THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 4

Record No: 2019/210

The President
McCarthy J.
Donnelly J.

BETWEEN/

X

APPLICANT/APPELLANT

- AND –

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT/RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 21st day of January 2020

1. On the 3rd April, 2019, Barrett J. refused an injunction restraining the Director of Public Prosecutions ("the DPP") from prosecuting the appellant in respect of 105 charges of historical sexual abuse. He also refused ancillary reliefs sought by way of judicial review. His judgment is available under the title *X v. The Director of Public Prosecutions* [2019] IEHC 221. The appellant now appeals against the judgment and order of Barrett J.

2. Barrett J. set out the background as follows: -

> *"The applicant is facing trial for 105 charges of historical sexual abuse, which abuse is alleged to have occurred between 1971 and 1982, and to have been committed against a relative who was between six and eighteen years of age at the time of the alleged offences. The offences are alleged to have occurred in the applicant's home, in outdoor locations in and around that home, and in various motor vehicles owned by the applicant. The charges are drawn from what are claimed to be thousands of instances of abuse over the period aforesaid."*

3. Each charge is an allegation of indecent assault on a male person contrary to common law as provided for by s.6 of the Criminal Law (Amendment) Act, 1935. Each of these offences carries a maximum sentence of two year's imprisonment.

4. The appellant claimed that his constitutional rights to an expeditious trial and to a fair trial would be breached if the trial were allowed to proceed. The appellant refers to the lapse of time since the commission of the alleged offences i.e. thirty-six to forty-seven years ago. He contends that the delay is attributable to both the complainant and the prosecution generally and that it is inordinate, culpable and unexplained.

5. The appellant claims both general and specific prejudice that he says that he will experience as a result of the delay. In terms of specific prejudice, the appellant points to

the death of witnesses, the inability to find records relating to the cars that he drove and in which it is claimed that offences took place and the absence of certain other witnesses who may or may not be deceased.

The High Court judgment

6. In the High Court below, it was accepted by both parties that the proceedings by way of judicial review had to commence within a three-month period from the return for trial. On that basis, the appellant was out of time by two months. The trial judge referred to O.84, r.21(1) and r.21(3) of the Rules of the Superior Courts (hereinafter "RSC"). Under the RSC, despite the requirement to apply for leave within three months from the date when grounds for the application first arose, the High Court may on an application for that purpose extend the period within which an application for leave to apply for judicial review may be made, which extension can only be granted if the court is satisfied inter alia that: -

> *"there is good and sufficient reason for doing so."*

The Supreme Court in *M. O'S v. The Residential Institutions Redress Board* [2018] IESC 61 emphasised the traditional idea that in approaching an application for extension, the interest of justice remains the overarching test.

7. The trial judge identified various relevant features in the application for an extension, including the delay in commencing proceedings where delay was the subject matter of the application, that awaiting disclosure was not a requirement before the judicial review application could be brought and that there was an alternative remedy open to the applicant, namely the ability to make his application to the trial judge. In the circumstances, the High Court did not see that there was good and sufficient reason for granting an extension of time, nor did the interests of justice require that such an extension be granted.

8. For those reasons the trial judge declined to grant an extension of time for the bringing of the application for judicial review.

9. Despite his finding that the matter was out of time, the trial judge went on to rule upon the entirety of the issues he heard thus minimising any exacerbation of the delay should he be incorrect in his initial finding.

10. The trial judge relied on the decision of the High Court (Charleton J.) in *K (E) v. Judge Moran & Anor* [2010] IEHC 23 and in particular to the reference therein to that case being "*one of those now rare cases where it would be unfair to allow the trial to proceed.*" He also referred to the distillation by Charleton J. of the legal principles applicable to the application. He also relied on the case of *M.S. v. DPP* [2015] IECA 309 where it was also claimed that the lapse of time since the date of the alleged offences was too great for the prosecution of that applicant to proceed.

11. Barrett J. also referred to a more recent decision of the Court of Appeal in *DPP v H* (8th February 2019) in which it was stated (Edwards J.): -

"110. The delay in this in this case, being close to fifty years, is one of the longest that the courts have encountered. However, be that as it may, that fact alone would not necessarily, in and of itself, justify the prohibiting of the appellant's trial. There is a public interest in this trial proceeding, notwithstanding that the matters complained of are said to have occurred a long time ago, but that can only happen provided that the appellant can receive a fair trial.

