

D. O'D., Applicant v. The Director of Public Prosecutions and Judge Patricia Ryan, Respondents [2009]
IEHC 559, [2009 No. 232 JR]

High Court

17th December, 2009

Criminal law – Fair trial – Video link – Mentally impaired person – Sexual offences against mentally impaired persons – Complainants testifying via live video link – Whether this suggested to jury that complainants were mentally impaired – Whether real risk of unfair trial – Whether risk could be overcome by warnings or directions to jury – Criminal Evidence Act 1992 (No. 12), ss. 13 and 19.

Section 13 of the Criminal Evidence Act 1992 provides:-

- “(1) In any proceedings for an offence to which this Part applies a person other than the accused may give evidence, whether from within or outside the State, through a live television link –
- (a) if the person is under 17 years of age, unless the court sees good reason to the contrary,
 - (b) in any other case, with the leave of the court.”

Section 19 of the Act of 1992 provides that a reference in s. 13(1)(a) to a person under 17 years of age shall include a reference to a person with mental handicap who has reached the age concerned.

The applicant was charged with five counts of having sexual intercourse with a mentally impaired person under s. 5 of the Criminal Justice (Sexual Offences) Act 1993. The second respondent directed that the complainants be permitted to give their evidence by way of a live video link pursuant to s.13(1)(b) of the Criminal Evidence Act 1992.

The applicant was granted leave to apply for judicial review seeking an order quashing the direction of the second respondent on the grounds that the giving of evidence by video link by the two complainants would create a real risk that the applicant would not get a fair trial as it would convey to the jury that the complainants were persons who were mentally impaired, a matter which the applicant disputed as part of his defence.

Held by the High Court (Ó Néill J.), in granting the relief sought and remitting the issue for rehearing in the Circuit Criminal Court, 1, that, where the main reason for the use of the video link was because the prosecution had satisfied the trial judge that the witnesses suffered from a mental impairment, the giving of evidence in this way carried with it a real risk of unfairness to the accused which could not be remedied by directions from the trial judge or statements from the prosecution.

2. That where the giving of evidence by video link carried with it a serious risk of unfairness to the accused which could not be corrected by an appropriate statement from the prosecution or by a direction from the trial judge, the court should only permit the giving of evidence in this manner where satisfied that a serious injustice would be done, in the sense of a significant impairment to the prosecution's case, if evidence had

to be given in the normal way, *i.e. viva voce*. The probability must be that the witness in question would be deterred from giving any evidence at all or would, in all probability, be unable to do justice to their evidence if required to give it *viva voce* in the ordinary way. This was a high threshold.

There are no cases mentioned in this report.

Judicial review

The facts have been summarised in the headnote and are more fully set out in the judgment of Ó Néill J., *infra*.

On the 12th December, 2006, the applicant was charged with five offences committed under s. 5 of the Criminal Justice (Sexual Offences) Act 1993. On the 20th February, 2009, the second respondent made an order directing that the complainants be permitted to give their evidence by way of a live video link, pursuant to s. 13(1)(b) of the Criminal Evidence Act 1992.

On the 2nd March, 2009, the High Court (Peart J.) gave leave to the applicant to apply by way of judicial review for an order of *certiorari* quashing the order of the second respondent dated the 20th February, 2009 and an injunction as against the first respondent restraining the further prosecution of the applicant by the presentation of the complainants' evidence *via* live video link.

The application was heard by the High Court (Ó Néill J.) on the 16th October, 2009.

Luán Ó Braonáin S.C (with him *Remy Farrell*) for the applicant.

Paul Anthony McDermott for the first respondent.

Cur. adv. vult.

Ó Néill J.

17th December, 2009

The reliefs

[1] Leave was granted by this court (Peart J.) to the applicant on the 2nd March, 2009, to seek the following reliefs by way of judicial review proceedings:-

1. an order of *certiorari* quashing the order of the second respondent dated the 20th February, 2009, directing the use of video link facilities pursuant to s. 13 of the Criminal Evidence Act 1992;
2. an injunction as against the first respondent restraining the further prosecution of the applicant in respect of bill no. DU179/07 currently pending before the Dublin Circuit Criminal Court by the presentation of the complainant evidence *via* live video link.

