THE COURT OF APPEAL

Peart J.
Sheehan J.
Hedigan J.

Neutral Citation Number: [2019] IECA 6

2016 523

B.S.

Applicant/Appellant

V

The People at the Suit of the Director of Public Prosecutions

Respondent

JUDGMENT of the Court delivered on the 20th day of March 2017 by Mr. Justice Sheehan

1. The appellant is a retired farm labourer in his early 60s who lives in sheltered housing in Co. Limerick.

2. He has been returned for trial on one count of rape which is alleged to have occurred on an unspecified date between 1st January, 1970 and 21st May, 1970 when the appellant/applicant was 16 years old and living with his uncle and grandfather. If convicted of this offence he could face a substantial prison sentence, the penalty for rape being life imprisonment.

3. The issue in the present appeal is whether or not the learned trial judge was right in holding that the appellant had failed to establish that there was a real risk of an unfair trial if the prosecution against him was allowed to continue.

Background
4. These proceedings arise following the taking of a statement from the complainant at Roxboro Road Garda Station on the 22nd February 2014 by Garda Elaine O' Neill in the presence of Garda Lesley Moloney and a member of the Rape Crisis Centre.

5. The complainant is a married woman living with her husband and family in Limerick. She grew up on her parents' dairy farm with her seven brothers and two sisters. She complains that on a date or dates unknown between January and May 1970 when she was seven years old and before she made her first communion she was raped by the appellant who she says was always around and was totally trusted. She states that the appellant lured her with sweets and money to a field away from the farm where he sexually assaulted her. She states that this happened a number of times and that she does not remember her parents being at home when these events occurred. She states that the other children were nearby or in the house playing but never in the same field or close by. She says that she told her mother what happened because she was in physical pain and that after that the appellant was gone. The complainant also states that she told a friend in boarding school what had happened, and her husband when she was going out with him. There are statements before this court by the complainant's late mother, an older sister, her husband and her school friend. The complainant's mother stated that she told her husband what her daughter had told her, and that he dismissed the appellant. She is now deceased. The complainant's sister made a statement to the gardaí on the 11th of March 2014 in the course of which she says that on one occasion when she was 12 or 12 and a half, the appellant kissed her on the lips. She says that on another occasion sometime after this, she was sexually assaulted by the appellant. She says no one else was around at the time and that her sister, the complainant, was the only person she ever told about this assault and that she only told her this 'in the last few years'. The complainants' school friend has made a statement confirming that the appellant told her about being assaulted sexually when they were in boarding school. There is also a statement from the complainant's husband, who states that the complainant told him about these matters as far as he can remember after they got married.

6. The appellant denies that he raped or assaulted the complainant in any way. He denies that he ever looked after the children when their parents were not there as has been suggested by the complainant. He says that he ended working for her father on very good terms. He says that he was let go shortly after he had been discharged from Croom Hospital where he had been hospitalised for some time and at a time when there were bad things happening on the farm which resulted in the death of a number of animals.

The Affidavit Evidence
7. The application to the High Court for an order stopping the trial was grounded on the affidavit of the appellant, the affidavit of his solicitor Sarah Ryan. In the course of his affidavit the appellant says that he was contacted by a garda who he understands was Elaine O' Keefe on the 1st May 2014 and that he agreed to call into the garda station that day when he was interviewed. He was arrested and charged on the 17th September 2015 and served with a book of evidence on the 11th of December 2015.

8. The appellant sets out the circumstances in which he ceased working on the farm in para. 2 of his affidavit: 'I worked for over two years for Mr. L until I reached the age of 17 years and I left on good terms. It is totally wrong to now make it look like I left, to make it anything to do with his daughter, UL. The gardai said to me that Mr. L let me go because of something I did to his daughter and this is completely untrue. Towards… the end of the time I was working with him, he had problems with a lot of his cows dying… I got sick and ended up in Croom Hospital. I was discharged from hospital and went back to tell Mr. L that I was ready to come back to work on the farm. I became unwell again that same night and Mr. L came to me a few days later and said I would be better off elsewhere looking for work. Mr. L said that he would deal with the piseogs himself. He had less animals and things were not the same

then. He was nice to me and hoped that I did well working elsewhere. I have no doubt that if Mr. L was alive now, he would help to explain all of this'. At para. 3 he says that helping at the farm also at this time was a man called M H who knew everything that was going on at the farm and with the family. The appellant says that if M H was alive now, he has no doubt that he would be able to explain a lot and he would be able to defend himself. He states at para. 3: 'I never looked after the children when I was there and I never went with UL as she claims… There was another man who also worked at the farm called M D H. He was not there as often as M H but also would confirm what I am saying'.

