THE COURT OF APPEAL

Neutral Citation Number [2021] 193
Record Number: 2021/39

Edwards J.
Kennedy J.
Ni Raifeartaigh J.

UNAPPROVED

BETWEEN/

M.S.

APPELLANT

- AND -

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT delivered (electronically) on the 12th day of July 2021 by Ms. Justice Kennedy.

1. This is an appeal by the appellant from the order of the High Court (O'Regan J.) dated the 15th December 2020, refusing the appellant's application for an injunction restraining the respondent from further prosecuting the appellant for indecent assault offences alleged to have been committed by him on eleven persons between January 1968 and December 1992. The judge refused to grant an extension of time in accordance with O.84, r.21 of the Rules of the Superior Courts.

Background

2. The appellant is an 88-year old retired consultant surgeon who is currently facing 31 charges of indecent assault. The appellant has previously been tried on three separate occasions in relation to similar offences of indecent assault in respect of a different set of

complainants. In the first trial in 2003 the appellant was acquitted on all counts. In November 2017, he was convicted and sentenced to 20 months' imprisonment for three offences of indecent assault on two complainants. His appeals against conviction and sentence were dismissed in 2019. In February 2019, the appellant was convicted of 12 counts of indecent assault and one of sexual assault on seven complainants and was sentenced to four years' imprisonment. His appeal against conviction was dismissed in November 2020.

3. The complaints grounding the current criminal proceedings were made between 23rd April 2012 and 2nd February 2014. The appellant was interviewed by the gardaí on 5th December 2015 in respect of 57 complainants including the complainants the subject matter of the within bill.

4. Although a direction to charge issued from the Director of Public Prosecutions on 11th May 2017 the appellant did not hear of the direction until shortly prior to charge on 3rd May 2019. In order to protect the appellant's right to a fair trial, it had been the intention of the Director of Public Prosecutions to advise the appellant's solicitors by letter of her intention to postpone the trial while the appellant was charged with other offences and to canvass the appellant's solicitors as to alternative suggestions concerning the charging of the appellant in order to avoid any prejudice to the charges which were before the court. Unfortunately, due to an oversight no such communication took place.

5. No indictment has yet been lodged and on the 8th June 2020 the appellant was granted leave to seek to prohibit the further prosecuting of bill DU874/2019 for which a trial date of 8th June 2021 had been fixed. This date has since been vacated.

Proceedings in the High Court

6. O'Regan J. ruled that the appellant was out of time under O.84, r.21 of the Rules of the Superior Courts and that time could not be extended having regard to the provisions thereof. Nonetheless, she proceeded to consider the substantive issue in the case and

concluded that even if she was incorrect on the issue of time, the appellant had not demonstrated that an Order of prohibition was warranted.

Substantive issues

7. The appellant relies on the Supreme Court decision in *S.H. v. DPP* [2006] 3 IR 575 and contends that it would be unfair and unjust to put the appellant on trial. It is accepted on his part that the law has evolved since *S.H.* and issues such as missing evidence or witnesses are now ordinarily left to the discretion of the trial judge. However, the appellant seeks to rely on the cumulative impact of factors which it is said causes the appellant to fall within the dicta of Murray C.J. in *S.H.* which does not exclude the prohibition of a trial in wholly exceptional circumstances.

> "The Court does not exclude wholly exceptional circumstances where it would be unfair or unjust to put the accused on trial."

8. The High Court judge accepted that there had been some prosecutorial delay which potentially caused prejudice to the appellant and consequently she carried out a balancing exercise. It is said on behalf of the appellant that the entire approach adopted by the judge was incorrect. Insofar as the balancing exercise is concerned the judge said as follows:-

> "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 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."

Extension of time

9. The preliminary issue to be determined by the High Court judge was whether the application for leave was out of time and whether an extension of time was necessary. The appellant relied on *C.C. v. Ireland* [2006] 4 IR 1, para. 94 where Geoghegan J. in the

Supreme Court held that in the context of the rules for judicial review, time would only start to run from the service of the indictment. The indictment in respect of the within bill has yet to be issued and on this view, the appellant was not out of time in bringing these proceedings. This argument was rejected by the High Court who noted that *C.C. v. Ireland* [2006] 4 IR 1 preceded the new Rules of the Superior Courts and 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] 4 IR 1 is not relevant.