111. The parties on both sides are agreed that the relevant test is that enunciated in SH v. Director of Public Prosecutions [2006] 3 I.R. 575, namely: -

> *'Whether the delay has resulted in a prejudice to an accused so as to give rise to a real or serious risk of an unfair trial'*

Moreover, the decision in SH holds open the possibility that, in addition to an identifiable specific prejudice that meets the required threshold, the threshold can also be met, at least in principle, by general prejudice, or a combination of general and specific prejudices, where it amounts, where they amount, to: -

> *'Wholly exceptional circumstances where it would be unfair or unjust to put an accused on trial'*

112. The jurisprudence makes clear that any judicial consideration of a claim of prejudice relied upon to prohibit a trial, requires a rigorous analysis of the overall circumstances in which the case is brought, including engagement with the currently available evidence."

12. The trial judge rejected each of the specific contentions raised by the appellant as to why his trial would be unfair due to the delay. He therefore refused to grant the injunction.

The grounds of appeal

13. The appellant submitted lengthy grounds of appeal. It is more useful to identify the issues which arose on the appeal.

(a) The failure to extend time;

(b) Whether it would be unfair given the length delay to put the appellant on trial

(c) Whether the trial judge was correct that the appellant failed to discharge the onus of proof to establish that there was a real risk of an unfair trial; and

(d) The order for costs made against the appellant in circumstances where he had been given the benefit of the Legal Aid Custody Issues Scheme.

The Extension of Time

14. Before this Court, the appellant relied upon *CC v. Ireland* [2006] 4 I.R. 1 for the proposition that the time for bringing a prohibition action seeking to prohibit a criminal trial did not begin to run until the DPP had served the indictment. No explanation was given as to why that was not relied upon in the High Court. Instead it had been expressly

conceded that time began to run from the date of the return for trial. A contrary view of the law was reached by Kearns P. in the case of Coton v. DPP [2015] IEHC 302. In that case Kearns P. heard evidence to the effect that it was commonplace for an indictment to be served on the eve of a trial and on that basis he determined that he could depart from the statement that had been made in CC v. Ireland by the Supreme Court.

15. Counsel for the DPP submitted that the appellant is not entitled to rely on CC v. Ireland in light of his concession at the hearing. Furthermore, it was submitted that CC v. Ireland was decided under the previous regime which had required an applicant for judicial review to move promptly. The DPP relied upon the decision of *Coton v. DPP* in particular, where the President of the High Court felt comfortable in departing from *CC v. Ireland* on the basis that the full facts had not been known to the Supreme Court. It was also submitted that *CC v. Ireland* referred to prohibition applications and on that basis could also be distinguished.

16. It is an unsatisfactory situation that an issue as to the date from which time ran has been raised on appeal when it was not raised in the court below. There is an apparent tension between *CC v. Ireland* and *Coton v. DPP* as to when time begins to run for the purpose of making an application for leave to apply for judicial review. Certainly, if the decision in the Supreme Court applies to applications for injunctions and the practice as outlined in *Coton v. DPP* continues i.e. indictments are only served on the eve of the trial, this would lead to a situation which would be regarded as unsatisfactory if an accused person will be entitled to take judicial review proceedings right up to the commencement of the trial. It is not necessary to rule upon any apparent divergence between the two judgments in circumstances where I am satisfied that the appellant is not entitled to succeed on the substantive grounds that he has raised in this appeal.

Right to a Fair Trial and Delay

The allegations of prejudice

17. It is necessary to outline in a little more detail the full facts of the case. The complainant, who was the nephew of the appellant, alleges that he was six or seven years of age when the appellant engaged in sexually abusive behaviour with him for the first time. This is alleged to have occurred in the appellant's then motor car, a Mini. Various other allegations of sexual abuse occurred more than once in that motor car as well, it appears, in other motor cars owned by the appellant. The complainant claims to recall certain details of motor cars owned by the appellant, who also ran a car repair garage. Apart from identifying the Mini, the complainant gave details of one car in particular, namely a car with a particular stripe. The complainant's statement appears somewhat contradictory as to whether any incident of sexual abuse occurred in that car.

18. It is of note that the book of evidence records the appellant telling the gardaí in interview, that he did have a Mini and it was one of the first cars he bought. He accepted that he had a car of the make indicated by the complainant and accepted there could have been a stripe on it. He accepted that he was into cars and he said that he had lot of cars.