The facts

[2] The applicant is currently the subject of proceedings before the Dublin Circuit Criminal Court. Those proceedings concern allegations made by two complainants, who are cousins of the applicant, in respect of five offences alleged to have been committed by him contrary to s. 5 of the Criminal Justice (Sexual Offences) Act 1993. That section provides for the offence of having sexual intercourse with mentally impaired persons. The meaning of the term mentally impaired is defined in s. 5(5) of the Act of 1993 as “suffering from a disorder of the mind, whether through mental handicap or mental illness, which is of such a nature or degree as to render a person incapable of living an independent life or of guarding against serious exploitation”.

[3] Four of the alleged offences relate to the complainant A.O'D., who is now 42 years old, and are alleged to have been committed at the home of the applicant in a suburb of Dublin in 2002 and 2003. The remaining alleged offence relates to A.O'D.'s sister, V.O'D., who is now 46 years old, and that offence is alleged to have been committed in Cork in 2002. As part of his defence to the charges, the applicant, at trial, intends to contest that the complainants suffer from a mental impairment.

[4] On the 20th February, 2009, the second respondent made an order on foot of an application of the first respondent, directing that the complainants be permitted to give their evidence by way of a live video link, pursuant to s. 13 of the Criminal Evidence Act 1992. The prosecution applied for evidence to be given in this way under s. 13(1)(b) of the Act of 1992. Section 13(1) of the Act of 1992 states as follows:-

“In any proceedings for an offence to which this Part applies [including sexual offences] a person other than the accused may give evidence, whether from within or outside the State, through a live television link –

- (a) if the person is under 17 years of age, unless the court sees good reason to the contrary,
- (b) in any other case, with the leave of the court.”

[5] Had the application been made under s. 13(1)(a) of the Act of 1992, it would have involved a finding that both of the complainants suffered from a mental handicap, as s. 19 of the Act of 1992 states, *inter alia*, that the reference in s. 13(1)(a) to a person under 17 years of age “shall include references to a person with mental handicap who has reached the age concerned”. In order to avoid pre-judgment of the issue of whether the complainants suffered from a mental impairment, the first respondent in the instant proceedings, avers that the application was brought under s. 13(1)(b) of the Act of 1992.

[6] At the hearing in the Circuit Criminal Court the second respondent, as revealed in the transcript, referred to the fact that she had heard a previous application in the same case. Counsel for the prosecution submitted that the case was one where the court had ample reason to exercise its discretion in favour of her application, based on the contents of the reports of Mr. John Buttimer, clinical psychologist, in respect of A.O'D. and V.O'D., and the two reports of Ms. Mary Desmond, psychologist, in respect of V.O'D., together with the nature of the case and the relationship between the persons involved. The said reports were handed into court. Reports, in the form of a statement given by way of additional evidence, of Mr. Buttimer dealing with A.O'D and of Ms. Desmond dealing with V.O'D., touch on the subject of the complainants' ability to give evidence and are in identical terms and are the only material put before the second respondent which expressly considers the ability of either complainant to give evidence. These statements are in the following terms:-

“Further to my psychological report on A.O'D., dated June, 2004 I would like to reiterate that on the basis of that psychometric assessment of intellectual ability, A.'s level of intellectual disability fell within the low mild range (low mild mental handicap).

Individuals who fall within this range of disability present with significantly lower levels of intellectual ability and adaptive/functional life skills than the typical person. A.'s level of disability would suggest that she would have difficulty living independently and in guarding against and protecting herself against serious exploitation.

A.'s level of disability and her special needs would be apparent to individuals following even a brief social interaction with A.

With respect to A.'s ability to give testimony in a court case, it would be advantageous were she permitted to give testimony by means of video link.”

