Neutral Citation: [2015] IEHC 704

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 524 JR]

BETWEEN

M.L.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

THE ATTORNEY GENERAL

NOTICE PARTY

JUDGMENT of Mr. Justice Noonan delivered the 13th day of November 2015.

Introduction

1. By order of this court (Cross J.), made on the 3rd of September 2014, the applicant was given leave to seek, *inter alia*, the following reliefs by way of judicial review:-

> (a) An injunction restraining the further prosecution of the applicant by the respondent in proceedings bearing the title *DPP v. M.L.* in respect of charges set out in a bill presently pending before the Circuit Criminal Court;
>
> (b) A declaration pursuant to s. 5 of the European Convention on Human Rights Act 2003 that the failure to put in place a mechanism whereby the applicant and/or the respondent may seek and/or obtain an order or orders directing a third party to provide disclosure of documents in the context of an indictable criminal trial and the applicant's trial, in particular, is incompatible with the State's obligations pursuant to Article 6 of the European Convention on Human Rights.

Background Facts

2. The charges pending against the applicant relate to sexual assaults allegedly perpetrated between June 1988 and August 1991 when the male complainant was aged between 11 and 15 years and was employed as a labourer on the applicant's farm. The complaint was first made to the Gardaí in 2008, some ten years after the earliest alleged assault.

3. In 1992, when the complainant was 16, he attended an anonymous counselling service although at that time he appears not to have disclosed any allegations of sexual abuse. The practice of this anonymous service was not to make a record of any interviews or sessions with clients.

4. Commencing in 2001 when the applicant was about 25, he attended counselling sessions with a psychotherapist in London, a Mr. Dyrud, for a period of some two years. Mr. Dyrud is now resident in Norway. At the request of the investigating Garda, Mr. Dyrud provided two reports which are essentially identical save for some inconsequential amendments both dated the 1st of November, 2013. These reports give an account of events consistent with the allegations made in the statement of the complainant contained in the Book of Evidence. The investigating Garda asked Mr. Dyrud to provide the notes of his therapy sessions with the complainant but Mr. Dyrud indicated that he had destroyed these some years previously. Further attempts were made to secure additional information from Mr. Dyrud but he ceased responding. The prosecution does not propose calling Mr. Dyrud as a witness in the case. The complainant says that Mr. Dyrud is the first person to whom he disclosed his sexual abuse by the applicant. Complaint is made by the applicant of the fact that Mr. Dyrud does not appear to be a registered therapist in the UK as he claims to be and in addition, the applicant says that there is evidence to show that he is or was a friend and business associate of a close relative of the complainant.

5. In January 2008 when the complainant was 32 and working in Abu Dhabi, he attended a consultant psychiatrist there, Dr. Abouallaban, for treatment of complaints of post traumatic stress disorder relating to the alleged sexual abuse. Dr. Abouallaban provided a short report dated the 31st of January, 2011, to the investigating Garda who sought further relevant documentation subsequently from Dr. Abouallaban. However despite the Garda's best efforts, Dr. Abouallaban did not communicate further with him. As in the case of Mr. Dryud, there was nothing in Dr. Abouallaban's brief report inconsistent with the complainant's allegations. The prosecution does not propose calling Dr. Abouallaban as a witness either.

6. It appears that Dr. Abouallaban referred the complainant for psychotherapy to Dr. Jim Collins who carried on a sole practice in Abu Dhabi but subsequently retired and died in the United States in 2012. No documents are available from that source either.

Submissions

7. The essential contention made by Ms. Gearty S.C. for the applicant is that the absence of documents in the circumstances described above now renders a fair trial impossible. She argues that the facts of this case are unusual because there is absolutely no evidence of any kind that corroborates the evidence of the complainant. It is clear that he spoke to a number of people about the events in issue for therapeutic purposes and of those, one is deceased and two will not cooperate with regard to making documents available.

