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Neutral Citation Number: [2007] IEHC 45

THE HIGH COURT

[2006 No. 319 JR]

BETWEEN

S.K.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Mr. Justice O'Neill delivered on the 2nd day of February, 2007

1. By order of this court (Peart J.) on the 27th March, 2006, the applicant was given leave to seek *inter alia* an order of prohibition of his trial on 51 counts of sexual assault and attempted buggery allegedly perpetrated on N.K. the applicant's stepson. These offences are alleged to have been committed between the 1st January, 1985 and the 18th October, 1991. A book of evidence was served on the applicant on the 29th July, 2005 and he was returned for trial to the Circuit Court on the 28th October, 2005 and the matter first appeared in the Circuit Court on the 24th January, 2006, the indictment having been served on the applicant on the 23rd January, 2006.

2. The grounds upon which the applicant was given leave to pursue relief by way of judicial review are that he has been deprived of his right to a trial in respect of the alleged offences, with due expedition because of the lapse of time between the commission of the alleged offences and the trial in respect of these, and as a consequence of this lapse of time the applicant contends that there is an unavoidable and incurable presumption of prejudice, and furthermore the State authorities and in particular the Gardaí and the prosecuting authorities have been guilty of inordinate and inexcusable delay in the prosecution of these offences.

3. The factual background to this matter is as follows.

4. The applicant herein is the stepfather of N.K. The applicant and N.K.'s mother were married in 1982. N.K. alleges that over a period of several years he was repeatedly sexually abused by the applicant and this sexual abuse is the subject matter of the 51 counts laid out in the aforementioned indictment.

5. When N.K. was approximately 18 years of age or slightly more, and in a course of a row with his mother, he revealed for the first time the alleged sexual abuse. The applicant was confronted with this by his wife and he admitted the abuse to her. The applicant then went to a Garda, not in the Garda Station but in his private house and disclosed the abuse to him. The Garda in question visited the family and interviewed N.K. in the presence of his mother and it would seem also the applicant. All were very upset and the Garda advised them of the need to seek counselling. N.K. in the course of the discussion made it clear that he did not want a prosecution in relation to his allegations. His reason for this was that he did not want to break up the family.

6. In or about the year of 2000, N.K. formed a relationship with S.K. and in due course had a son with her. Since having his own son, the incidents of alleged abuse came flooding back into mind and he began to suffer bouts of depression and anger. He attempted suicide by means of an overdose of tablets. The relationship with S.K. broke up. He described the hurt and anger at the alleged abuse as surfacing more, and he felt that the applicant should be punished or at least acknowledge the hurt he had caused.

7. In the meantime the applicant had left N.K.'s mother for about two years and he felt that he could report the alleged abuse without fear of any effect on the family.

8. N.K. got in touch with the Gardaí and on the 14th October, 2004 he made a formal statement. A Garda investigation commenced and statements were taken from the applicant's mother and his aunt G.C. and on the 22nd October, 2004 the applicant made a statement.

9. It is not clear whether a statement was furnished to the Gardaí initially in 1995, by the applicant.

10. For the applicant it was submitted that the delay or lapse of time from the reporting of the alleged abuse in 1995 until a formal complaint was made in October, 2004 is to be characterised as prosecutorial delay, on the basis that the Gardaí were apprised of the facts in 1995 and a prosecution should have ensued from then or not at all. In this regard the applicant relies on the case of *P.M. v. The District Judge Miriam Malone and The D.P.P.* [2002] I.E.S.C. 46. It was submitted, again in reliance upon *P.M. v. Malone and Another* that the presumptive prejudice suffered by the applicant as a result of the passage of time is sufficient to justify the prohibition of the applicant's trial, because of the inordinate and inexcusable delay on the part of the prosecuting authorities in failing to have pursued the prosecution actively from 1995.

11. It was submitted that the circumstances of this case are somewhat unique in that it was the applicant who initially brought the matter to the attention of the Gardaí and because of that, he was entitled to be dealt with promptly in 1995 and not to have had the whole issue left hanging over him for approximately ten years and as a consequence of the delay he has been caused wholly unnecessary stress and anxiety and this anxiety/stress is one of the three factors, identified originally in the judgment of Powell J. in the case of *Barker v. Wingo* 407 U.S. 514, [1972], and later identified in many cases in this jurisdiction culminating in the case of the *P.M. v. The D.P.P.* in which the Supreme Court delivered its judgments on the 5th April, 2006, as interests which should be protected from culpable prosecutorial delay.

