[2020] IEHC 165

THE HIGH COURT
JUDICIAL REVIEW

[2018 No. 1037 JR]

BETWEEN

S. O'B.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 5th day of March, 2020

1. A general issue arises in any retrial following a partial acquittal. If an accused is tried on counts A and B, and is acquitted of A, but the jury disagrees on B, there are at least two possible complications when that accused comes to be retried on count B:

   (i). firstly, the defence will have to deal with the question of whether the jury should be told of the acquittal on count A; and

   (ii). secondly, there is the fact that some reconfiguration of the prosecution case is inevitable in order to drop those parts of it that refer to count A.

2. Seeing as the Supreme Court has so definitively endorsed the procedure of retrial and indeed in serious cases a possible second retrial (*Byrne v. Judges of the Dublin Circuit Court* [2015] IESC 105, [2015] 2 JIC 1704 (Unreported, Supreme Court, 17th February, 2015)), it follows that any inevitable concomitants of such procedures, such as the reconfiguration of the prosecution case or the dilemma as to whether the jury should be told of the outcome of the first trial, are not in themselves unconstitutionally unfair.

Facts

3. The applicant was born in 1940 and is now 79. He is accused of sexual assault on a grandchild. The complainant was fifteen at the time of the incidents alleged. After a first trial in which there was a partial acquittal and a disagreement, he unsuccessfully applied to the trial judge to stop his retrial. He now seeks an equivalent order by way of judicial review.

4. The complainant's mother (who is the applicant's daughter) also complained that the applicant had sexually, emotionally and physically assaulted her, referring to incidents from age eight onwards. She did not make a formal complaint and the applicant claims that the mother had also loosely made such complaints against others, but had not followed up those matters with formal complaints either.

5. The context for the alleged offences was that the applicant's daughter and granddaughter moved into the applicant's house in July 2015. A complaint of sexual assault was made to the Garda Síochána in February 2016. The applicant was charged and in due course was returned for trial on 24th November, 2016 on seven counts of sexual assault against his granddaughter on various dates between 1st July, 2015 and 9th February, 2016.

6. The first three counts referred to specific incidents which the complainant particularly remembered and the latter four counts were general counts which were, in effect, representative of alleged ongoing abuse by the applicant over a period of time. There is no exact or rigid methodology for distilling offending over a period of time down to a net number of counts on an indictment. That ultimately is a matter for a prosecutorial judgment and discretion; and in that regard a balance between oppression of an accused, practicality, manageability with a jury and doing justice for the complainant, all come into the mix.

7. At the end of the first trial on 24th January, 2018, the jury returned a verdict of not guilty on the general counts numbered 4 to 7, and disagreed on the specific counts.

8. The D.P.P. now seeks to retry the applicant on counts 1 to 3. There is no intention to add any further counts. A second jury was empanelled over the course of 4th to 5th December, 2018 and legal argument relating to alleged prejudice to the applicant took place in an endeavour to stop the trial. His Honour Judge Keenan Johnson refused the application and adjourned matters until 18th December, 2018 to allow the second trial to begin.

9. It is not totally clear on the papers why the retrial did not commence immediately following the ruling refusing to stop it, but I am told that was due to the management of the sittings more than anything else. However, that adjournment did provide a window during which the applicant had the opportunity to seek judicial review and indeed that is what he did, applying for and being granted leave to seek judicial review on 10th December, 2018. In making that order Noonan J. also granted a stay on the criminal proceedings.

10. There was then a further order of 13th December, 2018 giving liberty to file an amended statement of grounds, although the statement as filed does not include the necessary endorsement as to the date on which, and the order pursuant to which, the statement was amended. No issue, however, has been taken with that omission. I have now received helpful submissions from Mr. Conor Devally S.C. (with Mr. Michael D. Hourigan B.L.) for the applicant and from Mr. Niall Nolan B.L. for the respondent.

Anonymity

11. The Criminal Law (Rape) Act 1981, s. 7(1) (as amended by the Criminal Law (Rape) (Amendment) Act 1990, s. 17(2)(a)), restricts the reporting of anything likely to identify the complainant in a sexual assault offence. The definition of sexual assault offence in s. 1(1) of the 1981 Act, as substituted, includes the offence of sexual assault. While the section purports to be self-executing, it seems appropriate in the interests of clarity to exercise the inherent jurisdiction of the court to make an order restricting publication of matter tending to identify the applicant, because in the circumstances of this case that would tend to identify the complainant, and I made such an order at the outset of the hearing.

