APPROVED **[2025] IEHC 10**

THE HIGH COURT

Record No.: 2024/46 JR

BETWEEN:

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Applicant

-and-

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

JUDGMENT of Mr Justice Rory Mulcahy delivered on 14 January 2025

Introduction

1. In October 2023, the applicant was acquitted on five of six counts on an indictment. Each count on the indictment related to acts which were alleged to have occurred as part of a single sequence of events. The jury were unable to reach agreement on the sixth count on the indictment. The respondent has directed a re-trial on that single count, an allegation of sexual assault. In these judicial review proceedings, the applicant seeks to prohibit his re-trial on that single charge. He claims that there is a real risk of an unfair trial should he be re-tried on that single count, which he contends would be a breach of his constitutional rights. He also argues that permitting a re-trial on the single remaining count would undermine the jury's verdict on the other counts on the indictment.

2. The respondent argues that there is nothing inherently unfair about ordering a re-trial where there has been a partial acquittal. She argues that the applicant has failed to discharge

the burden of establishing on the balance of probabilities that any re-trial will be unfair. Moreover, she argues that the applicant has an adequate alternative remedy still available to him, an application to the trial judge in accordance with the principles in *PO'C v DPP* [2000] 3 IR 87. In the circumstances, she argues that this application should be refused.

3. For the reasons set out in more detail below, I am satisfied that the applicant has not shown that any further trial will inevitably be unfair. Far from undermining the jury's verdict in the original trial, a re-trial on the single count on which the jury could not agree fully respects that decision. I am also satisfied that there remains available to the applicant an alternative, more appropriate remedy, an application to the trial judge, which he can pursue should it be considered appropriate in due course.

Background facts

4. When granting leave to apply for judicial review, the court (Hyland J) made an order, on the applicant's application, restricting the publication of any matter tending to identify the applicant. The respondent does not oppose that order. In the circumstances, I have anonymised the title to the proceedings and propose setting out the background facts in an abbreviated way to avoid any risk of identification of either the applicant or the complainant.

5. The applicant was tried in the Central Criminal Court on an indictment containing six counts, including three counts of rape contrary to common law, one count of rape contrary to section 4 of the Criminal Law (Rape)(Amendment) Act 1990 and two counts of sexual assault contrary to section 2(1) and 2(a)(i) of the Criminal Law (Rape) Amendment Act 1990. All counts on the indictment related to events which were alleged to have occurred on a particular date in 2020. In these proceedings, the parties were agreed that the main issues at trial were the question of consent and/or the lack of *mens rea.* In this regard, it is stated in the applicant's Statement of Grounds that it was never put to the complainant in evidence that the acts alleged in the indictment did not take place.

6. It appears from the pleadings that all counts on the indictment relate to a single sequence of events alleged to have occurred between the applicant and the complainant in which a number of offences were alleged to have been committed by the applicant, resulting in the six counts on the indictment. Following a trial, the jury returned verdicts of not guilty on

five of the counts but were unable to reach agreement in relation to the remaining count on the indictment. The applicant contends that the count on which the jury were unable to reach agreement, an allegation of sexual assault, is alleged to have occurred in the middle of the sequence of events, both before and after acts giving rise to counts on the indictment in respect of which he has been acquitted.

7. Following the trial, the applicant was remanded on continuing bail pending a decision by the respondent regarding the remaining count on the indictment. On 6 November 2023, the court was informed that the respondent had directed a re-trial on the remaining count.

8. The applicant sought and obtained leave to apply for judicial review on 24 January 2024. The respondent filed a Statement of Opposition on 1 August 2024. In her Statement of Opposition, the respondent pleads that she "*will not refer to [the] earlier trial in direct examination*."

9. The application for judicial review was heard on 13 December 2024.

Arguments

10. The applicant does not contend that re-trial following disagreement by the jury is inherently unfair. He accepts that the authorities support the proposition that a re-trial, even where there has been a partial acquittal, does not, in principle, breach the constitutional requirement for a fair trial. Rather, he argues that in the particular circumstances of this case, it is inevitable that any such re-trial would be unfair.

