APPROVED **[2021] IEHC 550**

THE HIGH COURT
JUDICIAL REVIEW

2020 No. 516 JR

BETWEEN

M.N.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 13 August 2021

INTRODUCTION

1. This matter comes before the High Court by way of an application to prohibit a criminal trial on the grounds of delay. The applicant has been charged with a number of offences arising out of child sexual abuse said to have occurred during the years 1984 and 1985. The prosecution is pending before the Circuit Criminal Court.

2. The applicant will be referred to throughout this judgment as "***the accused***" and the victim of the alleged sexual abuse will be referred to as "***the alleged victim***" or "***the complainant***". These terms reflect the fact that no criminal trial has yet taken place and the accused continues to enjoy the presumption of innocence. The accused has averred in his grounding affidavit that he has given instructions to enter a plea of not guilty, and wishes to contest the allegations against him.

3. The resolution of these judicial review proceedings requires the High Court to address two issues in sequence, as follows. First, it is necessary to rule upon an objection that the proceedings have been taken outside the three-month time-limit prescribed for judicial review proceedings under Order 84, rule 21 of the Rules of the Superior Courts. Secondly, it is necessary to consider whether the allegations of delay and prejudice are ones which should be left to the trial judge or, alternatively, whether they meet the high threshold for intervention by way of judicial review as prescribed by the Supreme Court in *Nash v. Director of Public Prosecutions* [2015] IESC 32 and subsequent case law.

PROCEDURAL HISTORY

4. The accused has been charged with eighteen counts of indecent assault. The offences are alleged to have occurred between the dates of 26 February 1984 and 3 September 1985. As of the date of the first of the alleged offences, the accused would have been fourteen years of age and the alleged victim would have been three years of age. The offences are said to have occurred in circumstances where the accused's mother had been providing childminding services at her family home.

5. As part of the disclosure process in the context of the pending criminal prosecution, the accused has been furnished with certain documentation from 1984 and 1985. It appears from this contemporaneous documentation that the alleged child sexual abuse came to the attention of the alleged victim's parents in October 1985. More specifically, it appears that at this time the child described to her parents certain acts which allegedly had been carried out by the accused. The parents arranged to have the child examined at the sexual assault treatment unit of a named hospital (the precise details have been omitted to protect the identity of the parties). It seems that the complainant may have had further dealings with the sexual assault treatment unit in 1994.

6. It further appears from the contemporaneous documentation that a separate allegation of child sexual abuse, involving a *different* child, had been made against the accused in 1985. This latter allegation had been reported to An Garda Síochána. It is not entirely clear, however, from the limited documentation which survives from 1985 whether An Garda Síochána had also been notified of the allegations which now form part of the criminal proceedings as against the accused. As discussed presently, counsel for the accused invites the court to draw the inference that An Garda Síochána had been so notified.

7. The contemporaneous documentation includes the minutes of a case conference dated 31 October 1985. The minutes purport to record the events at a case conference on 24 October 1985. The case conference had been convened in respect of both sets of allegations, and had been attended by a number of social workers and a medical doctor from the sexual assault treatment unit.

8. The minutes of the case conference include the following passages.

> "Sr. Peggie asked what was being done about [M.N.], the abuser. Dr. Woods said that he has been sent to John of Gods for therapy. He was badly beaten up by his father when his father was told about what [M] had done. Dr. Woods said that [M] was very reluctant to admit to anything at all.
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> Dr. Murphy then discussed the future work in relation to both children.
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> Dr. Woods informed the Conference that 'sexual abuse' is a misdemeanour in the eyes of the Law, therefore, the Police are under no obligation to prosecute offenders and it is therefore hard to get offenders to get treatment. Also, there is no therapeutic resource for offenders as yet in Dublin. It was generally agreed that laws needed changing and that a treatment centre for abusers should be acquired."

9. The minutes also contain the following summary of interviews with the complainant.

> "[Named redacted] subsequently saw Dr. Woods three times. Initially, it was hard to get information from her but finally she spilt the beans. Dr. Woods described [Name redacted]'s mother as very

> sensible and matter-of-fact and someone who was coping very well with the difficulties.
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> [Name redacted] has also mentioned that [M] was 'mean' to her, but hasn't yet disclosed how or what this means".

