

THE HIGH COURT

[Record No. 2022/112 JR]

BETWEEN

N.B.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

**JUDGMENT of Ms Justice Marguerite Bolger delivered on the 11<sup>th</sup> day of March  
2024**

1. The applicant seeks an order of prohibiting his trial which is scheduled for June 2024. The applicant was charged in September 2021 on a single charge of indecent assault alleged to have occurred between January 1987 and December 1988. There will be a delay of some 35 to 36 years from the alleged offence to the trial. The applicant claims there has been inordinate prosecutorial delay and that he is prejudiced by the death of three potential witnesses. He also says he has suffered heightened stress and anxiety because of the allegations and his prosecution, which he says brings him within the exceptional category of cases where it would be unfair to put him on trial.

2. For the reasons set out below, I am refusing this application.

**The law**

3. The burden of proof rests on the applicant to prove that there is a real risk of an unfair trial (*D. v. DPP* [1994] 2 IR 465; *Z. v. DPP* [1994] 2 IR 476). Prohibition is a remedy to be granted only in exceptional circumstances (*D.C. v. DPP* [2005] 4 IR 281). Trial judges frequently have to deal with cases of old allegations and are accustomed to using powers available to them to prevent injustice to accused persons. It is only in exceptional circumstances that a matter should not be allowed to go to trial.

4. The jurisprudence no longer seeks an explanation for a complainant's delay but, rather, focuses on any prosecutorial delay which must be inordinate, blameworthy or

unexplained. Prosecutorial delay of this nature may be of such a degree that a court will presume prejudice and direct prohibition (as per Kennedy J. in *Kiely v. DPP* [2022] IECA 26. This may be due to the absence of witnesses where there must be,

*"at least, a real possibility that the witness or evidence would have been of assistance to the defence. In other words, I do not believe that it is sufficient to point to a theoretical possibility that an unavailable witness might have had something to say that would contradict the complainant's account and that of other witnesses."* (as per O'Malley J. in *S.Ó'C. v. DPP* [2014] IEHC 65, at para. 65)

**5.** The role of the trial judge is crucial in ensuring fairness during the trial of an aged complainant. That judge is better able than a judicial review judge to assess the difficulties caused to a person accused of aged allegations (as per O'Malley J. in *P.B. v. DPP* [2013] IEHC 401). The trial judge was described by Charleton J. in *Nash v. DPP* [2015] IESC 32 as having a *"primary role"*. As observed by O'Donnell J. (as he then was) in *DPP v. C.C.* [2019] IESC 94, the assessment of the overall fairness of the proceedings,

*"is best carried out at the trial, rather than in advance on the basis of affidavit evidence professionally drafted and speculation as to what might transpire at a trial. The courts came to require that applicants at least directly engage with the case, rather than seek to raise hypothetical issues. Moreover, the place that any lost evidence, whether real or oral, might play in a case was best assessed in the context of the case itself, and the manner in which it proceeded"*.

**6.** There is an additional, though rarely invoked, jurisprudence where it may be unfair to put an accused on trial, a good example of which occurred in the decision of the Court of Appeal in *M.S. v. DPP* [2021] IECA 193 where an accused's health was found to be one of the factors to be assessed separately from the issue of the accused's fitness to stand trial. Kennedy J. emphasised that it was the cumulative impact of all of the factors present and that ill health on its own was not a restriction. She held at para. 57:-

*"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."*

On the facts of the case, she concluded,

*"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."*

**The delay in this case from complaint to trial**

7. Considerable time of between 35 to 36 years will have passed from when the complainant alleges he was indecently assaulted to when the applicant is due to stand trial on 5 June 2024. The complainant made a statement of complaint to An Garda Síochána on 11 December 2017, a prosecution was directed on 31 August 2021, the charge was proffered on 15 September 2021 and a book of evidence was served on 16 November 2021. The investigating Garda, Sgt. Geraghty, has set out on affidavit the steps he took from the complainant's first complaint, up to the date of the DPP's direction to prosecute on 31 August 2021. The complainant said he had made a number of disclosures to different services over many years, all of which required investigation and gathering records before Sgt. Geraghty interviewed the complainant in April 2019, after which he conducted further inquiries and sought further records. He took statements from members of the complainant's family in September 2019 and followed up on further records. He obtained a s. 63 order from the District Court to secure records that had not been provided by one of the services with which the complainant had engaged. The COVID-19 pandemic intervened in March 2020. The completed investigation file was furnished to the DPP in February 2021 and the DPP directed the applicant's prosecution on 31 August 2021.