[7] Counsel for the applicant objected to the prosecution's application on the grounds that it would create an inference that the complainants were vulnerable persons and persons who suffered from a mental impairment, if permitted to give evidence by way of video link. In essence, he argued that

the issue of their mental impairment would be pre-determined and would impinge on his client's right to a fair trial. He submitted that the reports handed in suggested merely that it would be preferable if the witnesses gave their evidence *via* a video link and that this did not go far enough. The second respondent recalled details of the complainants' circumstances and then a transcript of the evidence from the hearing of the 22nd November, 2007, was handed in.

[8] At that previous hearing an issue arose as to where a psychiatric assessment on the complainants by a consultant psychiatrist, Professor Patricia Casey, engaged for the defence, should take place. Counsel for the prosecution proposed that the psychiatrist should travel to the town where the two complainants resided, as opposed to them travelling to Dublin to her office. The prosecution called Ms. Judy Moynihan of the COPE Foundation, who had been A.O'D.'s social worker for the past 19 years and who had been V.O'D.'s social worker for the past eight years to give evidence. The following passage from the transcript of the evidence of Ms. Moynihan sets out the basis for her concerns for A.O'D. if required to travel to Dublin for the assessment:-

“Q. [Counsel for the prosecution]... You heard the suggestion that they [the complainants] travel to Dublin to be psychiatrically assessed. Can you comment on that for the assistance of the court at all?

A. [Ms. Moynihan] Well, I believe that is really a huge ask of anybody to do that to them because the trauma they experienced through the alleged incidents has been huge. It is something that is never far from their minds. They associate Dublin with that, and when I say ‘they’ I really should be speaking for A. [O'D.].

Q. I think you should, in fairness to the defence, and obviously the point that [counsel for the defence] has made I will confine myself to that, yes. Thank you.

A. I apologise. A. [O'D.] is hugely taken up by the events that have happened in Dublin. I have a number of reasons that I think that they should not travel. I think that they are alleged victims and this would exasperate the feeling of victimising them again by bringing them up to Dublin for such a proposed assessment. I think the picture that I've briefly painted of them and the supports that they offer the family; that is a huge role in their lives, daily lives, in her daily life and if A. [O'D.] were to be removed from that or if she was not there until 10 or half past everyday and back again at three or half past everyday she could not comprehend who would fill the gap for her, who would do those jobs.”

[9] Ms. Moynihan also gave evidence that A.O'D. was the main carer for her elderly dependent parents. Under cross-examination by counsel for the applicant, Ms. Moynihan alluded to the trauma the complainants would suffer from undergoing the assessment. Professor Casey then gave evidence as to what the assessment would entail.

[10] In her ruling the second respondent had regard to the following matters: the likely disruption to the family commitments of A.O'D.; the trauma A.O'D. would encounter due to the break in her routine; the fact that V.O'D. would not be paid for the day of work that she would miss and that she would have to provide an explanation to her employer and her friends for her absence and that the complainants were persons with intellectual disabilities. Having taken these matters into account the second respondent refused the application to have the assessment carried out in Dublin.

[11] In her ruling on the application under s. 13(1)(b) of the Act of 1992, the second respondent stated that her first concern was the right of the accused to get a fair trial but that she also had to take into account "the nature of this case, the relationship between the parties and the reports and the evidence given on the last occasion". She held that "given the particular circumstances of this case, the particular nature of the case, the relationship between both A.O.D. and V.O.D. and the accused man" that it was an appropriate matter for the court to exercise its discretion and she directed that the evidence should be given by video link.

The issue

[12] The issue that arises for determination in these proceedings is whether or not the giving of evidence by video link by the two complainants would create a real risk that the accused would not get a fair trial because the giving of evidence by the complainants by way of live video link could or would convey to the jury that the complainants were persons with mental impairment, a matter which the applicant disputes as part of his defence.

