THE HIGH COURT

[2023] IEHC 3

[2019-817 JR]

BETWEEN

F.

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice Bolger delivered on the 11th day of January, 2022

1. This is an application for *certiorari* and declaratory relief preventing a criminal prosecution arising from events alleged to have occurred between 1981 and 1985, on grounds of delay and the manner in which the case has been prosecuted, which the applicant says creates a real risk of an unfair trial and on grounds of the exceptional reasons that he says arise from his current health and memory issues.

2. The applicant is a 75-year-old man charged with five counts of indecent assault said to have been committed between June 1981 and May 1986 on the complainant when she was between 14 and 19 years of age.

3. For the reasons outlined below I am refusing this application.

The applicant's submissions

4. The applicant contends he cannot get a fair trial due firstly to specific prejudice caused by delay and secondly to his memory and cognition difficulties which he says compound the delay and constitute exceptional circumstances. He relies on the test of "a real or serious risk" of an unfair trial formulated by Murray C.J. in *SH v DPP* [2006] 3 IR 575 which he submits is fact specific; *PT v DPP* [2008] 1 IR 701. He says the delay has compromised his ability to mount a defence and relies on Hardiman J.'s criticism in *JO'C v DPP* [2000] 3 IR 478 of a trial consisting of assertion countered by bare denial. He says that the evidence relied on by the prosecution amounts to a bare allegation which can only be challenged by a mere denial in the absence of independent or objective factual evidence, which endangers his right to a fair trial; Hardiman J. in *PO'C*.

5. The applicant asserts specific prejudice firstly from the absence of three witnesses who have passed away and secondly from missing documentary evidence including records from the factory where the complainant worked at weekends and from where she says she visited the applicant. He relies on *DPP v CC* [2019] IESC 94 where O'Donnell J. held there is a point "at which the deficiencies are of such significance and reality in the context of the particular case that it can be said that it is no longer just to proceed".

6. The applicant says he was diagnosed with memory and cognitive issues in 2002 and relies on *TC v DPP* [2017] IEHC 839 where White J. found that the applicant's terminal medical difficulties gave rise to exceptional circumstances that prohibited the criminal trial.

7. The applicant also relies on the cumulative effect of the issues on which he relies individually, which he says creates a separate real and serious risk of an unfair trial: McCracken J. in the Supreme Court in *DK v DPP* [2006] IESC 40, MacMenamin J. in *JD v DPP* [2009] IEHC 48 and more recently Kennedy J in *MS v DPP* [2021] IECA 193

Submissions of the DPP

8. The Director sets out the following as the standards for the court to determine whether there is a real risk to an accused's right to a fair trial:

    a. Whether the applicant has engaged with the facts and demonstrated the materiality of unavailable evidence, and whether the evidence can be obtained elsewhere or can be dealt with by warnings from the trial judge (MacMenamin J. in *MU v DPP* [2010] IEHC 156).

    b. If certain witnesses are absent, does that absence give rise to irremediable prejudice on the basis that their presence was "demonstrated to be essential in order to assist the applicant's defence in respect of the charges" (Dunne J. in *KD v DPP* [2011] IEHC 384).

    c. An applicant must be able to point to a "real possibility that the witnesses or evidence would have been of assistance to the defence" as opposed to a theoretical possibility that the evidence of an unavailable witness might contradict the complainant's account or that of other witnesses (O'Malley J. in *Ó'C v DPP* [2014] IEHC 65).

    d. Whether the evidence which is no longer available is "no more than a missed opportunity" or whether the applicant has "lost the real possibility of an obviously useful line of defence" (Hardiman J. in *SB v DPP* [2006] IESC 67) and that the prejudice complained of is "manifest, unavoidable and of such significance as to give rise to a real risk or serious risk of an unfair trial" (Baker J. in *RB v DPP* [2019] IECA 48).

9. The Director disputes any culpable prosecutorial delay, but any that may have occurred is insufficient in and of itself to warrant prohibiting the prosecution. On the applicant's claimed medical problems, the respondent says the evidence indicates that he has always had memory problems so even if the trial had commenced closer in time to the alleged incidents, it is likely the same problems would have existed.

10. The absence of employment records does not establish prejudice. The complainant's employer had no legal obligation to maintain records in 1987 and in any event, two witnesses who worked with the complainant, as well as the complainant herself, are available for cross-examination. Any issues arising can be cured by appropriate rulings and directions from the trial judge.