12. It was stressed on behalf of the applicant that having taken the unusual step of going to the Gardaí himself, the applicant was entitled to have the whole matter dealt with in a timely fashion at that time, or not at all, and that it was unjust for him to now have to face a trial on these charges when he is ten years older, his life has moved on and whilst he does not point to specific prejudice to his defence he does suffer from the inevitable and unavoidable prejudice that results from a long lapse of time with the inevitable damage, that does to memory.

13. For the respondent it was submitted that the status of the applicant in 1995 and immediately thereafter was of a person who was suspected of criminality but no more and hence he was not entitled to have a prosecution taken against him within any particular time-frame. In this regard reliance was placed upon the judgment of Gannon J. in *O'Flynn v. Clifford and Others* [1998] 1 I.R. 740, which was approved by the Supreme Court *inter alia* in P.*M. v. Malone and Another*.

14. It was submitted that the prosecution did not commence in 1995 and could not have commenced then because the Gardaí were denied at that time the necessary evidence to ground a prosecution namely the formal statement from N.K. together with a willingness to testify in court. Hence it was submitted that there was no prosecutorial delay from 1995 onwards. From the commencement of the prosecution in October 2004 there was no delay and indeed the applicant does not complain of delay post October, 2004.

15. Insofar as the lapse of time from 1995 to October, 2004 is concerned if it is to be considered as delay it was submitted it could only be regarded as complainant delay and is now governed by the judgments of the Supreme Court in the case of *H. v. The D.P.P.* in which the Supreme Court delivered its judgment on the 31st July, 2006, holding that an inquiry as to the reasons for delay in sex abuse cases is no longer necessary, the courts, having regard to their accumulated experience on these issues, now will be in a position to take judicial notice of the reasons which cause delay in the reporting of allegations of sexual abuse.

16. Insofar as the applicant claims that his right to an expeditious trial has been breached because of what he characterises as prosecutorial delay from 1995 onwards, it was submitted that the applicant had not demonstrated, as was now required, following the judgment of the Supreme Court in *P.M. v. The D.P.P.*, that there was a breach of, or infringement or interference with one of the three protected interests as originally identified in *Barker v. Wingo*, namely, either prejudice to the defence, pre-trial incarceration, or unnecessary stress or anxiety. It was submitted that there was no evidence in this case of any interference with any of these protected interests. And hence even if the court were disposed to find that there had been prosecutorial delay, in the absence of any evidence of interference with any one of these protected interests, there was no basis for a prohibition of the trial.

17. It was submitted that insofar as the applicant complained that there was a real risk of an unfair trial, there was no evidence whatsoever to suggest any prejudice to the applicant in his defence to these proceedings

18. The respondent raise an initial objection on the ground of delay on the part of the applicant in bringing these judicial review proceedings. The applicant sought leave to file an affidavit on the morning of the hearing for the purposes of explaining that delay. Having heard submissions from counsel for the applicant and the respondent and having been shown a copy of the proposed affidavit *de bene esse*, I came to the conclusion that there were no facts deposed to in the affidavit which could require a response from the respondent and having regard to the shortness of the affidavit concluded that there would be no prejudice to the respondent in dealing with the affidavit, having only received it on the morning of the hearing and accordingly I gave the applicant leave to file the affidavit.

19. In general, the return for trial is taken, as being the event which gives rise to the grounds relied upon for judicial review, and as the point from which times runs. Therefore the three month period prescribed in O. 84, r. 21(1) expired on the 27th January, 2006. The ex-parte application for leave to apply for judicial review was moved on the 27th March, 2006. This is the operative day for the purposes of commencing an application for judicial review and O. 84, r. 21(1) specifically requires the application for leave for judicial review to be made promptly or in any event, within three months from when grounds for the application first arise.

20. It is quite clear that the applicants were out of time in making their application and must now seek an extension of time.

21. In the affidavit, for which I gave leave to file, during the hearing of this application, it is averred by the solicitor for the applicant that he sent the papers to counsel on the 15th November, 2005 but that these were returned by counsel on the basis that he did not do criminal defence work. Counsel was then briefed on the 24th January, 2006, the day the case was first listed in the Circuit Criminal Court. It is averred that counsel then had a detailed consultation with the applicant and having read the papers gave advice and thereafter an application for prohibition was brought.

22. On the basis of the facts deposed to in the affidavit, it would seem that the applicant did move promptly initially in the sense that papers were sent to counsel quickly, but then the momentum appears to have been lost, and as a consequence the application was not made until two months after the expiry of the three month time limit.