Counsels' submissions

[13] Counsel for the applicant submitted that the order of the second respondent permitting the complainants' evidence to be given by video link would prejudice the jury in their deliberations on whether the complainants are mentally impaired persons for the purposes of s. 5 of the Act of 1993. In his submission the evidence put forward to the second respondent on the hearing of the application under the Act of 1992 did not reach the required

threshold so as to displace the right of the accused to a fair trial. In this regard counsel for the applicant contrasted s. 13(1)(a) of the Act of 1992, which, he submitted, created a presumption that a person could give evidence by way of video link unless the court could find a reason to the contrary, with s. 13(1)(b) which, he submitted, providing for a threshold that a person had to meet in order for the normal rules to be displaced, notwithstanding the right to a fair trial. He argued that the evidence adduced by the first respondent, though it established an advantage to the complainants in giving their evidence *via* video link, did not amount to a basis for granting the order.

[14] The message to the jury at the trial, he submitted, would be that the complainants had to be protected and this created a fundamental disadvantage for the applicant. He contended that inadequate weight had been attached by the second respondent to his client's right to a fair trial and that the impact upon it had not been assessed by her. The appropriate test under s. 13(1)(b) of the Act of 1992, he submitted, was that there would have to be evidence of an inability on the part of a witness to give evidence or a very real or significant impairment of the capacity of that witness to give evidence.

[15] Counsel for the first respondent submitted that the application was made in the Circuit Criminal Court under the second limb of s. 13 of the Act of 1992 precisely to avoid establishing that the complainants suffered from a mental impairment and to avoid a suggestion of predetermination. He suggested that the jury could be given a direction that nothing was to be taken from the fact of persons giving evidence *via* a video link and that a properly charged jury would only have regard to the evidence. He submitted, in addition, that a jury may not be aware that there was anything unusual about evidence being given by way of video link and that the criterion of handicap or impairment was not the only basis upon which an order could be made under s. 13(1)(b) of the Act of 1992.

[16] In counsel's submission the second respondent considered a combination of factors and balanced them which led to her conclusion that the complainants should give their evidence by video link and that the evidence before her amounted to an adequate basis for the making of the order. Even if an error had been made by the second respondent, he contended that it would have been one made within jurisdiction and would not, as such, be amenable to challenge by way of judicial review. He noted that the legislature had not set down an actual test in s. 13 of the Act of 1992 and that the second respondent properly undertook a balancing exercise. He submitted that if evidence could not be given by video link that the whole purpose of the section would be defeated and the clear intention of the Oireachtas would be frustrated.

Decision

[17] The application under s. 13 of the Act of 1992 was objected to on the basis of the right of the accused to a fair trial *i.e.* if evidence was given by the complainants by way of video link that it would *ipso facto* involve an intimation to the jury that the complainants suffered from some element of mental impairment or that it would tend to sway the jury to that conclusion. The potential problem that arises is one of perception, in that, it might appear to the jury that, the complainants, who are women in the forties, are being allowed to give their evidence by video link rather than in the usual way simply because of mental impairment.

[18] The first respondent submits that the giving of evidence by the complainants by video could be explained to the jury by the prosecution in such a way as to convey to them that the use of the live video link did not involve or was not any determination on the question of the their mental competence. Also, it was submitted that a direction could be given by the trial judge to the jury to the effect that the issue of the complainants' mental impairment or otherwise was a matter for them to determine and to exclude from their minds any suggestion that the giving evidence by video link implied that the witnesses suffered from mental impairment.

[19] I am satisfied that this would be an unsatisfactory approach for the simple reason that it would be, partially at least, untrue, given that the main reason for the use of the video link is because the prosecution satisfied the second respondent, *inter alia*, that they do suffer from mental impairment. Perhaps another approach that could be adopted is for the trial judge to give an explanation to the jury of the statutory provisions regarding video link evidence and to direct them to ignore the method of giving evidence and to determine the issue of mental capacity purely on the evidence they hear. But, this too would not be a satisfactory direction as it could not remove from the minds of the jury the fact that the basis of the complainants giving their evidence by video link was an implicit interlocutory finding of mental impairment. The fact that the application for the video link was made under s. 13(1)(b) rather than s. 13(1)(a), if explained to the jury, could not, in my opinion, convey to the jury with the necessary degree of conviction, the fact that the selection of the video link did not suggest or imply mental impairment affecting the complainants.

