

THE HIGH COURT
JUDICIAL REVIEW

[2022] IEHC 229

[2019 No. 299 JR]

BETWEEN

W.C.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Charles Meenan delivered on the 11th day of April, 2022

Background

1. The applicant is currently before the Dublin Circuit Criminal Court charged by the respondent with eighteen counts of indecent assault contrary to s. 6 of the Criminal Law Amendment Act, 1935 and s. 10 of the Criminal Law (Rape) Act, 1981. The person who made these complaints is a first cousin of the applicant, C.R. (“the complainant”).
2. The said offences were alleged to have occurred between 1 February 1975 and 30 June 1984. At the time the complainant was aged between 4 and 14, and the applicant was aged between 20 and 29.
3. Following service of the Book of Evidence in Balbriggan District Court on 4 May 2017, the applicant was sent forward to the Dublin Circuit Criminal Court and appeared on several dates thereafter.
4. The primary evidence in the criminal proceedings is that of the complainant. There is also evidence from a family member who noted that she did not wish to be left alone with the

applicant. The complainant's brother describes an incident occurring between the complainant and the applicant when he was a child, but he cannot say whether it was physical or sexual. The stepmother of the complainant stated that the applicant admitted to her that he did "*fondle*" the complainant. The applicant denies the charges, has no previous convictions and has never appeared before a court of law before.

5. Having examined the Book of Evidence, and the nature of the complaints made by the complainant, the Solicitor for the applicant wrote to the respondent seeking certain specific items of disclosure. In particular, copies of all unredacted statements taken during the course of the investigation, including unredacted versions of all statements in the Book of Evidence, were sought.

6. By letter, dated 21 February 2018, the respondent sent copies of the unredacted statements in the Book of Evidence. In the unredacted statements of the proposed evidence of the complainant, the complainant alleges that, in the past, she had been subjected to a number of other serious sexual assaults.

7. The relevant parts of the complainant's unredacted statements in the Book of Evidence read as follows: -

- (i) "I remember another incident that occurred before my mother died. There were two young lads, two neighbours who attempted to sexually assault me in a laneway that runs along the back of our house and other houses. I do not want to detail what happened in this incident. I do not wish to name these two lads. I do not want any Garda investigation into this incident. ...";
- (ii) "When I was at this house party I was raped by a man at the party. It happened in the sitting room of the house. I do not wish to go into any more detail about what happened in this incident. I do not wish for Gardaí or UK police to investigate this incident. It was a once off and did not occur again. ...";

- (iii) "... I told *[blank]* there and then that I was repeatedly sexually assaulted by [the applicant] when I was younger. I have mentioned another four outstanding persons who sexually assaulted me. Once I was sexually assaulted by a neighbour, I was sexually assaulted by another uncle other than *[blank]*; I was sexually assaulted by two family members. One of these family members sexually assaulted me once and the other family member sexually assaulted me over a period of time. I do not wish to name any of these four people who sexually assaulted me or give any details of what happened to me in any of these incidents. I do not want to go into any details about them. I do not want Gardaí to investigate these incidents. I'm aware that should I wish to make a complaint in relation to any of these four persons I am aware I can report it to Gardaí in the future but I do not wish to do so at this time. ...";
- (iv) "In relation to the references I made in my original statement to the other people who abused me, I want to reiterate that I do not want to name any of these other people or disclose any information about what happened. This includes my other uncle, the man in – and the two boys in –. I don't want to make any complaint about these incidents or discuss them any further. The statement has been read over to me and is correct."

8. It should be noted that in the course of the statements the complainant alleged that she was sexually assaulted by a particular uncle: T.F. T.F. was prosecuted in the Dublin Circuit Court in respect of 20 sexual offence counts in respect of five complainants. He was prosecuted on three counts of indecent assault in respect of the complainant herein. He was found guilty and sentenced to five years' imprisonment.

9. Following receipt of the said unredacted statements of the complainant, a further letter seeking disclosure, dated 21 May 2018, was sent to the respondent. This letter sought all outstanding material that had not as yet been disclosed and sought details of, *inter alia*: -

“(i) The names and addresses of the two young persons who she alleges attempted to sexually assault her in a laneway ...

(ii) All material and full information in relation to an allegation made by the Complainant that she was raped while in [blank] in England.

(iv) Details of including all material, documents, notes, statements in relation to the investigation of and prosecution of allegations of sexual abuse made by the Complainant against another unnamed Uncle as referred to in her unredacted statement.

(v) Details of, including all materials, documents, notes, statements in relation to the investigation of and prosecution of allegations of sexual abuse made by the Complainant against a neighbour was contained in her unredacted statement.

