

## THE HIGH COURT

## JUDICIAL REVIEW

[2018 No. 171 JR]

BETWEEN

DANNY WYATT

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Twomey delivered on the 27th day of March, 2019

## SUMMARY

1. This is a case in which the applicant ("Mr. Wyatt") of Oaklands Drive, Clonmel, Co Tipperary seeks, *inter alia*, an order from this Court declaring his trial for assault a nullity because he claims he was deprived of his constitutional right to a trial in due course of law by virtue of the decision to try him with another defendant, not as co-accused on a joint indictment, but rather concurrently on two separate indictments before the same jury.

2. The key factual issue in this case is that Mr. Wyatt and Mr. Nathan Burke ("Mr. Burke") were tried together for the alleged assault before a jury on 6th December, 2017 in Clonmel Circuit Court. There were two separate indictments, one against Mr. Wyatt and one against Mr. Burke. The Circuit Court decided to try Mr. Wyatt and Mr. Burke concurrently on separate indictments before the same jury. At the trial, Mr. Wyatt was found guilty, while the jury could not reach a verdict regarding Mr. Burke and he was remanded to the next sessions of the Clonmel Circuit Court.

3. The key legal issue in this case is that Mr. Wyatt claims that the decision to try him concurrently with Mr. Burke on separate indictments deprived him of his constitutional right to a trial in due course of law.

4. At the hearing of this judicial review, Mr. Wyatt alleged that the decision to try him concurrently with Mr. Burke on separate indictments meant that:

- the composition of the jury hearing Mr. Wyatt's trial was affected by Mr. Burke who was entitled to, and did, challenge several members of the jury,
- Mr. Burke could not be a witness in Mr. Wyatt's trial since Mr. Burke was being tried at the same time, and
- evidence relevant to Mr. Burke's trial was automatically before the jury hearing Mr. Wyatt's trial, whether or not it was relevant evidence to Mr. Wyatt's trial.

5. While Mr. Wyatt sought to rely on these three grounds to challenge his trial at the hearing of this judicial review, a preliminary application was made by the DPP that Mr. Wyatt could not rely on these reasons, as they are not the grounds upon which he obtained leave to take these judicial review proceedings. This Court accepts this argument for the reasons set out hereunder, but will first set out the factual background.

## FACTUAL BACKGROUND

6. Mr. Wyatt was charged with committing an assault on a person called Mr. Robert Guiry ("Mr. Guiry"), which assault allegedly occurred in a nightclub in Clonmel, Co. Tipperary on 3rd August, 2015. A second person, Mr. Burke, was also charged with assault on Mr. Guiry which is alleged to have occurred in the nightclub at the same time as the assault by Mr. Wyatt and thus the charge against Mr. Burke and the charge against Mr. Wyatt arose out of the same incident.

7. Mr. Burke was sent forward for trial to the Clonmel Circuit Court on 21st February, 2017 on Bill No. TYDP0019/2017. As it was necessary to issue a bench warrant for Mr. Wyatt, he was sent forward for trial on the later date of 7th March, 2017 to the Clonmel Circuit Court on Bill No. TPD0021/2017. It appears that an error was made at this stage, as both accused were on the same indictment, namely TYDP0019/2017. It was for this reason that on 30th November, 2017, counsel for the DPP applied to amend the indictment as against Mr. Burke to remove Mr. Wyatt from it and to serve a fresh indictment on Mr. Wyatt bearing the Bill No. TPD0021/2017 as per his return for trial. This application was successful.

8. However, an application was also made on 30th November, 2017 on behalf of the DPP to have both cases proceed together. Mr. Wyatt's counsel objected to this application. However, the Circuit Court judge acceded to the DPP's application to try both indictments together.

9. The following are the relevant extracts from the transcript of that hearing on 30th November, 2017 when the Circuit Court acceded to the DPPs' request to try the two separate indictments concurrently:

Counsel for DPP: I am applying to have an indictment numbered 19/17 against Nathan Burke, charging the assault causing harm and an indictment number 21/17 against Danny Wyatt charging the assault causing harm and for them to be tried at the same time. And I have drafts, Judge, which I will hand in- if I'm successful, I'll hand in the drafts. At the moment the indictment is drafted as a single count against the two accused

[.....]

Counsel for DPP: "Judge, there is another possible misunderstanding in the submissions of my learned friends because, as I indicated at the call-over, the issue having been raised, what I'm applying to do is to have two separate indictments, both with the correct bill number, for the individual accused and have them tried at the same time. And that was made very clear in my application.