11. He notes the respondent's commitment not to refer to the earlier trial but contends that it remains unclear whether she will lead evidence of the alleged facts grounding the earlier charges. If she does, he says that there is a risk that a jury would convict the applicant based on the evidence grounding the charges on which he has already been acquitted and that "*no directions of a trial judge*" could prevent this. If, in the alternative, there is to be no reference to that evidence, he contends that the jury will inevitably be left with a "*partial, misleading and highly artificial account of what was essentially one continuing event*".

12. He argues that he will face an "*extremely difficult dilemma*" in deciding whether to refer to the other charges in any re-trial.

13. He also contends that the respondent's decision to re-try him on the single remaining count is "*factually inconsistent*" with respecting the first jury's verdict and that a conviction on the one remaining count would be logically inconsistent with the acquittal on the other counts. As explained in his submissions, he contends that a conviction on the remaining count would require a conclusion that it had been proved beyond reasonable doubt that the complainant had not consented to the conduct the subject of that count and that the accused knew or was reckless as to whether there was consent, notwithstanding the jury's apparent conclusion in the first trial that this had not been proved beyond reasonable doubt in relation to activity both immediately before and immediately after the incident the subject of the remaining count.

14. The respondent contends that the court should respect the DPP's decision. She accepts that it may be challenging to conduct a re-trial in accordance with the constitutional requirements for a fair trial but that it is not inevitable that any re-trial would be unfair. This court must assume that the trial judge will conduct any re-trial in accordance with the requirements of the Constitution and will vindicate the applicant's right to a trial in due course of law.

15. She contends that the public interest in the prosecution of offences weighs in favour of permitting a re-trial.

16. She places significant weight on the availability of an alternative remedy, being an application to the trial judge in accordance with the principles in *PO'C v DPP* [2000] 3 IR 87.

Case law

17. It is clear that a re-trial in the case of jury disagreement is not inherently unfair. In complex cases, even a third trial may be permissible (see *Byrne v Judges of the Dublin Circuit Court* [2015] IESC 105). This is not disputed by the applicant.

18. In *McNulty v White* [2009] 3 IR 572, the Supreme Court made clear that in a re-trial, neither party is bound to approach the case in the same way as they approached the first trial. The court (Hardiman J) did not rule out the possibility that there may be circumstances where a change of approach between trial and re-trial could be oppressive, but concluded that "*that is a matter for the judge presiding at the second trial and not for judicial review*."

19. In *SO'B v DPP* [2020] IEHC 165, the High Court (Humphreys J) considered the fairness of a re-trial in a case where, as here, there had been a partial acquittal and a disagreement at the original trial. In that case, the applicant had been charged with seven counts of sexual assault, alleged to have occurred over a period of time when the complainant was a minor. Three of the counts related to specific alleged incidents, four were, as described in the judgment, "*general counts which were, in effect, representative of alleged ongoing abuse by the applicant over a period of time*." The jury returned verdicts of not guilty on the four general counts and disagreed on the three specific counts. The applicant sought to restrain his re-trial on those three counts.

20. He argued that the re-trial would involve the prosecution re-configuring its case significantly. In addition, he contended that he would be faced with the "*impossible dilemma*" of deciding whether to refer to the previous acquittal.

21. As the court pointed out, reconfiguration was inevitable in any re-trial and the procedure is not in itself unconstitutional. As to the dilemma facing the applicant, he acknowledged that the choice facing an accused (and their legal advisers) may be an agonising one, but considered that to be a feature of any criminal trial. At the outset of the judgment, the court summarised the position as follows:

> "*1. A general issue arises in any retrial following a partial acquittal. If an accused is tried on counts A and B, and is acquitted of A, but the jury disagrees on B, there are at least two possible complications when that accused comes to be retried on count B:*
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> *(i). firstly, the defence will have to deal with the question of whether the jury should be told of the acquittal on count A;*
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> *(ii). and secondly, there is the fact that some reconfiguration of the prosecution case is inevitable in order to drop those parts of it that refer to count A.*