Transcript of the first trial

12. While the transcript of the application to stop the trial was exhibited, the applicant has not exhibited the transcript of the first trial, although it had been available. Counsel for the D.P.P. had not been shown it in advance. While I appreciate the general rule that a party is not entitled to produce documents at a hearing without advance notice, it was not immediately apparent whether my receiving the transcript would have actually disadvantaged the D.P.P. in the particular circumstances of the case. Nonetheless, Mr. Nolan resisted judicial encouragement to allow me to receive it and stuck with his objection, as he was fully entitled to do. Consequently I did not receive it on the grounds that to do so in the absence of prior notice could be potentially unfair to the respondent.

Reliefs sought

13. In the amended statement of grounds, two primary reliefs are sought. Firstly, an order requiring the D.P.P. to give reasons for the decision to prosecute the applicant on grounds 1 to 3 (relief 3). That aspect was helpfully abandoned by Mr. Devally. Secondly, an injunction restraining the D.P.P. from proceeding with the new trial (relief 1). A declaration was also sought (relief 4), but as such a declaration is unnecessary if the injunction is granted and inappropriate if it is refused, the claim for declaration does not really add anything. Interlocutory relief was also sought by way of a stay pending the determination of proceedings (relief 2), but that has already been granted, as noted above.

Is a retrial inherently unfair in the circumstances?

14. Two major aspects of potential unfairness were stressed by Mr. Devally:

    (i). that the prosecution would be reconfiguring its case significantly; and

    (ii). that the accused would be placed in an impossible dilemma in terms of whether to refer to the previous acquittal or not, or to put the matter alternatively, that the previous acquittal and the fact that the complainant's wider allegations were not upheld, would be taken out of the case unless the defence were to put itself in a difficult (if not, he says, impossible) position by reintroducing that item.

15. As regards the prosecution reconfiguring its case, that is inevitable in the context of any retrial following a partial acquittal. That procedure is not in itself unconstitutional and is not so here. Pertinent in this context are Hardiman J.'s comments in *McNulty v. D.P.P.* [2009] IESC 12, [2009] 3 I.R. 572 at pp. 581 – 582, that "*the trial process may involve two or more hearings for a number of reasons. The jury may disagree, as happened in this case and happens not infrequently … where there is a second trial, neither side is bound to approach the case in the same way that they approached the first trial … it would be a wholly unrealistic form of gamesmanship to hold that because the prosecution had not thought it necessary to prove a particular fact of the first trial, they were stuck with that decision at a retrial".*

16. The same logic applies *mutatis mutandis* where the prosecution seeks to prove a particular fact at the first trial and then finds itself in a position where it is either unnecessary or inappropriate to seek to prove that fact in the second trial.

17. As regards the second ground of complaint, which is the dilemma arising from what, if anything, the jury is to be told about the first trial, the prosecution now says that they will not lead evidence on any matters on which the applicant was acquitted. Mr. Devally submits that he cannot simply put to the complainant in cross-examination that she was not believed to the appropriate standard by the first jury, as demonstrated by the acquittal. That proposition is said to follow from the decision of the Privy Council in *Hui Chi-Ming v. R.* [1992] 1 A.C. 34, at pp. 42-43 *per* Lord Lowry. The Privy Council decision also indicates previous authority is to the same effect and that "*some exceptional feature is needed before [the outcome of a previous trial] is considered relevant".* Reference is made to what one might think is the *reductio ad absurdum* of that approach, *Hollington v. F. Hewthorn & Company Ltd.* [1943] K.B. 587, where evidence of a conviction for careless driving was held inadmissible in a subsequent civil action for damages arising out of the incident. That is taking the principle too far and well beyond what common sense would suggest (I might add that the English Law Reform Committee said that the latter decision "*offends one's sense of justice*": 15th Report, cited in Law Reform Commission, *Consolidation and Reform of Aspects of the Law of Evidence, LRC 117-2016* (Dublin, 2016) para. 3.84).

18. The sort of exceptions envisaged in the caselaw are where the previous acquittal reflects on the reliability of a confession (*R. v. Hay* [1983] 77 Cr App R 70), or where there is a clear inference from the previous verdict that a particular witness's evidence was not believed (*R. v. Cooke* [1986] 84 Cr App R 286) (see also the discussion in *Archbold*: *Criminal Pleading, Evidence and Practice 2019* (Sweet and Maxwell, London, 2019) at para. 4-400-401).