10. The contemporaneous documentation indicates that video recordings were made of a number of interviews with the complainant. These video recordings are no longer available. It is unclear as to whether they have been lost, misplaced or destroyed.

11. The complainant made a formal complaint to An Garda Síochána in June 2016. The accused gave a voluntary cautioned statement to An Garda Síochána in September 2018. Certain admissions were made but this court has been informed that the admissibility of the admissions made and the basis upon which they were made will be challenged at trial.

ORDER 84 TIME-LIMIT

12. The first issue to be addressed is whether these proceedings have been instituted within time. Order 84, rule 21 provides that judicial review proceedings must, generally, be instituted within three months from the date when grounds for the application first arose. This is subject to the court's discretion to extend time if certain criteria are fulfilled.

13. In order to determine when the grounds first arose, it is, obviously, necessary to consider the case that is actually being advanced by an applicant for judicial review. In the present proceedings, the case turns largely on the fact that the occurrence of the child sexual abuse had come to the attention of the victim's parents at the time. The accused invites the court to infer from the contemporaneous documentation that An Garda Síochána had also been notified of the alleged child sexual abuse. The accused then seeks to advance an argument that there has been blameworthy prosecutorial delay. Reliance is placed in this regard on the special duty imposed on the State authorities, over and above the normal duty of expedition, to ensure a speedy trial in the case of a criminal offence

alleged to have been committed by a young person (citing *Donoghue v. Director of Public Prosecutions* [2014] IESC 56; [2014] 2 I.R. 762).

14. It is correct to say, as counsel for the Director of Public Prosecutions does, that the accused, through his legal advisors, would have been aware as early as November 2019 that the alleged offences had come to the attention of the parents and the hospital authorities in 1985. November 2019 is the date upon which the first tranche of disclosure documentation was furnished to the accused's solicitor. The documentation had been provided in the context of the criminal proceedings, which were then before the District Court.

15. The application for leave to apply for judicial review was not moved before the High Court until 27 July 2020. Crucially, however, the possible involvement of An Garda Síochána in 1985 is not apparent from the first tranche of disclosure documentation made available to the accused's legal team. It was only when further disclosure was provided in June 2020 that the minutes in respect of the case conference on 24 October 1985 were first revealed. It seems to me, therefore, that the accused would not have been in a position to advance the specific case which he now pursues until the additional documentation had been disclosed. The application for judicial review hinges on establishing that prosecutorial delay should be measured from 1985 and not from 2016, when the complainant, as an adult, first made a formal complaint to An Garda Síochána herself.

16. It is correct to say that an applicant for judicial review is not entitled to hold off instituting proceedings until such time as all possible relevant documentation is available. Thus, for example, this court held in *Director of Public Prosecutions v. Tyndall* [2021] IEHC 283 that an applicant would not normally be entitled to await a copy of the transcript of the

digital audio recording of a Circuit Court hearing before pursuing judicial review proceedings.

17. It would, in principle, have been open to the accused to have instituted these judicial review proceedings prior to June 2020, and to make a generalised allegation of delay in accordance with the principles established in *S.H. v. Director of Public Prosecutions* [2006] IESC 55; [2006] 3 I.R. 575 and the subsequent case law. There is no doubt, however, that the grounds for an application to prohibit the criminal proceedings were significantly strengthened by the introduction of an argument to the effect that a complaint had been made to An Garda Síochána in 1985. On balance, therefore, I have concluded that the second tranche of documentation, belatedly disclosed in June 2020, is critical to what is, in truth, the principal argument now advanced. It was only on receipt of that documentation that the accused would have been in a position to formulate the claim now actually made.

18. In summary, therefore, I am satisfied that the application for judicial review has been made within three months of when the grounds of challenge first arose. The additional documentation was only disclosed in June 2020, and the *ex parte* application for leave to apply for judicial review was moved on 27 July 2020.