23. I am not satisfied that the delay has been adequately explained and that being so, the applicant is unable to establish good grounds for extension of time.

24. Notwithstanding the foregoing conclusion it is nonetheless appropriate that I give judgment on the substantial issues raised in the proceedings.

25. The first issue which arises for consideration is whether the bringing of the alleged sexual abuse to the attention of the Gardaí in 1995 was the commencement of a criminal investigation such that the passage of time between then and October, 2004 is to be treated as inordinate and culpable delay on the part of the Gardaí and prosecuting authorities. In making the case that this passage of time is to be treated as culpable delay as such, the applicant relies upon the following passages from the judgment of Keane C.J. in *P.M. v. Malone and Another*.

26. At p. 8:

> "In an affidavit sworn in these proceedings, Sergeant Moran, as she has since become, said that both the complainant and L refused to make statements to her about the alleged sexual abuse and that the parents were reluctant to have the allegations concerning J investigated any further, once they were aware that the physical examination of her had revealed nothing abnormal. They did not believe that the alleged disclosures made by her during the course of the investigation at St. Clare's Unit and said that she had been "coerced" into allegations that the applicant had interfered with her. Sergeant Moran said that in the absence of a complaint being forthcoming, it was "effectively impossible" to prosecute the applicant."

27. Later in the judgment at p. 43 the following is said:

> "I now return to the question of whether the court, in considering whether the accused's right to a reasonably expeditious trial has been violated, is entitled to take into account, not merely the period which has elapsed from the time at which he is charged with the offence to the time at which the court is asked to intervene, but also the period from the commission of the offence to the charging of the accused.
>
> I have already referred to the opinion of Lamer J. in *Mills v. The Queen* to the effect that such delay should not be taken into account. The judgment of the High Court (Gannon J.) in *O'Flynn v. Clifford and Others* (1998) 1 I.R. 740 also requires careful consideration…….

In the course of his judgment, Gannon J. said:

> "It is not the fact of delay but rather the effect of delay which is a primary factor, the test being whether or not the accused would have a fair trial."

In the light of the subsequent decision of this court in *D.P.P. v. Byrne* to which I have already referred, it is now clear that delay of itself even where neither actual nor presumptive prejudice to the accused is demonstrated may be a ground for restraining the continuance of the trial.

In *O'Flynn* the complaint of the applicants was confined to the delay preceding the preferral of the charges against them. The learned High Court Judge was of the view that there no evidence upon which the District Court in that case could have concluded that the period of delay was such as might be expected to prejudice the chances of either the applicants obtaining a fair trial. On that ground, accordingly he was satisfied that the applicants were not entitled to the relief sought.

As to whether the court could take into the account the precharge delay, Gannon J. had this to say:

> "The supposed existence of unexpressed suspicion of criminality in the mind of another in relation to a person cannot in law or in reason confer any rights cognisable by the courts upon the person to whom the suspicions relate. A person who is a mere suspect (and therefore presumed innocent) has no legal right to have a charge made against him nor to have some legal process diligently or expeditiously pursued by arrest or by summons, to bring in before a court. The public interest and good sense require that every crime be properly investigated and that the offender be expeditiously brought to justice. But the public interest also requires diligence and conscientious care in the investigation of crime, and the assembling and presentation of cogent evidence in support of a prosecution. It is no part of the function of the courts to participate either in the investigation of criminal offences or in the supervisory direction of those engaged in that work. The courts must remain detached and independent in relation to all matters antecedent to the laying of a charge against a person of a criminal offence."

I would respectfully agree with the view of the learned High Court Judge in that case that what he describes as "the supposed existence of unexpressed suspicion of criminality, could not confer rights cognisable by the law on the suspect. I think it is also clear that, generally speaking, it is not the function of the courts to participate in the investigation of criminal offences.

We are here concerned, however, with a case which not merely was there suspicion or criminality on the part of the applicant: there was an express complaint by the alleged victim to the psychologist and social worker who in turn, reported the matter to the Gardaí. Undoubtedly, if the complainant had at that stage made a formal complaint to the Gardaí the applicant would have been interviewed and, to that extent, it can be said that the investigation was not at that point complete. However, that is not to say that the court, in the present case, is entitled to leave entirely out of account the delay that subsequently ensued in charging the applicant in determining whether his constitutional right to an expeditious trial has been violated and I do not think that the passage I have cited from the judgment of *O'Flynn* would necessary support such a proposition…..

