Neutral Citation [2013] IEHC 183

**THE HIGH COURT**

**JUDICIAL REVIEW**

**Record Number 2012/504 J.R.**

**BETWEEN**

**K.M.**

**Applicant**

**-and-**

**Director of Public Prosecutions**

**Respondent**

**Judgment of Mr. Justice Hanna delivered on 1st day of March 2013**

1. The applicant seeks an order of prohibition restraining the respondent from prosecuting him in respect of a number of sexual offences allegedly committed between 1989 and 1996. Leave to proceed by way of judicial review was granted by Peart J. on 11th June, 2012.

2. The applicant qualified as a Medical Doctor in 1981 and began practicing as a General Practitioner in 1989. He is charged with four counts of indecent assault and sexual assault in respect of three complainants, MH, AMH and AM. It is submitted that the delay in making a formal complaint to An Garda Síochána after an initial complaint was made to the Health Service Executive (the HSE) in 2006, and, subsequently, the delay in processing that complaint until the applicant was charged on 27th March, 2012 make it impossible for the applicant to receive a fair trial. The applicant contends that there is actual prejudice due to a loss of documentary evidence, the death or unavailability of relevant witnesses and loss of memory; as well as prejudice brought about due to severe stress and anxiety suffered by him as a result of the delay.

**The Delay**

3. An initial complaint was made to the HSE by one of the complainants in 2006. As a result of this the applicant received a letter from the HSE in June, 2006 seeking an interview at which he was made aware of the nature of the allegation against him. In July, 2007 a formal complaint was made by AM to the Medical Council and a fitness to practice investigation was commenced. This matter was struck out in November, 2008. In 2010, two separate investigations were conducted by the HSE, firstly in pursuance of the applicant's four contracts with the HSE and secondly under the Child Care Act, 1991. Formal complaints were made to the Gardaí by the three complainants on 2nd October, 2010, 1st April, 2011 and 7th April, 2011. The applicant was arrested in June, 2011 and charged on 27th March, 2012 at Mallow District Court.

4. It is contended that from June, 2006 until March, 2012 the applicant has had to endure the uncertainty of whether criminal charges would proceed against him and that this length of time is excessive, inordinate, and unfair and has undermined his right to a trial in due course of law. It is contended that the stress and anxiety suffered by the applicant is excessive and make this an exceptional case.

5. It is further submitted that the length of time it took to charge the applicant after the first formal complaint was made was excessive and unfair. In relation to this period, Detective Sergeant Michael Corbett in his affidavit says that after receiving notification from the HSE in June, 2010, the three complainants were invited to make statements. Initially, the complainants needed time to consider whether they would make written statements and on 2nd October, 2010 MH gave a detailed written statement to Gardaí. Detective Sergeant Corbett says that a number of enquiries had to be made as a result of this statement including the search for medical and counselling records and the interviewing of a number of other persons. Detective Sgt. Corbett says that due to the passage of time records and archives had to be searched and this all consumed much time.

6. AH and AMH gave written statements to the Gardaí on 1st and 7th April, 2011 respectively. As the complaints against the applicant were similar, these matters were investigated together and records and statements were sought in relation to the second and third complainants also. A number of persons had to be interviewed and consideration had to be given to the fact that one of the complainants is now a vulnerable adult. Detective Sgt. Corbett says that on 7th June, 2011 a search warrant for the applicant's home was issued by at Mallow District Court and the home was searched on 10th June, 2011.The applicant was arrested and questioned on 22nd June, 2011 and a file on the matter was sent to the respondent on 27th September, 2011. Detective Sgt. Corbett swears in his affidavit that he understands from enquiries with the respondent that the file was received in the Directing Office of the respondent on 12th October, 2011 and assigned to a Professional Officer on the 14th October, 2011. Directions in relation to all three complaints were received from the respondent on 10th March, 2012 and the applicant was charged on 27th March, 2012 at Mallow District Court, a date agreed in advance with the applicant and his solicitor.

**Actual Prejudice**

7. In respect of each of the three complainants the applicant contends that there is a serious risk that he cannot receive a fair trial should criminal proceedings not be prohibited due to lack of documentary evidence and the death or unavailability of certain witnesses. It is appropriate to consider the applicant's claims in respect of each of the complainants in turn.

