[2020] IEHC 434

THE HIGH COURT
CENTRAL CRIMINAL COURT

Bill No. CCDP 87/2002

IN THE MATTER OF AN APPLICATION UNDER THE CRIMINAL PROCEDURE ACT 1993, SECTION 9

BETWEEN:
THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)
RESPONDENT

-AND-
YUSUF ALI ABDI

APPLICANT

JUDGMENT of Mr. Justice Alexander Owens delivered on 2nd September 2020

1. The applicant was tried before this court in December 2019 on a charge that he murdered his son Nathan on 17th April 2001. At the conclusion of the trial on 13th December 2019 the jury acquitted him of murder and returned the special verdict that he was not guilty by reason of insanity.

2. The jury accepted the evidence that at the time of the killing the applicant was a schizophrenic suffering from a compelling overpowering delusion.

3. He was previously tried in this court in May 2003 and at that trial he was convicted of the murder of his son. The jury did not accept his defence that the evidence established that he killed his son while legally insane on that occasion. Evidence that he was suffering from schizophrenia was rejected by the jury. An appeal to the Court of Criminal Appeal was unsuccessful.

4. An issue arose as to whether the initial diagnosis that the applicant was not suffering from schizophrenia was in fact incorrect. The applicant applied to the Court of Appeal for an order quashing his conviction under s.2 of the Criminal Procedure Act 1993. That Court decided in 2019 that the confirmed diagnosis of schizophrenia and the materials on which it was based and a reassessment of the diagnosis at the time of the trial were "*newly-discovered facts*" which indicated that there was a real risk that the murder conviction involved a "*miscarriage of justice*." There is an overlap in the list of "*newly-discovered facts"* set out in the judgment and I am giving a condensed summary here.

5. It appears that chronic psychiatric conditions may vary in intensity. Sometimes symptoms and behaviour may result in a review and change of diagnosis. Some years following his conviction the applicant was diagnosed as a schizophrenic by psychiatrists in the Central Mental Hospital. This led to the application to the Court of Appeal under s.2 of the1993 Act.

6. Diagnosis changed gradually. By the time of the re-trial what had started as a disputed medical opinion that the applicant suffered from schizophrenia at the time of the first trial had become accepted fact.

7. The Court of Appeal took the view that if this diagnosis of schizophrenia was an accepted fact at the time of the original trial, the jury might well have taken a different view of the

evidence and concluded that the applicant was insane at the time of the killing. The conviction was set aside and a re-trial was ordered.

8. The Court of Appeal will allow an appeal under s.2 of the 1993 Act where it considers that there is a real prospect that a jury would come to a different conclusion if the so-called "*newly-discovered facts*" were available as evidence at the trial or if it considers that the new material points in some other concrete way to the result in the original trial being a miscarriage of justice.

9. I refer to s.9(1)(a), (i) and (ii) of the 1993 Act. The context of this application is that compensation becomes payable where, following a successful s.2 application or a successful appeal, the accused "*has been acquitted in any re-trial*" and "*the court of re-trial….has certified that a newly-discovered fact shows that there has been a miscarriage of justice*." There must be a relationship between the "*newly-discovered fact"* and "*miscarriage of Justice*". The one must demonstrate the other, and it may be that the form of demonstration is cause and effect.

10. Two issues were raised in submissions. Was there an acquittal in the re-trial? Has it been demonstrated to my satisfaction that any newly-discovered facts show that there has been a miscarriage of justice?

11. I will deal with the issue of acquittal first. During the oral presentation counsel for the respondent accepted that the verdict amounted in law to an acquittal and that had a special verdict been entered in 2003, this would have amounted to an acquittal, but he suggested that the nature of the activity which the applicant was proved to have engaged in showed that the applicant was not "*acquitted*" within the sense of that term as used in s.9.

12. I do not agree with this submission and would not have accepted this proposition even if this matter had come up for determination prior to the commencement of the Criminal Law (Insanity) Act 2006. There are only two outcomes in any completed criminal trial where a jury has not disagreed. The first outcome is a conviction. The second outcome is an acquittal. Section 9(1) of the 1993 Act does not give any special meaning to the term "*acquittal*" which departs from the ordinary meaning as understood by lawyers.

