Neutral Citation Number: [2010] IEHC 229

THE HIGH COURT

2007 569 JR

BETWEEN

F. B.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice de Valera dated the 4th day of June, 2010

The applicant in these proceedings is seeking an injunction by way of an application for judicial review prohibiting the respondent from taking any further step in certain criminal proceedings against him on the grounds of delay and an order staying the said proceedings pending the determination of this application. The charges, the subject matter of the prosecution, concern the alleged abuse of two persons by the applicant, who is facing 66 counts in total, consisting of 65 charges of indecent assault and 1 charge of buggery.

Background
The two complainants, a female relative, W.N., and a male relative, D.N., are second cousins of the applicant. The complainants' paternal grandmother and the applicant's mother were sisters. The applicant was born in August 1960, W. was born in August, 1966 and D. was born in September, 1968.

As regards the female complainant, W., the elapse of time is 30 years 11 months between the first alleged offence and the date of charge and 26 years 3 months between the last alleged offence and the date of charging the applicant. As regards D., the elapse of time is 30 years 11 months between the first alleged offence and date of charge and 22 years 2 months between the last alleged offence and the date of charging the applicant.

The applicant is alleged to have abused W.N. on a regular basis for approximately seven years. In the statements of complaint she made to the Gardaí, she alleges that the abuse occurred when she was between six and 13 years of age. The alleged abuse took place at a number of locations in the Dublin area between 1973 and 1979. The abuse consisted of an incident of rape and numerous incidents of indecent assaults which included fondling, masturbation, digital penetration, attempted oral sex, stimulated sex and ejaculation. Initially the assaults consisted of the applicant fondling W.'s vagina and forcing her to masturbate him. Over time it progressed to the applicant forcefully penetrating W.'s vagina with his penis and this act occurred within a week of her father's funeral when she was 11 years of age. It is the State's case that the indecent assaults were numerous and constant and were committed up to three or four times a week. When W. was 13 years of age, she began inflicting injuries to her genital area in order to prevent the applicant abusing her.

The applicant is alleged to have abused D. on a regular basis for approximately 11 years. In the statements of complaint that he made to the Gardaí, he alleges that the abuse occurred when he was between six and seventeen years of age. The alleged abuse took place at a number of locations in the Dublin area between 1974 and 1986 and one incident in the Navan area. The abuse consisted of an incident of buggery and numerous incidents of indecent assaults which included fondling, masturbation, kissing, oral sex, stimulated sex and ejaculation. Initially the assaults consisted of the applicant fondling D.'s penis and masturbating him. Over time they progressed to D. having to perform oral sex on the applicant. Again, it is the State's case that the indecent assaults on D. were numerous and occurred on an almost daily basis.

Throughout the years of the alleged abuse, it is acknowledged that the two families were close and lived in close proximity to each other. The statements made by various witnesses to the investigating Gardaí have shown that the applicant was like a member of the complainants' family and was regularly in their family home. He was held in high esteem by a number of members of the complainants' family and the applicant had daily contact with the complainants. It is the State's case that he used every available opportunity to sexually abuse the children in whatever possible location was to hand and that he took advantage of the fact that they were vulnerable children and groomed them from a young age.

At the time of the hearing of the within application, the applicant was in or about 47 years of age and was in full health. The Gardaí had stated that they found him to be fully alert and coherent. Thus, the State submit, we are not dealing with an applicant who is an elderly man with health or memory problems, like in many other sex delay cases. Another unusual facet of this case is that the applicant has not asserted that he is suffering from any particular stress or anxiety in respect of the prosecution the subject of these proceedings.

The Applicant's Submissions
The applicant submits that he is prejudiced in this case and that the prejudice is such as would give rise to an unfair trial. The applicant identifies nine separate factors which he alleges have or will prejudice him in his ability to obtain a fair trial. These nine factors are as follows:

1. the death of the applicant's parents

2. the death of the applicant's grandparents

3. the death of other potential witnesses

4. a medical condition

5. difficulty in locating tenants of a property named as a location where a number of the offences are alleged to have been committed

6. difficulty in ascertaining the details of certain vehicles mentioned by the complainants in their statements to the Gardaí

7. changes to sheds to the rear of a certain location where a number of offences are alleged to have been committed