ASSESSMENT OF WHETHER REAL RISK OF UNFAIR TRIAL

19. The courts recognise that the dynamics of, and traumatic effect of, child sexual abuse are such that a victim may not come forward to make a complaint for many years after the event. For this reason, criminal prosecutions alleging child sexual abuse will be allowed to proceed notwithstanding periods of delay which, in the context of other types of prosecutions, would result in an order for prohibition.

20. The courts are, of course, also conscious of the constitutional right of an accused person to have a trial in due course of law. The test, per *S.H. v. Director of Public Prosecutions* [2006] IESC 55; [2006] 3 I.R. 575, is whether there is a real or serious risk that the accused, by reason of the delay, would not obtain a fair trial.

21. In the case of criminal offences alleged to have been committed by a child, there is an additional constitutional imperative to ensure that they are tried with expedition (*Donoghue v. Director of Public Prosecutions* [2014] IESC 56; [2014] 2 I.R. 762). To this end, the courts will assess whether there has been blameworthy prosecutorial delay. The ultimate test, however, is prejudice to the accused. Even if blameworthy prosecutorial delay is found to have occurred, this will not ordinarily be sufficient, in and of itself, to justify prohibiting a criminal prosecution from proceeding. It will normally be necessary to identify some specific prejudice.

22. The approach to be taken to prosecutorial delay is addressed as follows in *Director of Public Prosecutions v. C.C.* [2019] IESC 94 (at paragraph 5.30 of Clarke C.J.'s judgment).

> "However, it should also be noted that there can be cases where prejudice to the defence arises either from culpable delay on the part of investigating or prosecuting authorities or, indeed, although rarely, from wrongful acts on the part of such authorities. An overall assessment as to whether it can be said that a trial is fair can, in an appropriate case, take into account such culpable actions. An accused is entitled legitimately to complain that a trial is unfair by reference to a lesser degree of prejudice if that prejudice has been caused or significantly contributed to by the culpable actions of investigating or prosecuting authorities. The analysis of the prejudice actually caused should not differ from that outlined earlier. However, in reaching an overall assessment as to whether the trial is fair, the trial judge can properly have regard to such culpable failures, for it is particularly unfair that an accused suffers prejudice due to such culpable activity. It follows that a lesser degree of prejudice may suffice to render a trial unfair where the prejudice concerned flows from culpable acts or omissions."

23. The modern case law confirms that the court of trial—as opposed to the court of judicial review—is best placed to make an assessment as to whether there is a real and unavoidable risk of an unfair trial. The position is put as follows by Clarke J. (as he then was) in *Nash v. Director of Public Prosecutions* [2015] IESC 32 (at paragraph 2.22).

> "In those circumstances, I am of the view that it is preferable, except in clear cases, that the issue be left to the trial judge whether in civil or criminal proceedings. That position should only be departed from where, in advance of trial, the result of the outcome of any analysis of the competing interests is sufficiently clear to warrant the case not even going to trial. It must again be emphasised that, even where the case goes to trial, it remains one of the most important duties of the trial judge to assess, if the issue is raised, whether any of the lapse of time issues which emerge render it appropriate to reach a determination other than on the merits in all the circumstances of the case."

24. The Court of Appeal, in *H.S. v. Director of Public Prosecutions* [2019] IECA 266, has recently reiterated that it is the judge at trial who is primarily charged with upholding all relevant rights of the parties concerned, and that it is inappropriate to usurp that process save in the exceptional case where there is cogent evidence demonstrating the real risk of an unfair trial and where such prejudice cannot be avoided. The rationale for this approach was explained as follows (at paragraphs 83 to 85 of the judgment).

