Neutral Citation No. [2005] 112

THE HIGH COURT
JUDICIAL REVIEW

[Record No. 2003/762JR]

BETWEEN

C. D.

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of O'Sullivan J. delivered the 9th day of March, 2005

Introduction
1. The applicant seeks an order restraining prosecution by the respondent of offences of rape and indecent assault made against him on foot of complaints by his niece and indecent assault and attempted buggary by his nephew. A third complainant, now living in Australia, made similar allegations but does not wish to proceed with the charges and a *nolle prosequi* will be entered in respect of those.

2. The complaints of his niece P.D. are alleged to have occurred between June 1971 and December 1981, when she was aged between four and fourteen, while those made by J.D. are alleged to have occurred between January 1963 and December 1967, when he was aged between six and a half and ten and a half. The applicant was aged between twenty nine and thirty nine when P.D.'s complaints allegedly occurred and between twenty one and twenty five when those of J.D. allegedly occurred. All these ages are approximate.

3. P.D. complained to the Gardaí on 21st March, 2001, that is some twenty years after the latest of the offences she alleges. J.D. complained on 13th July, 2001, that is some thirty four years after of the later of the two offences alleged by him.

4. The applicant was charged on 16th September, 2002 and again on 18th November, 2002, having been interviewed in respect of P.D.'s complaint on 28th March, 2001, and J.D.'s complaint on 19th July, 2001.

The present challenge
5. The main ground of complaint now made by the applicant is that his trial will be prejudiced by reason of the elapse of time between the dates of the alleged offences and the dates on which formal complaint was made. No specific prejudice is alleged. He also relies on prosecutorial delay.

6. The applicant has made a cautioned statement on 28th March, 2001, admitting a long sequence of sexual misbehaviour against P.D. generally speaking such as she herself describes in her complaint. The same is true in a further cautioned statement made by him on 19th July, 2001, in relation to the complaint made against him by J.D. with the qualification that whereas there is only one complaint, namely indecent assault, the statement appears to refer to many more. On the basis of this statement there is a charge of attempted buggery of J.D..

7. The applicant has sworn two affidavits in these proceedings but neither suggests that he is or will be contesting these statements in any way.

8. In his principal affidavit the applicants says:

> "I say that the delay in the commencement of these proceedings is inordinate. I have not contributed to the delay. I say that my defence of these charges will be prejudiced as a result of the excessive delay that has arisen."

9. There is no reliance on any specific prejudice.

Counter-challenge
10. The respondent, however, alleges that the applicant "contributed" to the delay insofar as an affidavit has been sworn on its behalf by a clinical psychologist, Paul Gilligan, who has examined both complainants and offered an opinion in the case of P.D. that her delay in reporting the alleged offences was due to the fact that the alleged abuse had a lasting psychological impact on her and has contributed significantly to her reluctance to report the abuse. On the contrary, in the case of J.D. his delay in reporting the alleged assault was due to the fact that it had no lasting effect upon him and that in this context his delay in reporting was reasonable and understandable.

11. I will return in a little more detail to this topic shortly.

12. Unquestionably the delay in making a complaint to the Gardaí in this case of some twenty years in the case of P.D. and in excess of thirty four years in the case of J.D. are such that the courts will look very carefully at any suggestion that the applicant is unlikely to get a fair trial.

13. During the hearing, I asked counsel whether they could point to any one case where a court had stopped a trial merely on the grounds of a long delay and without any suggestion of prejudice other than delay. No such case was turned up.

14. I will, however, return to this topic in more detail at the end of this judgment.

15. Whilst there are *dicta* to the effect that the court has jurisdiction to stop a trial merely on the grounds of a long delay it does appear that the paramount question always is whether it can be shown as a matter of probability that an applicant is unlikely to get a fair trial. Accordingly, at this point in my enquiry, I do not think it correct to state that the applicant will be automatically entitled to an order stopping the trial unless the delay or part of the period of delay can be "laid at his door" to use the phrase of his own counsel.