8. changes to another location where offences are alleged to have been committed

9. changes to an outdoor location where offences are alleged to have been committed

The applicant points to statements from the complainants in the Book of Evidence which mention episodes of alleged abuse that took place at the applicant's family home which he shared with his parents, now deceased. The applicant submits that his parents could have had something to say about many of the allegations made, such as allegations that he used to shout at the children, that he used a cane to frighten them and that there were no locks on the doors in that house. There is also a reference to D. helping the applicant carry out repair works to a house owned by the applicant when this complainant was only 13 or 14 years old and that often times this work was carried out at the house with the applicant's father present. The applicant submits that his parents may therefore have been in a position to give evidence as to their recollection of these matters and that such evidence may have had a bearing on the reliability of the complainants' recollections of that time.

One witness whose absence is alleged by the respondent to give rise to specific prejudice is a Mr. S., who died in January 2002. This is a person whom W., the female complainant in this case, has made a complaint of indecent assault against in the past. However, this allegation of assault did not arise until her seventh statement to the Gardaí, made after this complainant disclosed the abuse to a psychologist retained by the respondent. The applicant submits that he is prejudiced by the passage of time in this case in that he cannot call Mr. S. as a witness to challenge the credibility of the complainant on this issue.

In addition to each item of prejudice relied upon by the applicant, it is further submitted that in accordance with the omnibus principle, the court must also look at the overall or combined picture. In this regard, the applicant relies on the decision of Denham J. in *J.T. v. The Director of Public Prosecutions* [2008] I.E.S.C. 20, as follows:

> "Although I am not satisfied that any of the grounds of prejudice raised of themselves constitute a sufficient basis upon which to prohibit this trial nevertheless I must step back, as it were, and survey the composite vista applying what is referred to as the omnibus principle. In the words of McCracken J.:
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> > 'It may well be that none of these matters individually would justify prohibiting the trial, but the court must view the matter with regard to the cumulative effect of these concerns.'(See *D.K. v. Director of Public Prosecutions* (Unreported, Supreme Court, 3rd July, 2006 at p. 9)'.
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> This approach was since endorsed by Hardiman J. in *S.B. v. Director of Public Prosecutions* (Unreported, Supreme Court, 21st December, 2006)"

The applicant invites the court to view the absence of the relevant witnesses and the other matters of alleged prejudice referred to above individually and also to assess and weigh them together and submits that if the court is of the view that none of the matters individually give rise to the risk of an unfair trial, then it must consider whether the overall effect of the totality of the matters complained of would give rise to such a risk.

The Respondent's Submissions
The respondent submits that the allegations the applicant faces could not be more serious and amount to systemic and brutal sexual abuse of two vulnerable children.

It is submitted that the key issue for the court to consider is the question of prejudice and that this is an example of a case where no sufficient demonstration of prejudice has been made out such as should lead to the prohibition of the trial. The respondent relies on the Supreme Court decisions in cases such as *H. v. The Director of Public Prosecutions* [2007] 1 I.L.R.M. 401 and *P.M. v. The Director of Public Prosecutions* [2006] 3 I.R. 174.

The respondent points to the multiplicity of complainants as a relevant factor in the court's determination of the judicial review application. In *H.*, the Supreme Court had this to say on the issue of multiple complaints:

> "The court is satisfied that in the same way as the fact that there is one complaint is a relevant factor, so too is the fact that there are a multiplicity of complaints a relevant factor for consideration by the court in determining whether to grant the relief sought."

In *D.C. v. The Director of Public Prosecutions* [2006] 1 I.L.R.M. 348, Denham J. made the following statement of principle, which the State urges the court to accept and be guided by in making its determination in this case:

> "The applicant in this case seeks to prohibit a trial in which he is the defendant. Such an application may only succeed in **exceptional circumstances**. The Constitution and the State, through legislation, have given to the Director of Public Prosecutions an independent role in determining whether or not a prosecution should be brought on behalf of the People of Ireland. The Director having taken such a decision, the courts are slow to intervene. Under the Constitution it is for a jury of 12 peers of the applicant to determine whether he is guilty or innocent. However, bearing in mind the duty of the courts to protect the constitutional rights of all persons, in exceptional circumstances the court will intervene and prohibit a trial.
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> In general such a step is not necessary as the trial judge maintains at all times the duty to ensure due process and a fair trial. The basic assumption to apply in relation to all pending trials is that they will be conducted fairly, under the presiding judge. However, in circumstances where there is a **real or serious risk of an unfair trial** the courts will intervene so that a defendant may not be exposed to the commencement of the process, it being the assumption that should such a trial commence it will be stopped by the direction of the trial judge because of the real or serious risk of an unfair trial.
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> It is this exceptional jurisdiction which the applicant wishes to invoke. Such a jurisdiction to intervene does not apply where the applicant has minutely parsed and analysed the proposed evidence and sought to identify an area merely of

