THE HIGH COURT

JUDICIAL REVIEW

2009 512 JR

BETWEEN

EAMONN K.

APPLICANT

AND

HIS HONOUR JUDGE CARROLL MORAN AND THE DIRECTOR OF PUBLIC PROSECTIONS

RESPONDENT

Judgment of Mr. Justice Charleton delivered on the 5th day of February, 2010.

1. This is an application to prohibit the trial of criminal charges for sexual abuse on the grounds of delay. The applicant claims that the delay has caused him such prejudice that there will now be a real risk that he will not obtain a fair trial notwithstanding the presumption that the trial Judge will give appropriate directions as to the law and warnings as to the evidence, including the standard warning in favour of the accused that points out to a jury the evidential deficit that automatically arises when a criminal case is delayed. In addition, the applicant claims a mental disability and so urges the Court that this is one of those now rare cases where it would be unfair to allow the trial to proceed. I will call the applicant Eamonn K. and the complainants M. and N.

Facts

2. At a family funeral in early August 2007, a scuffle broke out. This was because it had come to light that two members of a family, ostensibly friendly with the family of the accused, were now alleging that he had sexually assaulted them many years before. On the 17th August, 2007 formal statements were taken by the Gardaí from these two people. The accused was not then arrested but on the 20th August, 2007 he came to a Garda station in County Clare and was questioned. Eight months later, on the 16th May, 2007, he was charged with ten offences of indecent assault. On the 30th May, 2008 he was served with the book of evidence. His solicitor then had him psychiatrically examined and reports were received from two psychiatrists on the 3rd and 27th March, 2009. The applicant then commenced these judicial review proceedings, Peart J. granting leave in that regard on the 29th June, 2009.

3. It might also be mentioned that one of the alleged victims of this offence told her husband of the circumstances leading to these charges about ten years before the incident at the funeral. She also told her best friend from childhood about two years prior to that funeral incident. It is uncertain on the authorities whether in a criminal case I am allowed to take that fact in to account. In a civil case I would have to consider this delay; W. v. W. [2009] IEHC 442; such a delay might be regarded as inordinate and inexcusable, depending on what explanation might be put forward by the plaintiff, and the balance of justice would have to be considered. That would be in a case where the standard of proof is on the balance of probabilities, not as here where the prosecution must prove their case beyond reasonable doubt. Articles 5 and 6 of the European Convention on Human Rights guarantee trial in civil and criminal matters within a reasonable time. But, as this point was not debated, I will not consider it.

4. I turn first of all to the facts. There are ten charges brought by the second respondent against the applicant. The first alleges that between the 1st June, 1966 and the 31st December, 1967 at a town in Clare he indecently assaulted M, a male person. The other nine charges allege that between the 1st January, 1964 and the 6th June, 1969, during various time periods identified by the charges, he indecently assaulted N, a female. In his statement, M said that about 40 years previously he was on a fishing trip with the applicant. Suddenly, the applicant opened his trousers and asked M. to touch his erect penis. This he did, but that seems to be the extent of the incident.

5. N. says that when she was approximately eight years of age a pattern of abuse began which continued "for a few years after that". She believes that the alleged abuse by the applicant stopped when she started going to secondary school, "or at least I don't remember it happening after I started secondary school". All of the abuse happened in the applicant's family home, when they were in the kitchen, which was also a sitting room. She describes the abuse happening "most of the time, but not always" while they were sitting on a couch on the right hand side of this room as you go in the door. The abuse consisted of the accused putting his hand up her skirt, pushing her underwear aside and touching her while he masturbated to ejaculation. The details of this statement are, as one might expect after a gap of up to 43 years, slight. When it comes to the applicant's response, the same comment might be made. He said to the Gardaí that he never went fishing, or ever had a fishing rod. He never showed his penis, he says, to M. Whereas he knew the two alleged victims he says that he was never alone with N in his house. When asked about the allegations, he said "I did no such thing, I did not". At this remove in time, he claimed not to have been able to remember being alone with N in the sitting room of his family home but described the relationship with the family of M and N as "good …. in them years".

6. I am told by counsel, and it is not contradicted, that the mother of the applicant died about 17 years ago. A case is made that because of the mental disability of the applicant, to which I shall shortly refer, his mother was more likely to have been closely involved with his care and supervision than would otherwise be the case. Whereas they cannot say that she would have been a witness to the occurrence, or non-occurrence, of any particular incident, the applicant claims she is a crucial witness in a case of this kind. As to whether, for instance, he ever had a fishing rod or went fishing, as to whether there was any evidence of masturbation in a particular room at any particular time and as to surrounding details which have been lost due to the passage of many decades, she could be expected to be a witness.