19. The appellant relied upon a document he had obtained from the Motor Taxation Office in the relevant County Council. This was an email dated the 22nd October, 2018 and it stated: -

> "Further to our conversation this morning, I wish to confirm that the National Vehicle Driver File does not have any records of vehicles registered in your name/business during the period 1971-1982."

It was never made clear in the course of the pleadings whether that meant that records might have existed in the past but were destroyed because of the efflux of time or whether it was a simple statement that there was no documentary evidence of his ownership of cars. Either way, the appellant submitted that the absence of documentation and the delay meant that he could no longer be certain as to the cars he owned at any particular time.

20. The appellant makes particular complaint about the fact that charges 8-31 in the book of evidence are alleged to have occurred at unknown locations between 1976-77. It must be noted that all of the locations are said to be unknown but within the particular District Court area. These appeared to be charges drafted by reference to the claim by the complainant that the appellant would pull into a gateway, "it was always the same gateway coz there were no houses around" where he was sexually assaulted by the appellant.

21. The appellant is accused of carrying out much of the sexual behaviour in the appellant's home. The appellant was a minor himself when the sexual abuse is alleged to have commenced and he lived in this home with his parents (deceased) and a sister (deceased) with the result he submits that he is prejudiced by the loss of evidence. He also says that no statement was taken from a surviving sister who lived in the said house for a portion of the period during which the alleged offences occurred. It should also be noted that in the book of evidence, the interview with the appellant records him saying that the complainant was often in his *i.e.* the appellant's, bedroom. He also answered probably when asked if he, the appellant, would be in the room when the complainant was there.

22. The complainant also alleged that sexual assaults took place at a premises which was the business premises of the appellant. There were a number of people employed by him at those premises. Statements from two persons have been included in the book of evidence. Three other people, two of whom were employees do not appear to have made statements and the appellant maintains that the absence of these statements deprives him of potentially exculpatory evidence. The appellant also pointed to the administration at the work premises being poorly organised and there was an absence of available documentation to identify the hours during which various employees would have been at work.

23. Both parties were in agreement that the starting point for the law in delay is the Supreme Courts' judgment in *SH. v. DPP* [2006] 3 I.R. 575 which formulated the legal test in determining whether a criminal trial should be prohibited on the grounds of delay as: -

> *"The issue for a court is whether the delay is resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial. The Court does not exclude wholly exceptional circumstances where it would be unfair or unjust to put the accused on trial."*

24. The appellant relied upon both aspects of the above test. He submitted that the length of the delay being between 36 to 47 years was of itself an exceptional factor which meant it would be unfair or unjust to put the accused on trial. The appellant has relied upon well-known passages in various decisions in the Superior Courts that refer to the difficulties in defending cases after a significant lapse of time.

Is it unfair to put the appellant on trial?

25. The judicial acknowledgment of the difficulty in defending cases after a significant lapse of time, does not permit the courts to set a time limit beyond which no prosecution may be commenced. Murray CJ. in *SH. v. DPP* dealt with that issue succinctly when he stated: -

> *"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 its 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."*

That principle was applied in the case of *M.S. v. DPP* [2015] IECA 309 which was relied upon by the trial judge in this particular case.

26. There has been a long lapse of time between the dates of these alleged offences and the prosecution of this appellant in respect of them. In the context of prosecutions that have come before the courts and have been permitted to proceed, the time at issue in these proceedings is not in itself exceptional, even if it can be said to be towards the higher end of the timeframe for the prosecution of offences. It must also be noted that this appellant is not an elderly man, now only sixty-four years of age. From his apparent engagement with the gardaí in lengthy interviews, it is clear that he was quite capable of remembering the highly relevant issues *e.g.* the presence of the complainant in his work, his cars and his business premises. He has no particular vulnerability. Although he seeks to rely on ill health as a ground, he did not have any particularly severe or even unusual illnesses prior to these proceedings being commenced. It appears that he may have suffered some stress from being accused of these offences but that in itself is not unusual. No evidence was placed before the High Court as to any particular effect of that stress on him over and above what might be anticipated for a person who is shocked by allegations being made after such a long lapse of time.

27. In all the circumstances of this particular case, I am satisfied that the appellant has not made out any grounds to allow this appeal on the basis that it would be unfair to put him on trial.

Is there a real risk of an unfair trial?