10. In the alternative, the appellant accepted that the grounds first arose on receipt of the letter of 22nd January 2020 as to the reasons for the delay in charging the appellant. However, the High Court judge noted that this letter mirrored the content of the letter of 9th December 2019 insofar as the reasons for the delay. It was the Court's view that without having to decide on whether the commencement of judicial review time limits was 13th December 2019, or earlier, the appellant required an extension of time since it expired on the 13th March 2020, albeit, from the appellant's timeline point of view, it was only a matter of days.

11. The High Court judge noted that Order 84, r.21 states that the court shall not grant an extension of time unless *inter alia*, affidavit evidence establishes that the delay was beyond the control of the appellant or could not reasonably be anticipated by the appellant. The judge was satisfied that given the foregoing neither test has been complied with to the effect that an extension of time could not be granted under O.84, r.21.

Submissions of the appellant

12. The appellant submits that the decision in *C.C. v. Ireland* [2006] 4 IR 1 was binding on the High Court judge in circumstances where an indictment had not yet been served and she erred in failing to follow it.

13. The appellant submits that there was no basis in law for the finding that *C.C. v. Ireland* [2006] 4 IR 1 no longer applies because it precedes the new Rules of the Superior Courts and this goes beyond Donnelly J.'s acknowledgement in *X v. DPP* [2020] IECA 4 that there is an apparent tension between *C.C. v. Ireland* [2006] 4 IR 1 and *Coton v. DPP* [2015] IEHC 302 as to when time begins to run for the purpose of making an application for leave to apply for judicial review. The appellant submits that the circumstances in *Coton* are distinct from the circumstances in the instant case where *Coton* involved evidence of the practice in the Central Criminal Court with regard to the *pro forma* nature of the indictment, the norm of service of same on the eve of trial and that ordinarily little of substance arose from the indictment. It is submitted that the indictment is of central importance in a Circuit Court prosecution for historic allegations of sexual abuse involving multiple complainants such as this. The service and lodgement of the indictment is an important legal and procedural step in a prosecution of this nature. It defines the prosecution case. In such circumstances, an application to prohibit/injunct a prosecution where that step has not yet been taken by the prosecution cannot be out of time.

14. In the alternative, the appellant submits that the High Court judge was incorrect in her analysis and conclusion that time began to run before the receipt of the correspondence from the respondent dated 22nd January 2020.

15. The appellant further submits that having found, in error, that the appellant did need an extension of time, the High Court judge erred in fact and law in not extending time pursuant to Order 84 Rule 21 (3) and in finding that affidavit evidence did not establish that the delay was beyond the control of the appellant or could not reasonably be anticipated by the appellant.

Submissions of the respondent

16. The respondent submits that the judge was correct in her determination that the application was out of time although the respondent argues that grounds arose earlier than December 2019. In any event the respondent submits that with regard to the appellant's reliance of the date of 22nd January 2020, requests for disclosure do not stop the clock running.

17. It is further submitted that grounds for bringing the application do not first arise upon the service of the indictment, which in many cases would permit an application to be made on the eve or day of the trial. In this case, the indictment has not yet been served

18. With regard to the appellant's reliance on *C.C. v. Ireland* [2006] 4 IR 1, the respondent refers to the following remarks of Kearns P. in *Coton v. DPP* [2015] IEHC 302:-

> "In the C.C. case, there does not appear to have been any evidence offered to assist either the High Court or the Supreme Court as to when an indictment is normally provided to an accused person. In the High Court, after a considered analysis of relevant legal authority, Smyth J. found that the appropriate date from which time should run was the date of the return for trial. The application for prohibition, being brought as it was a mere 7 days before the trial was due to commence, (and being thus an "eleventh hour" application of the type later deplored by the Supreme Court in various "missing evidence" cases) was also significantly out of time by reference to the date of return for trial. Nevertheless, Smyth J. extended time in C.C., relying upon the "good reason" saver in 0.84 on the basis that matters of considerable importance to the administration of justice arose on the point being litigated, namely, whether s.1(1) of the Criminal Law (Amendment) Act provided a defence of reasonable mistake and, if not, was it inconsistent with the Constitution. Perhaps focusing more on this legal issue, the Supreme Court in a few short sentences dismissed objections that the application was out of time…