difficulty or complexity. **The test for this court is whether there is a real risk that by reason of the particular circumstances that the applicant could not obtain a fair trial.**" (Emphasis added)

The State submits that this is not an exceptional case, that there is no real risk that the applicant will not receive a fair trial and that consequently the court should refuse the reliefs sought.

As regards the applicant's claim that he will be deprived of a fair trial by virtue of the delay in this case, the respondent submits that any element of delay on the part of the complainants in making their complaint is not an issue for debate. The respondent claims that since the Supreme Court decision in *H.*, complainant delay is no longer a ground on which to succeed in an application for judicial review. In *H.*, Murray C.J. made the following observations on the issue of complainant delay and its role, if any, in these types of cases:

> "Over the last decade the courts have had extensive experience of cases where complaints are made of alleged sexual abuse which is stated to have taken place many, many years ago. It is an unfortunate truth that such cases are routinely part of the list in criminal courts today.
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> At issue in each case is the constitutional right to a fair trial. The court has found that in reality the core inquiry is not so much the reason for a delay in making a complaint by a complainant but rather whether the accused will receive a fair trial or whether there is a real or serious risk of an unfair trial. In practice this has invariably been the essential and ultimate question for the court. In other words **it is the consequences of delay rather than delay itself which has concerned the court**.
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> The court approaches such cases with knowledge incrementally assimilated over the last decade in some of which different views were expressed as to how these issues should be approached. In such cases when information was presented concerning the reasons for the delay it was invariably a preliminary point to the ultimate and critical issue as to whether the accused could obtain a fair trial. In all events, having regard to the court's knowledge and insight into these cases it considers that **there is no longer a necessity to inquire into the reason for a delay in making a complaint.** In all the circumstances now prevailing such a preliminary issue is no longer necessary." (Emphasis added)

Aside from the delay on the part of the complainants in making their complaint, the applicant also relies on prosecutorial delay as a ground for prohibiting his trial. In this regard, the State relies on *P.M. v. The Director of Public Prosecution* [2006] 2 I.L.R.M. 361 as authority for the proposition that even where there is blameworthy delay on the part of the prosecution, the applicant still has to satisfy the court that he has suffered or is in real danger of suffering some real form of prejudice as a consequence of that delay before he or she can succeed in obtaining an order prohibiting their trial. The respondent submits that there was nothing unusual or unexplained in the chronology of the various steps taken by the prosecution in this case. In the affidavit of Detective Garda Keogan, the key dates are set out as follows:

1. 10 March 2005: first statement made by D.

2. 29 March 2005: first statement made by W.

3. March – July 2005: further statements taken from D.

4. March 2005 – October 2006: further statements taken from W.

5. May – June 2005: statements taken from other witnesses

6. July 2005: records requested, locations identified, statements taken from various witnesses

7. August 2005: further statements taken

8. 23 August 2005: the applicant is arrested

9. September to November 2005: statements taken

10. 1 December 2005: Garda file submitted to DPP

11. 14 February 2006: DPP direction in respect of taking further steps such as taking further statements and getting psychological reports

12. February – October 2006: further statements taken and psychological reports obtained as directed by DPP

13. 17 November 2006: applicant arrested and charged

14. 12 January 2007: applicant served with book of evidence and returned for trial

15. 6 February 2007: the defence receive disclosure

16. 21 May 2007: the applicant seeks and obtains leave to bring the within judicial review proceedings

The respondent submits there is nothing unusual or unexplained in these events and that no prosecutorial delay has in fact occurred in this case.

On the issue of the actual prejudiced allegedly suffered by the applicant, the respondent submits that the applicant has failed to identify any material factors that indicate to the required standard of proof the existence of a real and serious risk of him not obtaining a fair trial as a result of the passage of time. It is further submitted that if the applicant is put on trial, he will be in a position to put before the trial judge any of the matters which he alleges to be prejudicial to his defence.

