THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 6

Appeal No. 2016/523

Peart J.
Sheehan J.
Hedigan J.

Between

B.S.

Applicant/Appellant

V

The Director of Public Prosecutions

Respondent

JUDGMENT delivered on the 20th day of March 2017 by

Mr. Justice Hedigan

1. This application is an appeal from the order and judgment of McDermott J. delivered on 7th October, 2016 in which he refused the appellant's application for an injunction by way of judicial review restraining the respondent from proceedings with a prosecution against him entitled *"The People (at the suit of the Director of Public Prosecutions) v. B.S."* (Bill CCDP 0131-2015). This case is currently listed for trial on 20th March next before the Central Criminal Court. The offence sought to be prosecuted is one of rape of a 7 year old girl on an unknown date between 1st January, 1970 and 21st May, 1970. The appellant was 16 years old at the time. The appellant brings the appeal on the following grounds:-

> i. The learned judge erred in law and in fact in deciding that the applicant had not established prejudice such as to give rise to a real or serious risk of an unfair trial.
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> ii. The learned judge erred in law and in fact in deciding that the unavailability of the evidence of two deceased farm labourers, even if such evidence was to be considered "general" in nature did not give rise to a real or serious risk of an unfair trial
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> iii. The learned judge erred in law and in fact in deciding that the unavailability of the evidence of the deceased father of the complainant was not such as to give rise to a real or serious risk of an unfair trial.
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> iv. The learned judge erred in law and in fact in finding that there was no real possibility that evidence helpful to the applicant would have been forthcoming from the deceased father.
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> v. The learned judge erred in law and in fact in attaching undue importance to his conclusion that the prosecution might not be able to pursue at trial the reason for the termination of the applicant's employment by the said deceased father. The learned judge failed to take into account that the applicant himself may have had reason to pursue this issue, and was now hampered from doing so.
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> vi. The learned judge erred in law and in fact in failing to give due weight to the age of the applicant at the time of the alleged offending and the importance of all other evidence being available at trial to ensure the fairness of the trial.
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> vii. The learned judge erred in law and on the facts in determining that any potential unfairness to the applicant could be remedied by the trial judge.
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> viii. The learned judge erred in law and [in fact] in refusing to grant an injunction in the particular circumstances set out on affidavit before him.

2. The complainant who is now a woman of 53 years was one of a large family and grew up on a farm. She complains that on a date or dates unknown between January and May, 1970, before she made her first communion, she was raped by the appellant who worked on her parents' farm as a farm labourer. She was 7 years old at the time. She says he was always around and was totally trusted. She states that he used to mind the children when their parents were away. She states that the appellant lured her with sweets and money to a field away from her home farm and assaulted her sexually. She said this happened on a number of occasions. She does not remember her parents being at home when these events happened. The other children were nearby or in the house playing but never in the same field or close-by. At some point she told her mother and after that as she put it, *"he was gone"*. There is before the court a statement by her mother, who is since deceased, to the effect that she told her husband what had happened and that he paid him his wages and dismissed him. There is also a statement from the complainant's older sister who states that the appellant on one occasion when she was 12 or 12½ kissed her on the lips. On another occasion sometime after, in the farthest field from the house, she states that she was sexually assaulted by the appellant. Nobody else was present or in the vicinity at that time. Her sister, the complainant, is the only person she ever told about this assault. She told her only in the last few years. There are also statements from a friend of the complainant from her schooldays stating that she told her in boarding school of the assault by the appellant. There is a further statement from the complainant's husband stating that she told him of this assault just after they got married.

3. The appellant denies that he assaulted the complainant. He also denies that he was dismissed for that reason. He denies that he ever looked after the children when their parents were not there. He says he was let go because there were a lot of bad things going on at the farm at the time. A number of animals had died, there had been accidents involving some of the children and he himself had

some illness which required him to go into hospital. It was considered, he states, that there was some kind of curse or *piseog* on the farm. When he came out of hospital and returned to work, he was told by the complainant's father that he would be better off working somewhere else and was let go. That, he says, is why he was dismissed.

4. The case made for the appellant both in the High Court and before this Court is essentially that due to the death of three witnesses he will be unable to defend himself at trial. Two of these are other labourers who worked on the farm and the third is the complainant's father. He argues that the first two could give evidence that the appellant never went away with the complainant. They could also give evidence about how things were on the farm and what went on there. They might be able to corroborate that he never was left to look after the children. Generally they could as he puts it *"explain a lot"*. The complainant's father, he states, would confirm that he had not been dismissed for abusing the complainant. He could say that he had been dismissed because of a bad run of luck at the farm attributed to *piseogs* and the like. The appellant also argues that the trial judge did not give due weight to his age at the time of the alleged offence. He further argues that the judge erred in determining that any potential unfairness could be remedied by the trial judge.