11. In relation to the death of witnesses, one of these died prior to the offending behaviour ceasing and another some thirteen months after the alleged offending ceased and so the respondent argues there is no reality to the trial having commenced prior to either death.

The complainant's mother's purported relevance is entirely speculative, and that the applicant's sister is a witness on the book of evidence and would be in a far better position to give evidence as to what happened. The complainant's mother was suffering from Alzheimer's as of 30 August 2011 at the latest. Even if the trial had been much earlier, it is likely she would have had difficulty providing any relevant evidence, assuming she had any to give.

12. In relation to the claimed lack of islands of fact, the respondent relies on the witnesses who were alive at the time. Determining factual issues such as inconsistencies are quintessentially a matter for a jury; Edwards J. in *DPP v M* [2015] IECA 65.

Decision

13. An accused person must not be put at a real risk of an unfair trial. A court must address that risk where there has been considerable delay in bringing forward a prosecution, whether that is due to a delay in the complaints or with the prosecution or a combination of both. The courts have generally (though not always) done that by leaving the issues to be addressed by the trial judge; see O'Donnell J. in *CC* where he discussed the "Haugh warning" in reference to the charge given to the jury at the trial in *DPP v. RB* and approved by the Court of Criminal Appeal DPP v. PB (Unreported, Court of Criminal Appeal, 12 February 2003).

14. O'Malley J. in *PB v DPP* [2013] IEHC 401 endorsed the better ability of the trial judge than the judicial review judge, to assess the difficulties caused to a defendant in cases of aged allegations. Charleton J. in *Nash v DPP* [2015] IESC 32 described the trial judge as having "the primary role" in decisions of this kind and went on to say that judicial review is rarely appropriate.

15. An assessment of the extent to which delay may have caused a prejudice is best done at the trial and by reference, where necessary, to the actual evidence adduced and/or the nature of any warning to be given to the jury, as observed by O'Donnell J in *CC*:

> "[T]he assessment of the overall fairness of the proceedings is best carried out at the trial, rather than in advance on the basis of the affidavit evidence professionally drafted and speculation as to what might transpire at a trial. The courts came to require that applicants at least directly engage with the case, rather than seek to raise hypothetical issues. Moreover, the place that any lost evidence, whether real or oral, might play in a case was best assessed in the context of the case itself, and the manner in which it proceeded… It is not necessary to indulge in any undue enthusiasm for the advantages of the eagle-eyed judge of trial, but it remains the case that, as has been observed, appellate courts should not interfere with findings of fact by trial judges unless compelled to do so, not least because, in making such decisions, the trial judge will have regard to "the whole sea of evidence presented to him, whereas an appellate court will only be island hopping", and "the atmosphere of a court room cannot in any event be recreated by reference to documents, including transcripts of evidence": see the judgment of Lewison L.J. in *ACLBDD Holdings Ltd. v. Staechelin* [2019] EWCA Civ 817, [2019] 3 All E.R. 429".

16. Charleton J., in the same decision said that "what the judicial system must seek is a trial that is good enough to meet the exacting standards that the administration of justice requires". O'Malley J. went on to summarise the issue as "whether the accused has lost the real possibility of an obviously useful line of defence".

17. I do not consider that the evidence establishes that the applicant has sustained that loss here or that the risk or possibility of any such loss cannot be safely and adequately addressed by the trial judge.

Specific prejudice

18. The applicant has identified five specific areas where he says he is irremediably prejudiced and which give rise to a real risk of a fair trial. I assess each of them below.

i. Prosecutorial delay

19. The complainant first made complaints in June 2017. The applicant was interviewed in November 2017. The file was submitted to the DPP and further statements from the complainant (who resides outside of the jurisdiction) were taken. The applicant was charged in May 2019. In October 2019 the indictment was served which altered the time span of the charges.

20. This timeline does not show blameworthy prosecutorial delay. If I am wrong on that, I do not accept that any prosecution delay that may have occurred has caused the applicant a prejudice that cannot be adequately addressed by the trial judge if necessary. Any such delay is insufficient to warrant prohibition of the trial.

ii. The applicant's memory problems

21. The applicant's medical evidence confirms he has had memory problems for very many years but has not yet developed actual dementia. Even if he had been prosecuted closer in time to when the incidents are alleged to have occurred, he would still have had to deal with the challenges that his long standing memory issues would have posed for him at that time. I am satisfied that any issues he may have arising from his current medical condition can be adequately addressed by a trial judge's rulings and directions if appropriate or necessary. I adopt the same approach as was adopted by Heslin J. in JJ v DPP.