With considerable diffidence, I venture to suggest that these observations could scarcely be regarded as a full or reasoned analysis of why the date of service of an indictment should be the operative date for the commencement of the time provided for by Order 84. Given the fact that the evidence before this Court clearly demonstrates that the indictment is normally served at the start of a trial, fixing this time as the relevant date when time begins to run simply makes no sense. It would mean that, regardless of gross delay by an appellant, a trial might have to be called off at the twelfth hour -just as it is about to begin - at a time when all preparations have been completed, with legal teams instructed and potentially vulnerable witnesses in attendance, and when precious court time has been set aside and allocated to the trial. This flies in the face of every requirement for an efficient criminal justice system, not least the interests of the victims of crime for whom the adjournment of an upcoming trial may be fraught and stressful.

42.Furthermore, and even more illogically, any application brought to prohibit a trial before service of an indictment could, by application of this method of determining when time begins, be actually deemed premature.

43.In contrast, at the date of return for trial, the accused has sight of all the evidence which may be offered against him at his subsequent trial. He has everything he needs to determine whether grounds for making an application for judicial review have arisen. This Court can see no reason why the date of service of an indictment on the morning of a trial should be preferred to the date of the order returning him for trial. The indictment contains no "information" which would provide grounds for making an application and is derived only from the information and proposed evidence contained in the book of evidence.

44.Smyth J. sensibly concluded in C.C. that the grounds for making an application for judicial review should properly be considered to arise on the date when an appellant is sent forward for trial by a judge of the District Court. He noted that in Patrick L. v. D.P.P. (Unreported, High Court, 16th April, 2002) Herbert J. had taken a similar view and in S.K. v. D.P.P. [2007] IEHC 45, O'Neill J. was also of the view that the operative date for the purpose of the time running is the date on which an appellant is returned for trial. A similar conclusion was arrived at by Quirke J. in B.T. v D.P.P. in a case which, though reversed on appeal by the Supreme Court ([2005] 2 I.R. 559) on other grounds, was not disturbed in respect of his finding that the calculation of time should be deemed to commence when the order for return for trial is made. Against a backdrop where there may in the past have been some degree of uncertainty and confusion on this issue, the Court would be firmly of the view that practitioners should focus henceforth on the date of return for trial as the key date for the commencement of time for judicial review proceedings brought to prohibit a trial."

Discussion

19. Order 84, rule 21(1) of the Rules of the Superior Courts as amended in 2011 (hereinafter "RSC") now 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." The prior requirement to move promptly is no longer included. Rule 21(3) provides:-

"Notwithstanding sub-rule (1) , the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:

(a) There is good and sufficient reason for doing so, and

(b) The circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either:

(i) were outside the control of, or

(ii) could not reasonable have been anticipated by

the appellant for such extension."

20. I am satisfied I do not have to consider whether time starts to run from the service of the indictment in terms of *C.C. v. Ireland* [2006] 4 IR 1 and I will provide my reasons presently. However, I merely make the observation, that on many occasions an indictment may not be served until just prior to trial, as observed by Kearns P. in *Coton v. DPP* [2015] IEHC 302 in which decision he departed from *C.C.* Respectfully in my view, to say time commences to run from the service of the indictment means that an application for judicial review to restrain the respondent from taking any further steps in the prosecution may be initiated almost simultaneously with the trial itself. This does not seem to sit easily with the Rules of the Superior Courts which are designed to ensure that judicial review proceedings are brought with some expedition. Donnelly J. in perhaps more measured terms, in *X v. DPP* [2020] IECA 4 , described 'an apparent tension between *C.C. v. Ireland* and *Coton v. DPP*.' However, as I said I do not believe I need to consider whether time commences from the service of the indictment or not.

