[2020] IEHC 659

THE HIGH COURT

[Record No. 2020/358 JR]

BETWEEN

M.S.

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Miriam O'Regan delivered on the 15th day of December, 2020

Issues

1. The within papers were filed on 4 June 2020 and leave was afforded to the applicant on 8 June 2020 to seek to prohibit the further prosecuting of bill DU874/2019 at present before the Circuit Criminal Court, together with an order staying any further prosecution under that bill, together with damages and an extension of time if necessary. The issue as to damages was not pursued either in the statement of grounds or in submissions.

2. The applicant makes an assertion of wholly exceptional circumstances claiming it unfair and unjust to put him on trial on the basis that the allegations are between 28 and 52 years old; there are missing documents and missing witnesses; the applicant is currently 87 years of age and the trial date is fixed for 8 June 2021 when the applicant will be 88 years; and, he is in poor health.

3. In addition, the applicant claims that there was delay on the part of the prosecution, violating the applicant's right to a fair trial with reasonable expedition without good explanation.

4. The applicant suggests that prosecution of historic indecency allegations in accordance with the Constitution does not apply to three named individuals based on statements to the Smith Inquiry in 2010, contact with a support group, and, in respect of one individual, a successful civil action.

5. The applicant also relies on a maximum sentence of two years for the offences, save for three complainants (two of whom might have a maximum sentence of five years and one ten years if the applicant was convicted) and the combined effect of the foregoing is such that it would be unfair and oppressive to prosecute.

6. The charges relate to 31 allegations from complainants (respondent says 11 complainants, applicant says 12 complainants) in respect of incidents alleged to have occurred between January 1968 and December 1992. The complaints themselves were made between 23 April 2012 and 2 February 2014. The applicant was interviewed by the gardaí on 5 December 2015 in respect of the original 57 complainants including the complainants the subject matter of the within bill.

7. Although a direction to charge issued from the Director of Public Prosecutions on 11 May 2017 the applicant had not heard of the direction until shortly prior to being charged with

the bill on 3 May 2019. It had been the intention of the Director of Public Prosecutions to advise by letter the applicant's solicitors of her intention not to proceed with the complaints while the applicant was charged with other offences which were before the court. However, it is common case that due to an oversight no such communication was had with the applicant's solicitor.

8. The application is grounded upon two affidavits of Donough Molloy, solicitor on behalf of the applicant, respectively dated 26 May 2020 and 3 June 2020. The initial affidavit relates to the application for an extension of time and the latter affidavit grounds the statement of grounds.

9. In the affidavit as to an extension of time it is asserted that the applicant was charged on 3 May 2019, and on 26 July 2019 the book of evidence was served together with the applicant being returned for trial. An indictment has not yet been served.

10. Following the service of the book of evidence, correspondence was entered into between the applicant's solicitors and the respondents wherein further details were sought in respect of witness statements, basis for the delays, and other material which it is asserted was relevant to the formulation of the application for judicial review. The respondents were on notice of an intention to apply for judicial review as and from the letter of 26 September 2019. Some of the documents were ordered to be disclosed by the Dublin Circuit Criminal Court on 28 November 2019.

11. At para. 15 of the affidavit it is stated that on 22 January 2020 the deponent's office received a reply to a letter of 2 January 2020, wherein it was disclosed that "The prosecution was vigilant in ensuring that proceeding trials were not prejudiced by further charging your client."

12. The affidavit goes on to detail efforts to secure a medical report on the applicant. However, it is clear that these efforts commenced in or about 6 February 2020, and in the events the only medical report received prior to the application for leave was that of Dr. Rasool, prison doctor, of 15 May 2020.

13. At para. 22 correspondence between the deponent and the chief prosecution solicitor of 22 April 2020 and 25 May 2020 are referred to. In the first, the deponent indicated that the matter of applying for judicial review is not sufficiently urgent to bring before the courts during COVID-19 and the response from the prosecuting solicitor is to the effect that the applicant was already out of time. The deponent states that the circumstances giving rise to the delays were outside the control of the applicant or could not reasonably have been anticipated by him.

