



**AN CHÚIRT UACHTARACH
THE SUPREME COURT**

**Clarke CJ
O'Donnell J
MacMenamin J
Charleton J
O'Malley J**

Supreme Court appeal number: S:AP:IE:2018:000025

[2020] IESC 000

Court of Appeal record number 2016 No. 210 [2017] IECA 326

Circuit Criminal Court bill number: Bill No. CC 110D/13

BETWEEN

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

PROSECUTOR/RESPONDENT

- AND -

CC (COUNTY CLARE SEXUAL ABUSE)

ACCUSED/APPELLANT

Judgment of Mr Justice Peter Charleton delivered on Thursday 19 December 2019

1. This judgment indicates briefly reasons for concurrence in the judgments of O'Donnell and O'Malley JJ.
2. It can often happen that a case is tried where every relevant witness and all relevant documents are put before the court of trial. Usually, that occurs where a case is tried quickly. The reason for the aphorism 'justice delayed is justice denied' is that as life goes on from the events that generate litigation, not only memories fade but items are thrown out and relevant papers are discarded or mislaid. For older cases, while the courts are striving for a perfect trial, the reality is that what the judicial system must seek is a trial that is good enough to meet the exacting standard that the administration of justice requires.
3. In many situations, witnesses are missing from the beginning. An obvious example is provocation; where the victim can never give evidence. Yet the victim, as to what he or she said or did to thereby, allegedly, according to the accused, incite deadly violence is missing from all witness lists in all trials. The consequence is that central testimony is missing from what should be either manslaughter, if that defence is not rebutted by the prosecution, or murder, if the accused's account of sudden loss of self-control in consequence of incitement is rejected.
4. Similarly, Part IV of the Civil Liability Act 1961 enables an action for wrongful death on behalf of dependants. In a road collision, a person in a car can be killed in circumstances where their evidence would seem to be vital to achieving a just result. To take an example, one car proceeds up a road but crashes into a car executing a turn across that

carriageway into a side turning. One of the drivers is dead, or perhaps so injured by the collision as to not remember anything, but the issue of fault remains whether one car cut into the path of another or was going so fast that an otherwise safe manoeuvre became a death trap. When the survivor or the dependants of the deceased come to court, the case is tried as best it may be on the basis of such facts on the ground or peripheral testimony as will yield the best result possible in the circumstances. A risk of injustice is always present since the survivor has the chance to give an uncontradicted account of events.

5. Sections 1 and 2 of the Criminal Law Amendment Act 1935 was a measure introduced in order to protect young girls from sexual exploitation. It provided that it was a felony, carrying "imprisonment for life" to "unlawfully and carnally know any girl under the age of fifteen years" and that where the girl was "under the age of seventeen years" that offence would be a misdemeanour carrying up to five years imprisonment, with that penalty increasing for subsequent offences. In a rare example of a limitation period applying to a crime, the misdemeanour offence had to be commenced no "more than twelve months after the date on which such offence is alleged to have been committed." That provision was removed by s 7 and the Schedule to the Criminal Law (Sexual Offences) Act 1996.
6. Generally, with some exceptions as to notification for road traffic matters, there is no limitation period for either taxation or for crime. Hence, cases of murder can be solved by the discovery of evidence through advances in technology decades later that could not have been applied at the time of the trial; *Nash v DPP* [2015] IESC 32 is an example. Memory suggests that what were a few isolated cases of sexual abuse in the early 1980s, that related to recent events, became the regular prosecution of alleged offenders from decades before through the late 1990s and into the current era. That continues.
7. The result was a resort to judicial review by what seemed to be a majority, if not almost all, of accused persons, often men of advanced middle age or old age. In the second case where the Supreme Court dealt with such a case, *B v DPP* [1997] 2 ILRM, the accused had been arrested in 1992 and charged with the rape of his daughters three decades before. Denham J considered that while prejudice could undermine the right to a fair trial, more and more as the case law progressed, the right of the victim to recourse to the criminal justice system came to the fore. That decision followed the earlier *G v DPP* [1994] 1 IR 374 where at 380, Finlay CJ added in the factor of the behaviour of the accused:

The court asked to prohibit the trial of a person on such offences, even after a very long time, might well be satisfied and justified in reaching a conclusion that the extent to which the applicant had contributed to the delay in the revealing of the offences and their subsequent reporting to the authorities meant that as a matter of justice he should not be entitled to the order.