Psychiatric evidence
7. Dr. Bhamjee examined the applicant. He describes him as "a simple bachelor who lives alone since his mother died 17 years ago". His work history is of cleaning roads until epilepsy developed about thirteen years previously. He will be 64 years old this year. He is now living on an invalidity pension and taking anti-epileptic medication. In addition he has high blood pressure and a hip problem. Dr. Bhamjee describes the applicant as having given him a history of having been slow in class and being illiterate. His interests now are in "simple programmes on television" and he also takes an interest in hurling. Nowadays, he rarely goes out but he is able to keep the house tidy and to care for himself. Dr. Bhamjee concludes:

> *"Mr. K. is a person of low intelligence in the mild to moderate learning disability range. Although he is able to answer questions in a simple manner Mr. K. will not be fit to plead and he will not be able to instruct counsel or understand court procedure."*

8. Dr. O'Connell explained to the applicant that he was being examined for the purpose of preparing a report for Court and that, in consequence, the normal relationship of confidence between a patient and a doctor would not exist. Although this was explained in simple terms, the applicant did not understand. Dr. O'Connell was of the view that Mr. K. did not have the capacity to participate willingly in the interview. Whereas a privilege against disclosure in these circumstances may be argued for, it is doubtful if it exists at the current state of the law; see O'Leary- A Privilege for Psychotherapy 12(1)BR 33 and 12(2)BR 76. The applicant scored 21 out of 30 on cognitive functioning. Even allowing for illiteracy, this suggested significant impairment. There was limited insight into the gravity of the circumstances. Dr. O'Connell concluded:

> *"In my opinion, Mr. K. presents with features consistent with a learning disability ….. In examining his fitness to be tried Mr. K. stated that he was innocent of the charges and that he wanted to plead not guilty. I was satisfied that he understood the nature of the accusations against him. However, I was concerned at his inability to weigh the consequences of entering a plea. Nevertheless, in the light of his evident desire to plead his innocence I am constrained from offering an opinion on the matter of his fitness to be tried. I am therefore reserving my opinion subject to a trial of the facts."*

Law
9. In all of these cases a multitude of decisions are opened to the Court. I intend to reduce these to a number of propositions:

> (1) The High Court should be slow to interfere with a decision by the Director of Public Prosecutions that a prosecution should be brought. The proper forum for the adjudication of guilt in serious criminal cases is, under the Constitution, a trial by judge and jury; D.C. v. DPP [2005] 4 I.R. 281 at p. 284.
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> (2) It is to be presumed that an accused person facing a criminal trial will receive a trial in due course of law, one that is fair and abides by constitutional procedures. The trial judge is the primary party to uphold the relevant rights which are: the entitlement of the accused to a fair trial; the right of the community to have serious crime prosecuted; and the right of the victims of crime to have recourse to the forum of criminal trial where there is reasonable evidence and the trial can be fairly conducted; P. C. v. DPP [1999] 2 I.R. 25 at p. 77 and The People (DPP) v J.T. (1988) 3 Frewen 141 .
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> (3) The onus of proof is therefore on the accused, when taking judicial review as an applicant is to stop a criminal trial. That onus is discharged only where it is proved that there is a real risk of an unfair trial occurring. In this context, an unfair trial means one where any potential unfairness cannot be avoided by appropriate rulings and directions on the part of the trial Judge. The unfairness of the trial must therefore be unavoidable; Z. v. DPP [1994] 2 I.R. 476 at p. 506 – 507.
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> (4) In adjudicating on whether a real risk occurs that is unavoidable that an unfair trial will take place, the High Court on judicial review should bear in mind that a District Judge will warn himself or herself, and that a trial Judge will warn a jury that because of the elapse of time between the alleged occurrence of the facts giving rise to the charges, and the trial, that the accused will be handicapped by reason of the lack of precision in the presentation of the case, and the disappearance of evidence such as diaries, or potentially helpful witnesses, or by the normal failure of memory. This form of warning is now standard in all old sexual violence cases and a model form of the warning, not necessarily to be repeated in that form by all trial Judges, as articulated by Haugh J. is to be found in the decision of the Court of Criminal Appeal in The People (DPP) v. E.C. [2006] IECCA 69.
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> (5) The burden of a proof on an applicant in these cases is not discharged by merely making a general allegation of prejudice by reason of the years that have elapsed between the alleged events and the commencement of the criminal process. Rather, there is a burden on such an applicant to fully and actively engage with the facts of the particular case in order to demonstrate in a specific way how the risk of an unfair trial arises; C.K. v. DPP [2007] IESC 5 and McFarlene v. DPP [2007] 1 I.R. 134 at p. 144.
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> (6) Whereas previously the Supreme Court had focused upon an issue as to whether the victim could not reasonably have been expected to make a complaint of sexual violence against the accused, because of the dominion which he had exercised over her, the test now is whether the delay has resulted in prejudice to an accused so as to give rise to a real risk of an unfair trial; H. v. DPP [2006] 3 I.R. 575 at p. 622.
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> (7) Additionally, there can be circumstances, which are wholly exceptional, where it would be unfair or unjust to put an accused on trial. Relevant factors include a lengthy elapse of time, old age, the sudden emergence of extreme stress in consequence of the charges, and which are beyond that associated with the normal stress that a person will feel when facing a criminal charge and, lastly, severe ill health; P . T. v. DPP [2007] IESC 39.
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> (8) Previous cases, insofar as they are referred on the basis facts that are advocated to be similar, are of limited value. The test as to whether a real risk of an unfair trial has been made out by an applicant, or that an applicant

has established the wholly exceptional circumstances that had rendered unfair or unjust to put him on trial, are to be adjudicated in the light of all of the circumstances of the case; H. v. DPP [2006] 3 I.R. 575 at p. 621.