(vi) Details of including all materials, documents, notes, statements in relation to the investigation of and prosecution of allegations of sexual abuse made by the Complainant against two family members as contained in her unredacted statement.

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10. The matter was mentioned in the Circuit Criminal Court on a number of occasions concerning, *inter alia*, the issue of disclosure. Following protracted correspondence between the applicant and the respondent, the position was set out in a letter, dated 29 April 2019, from the respondent: -

“We refer to the above matter and to your previous letter of the 21st March 2019. We can now confirm that the Complainant – does not wish to name or give any further details in relation to a number of persons whom she has alleged sexually assaulted her in the past.”

Application for judicial review

11. The High Court (Noonan J.) granted leave to the applicant to seek certain reliefs by way of judicial review: -

- (i) An order of prohibition prohibiting the further prosecution of the applicant on foot of the said criminal charges;
- (ii) A stay preventing the further prosecution of the said charges pending the determination of the application herein.

Submissions

12. In their written legal submissions, the applicant seeks certain alternate reliefs: -

- (a) That the trial be prohibited by reason of the failure to make proper disclosure and by reason of delay;
- (b) If the court does not see fit to permanently stop the trial, that the trial is prohibited until such time as the complainant agrees to give the information required by the applicant to properly prepare his defence.

The applicant maintains that in the absence of such disclosure his ability to defend himself is significantly undermined. He relies on the duty imposed on the respondent to make full disclosure.

13. Though the applicant refers to several legal authorities, he principally relies upon the decision of the Court of Appeal in *Vattekaden v. DPP* [2016] IECA 205. I will consider this authority in some detail later in the judgment.

14. The respondent submits that significance is to be attached to the evidence that the applicant allegedly made an admission to the stepmother of the complainant, referred to at para. 4 above. The respondent also submits that the issues raised by the applicant ought to be more appropriately left to be adjudicated by the trial judge. In respect of the decision in *Vattekaden v. DPP*, the respondent maintains that the facts of that case can be distinguished from the instant case. Further, the respondent goes considerably further and maintains that, although the decision in *Vattekaden* is binding on this Court, she disagrees with the decision and sets out the reasons for this.

Consideration of submissions

15. The applicant relies on the decision in *Vattekaden v. DPP*. The facts of this case were that the complainant alleged that in the course of receiving a massage from Mr. Vattekaden she was indecently touched by him. Some days later she made a complaint to An Garda Síochána who investigated the matter. Mr. Vattekaden was subsequently charged with a single count of sexual assault. On the morning of the trial, on 14 November 2013, the prosecution indicated to the Court that certain new matters had come to light which required a short adjournment. When the matter came before the Court again, the defence was served with a letter enclosing new material including statements from the complainant and from the investigating Garda. The new material disclosed that the complainant alleged two prior incidents of sexual assault when she was a child. Mr. Vattekaden sought details of the names and contact details of the two men involved so that they could be interviewed. The respondent replied stating that the Gardaí were not pursuing efforts to identify the persons allegedly involved in the prior incidents. The respondent had been advised that, as the complainant was making no formal complaints about these prior incidents, the Gardaí had no grounds to institute a criminal investigation. Mr. Vattekaden was granted leave to apply for judicial review seeking an order of prohibition of the prosecution against him.

16. Hogan J., in giving the judgment of the Court, posed the following question that had to be resolved: -

“1. Where an accused is charged with sexual assault and the evidence discloses that the complainant previously made similar allegations against unnamed third parties in the past but has never made a formal complaint to the Gardaí in respect of those matters, is he entitled to be informed of the identity of the alleged perpetrators of these offences in advance of trial and, in default, is he entitled to have the trial prohibited? ...”

This is, effectively, the same question which this Court has to answer.

17. In this case, the applicant has sought certain information for the purposes of cross-examining the complainant with a view to testing her credibility. As Hogan J. stated in *Vattekaden*: -

“22. There is no doubt but that the right to cross-examine a witness in a criminal trial is at heart of the constitutional guarantee in Article 38.1 of the Constitution to a trial in due course of law. ...”

Hogan J. referred to a number of decisions of the Supreme Court which have stressed the critical importance of the right to cross-examine by a person facing charges (*JF v Director of Public Prosecutions* [2005] 2 I.R. 174 and *PG v. Director of Public Prosecutions* [2007] 3 I.R. 39).

