

**THE HIGH COURT
JUDICIAL REVIEW**

[2022] IEHC 154
[Record No. 2019/481JR]

BETWEEN

RITA MURPHY

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 16th day of March, 2022

Issues

1. Criminal proceedings under Bill No. DUDP0567/2019, *DPP v. Rita Murphy* are currently pending before the Dublin Circuit Court in respect of fifteen offences under s.2 of the Larceny Act 1916 as amended. The applicant is the defendant in those proceedings and seeks an order of prohibition preventing her further prosecution in the criminal proceedings. The alleged offences are said to have occurred over a period of approximately twenty years. It is asserted that the applicant claimed her mother's Survivor's Pension.
2. The applicant claims that there has been prosecutorial delay as a consequence whereof the applicant has suffered prejudice by reason of the intervening death of her mother on 30 October 2015.

Background

3. On 31 October 2013 the Department of Social Protection (the Department) received an anonymous complaint as to a possible fraudulent claim of a payment of the Survivor's Pension in respect of her mother, to the applicant. It was indicated that the applicant's mother who was 91 years old at the time would "drop dead on the spot" if questioned by an official from the Department.
4. It is asserted by the applicant that prejudice is so significant and exceptional that a balancing exercise as such is not required, as the said prejudice coupled with prosecutorial delay is sufficient to secure an Order of Prohibition. It is further suggested that even if a balancing exercise is to be conducted the outcome of same should be in favour of an Order of Prohibition.
5. When the applicant was interviewed by An Garda Síochána on 24 May 2016 she stated that she collected the pension on behalf of her mother and gave it to her mother not knowing that her mother was in receipt of another pension.
6. It is argued that the applicant is now irremediably prejudiced by reason of the non-availability of her mother to confirm the applicant's explanation, and it is stated that this is an exceptional case where there is an inevitable and unavoidable risk of an unfair trial.

Jurisprudence

7. It is acknowledged that the prejudice must be manifest, unavoidable, and of such significance as to give rise to a real or serious risk of an unfair trial (*RB v. DPP* [2018] IEHC 326 para. 15, upheld by Baker J. in *RB v. DPP* [2019] IECA 48).
8. It is further acknowledged that the applicant must demonstrate a real possibility that the evidence of the missing witness would contain a material inconsistency that would be of benefit to the defence. It is not sufficient that the missing witness might have had something helpful to say but rather the applicant must be in a position to demonstrate what evidence the witness could reasonably be expected to have given. (*RB v. DPP* [2019] IECA 48 para. 55 and *AT v DPP* [2020] IECA 6 paras. 53-54).
9. The applicant relies on Dunne, *Judicial Review of Criminal Proceedings*, 2nd Ed., (Round Hall, 2021), para. 8 - 132, to the effect that the unavailable witness is more likely to create a real and unavoidable risk of an unfair trial where the witness would have been in a position to give direct evidence of matters material to the offences charged, and the proximity of the witness to events is more likely to give rise to a real possibility of that witness giving material evidence.
10. In *HS v. DPP* [2019] IECA 266 and in *AT v. DPP* [2020] IECA 6 the Court of Appeal endorsed the statement expressed by O'Malley J. in *SÓ'C v. DPP* [2014] IEHC 65 to the effect that the applicant must be in a position to point to, at least, a real possibility that the witness or evidence would have been of assistance to the defence. A theoretical possibility is insufficient. The question to be posed is as to whether there is a real possibility that the missing material would reveal a material inconsistency which would be of benefit to the applicant.
11. In *DPP v. CC* [2019] IESC 94 Charleton J. stated a summary of when an Order of Prohibition should be granted:
 - (1) the High Court should be slow to interfere with a decision of the DPP. The proper forum for the adjudication of guilt in serious criminal cases is, under the Constitution, a trial by judge and jury;
 - (2) it is presumed that an accused person facing a criminal trial will receive a trial in due course of law, the trial judge being the primary party to uphold the relevant rights, namely: an entitlement of the accused to a fair trial; the right of the community to have serious crimes prosecuted; and the right of the victims of crime to have recourse to the forum of criminal trial;
 - (3) the onus of proof is on the accused, and is discharged only where it is proved that there is a real risk of an unfair trial occurring, where any potential unfairness cannot be avoided by appropriate rulings and directions on the part of the trial Judge. The unfairness of the trial must therefore be unavoidable;
 - (4) in its adjudication the High Court should bear in mind that the trial judge will give necessary warnings to a jury;