> "The High Court judge erred in failing to have due regard to the fact that in a trial concerning sexual assault the burden of proof rests on the prosecution and the oral testimony of the relevant witnesses and complainants will be comprehensively stress tested in cross-examination. The trial judge has a far greater opportunity to consider the testimony of the witnesses and to make directions or orders as he sees fit. This offers a far superior process to an exercise carried out in the context of judicial review, relying merely on written statements, frequently averments and affidavits sworn inevitably by parties, with no direct knowledge of the matters or incidents alleged.
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> The prosecution has available to it a full panoply of remedies, applications, submissions, arguments and requisitions to exercise as considered appropriate depending on how the run of the evidence goes. The trial judge is in a position to make such rulings as are appropriate and grant directions to protect the fairness of the trial and ensure its integrity and that it is conducted fairly. The trial judge's position is unique as the central party charged with upholding the

> relevant rights, and in particular the entitlement of the accused person to a fair trial which he or she can balance with regard to the rights and interests of the other stakeholders, including the public interest that serious crime be prosecuted and the entitlement of complainants who assert that they are victims of crime to have recourse to the courts where there is reasonable evidence and the trial can be fairly conducted as was stated by Charleton J. in *K. v. His Honour Judge Carroll Moran and Others* [2010] I.E.H.C. 23.
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> The High Court judge failed to give adequate weight to the presumption of innocence which governs the trial and imposes the burden of proof beyond all reasonable doubt upon the prosecution. There are extensive inbuilt protections in the criminal trial process which are available to aid the respondent and his legal team, and which may result in an appropriate case in some or all of the counts not going to the jury and the requirement in law that the jury be satisfied beyond all reasonable doubt as to [guilt] before convicting on any one or more count."

25. The central role of the trial judge has also been emphasised by the Supreme Court in *Director of Public Prosecutions v. C.C.* [2019] IESC 94 (at paragraph 1.3 of the judgment of Clarke C.J.).

> "One of the developments in the case law in recent times has been a suggestion that the question of whether it is possible to provide a fair trial, in such cases involving a lengthy lapse of time, should be left to the trial judge rather than, as tended to be the case during the earlier stage of the development of the jurisprudence, be decided in proceedings which sought to prohibit the conduct of the criminal trial before it commenced. It will be necessary to refer briefly to that development in due course but the underlying reason behind it was a view that a trial judge would normally be in a much better position to assess the real extent to which it might be said that prejudice had been caused to the defence by the lapse of time in question."

26. The grounds of challenge advanced by the accused in the present case are such that the court of trial is undoubtedly better placed to assess same than is the court of judicial review. The gravamen of the accused's case is that there has been culpable prosecutorial delay. This contention is predicated on an argument that the complaint of child sexual abuse in the present case should be understood as having first been made in 1985. The accused places emphasis on the fact that, unlike many cases of child sexual abuse, the alleged abuse in this case came to attention shortly after it is said to have occurred. More

specifically, the victim's parents became aware of the alleged child sexual abuse at the time, and were referred to the sexual assault treatment unit of a named hospital. This court is invited to infer that the allegations were also brought to the attention of An Garda Síochána at this time.

27. Counsel for the accused properly acknowledges that there is no direct evidence before the court which confirms that An Garda Síochána had been made aware in 1985 of the allegations against the accused. Nevertheless, counsel submits that a reasonable inference can be drawn to this effect. Emphasis is placed, in particular, on the minutes of the case conference discussed earlier (at paragraphs 7 to 9 above). It is submitted that it is reasonable to infer from the fact that the allegations involving the other child-victim had been referred to the police in 1985 that the allegations involving the complainant would similarly have been referred to An Garda Síochána.

28. If this inference is drawn, then the date of complaint for the purpose of assessing whether or not there has been prosecutorial delay is October 1985. On this analysis, it is said that there has been blameworthy prosecutorial delay. This delay is said to be especially significant in the context of an offence alleged to have been committed when the accused was himself a minor. The alleged offences occurred over a period of time when the accused was fourteen and fifteen years of age.

29. Conversely, the Director of Public Prosecution submits that the relevant date for assessing delay is June 2016 when the complainant, as an adult, made a formal complaint to An Garda Síochána.

30. There is no doubt but that were the accused in a position to satisfy the court that a complaint had, indeed, been made to An Garda Síochána in October 1985, then there would be strong grounds for saying that any trial some 35 years later would be unfair. In

particular, it would represent a breach of the requirement for expedition in offences involving minor offenders.