Judge: the indictments would be – were identical save for the bill number, is that correct?

Counsel for DPP: Identical

Judge: Well, and, of course, naming a different accused and –

Counsel for DPP: Yes, Judge.

Judge: Yes, I see. Well, substantively the particulars of offence are the same except that it's a different accused but, in every other respect, the particulars of offence are identical.

Counsel for DPP: Yes, Judge. It's the same offence, Judge.

Judge: Yes.

Counsel for DPP: They're effectively co-accused

[.....]

Counsel for DPP: And in those circumstances, I maintain my opposition, I maintain my application, which I highlighted at the outset of the application, to have two indictments with the bill number appropriate to each person but tried at the same time.

Counsel for Mr. Wyatt: Yes, Judge, if I might just have liberty to just briefly reply again, Judge.

The first point I would make is that I did accept from the outset that the facts in *Conlon v. Kelly* were substantively different. I nonetheless said that the interpretation and the findings of the Court are applicable to this case. I stand over that. The Court, and as [Counsel for DPP] has highlighted, I don't gainsay that there might be certain impracticalities attached to the approach adopted by the Supreme Court, but I say that's the law and we're bound by it. I say the Court has to overlook any inconvenience that that judgement may have brought about, we're bound by it, and we simply have to comply with that judgement, Judge. I say that [Counsel for DPP] has suggested that he would – "prefer" perhaps is an incorrect word, but another indictment against Mr – a new indictment against Mr Wyatt and that then both matters would proceed together. I say he's set forward no statutory basis for adopting such procedures. I say that's a very unusual procedure that two criminal trials would be heard together. I say he's put forward no statutory or any basis or any precedent for it. "

[.....]

Judge: Well [Counsel for Mr. Wyatt and Counsel for Mr. Burke] argue that, arising out of the decision in *Conlon v. Kelly*, the court cannot accede to the application made by [Counsel for the DPP] here this morning to proceed on the basis of two separate indictments on the different bill numbers for each of them charging an assault causing harm on Mr Guiry on a particular date and on the basis of the State case alleging joint enterprise. They had argued that section 6 (1) of the Criminal Justice Act, Criminal Justice (Administration) Act of 1924, does not permit an indictment – does not permit amendment to indictment by combining counts, in effect, from separate indictments based on separate returns for trial.

Now, *Conlon v. Kelly* was decided on very different facts indeed. And Mr Conlon was returned for trial on two different occasions – one in 1996, one in 1998 – there having been, in the meantime, a jury disagreement in relation to the subject matter of the 1996 return for trial. It's difficult to see how the Supreme Court could have considered a situation such as this, where a book of evidence was prepared by the State for a return for trial of two men on the basis as I say, of a State case of joint enterprise and when one of them failed to appear and a bench warrant was issued, the result was that they were returned on different dates.

Now, I understand that, in practice, I understand from what's been submitted, that in practice, even when two or more persons are returned for trial on the same date, a separate return for trial issues in respect of each, and I regard that as a very important point here in light of the particular circumstances, as I've outlined. And I'm aware that, in cases of multiple defendants, it is very frequently the case that persons are returned on different dates.

So, I cannot regard *Conlon v. Kelly* as authority which precludes me from acceding to the application made by [Counsel for the DPP]. It seems, on the face of it, I know that by reason of the ruling which I'm now making, there is going to be – or is likely to be, at least – an application, perhaps even two applications, for separate trials but, with regard to the application that was made by [Counsel for the DPP] here this morning, I'm acceding to that.

Counsel for the DPP: May it please the Court.

Counsel for Mr. Burke: May it please the Court.

Counsel for Mr. Wyatt: Judge, in those circumstances, I would like to proceed and make an application for separate trials.

[.....]

Counsel for Mr. Wyatt: Well, Judge, I have no difficulty whether the application is made today or when – I have no preference either.

Counsel for Mr. Burke: Similarly, Judge.

Judge: Yes, well, I granted the previous application on the basis of common sense and administrative convenience and it is again a matter of commonsense and administrative convenience, I think, that I can proceed to hear this application or these applications whichever it be, now."