Reason for the delay
16. Paul Gilligan, psychologist, interviewed P.D. on 11th and 12th of May, 2004, at the request of the respondent. He gave the opinion already referred to. In a report exhibited to his affidavit he points out that the key factors influencing the impact on P.D. of

the alleged abuse were the type and duration (over a twelve year period), her age at the time (between four and sixteen), the age difference between her and the applicant (some twenty five years), his relationship as her uncle in a position of authority and trust, and the ongoing contact with her family (he frequently slept in her home and was part of the extended family circle).

17. He gave his opinion that the immediate impact on P.D. was to make her a quiet, confused and frightened child who first did not realise this was wrong and accepted it as normal, and later began to realise it was wrong but was too afraid to stop the accused and was worried she would be blamed and punished if she told anybody, and later still she became more frightened because of his threats that if she told anybody she would be "put into care where worse things would happen to her".

18. The delayed and current impact included depression, anger, insecurity, feelings of shame and an inability to trust, she becomes tearful, melancholy and sad with negative thoughts, her depression being made worse because many members of the extended family did not believe her allegations and felt she had brought shame on the family. This made her angry and she takes it out on her husband who however understands how to deal with her: he is one of the few people whom she trusts and she is "very lucky to have such a supportive husband" and "does not deserve him". He is the only person she really trusts in her life but constantly needs reassurance from him. She has been hospitalised three or four times for depression.

19. Both she and her husband are the prime carers of her son who has been diagnosed with Asperger's Syndrome Attention Deficit and Hyperactive Disorder. This presents her husband and herself with many challenges.

20. With regard to her delay in reporting, Mr. Gilligan says she did not disclose the abuse to anybody at first because she did not realise it was wrong and later because she was afraid she would be blamed, punished or put into care. Also, she felt she was to blame. Later she felt disclosure would bring shame on her family and "destroy" her parents and given the applicant's close relationship to her father, she felt she would not be believed. She did promise herself, however, that she would disclose the abuse "if ever a female grandchild was born into the family".

21. She did in fact disclose the alleged abuse first to her husband shortly after she met him and then to a cousin in 1991 who came back from Australia and revealed that he did not like the applicant. Seven years later, in 1998, she disclosed it to her brother-in-law because she believed the applicant was spending a lot of time around his house where he had contact with children. Some three years later, in 2001, she disclosed it to her parents in an angry outburst. Although they were "devastated", they were extremely supportive and then she decided to report the matter to the Gardaí which she did some days later. This has alienated her from many of her extended family.

22. Mr. Gilligan in his report endorses these reasons as the reasons which in his opinion explains why P.D. did not disclose the alleged abuse. He also says that the applicant was in a position of dominance in regard to P.D. and gave his conclusion that in his opinion "the assessment indicates that the alleged incidents of abuse have had a lasting psychological impact on Ms. D. and have contributed significantly to her reluctance to report the alleged abuse. It is my opinion that Ms. D.'s delay in reporting the alleged incidents of abuse is reasonable and understandable."

23. Mr. Aylmer S.C. for the applicant submits that this opinion does not go far enough under the authorities to establish that the applicant contributed to the delay. It is necessary to establish an inhibition as distinct from a contribution to a complainant's reluctance.

24. In this context, I refer to the judgment of McGuinness J. in *D.O'R. v. D.P.P.* Unreported, Supreme Court, (30th July, 2004) at p. 36 where she says:

> "The first issue which falls to be considered is the complainant's delay in reporting the alleged abuse to the authorities and, as expressed by Mr. Gageby, whether this delay can be laid at the applicant's door. In accordance with the judgement in *P.C. v. D.P.P.*, for this purpose the court may assume the truth of the complainant's allegations. In my view, counsel for the applicant is correct in his submissions that it is not sufficient to show that the complainant's delay was '*reasonable*'; what must be shown is that she was inhibited from complaining, or incapable of complaining, by reason of behaviour which can be attributed to the applicant. On the case law, this behaviour may be manifested in overt actions such as physical violence or threats but it may also be manifested in the more subtle form of dominion or psychological control."