31. I am not satisfied, however, that the accused has established this on the balance of probability on the basis of the limited evidence before the High Court. The contemporaneous documents are, at best, *ambiguou*s as to whether a complaint had been made in respect of this specific complainant. It does not necessarily follow from the fact that a complaint had been made by the parents of the other child-victim that one was also made in respect of the victim in this case.

32. Given the unsatisfactory nature of the evidence before this court, the court of trial is best placed to determine the issue of prejudicial delay. There will be an opportunity for the accused's legal team to interrogate further the question of whether or not a complaint had been made to An Garda Síochána in 1985. The affidavit evidence to date merely establishes that no formal records confirming the making of such a complaint have yet been found. The Office of the Chief Prosecution Solicitor, by letter dated 26 April 2021, has, very properly, indicated the limitations in terms of records from 1985.

> "In relation to records held by An Garda Síochána, I am advised that Garda Connolly has searched for Garda records dating from 1985. The Child Protection Unit based at Tallaght Garda Station have advised that records exist only from 1996 onwards, when the Unit was set up. The Superintendent's Office at Tallaght was searched and no records exist dating from 1985.
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> Rathfarnham Garda Station was searched and there are no records from 1985. The Station was renovated in 1999.
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> Tallaght Garda Station was built in 1987. Garda 'Pulse' records went live on a phased basis in 1999. A number of significant cases were transferred to the Garda Pulse System and there are no entries in respect of your client on same or in relation to [the complainant]."

33. The accused is entitled to pursue the extent of the documents, and as to the inferences, if any, to be drawn from the absence of any records from 1985, at trial.

34. The court of trial is also best placed to address the prejudicial effect, if any, of the absence of the video recordings of the contemporaneous interviews with the alleged victim. Counsel on behalf of the accused has drawn attention to a description of the interviews set out in the minutes of the case conference on 24 October 1985. It is submitted that the description—in particular, the use of the phrase "spilt the beans"—is open to the interpretation that the victim may have had to be coaxed to provide information.

35. The loss of the video recordings would also appear to be significant in that these would have been the "best evidence" in relation to the complaint, and could have been used as a basis for the cross-examination of the victim in the event of any discrepancy between the detail given in the interviews and the detail in subsequent complaints.

36. Similarly, the court of trial is best placed to address the question of the admissibility of the statements made by the accused at his cautioned interview in 2018. It would be inappropriate for this court to engage with that issue at all. In the event that the court of trial were to rule the statements to be inadmissible as evidence, then the absence of contemporaneous records and, in particular, the absence of the video recordings, would assume a greater significance.

CONCLUSION

37. The application for judicial review is refused for the reasons set out herein. This is not one of those exceptional cases where there is cogent evidence demonstrating the real risk of an unfair trial such as to justify an order of prohibition being made by the High Court in judicial review proceedings.

38. I propose to list this matter before me at 10.30 am on Friday, 8 October 2021 to address the issue of costs (including, if relevant, the application of the Legal Aid – Custody Issues Scheme).

39. In concluding, it is important to emphasise the following. The fact that this court, as a judicial review court, has declined to prohibit the trial at this stage, does not, in any way, affect the approach to be taken by the court of trial. The reason that the application for judicial review has been refused is precisely because the court of trial is better positioned to ensure the accused's right to a fair trial. The court of trial, having heard evidence, can make a determination in respect of matters such as to whether a complaint had been made to An Garda Síochána in October 1985 or as to the significance, if any, of the unavailability of the video recordings of the interviews with the complainant.

40. The powers of the court of trial are not confined simply to putting in place procedural mechanisms which might mitigate any prejudice arising from what is undoubtedly significant delay. As explained by the Supreme Court in *Director of Public Prosecutions v. C.C.* [2019] IESC 94, the court of trial has jurisdiction to withdraw the case from the jury where the trial judge considers that such is the only way to prevent injustice to the accused.

Appearances

Giollaíosa Ó Lideadha, SC and James McCullough for the applicant instructed by Michael Hennessy & Company Solicitors
Sunniva McDonagh, SC and Kieran Kelly for the respondent instructed by the Chief Prosecution Solicitor

Approved Garrett Simons