2. *Seeing as the Supreme Court has so definitively endorsed the procedure of retrial and indeed in serious cases a possible second retrial (*Byrne v. Judges of the Dublin Circuit Court *[2015] IESC 105, [2015] 2 JIC 1704 (Unreported, Supreme Court, 17th February, 2015)), it follows that any inevitable concomitants of such procedures, such as the reconfiguration of the prosecution case or the dilemma as to whether the jury should be told of the outcome of the first trial, are not in themselves unconstitutionally unfair.*

22. In *DPP v CC* [2019] IESC 94, the Supreme Court addressed the circumstances in which a trial might be prohibited on grounds of unfairness, in particular, on account of prosecutorial delay. A helpful summary of the relevant principles is set out in the judgment of the High Court (O'Regan J) in *Murphy v DPP* [2022] IEHC 154:

"*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."

23. In *SO'B*, Humphreys J applied those principles in the context of an application to prohibit a re-trial following a partial acquittal (at para. 23):

"*However, the general rule as the law currently stands is that matters such as delay and unfairness should be dealt with by application at the trial, although there may be very limited exceptions:* P.O'C v. D.P.P. *[2000] 3 I.R. 87. The test for prohibition and prohibition-like remedies, such as an injunction, is that it has been demonstrated that the trial will be inevitably or unavoidably unfair. If fairness can potentially be achieved within the trial then the ordinary criminal mechanisms, both at first instance and then on appeal, should be allowed to proceed.*"

24. It is clear that a trial judge remains under a continuing obligation to assess the fairness of a criminal trial. In *Nash v DPP* [2015] IESC 32, under the heading '*Emerging Unfairness'*, the Supreme Court (Charleton J) observed as follows:

> "*36. Whether as to the factors complained of, or on the basis of difficulties that may or may not emerge in the trial process, the duty cast on the trial judge remains the ensuring of a trial that accords with the constitutional norm guaranteed in Article 38.1, one "in due course of law." Should insuperable difficulties emerge whereby there cannot be a reasonable exploration of any rational line of defence enquiry into facts that may be relevant in a practical sense to what may reasonably be regarded as a potential reasonable doubt on behalf of the accused, there may come a time when the trial judge should declare that a fair trial is impossible. In making such an adjudication, a trial judge ought to take into account the rights of the community and the entitlement of victims to have the wrong done to them appropriately scrutinised in the context of a criminal trial. But if the risk of unfairness which emerges is real and is not merely a series of conjured-up hypotheses and is such that no direction or appropriate ruling may overcome it, the judicial duty may exceptionally emerge to stop the trial. That will be a matter for the trial judge.*

Discussion

25. It is clear from the authorities that it is only in exceptional cases appropriate to prohibit a criminal trial in judicial review proceedings on the grounds that a trial will be unfair or breach the constitutional guarantee of a trial in due course of law. Rather, any complaint about an unfair trial should ordinarily be made to the trial judge. This is for very good reason, amply demonstrated by the arguments in this case.

26. The applicant asks this court to determine that it is inevitable that any re-trial will be unfair. In so doing, he is required to hypothesise as to how such a trial may proceed, what evidence may be tendered, and what directions may be given by the trial judge. However, any trial judge will not be required to hypothesise, rather they will be in a position to assess

the fairness of the trial on the basis of the evidence actually sought to be adduced and in light of the tools available to that judge to ensure a fair trial. It is readily apparent, therefore, that the trial judge will be in a far better position to assess fairness than is this court in judicial review proceedings.

27. I am not persuaded that the hypothetical scenarios laid out by the applicant reflect the only possible outcomes should a re-trial take place. More importantly, I am not persuaded that the scenarios painted would inevitably breach the applicant's constitutional right to a trial in due course of law. The applicant contends that no direction from a trial judge regarding the treatment of evidence could prevent the risk of an unsafe conviction. I do not accept that this is so, or at least, I do not accept that the applicant has proven that, on the balance of probabilities, this is inevitably the case. In any event, the trial judge will be in a better position than this court to determine, should the situation arise, whether any direction is necessary, and, if it is necessary, whether it would be sufficient to ensure a fair trial.

