[2017] IECA 53

THE COURT OF APPEAL

Birmingham J.

Sheehan J.

Edwards J.

Record No. 27/2016

K.D.

APPELLANT

V

THE DIRECTOR OF PUBLIC PROSECUTIONS, AND

THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Birmingham delivered on the 21st of February, 2017

1. The background to this case is that the appellant is a 22 year old female who has been charged with a number of sexual offences alleged to have been committed against two children aged nine and ten years at the time of the offences. The offences against A are alleged to have been committed, at the earliest on dates between 2010 and 2011, when she was aged between nine and ten years of age. She is now fifteen years of age and the offences against B date back at the earliest to dates in 2010 when she was nine years. She is now fourteen years.

2. The matter came on for hearing before the Dublin Circuit Court on the 3rd December, 2015, Her Honour Judge Melanie Greally presiding. A number of issues were

raised in the Circuit Court. First there was a question as to whether the Circuit Court judge had jurisdiction to direct the discontinuance of the proceedings by reason of delay, in particular alleged blameworthy prosecutorial delay. The judge took the view that she did not have such jurisdiction. Secondly, an issue arose as to whether video recorded interviews with the complainants were admissible under s. 16(1)(b) of the Criminal Evidence Act 1992 (the Act of 1992). The complainants were under fourteen years of age when the recordings were made, but were fourteen years and fifteen years respectively at the time the matter came on for trial. Judge Greally ruled that the operative date for the purpose of s. 16 was the date on which the interviews took place. In the course of the debate, about the video recordings of interviews a third issue was raised, this time by the trial judge which was in relation to the applicability of the Victim's Directive and in particular Article 24 thereof which provides that Member States shall ensure that where the victim of crime is a child, which term is defined as meaning any person below eighteen years of age, that all interviews with the child taken in the course of criminal investigations may be visually recorded and such recorded interviews may be used as evidence in criminal proceedings.

3. The trial judge held that the reference in the statute to a person under fourteen years was a reference to their age at the time that the interview was conducted and accordingly that the video recordings were admissible and in those circumstances, she did not proceed to consider whether the Victims Directive was of any application.

4. As it happened following these rulings the jury was discharged for reasons unconnected with the current proceedings and a new trial date was fixed. Thereafter, on the 21st December, 2015, the appellant applied to the High Court (Humphreys J.) seeking leave to apply for judicial review for an order of prohibition and declaratory relief in

relation to the issue of prosecutorial delay and in relation to the provisions of the Criminal Act of 1992.

5. An important nuance in relation to the claim for relief in respect of prosecutorial delay was that it was based upon the appellant's right to a trial with due expedition and in particular, in this instance, upon a contention that as a result of such delay the appellant had suffered stress and anxiety going well beyond what would have been the case had the charges been prosecuted expeditiously. It was not contended that the appellant would be caused any difficulty in defending the case because of the delay. Neither was any case being made of oppressive pre-trial incarceration, as the appellant was on bail pending his trial.

6. Moreover, it should also be noted that in relation to the claim for relief in respect of the Act of 1992, the claim was primarily advanced on the basis that the Circuit Court judge had interpreted the statute incorrectly and with a declaration being sought in support of the interpretation being contended for by the appellant. However, it also involved a claim in the alternative for prohibition, and a declaration, on the basis that s. 16 thereof was repugnant to the Constitution in so far as it purported to authorise a significant departure from what is characterised as the "requirement of orality" in the criminal process, thereby cutting across the applicant's right to a trial in due course of law under Article 38.1 of the Constitution, as well as his right to equal treatment under the law guaranteed under Article 40.3 of the Constitution.

7. After the application had been opened, Humphreys J. directed that the respondent, Director of Public Prosecutions and notice party, the Attorney General, should be put on notice and he adjourned the hearing of the leave application. When the matter next came before the court, counsel for the parties that had been put on notice, indicated that they did not intend to take part in the leave proceedings, but intimated that in the event that leave

was granted it was intended at the substantive hearing to oppose the grant of the leave sought. In those circumstances the leave application, although directed to have been on notice was in fact heard on an *ex parte* basis on the 13th January, 2016 and Humphreys J. delivered his judgment refusing leave on the 15th January. It is that refusal that is now the subject of the appeal.

8. Humphreys J. was of the view that having regard to the recent decision of the Court of Appeal in *M.S. v. The Director of Public Prosecutions* [2015] IECA that it was clear that Judge Greally was correct in holding that she did not have jurisdiction to stop the prosecution on the grounds of delay alone. He felt that a trial judge could only stop a trial if an irredeemable injustice would be caused to the defendant of such gravity that it would be fundamentally unjust to allow the matter to go to a jury. He felt that the arguments that the applicant had suffered stress and anxiety going well beyond what would have been the case had the charges been prosecuted with greater expedition, even taken at their highest came nowhere near the level required to stop the trial. Indeed he felt that the worry and anxiety arose from the nature of the allegations themselves.