In relation to the nine specific instances of prejudice relied upon by the applicant in making this application, the respondent rejects the validity of each of those examples and denies that any prejudice arises as a result thereof. Specifically, as regards the death of the applicant's parents and grandparents, the respondent submits that those family members are not alleged to have been eye

witnesses to the abuse or to have known about it and that a number of other relatives are available to give evidence in respect of pertinent matters such as family arrangements, events and locations.

In relation to the deaths of what the applicant describes as "a number of relatives and other persons" who could potentially have given evidence relevant to the events alleged to have taken place, the respondent submits that the applicant has failed to name these other people, save for one individual, a Mr. S., who is also alleged to have perpetrated sexual abuse against the female complainant, W.N., but who died in January 2002. In any event, the respondent submits that the allegations against Mr. S. are relatively minor when compared with the allegations against the applicant and his unavailability as a witness is not a matter giving rise to any significant prejudice to the accused.

The respondent submits that the applicant has failed to provide sufficient detail of his alleged medical condition and that in those circumstances that cannot be relied upon as sufficiently prejudicial to warrant the prohibition of his trial. As regards claims of prejudice arising out of changes to various residential locations identified by the complainants as being the locations where some of the abuse took place, the respondent submits that no prejudice arises from these changes as statements have been taken from witnesses and photographs of the locations as they originally looked at the time of the alleged offences have been obtained. Difficulty in locating the tenants of one of the locations cannot be regarded as prejudicial in circumstances where it is not alleged that there were any eye witnesses to the events complained of. Similarly, the difficulty associated with trying to ascertain the details of the vehicles registered to the applicant's family does not, the respondent submits, give rise to any prejudice sufficient to warrant the prohibition of the trial. The respondent points to a list of relevant vehicles having been compiled by the Gardaí and that certain vehicles on that list correspond in make, model and colour to vehicles described by the complainants in their statements.

The respondent also gave a full and thorough description of the relevant case law on the type of prejudice to an accused which could give rise to the risk of an unfair trial. In *H. v. The Director of Public Prosecutions* [2007] 1 I.L.R.M. 401, Murray C.J. held as follows:

> "…the Court is satisfied that it is no longer necessary to establish such reasons for delay. The issue for the 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 would thus restate the test as:
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> > 'The test is whether there is a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay. The test is to be applied in light of the circumstances of the case.'" (Emphasis added)

On the subject of the lack of availability of the applicant's parents' and grandparents' evidence or testimony and the lack of the opportunity to adduce evidence from other potential witnesses lost through the passage of time, the respondent states that this is not an insurmountable obstacle in this case as similar evidence can and will be given by other witnesses including relatives of the applicant. In *P.H. v. The Director of Public Prosecutions* [2007] I.E.S.C. 3, the Supreme Court emphasised that prejudice will not be sufficient to prohibit a trial if it relates to a lack of evidence the essence of which can be obtained from other sources. In *P.H.*, the applicant claimed that there was a real or serious risk that his trial in respect of sexual offences alleged to have been committed a long time prior to the initiation of the proceedings against him would be unfair. The alleged unfairness stemmed from the death of a witness who had been a district nurse for the area in rural Ireland where the applicant and the alleged victims had lived during the relevant dates. The applicant said that he was gravely and obviously disadvantaged by the unavailability of this witness. Giving the judgment of the court, Hardiman J. said as follows:

> "It seems to me that the Director [of Public Prosecutions] has been able to point to the probable availability from other sources of at least the essence of the nurse's evidence, and that this is sufficient to avoid the inference that there is a real or serious risk of an unfair trial. Obviously, if the Director were hereafter, by cross-examination or otherwise, to belittle the evidence available from the other sources in its veracity or its significance, a different position might then obtain. But that, I am satisfied, is something that can be dealt with by the trial judge if and when it occurs."