21. Firstly, I look to the affidavit sworn by Donough Molloy, Solicitor, and in particular the correspondence exhibited thereto concerning the issue of delay. Six queries were raised by the appellant's solicitor by letter dated the 26th September 2019 to the Chief Prosecution Solicitor (CPS). A further letter was sent dated the 27th November 2019 requesting a specific response to the queries raised and stating that clarification was required to enable the position on judicial review to be finalised. The response from the CPS dated the 9th December 2019 was received on the 13th December 2019. The queries raised, included when directions were given to prosecute and an explanation setting out the reasons for any delays up to the time

the charges were brought. The penultimate paragraph of the letter of the 9th December 2019 stated:-

> "As you are aware allegations of misconduct levied against your client are numerous with one Prosecution only concluding this year. The Prosecution was vigilant in ensuring that preceding trials were not prejudiced by further charging your client."

22. By letter dated the 2nd January 2020, Mr Molloy sought further clarification regarding the issue of delay and specifically, *inter alia*, the delay between the date of the issuing of directions (11th May 2017) and the date of those directions being 'formally conveyed' on the 3rd May 2019.

23. Therefore, clearly clarification was being sought regarding the letter of the 9th December 2019.

24. On the 15th January 2020, a further letter was sent by Mr Molloy requesting a response to the previous letter and indicating that it was the intention of the appellant to bring judicial review proceedings.

25. This gave rise to the response dated the 22nd January 2020 in which the CPS reiterated the penultimate paragraph of the letter dated the 9th December 2019.

26. In my view, Mr Molloy was justified in seeking additional clarification and I would respectfully disagree with the view of the High Court judge that time commenced from receipt of the letter dated the 9th December 2019. I also observe that at no stage did the DPP inform the appellant's solicitor that it had been intended to inform the appellant of the reason for the postponement of the trial and to canvass his views in this respect, but that such did not occur due to an oversight.

27. In those circumstances, when one considered the impact of Covid 19 and the ensuing restrictions on court business, and the circumstances where clarification on queries was

sought by the appellant's solicitor's and received on the 22nd January 2020, I would extend the time pursuant to r.21(3). I am satisfied in the circumstances that there is 'good and sufficient reason' for doing so and the circumstances resulting in the failure to make the application for leave within the time frame prescribed were outside the control of the appellant.

Grounds of appeal

28. While the appellant puts forward a total of nine grounds of appeal, the real issue is whether, on a cumulative basis, there are wholly exceptional circumstances which would render it unfair or unjust to put the appellant on trial. Consequently, this judgment focuses on grounds 1 and 2 of the grounds of appeal.

Submissions

Grounds 1 & 2

1. The High Court judge erred in fact and in law in finding that the decision of the Supreme Court in P.T. v. DPP [2008] 1 IR 701was not applicable or relevant in the instant case by reason inter alia of the coming into force of the Criminal Justice (Insanity) Act 2006. This error appears to arise from a mistaken focus on capacity rather than the true issue of whether a further trial would be unjust.

2. The High Court judge erred in fact and in law by failing to consider and carry out the required balancing exercise arising from the separate and distinct matter as to whether, in the cumulative circumstances, it was unfair or unjust to put the accused on trial again. The High Court judge was required to address this issue, which had been pleaded and argued, by reason of the second limb of the test in S.H v. DPP [2006] IESC 55, as was done in P.T. v. DPP [2007] I I.R. 701. The High Court judge appears to have fallen into such error by

conflating this issue with the related, but separate, issue of whether there is a real or serious risk of an unfair trial.

Submissions of the appellant

29. This submission of the appellant is predicated on *S.H. v. DPP* [2006] 3 IR 575. The appellant argues that *S.H.* sets out two tests arising for an applicant who seeks to prohibit a trial in cases featuring long delay in bringing a prosecution for offences of alleged child sexual abuse. The first of these is where delay has resulted in prejudice to the defence, by way of missing or lost evidence, leading to a risk of an unfair trial. This issue normally falls within the remit of the trial judge and the applicant does not seek to argue his case on this basis. Rather, it is upon the second test set out by the Court in *S.H.* that this appellant grounds his argument, i.e., cases where putting the accused on trial would be unfair and unjust. It is said that the High Court judge erred by failing to carry out the balancing test arising from the cumulative impact of several factors which it is said bring this case into the wholly exceptional category as envisaged in the second limb of the test to prohibit a trial in *S.H.* Mr Hartnett SC for the appellant says the judge conflated the related but distinct tests in *S.H.* and only considered whether there was a real risk of an unfair trial as a consequence of delay.