9. The High Court judge then turned to the s 16 issue and commented that in *The People (Director of Public Prosecutions) v J.P.O'R.* (Central Criminal Court, *ex tempore*, 1st May, 2013, not circulated) O'Malley J. had ruled that s. 16 did not cease to have effect once the child concerned had turned fourteen. He said that that decision was binding on Judge Greally, but that furthermore, it was clearly correct.

10. He felt that it was not arguable that the section should be read as prohibiting the admission of a video recording after the date on which the injured party turns fourteen. The age of fourteen, he said, was relevant to the date on which the video recording of the interview was originally made, not to the date of trial and the contrary proposition was not arguable.

11. In the course of the present appeal the applicant/appellant has argued that the core issue is whether she had met the threshold for the grant of leave. She contends that while Humphreys J. referred to the arguability test derived from the case of *G. v. The Director of Public Prosecutions* [1994] 1 I.R. 374, that in truth he had proceeded to determine the substantive issue as to whether the applicant was entitled to the relief she sought rather than the preliminary issue of whether she was entitled to leave to bring the judicial review proceedings.

12. A reading of the judgment of Humphreys J. indicates that while he addressed the issues raised in greater detail than is often the case at a leave stage, he was in fact very conscious of the arguability threshold and was applying it. His conclusion was that Judge Greally was correct, that she did not have any jurisdiction to stop the prosecution on the grounds of delay alone and that having regard to recent decisions, and in particular having regard to the case of *M.S. v. Director of Public Prosecutions* [2015] IECA 309, she was clearly correct to the extent that the point was beyond argument. In my view he was correct in that conclusion, for reasons I will elaborate on below.

13. Before doing so, however, it should be recorded that the High Court judge then went further and concluded that to the extent that the High Court had the jurisdiction that Judge Greally had correctly concluded she did not have, he was not disposed to grant leave to apply for prohibition by way of judicial review because in his view the complaints being made *"are nowhere near the level at which it can be said to be arguable that the applicant has experienced the kind of severe and inevitable prejudice that would have warranted the stopping of her trial"*.

14. In *P.M. v Director of Public Prosecutions* [2006] 3 I.R. 172 the Supreme Court expressly approved of, and adopted, the observations of Powell J in the United States

Supreme Court in the case of *Barker v Wingo* (1972) 407 U.S. 514 to the effect that three interests are protected by the right to an expeditious trial , namely:-

(i) the right to prevent oppressive pre-trial incarceration;

(ii) the right to minimise anxiety and concern to the accused, and

(iii) the right to limit the possibility that the defence will be impaired.

Kearns J, with whom the other members of the five judge Supreme Court agreed, made clear that where, on an application to prohibit a trial from proceeding, the right to an expeditious trial was asserted the court was required to engage in the *"balancing test"* previously commended by Keane C.J. in *P.M. v Malone* [2002] 2. I.R. 560 in which four factors were required to be taken into account: "*the length of the delay, the reason for the delay, the accused's assertion of his right and prejudice.*" The establishment of culpable prosecutorial would not *per se* entitle the claimant to relief. Kearns J stated:

> *"I believe that the balancing exercise referred to by Keane C.J. in P.M. v. Malone [2002] 2 I.R. 560 is the appropriate mechanism to be adopted by a court in determining whether blameworthy prosecutorial delay should result in an order of prohibition. It means that an applicant for such relief must put something more into the balance where prosecutorial delay arises to outweigh the public interest in having serious charges proceed to trial. In most cases, pre-trial incarceration will not be an element as an applicant will probably have obtained bail pending his trial. Secondly, while he may assert increased levels of stress and anxiety arising from prosecutorial delay, any balancing exercise will have to take into account the length of such blameworthy delay, because if it is a short delay rather than one of years, the mere fact that some blameworthy delay took place should not of itself justify the prohibition of a trial.*

34 As part of the balancing exercise it should also be borne in mind that an order of prohibition may not be the only remedy available in such circumstances."

15. It has been held in subsequent jurisprudence that as a trial judge carries primary responsibility for ensuring fairness in the trial process, the trial judge has ample powers, up to and including staying the proceedings indefinitely if the interests of justice require it, to deal with any complaint about delay which alleges a prejudice to the third interest identified by Powell J as being protected by the right to an expeditious trial, namely the possibility that the defence may be impaired on account of the delay that has taken place. Equally, as Kearns J pointed out, a complaint about delay which is said to expose the accused to excessive pre-trial incarceration can be addressed by the granting of bail, either by the trial judge or by another court having jurisdiction to do so.