I am accordingly satisfied that in determining whether the concern and anxiety caused to an accused person is such as to justify the prohibition of his trial on the ground that his constitutional right to a reasonably expeditious trial has been violated, the court, depending entirely on the circumstances of the particular case, may be entitled to take into account, not merely delay subsequent to his being charged and brought to trial, but also a delay prior to the formal charge. It is to be remembered that, in upholding the applicant's rights in such a case the court is not merely vindicating or protecting the rights of all persons coming before the courts to the dispatch of criminal proceedings against them with reasonable expedition: it is also upholding the general public interest in speedy prosecution of crime…."

28. Later on at p. 55 the following was said:

> "It is hardly necessary at this stage to stress the gravity of an offence which consists of the sexual exploitation by an adult of children The unusual features of the present case have, however, already been emphasised. It began as a form of sexual experimentation between two children under the age of 10 and continued for a relatively short time after the applicant had reached the stage at which, in the eyes of the law, his actions attracted the same degree of criminal responsibility as adults. There is no indication in the affidavit sworn by the complainant in this case, or in the psychologist's report, that the alleged activities had any significant long-term consequence for her in psychological terms. The courts have become familiar in other cases with the extremely serious psychological effects that can flow from an innocent child been prematurely introduced to the world of sexual activity by a callous and exploitative adult. It can irredeemably blight the sexual development of young people without almost incalculable consequences for their general happiness and wellbeing.
>
> No such allegations are made in the present case. The complainant has made it clear that the only reason she made a complaint in 1992, and again in 1998, was because of her concern that the applicant might have been abusing her younger sister…. I am satisfied that in this case the nature of the offences which the applicant is now charged coupled with the inordinate and wholly unjustified delay in bringing them to trial renders this a case in which the constitutional right of the applicant to a reasonably expeditious trial out weighs any conceivable public interest there might be in the prosecution of the alleged offence."

29. As is clear from the above quotation the gravity of the offences in issue in that case was a significantly weighty factor in the judgment of the court. In that case the alleged abuse was said to have occurred between two children under the age of 10 and was in the nature of experimentation and in respect of which the learned Chief Justice posed the contrast with that of an innocent child being "prematurely introduced to the world of sexual activity by a callous and exploitative adult".

30. If the allegations of abuse in this case were proved it would undoubtedly cast the applicant, in this case, in that latter character. In my view the facts and circumstances at issue in this case are of such a radically different nature that the approach taken by the Supreme Court in the *P.M.* case is to be distinguished in applying the appropriate principles to the facts at issue in this case. I am

reinforced in that view by the fact that the judgments of the Supreme Court in *P.M. v. D.P.P.* (Unreported, 5th April, 2006) mark a significant departure from prior jurisprudence in that it was held that where there was inexcusable prosecutorial delay, mere presumptive prejudice would not justify a prohibition on a trial; that it was necessary to show interference with or impairment of either, (1) the defence (2) pre-trial incarceration or (3), unnecessary stress/anxiety due to the delay.

31. In *J.O.D. v. the D.P.P* (Unreported, High Court, 2nd April, 2004) O'Higgins J. had the following to say in respect of circumstances similar to those revealed in this case.

> "Mr. Devally argues that the fact that the matter was brought to the attention of the Gardaí in 1987 meant that they had a duty to investigate it and that the prosecutorial delay arises as and from that time. I cannot accept this submission. If, as was the case, there was a refusal to make a formal complaint, the Gardaí could not be faulted for not investigating the matter."

32. In this case the evidence established is to my satisfaction that N.K. refused to make a formal statement of complaint in 1995. That being so, having regard to the nature of the offence involved i.e. one of sexual abuse, there was no point in the Gardaí continuing to investigate the matter any further, as without the evidence of N.K. it was simply not possible to have a prosecution which could result in a conviction in respect of the offences involved.

33. It was suggested by the applicant that N.K. could have been summoned to the District Court for the purposes of taking depositions. In my view no reasonable person would expect Gardaí to do that where the offence under investigation was one of sexual abuse alleged to have occurred within a family. In my view there is no reality in the suggestion.

34. I am satisfied that there was nothing further that the Gardaí could have done in 1995 or indeed until N.K. got in touch with the Gardaí and made a formal statement of complaint in October, 2004.