25. The learned judge went on, however, to refer to this use of the term "reasonable" – with which she disagreed – to be "an error in nomenclature rather than an error of principle." She was left in no doubt, having regard to the evidence of the psychologist and more so having regard to the evidence of the complainant herself that she was inhibited from and incapable of making a complaint to the proper authorities for a significant period of time.

26. I respectfully share Mrs. Justice McGuinness's discomfort with the word "reasonable". During the hearing I asked counsel for the Director of Prosecutions, Mr. O'Malley, how was I to know what precisely Mr. Gilligan meant by this? Clearly, it could be said to be reasonable for the applicant to delay complaining if she thought she would not be believed or if she thought that it would cause her parents distress or for whatever other reason. But that, equally clearly, would not mean that she was inhibited or incapable as contemplated in the authorities.

27. It is clear to me in this case, however, having considered the report of Mr. Gilligan that his use of the term "reasonable" is in fact in direct response to the brief given him by the respondent which asked him, *inter alia*, to assess "whether the delay in reporting the alleged offence was reasonable in the light of the complainants circumstances."

28. Furthermore, I am satisfied from the evidence of Mr. Gilligan that in his use of this phraseology he is in fact communicating a professional opinion that the applicant P.D. was inhibited by reference to the alleged abuse and also by reference to the threats and given her fragile personality and the gradually dawning appreciation that the abuse was wrong, that it was not her fault, that she could stand up to the applicant and that she could tell others – beginning with the most trusted and closest to her - about it.

29. Against the background of the features in the case singled out by Mr. Gilligan in his report namely, type and duration of the abuse, the complainant's age at the time, the age difference between her and the applicant in these proceedings, the relationship constituting one of dominance, the applicant's ongoing contact with her family and the family functioning, it must come as no surprise to learn that Mr. Gilligan considered that the impact of the alleged abuse had a profound and lasting effect. Nor is it a surprise to see that the complainant having left home found it within herself to confide first to her husband whom she clearly trusts beyond any other individual in her life, next to her cousin visiting from Australia and then some years later to her brother-in-law because of the applicant's contact with children in his house. That was in 1998 and some three years later in an angry outburst she disclosed it to

her parents. That was in the context of her father criticising her husband's parenting of her son – clearly a criticism of profound impact which seems to have spurred her in anger to reveal the abuse. The clear inference is, I think, that had there not been this emotional energy she might not have done so.

30. I accept Mr. Gilligan's opinion to the effect that P.D.'s delay "in reporting the alleged incidents of abuse is reasonable and understandable" in the circumstances which I have identified above as meaning that she was inhibited from making the complaints until she actually did so. I do so because I think he felt bound to use the "nomenclature" in his brief. He has not sought to draw a distinction between the making of the disclosure to her husband and cousin in the early 90s and her brother-in-law in 1998 nor between that and the making of the disclosure to her parents in 2001 shortly before she went to the Gardaí. His opinion is expressed without making a distinction between any of these. In light of this and in light, also, of the statement of P.D. herself, my view is that her delay in making the complaints to the Gardaí is explicable (to use the word of Keane J. in *P.C. v. D.P.P.* [1999] 2 I.R. 25 at p. 68) by reference to the conduct of the accused.

31. With regard to the complaints of J.D. the evidence of Mr. Gilligan is that the alleged offence of indecent assault had no psychological impact on him when he was a boy nor any delayed impact on him. He dismissed the incident out of his thinking and never really gave any thought to it. He did not disclose it when he was a child because the significance of it did not occur to him and later because it was not an important issue to him and he only disclosed it to the Gardaí because he became very angry about the fact that many of the extended family including his own parents did not believe the allegations of P.D. and he disclosed it to support her allegations. Clearly when Mr. Gilligan says of this that his delay in reporting is "reasonable and understandable" he cannot mean that J.D. was inhibited but rather that from J.D.'s point of view the decision not to complain was reasonable and understandable. Clearly therefore this delay is not something which is explicable by reference to the behaviour of the applicant.