28. In the appeal before this court, counsel for the appellant laid great emphasis upon the case of *B.S. v. DPP* [2017] IECA 342. In that case, the complainant alleged she was raped a number of times by a farm labourer who was then an employee on the family farm. There had been a contemporaneous complaint made to the complainant's mother who has since deceased. This was passed on to the complainant's father who apparently dismissed the applicant on foot of the disclosure having been made. The applicant denied the complaint and averred that he ended up working for the father on very good terms and averred that if the father was alive he would have been able to explain this. There were also three other persons on the farm who it was said may know what was going on in or about the farm. The Court of Appeal overturned the High Court's refusal to grant prohibition in holding that the applicant was undoubtedly disadvantaged by not having the three deceased men available as potential witnesses to support his defence. The absence of the father of the complainant was also an issue. It was noted that the absence of these witnesses was particularly important in a case where credibility was likely to be a deciding factor.

29. It bears repeating as Murray CJ. stated that each case falls to be considered on its own circumstances. No two cases will have identical facts. It will be a matter of each court to assess the impact of the absence of particular persons on the fair trial in each particular case. The decision in *B.S. v. DPP* was based on the factual matrix of that case. It was bound up in the making of a contemporaneous complaint of rape and how that was dealt with *vis á vis* that applicant's position on the farm. Various witnesses including the complainant's father were important to that specific issue.

30. In the present case, the appellant has not identified any particular evidence that his late father, mother or sister might have given. It is acknowledged that they were people who were present in the house during the period of time in which these offences are alleged to have occurred. There is no suggestion that they witnessed any of the alleged offences or that any complaints were made to them. This is also a situation where the book of evidence records the appellant accepting that there were occasions he was present with the complainant in the bedroom in that house. He has not denied in the course of these proceedings, the accuracy or veracity of the record of his interviews. In my view, there has been a failure to engage with the facts by the appellant. His complaint about lack of fairness because of the intervening deaths of these people amounts to no more than a mere assertion of prejudice. I am satisfied that in respect of these witnesses, the trial judge did not err in his conclusion that he was not prejudiced in his ability to defend this trial.

31. The appellant also complained about the intervening death of the complainant's mother. The trial judge dismissed this claim on the basis that the complainant's mother received no mention in the statement of grounds, she lived some distance from the appellant's house and it was unclear as to what evidence apart from the most speculative evidence she could give. I am satisfied that he made no error in that regard.

32. The appellant also claimed that he was prejudiced due to the loss of the opportunity to have statements from certain employees. It appears that two employees have made statements. A third is in London and has not yet proven contactable. A fourth has suffered from a medical condition which apparently renders him incapable of giving a statement and the final employee for whatever reason has declined to make a statement. In the High Court, this was dealt with on the basis that these were absent statements. In the appeal, the appellant submitted that this was a situation where evidence from the three potential witnesses had been lost due to the passage of time. The appellant's complaint is thus that he is being deprived of potentially exculpatory evidence. He submitted that these witnesses worked for him and could assist the defence with a recollection of events for the alleged offences in the garage. Moreover, as the business of the garage had been poorly organised there was an absence of available documentation to identify the hours that various employees actually worked.

33. In this regard, the trial judge correctly identified that one of the three missing witnesses had simply declined to give a statement. In those circumstances it was possible that the appellant could call him on deposition to see if he had relevant information to give, or indeed could otherwise request a statement from him prior to going to court. In relation to the other statements, it is clear that the appellant has not identified anything particular that these missing employees could assist with. His complaint of prejudice is quite non-specific. The complainant in the present case did not make a complaint at any stage to the employees or indeed to any other person. The complainant does not claim that these were witnessed by any other employee. Moreover, two employees have made statements and can speak to the organisation of the business and the times in which employees were present. In the absence of any identifiable issue and in circumstances where these matters can quite properly be more fully considered at the trial, I am satisfied that the appellant has not established that there is a real risk of an unfair trial because of these missing witnesses.

34. In relation to the unknown location, the appellant has submitted that this creates a difficulty for him in defending the charges. These appear to relate to the alleged assault in the gateway. This is clearly a matter for trial. Indeed, in this case the lack of an identified place may never have been as a result of delay, because the complainant does not appear to have known which gateway or gateways, even at the time of the incident, that was the locus of the alleged abuse. In any event, if there is prejudice because of this lack of identification of the location, this is a matter that can be dealt with by the trial judge.

