



THE SUPREME COURT

Record Number: 2018/25

Clarke C.J.
O'Donnell J.
MacMenamin J.
Charleton J.
O'Malley J.

BETWEEN

THE PEOPLE
(AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)
PROSECUTOR/RESPONDENT

AND
C. CE.

DEFENDANT/APPELLANT

Statement

The Supreme Court has given judgment today in this appeal, which concerned the proper approach which should be taken by a trial judge in a case where an accused applies to have a trial halted on the grounds of alleged unfairness arising out of a significant lapse of time between the alleged offence and the trial.

Four of the judges have delivered judgments in which they agreed that the proper approach at the level of principle requires an assessment by the trial judge as to whether a trial is fair and just in light of the lapse of time complained of and whether the accused had thereby been deprived of a realistic opportunity of an obviously useful line of defence. In the judgment delivered by the Chief Justice, with whom MacMenamin J. agreed, the elements of that assessment were set out from paras. 9.2 to 9.5: -

“9.2 In that regard, the trial judge must (a) first consider the prosecution case as it has actually developed at the trial. Thereafter, the trial judge must (b) consider whatever evidence is available as to the testimony which might or could have been given but which is said to be no longer available. That exercise will generally involve two principal considerations; first, the court must (c) consider the available evidence about what might have been said by the missing witness or what might have been contained in missing physical evidence, such as documents or objects. The trial judge will be required to have regard to the degree of confidence with which it can be predicted that the particular evidence would have been available, while recognising that the very fact that the evidence is not available means that that exercise must necessarily be speculative at least to some extent.

9.3 If the trial judge is satisfied that it has been established that there was a real prospect that the evidence concerned could have been tendered, next, he or she will be required to (d) assess the materiality of any such evidence. The materiality of that evidence will need to be considered in the light of the prosecution case as it evolved at the trial.

- 9.4 *In the light of all of those factors, the court must finally (e) reach an assessment as to whether the trial is fair. The assessment of whether the trial is fair involves a conscientious determination by the trial judge whether, on the basis of all of the materials before the court, it can be said that the test identified by Hardiman J. in S.B. has been met, being that the absence of the missing evidence has deprived the accused of a realistic opportunity of an obviously useful line of defence.*
- 9.5 *Although not relevant on the facts of this case, it should also be noted that culpable prosecutorial failure or wrongdoing can be taken into account in assessing the degree of prejudice which renders a trial unfair. As noted earlier, no trial is perfect. However, the degree of departure from a theoretically perfect trial which will render the proceedings unfair can be less where it can be said that culpable action on the part of investigating or prosecuting authorities have contributed to the prejudice. A lesser departure from what might be considered to be a theoretically perfect trial will render the proceedings unfair if that departure is caused or significantly contributed to by culpable action on the part of investigating or prosecuting authorities. A greater degree of departure from the theoretically perfect trial will need to be demonstrated in cases where there is no such culpable activity."*

This step-by-step approach was expressly agreed with by O'Malley J. at para. 8 of her judgment. In that paragraph, she also agreed with the principles set out in the judgment of O'Donnell J. regarding the correct approach to be taken by a trial judge in this context, and stated that she did not see any real disagreement between the members of the Court as to how the trial judge determining such an application should proceed. These principles were set out at para. 46 of O'Donnell J.'s judgment as follows: -

- "(i) The jurisdiction to determine whether it is just to permit a trial of an accused person on historic allegations to proceed, is one normally best conducted at the trial;*
- (ii) The decision the trial judge should make is whether he or she is satisfied that it is just to permit the trial to proceed;*
- (iii) The obligation on the trial judge is to make a separate and distinct determination in this regard, and the trial judge must do so conscientiously, in the light of everything that has occurred at the trial;*
- (iv) The test to be applied does not involve any assessment of the guilt or innocence of the accused, which is a matter for the jury, but rather the fairness and justice of the process by which it is sought to determine that matter;*
- (v) While an appellate court must recognise that a trial court has particular advantages in the making of this assessment, the decision of a trial court is subject to appeal, and trial judges should therefore set out clearly the considerations leading to the conclusion that it is or is not just to permit the trial to proceed."*

O'Donnell J. similarly agreed that there was consensus in the Court as to how the trial judge should approach an application such as this, and stated that the differences between the members of the Court in this case involved the application of general principles to the particular facts of this case. O'Donnell J. further expressly agreed with paras 9.2 to 9.4 of the judgment of the Chief Justice. At para. 15 of his judgment, Charleton J. concurred with the principles which were set out by O'Donnell J., and reiterated in the judgment of O'Malley J.

It follows that the proper approach to be adopted by a trial judge in all cases involving such applications is as set out in those judgments.

However, the Court divided on the question of the proper application of those principles to the particular circumstances of this case, which involved the absence of a witness, M.Cy., whose evidence, it was argued, would have been of material assistance to the defence case.

The majority (O'Donnell, Charleton and O'Malley JJ.) considered that, having regard to the strength of the prosecution case and an assessment of the potentially missing evidence, any prejudice caused to the accused by the delay, and the resultant absence of M.Cy., did not render the trial unfair.

O'Malley J. considered that there was a reasonable possibility that the missing witness might have been of material assistance to the defence, but that in an evaluation of the strength of the prosecution case, there was evidence provided which was supportive of a number of aspects of the complainant's account and, significantly, that there was corroboration in the form of clear and effectively unchallenged evidence of an admission by the accused of criminal behaviour against the complainant. Thus, such evidence was sufficient to dispose of the claim that the appellant was unable to defend himself against the charges. Charleton J. also agreed that the evidence of the confession of the appellant carried a high degree of reliability, and that this, along with other relevant aspects of the evidence provided, meant the trial judge correctly allowed the matter to proceed for the jury's consideration.

O'Donnell J., agreeing with Charleton and O'Malley JJ., found, in light of a number of features of the evidence put before the trial court, that he was unable to accept that there was "a real possibility that M.Cy. might have been in a position to give evidence 'highly favourable' to the defence, which would, moreover, have survived any challenge to its credibility, so that the defence had not lost 'the real possibility of an obviously useful line of defence'". This conclusion was reached in light of the evidence provided in respect of the extent of the witness' knowledge of the allegations of the complainant, of the credibility of the appellant's account, and of the appellant's tacit admission of guilt. O'Donnell J. further stressed that the determination of the trial court should be awarded some margin of appreciation by an appellate court reviewing its decision.

The minority (Clarke C.J. and MacMenamin J.) considered that the absence of the witness concerned, who had died before the trial came on, in circumstances where she would have been potentially available for approximately 36 years after the date of the alleged offence, coupled with the lengthy period of time which had elapsed, rendered the trial unfair. This conclusion

was reached in light of her role as a central witness in the complainant's allegations, as stated by Clarke C.J. at para. 8.25 of his judgment: -

"[H]ere there can be little doubt that, had M.Cy. been available to give evidence, there is at least a realistic possibility that she might have been in a position to give evidence which would have been highly favourable to the defence and there is also a real possibility that such evidence would have survived any attack on its credibility to a sufficient extent to cause the jury to at least have a reasonable doubt as to the guilt of Mr. C. She would, highly unusually, have potentially been in a position to give direct evidence of the events surrounding an allegation of historic sexual abuse, although neither the complainant nor the accused."

19th December 2019