8. From that dictum developed the theory of dominion, expressly stated in the B case and later applied in such decisions as *C v DPP and Judge Brennan* (Supreme Court, unreported, 28 May 1998) which emphasised "psychological evidence" and the suppression of abuse "for complex personal family and social reasons." Since what was

involved in those cases was a civil application in judicial review to prohibit a criminal trial, many of the applicants and those complaining in the criminal prosecutions of sexual violence against them decades before, swore affidavits as to the diminution in opportunity to defend themselves, on the one hand, and the grave mental trauma that had led to them holding back accounts of gross abuse, on the other. In some such cases, this became almost a trial of psychological examination where psychiatrists became the main witnesses and liberty to cross-examine was given in the High Court; in the context of judicial review this was and ought to be a rare circumstance.

9. There was a shift from the dominion theory, perhaps in the realisation that this contest of psychologists could be seen to be about the central issue in the trial of whether the abuse of the victim, denied by the accused, had ever taken place, so that the law became closer to the application of the presumption of innocence. In *SH v DPP* [2006] 3 IR 575, the allegations revolved around the abuse of four minors that the accused was claimed to have subjected to sexual violence thirty years previously. This Court acknowledged again the special position of sexual offences against children, recognizing the trauma and suppression, often enforced by threats from the perpetrator, that characterise this kind of offence. Murray CJ, at para 47, proposed a straightforward test based on whether delay had caused “prejudice to an accused so as to give rise to a real or serious risk of an unfair trial.” Thereafter the test to be applied by the courts would be nothing to do with a supposition of dominion but “whether there is a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay.” Such a test retained the importance of whether the accused had made an admission from earlier decisions by this Court and stated that the “test is to be applied in light of the circumstances of the case.”
10. The other major change in the approach of the courts dealing with this extraordinarily difficult problem of delay in the context of the kind of violence which militates against any early report is that the ordinary and proper forum for adjudication became not judicial review but is instead an application to the trial judge. Both O’Donnell J and O’Malley J reaffirm this principle which was first stated as far back as *PC v DPP* [1999] 2 IR 25 at p 77. The subsequent decisions cited by them make this clear, including *The People (DPP) v P O’C* [2006] 3 IR and *SH v DPP* [2006] 3 IR 575. In the adjudication of such an application, best brought at the close of the prosecution case if the accused is not giving evidence, or at the close of the evidence, if the accused gives or calls evidence, a confession remains important. It is central in this case, as O’Donnell J and O’Malley J state in their judgments, and it has been in cases in the past. Other factors can be important as well as a confession, such as egregious conduct by the complainant.
11. In *MG v DPP* [2007] 2 IR 738, the accused was charged with three sexual violence offences against a particular complainant in 1977, who did not reveal these until 1996. At various times, the complainant demanded money to keep silent, the court noting that he “consistently used the weapon of blackmail”. Murphy J in the High Court refused the accused’s application for an injunction restraining trial. This was overturned by the Supreme Court on appeal, Fennelly J stating at paragraphs 38-40:

This situation is unique in the annals of the many cases of prosecution for sexual offences that have come before the courts in recent years. It constitutes a completely exceptional set of circumstances. The complainant wishes to use the courts at his own option as a means of extracting money from a person accused... This is an unprecedented situation. If the applicant's case were to be considered as one based on delay alone or on prosecutorial behaviour alone, it would not succeed. However, I am of opinion that this court should be slow to permit the criminal courts to be used as an instrument of blackmail. This is a matter of public policy. In most cases, improper demands by a witness would not provide a basis for halting a prosecution. However, the sole witness in respect of each alleged offence has consistently sought to use the threat of exposure to criminal prosecution, and thus the courts themselves, as a means of extracting private pecuniary benefit.