8. Moreover there is no mechanism under our law which enables her client to access the counselling notes which are known to exist, thereby depriving the applicant of a potentially critical opportunity of undermining the complainant's credibility in circumstances where inconsistencies may well arise from those notes. These would constitute the only "islands of fact" in a case such as this and there should be a legal onus on the plaintiff to produce these notes. It has been demonstrated that between 5% and 8% of complaints of historic sexual abuse are false but the applicant has been left without the means to defend himself by testing the consistency of the complainant's evidence.

9. The applicant submits that no direction of the trial judge could conceivably remedy this situation short of a direction to acquit the applicant. In that event, where there can only be one outcome, it should be brought about now and it would be unfair to the applicant to have to await the outcome of a trial for that purpose. She relied in that regard on well known authorities such as *State (Healy) v. Donoghue* [1976] I.R. 325, *D. v. DPP* [1994] 2 I.R. 465, *Z.. v. DPP* [1994] 2 I.R. 476 and *Wall v. DPP* [2013] IESC 56. Reliance was also placed on *P.G. v DPP* [2007] 3 I.R. 39 and *J. O'C. v. DPP* [2000] 3 I.R. 478.

10. With regard to the claim for relief in respect of the failure of the State to provide for an appropriate disclosure/discovery mechanism against third parties, the applicant referred to *People (DPP) v. Sweeney* [2001] 4 I.R. 102, *D.H. v. Judge Groarke* [2002] 3 I.R. 522 and the judgment of Edwards J. in *HSE v. Judge White* [2009] IEHC 242.

11. Ms. Brennan B.L. on behalf of the DPP submitted that there is no issue in this case as to disclosure since it is agreed that the prosecution has disclosed everything in its power, possession or procurement. She submitted, on the central issue of the ability of the applicant to receive a fair trial, that it was insufficient for the applicant to allege that there were unobtainable documents in existence which might possibly indicate some inconsistency in the complainants account. This was purely speculative and there was ample authority for the proposition that the applicant had to go considerably further than that. In that regard reliance was placed on *J.(S.)T. v. The President of the Circuit Court and Anor* [2014] IEHC 5, *Ó'C. v. DPP* [2014] IEHC 65 and *J.(S).T. v. President of the Circuit Court* [2015] IESC 25. The applicant did not satisfy the test required to establish a real or serious risk of an unfair trial stated by the Supreme Court in *Z. v. DPP* [1994] 2 I.R. 476*, Scully v. DPP* [2005] 1 I.R. 242 and *P.G. v. DPP* [2007] 3 I.R. 39.

12. On behalf of the Attorney General, Mr. Devally S.C. submitted that the applicant had no *locus standi* to pursue the declaratory relief sought in circumstances where the parties in respect of whom the non disclosure was complained of were outside the State and thus not amenable to the jurisdiction of the court in any event. Thus even if a mechanism were in place to compel third party disclosure/discovery, the absence of which the applicant criticises, it would in fact be of no benefit to him.

13. Further the attorney contends that the applicant lacks *locus standi* in a second respect, which is that he had failed to exhaust the remedy that would be available to him at the trial to request the trial judge to issue a letter of request to a designated member state (which includes Norway) for assistance pursuant to the provisions of the Criminal Justice (Mutual Assistance) Act 2008, the civil equivalent of which is the letters rogatory procedure.

14. With regard to the issue of whether or not the applicant can have a fair trial in the circumstances arising, the Attorney relied on the same authorities as those cited by the DPP.

Discussion

15. Two recent authorities concerned with historic sexual abuse have considered issues closely analogous to those arising herein. In *J.(S.)T.*, the complainant alleged that he had been abused by the applicant who was a teacher in a school he attended. As an adult, the complainant went to live in England where he attended counselling but all the counselling notes were destroyed before a complaint was made to the Gardaí. He had also attended a doctor, now deceased, whose evidence would have been that there were scars on the complainant's genitals consistent with the alleged abuse. Furthermore, two other persons who had counselled the complainant could not be traced.

