



THE COURT OF APPEAL

**Birmingham J.
Sheehan J.
Mahon J.**

The People at the Suit of the Director of Public Prosecutions

V

P.C.

No. 196/14

Respondent

Applicant

JUDGMENT of the Court delivered on the 3rd day of March 2017 by

Mr. Justice Sheehan

1. This is an application by PC for an order allowing the time within which to appeal his conviction and sentence be enlarged.
2. On the 25th March, 2011, the applicant was convicted by a unanimous jury verdict on 60 counts of sexually assaulting his daughter A and fourteen counts of raping her. These offences occurred over a four year period when A was aged between nine and fourteen years.
3. On the 26th May, 2011, the applicant was sentenced to ten years imprisonment on each of the sexual assault counts and fifteen years imprisonment on each of the rape counts. The final three years of each sentence was suspended on condition that the applicant keep the peace and be of good behaviour for a period of three years from his release and that he keep away from the victim in perpetuity.
4. This application is based on a notice of application signed by the applicant, two affidavits sworn by his present solicitor James McGuill and the exhibits referred to in those affidavits, in particular a psychological report and correspondence with the applicant's trial solicitor.
5. The grounds on which the applicant proposes to base his appeal are set out by him in the notice of appeal which he has signed and these are:-
 1. The applicant was interviewed at Roscommon garda station on December 19th 2006. The said interviews were admitted in evidence on day 2 of the applicant's second trial on March 23rd 2011. Prior to being interviewed the applicant was introduced to a solicitor by members of An Garda Síochána. The applicant was advised by the said solicitor that she was available to advise him in the course of his interview should he require such advice. The interview proceeded in the absence of the said solicitor. In proceeding to conduct the interview with the applicant following such cursory advice from a solicitor introduced to the applicant by An Garda Síochána and in failing to secure the presence of a solicitor in the course of the mandatory questioning of the applicant his entitlement not to incriminate himself was denied. Consequently he did not have a trial in due course of law by reason of the fact that material evidence on foot of which he was convicted was evidence obtained during questioning which occurred in the absence of a solicitor.
 2. The applicant was born on February 10th 1940. He was 66 years old when interviewed by An Garda Síochána concerning the instant offences. The applicant suffers from obsessive compulsive personality disorder. He is open to suggestion and suffers from memory impairment. The applicant's psychological condition with traces of passivity, depression and withdrawal was not proffered to the trial court as a reason for his refusing to deny the allegations of his daughter. The reason he gave for not challenging his daughter's account of events was that he did not wish to see her being accused of lying. In circumstances where the applicant was unaware of his psychological condition where he is suffering from depression and where he thought his daughter would retract her allegations and now realises that this will not happen, the applicant seeks to adduce evidence concerning his psychological condition and the effects such condition had upon the applicant when questioned about the allegations of the offences for which he was subsequently convicted.
 3. The learned trial judge erred in fact and in law in failing to withdraw from the jury counts 61 and 62 and counts 64 to 70 inclusive charging the offence of rape from the jury upon the application by the defence in circumstances where the prosecution failed to lead evidence of penetration with respect to each of the said offences.
 4. The sentences of ten years and fifteen years respectively with three years thereof suspended were excessive with regard to the applicant's personal circumstances and in particular his advanced years at the time of the trial.
6. The affidavits of the applicant's solicitor disclose correspondence with the solicitor who represented him at trial. This correspondence indicates that the video recordings of the garda interviews are no longer available and also that while the applicant always maintained his innocence it was his solicitor's view that no appeal lay against the conviction, a view not shared by the applicant.
7. At para. 6 of his affidavit of the 20th December, 2016, the applicant's solicitor avers that having considered the available materials, the following matters are the grounds of appeal which the applicant wishes to pursue. These are:-
 - (a) In all the circumstances the trial was unsatisfactory and the verdicts are unsafe.
 - (b) Apart from the evidence of the complainant the crucial evidence in the trial was admission evidence arising from what the applicant was alleged to have said to T.F. (admitting the offences when confronted aggressively by T. F.) and to gardai in interview (explicitly not disputing and therefore accepting the complainant's allegations).

(c) The fresh evidence (psychological assessment of the applicant as set out in the report of Dr. Joanne Kelly-Keogh exhibited in my previous affidavit as aforesaid) if adduced before the jury could have resulted in the jury not arriving at guilty verdicts and in particular could have had a crucial effect on the jury's assessment of the admissions and the explanations offered by the applicant that he had made the admissions:

(i) to T. F. because she was punching him and that making the false admission was designed to calm her down and to defuse the conflict situation and

(ii) to the gardaí because to deny the allegations would have implied that the complainant had told lies to the gardaí which could get her into trouble.

