APPROVED **[2023] IEHC 8**

THE HIGH COURT

2021 No. 827 J.R.

BETWEEN

JOHN CONNORS

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 11 January 2023

INTRODUCTION

1. This judgment is delivered in respect of an application to quash a sentence of imprisonment imposed by the Circuit Court. The principal issue for determination in these judicial review proceedings is whether the Circuit Court judge's refusal to allow counsel an opportunity to take instructions from the accused person resulted in an unfair hearing.

FACTUAL BACKGROUND

2. These judicial review proceedings concern the circumstances in which a three-year sentence of imprisonment was imposed upon the applicant. For ease of exposition, the applicant will be referred to in this judgment as "***the defendant***", i.e. to reflect his status as the responding party in the criminal proceedings, rather than as applicant in these judicial review proceedings. This is because much of the discussion which follows refers to events in the criminal proceedings.

3. The defendant had entered a guilty plea before Carlow Circuit Criminal Court on 20 May 2021. More specifically, the defendant had pleaded guilty to an offence of burglary contrary to Section 12 of the Criminal Justice (Theft and Fraud Offences) Act 2001. The offence had been committed in November 2014. A sum of €5,000 had been stolen during the course of the burglary.

4. The sentencing hearing took place on 21 July 2021. As of that date, the defendant was in custody for other offences and had to be conveyed to the courthouse by the prison service for the purpose of attending the sentencing hearing. For reasons which have not been fully explained, there had been a delay in the defendant being brought to the courtroom. As a result, the counsel and solicitor who had been appointed to represent the defendant did not have time to consult with him prior to the judge sitting. It has been explained that the counsel who had been briefed to represent the defendant had only recently come into the case and had not previously met with the defendant.

5. Accordingly, at the call-over of the list, counsel for the defendant sought a short adjournment to allow for a consultation with the defendant. This was refused as follows:

> "DEFENCE COUNSEL: Yes, Judge. I wonder could I have permission to speak to Mr Connors.
>
> JUDGE: No. We're going [on] now. Let's get on. Come on. You'd plenty of time before this to be talking to him, since last May or whenever."

6. Having called over the balance of his list, the Circuit Court judge then took up the sentencing hearing as the first matter. The exchange between the judge, defence counsel and prosecuting counsel unfolded as follows:

> "COUNSEL FOR DPP: Judge, I was just going to say, [counsel for the defendant] has just come into this case, late in the day.
>
> JUDGE: If she doesn't [want] to do it, don't do it. If you do want to do it, get on with it.
>
> COUNSEL FOR DPP: Would the Court -- would the Court give her five minutes, Judge?
>
> JUDGE: No. I'm giving nobody any time. Get on with it now. I'm fed up with waiting for ye."

7. The sentencing hearing which followed was unsatisfactory in a number of respects. First, the member of An Garda Síochána who was called to give evidence of the circumstances of the offence and of previous convictions made a number of highly prejudicial comments, including an unsubstantiated allegation that the defendant was a key member of an organised crime gang. Secondly, the guard purported to refer to a number of convictions said to have been entered against the defendant in England. This was done without prior notice to the defence nor to counsel representing the Director of Public Prosecutions. No proper evidence was provided in respect of these supposed convictions.

8. One of the cornerstones of the plea of mitigation on behalf of the defendant had been an offer to pay the sum of €5,000 by way of compensation to the victims

of the crime. Defence counsel explained that the defendant's family members had "*pooled together*" and brought this sum to court. During the course of the hearing, the judge indicated his scepticism as to the actual source of the monies.

9. In his sentencing ruling, the judge addressed the provenance of the monies as follows:

> "JUDGE: […] This man comes forward on a plea, and I will take the plea as an early plea, in relation to the count of burglary. This unattended, at that particular time, residential premises in Bagenalstown, was entered by breaking the glass of the back door and getting in. While in the house, €5,000 was taken and to date has not been recovered. 5,000 is offered from unknown sources this morning. Considering the time that has elapsed, and considering the length of time this man has been on remand for this matter, I find it curious that that money was not offered earlier, so that the provenance of the money could be tested. I accept what the guard has said in court, that he is doubtful about where the money comes from, and he suspects that it originates with John Connors himself. I don't know but I am very sceptical, and I decline to accept the money on behalf of the victims. The victims have in fact been out of the money since the date of the burglary and I'm sure that they've made up or put up with the loss.
>
> […]"

10. The judge imposed a three-year sentence of imprisonment.

PROCEDURAL HISTORY

11. The defendant has purported to challenge the sentence of imprisonment imposed upon him by two parallel procedural routes as follows. First, the defendant instituted these judicial review proceedings on 24 September 2021. The application for leave was directed to be heard on notice and the High Court (Meenan J.) granted leave on 20 December 2021. The substantive application for judicial review came on for hearing before me on 15 December 2022 and judgment was reserved until today.