14. In the affidavit of 3 June 2020 the background to the subject criminal proceedings and other proceedings is set out. On 10 June 2013 the applicant was granted leave to prohibit bill 1085/12 which application was refused both in the High Court and in the Court of Appeal, save that the Court of Appeal did indicate at para. 69 of the judgment of Hogan J. that the additional charges sought to be proffered by the Director of Public

Prosecutions relating to six complainants who had not been the subject of any of the charges sent forward from the District Court do not arise from the earlier charges for the purposes of s.4M of the Criminal Procedure Act 1967 (as amended), on the basis that under s.4N the consent of the applicant is required, but was not forthcoming.

15. By reason of the foregoing, bill 1085/12 was split and the charges in relation to the additional six complainants were the subject matter of bill 498/16. The trial of the complaints in bill 498/16 took place in October 2017. The applicant was convicted on 2 November 2017 in respect of two complainants and the appeal of this conviction was unsuccessful. The trial in respect of bill 1085/12 commenced in January 2019. The applicant was convicted in relation to seven complainants on 8 February 2019 and the subsequent appeal of this conviction was dismissed on 17 November 2020.

16. The applicant was advised of a further 57 complaints in August 2015 with a 58th complaint being added soon after.

17. The deponent identifies that there was a three-year delay period between the last statement of the complainant in February 2014 and the date of issue of the direction from the Office of the Director of Public Prosecutions on 11 May 2017. A further period of delay was the two-year period between the direction aforesaid from the Office of the Director of Public Prosecutions and the actual charging of the applicant on 3 May 2019. These delays are said to be inordinate and inexcusable. The deponent says that the assertion that "'the prosecution was vigilant in ensuring that preceding trials were not prejudiced by further charging' is unreasonable and without basis in law and in fact."

18. It is suggested that notes and medical records are not available, that witnesses who previously gave evidence in support of the applicant would not now come forward because of adverse publicity, that the mother of two complainants might have been of some aid to the defence, and a boy who had teased one of the complainants might also be of assistance but was unavailable.

19. At para. 76 the deponent states that it had been the intention to make the judicial review application on an earlier date but this proved not possible because of COVID-19.

20. A statement of opposition was filed in July 2020 and it is suggested that the date upon which grounds first arose was 26 July 2019 when the book of evidence was served and the applicant was returned for trial (some implicit supports for this contention appear to be contained in para. 69 of the judgment of Hogan J. aforesaid when it was held that the additional six complainants had not been the subject matter of the charges sent forward from the District Court, without the consent of the applicant, which charges had to be the subject matter of a separate prosecution).

21. The respondents suggest that the application is out of time with insufficient reasons forthcoming in respect of an extension having regard to O.84, r.21 of the Rules of the Superior Courts, 1986 (as amended in 2011) which provides that the court shall only grant an extension if good and sufficient reasons for the failure to seek leave within the

relevant three-month period was outside the control of the applicant or could not reasonably be anticipated by him. The provision mandates that these matters are particularised in a grounding affidavit on behalf of the applicant.

22. It is asserted that the letter from the respondents of 22 January 2020 merely reproduced the content of a prior letter of 9 December 2019.

23. The respondents suggest that the trial judge should deal with the complaint relative to missing documents, missing witnesses, potentially being unfit for trial and all other issues raised on the basis that there are no wholly exceptional circumstances whether considered separately or cumulatively to warrant interference by the High Court. In addition, it is denied that there was culpable prosecutorial delay with the respondents taking a reasonable approach in respect of not charging the applicant while other proceedings were before the courts given that part of the applicant's prior judicial review proceedings involved taking prohibition including on the basis of adverse pre-trial publicity.

24. It is claimed that allegations of general prejudice with regard to witnesses and documents are indistinguishable from the allegations of prejudice found by the Court of Appeal in the prior judicial review proceedings to be only of peripheral relevance and did not warrant prohibition. Insofar as other grounds are asserted, including the complaint that the applicant has been subjected to three trials already, it is asserted that there is a strong public interest in prosecuting the applicant who was in a position of authority and/or dominance, that any potential sentence does not provide a legal basis for prohibiting trials, and the number of complainants has been limited out of fairness to the applicant.

25. The statement of opposition is grounded on the affidavit of Detective Garda Seamus Nolan of 24 July 2020, being the garda who had carriage of the investigation the subject matter of the within bill. At para. 7 the deponent says that between 28 November 2008 and the swearing of his affidavit a total of 189 complainants have made allegations of sexual assault against the applicant and all were thoroughly investigated with 163 complaints submitted to the Director of Public Prosecutions. There were two other files which were previously submitted to the Director of Public Prosecutions and the within bill arises from a file containing a total of 57 complainants with statements taken between 1 August 2011 and 19 November 2015.

