THE COURT OF APPEAL

Neutral Citation Number: [2024] IECA 303

Record Number: 2024/110

Edwards J.

Kennedy J.

Burns J.

BETWEEN/

SIDNEY SUTTON

APPELLANT

-AND-

THE DIRECTOR OF PUBLIC PROSECUTIONS, AN GARDA SÍOCHÁNA, THE COMMISSIONER OF AN GARDA SÍOCHÁNA, THE DEPARTMENT OF JUSTICE, THE ATTORNEY GENERAL, IRELAND AND CIRCUIT COURT JUDGE CORMAC QUINN

RESPONDENTS

JUDGMENT of Ms. Justice Tara Burns delivered on the 6th day of December, 2024.

1. This is an appeal from the judgment of the High Court (Gearty J.) ([2024] IEHC 155), wherein she refused to grant the appellant leave to apply by way of judicial review for an Order of Prohibition in respect of his pending trial before the Circuit Court, together with various other reliefs.

2. The appellant appeared in person both before the High Court and this Court.

Background

3. On 2 November 2017, the appellant was convicted before the Circuit Court of assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997 ('the 1997 Act'), four counts of assault contrary to s. 2 of the 1997 Act, and production of a knife contrary to s. 11 of the Firearms and Offensive Weapons Act 1990.

4. The offences related to events which occurred on 6 February 2016, when it was alleged that the appellant had been involved in an altercation with his wife, initially in a taxi on the way to their house, and subsequently at their house.

5. In respect of the s. 3 assault and production of a knife charges, the Circuit Court imposed a two-year term of imprisonment on the appellant, one year of which was suspended on certain terms and conditions, and four months' imprisonment in respect of the s. 2 assault charges. The appellant was represented by senior counsel, junior counsel, and a solicitor at his trial.

6. The appellant appealed against his conviction and the first respondent brought an application seeking a review of the sentence imposed on the appellant on grounds of undue leniency.

7. Preparation by the appellant for his appeal against conviction proceeded at a very slow pace, resulting in the first respondent's application for a review of the sentence imposed by the Circuit Court being listed for hearing before this Court first in time.

8. On 25 September 2020, this Court determined that the sentence imposed on the appellant was unduly lenient and proceeded to re-sentence the appellant to a term of imprisonment of two years and four months. This resulted in the appellant, who had served the term of imprisonment

imposed upon him by the Circuit Court, being re-incarcerated to serve the remainder of the revised sentence determined by this Court.

9. On 26 April 2021, this Court delivered judgment in the appellant's conviction appeal and determined to quash the conviction in light of the Supreme Court decision in *The People (DPP) v. Almasi* [2020] 3 IR 85. The legal error identified in the appellant's trial related to the editing of the memoranda of the interview conducted with the appellant by An Garda Síochána. This resulted in portions of the memoranda being omitted from the exhibits produced before the jury. The portions omitted from the memoranda related to the case which the appellant wishes to make.

10. On 10 May 2021, a retrial of the charges preferred was ordered by this Court pursuant to s. 3(1)(c) of the Criminal Procedure Act 1993 ('the 1993 Act'). To correct a misunderstanding of the appellant, the effect of quashing the appellant's conviction is that he is presumed innocent of the charges which he again faces before the Circuit Court. However, contrary to the appellant's description of his status, he is not acquitted of those charges, but remains a person charged with such offences.

11. On 19 July 2021, the appellant sought leave before the Supreme Court to appeal the decision of this Court which ordered a retrial. On 21 January 2022, the Supreme Court declined this application.

12. At the time of the hearing of the present application before this Court, the appellant's trial remained listed for hearing in the Circuit Court, accompanied by an application which the appellant has brought pursuant to s. 4E of the Criminal Procedure Act 1967.

13. The appellant has also brought a miscarriage of justice application before this Court (pursuant to s. 2 of the 1993 Act) which stands adjourned for mention only on 17 January 2025.

14. On 12 June 2023, the appellant's *ex parte* application seeking leave to apply by way of judicial review came before the High Court. On 31 July 2023, the appellant was ordered to put the respondents on notice of the application.

The Appellant's Position with respect to the Underlying Charges

15. The appellant's case is that he is innocent of the charges preferred; that he is the victim of domestic violence and that on the night in question, it was he who was assaulted by his wife, rather than him assaulting her; and that she deliberately harmed herself downstairs in the house to bring a false claim against him and subsequently attempted suicide in the bathroom upstairs.