(9) I will attempt to apply these legal principles to my adjudication of the circumstances in this case. In doing so, I would simply comment, as a final observation on the law, that having read the relevant case law, it can be the case sometimes that circumstances such as extreme age or very poor health will be contributory factors to an applicant succeeding in making out that a real risk of an unavoidably fair trial is established. Old age and ill health can assist in establishing that there is prejudice by reason of a delay, since memory fails with time and the ability of an accused to instruct counsel with a view to mounting a defence can be, in extreme circumstances, undermined by those factors. Where extreme delay, old age and serious ill health are, of themselves, pleaded as a circumstance which would make it unfair or unjust to put a specific accused on trial then, in the absence of proven prejudice, those circumstances will indeed occur rarely; The People (DPP) v. P. T. [2007] IESC 39 and Sparrow v Minister for Agriculture, Food and Fisheries [2010] IESC 6.

Fitness to plead

10. One further argument has been advanced on behalf of the applicant. It is contended that I should stop the trial by reason of the fact that the accused is not fit to plead. This matter, in my view, is fully governed by s. 4 of the Criminal Law (Insanity) Act 2006. Under it, a person is unfit to be tried if he or she is unable by reason of a mental disorder to understand the nature and course of criminal proceedings so as to be able to plead guilty or not guilty to the charge, to instruct a legal representative, to elect for trial by jury where same is available, to make a proper defence, to challenge a juror who might be thought worthy of being objected to or to understand the evidence. Where a Court determines that an accused person is fit to be tried the proceedings should continue. The trial Judge determines the question of fitness to be tried sitting alone. Prior to the Act, it was determined by a jury if there is a finding made that the accused is not fit to be tried then the Judge may adjourn the proceedings and may, further, order him or her to be detained for in-patient care, or order that the accused should receive out-patient treatment. In addition, a Judge may embark on a trial, without a jury, as to whether the accused person did the act alleged in the indictment. Where the Judge finds that there is a reasonable doubt as to whether the accused did the act alleged then the Court may order that the accused should be discharged.

11. There is no possible basis for substituting an inquiry on judicial review for this comprehensive statutory code. Nor do I find that there are any grounds made out whereby I would have an entitlement to bypass the intention of the Oireachtas on the proper disposal of those in respect of whom a question arises as to whether they are fit to plead.

Conclusion

12. The applicant, who is accused of 10 counts of sexual violence over 40 years ago, is a 63 year old retired general labourer. He suffers from epilepsy and is illiterate. In addition to that he has significant cognitive impairment. His answers to the Gardaí, and his interview with Dr. O'Connell, suggest to me that his manner of dealing with events in his life history is to recall them in simple terms, where he remembers at all, and to eschew descriptive narrative.

13. He is now facing an allegation in respect of something which allegedly happened between 43 and 44 years ago. It is argued on his behalf that if his mother were alive, significant evidence might be available as to the circumstances surrounding this series of what are alleged to be horrible sexual assaults on two children. More importantly, however, from the point of view of this Court, there are only two real possibilities whereby the accused might meet these charges. The first is by entering the witness box to give evidence in his own defence. The material before me suggests that that evidence would be terse, truncated to a general denial and possibly emotional. The other possibility is that the accused would be able to remember circumstances in relation to a fishing trip, or specific visits by the alleged main victim to his family home all these decades ago. By the recall of such details, and by instructing counsel, the accused might seek to gently undermine the case being made by the complainant N. With a person of reasonable intelligence that prospect might possibly, but not confidently, be expected to be open, even after all these years. With a person at his level of intelligence, and therefore of recall, I cannot see that it is reasonably open. Whereas the presumption that people are presumed to be innocent until presumed guilty is are part of the fundamental bedrock of a fair criminal trial, the proof in a civil case is that no case is made out until it is proven as a matter of probability. In this judicial review application, the onus is on the applicant to show a real prospect of an unfair trial. In that regard, I do not regard the applicant as innocent or as guilty as a matter of legal presumption, but bear in mind that I am not entitled to judge the facts of this case on the basis of the papers that are before me. As a matter of ordinary sense, I remind myself that he may be innocent or he may be guilty. In all the circumstances, can that be fairly decided beyond reasonable doubt at a criminal trial?

14. Should this trial proceed and a conviction occur, it would be open to a reasonable person to doubt the soundness of the conviction whereby a simple man with limited recall could have defended himself against allegations arising out of family visits almost half a century beforehand where one of the closest participants, namely his mother, is now dead. I would therefore regard this applicant as one of the very few applicants who fall within the category of succeeding in showing that there is a real risk of an unfair trial due to delay.