing from the expert, would have been premature.

8. The Applicant referred to the decision of Kearns P. in *Coton v Director of Public Prosecutions* [2015] IEHC 361, which decision dated the relevant date for a prohibition application as of the return for trial, and identified a basis to take a different view from previous caselaw which suggested that the relevant date was when the indictment is delivered. In the present case the application was more than three months after the return for trial. It was argued that Coton is of reduced significance since this application did not arise out of issues with the book of evidence. As such, it was argued that this is not a case where time should run from the return for trial; instead it should run from 27th October, 2015, when the applicant was made aware of the unavailability of the results of the kit as evidence.

9. Had there been appropriate time available, I would have preferred to put the Director on notice of this application. The applicant has been on notice since 27th October, 2015 and the delay in applying is explained by the need for expert report to show that something turns on the unavailability of this evidence. While the report provides further evidence for this contention, it does not create the grounds as known by the applicant on 27th October, 2015. Even if it did, there is a further week's delay thereafter, where the report was available to the applicant on 16th November, 2015. Had the applicant even applied to me last week, I could have put the Director on Notice for today, but of course that is not to be taken as encouraging applications on the second-last day before the trial.

10. On the one hand, Mr. Micheál P. O'Higgins S.C., who appeared for the applicant, is correct; there is no longer a promptness requirement as such in O. 84. However, on the other hand, O.84 r.21(6) provides:

> *(6) Nothing in sub-rules (1), (3) or (4) shall prevent the Court dismissing the application for judicial review on the ground that the applicant's delay in applying for leave to apply for judicial review (even if otherwise within the period prescribed by sub-rule (1) or within an extended period allowed by an order made in accordance with sub-rule (3)) has caused or is likely to cause prejudice to a respondent or third party.*

11. That rule clearly applies here. Criminal trials affect third parties above and beyond the D.P.P.; there is also an injured party and witnesses that have to prepare for a trial. Coton provides a clear policy of not allowing eleventh-hour applications for that very reason.

12. I refuse the application on the basis of the delay in making the application.

13. I am also refusing the application on the basis that the fairness of the trial is primarily a matter for consideration by the trial judge. While Mr. O'Higgins stated that a refusal of the application will mean that an important point cannot be raised, it seems to me that that point can be ventilated at trial. But as I say, had the matter been brought to me earlier, it could have been explored in further detail.