Appeal from High Court

16. As this is an appeal against the refusal of the High Court to grant the appellant leave, this hearing is a *de novo* hearing. Whilst the appellant made many complaints with respect to the manner in which the High Court dealt with the application, these are not matters which need concern this Court for the purpose of this application.

Test to be Met for Leave to Apply by way of Judicial Review

17. In *O'Doherty v. Minister for Health* [2022] IESC 32, O'Donnell C.J. stated at para. 39:-

> "39. … It *is clear that the threshold of arguability in G. v. DPP is a relatively low bar, but, as Birmingham P. said in the Court of Appeal, it is not a non-existent threshold. It is worth recalling in this context the observation of Charleton J. in the course of his judgment in Esmé v. Minister for Justice and Law Reform [2015] IESC 26 […]:-*

'any issue of law can be argued: but that is not the test. The point of law is only arguable within the meaning of the relevant decisions if it could, by the standards of rational preliminary analysis, ultimately have a prospect of success.'

The threshold is a familiar one in the law. It is, in essence, the same test which arises when proceedings are sought to be struck out on the grounds that they are bound to fail, or the test that is normally required in order to seek an interlocutory injunction. It must be a case that has a prospect of success (otherwise it would not be an arguable case) but does not require more than that."

The Appellant's Reasons for Why his Re-trial Should be Prohibited

18. The grounding affidavit filed on behalf of the appellant for the purpose of his leave application before the High Court referred to a series of wide-ranging reasons as to why his trial should be prohibited, to include, *inter alia*, complaints relating to his earlier trial; his family law proceedings; and his appearances before this Court. However, at the hearing before this Court, the appellant relied on five separate reasons as to why his trial should be prohibited, namely: lost evidence/suppression of evidence; delay; prejudicial pre-trial publicity; ineffective assistance of counsel; and an unlawful decision by the first respondent to prosecute the appellant coupled with an abuse of process.

Jurisdiction to Prohibit a Trial

19. With respect to the first four of the appellant's claims, the appellant must establish that he has an arguable case that there is a real risk that his upcoming trial in the Circuit Court will be unfair because of the issues which he raises and that these issues are such that they cannot be remedied by

the directions of the trial judge upon whom a duty rests to ensure the appellant receives a fair trial.

20. The appellant has very many complaints and criticisms about very many issues surrounding his prosecution for the offences at issue. Indeed, he has made very serious and preposterous allegations against a large number of guards, lawyers and judges who have dealt with his cases. The High Court Judge dealt with this long list of complaints in a detailed manner. However, the sole matter which arises for determination in relation to the first four issues he raises is the question of whether he has established an arguable case that there is a real risk of an unfair trial in the impending proceedings which cannot be met by directions from the trial judge. This is a prospective test which relates to the forthcoming trial, rather than a review of what occurred in the previous trial or his miscarriage of justice application.

Lost Evidence/Suppression of Evidence

21. The appellant maintains that a scenes of crime report was concealed by the investigating Gardaí and that this report would assist his defence because it will establish that the blood spatter on the downstairs walls of the hallway and the ceiling of the bathroom upstairs resulted from, as he asserts, his wife purposefully harming herself on the occasion in question. He submits that the suppression of this report has deprived him of a reasonable opportunity of a realistic line of defence and that its absence cannot be met by directions from the trial judge.

22. The basis for the appellant's assertion that a scenes of crime report was withheld from him arises from evidence given by Garda Samantha Meehan at the original trial. In the course of cross-examination by the appellant's senior counsel, Garda Meehan stated:-

"*I was aware that shortly after this incident, the scene was technically examined by a scenes of crime expert subsequently*."

23. In addition, the appellant avers in his replying affidavit, sworn on 12 December 2023, that he heard prosecuting counsel saying to his senior counsel when the latter asked for the scenes of crime report at this point in the cross-examination – "*You know they are not available anymore*". In a grounding affidavit, sworn on 27 August 2024 for the purposes of this appeal, the appellant avers that he heard prosecuting counsel giving a somewhat different answer in response to this request from the appellant's senior counsel, namely – "*You know they are not available*."