19. The traditional rule thus was that the outcome of an earlier trial arising out of the same events is, with limited exceptions, not relevant to a subsequent trial dealing with the same issue, and the circumstances of the present case do not seem to come within the sort of exceptions contemplated by established caselaw. (I should add that that is not an unchallenged position (see the informative discussion in Law Reform Commission, *Consolidation and Reform of Aspects of the Law of Evidence, LRC 117-2016* (Dublin, 2016) paras. 3.76 to 3.87). I might also add that a conviction proves considerably more than an acquittal for subsequent litigation purposes, since the establishment of X beyond reasonable doubt implies that X has also been established as a matter of probability, whereas the existence of a reasonable doubt as to X doesn't preclude X being held to be probably true). But assuming for the sake of argument that the *Hui Chi-Ming* doctrine were to be held to apply here, the options left to the defence in this case would be either:

    (i). to reargue the issues raised in first trial in relation to the counts the applicant was acquitted on, in order to impugn the complainant's evidence; or

    (ii). not to make reference to it, which would forfeit the arguably undermining effect on the complainant of referring to the outcome of the first trial.

20. One might add that there is the perhaps theoretical possibility of a third option, which is consent of the prosecution. The D.P.P. could agree to allow the jury to be told that the

applicant was acquitted on the general counts, notwithstanding the contents of the complainant's statement in that regard. That is, of course, entirely a matter for the D.P.P., but if, hypothetically, there was such consent, it must be presumed that the trial judge would not unfairly thwart the giving effect to of such consent.

21. Even if the third option did not materialise, I do accept the point that this could be an agonising choice for the applicant and more particularly for his legal advisers; but professional decision-making in the context of a criminal trial *is* often agonising. Section 1(1) of the Criminal Evidence Act 1898 brought about a permanent and ongoing dilemma for the defence by allowing the accused to give evidence. Some such dilemmas can only be resolved by the accused personally. Practising when the 1898 Act was enacted, Sir Edward Marshall Hall K.C. required his clients to complete a written form setting out their decisions on such key matters (see Edward Marjoribanks, *The Life of Sir Edward Marshall Hall K.C*. (London, Victor Gollancz, 1929) p. 154; Thomas Grant, *Court Number One: The Old Bailey Trials that Defined Modern Britain* (London, John Murray, 2019)). Decisions about what line to take are often far from clear-cut and may be very painful, especially in retrospect, but that in itself does not automatically amount to unconstitutional unfairness. It is true that the defence in the case of a retrial following a partial acquittal has a difficulty that it did not have before; but then so does the prosecution. It will have to keep the complainant on track in referring only to the three incidents concerned when giving her evidence, or at least her evidence in chief.

Alternative remedy

22. At paras. 12 and 13, the statement of opposition contends that the trial judge will ensure fairness and that the Court of Appeal will be available to deal with any appeal. It is contended that this "*further militates against relief*". At para. 15 the statement of opposition also argues that the court should exercise discretion to refuse relief.

23. In fairness to the applicant, it might be said that there has been a certain amount of vacillation in the caselaw over the years as to how fairness in a criminal trial on indictment is to be ensured. However, the general rule as the law currently stands is that matters such as delay and unfairness should be dealt with by application at the trial, although there may be very limited exceptions: *P.O'C v. D.P.P.* [2000] 3 I.R. 87. The test for prohibition and prohibition-like remedies, such as an injunction, is that it has been demonstrated that the trial will be inevitably or unavoidably unfair. If fairness can potentially be achieved within the trial then the ordinary criminal mechanisms, both at first instance and then on appeal, should be allowed to proceed.

24. There is, needless to say, a presumption that the trial and any appeal will be conducted in such a manner as to vindicate the constitutional rights of all concerned; and indeed in the context of the present case, the comments of the learned trial judge in the portion of the transcript which has been exhibited in relation to the abortive second trial indicate a clear determination to ensure fairness.

25. Thus, while the application is being dismissed on the merits, even if I am wrong about the substantive legal issues involved, I would have refused relief on the grounds of there

being an alternative remedy, because any potential unfairness can be cured within the ordinary criminal process.

Order

26. The order, therefore, is as follows:

    (i). as mentioned above, at the outset I made an order restricting publication of matter tending to identify the applicant, because in the circumstances of this case that would tend to identify the complainant;

    (ii). the application is dismissed; and

    (iii). the stay on the criminal proceedings is discharged.

27. Finally, I might say that it is somewhat concerning that five years have now elapsed since the alleged offences and it is very much in the interests of both the applicant and the complainant that finality be brought to this one way or the other and that the retrial occurs in early course.