13. It is necessary to say something about the history of the defence of insanity and of the special verdict where a defence based on insanity is made out. The origin of special verdicts in insanity trials goes back to the trial of *James Hadfield* reported in *(1800) 27 State Trials 1281.* He was charged with treason following an attempt to kill George III with a pistol at the Drury Lane Theatre on 15th May 1800. At that time the correct course was for the jury to find the prisoner who was adjudged to be insane not guilty but as the law then stood this might result in his immediate release. The common law on that was unclear.

14. Everybody was in agreement that Hadfield should be kept in confinement as he posed a danger to others. At the time of his trial legislation was contemplated to cover the

potential difficulty as to what was to be done after the verdict if Hadfield was found not to be so under the guidance of reason as to be answerable for his act. At the suggestion of the prosecution the jury returned a verdict *"We find the prisoner is not guilty; he being under the influence of insanity at the time the act was committed*."

15. This brought Hadfield within the scope of the Bill which Parliament was about to consider and which became the Criminal Lunatics Act 1800. The effect of the Act was that a person found not guilty on the grounds of insanity was no longer entitled to a general acquittal which would permit release. Insanity became a special verdict with automatic confinement for an indefinite period of time. The Act required the jury to find specially whether the person charged with the offence was insane and made it lawful for a court as a consequence of such a finding to order the detention of that person at the pleasure of the Sovereign.

16. The form of the special verdict was altered by s.2(1) of the Trial of Lunatics Act 1883 which provided as follows:

> *"Where in any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible, according to law, for his actions at the time when the act was done or omission made, then, if it appears to the jury before whom such person is tried that he did the act or made the omission charged , but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission."*

17. The expression "*guilty but insane*" is not an accurate description of the legal effect of the verdict. The legislation was introduced at the behest of the reigning Sovereign in the hope that a change in the manner in which the verdict was expressed would dissuade mentally deranged persons from making attempts on her life. This provision was procedural and did not affect the substance of the verdict. The verdict remained a verdict of acquittal which carried special consequences. The wording of the verdict did not connote that the person was convicted of the offence charged and the "*guilt*" proved was nothing more than that the person did or made the act or omission which, if committed by a sane person, would constitute an offence.

18. This section was repealed by the Criminal Law (Insanity) Act 2006 which specifies in s.5(1) that where the court or jury makes a finding that the accused was suffering from a mental disorder at the time of the offence charged and fulfils one or more of the criteria set out in s.5(1)(b) that court or jury *"shall return a special verdict to the effect that the accused person is not guilty by reason of insanity*."

19. The special verdict was not regarded as a conviction for the purposes of an appeal to the Court of Criminal Appeal under the Courts of Justice Act 1924 and was not appealable. It was regarded as an acquittal for procedural purposes. The 2006 Act has now altered the

law by giving a right of appeal. The reason for the alteration is that the prosecution may now make the case that a person accused of committing a criminal offence was insane at the time.

20. The second issue here is whether it is established that "*newly-discovered facts*" show that there has been a "*miscarriage of justice*." The applicant has satisfied me on both of these points.

21. The term "*miscarriage of justice*" has not been defined in the 1993 Act. It appears in three separate sections in that Act. Courts dealing with s.9(1) applications have been reluctant to commit themselves to providing a definition of a concept that the Oireachtas has chosen not to define because of the danger that definition will not express the concept which the Oireachtas has in mind adequately. Courts interpret this legislation. It is not their business to supplement it by providing exclusive or closed lists of categories of matters which may amount to miscarriages of justice. Any comments of this sort in the authorities are for guidance only.

22. Section 2(1)(b) makes clear that an applicant under s.2 must advance a case "*that the newly-discovered fact shows that there has been a miscarriage of justice*". The provisions of s.3 apply to all appeals , including applications under s.2, and use the term "*miscarriage of justice*" in the so-called "*proviso*". This is set out in s.3(1)(a) which allows the Court of Appeal to "*affirm the conviction (and may do so, notwithstanding that it is of opinion that a point raised in the appeal might be decided in favour of the appellant, if it considers that no miscarriage of justice has actually occurred*)." This was originally contained in s.5 of the Courts of Justice Act 1928.