8. Nearly four years passed from the complainant's initial complaint to the service of the book of evidence on the accused. However I do not consider there is evidence of inordinate, culpable or unjust delay. Having regard primarily to the records that had to be obtained from a number of different services, including necessitating a s. 63 order from the District Court, and, to a lesser extent, the intervening COVID-19 pandemic, I do not find that there was blameworthy prosecutorial delay.

**The absence of witnesses**

9. The applicant says that the delay has prejudiced him because the complainant's mother, father and uncle, whom he says could have exonerated him and/or enabled him to challenge the credibility of the evidence against him, are all now deceased. However the complainant's sister will be giving evidence and may be able to give an account of the arrangements in the family home at the relevant time and will be available for cross-examination both on her recollection and her credibility.

**10.** The applicant has not established any prejudice that cannot be adequately and better addressed by the trial judge than what can or should be done in this application.

**The applicant's mental health**

**11.** The applicant suffers from severe stress and anxiety for which he has been medically treated and he remains under the care of his GP. Counsel for the applicant argued that the level of anxiety in this case is greater than the cases in which the mental health of an accused was not found to be sufficient prejudice to prohibit a trial from going ahead. The applicant says his heightened stress and anxiety is because of both the allegations made against him and the fact of his prosecution and that this brings him into the exceptional category of cases where it would be unfair to put him on trial. His counsel fairly said he could not identify an authority on all fours with the applicant's situation but did refer the court to a number of *dicta* where the accused's medical condition was considered to be relevant. In *D. v. DPP* [2011] IEHC 384, evidence of the applicant's "*significantly increased anxiety*" from a lengthy prosecutorial delay was described by Dunne J. as compelling. In *Devoy v. DPP* [2008] 4 IR 235, Denham J. (as she then was) and Kearns J. referred to the absence of evidence of stress that could require the prohibition of a trial. In *O'H. v. DPP* [2007] 3 IR 299, the Supreme Court said that some distress is "*inevitable*" and emphasised the need for "*evidence of something more than normal, something extra caused by the alleged prosecutorial delay*".

**12.** The applicant says he has established sufficient evidence of that something extra in the reports of his medical advisers. His solicitor, in his supplemental affidavit of 18 February 2022, exhibits what he refers to as a medical report from the applicant's GP, although the applicant's counsel suggested it was a report filed by the GP from notes on the applicant's file rather than a medical report. I do not appreciate the difference, if any. The GP's account of the applicant's complaints, diagnosis and treatment which was prepared by reference to, *inter alia*, the contemporaneous account of the applicant's treating psychiatric team, was both relevant and valuable in the court's assessment of his medical situation.

**13.** The applicant's solicitor in his affidavit also averred, at para. 8, that it was anticipated a psychological assessment of the applicant would be carried out in due course to examine the specific question of the impact of the ongoing prosecution on his mental health. The applicant later swore an affidavit on 23 October 2023 exhibiting the report of Dr. Rioghnach O'Leary of 10 May 2022. In that affidavit, the applicant said, *inter alia*, the following:-

- i) His mental health further deteriorated subsequent to the allegation the subject matter of the proceedings coming to his attention in June 2017.
- ii) His mood became notably depressed and he experienced chronic anxiety both in relation to the prospect of being charged with the alleged offence and the thought that people could consider him capable of sexually abusing a child. He was unable to sleep and suffered from severe insomnia.
- iii) His mental health continued to be poor during late 2017 and throughout 2018. While he commenced full-time work in a local restaurant in late 2017, he continued to experience chronic low mood and anxiety emanating from both the alleged offence and concerns about his physical health.
- iv) This had a devastating effect on his mental health. His symptoms of depression and anxiety intensified once again in the months subsequent.

**14.** The applicant also exhibits a report from his consultant cardiologist, Dr. Bassareo, of 31 March 2023 which sets out a history of cardiac arrest in 2016 and confirms that the applicant is at a moderate risk of 11% likelihood to suffer from myocardial infarction, stroke and vascular death in the next ten years.

