THE HIGH COURT

Record No. 2015/61JR

BETWEEN

MR C

APPLICANT

AND

HIS HONOUR JUDGE SEÁN Ó'DONNABHÁIN AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr Justice Max Barrett delivered on11th February, 2016.

Part 1: Key Issue Arising

1. Ought the court to grant an order of prohibition or stay in respect of pending criminal proceedings, given an alleged want of third party disclosure arising?

Part 2: Relevant Facts

2. Mr C faces a staggering 42 charges of indecent assault allegedly perpetrated against 14 named individuals while he was a teacher at a country school where those individuals were boarders. No trial has yet occurred but Mr C's name has already entered the public domain. He has been identified in the Oireachtas. The *Irish Examiner* has also published articles in which various people, some of whose names were anonymised, have recounted alleged experiences of abuse at the school where Mr C taught. It is the articles in the *Irish Examiner* that have led to the within application. The court sets out below a summary chronology, which indicates how matters have come to their present juncture and shows also the full background to the within application:

- in the summer of 2011, various articles were written in the *Irish Examiner* in relation to the allegations concerning Mr C;

- in February 2014, Mr C first appeared before Cork Circuit Criminal Court, having been sent forward for trial on various counts of indecent assault;

- in June 2014, following application being made, Judge Ó'Donnabháin indicated that disclosure should be made by the *Irish Examiner* and one of its journalists of such complaints as were made to that journalist by certain of the complainants in the case;

- in July 2014, it was indicated to Judge Ó'Donnabháin that the complainants were prepared to consent to disclosure of the material that was in the possession of the *Irish Examiner*;

- on 8th September 2014, the editor of the *Irish Examiner* indicated to a member of An Garda Síochána that he(the editor) would not be in a position to make disclosure of any material in the possession of the relevant *Irish Examiner* journalist; the editor's stated concern was the protection of 'sources';

- on 28th September 2014, a member of An Garda Síochána wrote to the *Irish Examiner* and enquired if the *Irish Examiner* would be prepared to make disclosure in the event that the complainants consented;

- on 1st October, 2014, the editor of the *Irish Examiner* reiterated that the paper would not be in a position to make voluntary disclosure, irrespective of the position of the complainants;

- on 3rd October, 2014, Judge Ó'Donnabháin was told of the *Irish Examiner's* position. The learned judge was also advised by counsel for the DPP that, under our law as it stands, he could not make any order against the newspaper.[i]So the learned judge adjourned proceedings to allow Mr C to take whatever steps he saw fit.

[i] In *Health Service Executive v. White* [2009] IEHC 242, Edwards J. makes clear that the Circuit Court has no jurisdiction to order disclosure in a criminal case against a non-party to the proceedings, though he suggests that this is an area ripe for statutory reform, an observation echoed in the Law Reform Commission's relatively recent report on *Disclosure and Discovery in Criminal Cases* (2014), para.2.10.

3. What Mr C has elected to do, following on the above-mentioned adjournment, is to bring an application seeking an order of prohibition of his trial or, alternatively, an order staying his trial, pending the release of such documentation as is in the possession of the *Irish Examiner*, as well as certain ancillary reliefs. Mr C contends that the non-disclosure of such material as is in the possession of the *Irish Examiner* and/or a relevant journalist fundamentally undermines Mr C's right to a fair trial. In this regard, Mr C has drawn the court's particular attention to the fact that:

(a) all of the charges against him relate to alleged incidents claimed to have occurred between 25 and 45 years ago;

(b) the complaints against him are allegedly vague in terms of dates, times and specifics;

(c) he is now an old man of some 82 years of age;

(d) the book of evidence contains no corroborative evidence of any nature and each charge is dependent on the account given by each complainant;

(e) all of the complaints appear to date from about 2011/2012, many of them having been made as a result of publicity in the news media concerning Mr C – this Court must admit that it is at something of a loss as to why it would be contended that the fact that complaints followed such publicity is necessarily or inherently objectionable, let alone so objectionable as to offer a basis for an order of prohibition or stay; and

(f) Mr C is allegedly hampered in preparation for the trial and in defending the charges brought against him in circumstances where, because the charges are allegedly old and vague, there is an absence of any available witness who might otherwise have been available.

4. All of the foregoing needs to be read in the context of the following. The above-described chronology, and the responses of the *Irish Examiner*, might suggest to the reader that the *Irish Examiner* is possessed of voluminous documentation concerning Mr C and his case. However, it has turned out that only two of the 14 complainants whose allegations ultimately prompted the pending criminal trial (Mr JG and Mr JK)have given any account of matters to a newspaper, and those accounts are very limited in their scope. Mr JG was interviewed by the *Irish Examiner* but did not give a detailed narrative of his alleged experience of sexual abuse, confining himself mainly to a description of college life in general. Mr JK likewise spoke to newspaper journalists but did not give a detailed account of his sexual abuse allegations. This is not therefore a case of the type contemplated in *P.G. v. DPP* [2006] IESC 19 where Hardiman J. expresses the view, at 43, that "*an applicant in an old sex abuse case may be entitled to sight of all statements in the nature of complaints or disclosures of alleged abuse*", these being in many instances the only "*islands of fact*" available to an applicant. The rationale offered by Hardiman J. for the foregoing view was that "*It will clearly be of the greatest importance to establish if there is consistency over time in the complaints made, or if they evolved over time, and if so why*." Here, it appears that the highly restricted information provided by Mr JG and JK to the *Irish Examiner* will not assist in the achievement even of the objective identified by Hardiman J.