9. Sarah Ryan, solicitor for the appellant, who was first instructed by the appellant on the 17th of September 2015, states in her affidavit filed on his behalf that the appellants' ability to defend himself against the charge has been severely compromised in the particular circumstances of this case and says that she believes there is an inevitability of unfairness in the process set in train against him. She states at paragraph two of her affidavit: 'I say that it is clear from the book of evidence that the appellant went voluntarily to the Garda station in Newcastle West in Co. Limerick on May 1st 2014 and was interviewed by Garda Elaine O' Keefe and William McElligott. The memorandum of interview indicates that the appellant was advised to consult with his solicitor and his response was 'I have not contacted a solicitor. I have not got the money'. Looking at the written memorandum, no further advice in this regard seems to have been given to the appellant, and it is clear that he did not consult a solicitor prior to being interviewed. I am instructed that I am the first solicitor contacted by him. I note that in the interview, certain things were put to him that were allegedly said by persons not listed in the book of evidence and I have not yet been served with copies of any further documentation in this regard such as statements from other persons. That affidavit was sworn on the 9th of February 2016 and filed in the Central Office on the 11th of February 2016. The replying affidavit on behalf of the respondent was sworn by Garda Elaine O' Keefe on 28th May, 2016. She states at para. 3 of her affidavit: 'I say believe and am advised that nothing has been raised by Mr. Sheehan in this application that entitles him to any relief. I am advised and believe that the two issues he raises in this regard, firstly as to the time that has passed since the alleged crime and secondly the unavailability as witnesses of the alleged victims' father NL, and two other men who I believe were workers on the farm and family friends do not entitle the applicant to an order stopping his trial. I am further advised that these issues the applicant raises in this application are more properly matters that fall to be addressed as part of the trial of the alleged offence'.

Judgement of the High Court

10. In the course of his concluding remarks, the trial judge stated; "It is asserted that the two deceased labourers would have been able to give evidence about how the farm worked but there is no evidence that they knew the reason for the termination of the applicants' employment. The alleged sexual abuse of the complainant had occurred in an isolated location away from the farmhouse in a field adjacent to the farm. It is not suggested that either of these witnesses would have anything of significance to say about these allegations other than of a most general nature". He further held that the issue as to whether the unavailability of the complainants' father to give evidence that the termination of his employment was due to his continuing bad health rather than the alleged sexual abuse of his daughter did not result in such prejudice to him as to give rise to a real or serious risk of an unfair trial. He further pointed out that it was not said that the complainants' father witnessed anything that would support the complainants' version of events. He further stated that the reality was that it could not be established whether or not the complainant's father would have supported the applicants' version of events.

11. In the course of his judgement, the trial judge stated that he was not satisfied that the applicant or his solicitors had exhausted all relevant avenues of inquiry "some of which may emerge from disclosure in respect of these events". It seems to me that this finding by the trial judge is somewhat unfair to the appellant's solicitor in the present proceedings. The obligation of full disclosure in a criminal trial rests on the prosecution. It is noteworthy that this disclosure was apparently only completed on 17th January, 2017 following repeated requests from the appellant's solicitor to have that disclosure delivered prior to the hearing of this appeal.

Submissions

12. Counsel for the appellant advances 8 grounds of appeal. These are:

> 1. The learned Judge erred in law and fact in deciding that the Applicant/Appellant had not established prejudice such as to give rise to a real or serious risk of an unfair trial.
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> 2. The learned Judge erred in law and in fact in finding that the unavailability of the evidence of two deceased farm labourers, even if such evidence was to be considered 'general' in nature, did not give rise to a real or serious risk of an unfair trial.
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> 3. The learned Judge erred in law and in fact in deciding that the unavailability of the evidence of the deceased father of the complainant was not such as to give rise to a real or serious risk of unfair trial.
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> 4. The learned Judge erred in law and in fact in finding that there was no real possibility that evidence helpful to the Applicant would have been forthcoming from the said deceased father.
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> 5. The learned Judge erred in law and in fact in attaching undue importance to his conclusion that the prosecution might not be able to pursue at trial the reason for the termination of the Applicant's employment by the said deceased father. The learned Judge failed to take into account that the Applicant himself may have had reason to pursue this issue, and was now hampered from doing so.
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> 6. The learned Judge erred in law and in fact in failing to give due weight to the age of the Applicant at the time of the alleged offending and the importance of all other evidence being available at trial to ensure the fairness of the trial.
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> 7. The learned Judge erred in law and on the facts in determining that any potential unfairness to the Applicant could be remedied by the trial judge.
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> 8. The learned Judge erred in law in refusing to grant an injunction in the particular circumstances set out an affidavit before him.