16. What a trial judge cannot address, however, is a complaint about delay based solely on the second of the interests identified by Powell J, namely prejudice to the accused's right to mental health and well being and her entitlement to be spared from stress and anxiety over and above that which any accused will inevitably face as a result of being charged and of having to face trial. Where it is claimed that that sort of prejudice has been suffered, or will be suffered, the trial judge has no power or jurisdiction to prohibit the trial from going ahead. The most a trial judge can do is grant an earlier trial date than might otherwise have been available, a step that might or might not be adequate to address the concern raised. Only the High Court, being a court of full original jurisdiction, has the entitlement, in the context of its power of judicial review, to prohibit or to injunct a trial from going ahead on such grounds. Moreover, it is only very infrequently and rarely that prohibition is in fact granted by the High Court on such a basis, because the court must always engage in a balancing process between an accused's right to be protected from such stress and anxiety and the public's interest in the prosecution and conviction of those guilty

of criminal offences; and the public interest will always be afforded very significant weight.

17. By way of example, such a claim had been made in *Kennedy v The Director of Public Prosecutions* [2012] IESC 34 and had been rejected by the High Court. Giving judgment in the Supreme Court on an appeal against the High Court's dismissal of the claim, Denham C.J. stated:

> *55. The appellant did raise the issue of stress and anxiety. However, no evidence was before the Court to establish this ground. As has been stated previously, it is necessary to provide an evidential basis to establish this ground so as to prohibit the trial.*
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> *56. There is well established jurisprudence that such a claim may not succeed where an appellant is suffering from normal stress and anxiety from a pending prosecution. Evidence is required to ground any exercise of discretion by the Court in favour of an applicant: P.M. v. Malone [2002] 2 I.R. 560. In this case the appellant has laid no such foundation, and hence may not succeed on this submission.*
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> *57. Further, even if evidence was before the Court as to specific stress and anxiety, the Court is then required to engage in a balancing process between an accused's right to be protected from such stress and anxiety and the public's interest in the prosecution and conviction of those guilty of criminal offences.*
>
> *58. Thus, this aspect of an infringement of the right does not arise."*

18. In addressing the issue of arguability in respect of the claim for leave to seek prohibition based on "stress and anxiety" in the present case, the High Court judge stated:

10. Mr. Colman Fitzgerald, S.C., on behalf of the applicant, submits that the applicant has suffered stress and anxiety going well beyond what would have been the case had the charges been prosecuted expeditiously. But it will always be the case that additional delay will produce additional difficulties for a defendant. If delay in itself is not a ground to stop a trial, as the Court of Appeal have clearly said, the inevitable additional stress and anxiety that is inextricably linked with such delay could not logically be such a ground either. Even assuming in favour of the applicant that all of her complaints could be taken into account, subject to an assessment of gravity, and taking them at their highest, those complaints come nowhere near the level required.

11. Paragraph 7 of the applicant's affidavit sets out various matters relating to stress, strain, worry and anxiety and other related difficulties, including active investigations of her family by the HSE. It seems to me that most of these difficulties arose from the nature of the serious allegations made against the applicant in the first place relating to defilement and sexual assault of children, rather than the delay as such. For example, the HSE (and now the Child and Family Agency) would have been entitled, if not required, to investigate the applicant, possibly at some length, in relation to this matter in any event. If and to the extent that any additional difficulties have been experienced by the applicant as a result of the delay, they are nowhere near the level at which it can be said to be arguable that the applicant has experienced the kind of severe and inevitable prejudice that would have warranted the stopping of her trial, even if all of the matters relied on by the applicant were entirely attributable to the delay, which they are not.

19. It is clear from the jurisprudence already alluded to that for the appellant's claim to even arguable, she was required to meet a threshold of being in a position to adduce cogent

evidence capable of supporting her contention that she had suffered stress and anxiety that went well beyond that which any person charged with and facing trial for the same offences would face. It is clear that the High Court judge was doing no more than examining whether there was any such cogent evidence in the affidavits being relied upon. He was not deciding whether the evidence offered in fact supported the claim being advanced, merely was it capable of so supporting it. In other words, his consideration was focussed on whether the appellant had laid the necessary evidential foundation to render the claim at least arguable. He concluded that evidence of stress and anxiety at the level proffered was not capable of supporting such a claim, and that therefore the claim was not arguable. The High Court judge was, in my view, perfectly correct and was wholly justified in adopting that approach.