*Prejudice in relation to MH*

MH alleges that the applicant indecently assaulted her while medically examining her at her family home on 23rd December, 1989. The applicant does not deny treating MH's mother, who was terminally ill, at the family home on a number of occasions and does not deny being at the home on 23rd December, 1989. However the applicant denies ever treating or visiting MH at her home in his capacity as a General Practitioner. It is submitted that there was always a number of people in the home whenever he attended to MH's mother and he was often accompanied on such visits by his wife, a reflexologist. The applicant submits that the passage of time means it is

now impossible to adduce witnesses who would be able to confirm that he did not medically examine the complainant on 23rd December 1989.

It is submitted that the applicant also suffers prejudice as a result of vital documents being missing and no longer available to his defence. MH attended counselling sessions while she was at University and told her counsellor, Ms. Maggie Tierney, of her relationship with the applicant. Ms. Tierney has given a written statement to the Gardaí and says that she no longer has notes of her meetings with MH.

Relevant also to the prejudice alleged by the applicant is the unavailability of his own medical records. The applicant in his affidavit states that his practice was to keep medical records for 10 years after which they would be routinely destroyed. It is claimed that these records if available would be vital to his defence as they would show that he never treated MH in her family home and would indicate the date on which MH became a patient of the applicant.

*Prejudice in relation to AMH*

AMH states that some time between September 1989 and June 1990 her mother brought her to the applicant's surgery as the family's regular GP was unavailable. She believes it was a Saturday and that she was suffering from a cold. She was 13 years old at this time. Her mother was with her at all times during this visit and nothing untoward occurred. A number of days later she attended the surgery alone after school for a follow up and she alleges that she was indecently assaulted by the applicant on this occasion. She describes the layout of the surgery and says that there was no receptionist or any other person present.

The applicant states that he has no recollection of AMH. He has attended on several thousand patients and submits that the passage of time and loss of memory make it impossible to put forward a defence such as alibi or otherwise. The applicant states that to the best of his recollection his surgery where the alleged incident occurred was not open on Saturday and the unavailability of medical records is significant as they would indicate how many times AMH attended the surgery and what was the nature of her complaint.

*Prejudice in relation to AM*

AM alleges that on 15th February 1989, the day after her father's burial, she was suffering from a chest infection and attended the applicant's surgery. She describes the surgery and says there was no receptionist present. She says that the applicant sexually assaulted her in the surgery. It is also alleged that on another occasion some time between 8th May 1996 and 31st December 1996 the applicant again sexually assaulted AM at his surgery. AM says that she told her home help assistant and her friend what had happened. She says that a Sr. Rosarie who worked in the Convent referred her to a Counsellor named Ann Farrell and that she attended a number of sessions with Ms. Farrell.

The applicant recalls treating AM shortly after her father's death and says she attended his surgery a number of times, accompanied by her brother. The applicant submits that medical records would indicate a number of inconsistencies in AM's evidence and show that she attended his surgery on a significantly less frequent basis than alleged. It is submitted that the unavailability of these records prejudices the applicant's case and inhibits his ability to test the credibility of the complainant.

It is also submitted that Sr. Rosarie has since died and the inability of the defence to ascertain her account of events is detrimental to the applicant's ability to conduct a proper defence.

**Stress and anxiety**

8. In his grounding affidavit the applicant states that he has suffered severe distress, anxiety, and shock since he first learned of the complaints. He said the allegations and subsequent investigations have had a devastating effect on his private and professional life. The applicant became suicidal and was admitted to St. John of God's Psychiatric Hospital in or around 24th March, 2010. He was diagnosed by Dr. Abbey Lane, Consultant Psychiatrist, as suffering from acute anxiety and depression. It is submitted that the stress and anxiety experienced by the applicant as a result of the delay and the various investigations by state bodies since the initial complaint is an exceptional feature of this case and has undermined the applicant's right to "trial in due course of law" under Article 38.1of the Constitution.