16. In the course of his judgment, Kearns P. said, at para. 13:

> "The book of evidence in relation to R.C. contained a number of witnesses, including a Dr. Little who gave medical treatment to R.C., and three others, all based then – as was R.C. – in the United Kingdom, who provided counselling about the matters which are the subject matter of his complaints. Dr. Little is now deceased and the other three witnesses cannot be located and all records made by them have been destroyed."

17. Kearns P. continued, at para. 22:

> "Insofar as the death of Dr. Little is concerned, he appears to have examined R.C. in relation to an allegation that the applicant caused cigarette burns to his penis and found scar tissue consistent with the allegations of buggery made by R.C. His absence would appear to prejudice the prosecution rather than the defence. In relation to the counsellors, they all lived in England and cannot now be located by the prosecution authorities. While it is asserted they cannot be cross-examined as to any previous inconsistent statements made by the applicant, there is no indication or evidence that there were any such inconsistent statements, and it is pure speculation as to what these witnesses would have added in terms of evidential value to the defence of the applicant. It is suggested on behalf of the prosecution that these witnesses were more likely to have been helpful to the prosecution than to the defence, given that their statements as set out in the book of evidence appear to corroborate the account of R.C. that he was abused by the applicant."

18. *Ó'C* also concerned missing evidence in an historic sex abuse case. There, a psychiatrist to whom the complainant spoke about the abuse was deceased. Other medical records which might have been relevant were missing including notes belonging to a psychotherapist attended by the complainant. In the course of her judgment, O'Malley J. said, at paras. 65 to 67:

> "65. Secondly, it seems to me that when an applicant seeks to establish that the absence of a specific witness or piece of evidence has caused prejudice, he or she must be in a position to point to, at least, a real possibility that the witness or evidence would have been of assistance to the defence. In other words, I do not believe that it is sufficient to point to a theoretical possibility that an unavailable witness might have had something to say that would contradict the complainant's account and that of other witnesses.
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> 66. In this case, it is theoretically possible that C. gave an account to Dr. O'Carroll which was wholly at variance with that given to others and consistent with the innocence of the applicant, or which, at least, was materially inconsistent with her other accounts. On the basis of the evidence, however, that is not a real possibility.
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> 67. The question is, I consider, whether there is a real possibility that the missing material would reveal a material

> inconsistency which would be of benefit to the applicant. In my view, there is nothing in the evidence to suggest that this is a realistic possibility as might be the case if, for example, it was shown that she had given materially inconsistent accounts in other instances. I do not consider that the presumption of innocence requires the court to assume, in the absence of any supporting evidence, that it did happen in relation to Dr. O'Carroll."

19. The reasoning applied in both of these cases was approved by the Supreme Court in *J.(S.)T. v. President of the Circuit Court*. In delivering the court's judgment, Denham C.J. said, at para. 26-27:

> "26. Three individuals who were counsellors and from whom statements were taken are unavailable. Counselling records in relation to one of the complainants, R.K have been destroyed.
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> 27. In all the circumstances, the missing records are not a basis upon which to prohibit the trial. In a recent case of *Ó'C. v. D.P.P* [2014], O'Malley J. rejected the argument that missing records from a health centre and the death of a doctor, to whom the complainant had spoken to about alleged sexual abuse, were matters which should persuade the Court to grant prohibition. Each case has to be considered on its own facts. The alleged absence of documents in this case does not appear to be such upon which to prohibit a trial. That said, it is an issue which may be opened to the trial judge, who will be best placed to determine the matter."

20. In applications to prohibit a criminal trial, it is well settled since *Z. v. DPP* that the onus rests upon the applicant to show that he faces a real or serious risk that he will not have a fair trial. Further, the risk has to be one which could not be avoided by the trial judge by means of appropriate directions and rulings. The fact that evidence is missing, even if it might be evidence favourable to the accused, is not of itself sufficient to warrant the grant of an order of prohibition.