23. Finally, the term "*miscarriage of justice*" appears in s.9(1). This provides that where the Court of Appeal quashes a conviction on an application under s.2 or on appeal or the accused has been acquitted in any re-trial, compensation becomes payable if the *"Court or the court of re-trial, as the case may be, has certified that a newly-discovered fact shows that there has been a miscarriage of justice*".

24. Section 9(1) applies to all successful criminal appeals to the Court of Appeal. Not all appellants who succeed in an appeal on the basis that some "*newly-discovered fact*" has emerged become entitled to a certificate. Furthermore, there is no requirement in s.9(1) that the re-trial referred to in that provision follows an appeal where an application to introduce fresh evidence has been considered and allowed, though this will usually be the case. Jurisdiction under s.9(1) is not confined to cases where the Court of Appeal has allowed an appeal following the introduction of fresh evidence which was not available at the original trial or other cases where the basis of appeal was material non-disclosure or irregularity. The "*newly-discovered fact*" which shows that a miscarriage of justice has occurred which led to the original verdict may only emerge for the first time after the matter has been remitted for re-trial or during a re-trial. There may be a combination of "newly-discovered facts" which emerge over time.

25. The Court of Appeal in exercising jurisdiction under s.2 is only concerned with whether the "*newly-discovered fact*" demonstrates that the initial verdict is unsafe and that there has been a "*miscarriage of justice*" in that sense. The term "*newly-discovered fact*" in s.9(1) has the much the same as meaning as it does in s.2. It is defined in s.2(4). For the purposes of this application the relevant words within the definition are: *"….a fact discovered by or coming to the notice of a convicted person after the appeal proceedings have been finally determined…*". This is subject to a qualification that for the purposes of s.9(1) it is sufficient that the new material be discovered or come to the notice of the convicted person after trial: see for example *The People (Director of Public Prosecutions) v. Wall [2005] IECCA 140.*

26. In my view, the meaning of the term "*miscarriage of justice*" in s.9 is the popular meaning which connotes *"a failure of the judicial system to attain the ends of justice".* This formulation is quoted in the judgment of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Hannon [2009] 4 I.R. 147 at 156 [25]*. The words "*miscarriage of justice*" in s.9(1) are used convey that something has gone seriously wrong in relation to the original trial process which has led to a conviction and not merely that there are misgivings about the result.

27. "*Miscarriage of justice*" is used in a different sense in ss.2 and 3. These sections deal with criteria which must be met by either an applicant who relies on s.2 or an appellant under s.3 in order to succeed in an appeal against conviction. It is not necessary to show the matters specified in s.9 in order to succeed in an application under s.2.

28. In this case a directed acquittal was not available and the Court of Appeal had no option but to remit the case against the applicant for a re-trial. A different option was formerly available under s.35 of the Courts of Justice Act 1924. This allowed the Court of Criminal Appeal to find that an appellant was insane and substitute the special verdict for the conviction. Section 35 of the 1924 Act was repealed by s.25 of the Criminal Law (Insanity) Act 2006. On the material put before the Court of Appeal this would not have been a suitable case for a substituted special verdict, even if that option had been available.

29. I have considered the authorities cited in relation s.9(1) of the 1993 Act. In each case where a certificate was granted it was clear that the original verdict could not stand because of prosecutorial irregularities or perjured evidence or other material which demonstrated to the courts in a real way that there was a miscarriage of justice in the sense that the conviction was wrong in a fundamental aspect. These convictions were not merely wrong in law because of judicial misdirection or introduction of inadmissible evidence.

30. This type of serious defect in criminal proceedings which leads to a miscarriage of justice may occur for a number of reasons. The new material may demonstrate the innocence of the accused or that a fundamental element of the evidence which led to a conviction has been undermined. It may demonstrate an irregularity which shows that a substantial failure of due process led to the conviction. The phrase "*newly-discovered fact*" is not

confined to new evidence having a bearing on proof of guilt of the accused. It may relate to other matters which undermine confidence in the process or result of the original trial.