- (5) the applicant's burden of a proof is not discharged by making general allegations of prejudice but such a burden requires the applicant to fully and actively engage with the facts;
 - (6) there may be circumstances, which are wholly exceptional, where it would be unfair or unjust to put an accused on trial;
 - (7) previous cases are of limited value and the adjudication is to be conducted in the light of all of the circumstances of the case before the court;
12. In the same case Clarke C.J. held that it has become accepted except in very clear cut cases that the issue of delay should be left to the trial judge who would normally be in a much better position to assess the real extent to which it might be said that prejudice has been caused to the defence by the lapse of time in question.
 13. O'Donnell J. indicated in that matter that the position has now been reached where it is generally accepted that in most cases it is preferable that delay be addressed by the so-called "POC application" made at the close of the prosecution case on the basis that the assessment of the overall fairness of the proceedings is best carried out at trial rather than in advance on the basis of affidavit evidence professionally drafted and speculation as to what might transpire at the trial.

Prosecutorial delay

14. In respect of the assertion of prosecutorial delay it is clear that the Department received the relevant anonymous complaint on 31 October 2013. There is an affidavit of Eltin Moran of the Department of 2 July 2020 setting out the steps taken by the Department following the anonymous complaint.
15. In respect of the period November 2013 to November 2014 it was indicated that there was a backlog in processing reports which had been referred notwithstanding the policy to act on such reports within a one-month period. The relevant section of the Department could not specifically recall the details concerning the report nor recall what actions occurred owing to the passage of time, the volume of work and staff fluctuations.
16. In *Nash v. DPP* [2015] IESC 32 at para. 3.6 Clarke J. stated that:

"It is important to emphasise that prosecuting authorities should only properly bring criminal proceedings where there is a prospect of success... But even beyond that, prosecuting authorities are, like all other agencies, subject to the limitation of finite resources. Decisions have to be made as to how those resources are best to be deployed. Allocating resources in the prosecution of one case may mean that there are less resources available in another area...a wide margin of appreciation must be left to prosecuting authorities as to how to allocate their resources with particular reference to concentrating on cases where there is the greatest likelihood of securing a conviction."
17. In *Daly v. DPP* [2015] IEHC 405, Kearns P. stated that:

“... there can be no obligation on prosecution authorities to unrealistically prioritise cases involving minors. In the view of the Court there was no blameworthy prosecutorial delay in this case. Even if I am wrong in this, applying the balancing test described by Dunne J. in *Donoghue*, I am satisfied that the applicant has failed to tip the balance in favour of prohibition.”

18. Insofar as the delay between the making of the complaint in October 2013 and the transmission of such complaint to An Garda Síochána is concerned, there does appear to be a period of approximately one year where no steps were taken and the explanation afforded is the volume of work and staff fluctuations. Bearing in mind the dicta in *Nash* aforesaid, it does appear to me that there is approximately a six to nine- month period of delay notwithstanding the margin of appreciation to be afforded to the Department.
19. Insofar as delay between November 2014 and 30 October 2015 (the date of death of the applicant’s mother) is concerned, there is a substantial affidavit of Garda Louise Keane of 30 June 2020 (and a second affidavit of 15 April 2021) which sets out in detail the steps taken in advancing the matter.
20. The applicant’s argument in this regard is to suggest that the affidavit contains a lot of “fluff and padding”. Such a submission is entirely inadequate to ground the suggestion that there was prosecutorial delay during this period, not least given the fact that the period of delay complained of in prior written submissions to the Court suggested that nothing was done from November 2013 to November 2014, and thereafter the investigation proceeded at a particularly slow pace. No details of a lapse on behalf of An Garda Síochána has been identified.
21. It has been accepted that given the basis of the applicant’s instant claim the period up to death of the applicant’s mother is the most significant period. It was suggested on behalf of the applicant that the period thereafter was also being relied on but there are no submissions, either oral or in writing, as to any identifiable period of prosecutorial delay in the period after the applicant’s mother’s death.
22. In the circumstances at best there is a period of between six and nine months of delay.