12. On the basis of the "exceptional element" of blackmail involved, Fennelly J concluded that it would be "wrong and unjust" to put the accused on trial for any of the alleged sexual offences. Ultimately, both O'Donnell J and O'Malley J analyse this case on the same basis as Hardiman J in *SB v Director of Public Prosecutions* [2006] IESC 67, where speaking for the Supreme Court, he proposed a test of whether a realistic line of defence had been closed off in consequence of delay. As regards judicial review in criminal cases generally, not just in sexual violence cases, there have been so many cases that a summary of when an order of prohibition should be granted may assist. Such a summary was made by the High Court in *K v His Honour Judge Carroll Moran and DPP* [2010] IEHC 23 at paragraph 9 and still remains useful as a guide around the case law in prohibition cases generally:
 - (1) The High Court should be slow to interfere with a decision by the Director of Public Prosecutions that a prosecution should be brought. The proper forum for the adjudication of guilt in serious criminal cases is, under the Constitution, a trial by judge and jury; *D.C. v. DPP* [2005] 4 IR 281 at p. 284.
 - (2) It is to be presumed that an accused person facing a criminal trial will receive a trial in due course of law, one that is fair and abides by constitutional procedures. The trial judge is the primary party to uphold the relevant rights which are: the entitlement of the accused to a fair trial; the right of the community to have serious crime prosecuted; and the right of the victims of crime to have recourse to the forum of criminal trial where there is reasonable evidence and the trial can be fairly conducted; *P.C. v. DPP* [1999] 2 IR 25 at p. 77 and *The People (DPP) v J.T.* (1988) 3 Frewen 141.
 - (3) The onus of proof is therefore on the accused, when taking judicial review as an applicant is to stop a criminal trial. That onus is discharged only where it is proved that there is a real risk of an unfair trial occurring. In this context, an unfair trial means one where any potential unfairness cannot be avoided by appropriate rulings and directions on the part of the trial Judge. The unfairness of the trial must therefore be unavoidable; *Z. v. DPP* [1994] 2 I.R. 476 at p. 506 – 507.

- (4) In adjudicating on whether a real risk occurs that is unavoidable that an unfair trial will take place, the High Court on judicial review should bear in mind that a District Judge will warn himself or herself, and that a trial Judge will warn a jury that because of the elapse of time between the alleged occurrence of the facts giving rise to the charges, and the trial, that the accused will be handicapped by reason of the lack of precision in the presentation of the case, and the disappearance of evidence such as diaries, or potentially helpful witnesses, or by the normal failure of memory. This form of warning is now standard in all old sexual violence cases and a model form of the warning, not necessarily to be repeated in that form by all trial Judges, as articulated by Haugh J is to be found in the decision of the Court of Criminal Appeal in *The People (DPP) v. E.C.* [2006] IECCA 69.
- (5) The burden of a proof on an applicant in these cases is not discharged by merely making a general allegation of prejudice by reason of the years that have elapsed between the alleged events and the commencement of the criminal process. Rather, there is a burden on such an applicant to fully and actively engage with the facts of the particular case in order to demonstrate in a specific way how the risk of an unfair trial arises; *C.K. v. DPP* [2007] IESC 5 and *McFarlene v. DPP* [2007] 1 IR 134 at p. 144.
- (6) Whereas previously the Supreme Court had focused upon an issue as to whether the victim could not reasonably have been expected to make a complaint of sexual violence against the accused, because of the dominion which he had exercised over her, the test now is whether the delay has resulted in prejudice to an accused so as to give rise to a real risk of an unfair trial; *H. v. DPP* [2006] 3 IR 575 at p. 622.
- (7) Additionally, there can be circumstances, which are wholly exceptional, where it would be unfair or unjust to put an accused on trial. Relevant factors include a lengthy elapse of time, old age, the sudden emergence of extreme stress in consequence of the charges, and which are beyond that associated with the normal stress that a person will feel when facing a criminal charge and, lastly, severe ill health; *P.T. v. DPP* [2007] IESC 39.
- (8) Previous cases, insofar as they are referred on the basis facts that are advocated to be similar, are of limited value. The test as to whether a real risk of an unfair trial has been made out by an applicant, or that an applicant has established the wholly exceptional circumstances that had rendered unfair or unjust to put him on trial, are to be adjudicated in the light of all of the circumstances of the case; *H. v. DPP* [2006] 3 IR 575 at p. 621.
- (9) ... [It] can be the case sometimes that circumstances such as extreme age or very poor health will be contributory factors to an applicant succeeding in making out that a real risk of an unavoidably fair trial is established. Old age and ill health can assist in establishing that there is prejudice by reason of a delay, since memory fails with time and the ability of an accused to instruct counsel with a view to mounting a defence can be, in extreme circumstances, undermined by those