32. Once again, there is a statement and whilst the statement would appear to refer to more incidents than those contained in the complaints of J.D. the relevance of the statement is not so much in relation to its contents but insofar as it shows that the applicant has some memory of incidents going back as far as those alleged to have taken place in J.D's complaint.

Risk of unfair trial

33. Because the foregoing exercise has involved a suspension, for the purposes of that exercise and for that purpose alone, of the applicant's entitlement to the presumption of innocence, it is necessary, notwithstanding my foregoing conclusion, to move to consider whether, nonetheless, this trial should be stopped. Keane J. (as he then was) in *P.C. v. D.P.P.* [1999] 2 I.R. 25, in part of an oft-cited passage put the matter this way at p. 68:

> "If that stage has been reached, the final issue to be determined will be whether the degree to which the accused's ability to defend himself has been impaired is such that the trial should not be allowed to proceed. That is a necessary inquiry, in my view, in every such case, because, given the finding that the delay is explicable by reference to the conduct of the accused is necessarily grounded on an assumption as to the truth of the complaint, it follows that, in the light of the presumption of innocence to which he is entitled, the court asked to halt the trial must still consider whether the degree of prejudice is such as to give rise to a real and serious risk of an unfair trial."

34. It is clear that in proceeding with this next part of its inquiry the court is engaged in a balancing exercise, that is to say, a balance between the right of the applicant to a fair trial on the one hand and on the other the right of the community to see complaints of a serious nature prosecuted.

35. In the present case there is no allegation of specific prejudice, but rather a general claim that due to the elapse of time that the applicant's "defence of these charges will be prejudiced as a result of the excessive delay that has arisen."

36. As part of the balancing exercise referred to it is right, I think, that I bear in mind that it is notoriously difficult to defend allegations of such a nature at so long a remove of time, that even though there may be no claim of specific prejudice it is inevitable that memories will fade, that specific dates and occasions that may in principle come to the aid of a defendant will be forgotten or confused and that the prosecution can easily reduce itself to a case of mere allegation and mere denial.

Admissions by applicant

37. Am I entitled to take into account the fact that the applicant has made statements admitting sexual offences against both complainants? It seems that I am. In *B. v. D.P.P.* [1997] 3 I.R. 140 at p.202, Denham J. speaking for the Supreme Court said:

> "If there has been admission by the accused of all or any of the alleged crimes this will be a factor for consideration. If the admission is contested that is also a matter to be considered by the Court on an application to prohibit the trial on the ground of delay."

38. In *D.W. v. D.P.P.* (Unreported, Supreme Court, 31st October, 2003) McGuinness J. said:

> "The applicant is fully entitled to the presumption of innocence in regard to all the charges which have been brought against him. However, when considering whether his trial on these charges is to be prohibited, his own attitude to the charges is a relevant factor."

39. I note also the observation of Hardiman J. in *N.C. v. D.P.P.* (Unreported, Supreme Court, 5th July, 2001) at p. 28, where he says:

> "Secondly, I would record my agreement with the decision of the trial judge to attribute no significance to the alleged admissions made by the applicant, which are strongly disputed by him. The alleged admissions were in any event, as the learned trial judge found, of a limited nature."

40. In principle, it seems that where admissions are not contested, and are not of a limited nature, they may be taken into account. Their significance, however, seems to me to relate to the capacity of the applicant to recall events in the past rather than to the contents of the statements themselves.

41. In the present case, however, the applicant has made detailed statements in relation to the complaints of both P.D. and J.D.. It is important here that I point out, at once, that I have no business at this point in trying to weigh the evidence or in considering whether any part of it on either side attains a particular standard of credibility or conviction. I am concerned only with whether the degree to which the accused's ability to defend himself has been impaired is such that the trial should not be allowed to proceed. It there a real and serious risk of an unfair trial?

42. I am not therefore concerned with the contents of the applicant's statement but rather with the fact that it is demonstrated thereby that he has a good memory in the case of one of the complainant's allegations going back to the period when these offences are alleged to have occurred. Again, the relevance of the fact that these statements are not in anyway contested by the applicant is not so much that this tends to show that their contents are true but that it shows that he has no present concern in relation to his capacity to recall events so far in the past of in relation to the manner in which these statements were given by him.