35. The appellant's principle concern was the absence of records in relation to the cars that he drove or owned during the period of the alleged abuse. The appellant claims to have difficulty identifying what motor vehicles he owned between 1971 and 1982. The trial judge noted that the appellant undoubtedly recalled owning three of the motor vehicles that had been identified by the complainant as motor vehicles in which certain of the alleged offences had transpired. I have referred in more detail to these above. The trial judge approved of the reasoning set out on affidavit by the investigating garda that the appellant's claim that he will be prejudiced because he encountered difficulty in

establishing ownership of the vehicles must be regarded with some scepticism. The reason for the scepticism was because he had agreed in interview that he owned various brands of car of stated colours. The trial judge held that this alleged prejudice was unaffected by his business premises being poorly organised administratively or the fact that there had been a fire.

36. I am quite satisfied that the learned trial judge did not err in that regard. There was no real issue of any substance between the appellant and the complainant as to the cars. The Mini in which the first set of offences is alleged to have occurred was accepted as having been the first car that the appellant drove. The appellant also accepted that he had a very particularly striped car. Any issue at trial as to the precise identity of that car or whether the complainant is actually alleging that an offence occurred in that car are properly matters for cross-examination at the trial. Moreover, the two former employees of the garage also identify up to five cars that the appellant owned. Many of these overlap with the information given by the complainant. The appellant has not engaged with all the available evidence about the cars in any meaningful way; his claim to prejudice has no substance.

37. The appellant also relied upon the cumulative nature of these prejudices. There may be cases where it is appropriate to grant an injunction preventing further prosecution on the basis of the cumulative nature of the prejudices alleged, even though no single item of alleged prejudice would be sufficient on its own to merit granting the injunction. This is not such a case. None of the items of alleged prejudice that the appellant has put forward comes close to establishing a real risk of an unfair trial. The cumulative effect of those alleged items of prejudice does not give any concern that in totality they amount to a real risk of an unfair trial. Even when combined with the lengthy delay and the stress that this appellant is under, there is no real risk of an unfair trial nor do those factors amount to exceptional circumstances which would mean it would be unfair to put him on trial.

38. Accordingly, and for the reasons set out above I would dismiss this appeal.

Postscript

39. Since the arguments were heard in this case, the Supreme Court has delivered judgment in *The People (DPP) v. C.C.* [2019] IESC 94. Although the decision upholding the fairness of the trial of that accused in the absence of a witness due to delay who allegedly played a role in the rape was a majority one of the Supreme Court, there was unanimity on the appropriateness of the criminal trial court dealing with the issue of fair trial. As O'Donnell J. stated: *"The position now has been reached, however, where it is generally accepted that in most cases it is preferable that delay be addressed by a so-called 'P.O'C. application' made at the close of the prosecution case, or by the evidence generally, if the accused adduces any evidence. The reasons for preferring that the matter be ventilated in the course of the trial have been set out in some detail in the judgment of the Chief Justice, and now appear settled. One example may, however, suffice. In a helpful passage in her judgment in the High Court case of P.B. v. Director of Public Prosecutions [2013] IEHC 401, (Unreported, High Court, O'Malley J., 6 September 2013), O'Malley J. said, at para. 59:-*

'The point of the decision in S.H. and the authorities that followed is that the difficulties caused to a defendant in cases of old allegations (and I do accept that there can be very real difficulties) are best dealt with in the court of trial. Trial judges are now accustomed to dealing with such cases and using such powers as are necessary to prevent injustice to accused persons. It is perfectly clear that a trial judge is not restricted to simply giving warnings to the jury but may, where necessary in exceptional cases, withdraw the case from the jury on the basis that the difficulties for the defence are such that it is not just to proceed. Such a decision, in the normal course of events, will often be better taken in the light of the evidence as actually given rather than as speculated about in judicial review proceedings.'"

40. Following on from *People (DPP) v. C.C.*, those who wish to challenge their prosecution on the grounds of delay may be well advised to think twice before proceeding to judicial review.

41. Finally, I am satisfied that the decision in *People (DPP) v. C.C*. confirms the principle that each of these cases is fact specific and that the issue of fairness and justice must be addressed in a very context specific manner. In the present case, and using the language of Hardiman J. in *S.B. v. Director of Public Prosecutions* [2006] IESC 67, (Unreported, Supreme Court, 21 December 2006), as referred to by O'Donnell J. in *People (DPP) v C.C,* I am satisfied that the appellant has not demonstrated that he has "*lost the real possibility of an obviously useful line of defence*".