factors. Where extreme delay, old age and serious ill health are, of themselves, pleaded as a circumstance which would make it unfair or unjust to put a specific accused on trial then, in the absence of proven prejudice, those circumstances will indeed occur rarely; *The People (DPP) v. P. T.* [2007] IESC 39 and *Sparrow v Minister for Agriculture, Food and Fisheries* [2010] IESC 6.

13. To that might be added, in terms of trial judges dealing with these cases in the future, that in *The People (DPP) v RB* (unreported, Court of Criminal Appeal, 12 February 2003), later endorsed in *The People (DPP) v PJ* [2003] 3 IR 440 and *The People (DPP) v EC* [2007] 1 IR 749, the Court of Criminal Appeal found that a warning given by Haugh J as the trial judge was appropriate in a case involving delayed prosecution:

But how can a person be expected to attack the allegation, to contest the allegation with any subtlety, with any detail, with any forensic form of attack if all you are told about it is that you did it about fifteen years ago on some date unknown over a period of eighteen months? That, I suggest to you, makes it far harder to defend it than it is to prosecute it. In fact, to prosecute it is easier if you do not nail your colours to the mast because there is less you can be cross-examined on. But the law does not say that stale cases, old cases, cannot be tried. But what I must tell you is that an accused person cannot in your minds or in your consideration be disadvantaged because the case is old, because the complaint is related to events from a long time ago. You have to be all the more careful and it should be much harder to satisfy you in relation to an event that is phrased in a vague and general way, rather than an event which carries details or particulars.

14. In terms of the relevant facts here, the confession of the accused to his son carried a high degree of reliability. It is appropriate to ask whether a trial should be stopped in circumstances where a reliable and admissible admission of guilt by the accused has been made. While confessions in police custody are attendant with safeguards, these exist in order to bring the reliability of evidence, sufficient in itself to convict the accused but sometimes carrying a warning, close to the standard of the spontaneous admission made in this case. As regards the allegation made by the complainant that the domestic partner of the accused led her naked to his bed when she was but eleven years old, that evidence is missing from that domestic partner. It could be regarded as inherently likely to be denied by that person, had she been still alive. Such conduct would make her a participant in sexual violence and hence complicit in rape. Nonetheless, her denial would have been important in the trial had it been available. Also in the matrix of fact was the accused's denial, in statements to the gardaí, that any of the complainant's family, or her, had stayed in his home. Against that are the multiple pieces of evidence indicating that this had in fact happened.
15. Applying the test, concurred with in this judgment, stated at paragraph 46 of O'Donnell J's judgment on this appeal and reiterated in the judgment of O'Malley J at paragraph 7 and Clarke CJ at paragraph 9.2-5, the trial judge rightly left this case for the consideration of the jury and the resultant verdict should stand.