## PRELIMINARY ISSUE

11. Mr. Wyatt was granted leave to issue judicial review proceedings by Noonan J. on 29th January, 2018 upon the following three grounds:

- "(i) The Applicant was denied his constitutional right to a trial in due course of law in circumstances where the procedure adopted by the Respondent has no basis in law;
- (ii) The learned trial Judge in acceding to the Respondent's application for concurrent trials acted without jurisdiction;
- (iii) The trial conducted against the Applicant is a nullity."

12. The relief being sought in that application for leave was, *inter alia*:

"An Order of *Certiorari* quashing the learned trial Judge's ruling of 30th November, 2017 permitting the running of concurrent trials in cases bearing bill numbers TYDP0019/2017 and TYDP0021/2017;

A Declaration that the learned trial Judge in acceding to the Respondent's application for concurrent trials did so without jurisdiction;"

13. However, in his legal submissions and more particularly during his oral submissions before this Court, the key arguments of Mr. Wyatt's counsel were that Mr. Wyatt was denied his constitutional right to a trial in due course of law because:

- the composition of the jury to hear his trial was determined in part by Mr. Burke, because he was being tried concurrently with Mr. Wyatt before the same jury and Mr. Burke had a right to challenge the composition of that jury;
- Mr. Burke was not a competent or compellable witness for Mr. Wyatt's defence as he was being tried concurrently with him;
- evidence was before the jury hearing Mr. Wyatt's indictment, which related to the indictment of Mr. Burke, and which was not per se relevant to Mr. Wyatt's indictment but was before the jury because of the decision to conduct a concurrent trial.

14. The DPP argued that, as a preliminary point, Mr. Wyatt should not be entitled to rely on these three reasons at the hearing of this action, since they should have been contained in his Statement of Grounds. He also argued that if Mr. Wyatt was to be permitted to rely upon these grounds now, it would lead to the DPP being taken by surprise and therefore prejudiced at the hearing of this action.

15. In *AP v DPP* [2011] IR 729 at 734, Denham J. (as she then was), stated in relation to judicial review applications:

"The order of the High Court determines the parameters of the grounds upon which the application proceeds. The process requires the applicant to set out precisely the grounds upon which the application is to be advanced."

It follows that an applicant in judicial review proceedings is not entitled to rely on matters which are outside the scope of the grounds upon which leave was granted. At p 732 Murray C.J. stated:

"In the interests of the good administration of justice it is essential that a party applying for relief by way of judicial review sets out clearly and precisely each and every ground upon which such relief is sought. The same applies to the various reliefs sought.

It is not uncommon in many such applications that some grounds, and in particular the ultimate ground upon which leave is sought are expressed in the most general terms as to the alleged frailties of the decision or other act being impugned, rather in the nature of a rolled up plea, and alluding generally to want of legality, fairness or constitutionality. This can prove to be quite an unsatisfactory basis on which to seek leave or for leave to be granted, particularly when such a ground is invariably accompanied by a list of more specific grounds.

Moreover, if, in the course of the hearing of an application for leave, it emerges that a ground or relief sought can or ought to be stated with greater clarity and precision then it is desirable that the order of the High Court granting leave, if leave is granted, specify the ground or relief in such terms.

There has also been a tendency in some cases, at a hearing of the judicial review proceedings on the merits, for new arguments to emerge in those of the applicant which in reality either go well beyond the scope of a particular ground or grounds upon which the leave was granted or simply raise new grounds."

16. In that same case Hardiman J. remarked at 739 that:

"In too many judicial review cases, it will be found that little attention has been paid to the absolute necessity for a precise defining of the grounds on which relief is sought until the case is actually before the court"

## Decision on preliminary issue

17. It seems clear to this Court from the oral submissions and the written submissions that the grounds, upon which Mr. Wyatt is now relying, to claim that his concurrent trial was a nullity, are as follows: (i) that he did not get to 'fashion' (to use that expression) his own jury (since it was fashioned by Mr. Burke as well), (ii) that Mr. Burke was not a competent or compellable witness for Mr. Wyatt's defence and (iii) that evidence in relation to Mr. Burke's indictment was before Mr. Wyatt's jury.