26. This file was submitted to the Director of Public Prosecutions on 9 February 2016 with further materials being sought from the Director of Public Prosecutions on 27 September 2016. The further material was submitted on 9 December 2016, with a direction from the Director of Public Prosecutions issuing on 11 May 2017 subject to a direction not to proceed until the determination of the trials already before the courts. It is asserted that the Director of Public Prosecutions was mindful of pre-trial publicity that might jeopardise charges then before the courts. It is asserted that such a decision was reasonable.

27. Insofar as prior proceedings were concerned the applicant was convicted on 5 February 2019 and sentenced on 25 February 2019, with the within charges being made against the applicant on 3 May 2019.

28. The suggestion of prosecutorial delay is rejected on the basis of the large number of complaints and the complex and sensitive investigation required. Records had to be sought and cross-checked which was an onerous undertaking. The affidavit detailed why the trial judge is in a better position to deal with matters such as fitness to attend trial, medical considerations and other issues raised by the applicant in these proceedings.

Are the within proceedings out of time?

29. The applicant relies on *C.C. v. Ireland* [2006] 4 IR 1, para. 94 where Geoghegan J. in the Supreme Court held that under prosecutorial rules for judicial review time would only commence to run from the service of the indictment. Both Fennelly J. and Denham J. agreed with Geoghegan J. on this point. The indictment in respect of the within bill has yet to be served.

30. In the alternative it is suggested that COVID-19 restrictions were such that only urgent applications were brought before the court from *inter alia*, 16 March 2020 when there was the first suspension of ordinary court business due to COVID-19. In addition, it is stated that it was proper for the applicant to pursue detailed correspondence and it only became clear on receipt of correspondence from the respondents of 22 January 2020 that no further explanation would be provided as to the delay.

31. In correspondence the disclosure of original statements and other documentation was not made available until 18 November 2019, with original statements being furnished for the first time on that date. It is claimed that information remains outstanding. On 28 November 2019 notwithstanding a request, no indictment had been served. On this date it appears that the applicant advised the Circuit Court of outstanding documentation and the Circuit Court directed the respondents to make available such documentation.

32. Although it is asserted that it was not until a letter of 22 January 2020 that the respondents advised the applicant the basis for not charging the applicant sooner than 3 May 2019, the applicant has tendered to this Court a chronology of events and in that chronology it is recorded that on 9 December 2019 the Director of Public Prosecutions sent a letter saying that the delay in charging was as a result of prosecutorial vigilance. Thereafter the letter of 22 January 2020 has been highlighted. In the chronology it is stated that in this letter the Director of Public Prosecutions addressed the reasons for the delay in charging in similar terms to the 9 December 2019 letter.

33. The respondents counter the applicant's assertion that either no extension is required or that O.84, r.21 has been complied with on the basis of *C.C. v. Ireland* [2006]. However, *C.C. v. Ireland* [2006] preceded the new Rules of the Superior Courts, which in turn followed the Supreme Court decision in *A.P. v. DPP* [2011] IESC 2. It is further argued that in *X v. DPP* [2020] IECA 4, para. 16, Donnelly J. suggested that if the decision in *C.C. v. Ireland* [2006] applied and indictments are only served on the eve of the trial this

would lead to an unsatisfactory situation where an accused might be entitled to take judicial review proceedings right up to the commencement of the trial. The respondents suggest that the date of return for trial and service with the book of evidence, being 26 July 2019 was the date of commencement of the relevant three-month period under the new rules.

34. Order 84, r.21(1) provides that an application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose. Therefore, *C.C. v. Ireland* [2006] is not relevant.

35. When pressed in submissions the applicant accepted that the grounds first arose on receipt of the letter of 22 January 2020 as to the reasons for the delay in charging the applicant.

36. As has been acknowledged in the chronology furnished with submissions by the applicant, it is clear that the content of the letter of 22 January 2020 mirrored the content of the letter of 9 December 2019 insofar as the reasons for the delay. Taking the applicant's position at its height that this aspect of the matter required clarification prior to the commencement of time limits (which is not accepted as aforesaid by the respondents), the commencement of time limits for the within judicial review application was 13 December 2019, the date of receipt of the letter of 9 December 2019.