9. The applicant describes that in 2006 a complaint was made about him to the HSE in respect of one of the complainants. Notification was made to An Garda Síochána but a formal complaint was not made at this time. As a result of the initial allegation, the applicant was investigated by the HSE and the Medical Council before the matter was struck out. In addition to this investigation by the Medical Council as a result of the complaint made in 2006, the applicant has also been subject to a number of other investigations. On 6th May, 2010 the applicant was notified by Mr. Brendan Drumm, then CEO of the HSE, that, in pursuance of the four contracts he held with the HSE, they would be conducting an investigation into allegations received regarding retrospective child sexual abuse. On 28th June, 2010 he was further informed that the investigation would include two additional complainants. The applicant says that treatment and demands from the HSE in relation to their investigations made it increasingly difficult to cope and on 27th August, 2010 he resigned his contracts with the HSE. In a letter dated 16th September, 2010 the HSE informed the applicant that they were no longer conducting an investigation in pursuance of the contracts but that an investigation under the Child Care Act, 1991 would continue. As a result, the applicant's wife was required to undergo a Parenting Capacity Assessment and meet with the HSE to determine the outcome of her interviews with her children regarding their relationship with the applicant. The HSE advised the applicant they would conduct an Independent Safeguarding Inquiry to determine the risk posed by the applicant to his children. On 5th January, 2011 papers were served on the applicant and his wife stating that an application would be made to the District Court on 9th February 2011 for a Supervision Order by the HSE. This Order was made on 18th February, 2011 and imposed a number of restrictions on the applicant. The applicant says that the Supervision Order had a devastating effect on the entire family and the children in particular. Since 2006 when the initial HSE investigation began, the applicant says he has suffered an almost complete loss of income and has been socially isolated from friends, colleagues, and patients. He says he now suffers from paranoia, depression and anxiety on a constant basis.

**Submissions – the applicant**

10. Counsel for the applicant highlights the dicta of the Supreme Court in *SH v DPP* [2006] 3 IR 575 that "The test is whether there is a real or serious risk that the applicant, by reason of delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay. The test is to be applied in all the circumstances of the case."

11. In relation to actual prejudice the applicant relies on *B(S) v DPP* [2006] IESC 67 where it was held that rosters which indicated work times and dates were relevant to the defence of a psychiatric nurse accused of abuse in a psychiatric hospital. Hardiman J. found that "*the utility of these records is so obvious that I would find a real risk of an unfair trial to arise from their absence even if there were no further evidence*". It is submitted that the documents missing in this case are crucial to the applicant's defence in that

they would enable him to highlight inconsistencies and challenge the credibility and reliability of the complainants.

12. Counsel for the applicant asserts that extensive case law in this jurisdiction in relation to delay originates from the principles laid down in the US case of *Barker v Wingo* US 514 (1972) where it was established that three issues generally arise in cases of delay which can cause prejudice to an accused, including the need to minimise anxiety and concern of the accused. The applicant places particular reliance on PM v Malone [2002] 2 IR 560 where the applicant in that case was accused on several counts of incest and indecent assault of his younger sister. The Court held that the delay between the initial allegation and the formal complaint was inordinate and inexcusable and that in all the circumstances of the case, the right of the accused to an expeditious trial outweighed the public interest in the prosecution of criminal offences. Keane CJ. Held –

> *"Where, as here, the violation of the right has not jeopardised the right to a fair trial, but has caused unnecessary stress and anxiety to the applicant, the court must engage in a balancing process. On one side of the scales there is the right of the accused to be protected from stress and anxiety caused by unnecessary and inordinate delay. On the other side, there is the public interest in the prosecution and conviction of those guilty of criminal offences. In all such cases, the court will necessarily be concerned with the nature of the offence and the extent of the delay."*

13. The statement of Keane CJ was approved in the subsequent case of *M(P) v DPP* [2006] IESC 22 where Kearns J. held –

> *"I believe that the balancing exercise referred to by Keane CJ. In MP v Malone is the appropriate mechanism to be adopted by the court in determining whether blameworthy prosecutorial delay should result in an order of prohibition. It means that an application for such relief must put something more into the balance where prosecutorial delay arises to outweigh the public interest in having serious charges proceed to trial."*

In that case it was held that the anxiety suffered by the applicant coupled with the 34 months it took to commence proceedings after a formal complaint was made was sufficient to prohibit a trial. It is submitted that the applicant's case comes within the ambit of *PM v Malone* and the right to an expeditious trial outweighs the public interest in prosecution.