43. I must also bear in mind that there is no claim in this case of specific prejudice such as the loss of a witness through death or of documents through passage of time.

Delay and presumption of prejudice
44. I now turn to consider in light of the authorities the effect of the elapse of lengthy periods of time before complaints were made against the applicant.

45. In *P.C. v. D.P.P.* [1999] 2 I.R. 25, Keane J. (as he then was) said (at p.68)

> "The delay may be such that, depending on the nature of the charges, a trial should not be allowed to proceed, even though it has not been demonstrated that the capacity of the accused to defend himself or herself will be impaired."

46. In *J.O'C. v. D.P.P.* [2000] 3 I.R. 478, at p. 531 Hardiman J. in a dissenting judgment with which Barron J. agreed said:

> "For the reasons set out extensively earlier in this judgment, I believe that a gross lapse of time, in a case almost devoid of detail in relation to surrounding facts and circumstances, carries with it a real risk of wrongful conviction. In the language of the decided cases, it is so old as to be 'beyond the risk of fair litigation'. 'The chances of the courts being able to find out what really happened' have been progressively reduced and the delay is 'patently and grossly unfair to the defendant'."

47. In that dissenting judgment it is clear that Hardiman J. would have stopped the trial.

48. There appear to have been four High Court cases in which the trial was stopped solely on the grounds of delay In *P.L. v. D.P.P. and Her Honour Judge Olive Buttimer*, (Unreported, High Court, Herbert J., 16th April, 2002) Herbert J. was:

> "satisfied in the circumstances of this particular case, from the length of this delay alone [18-24 years] that the court is entitled to presume, and does so presume, that the capacity of the applicant to defend himself is thereby materially impaired and that accordingly the trial in respect of these two complainants should not be allowed to proceed because of the risk of it being unfair even if no specific prejudice is in fact established."

49. In *J.B. v. D.P.P.* (Unreported, High Court, Ó Caoimh J., 14th November, 2003) stopped the trial in respect of one of five complainants where he had held that the applicant had not demonstrated that the capacity to defend himself would be impaired. Nonetheless he said:

> "…while I am satisfied that the applicant has failed to show that in the case of this complainant that his capacity to defend himself will be impaired in any respect beyond that of the other cases, I believe that the judgments of the Supreme Court in that case [*P.C. v. D.P.P.* [1999] 2 I.R. 25] suggest that the trial in respect of this single complaint should not proceed as it relates to a single event a very long time ago."

50. O'Leary J. in *P.G. v. D.P.P.* (Unreported, High Court, O'Leary J., 10th December, 2004) prohibited a trial on grounds of delay alone saying:

> "…it is obvious and when taken together in their entirety the delay in making the complaint is in breach of the applicant's right to a speedy trial. Therefore, it is clear that the applicant is entitled to succeed having regard to the test of general delay laid down in *P.O'C v. Director of Public Prosectuions* by Keane C.J."

51. Quirke J. prohibited a trial on the ground of delay (he found the applicant had not established specific prejudice). In reaching his conclusion he cited at length the well known passage from Keane J. (as he then was) in *P.C. v. D.P.P.* referring to what he called the three stage approach and concluded:

> "Adopting that statement of the law it follows that the delay of some fourteen years from the time of the alleged offence to the complaint by M.H. clearly justifies an inference that the applicant's constitutionally protected right to a trial with reasonable expedition has been violated."

52. In *J.M. v. D.P.P.*, (Unreported, Supreme Court, 28th July, 2004) a trial was stopped where there was upwards of thirty years between the alleged complaints and the date of charge. McCracken J. said at pp. 13-17:

> "…cases, such as the present one…do not depend on a specific prejudice, but rather on a general overview of all the circumstances of the case which could affect a fair trial….in considering cases of this nature, the court should have regard to the totality of the circumstances surrounding the proposed prosecution, even though no single factor would justify prohibiting the prosecution."