37. Again, according to the chronology, ordinary business in the High Court was first suspended on 16 March 2020. Assuming this to be correct and that it was not possible to apply for leave for judicial review until *inter alia*, 8 June 2020 when leave was afforded, nevertheless the three-month period from receipt of the notice as to the basis for the delay in charging expired on 13 March 2020. Furthermore, the judicial review documents were filed on 4 June 2020 and mindful of time limits the applicant does not advise why the application was not moved until 8 June.

38. In my view without having to decide on whether the commencement of judicial review time limits was 13 December 2019, or earlier, the applicant does need an extension of time albeit, from the applicant's timeline point of view, a matter of days.

39. Order 84, r.21 states that the court shall not grant an extension of time unless *inter alia*, affidavit evidence is available establishing that the delay was beyond the control of the applicant or could not reasonably be anticipated by the applicant.

40. I am satisfied that given the foregoing neither test has been complied with to the effect that an extension of time cannot be made under O.84, r.21.

Prosecutorial delay

41. The applicant is relying upon the two periods of asserted prosecutorial delay (inordinate and inexcusable period of delay) between:

(1) the last statement of the complainants the subject matter of the instant bill (DU874/2019) in February 2014, and the directions by the Director of Public Prosecutions to charge the applicant on 11 May 2017; and,

(2) between the direction of the Director of Public Prosecutions (11 May 2017) and the ultimate charging of the applicant on 3 May 2019.

42. The respondents rely on the grounding affidavit of Garda Detective Seamus Nolan aforesaid and in particular paras. 8 and 9 as to the complexity of the investigation and the volume of complainants in explaining the time lapse as between the last statement taken from one of the complainants and the direction of the Director of Public Prosecutions to charge on 11 May 2017.

43. Insofar as the second period is concerned it is asserted that there were valid reasonable grounds for this delay namely the Director of Public Prosecutions being mindful of pre-trial publicity which might jeopardise existing court trials, which was one of the grounds relied upon by the within applicant in prior judicial review proceedings.

44. The respondents suggest there has been no prejudice to the applicant. The respondents also point to the fact that the applicant has in prior judicial review proceedings successfully challenged the adding of further complainants to the prosecution charge against the applicant.

45. The applicant counters that he has been prejudiced on the basis that the trial of bill 498/16 commenced on 2 October 2017, therefore, the within charges could have been added to that bill in which event the applicant would not be facing a further trial. Both parties rely on different portions of the judgment of Kearns J. in *P.M. v. Director of Public Prosecutions* [2006] 3 IR 172.

46. The applicant relies on para. 18 of the judgment where Kearns J. noted that

> "the respondent accepts the premise that where there has been a long delay between the commission of the alleged offences and their coming to the attention of the prosecution authorities, the latter are under a special obligation to expedite any subsequent investigation and prosecution."

47. The respondents rely on paras. 29, 30 and 31 of the judgment together with para. 33 thereof to the effect that in seeking prohibition it is insufficient for an applicant to demonstrate blameworthy prosecutorial delay only, but must also establish one or more of the three possible consequential elements namely:

(1) the loss of liberty while the trial is pending;

(2) anxiety and concern of the accused resulting from a significant delay; and,

(3) the possibility that the defence will be impaired.

48. Keane C.J. in *P.M. v. Malone* [2002] 2 IR 560 at p.581 stated where an applicant's ability to defend himself has been impaired as a result of the delay and therefore there is a real and substantial risk of an unfair trial, then the applicant's right to a fair trial would necessarily outweigh the communities right to prosecute. In that case the delay was accepted to have caused unnecessary stress and anxiety and therefore the Court had to engage in a balancing exercise where on the one hand was the right of the accused to be protected from stress and anxiety caused by unnecessary and inordinate delay, and on the other the public interest in the prosecution and conviction of those guilty of criminal offences. The nature of the offence and the extent of the delay will be matters of concern for the judge.

49. It does appear to me that assuming that the applicant would have, following the Director of Public Prosecutions' decision, agreed to have the current complainants incorporated in the within bill added to bill 498/16, any current outstanding stress and anxiety by reason of a further trial would have been avoided.