21. As Fennelly J. said in *Savage v. DPP* [2009] 1 I.R. 185, at p. 208:

> "60. (b) The missing evidence in question must be such as to give rise to a real possibility that, in its absence, the accused will be unable to advance a point material to his defence. This is, like the Garda obligation to retain and preserve evidence, to be interpreted in a practical and realistic way and "no remote, theoretical or fanciful possibility will lead to the prohibition of a trial" (see Dunne v. Director of Public Prosecutions [2002] 2 I.R. 305 at p. 323)."

22. It is by now well settled that only in exceptional circumstances will the court intervene to prohibit a criminal trial. In *Devoy v. DPP* [2008] 4 I.R. 235, Kearns J. (as he then was) speaking in the Supreme Court said, at page 255:

> "In the context of prohibition this is not to say that an Irish court must readily or too easily resort to prohibition, whatever about other remedies, when vindicating rights under Article 38.1. Under our jurisprudence, as noted by Denham J. in *D.C. v. Director of Public Prosecutions* [2005] IESC 77, [2005] 4 I.R. 281 prohibition is a remedy to be granted only in exceptional circumstances."

23. Similar views were expressed by *O'Donnell J. in Byrne v. DPP* [2011] 1 I.R. 346, at page 356:

> "19. In my view, having considered the decided cases, the position has now been reached where it can be said that, other than perhaps the very straight forward type of case as in *Braddish v. Director of Public Prosecutions* [2001] 3 I.R. 127, it would now require something exceptional to persuade a court to prohibit a trial. This, in my view, is in accordance with principle…
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> 20. This, in my view, is an important observation. The constitutional right, the infringement of which is alleged to ground an applicant's entitlement to prohibit a trial, is the right to fair trial on a criminal charge guaranteed by Articles 38 and 34 of the Constitution. The manner in which the Constitution contemplates that a fair trial is normally guaranteed is through the trial and, if necessary, appeal processes of the courts established under the Constitution. The primary onus of ensuring that that right is vindicated lies on the court of trial, which will itself be a court established under the Constitution and obliged to administer justice pursuant to Article 34. It is, in my view, therefore, entirely consistent with the constitutional order to observe that it will only be in exceptional cases that superior courts should intervene and prohibit a trial, particularly on the basis that evidence is sought to be adduced (in the case of video stills) or is not available (in the case of CCTV evidence itself)."

24. It does not seem to me that there is anything exceptional or even particularly unusual about the facts in this case. The nature of sexual abuse offences against children in itself commonly militates against the likelihood of there being corroboration. There is nothing to suggest here that the missing counselling notes would have been of any assistance to the applicant. Indeed, insofar as the reports provided are presumably based on those notes, it seems more likely than not that they would be unhelpful to the applicant.

25. Accordingly, in my view, the applicant falls well short of demonstrating the kind of real possibility of benefit from the missing material envisaged by O'Malley J. in *Ó'C.* Furthermore, there is nothing to my mind exceptional about the facts of this case which would in any event warrant the intervention of this Court even in the absence of the latter factor I have identified. As has been stated time and again, the fairness of the trial is primarily a matter for the trial judge and nothing that arises in this case could in my view be said to be incapable of being dealt with by way of appropriate rulings and directions by the court of trial.

26. I would therefore refuse an order of prohibition on the foregoing ground. Whilst that effectively disposes of the matter, I would add that, in my opinion, the applicant does not enjoy the requisite locus standi to claim the declaratory relief sought. I am satisfied that the Attorney's submissions in this regard are correct as even if a mechanism of the type contended for by the applicant were available under our law, it would not avail him as the parties he seeks to make amenable are outside the jurisdiction. Furthermore, he has clearly not exhausted the remedy that is available to him from the trial court in that respect.

27. For these reasons therefore, I will dismiss this application.