24. Bizarrely, there is no reference to Garda Meehan's evidence or what the appellant alleges he heard prosecuting counsel say, in his original grounding affidavit sworn on 6 June 2023 for the purpose of the leave application.

Discussion and Determination

25. At any given crime scene, the fact that a scene was technically examined does not mean that there will be a scenes of crime report prepared. The usual practice is that a statement is prepared by the scenes of crime examiner who attended at the scene, which sets out the relevant findings at the scene. It is unusual that a report is compiled. Such a statement, if it contains evidence which the prosecution intends to rely on, is served on an accused as part of the book of evidence. If it is not the intention of the prosecution to rely on evidence from the scenes of crime examiner, then such a statement is disclosed to the appellant, if it has come into being in the first instance. Simply because a scene was technically examined does not mean that a scenes of crime report is prepared.

26. The book of evidence in the instant case reveals that Garda Meehan attended at the family residence of the appellant and his ex-wife, on foot of a 999-call received from the injured party. Having attended to the injured party, Garda Meehan took photographs of the scene on her mobile phone. These photographs were served as exhibits in the trial and are the photographs upon which the appellant relies to demonstrate the blood spatter pattern. As I understand it, the appellant also took photographs of his own.

27. A perusal of the book of evidence reveals that on 8 February 2016, Sergeant Greg Baker obtained a search warrant for the appellant's house and attended at the house in the company of Gardaí Pascal Meehan, James Murray, James Dourigan, Aodhán Healy and Michael Kenny. The guards arrived at the premises at 12.45, but as the house was unoccupied, entry had to be gained through a back window. Garda Healy recounts in his statement that he searched the premises and that he located and seized a number of items which he believed to be of evidential value. Garda Healy handed these items to Garda Pascal Meehan. Sergeant Ivor Burlingham, who is attached to the divisional scenes of crime unit, received items from Garda Shane Waldron and submitted these items for forensic analysis. Dr Yvonne O'Dowd, forensic scientist, carried out forensic analysis on a knife found at the scene.

28. The date when the appellant asserts the scenes of crime examination of his house took place (which he was not present for) is the same date when the search warrant was executed at his house.

29. The evidence of Garda Meehan quoted above does not establish that a scenes of crime report was prepared. The height of the evidence is that she was aware that the scene was technically examined by a scenes of crime expert shortly thereafter. The occasion when the appellant asserts a scenes of crime examination took place is at the time of the search referred

to above, namely on 8 February 2016, when he was absent from the house. Clearly, a search did take place of the appellant's house and various Gardaí were present for this search. It is not known what function each of these Gardaí had at the time of the search. However, it is not established on Garda Meehan's evidence that a scenes of crime report was actually compiled.

30. With respect to what the appellant asserts he heard counsel for the prosecution say to his senior counsel in relation to the existence of a scenes of crime report, it firstly is to be noted that a discrepancy arises on the appellant's affidavits as to what he asserts he heard. Two different versions have been averred to by the appellant which, while including only one additional word, result in a very different interpretation with respect to the meaning of the words spoken. On the first version averred to, the implication is that a report was in existence and is now no longer in existence. The second version averred to is open to the interpretation that such a report never came into existence. This is aside from the unexplained oddity that there is no reference whatsoever to this issue in the affidavit sworn by the appellant to ground the leave application. This is very unusual in circumstances where the claim that important evidence was withheld from him, is grounded in part upon what he alleges he heard.

31. The High Court judge listened to the DAR recording relating to when this was supposed to have been said at trial and did not hear reference to this issue. This Court has not engaged in such an exercise. However, of greater significance is the fact that, in the course of the oral hearing before us, the appellant indicated that on an occasion when the criminal proceedings were before the Circuit Court, the Circuit judge played the relevant DAR recording in court, and the appellant could not hear these words spoken either. The appellant previously suggested on affidavit that the transcript was redacted. Having heard the DAR recording himself, he now has

suggested someone interfered with the DAR recordings. This is not only impossible but farcical.

32. On the basis of the evidence, I am not satisfied that it is likely that a scenes of crime report came into existence which was then maliciously and intentionally withheld from the appellant.

33. However, the appellant is not without a means of exploring whether a scenes of crime report came into existence; whether a scenes of crime examiner attended at the house on 8 February 2016; what examinations were carried out; and what were the results of those examinations. Firstly, he can ask for disclosure of this information from the first respondent prior to a new trial commencing. Secondly, he can explore these issues in the course of a new trial.