13. The respondent disputed each of these grounds of appeal maintaining that the trial judge's conclusions were correct in every respect. In particular counsel for the respondent relied on the judgement of this Court in *M.S. v. The Director of Public Prosecutions* [2015] IECA 3009 in which Hogan J. stated *inter alia*: 'There has been a growing recognition at various levels throughout the criminal justice system that it requires something exceptional to justify the prohibition of a criminal trial especially if any potential unfairness to an accused is capable of being mitigated by appropriate rulings in the course of the trial.

Discussion

14. Delay in historic child sexual abuse cases is an issue that has occupied a considerable amount of judicial time in both the High Court and Supreme Court. As Professor O' Malley points out in Chapter 17 of the Criminal Process 2009: Thompson Reuters (Professional) Ireland Ltd. many judgements delivered between 1997 (*B v DPP* [1997] 31. R) and the middle of 2006 *(H v DPP* (2006) 31. R) generated a significant and complex body of jurisprudence which often seems to reveal conflicting principles.

15. At 17.36 Professor O' Malley states :In the penultimate paragraph of its judgement in *H v DPP* the Supreme Court said: 'The issue for a 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 the accused on trial'. The conjunction of these two sentences suggests that, if the circumstances are sufficiently exceptional and compelling, a trial may be prohibited even if the applicant is unable to point to any specific factors demonstrating or indicating the risk of an unfair trial. The circumstances in which a trial may be prohibited on this residual ground will naturally be highly fact-specific. In P.T. v. DPP [2008] 1 I.R. 701 the Supreme Court stated at p. 708:

> "This is a test based on 'wholly exceptional circumstances', which are essentially fact and thus previous cases are of limited value as precedents. It is necessary when analysing this aspect of the test to consider the particular facts of a case, and to determine whether it would be unfair or unjust to put that specific accused on trial in all the circumstances of the case."

16. In *McFarlane v DPP* [2006] IESC 11, Hardiman J. on behalf of the majority of the Supreme Court stated para. 24, " In order to demonstrate that risk (of an unfair trial) there is obviously a need for an applicant to engage in a specific way with the evidence actually available so as to make the risk apparent… This is not a burdensome onus of proof: what is in question, after all, is the demonstration of a real risk, as opposed to an established certainty, or even probability of an unfair trial'.

17. Whether or not the appellant has sufficiently engaged with the evidence and established prejudice in accordance with the dicta of O' Malley J. in *S.O'C v. The Director of Public Prosecutions & Ors*., the fact remains that the appellant is undoubtedly disadvantaged by not having the three deceased men available as potential witnesses to support his defence. This is particularly important in a case where credibility is likely to be the deciding factor. Again, while the complainant does not say she was present when the appellant ceased working for her father, a clear inference to be drawn from her statement is that the appellant was immediately dismissed because of what she had told her mother. The absence therefore of the complainant's father also disadvantages the appellant.

It is instructive to consider how fair trial rights have been viewed on the civil side. A review of these civil cases was carried out by Irvine J. in *Maria Cassidy v the Provincialate* [2015] IECA 74. In the course of her judgement, Irvine J. cited with approval the judgement of Henchy J. in *O' Domhnaill v Merrick* [1984] I.R.151 she stated at paragraph 31 of her judgement:

> "[…] the *O'Domhnaill* jurisdiction is most usually employed where, at the time the application to dismiss is brought, such a significant length of time has elapsed between the events giving rise to the claim and the likely trial date that the defendants can maintain that, regardless of the absence of blame of the part of the plaintiff for that delay, it would be unjust to ask to the defendant to defend the claim. The question most commonly considered by the court when exercising its *O'Domhnaill* jurisdiction is whether, by reason of the passage of time, there is a real or substantial risk of an unfair trial or an unjust result.