**15.** The applicant claims to have experienced significant mental health difficulties as a result of the charges against him. It is necessary to examine the medical evidence to assess the validity of that claim. The GP confirms the applicant's long history of depression and anxiety which necessitated psychiatric attendances in 1997, 2006, 2009, 2019 and 2020, and confirms what the applicant reported, and his psychiatric team diagnosed, as the causation/triggers for his psychiatric issues, none of which refers to the complaint made against him in 2017 or to his subsequent prosecution. Neither does his interview with An Garda Síochána in April 2018 or his being charged in September 2021 feature. The applicant's counsel suggests that the applicant may have been too embarrassed to tell his doctors about the charges. There is no evidence that the applicant chose not to tell his GP or his psychiatric team about issues in his life that were affecting his mental health. He was clearly willing to share personal details pertaining to his childhood and his physical health with his medical advisers. The applicant did not aver why he did not disclose the allegations against him or his prosecution to his treating doctors. He was discharged from the psychiatric services in June 2021 and, as of the date of the report of the GP in February 2022, had not been referred back. There has been no suggestion that the applicant has received additional

treatment since that time other than as set out in the report, *i.e.* ongoing medication prescribed by his GP.

**16.** The applicant was referred to Dr. Riognach O'Leary, forensic psychologist, by his solicitor. Dr. O'Leary, who had access to the GP's aforementioned report and records, said the purpose of her assessment was to identify how the allegations and resulting legal proceedings have affected the applicant on a psychological and emotional level. Her lengthy report includes detailed accounts of the applicant's life experiences, education and employment history, relationships history, medical history, the alleged offence, functioning since being made aware of the alleged offence, collateral information provided by his sister and a section entitled "*Personality Functioning*". Dr. O'Leary's findings include the following findings:-

- (i) Before the applicant became aware of the allegations, he was a psychologically vulnerable man who had suffered depression and anxiety.
- (ii) His mental health deteriorated from when he first learned of the allegations in June 2017, including chronically elevated levels of anxiety, all of which Dr. O'Leary says stemmed from the prospect of being viewed as a sex offender.
- (iii) Following contact from An Garda Síochána in late 2019, the applicant became acutely suicidal in early 2020.
- (iv) The applicant's pre-existing fragile mental health was unable to cope with the allegations made.
- (v) It is highly likely that the applicant may become actively suicidal prior to and during the trial.

**17.** Some of Dr. O'Leary's conclusions are markedly different from the views of the applicant's GP which were based on the records of his treating psychiatric team. I prefer the account and conclusions of his GP, none of which identify the complaint or prosecution or pending trial as a causation of or trigger for the applicant's mental health difficulties. There is no reference in the GP's report to the applicant having suicidal ideation. Whilst I do not question Dr. O'Leary's account of the applicant's history and experiences as given to her, I am mindful of the purpose of Dr. O'Leary's assessment as versus the treating role of the applicant's GP and psychiatric team.

**18.** Some of Dr. O'Leary's conclusions are markedly different from the views of the applicant's GP which were based on the records of his treating psychiatric team. I prefer the account and conclusions of his GP, none of which identify the complaint or prosecution or pending trial as a causation of or trigger for the applicant's mental health difficulties. There is no reference in the GP's report to the applicant having suicidal ideation. Whilst I do not question Dr. O'Leary's account of the applicant's history and experiences as given to her, I am mindful of the purpose of Dr. O'Leary's assessment as versus the treating role of the applicant's GP and psychiatric team.

**19.** I accept that the applicant has a history of depression and anxiety and cardiac issues for which he has been and continues to be prescribed medication and remains under medical care. However, there is insufficient evidence that those medical issues, or any exacerbation of them since the applicant first became aware of the allegations made against him, can be safely attributed to the length of time it has taken to bring the complaint to trial. Thus, whilst I do not accept there has been inordinate prosecutorial delay, I do not accept that any delay that has occurred has caused the applicant's current mental health difficulties.

**20.** I now consider whether the extent of those mental health difficulties, in itself, is a ground for prohibition on the basis that the applicant's health renders it unfair to put him on trial. Such a case can, in principle, be made and I note the relevance of poor health as part of the cumulative events that were found to render the trial unfair as occurred, for example, in *M.S. v. DPP* as discussed at para. 6 above.

**21.** The court was told of a number of supports that can be made available to the applicant during the trial if necessary, including the individual psychotherapy that Dr. O'Leary says has commenced with her with a view to reducing his psychological distress to a tolerable level. The trial may be managed so to allow the applicant to take breaks, avail of shorter hearing days and be assisted by a support person. I am satisfied that those steps, combined with the very important role to be played by the trial judge as set out at para. 5 above, means that the balance to be struck between the applicant's rights and the community rights to prosecute are in favour of proceeding with the trial.

**22.** The applicant's case falls outside of the exceptional category where it would be unjust to put an accused on trial.

**23.** I refuse this application. I will put the matter in for mention before me at 10.30am on 11 April 2024 for final orders.

**Counsel for the applicant:** Michael Liam O'Higgins SC, Karl Monahan BL

**Counsel for the respondent:** Kieran Kelly BL