50. The Director of Public Prosecutions was clearly concerned to bring to the attention of the applicant her decision to defer charges until after the pending matters before the courts and further wished to have the applicant's views canvassed (see exhibit 'A' in the affidavit of Desmond Hogan, 4 November 2020). This did not occur. Given that such facility was not afforded to the applicant to express his views and potentially opt for a trial of the within complaints with bill 498/16, the applicant has suffered some potential prejudice because of delay during the period 11 May 2017 and commencement of the trial of bill 498/16 in October 2017 – five months.

51. The applicant has not put before the Court any basis for suggesting Garda Nolan is incorrect in swearing that the time period between 2 February 2014 (last statement of the instant complainants) and 11 May 2017 (decision of the Director of Public Prosecutions to charge) is not unreasonable in the instant circumstances, and therefore the applicant has not established prosecutorial delay/inordinate and inexcusable delay in respect of this period.

52. The period of delay from 11 May 2017 and charging on 3 May 2019 was due to an oversight on the part of the respondents which does amount to prosecutorial delay with possible consequence of additional stress and anxiety. A requirement to balance the rights identified by Keane C.J. (para. 49 above) in a proportionate manner arises.

Oppression and multiple sequential trials

53. Under this heading the applicant refers to the principle in *Henderson v. Henderson* [1843] 3 Hare 100, as applied by the Court in *Cosgrave v. DPP* [2012] IESC 24. In that decision Denham C.J. stated at para. 52 of her judgment:

> "It is a general rule at common law that the prosecution should join in the same indictment charges founded on the same, or similar, or substantially the same, facts. However, there are exceptions to this rule. A second trial on the same, or

similar, or substantially the same, facts is not necessarily oppressive. There may be particular circumstances which make it appropriate in that case."

54. The case involved a singular statement where the accused on foot of that statement pleaded guilty and was punished. However, some time later, without warning, the accused was subjected to the criminal process again.

55. In O'Donnell J.'s minority judgment in *DPP v. C.C*. [2019] he referred to the fact that *prima facie* the offences could have been tried together and therefore it follows that the offences should at least in principle have been tried together. O'Donnell J. was accepting that the general principle is subject to exceptions and the court's discretion. O'Donnell J. identified that the civilised system of trial of an offence involved treatment of the accused in a demonstrably fair manner and acknowledged that a trial which might result in a conviction is often humiliating and stressful. He noted that there was important and vital public interest in securing the trial, and where appropriate the conviction of guilty persons, but there was also an important interest in ensuring that the process is not arbitrary or oppressive or needlessly humiliating as this would subvert the rehabilitative purposes of the system.

56. The applicant relies on para. 6 of the judgment of O'Donnell J. in *DPP v. C.C*. [2019] IESC 94 above when he states that with a clear cut case which will not be affected by evidence at the trial, prohibition might lie.

57. The respondent distinguishes the facts in the within matter from those prevailing in *Cosgrave v. DPP* [2012] and also refers to the exceptions and court discretion. The respondent argues that the trial judge is best placed to deal with all issues that arise in the within proceedings in accordance with the up to date jurisprudence from the Supreme Court including *DPP v. C.C*. [2019] above.

58. I am of the view that the general principle identified by O'Donnell J. in *Cosgrave v. DPP* [2012] aforesaid does not apply and the within matter is within the parameters of the exception to the general rule by reason of:

    (a) In *Cosgrave* the applicant had pleaded guilty which was part of the factual matrix identified by O'Donnell J.

    (b) In *Cosgrave* prohibition was not afforded.

    (c) There was one statement involved in both criminal trials in Cosgrave whereas the complainants in the within bill have not been the subject matter of any prior trial against the applicant.

    (d) Given the fact of different complainants, involved in the different trials, it cannot be stated that the trials involve the same facts.

    (e) An additional trial has already taken place by reason of the applicant's refusal to consent to a joinder of six additional complainants to what was bill 1085/12.

(f) The applicant was not without warning as in *Cosgrave*, as aforesaid - the applicant was interviewed by An Garda Síochána in respect of a total of 58 complainants on 5 December 2015.

59. In all of the circumstances therefore I am satisfied that the within bill is within the exception to the general rule principle identified by O'Donnell J. in *Cosgrave v. DPP* [2012]. Accordingly, the principle does not apply in the context of the within factual matrix.