Part 3: Law as to Disclosure
5. The court has been referred by counsel for Mr C to some of the principal threads in the law concerning disclosure in criminal proceedings. These are identified hereafter:

(1) the prosecution in a criminal case is obliged to disclose to the defence all relevant evidence which is within its possession (*The People (DPP) v. McKevitt* [2005] IECCA 139);

(2) a person charged with a criminal offence has a right to be furnished (a) with details of the prosecution evidence that is to be used at trial, and (b) with evidence in the prosecution's possession which the prosecution does not intend to use if that evidence could be considered relevant or could assist the defence (*The People(DPP) v. McKevitt)*;

(3) the prosecution's duty to disclose covers any material which may be relevant to the case which could either help the defence or damage the prosecution (*McKevitt v. DPP and Anor.* [2003] WJSC–SC 9889, at 7);

(4) there is no entitlement to bring an application for discovery against a third party in criminal cases (*People (DPP) v. Sweeney* [2001] 4 I.R. 102; *H (D) v. Groarke* [2002] 3 I.R. 522); and

(5) an applicant in a historical sexual abuse case may be entitled to sight of all statements in the nature of complaints or disclosures of alleged abuse (*P.G. v. DPP, supra*).

6. Mr C contends that by virtue of the failure to secure disclosure of such material as is in the possession of the *Irish Examiner*, he now runs an unavoidable risk of an unfair trial for which the appropriate legal remedy is the order of prohibition or the order of stay sought. Mr C's application for either such remedy almost immediately flounders on the fact that only two of the 14 complainants whose allegations prompted the pending criminal trial have given any account of matters to the *Irish Examiner*, neither has given a detailed narrative of his alleged abuse, and no allowance is made by Mr C for the potential for invocation, at his criminal trial, of s.4L of the Criminal Procedure Act 1967 (considered later below). His floundering application for an order of prohibition or stay sinks into failure when one has close regard to the law as to prohibition in the context of pending criminal proceedings.

Part 4: Prohibition of Pending Criminal Proceedings
7. In *K v. Moran* [2010] IEHC 23, at para.9, Charleton J. helpfully synthesises the law governing prohibition applications in the context of pending criminal proceedings into a series of principles which this Court respectfully adopts as a correct statement of the law in this area. These principles might be summarised as follows:

High Court slow to interfere
[1] The High Court should be slow to interfere with the DPP's decision that a prosecution be brought.

Trial by judge and jury standard
[2] Trial by judge and jury is the constitutionally proper forum for the adjudication of guilt in criminal cases.

Presumption of fair trial
[3] It is to be presumed that an accused will receive a criminal trial in the due course of law that is fair and abides with conventional procedure.

Onus of proof on applicant
[4] The onus of proof is on an accused when seeking to stop a criminal trial; s/he must show a real and unavoidable risk of an unfair trial occurring.

What constitutes an unfair trial?
[5] An unfair trial is one where any potential unfairness cannot be avoided by appropriate rulings and directions by the trial judge.

Engagement with specific facts of case
[6] The burden of proof is not discharged by an applicant making a general allegation of prejudice; s/he must fully and actively engage with the facts of the case at hand to demonstrate in a specific way how the risk of unfair trial arises.

Limited helpfulness of precedent
[7] Previous applications of a similar vein are of limited worth as precedent. It is the specific circumstances presenting that are the focus of the application.

Test regarding delay
[8] As regards delay, the test now to be applied by the High Court is whether the delay presenting yields a real risk of an unfair trial.

Exceptional factors
[9] Other exceptional factors may present that would make it unjust to put an accused on trial, e.g., lengthy elapse of time, old age, extreme stress beyond that which is a normal feature of facing prosecution, and severe ill-health.

General need for proven prejudice
[10] Old age and poor health can assist in establishing a risk of an unavoidably fair trial by virtue of delay. Absent proven prejudice, any of old age, poor health or even extreme delay, in and of itself, is unlikely per se to make it unfair or unjust to place an accused on trial.

Warning by judge of self or jury
[11] In reaching its conclusion in a prohibition application, the High Court should be mindful that a District Justice will warn herself, and a trial judge will warn a jury, of the perils that arise as regards the prosecution and defence of historical sexual abuse cases.

