

APPROVED

[2021] IEHC 12

THE HIGH COURT
JUDICIAL REVIEW

2020 No. 6 J.R.P.

BETWEEN

DERMOT O'CALLAGHAN

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 5 January 2021

INTRODUCTION

1. This ruling is delivered in respect of a renewed application for leave to apply for judicial review. The application has been made by way of a written application submitted to the Central Office of the High Court by a personal applicant. The applicant, Mr. O'Callaghan, is currently detained in Mountjoy Prison.
2. The initial application for leave to apply for judicial review had been refused for the reasons set out in a written judgment delivered on 12 October 2020, *O'Callaghan v. Director of Public Prosecutions* [2020] IEHC 463 (“*the principal judgment*”).
3. The applicant submitted a further affidavit and sought to renew his application for leave on 19 November 2020.

NO REDACTION REQUIRED

PROCEDURAL HISTORY

4. The applicant had been charged with two offences in respect of an armed robbery said to have been carried out at Ulster Bank, Stillorgan, County Dublin on 26 September 2017. The applicant had, initially, entered a plea of not guilty. The applicant and a number of co-accused were tried before the Circuit Criminal Court (Her Honour Judge Pauline Codd sitting with a jury) in March 2020. The applicant had been represented by solicitor and junior and senior counsel.
5. During the course of the trial, it was indicated to the trial judge on 5 March 2020 that the Director of Public Prosecutions would be entering a *nolle prosequi* in respect of some of the charges against the applicant, and that the applicant would be entering a guilty plea in respect of an existing count and a new count. The applicant was formally arraigned on the new count, and entered a guilty plea.
6. The applicant subsequently sought to withdraw his guilty plea. This application was refused by the trial judge.
7. The applicant now alleges that he pleaded guilty to one charge only, namely possession of an imitation firearm. As part of his renewed application for leave, the applicant alleges that the trial judge should not have allowed him to diverge from his original plea of not guilty.
8. As of the date that the renewed application for leave was made, the applicant had not yet been sentenced.

DISCUSSION AND DECISION

9. The principal argument advanced in support of the renewed application for leave is to the effect that this court had been “misled” as to the circumstances

surrounding the applicant's trial before the Circuit Criminal Court. This is not so. As appears from the principal judgment, this court had been fully cognisant of the procedural history.

10. For the reasons explained in detail in my principal judgment, none of the complaints which the applicant wishes to advance are ones which are amenable to judicial review. This is because the complaints all relate to rulings made in the course of an ongoing criminal trial.
11. The Supreme Court has endorsed the well-established principle that the taking of judicial review proceedings in the course of a criminal trial will only be appropriate in exceptional circumstances in its recent judgment in *E.R. v. Director of Public Prosecutions* [2019] IESC 86 ("*E.R.*"), citing *Director of Public Prosecutions v. Special Criminal Court* [1999] 1 I.R. 60, and *Freeman v. Director of Public Prosecutions* [2014] IEHC 68.
12. The case law indicates that there are two strands underlying the principle. The first is that the taking of judicial review proceedings prior to the conclusion of a criminal trial has the effect of disrupting the unitary nature of the trial. It also has the capacity to create chaos in the criminal justice system and is open to abuse.
13. The second strand underlying the principle concerns the limitations of the High Court's judicial review jurisdiction. Judicial review is concerned principally with the legality of the decision-making process, and not with the underlying merits of the ruling under challenge (save in cases of irrationality). Put otherwise, the function which the High Court exercises in determining judicial review proceedings is far more limited than that which the Court of Appeal would exercise in determining an appeal against conviction and sentence.

14. The inherent limitations on the High Court's judicial review jurisdiction have been described, in more eloquent terms, by the Supreme Court in *E.R.* as follows (at paragraph 17).

“[...] an accused in a criminal trial who is advised to forego an appeal and instead pursue a judicial review, faces a burden different to an argument as to right and wrong. Judicial review is not about the correctness of decision-making, nor is it the substitution by one court of a legal analysis or factual decision for that of the court under scrutiny. On judicial review, where successful, the High Court returns the administrative or judicial decision to the original source and, implicitly in the judgment overturning the impugned decision, requires that it be redone in accordance with jurisdiction or that fundamentally fair procedures be followed. If the decision-maker has no jurisdiction, that may be the end of the matter but the High Court never acts as if a Circuit Court case were being reconsidered through a rehearing, which is a circumstance where a court will be entitled to substitute its own decision. Judicial review is about process, jurisdiction and adherence to a basic level of sound procedures. It is not a reanalysis.”

15. Applying these principles to the facts of the present case, the applicant should pursue his complaints, in the first instance, before the Circuit Criminal Court, and, if necessary, by way of an appeal thereafter to the Court of Appeal.
16. Finally, whilst not determinative of the application, it is to be noted that the applicant is currently serving a term of imprisonment in respect of an *unrelated* conviction. More specifically, the applicant had been sentenced, on 19 November 2018, to a term of imprisonment for a period of eight years (with the final year suspended). No complaint is made in these judicial review proceedings as to this earlier conviction. (It seems that an appeal is pending before the Court of Appeal against that conviction).
17. Thus, irrespective of the outcome of these judicial review proceedings, the applicant would remain in custody. There is no prejudice caused to the applicant, therefore, in his having to pursue the conventional route of an appeal to the Court

of Appeal against the orders of the Circuit Criminal Court, instead of judicial review.

FORM OF ORDER

18. The renewed application for leave to apply for judicial review is refused. I direct that a copy of this ruling be provided to the applicant and the Director of Public Prosecutions (via the Office of the Chief Prosecution Solicitor), and to the relevant Circuit Court Office.

Approved
Gareth S. Mans