34. The statements of Sergeants Baker and Burlingham; Gardaí Meehan, Healy and Waldron; and Dr O'Dowd all feature on the book of evidence, which means that all these witnesses must be available to be called by the prosecution. If the prosecution does not intend to call these witnesses, they nonetheless must be available to be tendered for questioning by the appellant. Accordingly, all of these witnesses are available to the appellant to ask whatever relevant questions he wishes of them. He is also aware of other guards who were present at the search, even if statements have not been provided to him from them. (I am unaware of what further statements the appellant has received in the nature of disclosure).

35. Having regard to the evidence served by the prosecution, any relevant questions in relation to a scenes of crime examination and/or blood spatter examinations can be put to these witnesses. The appellant is also free to call his own expert with respect to the blood spatter pattern which was photographed and what it might establish.

36. It is also open to the appellant to make appropriate applications to the trial judge with respect to any unfairness arising in relation to missing evidence which he asserts has the effect of him being deprived of a realistic defence, to include, an application to withdraw the case from the jury pursuant to *The People (DPP) v. PO'C* [2006] 3 IR 238*,* as recently considered in *The People (DPP) v. CCE* [2019] IESC 94. Such an application can be made either at the close of the prosecution case, or at the close of the defence case, should the appellant call expert evidence.

37. In these circumstances, the appellant has failed to establish an arguable case that an unfairness arises with respect to missing evidence such that there is a real risk that he cannot receive a fair trial.

Delay

38. The appellant points to the length of time which has passed since the events the subject matter of the prosecution occurred and asserts that the delay is such that he cannot receive a fair trial.

39. Aside from the fact that this delay was substantially contributed to by the appellant, the appellant has failed to establish how this passage of time has resulted in an unfairness or prejudice to him such that it is not possible for him to receive a fair trial.

40. A delay in a prosecution very rarely results in a trial being prohibited with the jurisprudence now leaning in favour of the trial judge being best placed to assess how a delay affects the fairness of the trial in light of the actual evidence adduced.

41. The appellant has failed to establish an arguable case that there is a real risk that the delay which has occurred has created an unfairness for him which cannot be dealt with by the directions of the trial judge.

Prejudicial Pre-trial Publicity

42. The appellant asserts that he will not receive a fair trial in light of the significant pretrial publicity which he has been exposed to.

43. *Rattigan v. The People (DPP)* [2008] IESC 34 establishes that a lapse of time between publicity in relation to a trial and a future trial, together with appropriate directions from a trial judge, can render a trial fair. The period of six months which the Superior Courts have held to be a sufficient length of time, in this regard, will have well expired by the time this matter comes on for hearing.

44. The appellant has failed to establish an arguable case that the pre-trial publicity is such that, at this stage, there is a real risk that he cannot receive a fair trial.

Ineffective Counsel

45. The appellant asserts that his legal representation in his previous trial was ineffective and that, despite changing legal representation on a number of occasions since his trial, he has continued to experience ineffective legal representation. For that reason, he asserts that he will not engage legal representation in his pending trial. His assertion appears to be that if he takes that course, that will result in an unfair trial. This particular focus on the question of ineffective counsel was not a feature before the High Court.

46. It is a matter for the appellant as to whether he wishes to engage legal representatives to represent him in his pending trial. He also has the option of representing himself. These are choices for the appellant to make. However, whatever choice the appellant makes in this regard in no way impacts on the question of a fair trial.

47. The appellant has failed to establish an arguable case that this issue raises a real risk that he will be subjected to an unfair trial.

Malicious Prosecution/Abuse of Process

48. The appellant asserts that the first respondent's prosecution of him was malicious and that ordering a retrial is an abuse of process.

49. The complaint which the appellant makes in this regard centres on his claim that a scenes of crime report was supressed, in conjunction with other matters. As I have found that there is no evidence to support the assertion of that a scenes of crime report was supressed, there is no basis for this ground. Furthermore, the appellant is well out of time to challenge either the decision to prosecute of the decision to retry him.

50. The appellant has failed to establish an arguable case in this regard.

Conclusion

51. The appellant has failed to establish an arguable case with respect to any of the issues he raises. Accordingly, leave to apply by way of judicial review is refused by me.

APPROVED

NO REDACTION NEEDED