Prejudice

23. The applicant has no longer available to her, her mother’s evidence, assuming that her mother would support her contention that she was in effect merely facilitating her mother by collecting the pension, and always transmitted the pension monies to her mother.
24. During the course of submissions, it was argued that the prejudice to the applicant by reason of the death of her mother cannot be remedied by directions to the jury at trial other than they must acquit, as no other warning can deal with the issue.
25. Given:
 - (1) It is available to the trial judge to give a direction to acquit the applicant if the trial judge feels this is the only direction possible to ensure a fair trial;

- (2) it is impossible to know what the applicant's mother might say in favour of the applicant at her trial if still alive. However, now that she is not available to give evidence the applicant has no fear of her mother countering the applicant's explanation with regard to the collection of the pension;
- (3) it remains available to the applicant to call such evidence as she deems helpful to her other than her mother's evidence, for example, she travelled to her mother's home weekly to deliver the pension monies;

and accordingly it occurs to me that this is not the exceptional case suggested by the applicant by reason of the fact that it cannot be said that the prejudice complained of is manifest, unavoidable and of such significance as to give rise to a real or serious risk of an unfair trial.

26. As in the case of AT aforesaid, in the Court of Appeal, prematurity of the claim of prejudice means that at this point it cannot be said that same is manifest, unavoidable and of such significance as to give rise to a real or serious risk of an unfair trial.

Balancing exercise

27. Insofar as a balancing exercise is concerned the following factors would appear appropriate factors to be taken into account:

- (1) There is prosecutorial delay in this matter of approximately six to nine months allowing for a margin of appreciation in favour of the Department.
- (2) Once the matter was referred to An Garda Síochána and having regard to the evidence from An Garda Síochána which is before the Court, in circumstances where a margin of appreciation must also be applied, it appears to me that the applicant has not demonstrated that there is any further prosecutorial delay. The delay period therefore is modest/moderate.
- (3) There is no assertion or evidence of deliberate prosecutorial delay.
- (4) The applicant asserts that she has been considerably prejudiced by the death of her mother who is now unavailable to support the applicant's version of events.
- (5) The applicant has not been incarcerated on foot of the within charges at any time.
- (6) There is no evidence as to any heightened anxiety or concern.
- (7) There is an allegation of impairment of defence. However, it remains possible for the applicant to pursue by other means her defence to the within charges without fear of contradiction from her mother.
- (8) No prejudice in the conduct of a trial has been identified.
- (9) The community has a right to have serious offences prosecuted and the High Court should be slow to interfere with the decision of the DPP in respect of a prosecution.

- (10) The trial judge can withdraw the charges from the jury in the event that the trial judge is of the view that this is the only mechanism by which fairness can be achieved.

Conclusion

28. Having considered the foregoing matters, it appears to me that a fair trial is possible and that in all of the circumstances prohibition should not be granted.

Costs

29. If an order for costs is sought, the Court should be provided with submissions identifying the legal basis for such an entitlement. If either party contends for an order regarding costs, written submissions no longer than 2,000 words should be filed in hard copy in the High Court List Room and in soft copy by email to the High Court Submissions Inbox (highcourtsubmissions@courts.ie) within 14 days following electronic delivery of this judgment; the other party being entitled to respond by written submission no longer than 2,000 words within a further period of 14 days thereafter. The Court will thereafter consider same and the matter will be listed for mention on Tuesday, 26 April 2022 at 11am.
30. Otherwise, in default of any submission seeking costs being filed as above provided and within the time specified, there will be no order as to costs.