Missing witnesses/documents, age, health, historic alleged offences

60. The respondent acknowledges that the applicant suffers from ill-health and he does not seem to counter the summary of medical history given by Dr. Rasool in two reports respectively dated 15 May 2020, and 6 July 2020, to the effect that the applicant suffered a coronary artery by-pass and cardiac stenting in the past. Currently he has hypertension, depression, peptic ulcer disease, lumbo-sacral pain, vascular changes at MRI brain scan, an unexplained collapse in prison on 19 April 2019 (which he recovered from spontaneously without the need for hospitalisation) together with working memory deficits. He will be 88 at the date of the prospective trial.

61. Taking the above into account and his isolation (COVID-19 and imprisonment) Dr. Rasool suggests the applicant has a poor medical prognosis.

62. The applicant's solicitor has recorded that he has certain difficulty in obtaining instructions.

63. Witnesses and documents as herein before mentioned are said to be beyond the reach of the applicant.

64. Three of the complainants have made disclosures to other parties as aforesaid and therefore delayed in making complaints to the gardaí, the result that the rationale identified in *S.H. v. DPP* [2006] IESC 55 does not apply, according to the applicant.

65. The applicant relies on *P.T. v. DPP* [2007] IESC 39 where the Court found that no single factor rendered the case an exception but rather the cumulative effects of all the factors brought the matter within the clear exceptional circumstances requirement to prohibit the trial. In that case the complaints were of historic alleged offences, the prosecution took some time to mount, the applicant was in his 87th year and had bad health.

66. In *M.S. v. DPP* [2015] IEHC 84, the within applicant sought prohibition based on delay, the applicant's poor health, prejudicial publicity, unavailable witnesses causing general as opposed to identifiable prejudice, together with the joinder of additional charges to the indictment. O'Malley J. quoted at para. 53 from the analysis of Charleton J. in *K (E) v. His Honour Judge Carroll Moran* [2010] IEHC 23, the Court summarised the principles to be applied including:

(a) the High Court should be slow to interfere with a decision by the Director of Public Prosecutions, and the proper forum for adjudicating on guilt in serious criminal cases is, under the Constitution, a trial by judge and jury;

(b) a presumption arises that an accused person facing a criminal trial will receive a trial in due course of law – fair and abiding by constitutional procedures – the trial judge being the primary party to uphold all rights of the accused;

(c) the onus of proof is on the accused seeking prohibition;

(d) the adjudication is on whether there is a real or serious risk of an unfair trail, which risk is unavoidable;

(e) general allegations of prejudice will not suffice; and,

(f) there are circumstances which might amount to wholly exceptional circumstances such as severe ill-health as identified in *P.T. v. DPP* [2007] IESC 39.

67. The Court also quoted from Geoghegan J. in *Rattigan v. DPP* [2008] IESC 34 to the effect that

> "a court will only stop a trial if it is satisfied that the normal safeguard procedures in a trial, including the making of appropriate directions, will not, in fact, achieve a fair trial. In practice, this will rarely be the case."

68. At para. 88 of the judgment, O'Malley J. was satisfied that the cumulative effect of the grounds relied on did not create the risk of an unfair trial or make it unfair to put the applicant on trial.

69. At para. 52 O'Malley J. stated that since *S.H. v. DPP* [2006] IESC 55, there is no requirement for the court to inquire into the reasons for the delay or to make any assumption of the truth of the complaints.

70. Leave was afforded to the applicant in *P.T. v. DPP* [2007] aforesaid in 2005 and it therefore preceded the coming into force of the Criminal Justice (Insanity) Act 2006 and in particular s.4 thereof which provides that the issue as to fitness for trial is a matter for the trial judge.

71. This was confirmed in the case of *T(J(S)) v. President of the Circuit Court & DP*P [2015] IESC 25, when Denham C.J. confirmed at paras. 30 and 31 thereof that issues as to capacity are now catered for under s.4 of the 2006 Act.

72. In *O'C v. DPP* [2000] 3 IR 87 (quoted by O'Donnell J. in *C.C. v. DPP* [2019]) the Court stated that

> "expert evidence in a succession of cases which have come before this Court and the High Court has demonstrated that young or very young victims of sexual abuse are often very reluctant or find it impossible to come forward and disclose the

abuse to others or in particular complain to the Gardaí until many years later (if at all)".