5. The respondent argues that the judge applied the correct principles to determine the application. Ms. Brennan, for the respondent, argues that there is nothing other than a bare assertion that the three deceased witnesses could or would say anything favourable to the appellant's defence. By their very nature, sexual assaults are done secretively and the fact that two fellow workers might say they saw nothing would not advance matters very far for the appellant in his defence. No indication exists as to what they might say. The same, it is argued, goes for the father. There is nothing to indicate what evidence he would give. The appellant states he would say that the appellant was not dismissed for sexually abusing the complainant. However, there is before the Court a statement from the complainant's mother that effectively says that this was in fact why he was dismissed.

The applicable principles

6. The test an applicant must meet in order to prohibit the State from bringing a criminal charge to trial against him is a strict one. The court of judicial review must bear in mind that an accused person will be tried before a court established under the Constitution to exercise a criminal jurisdiction. It will be presided over by a judge sworn to do justice without fear or favour, affection or ill will. It must be presumed that such a judge will ensure that constitutional standards of fairness and justice will prevail and that all his rights to a fair trial will be vindicated. It is therefore only in the most exceptional circumstances that this Court will step in and prevent the criminal court from exercising its jurisdiction. McDermott J. summarised these principles at para. 14 of his judgment where he stated:-

> *"The legal principles applicable are well settled. The test to be applied is whether the delay of 44 years in initiating these proceedings has resulted in such prejudice to the applicant as to give rise to a real or serious risk of an unfair trial. The length of time between the date of the alleged offence and the charging of the alleged offender is not determinative of the issue, nor is the complainant's delay in making a complaint to An Garda Síochána. The onus is on the applicant to establish that there is a real or serious risk of an unfair trial and the unfairness must be such that it cannot be avoided by appropriate rulings or directions in the course of the trial by the trial judge."*

In this regard he relied upon *Z. v. DPP* [1994] 2 I.R. 471, *D.C. v. DPP* [2005] 4 I.R. 281 and *S.H. v. DPP* [2006] I.R. 575.

7. This principle has been continuously upheld by the Supreme Court and by the Court of Appeal. In *K. v. His Honour Judge Carroll Moran & Ors*. [2010] IEHC 23 Charlton J. at para. 9 conveniently summarised the law in the following nine propositions:—

"(1) The High Court should be slow to interfere with a decision by the Director of Public Prosecutions that a prosecution should be brought. The proper forum for the adjudication of guilt in serious criminal cases is, under the Constitution, a trial by judge and jury; D.C. v. DPP *[2005] 4 I.R. 281 at p. 284.*

(2) It is to be presumed that an accused person facing a criminal trial will receive a trial in due course of law, one that is fair and abides by constitutional procedures. The trial judge is the primary party to uphold the relevant rights which are: the entitlement of the accused to a fair trial; the right of the community to have serious crime prosecuted; and the right of the victims of crime to have recourse to the forum of criminal trial where there is reasonable evidence and the trial can be fairly conducted; P. C. v. DPP *[1999] 2 I.R. 25 at p. 77 and* The People (DPP) v J.T. *(1988) 3 Frewen 141 .*

(3) The onus of proof is therefore on the accused, when taking judicial review as an applicant is to stop a criminal trial. That onus is discharged only where it is proved that there is a real risk of an unfair trial occurring. In this context, an unfair trial means one 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; Z. v. DPP [1994] *2 I.R. 476 at p. 506 – 507.*

(4) In adjudicating on whether a real risk occurs that is unavoidable that an unfair trial will take place, the High Court on judicial review should bear in mind that a District Judge will warn himself or herself, and that a trial Judge will warn a jury that because of the elapse of time between the alleged occurrence of the facts giving rise to the charges, and the trial, that the accused will be handicapped by reason of the lack of precision in the presentation of the case, and the disappearance of evidence such as diaries, or potentially helpful witnesses, or by the normal failure of memory. This form of warning is now standard in all old sexual violence cases and a model form of the warning, not necessarily to be repeated in that form by all trial Judges, as articulated by Haugh J. is to be found in the decision of the Court of Criminal Appeal in The People (DPP) v. E.C. *[2006] IECCA 69.*

(5) The burden of a proof on an applicant in these cases is not discharged by merely making a general allegation of prejudice by reason of the years that have elapsed between the alleged events and the commencement of the criminal process. Rather, there is a burden on such an applicant to fully and actively engage with the facts of the particular case in order to demonstrate in a specific way how the risk of an unfair trial rises; C.K. v. DPP *[2007] IESC 5 and* McFarlene v. DPP *[2007] 1 I.R. 134 at p. 144.*

(6) Whereas previously the Supreme Court had focused upon an issue as to whether the victim could not reasonably have been expected to make a complaint of sexual violence against the accused, because of the dominion which he had exercised over her, the test now is whether the delay has resulted in prejudice to an accused so as to give rise to a real risk of an unfair trial; H. v. DPP *[2006] 3 I.R. 575 at p. 622.*

(7) Additionally, there can be circumstances, which are wholly exceptional, where it would be unfair or unjust to put an accused on trial. Relevant factors include a lengthy elapse of time, old age, the sudden emergence of extreme stress in consequence of the charges, and which are beyond that associated with the normal stress that a person will feel when facing a criminal charge and, lastly, severe ill health; P.T. v. DPP *[2007] IESC 39.*