31. This is not a case where the newly discovered-facts relied on are outside the evidence in the re-trial. I am in a somewhat different position to the Court of Criminal Appeal as I have presided over the re-trial. I have the transcript and I can see the effect of any new material which the jury did not have the benefit of in 2003. I can look at how any evidential material which was not put before the original tribunal impacted on the evidence at the re-trial and examine whether this shows that something went seriously wrong at the time of the original trial and resulted in a wrongful conviction. Section 9(1) does not require that the finger of blame must be pointed at any person or thing. Was the result of the process in 2003 a "*miscarriage of justice*" in the sense that there was a conviction when there ought to have been an acquittal because of something fundamental which is disclosed by the new material relied on by the applicant?

32. Re-trials do not run in the same way as original trials. The evidence may be different. To give an example, it appears that at the original trial the defence advanced evidence to attempt to establish that the applicant had taken a drug which had potential side-effects of causing psychosis which explained his actions. The applicant gave evidence in the original trial. Thse aspects did not feature in the re-trial. I have information on what happened in the first trial which I have gleaned from the judgments of the Court of Criminal Appeal and the Court of Appeal at *[2004] IECCA 47 and [2019] IECA 38* and from affidavits and an exhibit.

33. I do not regard myself as bound by the view which the Court of Appeal expressed in the judgment on the s.2 application on what may or may not be newly- discovered facts. The Court of Appeal was expressing a view for the purposes of exercising a jurisdiction under s.2 of the Act. Things have moved on since the decision of the Court of Appeal. The decisive factor in the re-trial was agreement by all psychiatric experts who gave evidence that the applicant was a schizophrenic when he killed his son.

34. To my mind, having heard the evidence in the re-trial, the matter all boils down to this acceptance at the re-trial that the diagnosis which formed the basis of the prosecution view in evidence back in 2003 was incorrect and that the applicant was suffering from schizophrenia when he killed his son. The challenge to the defence evidence and alternative explanation for the killing based on the applicant locking the door and other behaviour which the prosecution relied on at the original trial as showing that he was not insane were abandoned.

35. Much of the evidence at the re-trial appears to have been a re-run of the evidence at the original trial with some further support for the defence contentions from Professor Rix, Dr Washington-Bourke, and Dr Quinn based on the applicant's medical history after his conviction. Dr Washington Burke gave evidence for the defence at the original trial. Even without considering the evidence relating to the applicant's psychiatric history following his conviction, Dr Quinn and Dr Washington-Bourke would have concluded that the applicant was suffering from a schizophrenic episode at the time of the killing. This does

not count for the purposes of what I have to decide because there was nothing in those views which is based on material which was unavailable to a psychiatrist in 2003.

36. The new feature in the evidence at the re-trial was acceptance of the defence diagnosis of schizophrenia as an agreed fact. This resulted from a re-appraisal of the medical material in light of the applicant's medical history following his conviction. This now represents the view of the psychiatrists in the Central Mental Hospital, including Dr Mohan who gave evidence in both trials. Dr Mohan did not agree with a diagnosis of schizophrenia at the time of the 2003 trial. His opinion in 2003 was based on the materials available to him at the time. In his view, these materials pointed to the applicant not having a mental illness which had the effect of disabling him from understanding that what he did was wrong or from resisting a psychotic impulse. He no longer holds that view.

37. This trial is somewhat different from a trial where the prosecution must prove guilt. There may be all sorts of reasons for an acquittal following a re-trial where insanity is not a defence issue. The acquittal does not amount to proof of innocence. In this re-trial the onus of proof was on the applicant because he was relying on the special defence of insanity and he has proved his innocence. However, this of itself is not the decisive factor for the purposes of the s.9(1) application. The decisive factor is that a fundamental factual element within the evidence on which the applicant was convicted of murder and which led to his defence of insanity being rejected by the jury at his first trial was demonstrated by his subsequent medical history to be incorrect.

38. I suspect this is not the first time that something of this sort has happened in an insanity case. Similar issues arise where other types of expert evidence is relied on in trials. For example, a forensic science conclusion which is central to a conviction may subsequently be demonstrated to be erroneous. The error discovered might be in the science or in the scientist. The effect of the error may be that a person who would otherwise be treated as not guilty of an offence and who may be innocent is convicted. In that scenario it would be difficult to take seriously any argument that the newly-discovered fact did not result in a miscarriage of justice. There is no reason why incorrect diagnosis should be treated differently to scientific or other expert error. I do not accept the submission made by counsel for the respondent on this point. In my view, this case is no different in character and a certificate must issue.