## Grounds upon which leave granted v. grounds argued at judicial review hearing

18. Yet these three grounds are absent from the leave which was granted. Anyone reviewing the grounds upon which leave was granted would not be able to discern that these are the reasons why the concurrent trials are claimed to be a nullity. This is because the grounds upon which Mr. Wyatt was granted leave were in essence that his concurrent trial led to his being deprived of a trial in due course of law. There is no reference in the leave which was granted to the jury composition, the compellability of witnesses or the relevance of evidence before the jury. *APP v DPP* makes clear that there is an '*absolute necessity*' that grounds be precisely

defined and that the grounds set out in the leave which is granted set the 'parameters' for the hearing. In these circumstances, this Court is forced to conclude that Mr. Wyatt is not entitled to rely on these three reasons at the judicial review hearing of his action, since he was not granted leave to do so and they are clearly outside the parameters of the leave granted. Since these were the only grounds upon which Mr. Wyatt relied at the hearing of this action, this Court is therefore forced to dismiss Mr. Wyatt's application.

#### OTHER ISSUES

19. For the sake of completeness, even if Mr. Wyatt were to be permitted to rely upon these three grounds for which leave was not granted, this Court would comment that:

- In relation to the complaint that the composition of the jury was fashioned by Mr. Burke as well as by Mr. Wyatt, there was no evidence before this Court that Mr. Wyatt was prejudiced by the composition of the jury, such that he did not get a trial in due course of law. In any case, even if there was any prejudice caused by the composition of the jury, neither this issue (nor the competence/compellability of Mr. Burke or the evidence of Mr. Burke's indictment being before Mr. Wyatt's jury) were raised with the trial judge. The most that was said prior to the trial by counsel for Mr. Wyatt was that her application for a separate trial was based on her client being prejudiced, but no prejudice was identified by her. As is clear from Maguire C.J.'s judgment in the *People v Carney* [1955] IR 324 at 330, counsel for the accused has to do more than simply state the accused would be prejudiced by joint trial:

"When asked if he had anything further to add, Mr. Murnaghan said:—"No, I cannot urge anything further than to say that my opinion is that I would be seriously embarrassed by a joint trial." Mr. Murnaghan explains to this Court that he also had in mind the fact that Carney was a notorious criminal and that his client would be prejudiced by being tried along with him. He explains that he did not give this reason to the trial Judge because to do so in the presence of the jury might of itself be damaging. The trial Judge refused the application. [...]

This Court is of opinion that it cannot hold with Mr. Murnaghan's contention that the trial Judge in refusing the application failed to exercise his discretion judicially merely because he did not accept the statement of counsel that in his opinion his client would be prejudiced by a joint trial. In the opinion of the Court the trial Judge should have clearly placed before him all the points upon which improper prejudice is feared so that he may form his opinion whether such improper prejudice may or may not be created."

Furthermore, as noted in *Lynch v Anderson* [2010] IEHC 284, the High Court in the exercise of its judicial review function will not necessarily facilitate an applicant such as Mr. Wyatt, who does not allege prejudice at his trial when he could have, but rather reserves any allegations of prejudice for use at a judicial review hearing if the outcome of the trial is not favourable. In that case Kearns P. stated at p 8:

"If this were a case where the applicant had failed to raise the jurisdictional point until after the hearing had been disposed of, I would exercise my discretion against granting relief notwithstanding the manifest error on the face of the charge sheet and conviction order in this case. However, the invalidity of the charge sheet was raised at the outset of the hearing in this matter. This was therefore not a case where the applicant sat on his hands hoarding a valuable legal point for deployment at a later time by way of judicial review application if the case outcome was not to his liking."

- In relation to Mr. Wyatt's complaint that there could have been irrelevant evidence before Mr. Wyatt's jury regarding Mr. Burke's indictment, it was suggested in submissions that a decision had been taken by Gardai to the effect that CCTV footage should not be shown at the trial because it had no probative value, which was agreed to by Mr. Wyatt. However Mr. Burke's counsel cross-examined the relevant guard on the footage. Mr. Wyatt's counsel suggested that this evidence would not have been offered to the jury if Mr. Wyatt had been tried separately. However, this matter was not raised at the trial as a prejudice to Mr. Wyatt and there was no suggestion that this evidence actually prejudiced Mr. Wyatt so as to enable this Court reach the conclusion that Mr. Wyatt did not get a trial in due course of law.
- In relation to Mr. Wyatt's complaint that Mr. Burke was not a competent and compellable witness at Mr. Wyatt's trial, there was no evidence before this Court to suggest that Mr. Burke would have been called as a witness if Mr. Wyatt had been tried separately, so as to enable this Court conclude that Mr. Wyatt did not for this reason get a trial in due course of law.

20. For all of these reasons, the application by Mr. Wyatt is not granted.