30. The appellant submits that there are several factors which render the prosecution unfair and unjust. These include the age of the appellant, the prosecutorial delay as found by the High Court, that the appellant could have been tried earlier in conjunction with other charges, the history of previous trials arising from the same context, the lapse of time between the alleged offences and the present day and the poor health of the appellant which impacts on his ability to participate fully in the trial.

31. The appellant relies on *P.T. v. DPP* [2008] 1 IR 701 which is illustrative of the type of situation where the second 'unfair trial' limb of *S.H. v. DPP* [2006] 3 IR 575 applies. In *P.T.* the Court found that the balance lay in favour of prohibiting the trial of an 87-year-old

appellant, who was in poor health, in light of the cumulative factors in the case. The appellant refers to the following passage from the judgment of Denham J. (as she then was) at para. 27 onwards-

> " Factors may exist or may develop after a decision has been made by the respondent, which would render a trial unjust. The issue in this case is whether such an exception has occurred. In this balancing exercise the court must give consideration to the right of the public to have crimes prosecuted. This is not an absolute, for prosecutions are taken when they are in the public interest. It is part of a justice system which is for the common good, which includes consideration of the constitutional requirement of due process. A prosecution is not an exercise in vengeance. While a court should give careful regard to the position of victims, it must protect the integrity of the justice system as a whole.
>
> 28 19. No single factor renders this case an exception. This decision does not mean that a person may not be prosecuted for a crime committed many years ago, nor that a person in their eighties may not be prosecuted, nor that a person with ill health may not be prosecuted. It is the cumulative effect of all the factors which bring this case within the category of an exception requiring a balancing exercise to be conducted by the court. Of specific importance is that it is an old case, that the prosecution took some time to mount (I am not finding that there was prosecutorial delay but merely recording the fact of the time lapse), that the appellant is an elderly man, in his 87th year, and that he is in bad health.
>
> 29 20. It demeans a system of justice if its process is one of vengeance or has such a perception. It evokes concepts of primitive jurisprudence. The People of Ireland under the Constitution require that there be due process in the justice system. The courts are required to protect the integrity of that system, which may mean that in

exceptional circumstances a prosecution should be restrained. It is a question of proportionality."

32. The appellant argues that the High Court judge erred in holding that *P.T. v. DPP* [2008] 1 IR 701 was not relevant on the basis that *P.T.* 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. The appellant argues that the Court has mistakenly focused on capacity rather than the actual issue of whether a further trial would be unjust.

33. The appellant further submits that the High Court judge erred in her reading of *T(J(S)) v. President of the Circuit Court & DPP* [2015] IESC 25 and that this decision in fact supports the appellant's case as it is noted there that the successful appellant in *P.T. v. DPP* [2008] 1 IR 701 'had a serious medical condition and was much older, 87 years of age', very similar to the appellant herein, whereas the appellant in *T(J(s)) v. President of the Circuit Court & DPP* was a 70 year old man.

34. The appellant submits that while the High Court judge did carry out a narrow balancing exercise as a result of her finding of prosecutorial delay, it was not the type of cumulative, macro balancing exercise which was required by reason of the binding precedent of the Supreme Court decision in *S.H. v. DPP* [2006] 3 IR 575.

Submissions of the respondent

35. In response, Ms. McDonagh SC for the respondent, submits that the High Court judge followed the approach of the Supreme Court in *P.T. v. DPP* [2008] 1 IR 701 and she did consider whether, absent specific prejudice, there were other "wholly exceptional circumstances" which meant it would be unfair to put the accused on trial. She listed all of the factors relied upon by the appellant which are not alleged to be specific prejudice and

the countervailing factors too. The trial judge did properly consider the second limb of *S.H. v. DPP* [2006] 3 IR 575 as well as the risk of an unfair trial issue.