12. Secondly, the defendant lodged an appeal with the Court of Appeal against the severity of sentencing. It is common case that the appeal is subject to the provisions of the Criminal Procedure Act 1993 (as adapted by the Court of Appeal Act 2014). Relevantly, an appeal against sentence is generally conducted by reference to the transcript of the hearing at first instance, rather than by way of a *de novo* hearing.

JUDICIAL REVIEW OR APPEAL

13. An application for judicial review will not normally be appropriate where an applicant has an adequate alternative remedy by way of an appeal. This is especially so in the context of a criminal conviction entered in the District Court or the Circuit Court. This is because an appeal to the Circuit Court or the Court of Appeal, respectively, will generally represent an adequate alternative remedy. Indeed, an appeal is almost always the *preferable* remedy from an accused's perspective because of the inherent limitations on the judicial review jurisdiction.

14. Judicial review is concerned principally with the legality of the decision-making process, and not with the underlying merits of the decision 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 Circuit Court and the Court of Appeal, respectively, would exercise in determining an appeal against conviction and sentence.

15. 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. v. Director of Public Prosecutions* [2019] IESC 86 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."

16. The Supreme Court judgment goes on, in the next paragraph, to emphasise that an applicant for judicial review in criminal proceedings has the "*substantial burden*" of showing the deprivation of a right. It is not enough to ground a successful application for judicial review that the trial judge might have made an error of fact, nor even an incorrect decision of law.

17. The circumstances in which judicial review may be appropriate, notwithstanding the availability of a right of appeal, have been summarised as follows by Clarke J. (as he then was) in *Sweeney v. District Judge Fahy* [2014] IESC 50 (at paragraphs 3.14 and 3.15):

> "Thus, it is clear that a court may refuse to consider a judicial review application where it is apparent that the complaint made is one which is more appropriately dealt with by means of a form of appeal which the law allows. There can, of course, be cases where the nature of the allegation made is such that, if it be true, the person concerned will have, in substance, been deprived of any real first instance hearing at all or at least one which broadly complies with the constitutional requirements of fairness. To say that someone, who has been deprived of a proper first instance hearing at all, has, as their remedy, an appeal is to miss the point. In such circumstances what the law allows is a first hearing and an appeal. If there has, in truth, been no proper

> first hearing at all, then the person will be deprived of what the law confers on them by being confined, as a remedy, to an appeal. In such a case, judicial review lies to ensure that the person at least gets a first instance hearing which is constitutionally proper and against which they can, if they wish, appeal on the merits in due course.
>
> Where, however, a person has had a constitutionally fair first instance hearing and where their complaint is that the decision maker was wrong, then there are strong grounds for suggesting that an appeal, if it be available, is the appropriate remedy."

18. These, then, are the principles to be followed in deciding whether to grant judicial review in this case.

CONSTITUTIONAL REQUIREMENT OF FAIRNESS

19. A person, who is at risk of having a term of imprisonment imposed upon them, is entitled to a constitutionally fair hearing at first instance. This entitlement includes, *inter alia*, the right to effective legal representation. The refusal to afford an accused person a reasonable opportunity to consult with their legal representatives prior to a hearing, whether a full trial or a sentencing hearing, has the potential to undermine this right.

20. The High Court, in exercising its judicial review jurisdiction, will show considerable deference to the decision of the court of trial on whether or not to grant an adjournment. It is essential to the proper functioning of the criminal justice system that hearings should normally proceed on their scheduled date. There would be a potential for abuse if a recalcitrant party were able to challenge a reasoned and justified decision to refuse an adjournment.

21. The approach to be taken to the review of the decision of a first instance court to refuse an adjournment in the context of a criminal trial has been set out by the Supreme Court in *O'Callaghan v. District Judge Clifford* [1993] 3 I.R. 603. The

Supreme Court reiterated that the adjournment of a case is a matter for the discretion of the court of trial and must be exercised as a judicial discretion within constitutional parameters. A higher court should only intervene cautiously.