53. In *J.S. v. D.P.P.*, O'Higgins J. (Unreported, High Court, O'Higgins J., 2nd April, 2004) prohibited a trial involving a delay of between sixteen and seventeen years from the date of alleged abuse to the date of first complaint. He held that the right of an applicant to a trial with reasonable expedition had been violated with regard to deterioration of memory he said at p. 25 if this was:

> "a factor which can be taken into account together with other matters in accessing whether the circumstances are such as to give rise to a presumption that the capacity of the applicant to defend himself has been impaired to the extent that there is a risk of an unfair trial."

54. In *S.F. v. D.P.P.* (Unreported, High Court, Geoghegan J., 17th December, 1997) a large number of sexual offences were alleged to have been committed by a diocesan priest between 1981 and 1984 and not reported (other than a handful in 1990) until 1995. this delay was held by Geoghegan J. to be:

> "…excessive and for the particular reasons which I have explained it is not in my opinion a delay which can be attributed

to the applicant. As there must be some presumed prejudice to the applicant as there is in the circumstances of that case no factor to be balanced against it, a trial in respect of those offences ought not to be allowed to proceed."

55. Although this order was overturned in the Supreme Court these views of Geoghegan J. were agreed with by Hardiman J. in the Supreme Court.

56. I have not been able to find any case where there was such a long delay that on the authorities it would give rise to a presumption, without more, that the ability of the applicant to defend himself had been prejudiced but where the applicant had made a statement admitting the alleged offences and had not indicated that these would be contested.

Application of principles to the present case

57. In the present case the complaints of P.D. were made some twenty years after the latest of the offences alleged; those of J.D. some thirty four years afterwards. In both cases the applicant has made admissions: his admissions in relation to the complaints made by P.D. are similar to those complaints and in my view demonstrate an ability on the part of the applicant to recollect events going back to the relevant time and a capacity to deal with them. In the case of the complaint made by J.D. which relate to one offence only, the admission suggests an acknowledgment of significantly greater number of offences. It was suggested by Mr. Aylmer S.C. on behalf of the applicant that this factor called into question the reliability of that admission.

58. Given the gross delay in the making of these latter complaints – namely some thirty four years – I consider that in light of the authorities a court should be prepared to presume that the applicant's ability to defend himself has been compromised by the passage of time and that it is only if that presumption can be shown to be incorrect for some reason that the applicant will be denied relief. In the case of the admissions made by the applicant in relation to the allegation made by J.D. my view is that these are open to question in the way submitted by counsel for the applicant and given the very long delay involved I consider any indication of confusion or lack of clarity on the part of the applicant as sufficient to revive the presumption that the applicant's ability to defend himself has been compromised. I therefore propose to make an order prohibiting the respondent from proceeding further with the prosecution of the charges that refer to J.D..

59. In the case of the allegations made by P.D. the elapse of time is also, in my view, sufficiently lengthy to raise a presumption that the applicant's ability to defend himself has been compromised. In this case, however, his statement of admission seems to demonstrate a capacity to recall and deal with the events as alleged by P.D. so that the presumption that his memory and ability to deal with those events has been impaired is in my view displaced by his demonstrated ability as contained in the statement of admission. Once again I emphasise that the relevance of this admission is not for its contents or in relation to whether or not the allegations of the complainant are accepted by the court as having attained a particular standard – the applicant is entitled to the presumption of innocence without qualification at this point of the court's enquiry – but rather because these statements indicated an ability on the part of the applicant (contrary to what the court would have presumed in the absence of such statements) to recall events at the time of these allegations and to deal with them as best he sees fit.

60. In those circumstances, in my opinion and notwithstanding the elapse of a very lengthy time between the years when the allegations are said to have happened and when the applicant was charged with them, his ability to defend himself has not been compromised. Furthermore, the difficulty of defending generalised counts on this indictment arises because the manner in which these offences are laid rather than, specifically, by reason of the passage of time. In those circumstances I am not satisfied that it is likely that the applicant will be unable to obtain a fair trial in relation to these complaints and I decline to prohibit their further prosecution.