36. As regards the appellant's submission that the High Court judge was mistaken in her approach towards the appellant's cognitive impairment, the respondent submits that the appellant's cognitive impairment and his ill health are both issues best dealt with by the trial judge. It is submitted that the trial judge has jurisdiction to deal in a constitutionally fair way with all of these matters and is not limited to dealing with the issue solely on the basis of whether an appellant is unfit to stand trial. The trial judge is best placed to make an assessment of the appellant's difficulties and to consider what accommodation can be made to alleviate any difficulties arising therefrom.

The High Court judgment - Periods of Delay

37. The appellant contended and contends for the following periods of delay;

1. The period between the date of the last statement of complaint (February 2014) and the direction to charge (11th May 2017).
2. The period between the direction to charge (11th May 2017) and the ultimate charging of the appellant. (3rd May 2019).

38. The High Court judge was not satisfied that the appellant had established prosecutorial delay or inordinate and inexcusable delay in respect of the first period but was satisfied there was a two-year period of prosecutorial delay between the 11th May 2017 and the 3rd May 2019.

39. She found that the appellant had suffered some potential prejudice due to the delay between the date of the direction to charge and the commencement of the trial on bill number 498/17 (October 2017), a period of five months. This potential prejudice arose due to the inability to have these complaints heard in conjunction with those on bill number 498/16.

Cumulative Circumstances

40. The High Court judge considered the factors of oppression, multiple trials, missing witnesses/documents, age, health and the historic nature of the offending and concluded that 'neither individually or collectively could the instant grounds be relied upon to establish a real risk of an unfair trial."

41. Having concluded that there existed some limited prosecutorial delay giving rise to potential prejudice, she conducted a balancing exercise and was not satisfied there was a real risk of an unfair trial. She concluded:-

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

42. It is accepted that the judge carried out the necessary balancing exercise in the context of culpable prosecutorial delay, but it is said on the part of the appellant that the judge fell into error in failing to consider whether the cumulative impact of the identified factors brought the case into the realm of exceptionality required so as to render it unjust, unfair and/or oppressive to put the appellant on trial. It is contended that a global evaluation of the circumstances ought to have been conducted by the judge, which evaluation ought to have included all periods of delay in conjunction with other factors notwithstanding the absence of specific prejudice. With this submission, I am in agreement. While the High Court judge identified the periods of delay and found there to be limited culpable prosecutorial delay which when assessed by her did not give rise to specific prejudice sufficient to prohibit the trial, it does not seem to me that she applied the second limb of the test in *S.H. v. DPP* [2006] 3 IR 575.

Discussion

43. It is appropriate to take *S.H. v. DPP* [2006] 3 IR 575 as the starting point for discussion in the present case. Murray C.J. in conclusion said:-

> "The issue for a court is whether the delay has resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial. The court does not exclude wholly exceptional circumstances where it would be unfair or unjust to put an accused on trial.
>
> 55 In this case the court is I am satisfied, as the High Court Judge found, that the delay has not resulted in prejudice to the appellant so as to give rise to a real or serious risk of an unfair trial. Further, no wholly exceptional circumstances arise in this case whereby it would be unfair to put the appellant on trial."

44. He obviated the need for an explanation for complainant delay but did not remove the test as to whether there existed a real risk of an unfair trial. To fall within the second limb of the test in *S.H.* the application must point to 'wholly exceptional circumstances'. Possibly this could arise due to a single exceptional circumstance or due to an accumulation of factors. Either way it is very much fact specific.