22. The Supreme Court then identified a number of factors which indicated that the trial judge in that case had exceeded his jurisdiction in refusing an adjournment, as follows:

> "1. This was a criminal trial with the consequent possibility of a penalty of imprisonment (which in fact happened).
>
> 2. This was the first time this case had come before the court.
>
> 3. Counsel had not had an opportunity of obtaining instructions from the applicant.
>
> 4. Because of the nature of the prosecution, by certificate, matters could arise on trial (such as to how the notice was served) which even if the applicant had had an opportunity to instruct counsel prior to the trial (which was not the case here) he would not have been able to instruct fully in advance.
>
> 5. The applicant was to be in court at 4.30 p.m.
>
> 6. The witnesses which the State indicated were in court were for sentencing purposes only."

23. There is an obvious resonance between some of these factors and those arising in the present case. In each instance, the respective defendant was at risk of having a penalty of imprisonment imposed upon him. In each instance, defence counsel had not had an opportunity to take instructions. In each instance, the adjournment sought was a very short one: on the facts of the present case, the time sought was measured in minutes.

24. The major distinction between the two cases is that the adjournment in *O'Callaghan* had been sought in the context of a criminal trial, rather than a sentencing hearing following upon an earlier guilty plea. This distinction does not affect the underlying principle. As the course of the hearing before the Circuit Court in the present case demonstrates, significant factual issues can arise even in the context of a sentencing hearing. For example, a dispute arose as to whether the defendant had previous convictions from England and as to the source of the sum of €5,000 being offered by way of compensation.

25. For the reasons which follow, I have concluded that the refusal to grant a short adjournment, measured in minutes, resulted in a breach of the defendant's right to a constitutionally fair hearing. First, the defendant was at risk of, and ultimately received, a significant custodial sentence. Given that his right to liberty was engaged, it was essential that he be afforded effective legal representation. This necessitated his counsel having an opportunity to take instructions.

26. Secondly, an adjournment would not have interfered with the efficient running of the court's list that day. The adjournment could have been readily facilitated by putting the defendant's sentencing hearing towards the end of the list. The potential detriment to the defendant was disproportionate to any supposed inconvenience to the court.

27. Thirdly, the defendant himself was blameless. The need for an adjournment arose from circumstances outside his control, namely the delay on the part of the prison service in bringing him to the courtroom that morning and a change in legal representation. The case is to be contrasted with one where an accused person fails to turn up on time or at all.

28. Fourthly, some weight can be attached to the fact that counsel for the Director of Public Prosecutions had supported the application for an adjournment. Whereas it is ultimately a matter for the judge, not the parties, to determine the order of proceedings, the fact that the Director was not objecting is indicative that the application for an adjournment did not involve an abuse of process.

29. Last but not least, the judge failed to provide any reasoned justification for the refusal of the adjournment. The court of judicial review will show deference to the court of trial where an explanation is provided for the refusal of an adjournment. The explanation does not have to be elaborate or lengthy. In the absence of any explanation, however, the court of judicial review cannot simply rubberstamp the decision but must instead consider all relevant factors.

30. In summary, although a court may be busy, and judicial resources are scarce, an accused person's right to be heard must be respected. As stated by the Supreme Court in *O'Callaghan v. District Judge Clifford* [1993] 3 I.R. 603 (at 612), the essence of constitutional justice is the *audi alteram partem* rule, and the right to instruct counsel to defend one's case. A person being sentenced must have adequate opportunity to instruct counsel and to clarify any matters that so require.

WHETHER ACTUAL PREJUDICE CAUSED

31. The Director of Public Prosecutions has sought to oppose these judicial review proceedings, in large part, on the basis that the defendant suffered no actual prejudice. More specifically, it is submitted that it is apparent from the transcript that defence counsel was able to address the issues that arose during the course of the sentencing hearing. Put bluntly, the Director seeks to avail of the

competence of defence counsel to minimise the judge's error in refusing to allow an adjournment.