28. I accept, as did Humphreys J in *SO'B*, that the applicant and his advisers will have to make difficult decisions regarding how to approach his defence in any re-trial, but I take the same view as was taken in that case, that that does not render a re-trial unfair.

29. Separate from the applicant's complaints regarding the potential difficulties in ensuring that any re-trial is unfair, he seeks to argue that a re-trial is inherently inappropriate because it does not respect the original jury's decision. When broken down, however, it is apparent that it is the applicant who is arguing for a position which does not respect the original jury's verdict.

30. As characterised by the applicant, the jury's decision must have involved a conclusion that the absence of consent, or recklessness as to whether there was consent, had not been proven beyond a reasonable doubt in relation to offences alleged to have occurred immediately before and after the incident the subject of the remaining count. He argues that it would be inconsistent with that verdict to ask a second jury to conclude that it had been proven beyond a reasonable doubt that there was no consent to the conduct the subject of the remaining count. In effect, he argues that it would be irrational for a jury in a re-trial to reach such a conclusion, so it would be unfair to subject the applicant to a trial in which it was asked so to do.

31. Even if the court accepts, for the purpose of this argument, the applicant's explanation of the jury's decision to acquit on five counts to be correct, the logic of the argument is wholly flawed. It simply does not follow that a conclusion that the absence of consent had not been proved beyond a reasonable doubt in relation to some sexual activity means that it is not open to a jury to conclude that there was no consent to other activity. To suggest otherwise is plainly wrong and inconsistent with the law in relation to consent. This remains the case when the activity complained of is part of a single sequence of event, even, as here, where it occurs in the course of a sequence of events where the absence of consent has not been proven in respect of sexual activity both before and after the matter the subject of the remaining charge.

32. Moreover, it is apparent that that conclusion is consistent with the jury's original verdict. On the applicant's case, having been acquitted on the other five counts, the only logical conclusion was that he should have been acquitted on the remaining count. However, the jury did not acquit on that count; rather, they could not agree. It is apparent, therefore, that for the original jury, acquittal on the other counts did not lead to an inevitable conclusion that there must be an acquittal on the remaining count. To permit a jury in a re-trial to consider that remaining count afresh is, therefore, entirely consistent with the original jury's verdict and respects it. To prohibit a re-trial, by contrast, would be, in effect, to re-write the decision of the jury on that count.

33. In all the circumstances, the applicant has not established that this is one of the exceptional cases in which it can be determined *a priori* that a trial will be unfair such that it is appropriate to prevent that trial taking place. A re-trial will not inevitably be unfair, and the trial judge will have adequate tools to ensure a fair trial or to determine, in light of the conduct of the trial, whether a fair trial remains possible. The matter should, therefore, proceed to re-trial, as directed by the respondent. Should any issue of alleged unfairness arise in the course of the trial, it is open to the applicant to make a *PO'C* application to the trial judge.

34. Before concluding, I should address one argument advanced by the applicant in response to the respondent's contention that an application to the trial judge was a more appropriate remedy in this type of case. The applicant refers to the fact that when these proceedings were listed for mention for the purpose of fixing a date for trial, his counsel

referred to the possibility of seeking a pre-trial application regarding the fairness of a re-trial. The applicant then refers to the fact that the presiding judge refused to entertain an application, noting that he was not a judicial review court. He seeks to rely on this exchange to support an apparent contention that there is no alternative remedy available to the applicant because, as he puts it in his submissions, "*the issue of opening the question as part of a pre-trial hearing has been refused*".

35. The applicant has, unfortunately, read far too much into this exchange. It is clear that no application was, in fact, made for any form of pre-trial hearing, and there can be no question of any application being refused. In any event, it is clear from the authorities that the most appropriate forum for making an application regarding the fairness of a trial is at the trial itself, to the trial judge. That avenue clearly remains open to the applicant in this case and is the appropriate remedy for the applicant to pursue should the necessity to do so arise.

36. Accordingly, I refuse the application for judicial review.