14. It is further submitted that the cumulative effect of actual prejudice and the unique problems faced by the applicant arising from the various state investigations point to this case being of an exceptional nature. It was established in *SH v DPP* that even where no risk of unfairness to the trial has been established the Courts may prohibit a trial on grounds of delay where there are exceptional circumstances.

**Submissions – the respondent**

15. The respondent submits that the Constitution and the State through legislation have given the Director of Public Prosecutions an independent role in determining whether or not a prosecution should be brought on behalf of the public and that where a decision to prosecute has been made, the courts have been slow to intervene in such a decision. In *Devoy v DPP* [2009] 4 IR 235 the Supreme Court found as follows –

> *"Under our jurisprudence, as noted by Denham J. in JC v DPP [2006] 1 ILRM, prohibition is a remedy only to be granted in exceptional circumstances. The Court does not adopt a punitive or disciplinary role in this context. Further any court called upon to prohibit a trial must give due weight to the gravity and seriousness of the offence when exercising this jurisdiction."*

16. It is submitted that in *SH v Director of Public Prosecutions* [2006] 3 IR 575 the test to be applied to determine if there would be a fair trial in historic sexual abuse cases was whether the delay had resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial.

17. In relation to the actual prejudice claimed by the applicant to be the result of the delay, the respondent relies on *PO'C v DPP* [2008] 4 IR 76. There the applicant was charged with indecently assaulting a complainant on a date unknown in 1982. A formal complaint was made in 1998. Actual prejudice was complained of as relevant witnesses were deceased and passage of time meant that other witnesses would be unable to recall the day in question. Furthermore, diaries which it was claimed would show the applicant was elsewhere on the day in question had been destroyed. The High Court ruled that this resulted in real prejudice to the defendant. In the Supreme Court however it was held that while the lack of diaries resulted in prejudice, it was not clear that the effect of this was to render the trial unfair and the Court was satisfied this was essentially a matter for the trial judge. In *JK v DPP* [2006] IESC 56 work records which may have been relevant were unavailable and a person who may have been a material witness was deceased.

18. The respondent also relied on the principles of *Barker v Wingo* as those relevant to a court considering whether to prohibit a trial on grounds of a breach of the constitutional right to an expeditious trial. The following statement of Powell J. has been approved in a number of cases including *Blood v DPP* [ 2005] IESC 8 and *PM v DPP* [2006] 3 IR 172 –

> *"A balancing test necessarily compels the courts to approach the speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: length of delay, the reason for the deal, the defendant's assertions of his right, and prejudice to the defendant".*

As outlined above, in relation to prejudice, the court identified the need to minimise anxiety and concern to the accused. The respondent submits that it is only necessary to consider the interests protected by the right to expedition and conduct a balancing exercise where blameworthy delay has been established. This was not a straightforward case and involved multiple complainants and complicated investigations. In addition, one of the complainants is now a vulnerable adult which raised separate considerations. It is asserted that a full explanation for the delay has been provided.

19. The respondent submits that the applicant is incorrect to rely on *PM v Malone* as authority for the proposition that a trial should be prohibited by reason of the levels of stress and anxiety endured even where the right to a fair trial is not impaired and contends that the test to be applied in relation to pre-complaint delay is that set out in *SH.* In any event, it is contended that PM is distinguishable from the present case due to the disparity in age of the applicant and complainants and the position of trust and dominion exercised by the applicant.

20. Counsel for the respondent submits that even where no risk of unfairness to the trial has been established and there has not been blameworthy prosecutorial delay which interferes with the interests protected by the right to expedition, it is still appropriate to consider the applicants case in light of the 'exceptional circumstances' referred to in SH v DPP [2006] 3IR 575 where it was stated –

*"I am satisfied that there is no necessity to hold an inquiry into, or establish the reasons for, delay in making a complaint. 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. The court does not exclude wholly exceptional circumstances where it would be unfair or unjust to put an accused on trial".*

21. In *PT v DPP* [2008] 1 IR 701 the applicant claimed that his case should not proceed due to his age and the fact that the charges he faced related to incidents which allegedly occurred between 37 and 43 years previously. Medical evidence was also adduced to the effect that the stress of trial could have a major effect on his health. The Supreme Court reiterated a trial could be prohibited on grounds of delay in exceptional circumstances where it would be unfair or unjust to put an accused on trial. The Court held that "*no single factor renders this case an exception…It is the cumulative effect of all the factors which bring this case within the category of an exception requiring a balancing exercise to be conducted by the court*." The respondent contends that while the making of complaints and the preferring of charges have undoubtedly had a detrimental effect on the life of the applicant, the performance of the HSE of its statutory functions as a consequence of the nature of the allegations do not constitute exceptional factors which warrant prohibition. Where a person in a position of trust is charged with offences related to the abuse of such trust it is entirely proper that they should face measures designed to protect the welfare of those in relation to whom they occupy such a position of trust.