8. By way of aside, Principles [3] and [5] also appear worthy of note, *mutatis mutandis*, in the civil context. Certainly the critical role of the trial judge in civil proceedings as regards tempering any potential for unfairness appears, at least to this Court, to be a factor that might also usefully be borne in mind when application is made, on the civil side, to strike out, on grounds of inordinate and inexcusable delay, a claim for damages brought in respect of alleged historical sexual abuse. The interest of a victim of long-ago sexual abuse in seeing a criminal prosecution brought against an alleged abuser, even if such a prosecution ultimately fails, seems matched by the interest of a victim of long-ago sexual abuse in having her or his civil claim for recompense against an alleged wrong-doer heard, even if that claim ultimately fails. The trial judge in both forms of case affords a medium through which potential unfairness can be mitigated or obviated; and the public interest in both cases seems generally aligned with the interest of those who are or claim to be victims.

9. In any event, be all that as it may, cumulatively and separately, the principles identified by Charleton J. and summarised above offer are sounding basis on which to reject the within application for prohibition and also for rejecting its 'near-cousin', the application for a stay. Specifically, as regards:

> [1] the court notes that it should be slow to interfere with the DPP's decision to prosecute;
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> [2] the court notes that trial by judge and jury is the constitutional standard in criminal cases;
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> [3] the court notes the presumption of fair trial arising and sees nothing in the facts presenting that would prevent the realisation of that presumption;
>
> [4] the court does not consider that Mr C has shown a real and unavoidable risk of an unfair trial occurring;
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> [5] no potential unfairness has been identified that cannot be avoided by way of appropriate rulings and directions by the trial judge;
>
> [6] Mr C's claims of prejudice are mostly general in nature, and a porridge of potential problems arising is no substitute for identified grains of difficulty presenting; the only specific concern Mr C raises is the fact that information is in the possession of the *Irish Examiner* and (a) in truth, this appears to be a problem that is more imagined than real, given that, as mentioned, only two of the 14 complainants whose allegations ultimately prompted the pending criminal trial have given any account of matters to the *Irish Examiner*, and, as amplified upon above, neither has given a detailed account of his alleged abuse, and (b) as will be considered hereafter, s.4L of the Criminal Procedure Act 1967 offers an avenue for relief in this regard, should the trial judge consider that such relief is required;
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> [7] the court notes the need for it to focus on the specific facts presenting and has done so;
>
> [8] although there has been some delay, apart from the fact of delay there is nothing to suggest that Mr C is exposed to a real risk of an unfair trial, i.e. one where any potential unfairness presenting cannot be avoided by appropriate rulings and directions by the trial judge;
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> [9]& there is nothing exceptional about Mr C's age or the delay presenting that
>
> [10] yields a proven prejudice which has as its consequence that it would be unfair to place Mr C on trial; and
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> [11] the court notes the warning that will issue from the trial judge to the jury in the within case of historical sexual abuse.

10. There is nothing in the facts of this case, no specific existing or potential prejudice arising, that would justify stepping outside the ordinary process of criminal law, no occurrence of what Charleton J. clearly and rightly contemplates will be the generally exceptional circumstances in which an order of prohibition – and, this Court would add, the separate order for stay that is now sought – would appropriately issue. Certainly there is no evidence to suggest that the trial court in this matter will not be adequately equipped to deal with any unfairness arising during the course of trial by means of suitable interventions and rulings.

11. In this last regard, notwithstanding the fact that the *Irish Examiner* appears in truth to be possessed of little or no documentation of relevance to the pending trial, and certainly not of such documentation as would justify the far-reaching reliefs sought, the court notes that under s.4L of the Criminal Procedure Act 1967 there is a broad power conferred upon the trial court whereby:

> *"On application by the prosecutor or the accused, a summons may be issued out of the trial court requiring the person to whom the summons is directed to –*
>
> *(a) attend before the trial court and give evidence at the trial of the accused, and*
>
> *(b) produce to that court any document or thing specified in the summons,*

unless the court is satisfied that the person proposed to be summoned cannot give any material evidence or, as the case may be, produce any document or thing likely to be material evidence."

12. The trial judge therefore enjoys a power, pursuant to s.4L of the Act of 1967, to summon the editor of the *Irish Examiner*, and the relevant journalist(s), before the trial court, and to bring with them such documentation as may be specified in the relevant summons. Of course our liberty as a people is inextricably linked to our freeness of speech. So if such a summons were to issue, arguments of public significance concerning the proper extent of journalistic privilege and the protection of journalists' sources would almost certainly arise to be ventilated anew. And, as was accepted by Geoghegan J. in *J.F. v. O'Reilly* [2008] 1 I.R. 753, 760, such a form of subpoena is no substitute for disclosure – though in a case where there is nothing or next to nothing to disclose, it might be contended to be a suitable legal 'fix'. But these are among the arguments and contentions on which a judge presiding at a criminal trial would be perfectly competent, and best placed, to adjudicate upon. The fact that they might be raised does not negate what s.4L of the Act of 1967 provides on its face, and, to this Court's mind, offers no basis on which to order either the prohibition or stay now sought.

Part 5: Conclusion

13. For the reasons stated above, the court declines to grant any of the reliefs sought by Mr C in the within application.