45. A helpful chronology of relevant dates has been provided, some of which I refer to hereunder.

- 1968-1992 – Alleged offences on this bill number 874/19.
- 2012 -2014 – Complainants make statements.
- December 2015 – Appellant is interviewed by Gardaí.
- February 2016 – File submitted to DPP.
- 11 May 2016- Appellant returned for trial on bill number 498/16
- September 2016 – Clarification sought by DPP re 874/19
- December 2016 – Further materials submitted by Gardaí

- May 2017 – DPP directs charges and directs appellant's solicitor be canvassed regarding the timing.
- November 2017 – Appellant convicted on bill number 498/16
- December 2017 – Sentenced
- 3 May 2019 – Appellant charged on bill number 874/19
- 26 July 2019 – Appellant sent forward.
- 9 December 2019 – DPP disclosure letter seeking to explain delay –'prosecution vigilant...proceeding trials not prejudiced by further charging.'
- 22 Jan 2020 – DPP's letter referring to "The prosecution was vigilant in ensuring that proceedings trials were not prejudiced by further charging your client."

The Cumulative Factors

46. As I have already stated the appellant relies on the second limb of the test in *S.H. v. DPP* [2006] 3 IR 575 as to the existence of wholly exceptional circumstances due to the delay which would render it unfair or unjust to put the appellant on trial.

47. Taking the trial date as the 8th June 2021, (which is now vacated), the total period of delay in this case is between 29 and 53 years. The appellant is now 88 years old and was found by the High Court judge to be in poor health, physically and mentally. The appellant has stood trial on three separate occasions; 2003, 2017 and 2019. The file relating to these proceedings was received in this matter by the Director in February 2016 and the appellant was sent forward on other charges of a sexual nature on foot of bill number 498/16 in May 2016. The directing officer was very aware of the need for expedition and directed a letter be furnished to the appellant's solicitors regarding the issue of the time of charge, but due to a misstep, this was not sent. The appellant was sent forward on these charges in May 2019.

48. The issue is whether the High Court judge was in error in failing to restrain the respondent from taking any further steps in the prosecution on the basis of the several factors

combined together; whether such factors taken together would establish that the trial be prohibited.

49. The appellant has a right to a trial with expedition and this is all the more so in cases that are historic. The Director was clearly very much alive to the issues that can arise and sought to address those by canvassing the defendant's solicitor regarding the timing of the charge. The appellant did not become aware that a direction to charge had issued until May 2019. Should the appellant's solicitors have received the intended letter, it would have been open to the appellant to consent to all matters being tried together pursuant to s.4N of the Criminal Procedure Act 1967 as inserted by s.9 of the Criminal Justice act 1999. He may not have consented, and, if he had not, it would difficult to see how he could then justify an application to prohibit the trial on that basis. However, the matter does not end there because in the present case he was not given that choice. The possibility existed that the appellant could have been prosecuted on these charges as part of bill 498/16 and sent forward on all matters. This might have been something of a Hobson's choice for the Director, in that such would have undoubtedly delayed the trial on bill number 498/16. However, the Director is entirely independent and without doubt a decision to prosecute and the approach in any given case is a complex one. This is particularly so, in my view in the present case, in that there were numerous complaints over the years in respect of the appellant. He has been found to be a prolific sexual offender, who has been convicted of many offences of a similar nature in respect of a similar category of victims. There is again, no doubt in my mind, in the present case that the Director sought to do all in her power to ensure that the appellant received a fair trial in the other prosecutions which were ongoing and in this potential prosecution.

Conclusion

50. The prosecution of crime is crucial in the public interest and there is no bar to the prosecution of historic cases; indeed once there is sufficient evidence to prefer charges,

there is, in principle in any event, a duty to prosecute. However, the public interest in prosecuting an alleged offender must be balanced with the right to a fair trial.

51. As I have stated, the issue here is whether the cumulative factors are of such an exceptional nature so as to render it unfair to put the appellant on trial. The jurisprudence establishes that there may be circumstances which are of such an exceptional nature, that a court may prohibit a trial even in the absence of any established specific prejudice indicative of a real risk of an unfair trial. The test is one of 'wholly exceptional circumstances' and is fact specific. It is by no means a one size fits all.