(d) Had the fresh evidence been available to the legal representatives of the applicant prior to the trial the admissibility of the admissions to gardaí could or would have been contested on the grounds that the applicant did not receive adequate legal advice and/or representation in particular having regard to the said fresh evidence at a minimum the applicant should have been in receipt of informed advice from a solicitor before being questioned and in the particular circumstances of the applicant, a solicitor should have been present for the interview for a trial in which the garda interviews were subsequently admitted in evidence to be regarded as fair.

(e) Having regard to the unavailability of the videos of interview the reliability, fairness and admissibility of the memos of interview cannot be assessed properly.

(f) I say and believe that there are grounds on which the court could come to the conclusion that in all the circumstances the requirements of justice on the particular facts of this case are that time be enlarged as sought in the application herein.

8. In the course of the oral hearing before us, counsel for the applicant maintained that the psychological make up of the appellant identified in the psychologist's report is relevant to three issues in the case namely:-

1. The admissions allegedly made by the applicant to the gardaí and to his former partner and mother of the complainant.
2. The applicant's explanation that he made admissions to his partner to defuse a violent situation.
3. The applicant's responses to the gardaí when he replied "if A says so then it must be true".

9. Counsel submitted that the finding by the psychologist to the effect that the applicant suffered from a compulsive obsessive personality disorder was central to his application.

10. Counsel also acknowledged the difficulty he faced with regard to his client's daughter's entitlement to finality.

11. In support of his application counsel for the applicant relied on the Supreme Court judgment *The People (at the suit of the Director of Public Prosecutions) v. Eamon Noel Kelly* [1982] I.R. at p. 90 and in particular that part of the judgment delivered by O'Higgins C.J. where he states:-

"In my view, the matters to be considered are the requirements of justice on the particular facts of the case before the court. A late and stale complaint of irregularity with nothing to support it can be disposed of easily. Where there appears to be a possibility of injustice, of a mistrial, or of evidence having been wrongly admitted or excluded, the absence of an earlier intention to appeal or delay in making the application or the conduct of an appellant should not prevent the court from acting. This seems to me to be the practical result of considering what the 'justice of the case may require'."

12. Counsel for the Director of Public Prosecutions opposes the application and notes that the applicant makes no complaints about his trial representation.

Discussion

13. In order to properly consider what the "justice of this case may require" it is helpful to consider not only the applicant's reason for failing to appeal until now, namely that he always believed his daughter would recant her evidence, but also to consider in some detail the psychological report now relied on as well as the transcript of the trial and in particular the applicant's evidence at that trial. On day 2 of the trial, the appellant gave evidence and the following question and answer emerge on pp. 38 and 39 of the transcript.

Q. And in reply to most of the questions concerning the alleged assaults on your daughter A your reply was: "if A says so, yes". Can you explain to the judge and to the jury why you would have said that in that manner? What was the purpose of it?

A. Well to my mind if I had said no and in hindsight it probably would have been the right thing to do say no, none of these things happened but again I was thinking if I say these are all lies A is going to be in trouble. And as they were read – as Garda Hynes read out the statement, that is exactly the way it was meant. It was to keep A out of trouble. I sort of said in my mind well this might never go to court. I didn't think it would. This may never get to court so why put A in a position where she is going to be branded as somebody who tried to get her father into trouble. And I am sure at the time she did not realise that it was so so very serious and I didn't either because I thought that it would never ever get to court. And that's the only reason I gave the answers that I did as again I have a very strange mind in that respect. To me it was the right thing to do at the time and that's what I did.

14. In the course of his evidence and towards the end of his examination in chief, the applicant stated:-

"I am just stating what happened. I had to ask for a solicitor because I thought I could have a solicitor and they got me a solicitor and she came out of the court in Roscommon . . . she came over to me and introduced herself and all she said was 'my name is . . . and if you want me send for me' and she was gone. That was the end of it so I had no chance to ask her advice, you know as to what was going to come so I ended up in there not knowing what was going to happen. . ."

15. The psychological report is largely taken up with applicant's account of his background, family relationships, the investigation and subsequent trial. At p. 6 of her report the psychologist notes as follows:-

"Mr. C. stated that he always believed that his daughter would retract her allegations as he believed that she had a conscience."

16. Analysing the results of various tests carried out by her, the psychologist says at p. 11 of her report:-

"Results suggest poor memory recall as the average recall for prisoners on immediate recall is 15.5 and Mr. C. scored 7 and 8 respectively suggesting memory recall issues. The average score for total suggestibility for a prisoner is 9.4. Mr. C scored 19 and 22 which is more than two standard deviations (SD = 4.5) above the mean meaning that his score is clinically significant and he is very open to suggestion.