73. In *DPP v. C.C.* [2019], para. 6, O'Donnell J. noted that except for very clear cut cases, where the issue will not be affected by the development of the evidence at trial, issues should be left to the trial judge rather than as tended to be the case during the earlier stages of the development of the jurisprudence to be decided in proceedings which sought to prohibit the conduct of the criminal trial before its commencement.

74. Clarke C.J. in *DPP v. C.C*. [2019] noted a growing tendency by the courts to consider it appropriate to leave the final decision for the trial judge who now has the primary role in decisions of this kind and judicial review is rarely appropriate.

75. Given the finding of the High Court (O'Malley J.) in the 2015 judicial review proceedings of the within applicant and bearing in mind the foregoing it appears to me that neither individually nor cumulatively could the instant grounds be relied upon to establish real and unavoidable risk of an unfair trial.

Balancing exercise

76. On the basis that there does appear to have been some prosecutorial delay which potentially caused prejudice to the applicant in his ability to have the complainants the subject matter of the within bill heard at the same time as bill 498/16, the Court must conduct a balancing exercise.

77. In favour of the applicant's position the following matters have been put forward:

    (1) The applicant had three prior trials.

    (2) The applicant has a right to an expeditious trial, all the more so in historic cases.

    (3) There is a two-year maximum sentence for eight of the complainants, a five-year maximum sentence for two of the complainants and a ten-year maximum sentence for one of the complainants assuming that the applicant might be convicted.

    (4) The applicant will be 88 years in June 2021.

    (5) The applicant is in poor health both physically and mentally (see Dr. Rasool's report aforesaid) and has difficulty giving instructions.

    (6) The within alleged offences are of a historic nature.

    (7) The applicant will have difficulties at trial as identified by Dr. Robinson.

    (8) Dr. Sugrue has opined that stress and anxiety may affect his heart condition and there would be stress related difficulties at trial.

    (9) Dr. Lamb states that the applicant would require intermediary help in court.

78. In favour of allowing the matter proceed to trial the following issues are relevant:

(1) There is a public interest in prosecuting serious offences and notwithstanding the two-year maximum limit in respect of eight of the complainants, nevertheless, the applicant was in a position of authority and dominance over the complainants and indeed would have had the trust and confidence of guardians of such complainants. In respect of two complainants there is a maximum sentence of five years and in respect of one, ten years.

(2) There were, in total, 189 complaints against the respondent.

(3) There is a maximum prosecutorial prejudicial delay period of five months as opposed to two years namely between the date the Director of Public Prosecutions directed a charge and the date upon which a trial of bill 498/16 commenced.

(4) The applicant when he had an opportunity previously refused to permit the joinder of six additional complainants to what was originally bill 1085/12.

(5) The applicant was involved in prior judicial review proceedings complaining of adverse media attention and the addition of complainants to the charge.

(6) The within complainants were not the subject matter of any prior trial.

(7) The defilement of a child is a very serious offence.

79. Of the eight points identified at para. 77 hereof all save the first three are matters which have repeatedly been held to be matters for the trial judge. The fact that the applicant has had three prior trials is reflective of the volume of complaints and the position of authority of the applicant relative to the complainants at the date of the alleged offences.

80. Given the prior choice of the applicant not to have additional complainants joined with bill 1085/12 it is not clearly the case that the applicant would have consented to the joinder of additional complainants to bill 498/16.

81. The maximum sentence in respect of the complaints of eight of the within complainants is tempered by a maximum of five years for two and ten years for one of the complainants. The egregious nature of the complaints is also relevant in this regard.

82. I am satisfied that on consideration of all the foregoing factors the applicant has not tipped the balance in favour of prohibition of the trial and the applicant has not established that there is a real and unavoidable risk of an unfair trial by appropriate rulings and directions of the trial judge.

Conclusion

83. On the preliminary point of delay in the institution of the within proceedings I am satisfied that the applicant is out of time in accordance with O.84, r.21 and this is not a matter in which an extension of time might be made having regard to the provisions thereof.

84. Even if I am incorrect in respect of the foregoing on the substantive claim of the applicant he has not demonstrated that an order of prohibition is warranted.

85. The reliefs claimed are refused.