52. The lapse of time in this case is considerable by any standards, and the appellant is now 88 years old and in poor mental and physical health, as found by the High Court judge, the details of which I do not intend to rehearse here. He has already been the subject of three trials. The trial which he seeks to prohibit relates to matters which were dealt with in a Garda file submitted to the DPP on the 9th February 2016 before the third trial took place. The appellant was not aware that further charges might be brought nor was he in a position to consent to all remaining charges being dealt with in the third trial. This came about, as I have mentioned, due to an oversight which meant that a letter was not sent to the appellant's solicitor advising of the Director of Public Prosecution's intention to postpone this trial while the appellant was facing other charges before the courts and to canvass his solicitor regarding suggestions concerning the charging of the appellant. Had this been done, the appellant would have had the choice to consent or not to joint trials. As matters have transpired, he was not given this opportunity, and time has moved on with the resulting consequences for this fourth proposed trial in terms of the passage of time since the events complained of as well as the appellant's age and health,

53. Insofar as it is said the judge erred in her approach to Criminal Law (Insanity) Act, 2006, and s.4 thereof, I am in agreement. It seems to me that while issues of mental capacity

as to fitness to stand trial will normally fall for consideration under s.4 before a court of trial, in the present case, I am satisfied that this aspect of the appellant's case is one of the cumulative factors to be assessed and falls for consideration under the rubric of ill-health in that context rather than as a stand-alone fitness for trial issue.

54. It is by now well established that the difficulties which may be encountered by an accused who is prosecuted for old allegations may be fully and properly addressed by the trial judge. The powers of the trial judge to ensure a fair trial are not limited to directions in the judge's charge but, a judge may where necessary, stop a trial in exceptional cases where it would be unjust to proceed. As stated by O'Malley J. in *P.B. v. DPP* [2013] IEHC 401:-

> "It is perfectly clear that a trial judge is not restricted to simply giving warnings to the jury but may, where necessary in exceptional cases, withdraw the case from the jury on the basis that the difficulties for the defence are such that it is not just to proceed."

55. However, the inherent jurisdiction vested in a trial judge does not in my view exclude the possibility of a court on an application for judicial review concluding that cumulative factors exist of such a wholly exceptional kind which would mean that it would be unjust to put the appellant on trial.

56. A court must be vigilant to protect the rights of victims of crime, but a court must also be vigilant to ensure that justice is done and to protect the integrity of the justice system.

57. Having carefully scrutinised the facts in this case, I do not believe that any of the factors identified taken alone would bring this case into the kind of exceptional category envisaged in *S.H. v. DPP* [2006] 3 IR 575 so as to render a trial unjust or unfair. It is quite clear that old cases may be prosecuted, it is also clear and my firm view that age is no restriction, nor is ill health, either mental or physical. But it is not only a question of the individual factors, it is also the cumulative impact of the various factors present. I do not

find that any single period of delay would in and of itself require the trial to be prohibited, but when I look at the entire period, together with the other factors, I am driven to the inexorable conclusion that this is one of those rare cases, where the cumulative factors are such so as to bring this matter into the wholly exceptional category where it would be unjust to put the appellant on trial.

Decision

58. Accordingly, I would allow the appeal thus setting aside the order of the High Court (O'Regan J.). I will grant the appellant an extension of time and an injunction restraining the respondent from further prosecuting the appellant on bill number 874/19 at present pending before Dublin Circuit Criminal Court.

59. Insofar as costs are concerned as this judgment is being delivered electronically, it is the practice to offer a provisional view on the costs of the appeal, subject to any application on costs which may be brought. The High Court ordered that the respondent recover 75% of her costs together with reserved costs.

60. My provisional view is that the costs of the High Court together with reserved costs and of this appeal should be awarded to the appellant and I would so order 14 days from the date of this judgment unless either party wish to argue to the contrary. If so, short written submissions should be forwarded to the Office of the Court of Appeal within that 14-day period by the party who wishes to argue the contrary with the other party having a further week to file their submissions.

61. Alternatively, the party should contact the Office of the Court of Appeal within 7 days to request a short oral hearing on the costs issue, though any party who requests such a hearing which results in an order in line with that indicated provisionally, may incur the further costs of such a hearing.

62. Following the expiration of the 14-day period, should no submissions be received or application made, the costs order will be effective subject only to a stay should an application be made to the Supreme Court for leave to appeal.

63. As this judgment is to be delivered electronically, the views of my colleagues are recorded below.

Edwards J. I agree.

Ní Raifeartaigh J. I agree.