(8) Previous cases, insofar as they are referred on the basis [of] facts that are advocated to be similar, are of limited value. The

test as to whether a real risk of an unfair trial has been made out by an applicant, or that an applicant has established the wholly exceptional circumstances that had rendered unfair or unjust to put him on trial, are to be adjudicated in the light of all of the circumstances of the case; H. v. DPP *[2006] 3 I.R. 575 at p. 621.*

(9) I will attempt to apply these legal principles to my adjudication of the circumstances in this case. In doing so, I would simply comment, as a final observation on the law, that having read the relevant case law, it can be the case sometimes that circumstances such as extreme age or very poor health will be contributory factors to an applicant succeeding in making out that a real risk of an unavoidably fair trial is established. Old age and ill health can assist in establishing that there is prejudice by reason of a delay, since memory fails with time and the ability of an accused to instruct counsel with a view to mounting a defence can be, in extreme circumstances, undermined by those factors. Where extreme delay, old age and serious ill health are, of themselves, pleaded as a circumstance which would make it unfair or unjust to put a specific accused on trial then, in the absence of proven prejudice, those circumstances will indeed occur rarely; The People (DPP) v. P. T. *[2007] IESC 39 and* Sparrow v Minister for Agriculture, Food and Fisheries *[2010] IESC 6."*

8. Dealing with the case of missing witnesses, McDermott J. relied upon the principles set out in *S.O'C v. DPP* [2014] IEHC 65 where O'Malley J. stated as follows:—

> *"65. … it seems to me that when an applicant seeks to establish that the absence of a specific witness or piece of evidence has caused prejudice, he or she 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. In other words, I do not believe that it is sufficient to point to a theoretical possibility that an unavailable witness might have had something to say that would contradict the complainant's account and that of other witnesses."*

Thus it is not enough for an applicant to simply assert that three deceased persons would give evidence on his behalf in order to support his case for an injunction restraining his trial. He must be able to demonstrate a real possibility that they could have given evidence in support of him in his defence. There must exist something which raises the proposition from an assertion to a real possibility.

Application of these principles

9. In his judgment, McDermott J. clearly identified that the appellant's case was focused centrally on three witnesses who are deceased but whom he states would give evidence that could be helpful to his defence on this charge. He noted the existence of other statements taken in the case including from the complainant's siblings. No application was made by the appellant for discovery of these. The appellant, he stated, was not satisfied that these statements should be made available to the High Court hearing his application. The learned judge observed that it was appropriate in cases such as this that all relevant potential evidence and material should be before the Court. The Court should not be asked to restrain the appellant's trial on the basis of limited documentation and statements. I would readily adopt these comments. The court of judicial review exercises a discretionary remedy. It is thus appropriate that all relevant evidence should be before it when it is asked to injunct, as herein, the exercise by the Central Criminal Court of its jurisdiction to try the accused. All of the evidence before this Court should be considered by it as a part of the factual matrix of the application in order that it can fully assess the circumstances of the case. It is not the role of this Court to try the guilt or innocence of the appellant. That is the sole function of the Central Criminal Court. The admissibility of the evidence which is before this Court in that criminal trial will be determined by the trial judge at the trial. The role of the court in judicial review is to determine whether there exists a real risk of an unfair trial irremediable by any orders or directions of the trial judge.

10. Dealing with the evidence of the two labourers: The appellant has merely stated that the younger of these two men, might give evidence that would "explain a lot" and would help him defend himself. He says the other man, was not on the farm as often but would also, as he put it in his grounding affidavit at para. 3 *"… confirm what I am saying"*. In both these cases this assertion of the potential relevance of these two men does not rise above a theoretical possibility. The appellant does not know what evidence they would give. In any event, sexual offences, notably involving children, are invariably of a highly secretive nature. Thus the mere fact that neither of these two men saw anything would hardly advance the appellant's defence. Nothing appears to exist that would raise the assertion in respect of these two witnesses above the level of a theoretical possibility. As McDermott J. pointed out, they could only give evidence of a most general nature. As to the possibility of the complainant's father giving evidence helpful to the appellant concerning his dismissal, McDermott J. referred to the mother's evidence that immediately after the complainant told her she had been assaulted by the appellant, she had told her husband who then dismissed the appellant. Her statement before the Court in this appeal states that when told by her daughter what had happened *"I just wanted to get rid of him straight away. I told my husband about what [ ] had said and then he paid him his week's wages and he left and never worked for us again"*. In the light of this evidence it is highly improbable the father would give evidence that would be helpful to the defence.

11. It should be noted that there is also before the Court a statement of the complainant's older sister. She states therein that when she was 12 or 12 ½ years old she was sexually assaulted by the appellant in a similar fashion to the sexual assault described by the complainant.

12. In the light of the above facts and the applicable principles of law in respect of the prohibition or injunction of a criminal trial, I am satisfied that the High Court judge was entirely correct in refusing the application to injunct the trial of the appellant in the Central Criminal Court on the charges brought against him herein. I would dismiss the appeal.