The average score of compliance for prisoners is 11.0. Mr. C scored 11 out of 20 for compliance, therefore Mr. C's scores fall within the normal range meaning that he will not consciously comply with that which he does not agree with."

17. In the concluding section of her report the psychologist states:-

"Mr. C meets the criteria for obsessive compulsive personality disorder. A pervasive pattern of pre-occupation with orderliness, perfectionism and mental and inter personal control at the expense of flexibility and openness (DSM/5 301.4 PG 678). He is often preoccupied with details, order and organisation and excessively devoted to work at the exclusion of leisure activities and friendships and in the past this manifested as an obsession with the game of soccer. He also has very strong views about right and wrong accounting for his need to protect his daughter above his own interests. Mr. C can show rigidity and stubbornness holding a view no matter what others try to suggest and may be reluctant to delegate tasks as he believes that he does things better. These traits have been evidenced during police interviewing whereby he refused to deny his daughter's allegations.

Currently Mr. C is vulnerable to a tendency to ruminate about his past and worry about his future. However he has no major mental disorder and stated that when feeling low he overcomes his feelings through strict routine and when beginning to ruminate to push his thoughts away and change perspective."

Conclusion

18. It is important when considering this application to note that this is an application to enlarge the time within which to appeal by a period of almost six years. It is also important to note that the applicant gave evidence at his trial and that he did not challenge the admissibility of his admissions to the gardaí nor did he challenge the admissibility of the admissions he made to his former partner. He explained why he made those admissions. While he expressed dissatisfaction with the legal advice he received, he did not allege any breach of his right to legal advice during the trial and his own counsel specifically stated that he was not challenging any breach of the regulations.

19. The psychological report exhibited and referred to above is of extremely limited value. It is difficult to see how it advances the position of the applicant. This Court asks itself how can the applicant now complain about the adequacy of his original legal advice at the police station when this matter was not complained about at his trial although it is fair to say that the appellant's own evidence suggests that he felt that he had not then got adequate advice. How does one square the finding in the psychological report of suggestibility with the other finding that the applicant is not easily dissuaded from his own position? The applicant gave evidence as to why he responded to his daughter's allegations in the way he did during the garda interviews. He denied that he had sexually assaulted or raped her. There was no suggestion that the answers he gave in the course of his garda interviews were suggested to him by the gardaí. Finally it is the case that the applicant makes no complaint about his legal representation at the second trial when he was convicted on all counts on the indictment by a unanimous jury verdict.

20. In an application to enlarge the time three matters arise for the court's consideration.

1. Was there a *bona fide* intention to appeal in the prescribed time.
2. Is there something in the nature of mistake which resulted in a failure to appeal within the appropriate time.
3. Has the applicant got an arguable ground of appeal.

21. It is clear that the applicant did not form an intention to appeal within the prescribed time, although his counsel, it should be noted, did apply for leave to appeal to the trial judge. It is also the case that his solicitor at the time says that while he took the view that no appeal against conviction lay, the applicant himself maintained his innocence. It is also clear that the applicant did not make a mistake with regard to the time within which to appeal as is clear from his own statement to the psychologist namely that he believed that his daughter would recant. Finally it is our view that even were the appellant allowed to appeal he has little or no prospect of success. However, as Henchy J. pointed out in the Kelly case, that is not the end of the matter. At p. 111 of the 1982 Irish Reports he states as follows:-

"Therefore, even in civil matters, it will be seen that this Court is not confined to those three conditions when ruling on the application of a would-be appellant to be allowed to appeal to this Court after the time fixed by the rules for appealing has passed. On the contrary, there should be presented to the Court for consideration all the relevant circumstances of the particular case. Otherwise, injustice might result by worthy extensions of time being disallowed or by unmeritorious extensions being allowed."

22. Finally one must have regard to the applicant's daughter and family. The complainant to use a neutral term is entitled to have her right to closure factored into our consideration even though it cannot be determinative. The appellant has failed by an appreciable margin to establish that the interests of justice are such that he ought now to be allowed appeal against his conviction. This is a case where in the words of Henchy J. "Injustice might result as a result of an unmeritorious extension being allowed". Accordingly we dismiss the application to enlarge the time in which to appeal against conviction.

23. The appellant was sentenced to fifteen years imprisonment with the final three years of that sentence suspended. He was 71 years old at the time. It appears that the Director of Public Prosecutions has no objection to the appellant being allowed to appeal against sentence.

24. This Court has traditionally adopted a flexible approach in respect of the late entry of sentence appeals. In these circumstances

we will enlarge the time for the applicant to appeal against sentence by 21 days from today's date.