32. With respect, an accused person who has established that a criminal trial has not been conducted in a constitutionally fair manner is not required to demonstrate actual prejudice. An accused person is not required to demonstrate that the outcome of the criminal trial or sentencing hearing would have been different had the breach of fair procedures not occurred. Here, the defendant has established that the Circuit Court judge exceeded his jurisdiction in refusing the adjournment application. This excess of jurisdiction cannot be cured retrospectively, i.e. by analysing the course of the subsequent hearing. It is a fundamental constitutional requirement that justice not only be done but be seen to be done. The refusal of the adjournment application was, objectively, unfair. The defendant was subject to a sentencing hearing in circumstances where his right to effective legal representation had been undermined because of the lack of an opportunity to consult with his counsel. The reasonable observer's perception of the proceedings as unfair would not be remedied by their being told that an adjournment would have made no difference to the sentence imposed.

33. None of this is to say that an assessment of fairness is to be carried out in the abstract, divorced from the particular circumstances of the case. Rather, the point is that this assessment is done, primarily, by reference to the factors which would have been known to the judge at the time he or she made the decision on whether or not to grant the adjournment. The factors relevant to this assessment have already been discussed under the previous heading. In summary, it was

unreasonable and disproportionate to refuse the adjournment application given the fact that the defendant was at risk of a lengthy custodial sentence.

34. For completeness, and if and insofar as it might be necessary to do so, an examination of the transcript indicates that the proper presentation of the defendant's case was actually prejudiced.

35. First, defence counsel did not have an opportunity to take proper instructions on the allegation, introduced by the garda witness, that the defendant had previous convictions from England. This may well have affected the outcome: it is not clear from the sentencing ruling that the judge disregarded these supposed convictions.

36. Secondly, defence counsel did not have an opportunity to take proper instructions on the source of the sum of €5,000 which was offered by way of compensation to the victims of the crime. The offer of compensation was a cornerstone of the plea of mitigation. The judge ultimately excluded this from consideration on the basis that he was not satisfied as to the source of the monies. A different outcome might well have ensued had counsel had a proper opportunity to take instructions on the issue.

37. Thirdly, the refusal of the adjournment meant that defence counsel could not make full use of certain letters. These letters contained sensitive and personal details in relation to the death of the defendant's father prior to the time of the offences on which the defendant was being sentenced. There was also sensitive and personal information that related to personal tragedies that had befallen the defendant and his wife. (These details have been redacted for the purpose of this judgment). Defence counsel was not in a position to show the letters of mitigation to the garda witness and counsel for the Director of Public

Prosecutions and to raise the letters in cross-examination, having only taken instructions on these during the hearing itself.

CONCLUSION AND PROPOSED FORM OF ORDER

38. A person, who is at risk of having a term of imprisonment imposed upon them, is entitled to a constitutionally fair hearing at first instance. This entitlement includes, *inter alia*, the right to effective legal representation. The refusal to afford an accused person a reasonable opportunity to consult with their legal representatives prior to a hearing, whether a full trial or a sentencing hearing, has the potential to undermine this right.

39. For the reasons explained at paragraphs 25 to 30 above, the refusal of the application for a short adjournment, to be measured in minutes, was in breach of fair procedures. The applicant/defendant was thus denied a constitutionally fair hearing at first instance. An appeal to the Court of Appeal does not provide a full remedy to this breach for the reasons explained in *Sweeney v. District Judge Fahy* [2014] IESC 50 (at paragraphs 3.14 and 3.15). Rather, this is one of those truly exceptional cases where the appropriate remedy is by way of judicial review.

40. There was some debate at the hearing before me as to whether it is permissible to sever the sentence from the conviction. Counsel for the Director of Public Prosecutions submitted that this cannot be done in respect of an order of the Circuit Court. Counsel cited, in particular, *State (de Burca) v. O hUadhaigh* [1976] I.R. 85 (at 92). In reply, counsel for the applicant/defendant submitted that his client did not seek to resile from his earlier plea of guilty and the matter might be remitted on that basis.

41. Subject to hearing further from counsel on this point, my *provisional* view is that the justice of the case can be met by setting aside the conviction and sentence; and remitting the criminal prosecution to the Circuit Court on the basis of a guilty plea. Put otherwise, the clock would be turned back to the point in the process at which the applicant/defendant had come before the Circuit Court for sentencing. The judge dealing with the matter can then enter a fresh conviction.

42. I will list the matter before me, remotely, on 30 January 2023 at 10.30 am for submissions on this point. I will also address the question of costs on that occasion. The parties are at liberty to suggest a different date if needs be.

Appearances

Mícheál P. O'Higgins SC and Amy Heffron for the applicant instructed by Aonghus McCarthy Solicitors
Kieran Kelly for the respondent instructed by the Chief Prosecution Solicitor