[20] In my judgment, it is clear that evidence by video link in the circumstances of this case does carry with it a real risk of unfairness to the accused person which probably cannot be remedied by directions from the trial judge or statements from the prosecution.

[21] Manifestly, s. 13 of the Act of 1992 provides for the giving of evidence by video link for offences such as the ones the applicant is

charged with. The discretion which the court has under s. 13(1)(b) to order evidence to be given in this way or to direct otherwise raises the difficult question as to how the court is to achieve a correct balance between the accused's right to a fair trial and the prosecution's right in an appropriate case to have evidence given by video link. It is clear that what is required is a test that achieves the correct balance between these two competing rights.

[22] Where the court reaches the conclusion that the giving of evidence in this way carries with it a serious risk of unfairness to the accused which could not be corrected by an appropriate statement from the prosecution or direction from the trial judge, it should only permit the giving of evidence by video link where it was satisfied by evidence that a serious injustice would be done, in the sense of a significant impairment to the prosecution's case, if evidence had to be given in the normal way, *viva voce*, thus necessitating evidence by video link in order to vindicate the right of the public to prosecute offences of this kind. The fact that the giving of evidence *viva voce* would be very unpleasant for the witness or coming to court to give evidence very inconvenient, would not be relevant factors. In all cases of this nature the giving of evidence by the alleged victim will be very unpleasant and having to come to court is invariably difficult and inconvenient for most persons. Most witnesses have vital commitments which have to be adjusted to allow them to come to court. The real question is whether the circumstances of the witness are such that the requirement to give evidence *viva voce* is an insuperable obstacle to giving evidence in a manner that does justice to the prosecution case. The evidence must establish to the satisfaction of the court hearing the application under s. 13 of the Act of 1992 that the probability is that the witness in question will be deterred from giving evidence at all or will, in all probability, be unable to do justice to their evidence if required to give it *viva voce* in the ordinary way. This is necessarily a high threshold, but I am satisfied that in order to strike a fair balance between the right of the accused person to a fair trial and the right of the public to prosecute offences of this kind, it must be so.

[23] I am satisfied that the second respondent did not apply the correct test as set out above, to achieving the correct balance in this case between the right of the applicant to a fair trial and the right of the first respondent to prosecute the offences in question on behalf of the public. In my judgment she had regard to and attached considerable weight to factors such as the relationship between the applicant and the complainants, the reports on mental assessment of the complainants, domestic and vocational awkwardness and inconvenience, and the unpleasantness of the experience of giving evidence as factors which, in themselves, warranted the making of the order. Whilst these factors were directly relevant to the decision

made in the earlier application on the location of the psychiatric assessment to be carried out for the applicant, in the application under s. 13 of the Act of 1992 these factors would only be relevant if they amounted to or supported evidence which established that the witnesses in question would not be capable of giving their evidence *viva voce* or would not be capable of doing justice to their evidence in that setting. That core question does not appear to have been expressly addressed, save in a very limited way, as set out above, in the last paragraphs in the reports or statements of Mr. Buttimer and Ms. Desmond. As is apparent, their conclusion was merely that the giving of evidence by video link would be “advantageous” and no more. There is no real exploration or consideration of the ability of either complainant to give evidence *viva voce*. Such a consideration or conclusion, quite simply, fails to meet the requirements of the test as set out above.

Conclusion

[24] For these reasons I am of the opinion that the impugned order made by the second respondent places the applicant at risk of an unfair trial and, accordingly, I will grant an order of *certiorari* to quash it. It is appropriate that the matter be remitted to the Circuit Criminal Court for a rehearing of the application under s. 13 of the Act of 1992.

Solicitors for the applicant: *Garrett Sheehan & Partners.*

Solicitor for the first respondent: *The Chief Prosecution Solicitor.*

Genevieve Coonan, Barrister