22. The applicant says that his now impaired memory precludes him from securing evidence that might otherwise have been available to him. I consider the claim, that useful evidence may have been available to him if he had been prosecuted earlier, is speculative. In any event even if he is correct, any issues arising from unavailable evidence can be dealt with by the trial judge more appropriately than this court could or should. Insofar as the applicant claims inconsistencies, those claims are usually better addressed by a jury; Edwards J. *M v DPP* [2015] IECA 65.

iii. The lack of employment records

23. The applicant claims prejudice in establishing islands of facts from the absence of his and the complainant's employment records. Such records have only required to be kept for a limited number of years since the implementation of the Organisation of Working Time

Act in 1997. Even if the applicant had been prosecuted closer in time to the occurrence of the alleged incidents, no obligation to retain records would have been in place at the time when the complainant claims she was assaulted by the applicant. In any even the availability of two witnesses who worked with the complainant means the applicant will be allowed to challenge the complainant's claim that she would cycle to his house after finishing her work in the factory at weekends.

iv. The death of the applicant's aunts and the complainant's mother

24. The applicant asserts prejudice due to the absence of his two aunts whom the complainant says he visited during the week. The complainant claimed that the applicant would leave his aunts' house to coincide with her alighting from her school bus. The applicant disputes this as factually incorrect as he was living and working in Dublin during the week at that time. He says the absence of his aunts, who are now deceased, has prejudiced him in challenging the complainant's account. One of his aunts died before the alleged incidents ceased and the other died some thirteen months later. Their loss cannot be said to have deprived him of making a defence that would otherwise have been available to him had he been prosecuted sooner. To the extent that the delay gives rise to any issues for him, I am satisfied that they can be adequately dealt with by the trial judge.

25. The applicant suggests that the complainant's mother could have given "potentially helpful evidence" about the complainant's version of events and her routine after she got off the school bus. However on the complainant's statement her mother is not a central witness and even if she was, the medical evidence is that she had developed Alzheimer's by August 2011 at the latest. So if the trial had taken place sooner it is unlikely that the complainant's mother could have provided reliable evidence, even if she had anything relevant to say. To the extent that her absence may present an issue for the applicant, I am satisfied that that can be addressed adequately by the trial judge more appropriately than this court could or should.

v. The applicant's health problems as exceptional circumstances

26. The applicant claims that his health problems amount to wholly exceptional circumstances that would render any trial unfair and/or pose a real and substantial risk to his right to a fair trial. His medical reports confirm a diagnosis in 2019 of long term memory and cognitive difficulties and a recent diagnosis from 2021 of an amnestic type mild cognitive impairment. Nevertheless his doctors found he was well cognitively, not progressing to dementia and not showing rapid changes in his memory. I am satisfied that the applicant's health difficulties are not at a level that could justify his claim that he is at a risk of an unfair trial that cannot be ameliorated by the trial judge in their management of his trial. I distinguish the findings made by the High Court in *MS v DPP* [2018] IEHC 285 to the effect that the appellant's poor health impacted on his ability to participate fully in the trial. That, combined with what the court had found to have been prosecutorial delay and the fact that the appellant could have been tried earlier in conjunction with other charges (neither of which arise in this case) combined with the passage of time since the alleged incidents led Kennedy J. in the Court of Appeal to conclude:

"the cumulative impact of the identified factors brought the case into the realm of exceptionality required so as to render it unjust, unfair and/or oppressive to put the appellant on trial".

27. This case includes a lengthy delay since the incidents are alleged to have occurred but does not include the other findings made by the High Court in *MS*. I do not find cumulative factors of an exceptional kind here such as would render it unjust to leave it to the trial judge to ensure the protection of the applicant's right not to be subjected to an unfair trial.

Conclusions

28. The applicant has not satisfied me that he has suffered irreparable prejudice, whether specifically or cumulatively, by the lapse of time, his health or memory issues, the manner in which the charges are being prosecuted or the absence of oral or documentary evidence. Neither has he satisfied me that those matters amount to exceptional circumstances rendering the continuation of the prosecution unfair or unjust. I find that any issues that may arise at the trial due to any delay, the absence of evidence and/or the applicant's medical condition, can be safely and adequately addressed by the trial judge and, if necessary or appropriate, by directions to the jury or any other steps that the trial judge may consider appropriate in ensuring the applicant's constitutional right to a fair trial in accordance with law.

29. I will put the matter in for mention before me on 26 January at 10:30 to deal with final orders including any costs order that may be required.