35. I have come to the conclusion therefore that there was no prosecutorial delay at all.

36. That being so it necessarily follows that there has been no breach of the applicant's right to an expeditous trial.

37. I am of opinion that in the period between 1995 and October, 2004 the applicant's status was as submitted by counsel for the respondent that of a person in respect of whom there was a suspicion of having committed a crime, but no more. As said in the judgment of Gannon J. in *O'Flynn v. Clifford and Others*, as quoted above, the applicant was not entitled to have any particular prosecutorial activity carried out or to have had a charge preferred against him in any particular time scale, there being no basis upon which the Gardaí could progress the investigation, having regard to the refusal of N.K. to make a formal statement of complaint.

38. Even if I had come to the conclusion that there had been prosecutorial delay, I am satisfied that following judgments of the Supreme Court in *P.M. v. the D.P.P.*, that it would have been necessary for the applicant to establish interference with one of the three protected interests, namely prejudice to his defence, pre-trial incarceration or unnecessary stress and/or anxiety.

39. There is no evidence whatsoever in this case which establishes any interference with any of these protected interests. Counsel for the applicant submitted that the court should infer anxiety and stress and also prejudice to the defence. In my view the court should not do that. It was made clear in the judgment of Hardiman J. in *J.B. v. The D.P.P.* in which the Supreme Court delivered its judgment on the 29th November, 2006, that it is necessary for an applicant to establish by way of evidence the nature and extent of the stress or anxiety alleged to be suffered. Clearly that is not done in this case and insofar as any inference in regard to stress or anxiety is to be drawn from the facts proved in evidence, it would have to be to the effect that the applicant must have been, in general, relieved of stress or anxiety by the fact that it was made clear to him in 1995 that N.K. was not going to make a formal statement of complaint and that the Gardaí were not going to take any action against him. There is no evidence of any change in that situation until October 2004. It would seem to me to be probable, that during the period from 1995 to 2004 the applicant would have had no cause to suffer the kind of stress or anxiety that can result from a pending prosecution which is of course a particular stress which is sought to be kept to a minimum by the elimination of unnecessary delay.

40. Insofar as the applicant complains that there is a real risk of an unfair trial, it is quite clear that he has not by way of evidence or otherwise advanced any specific prejudice to his defence and the height of his case in this regard is to rely upon presumptive prejudice. Having regard to the fact that the delay which occurred in this case is complainant delay, in reality, rather than prosecutorial delay, I am of opinion that the judgment of the Supreme Court in the case of *H. v. The D.P.P.* (Unreported, 31st July, 2006), applies. Whilst it is the case that there is no evidence of any dominion exercised by the applicant over N.K. the reason given by N.K. for not making a formal statement of complaint in 1995 is one of the fairly typical reasons given by persons, who allege sexual abuse, for delay in reporting of the alleged abuse, and as such it is amongst the bundle of those reasons in respect of which, following the judgment of the Supreme Court in the H case, this court should take judicial notice.

41. I am satisfied therefore that the complainant delay involved from 1995 to October, 2004 is adequately explained and excused.

42. The following passage from the judgment of Murray C.J. in the *H* case is of considerable relevance to this case;

> "There is no doubt that difficulties arise in defending a case many years after an event. However, the courts may not legislate, the courts may not take a policy decision that after a stated number of years an offence may not be prosecuted. Also, as the legislature has not itself established a statute of limitations, that itself may be viewed as a policy of the representatives of the people. Thus each case falls to be considered on its own circumstances."

43. It necessarily follows in my view from this passage that what has hitherto been referred to as presumptive prejudice can not, of itself, be a ground for prohibiting a trial for sex abuse offences.

44. In my view the onus rests on an applicant for prohibition, where it is claimed that there is a real risk of an unfair trial, to show that there has been some specific or actual impairment of the defence or of the capacity of an applicant to defend himself. As said earlier there is no evidence in this case of any impairment of the applicant's defence and in the light of the content of the applicant's statement made on the 22nd October, 2004, it would a fortiori, in my view, be necessary for the applicant in this application to prove by way of evidence real and very specific interference with or impairment of specific elements of his potential defences.

45. As this clearly, has not been done, I am quite satisfied that the applicant has wholly failed to demonstrate that there is a real risk of an unfair trial.

46. In these circumstances I have come to the conclusion that there has been no breach of the applicant's right to an expeditious trial nor has it been demonstrated that there is a real risk of an unfair trial.

47. For these reasons and having concluded earlier that the applicant does not have good grounds for an extension of time for the bringing of this application, I must refuse the reliefs which are claimed.