**Decision**

22. In relation to actual prejudice, the Court is not satisfied that the applicant has established that there is a real or serious risk of an unfair trial due to the absence of documentary evidence, the death of a possibly relevant witness and the passage of time. In relation to the complaint of MH, it is noted that Ms. Maggie Tierney has provided a statement to the Gardaí. Detective Sergeant Corbett has explained that this statement was of little probative value but that Ms. Tierney is available as a witness if required. In relation to the complaint of AM and death of Sr. Rosmarie, there is no evidence that the alleged abuse was reported to her or that the deceased would have been in a position to give testimony in relation to the alleged abuse. It has not been established that the effect of the missing medical records is to render the trial unfair. In relation to the Saturday opening hours of the applicant's surgery, other evidence may be available such as the testimony of his wife, landlord or other potential witnesses. In assessing this ground the Court has had regard to the role of the trial Judge who is in a position to give appropriate warnings and directions to a jury in relation to these matters. The applicant has failed to engage with the evidence and demonstrate why the directions of a trial judge could not effectively deal with these matters.

23. In relation to delay, the applicant places particular reliance on the *PM* case. That case is distinguishable from the present proceedings for a number of reasons. In *PM* the accused and the complainant were of similar ages. In the present case, the applicant was considerably older and held a position of trust over the complainants. It was determined in PM that the complainant made a conscious decision not to proceed with her complaint for reasons which were not the result of dominion or authority exercised over her by the applicant. The Court also found inaction on the part of the Gardaí. I am not satisfied that the applicant has established blameworthy prosecutorial delay to warrant prohibition of the trial. The Gardaí and DPP can only act when a formal complaint is made and the period of time which elapsed after a formal complaint was made until the Gardaí concluded their investigation is not sufficient to warrant prohibition of the trial. The respondent has provided adequate explanation for any delay and the affidavit of Detective Sergeant Corbett in particular has described the complicated and time consuming nature of the investigation. This was a multifaceted case with multiple complainants, one of which was said to be particularly vulnerable, which required careful consideration by the respondent before making the decision to prosecute and returning directions to that effect to the Gardaí.

24. In the absence of a finding of delay, it is not necessary to move on to consider the question of stress and anxiety. However, it is appropriate that I indicate that I am not satisfied that the applicant has established stress and anxiety over and above that level of stress and anxiety as would unavoidably and unfortunately be experienced by a person presumed innocent facing such serious charges. On the evidence before me, the applicant has not returned to Dr. Lane and has not medicated since 2010. I should observe that both counsel accepted the perhaps somewhat crude parallel I drew between solatium for mental distress under the Civil Liability (Amendment) Act 1964 resulting from fatal accidents and the level of mental distress that goes beyond that entitling a civil litigant, for example, to damages for post traumatic stress disorder, as in *Mulally v Bus Eireann* [1992] I.L.R.M. 722 24.

25. I am of the view that the apparent stress and anxiety caused to the applicant, and the effect this has had on his professional, personal and family life, was principally and primarily caused by the HSE and Medical Council investigations commenced following the initial complaint in 2006. The Medical Council was obligated by law to investigate the complaint made to it. In conducting its' investigations the HSE was exercising its statutory obligation to safeguard the welfare of persons over whom a position if trust is held. In weighing this requirement against the need to minimise stress and anxiety of the accused, the Court finds that the public interest in safeguarding the welfare of vulnerable people, particularly those over whom a position of trust and dominion is enjoyed, is paramount. While the pre-garda investigations conducted in this case undoubtedly caused upset and distress to the applicant they were necessary and proper as a matter of law and public policy given the nature of the allegations against the applicant.

26. In light of the foregoing, the Court refuses the relief sought.