The respondent also relies on the Supreme Court decision in *C.K. v. The Director of Public Prosecutions* [2007] I.E.S.C. 5 and drew the court's attention to the following extract from the judgment of Kearns J. in that case:

> "The decision in *H. v. Director of Public Prosecutions* thus ushered in a new approach to cases of this nature, being one whereby **the degree of prejudice arising from the delay in bringing a prosecution is the principal test** in determining whether prohibition should or should not be granted. However, I do not interpret the decision in *H. v. Director of Public Prosecutions* as establishing or laying down the proposition that if any degree of prejudice is established, that a trial must automatically be prohibited, given that there is ample judicial authority for the proposition that **prejudice arising in certain circumstances may be overcome or countered by means of appropriate directions or warnings** from the trial judge. For example, the warning as to the deleterious effects of delay on human recollection which was given by Judge Haugh (as he then was) in *Director of Public Prosecutions v. R. B.* was cited and approved in the judgment of the Court of Criminal Appeal, 12th February, 2003 in that case and further approved in *Director of Public Prosecutions v. E.C.* (Unreported, Court of Criminal Appeal, 29th May, 2006)."

The learned Judge continued:

> "It is therefore now essential in these applications for prohibition in old sexual cases to fully and actively engage with the facts of the particular case. That is the main consequence of the simplification brought about by the decision in *H. v Director of Public Prosecutions.*
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> In this regard the first question to be addressed is whether or not the applicant has discharged the onus of establishing on the balance of probabilities that he has been prejudiced by the consequences of delay to the extent that there is a real risk of an unfair trial. If that question is answered affirmatively, the applicant must further satisfy the court that it is a degree or type of prejudice which can not be overcome or countered by appropriate directions or warnings to the jury to be given by the trial judge. Only if he succeeds in both respects is he entitled to an order."

The respondent ultimately submits that the applicant in this case has failed to clearly explain why the missing witnesses were essential to his defence and that he has failed to show that the essence of the evidence of any such missing witnesses could not be obtained from other sources. He has not established how, if they had been available, these witnesses could have assisted him in his defence. Furthermore, the respondent says that the applicant is not prejudiced in any way that could not be overcome by appropriate warnings or directions from the trial judge so as to ensure a fair trial.

Decision
I am not satisfied that the applicant is likely to be prejudiced in any real way in his defence of these charges. If I am wrong in that, any prejudice which he alleges to have suffered is clearly of the type which could be dealt with by the trial judge through appropriate directions and warnings and not of the type likely to give rise to a real risk of an unfair trial.

As regards the changes to the various locations where the offences are alleged to have taken place, I am not convinced that this is sufficient to give rise to any prejudice which could lead to an unfair trial. I am satisfied that any prejudice that could arise from such changes or from the death of persons who could have been called as witnesses could be dealt with by the trial judge through the giving of appropriate warnings and directions. Support for this view is to be found in the judgment of Fennelly J. in *P.D. v. The Director of Public Prosecutions* [2008] I.E.S.C. 22, where he held as follows:

> "The respondent no longer lives at the house where all but one of the offences are alleged to have taken place. He has made no attempt to show how this fact affects his defence. The same remark applies to his allegation that the public toilets, where the only other offence is alleged to have been committed, have since been demolished. There have been cases where the courts have prevented trials due to the absence of material physical evidence, such as a door, a lock (*P. O'C. v. Director of Public Prosecutions* [2000] 3 I.R. 478 or a desk (*P.L. v. Judge Buttimer* [2004 4 I.R. 494). On the other hand, the case of *D. v. Director of Public Prosecutions* [2004] IESC 33 (19th May, 2004) demonstrates that even the total destruction of a school building where offending is alleged to have taken place does not avail an applicant, **unless he can point to some concrete piece of material evidence which might affect his trial.** The respondent does not satisfy the test." (Emphasis added)

Also, in *Z. v. The Director of Public Prosecutions* [1994] 2 I.R. 476, on the subject of prejudice and the risk of an unfair trial, Finlay C.J. had made the following comments, at page 507:

> "… where one speaks of an onus to establish a real risk of an unfair trial it necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk is a real one but **the unfairness of trial must be an unavoidable unfairness of trial**." (Emphasis added)

The applicant in this case has failed to establish any unavoidable unfairness of trial likely to arise by virtue of the various items of alleged prejudice raised by him in these proceedings. The issues of changes to the shed and other locations involved and of the unavailability of witnesses are matters which it would be appropriate for the trial judge to deal with and are not matters which give rise to any unavoidable unfairness. Accordingly, I decline to grant the reliefs sought and dismiss the application.