In the course of his judgment in the *Merrick* case Henchy J. stated at p. 158:

> "While justice delayed may not always be justice denied, it usually means justice diminished. In a case such as this, it puts justice to the hazard to such an extent that it would be an abrogation of basic fairness to allow the case to proceed to trial. For a variety of reasons, a trial in 1985 of a claim for damages for personal injuries sustained in a road accident in 1961 would be apt to give an unjust or wrong result, in terms of the issue of liability or the issue of damages, or both. Consequently, in my opinion, the defendant, who has not in any material or substantial way contributed to the delay, should be freed from the palpable unfairness of such a trial."

18. This is a case in which a trial, if it proceeds, will now take place 47 years after the alleged events. This is not a situation in which statements were taken at or near the time of the alleged offence nor is it a situation in which the defendant is responsible for the delay. In *I.I. v J.J.* [2012] IEHC. Hogan J giving judgement stated that in cases where, by reason of the passage of time, the evidence available has become eroded to the point that a jury is left to choose between two different narratives advanced by a plaintiff and the defendant, there is a real risk that justice will be put to the hazard.

19. The appellant's solicitor is an experienced criminal lawyer who has sworn that the appellant's ability to defend himself against the charge in the book of evidence has been severely compromised and that there is an inevitability of unfairness in the process set in train against him. This averment needs to be factored into any assessment of all the particular circumstances of the case.

20. While it may be that the judgement of Hogan J. in *M.S.* which the respondent relies on in this appeal means that the prejudice complained of in this case has not reached the necessary threshold which would result in an obligation to halt the trial on that ground the question nevertheless does arise that if this were a civil case, would the appellant have established 'moderate prejudice'? Ultimately the question that arises for civil and criminal cases is often the same one namely whether or not a fair trial is possible given the lengthy delay in a case. In *O' Domhnaill v Merrick*, Henchy J. was clearly saying that a fair trial was not possible when there was a 25 year delay. One might ask if fair trial rights do not require greater protection when personal liberty rather than property is at stake. In fact in a criminal trial, both can be at risk. The facts of the present case differ considerably from those in MS who was facing multiple charges in respect of multiple allegations by different complainants.

21. Ultimately the Supreme Court in H. also left it open to a trial judge in judicial review proceedings to halt a trial where it was unfair or unjust to proceed with that trial.

22. At the oral hearing before this Court Mr. Sexton S.C. placed emphasis on the fact that the charge which his client faces is alleged to have occurred when he was a minor and being a person who had not then reached full maturity. This is a specific fact to be taken into consideration. Another specific fact to be taken into consideration is the fact that both parents of the complainant are now deceased and a jury will not hear what steps if any the complainants' parents took following her alleged disclosure."

23. A further matter arose during the oral hearing. The appellant's solicitor in the course of her affidavit refers to the Garda interview with the appellant. When the investigating Garda raised the issue of the appellant being entitled to legal advice he replied that he could not afford a solicitor. Despite that being said by the appellant the Garda interview proceeded immediately. While counsel for the Director of Public Prosecutions submits that an unfair interview can be edited to ameliorate the unfairness this does not get over the

difficulty that in this case the appellant seems to have been deprived of a fair interview process.

Conclusion
24. The appellant in this case has engaged with the evidence and his belief that the 3 deceased witnesses could have been of assistance to him goes beyond mere assertion. If he is not prejudiced according to the dicta of O'Malley J. in *S. O'C v DPP* [2014]IEHC 65 then he has at least established "moderate prejudice". Further, there is in my view inherent prejudice in a delay of what will now be 47 years if this trial is allowed to proceed. This is particularly so in a case that is wholly dependent on oral testimony of the complainant and the appellant. Two separate tests arise following the judgment in the H. case. With regard to the first test I hold that the appellant has established sufficient prejudice which gives rise to a real risk of an unfair trial which cannot be overcome by any delay warning.

25. Having considered all of the particular facts and circumstances of this case and looking at them cumulatively I hold that this case comes within the 'wholly exceptional circumstances category' as a result of which it would be unfair and unjust to put this specific accused on trial. I therefore allow this appeal on the 2 separate grounds envisaged in 'H' whereby a trial should be prohibited. Accordingly, I grant the application for an injunction restraining the Director of Public Prosecutions from proceeding further in this matter.