18. Hogan J. considered the issue of previous complaints in the context of the collateral questions rule. This rule was stated by Henry J. in *R. v. Funderburk* [1990] 1 WLR 587, as follows: -

“When one comes to cross-examination, questions in cross-examination equally have to be relevant to the issues before the court, and those issues of course include the credibility of the witness giving evidence as to those issues. But a practical distinction must be drawn between questions going to an issue before the court and questions

merely going either to the credibility of the witness or to facts that are merely collateral. Where questions go solely to the credibility of the witness or to collateral facts the general rule is that answers given to such questions are final and cannot be contradicted by rebutting evidence. This is because of the requirement to avoid multiplicity of issues in the overall interests of justice.”

Hogan J. stated: -

“42. In the light of these authorities it must be acknowledged that evidence in relation to previous complaints would not necessarily be admissible at the trial, even by reference to the modern understanding of the application of the collateral questions rule in sexual offence cases. It would generally be necessary for this purpose for the applicant to demonstrate that there was some evidential basis for the suggestion that the earlier complaints had been fabricated or invented.

43. It would, of course, be inappropriate for this Court to determine at this juncture whether, in all the circumstances, any such evidence as to previous complaints would be permitted. This would ultimately be a matter for the trial judge to determine in the event that a trial were to go ahead. It is sufficient to say that, in the light of the authorities to which I have just referred, it is certainly possible that the criteria for the admission of such evidence might be met.

44. None of this means, however, that the failure on the part of the complainant to disclose the identity of the persons against whom the previous complaints were directed does not have implications for the applicant's right of effective cross-examination. Without this information in advance the applicant cannot hope to have any effective opportunity of contradicting the complainant's account of these earlier alleged incidents from 1993 and 1999 or which might otherwise impeach her credibility as a witness,

even if the admissibility of such evidence concerning third parties will ultimately be a matter for the trial judge.

45. As the authorities make clear, it seems likely that it would be necessary for the applicant to establish some evidential basis for the suggestion that the earlier complaints (*i.e.*, the complaints dating from 1993 and 1999) had been fabricated or invented. Without, however, knowing the identity of the persons who were the subject matter of the complaints, it is difficult to see how the applicant can otherwise effectively ascertain material upon which to cross-examine the complainant in respect of these matters.”

19. Hogan J. concluded as follows: -

“46. Summing up, therefore, it seems to me that a key aspect of the applicant's constitutional right to trial in due course of law – namely, the right to an effective cross-examination – will be compromised in the circumstances unless the identity of the persons who are alleged to have sexually abused or raped the complainant by reference to the two earlier allegations dating respectively from 1993 and 1999 is disclosed by her in advance of the trial. ...”

20. The respondent submitted that disclosure of the complainant’s references to earlier sexual assaults (including rape) are best left to the trial judge. I do not think that this deals with the issue. As Hogan J. stated: -

“49. If, on the other hand, the complainant were to refuse to reveal the identity of the persons who are the subject matter of the earlier 1993 and 1999 complaints, it is difficult to see how, judged by the comments of Fennelly J. in *PG* to which I have just referred, the trial judge would have any option but to bring the trial to an end.”

Therefore, it seems to me that the issue of disclosure must be dealt with in these judicial review proceedings.

Conclusion

21. By reason of the foregoing, I am satisfied that the applicant is entitled to the disclosure of the information which he seeks. Again, referring to *Vattekaden v. DPP*, as per Hogan J., I do not think it would be appropriate at this stage to grant a final order prohibiting the trial. As Hogan J. stated: -

“51. --- I consider that this would be too prescriptive a remedy and one which may ultimately prove to be unnecessary. In my view, the complainant should first be given a fair opportunity of considering her position in the light of this judgment. ...”

I will therefore grant an Order staying the prosecution of the charges against the applicant unless the complainant discloses the following: -

- (i) The names and addresses of the two young persons who she alleges attempted to sexually assault her in a laneway near her home on some occasion before the death of her mother;
- (ii) All material and full information in relation to an allegation made that she was raped while in (name provided) in England;
- (iii) All material, documents, notes, statements in relation to the investigation of and prosecution of allegations of sexual abuse made by the complainant against an unnamed uncle as referred to in the unredacted statements;
- (iv) Details up to and including all material, documents, notes, statements in relation to the investigation of and prosecution of allegations of sexual abuse made by the complainant against a neighbour as contained in her unredacted statements;
- (v) Details of including all material, documents, notes, statements in relation to the investigation of and prosecution of allegations of sexual abuse made by the complainant against two family members as contained in her unredacted statements.

The aforesaid is to be disclosed to the Solicitor for the applicant within four months of the date of this judgment. In the event of the aforesaid information not being disclosed, a stay on the prosecution will become permanent.

22. I will list this matter to deal with the issue of costs, and any other issue that may arise, on 3 May 2022.