20. It is appropriate at this point to consider the complaints concerning the further rejection by the High Court judge of the claim for relief based on complaints concerning the Act of 1992. Again, he felt that the point that was being raised in relation to the correct interpretation of s. 16 of the Act of 1992 was a very straightforward one and one where the answer was clear. Moreover, he felt that when the matter was raised in the Circuit Court there was a relevant and binding authority. I consider that the section could scarcely be clearer and that the trial judge (Judge Greally) was entirely correct in the interpretation that she had placed on the section. The High Court judge was therefore correct in rejecting the statutory interpretation point as failing to meet the arguability test. In the circumstances it was unnecessary to consider whether the Victim's Directive has direct effect.

21. The High Court judge had then turned to the alternative claim for prohibition, and a declaration, on the basis that s. 16(1)(b) of the Act of 1992 was repugnant to the Constitution for authorising a significant departure from the "requirement of orality" in the criminal process. He noted that *"the fundamental problem with this argument is that the*

section protects rights conferred by the [Victim's] directive insofar as persons under 14 are concerned. It is not therefore unconstitutional by virtue of Article 29.4.6°."

22. Article 29.4.6° of the Constitution provides:

"No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State, before, on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of membership of the European Union referred to in subsection 5° of this section or of the European Atomic Energy Community, or prevents laws enacted, acts done or measures adopted by—

i the said European Union or the European Atomic Energy Community, or institutions thereof,

ii the European Communities or European Union existing immediately before the entry into force of the Treaty of Lisbon, or institutions thereof, or

iii bodies competent under the treaties referred to in this section,

from having the force of law in the State."

23. The High Court judge is clearly right in his contention that to the extent that s. 16(1)(b) is capable of being relied upon by the state as representing a partial transposition of the Victim's Directive, Article 29.4.6° *prima facie* precludes a challenge to its constitutionality. However, he goes on to point out that in any event counsel for the applicant was unable to identify any unfairness or discrimination created by the impugned provision such as might render it unconstitutional, and noted that it contained a number of significant safeguards including that the child must be available for cross-examination, and the vesting of a discretion in the trial judge not to admit the evidence where to do so would be contrary to the interests of justice. He then continued:

"28. If, which is not the case, I was of the view that there was an arguable issue as to the constitutionality of the section, it is important to recall the view of Clarke

J. in Nawaz v. Minister for Justice Equality and Law Reform [2013] 1 I.R. 142 at p. 161 that "the normal procedure by which a case, in which the primary relief claimed concerns a declaration of invalidity of an Act having regard to the Constitution, should be brought by plenary proceedings rather than judicial review". Even accepting the point that the declaration of unconstitutionality is not the primary relief being sought in these proceedings, having regard to the approach in relation to constitutional challenges in the criminal context which I discussed in Casey v. D.P.P. [2015] IEHC 824, it seems to me that judicial review at this stage of the process is inappropriate.

29. As discussed in Casey, the principle that constitutional issues should be reached last militates in favour of requiring the applicant to submit to the criminal process and pursue any criminal appeal before being permitted to have proceedings challenging a duly enacted statutory provision listed for hearing. To do otherwise would be to put an Act of the Oireachtas to the test in circumstances where it had not yet been determined whether and to what extent that was necessary, and also in circumstances where the factual matrix for the application of the Act had not been finally determined in the criminal proceedings. As Easterbrook J. put it in Alliance for Water Efficiency v. Fryer (U.S. Court of Appeals for the Seventh Circuit, Appeal Number 15-1206, 22nd December, 2015), "courts should not decide constitutional issues unnecessarily" (at p. 7).

24. The High Court judge then proceeded to refuse judicial review in relation to the constitutional issue at any event at this stage having regard to the principles discussed in *Casey*.

25. The appellant's submissions, both oral and written, have not engaged in any way with the High Court judge's ruling on the alternative claim based on the alleged unconstitutionality of the s.16(1)(b) of the Act of 1992. However, the ground of appeal relating to it does not appear to have been abandoned. I can identify no ostensible error in the High Court judge's approach, and consider that he was correct both in his view that an arguable case to challenge the constitutionality of the section in question had not been demonstrated, and further that it was not in any event an appropriate claim to seek to make by way of judicial review proceedings.

26. In conclusion then, as has been said so often, the burden on a party seeking leave is a light one, but nonetheless it is the case that there is a threshold to be crossed. Low as the threshold is, the appellant has singularly failed to cross it. I would dismiss the appeal.

George Birmingham
21st June 2017

No redaction needed
- already undertaken