THE COURT OF APPEAL

[240/2017]

The President

McCarthy J.

Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

FAISAL ELLAHI

APPELLANT

JUDGMENT of the Court delivered on the 31st day of May 2019 by Birmingham P.

1. This is an application by Mr. Faisal Ellahi seeking to extend time for an appeal to this Court against conviction and sentence.

2. The background to the application is that he was convicted on 18th December 2015 following a trial on counts of rape and sexual assault and was then sentenced on 14th March 2016 to a term of 13 years imprisonment, the sentence being backdated to 27th June 2013.

3. No application was brought within the time prescribed to appeal against conviction or sentence. However, on 3rd November 2017, a Notice of Application for enlargement of time within which to appeal was lodged.

4. In an affidavit sworn on 7th November 2017, the appellant says:

> "4. I say that I was distraught and overwhelmed on receipt of the jury's verdict. My shock and dismay was also compounded by the lengthy sentence of imprisonment imposed by the trial Judge. I say that notwithstanding the adverse findings against me, I was determined to continue asserting my innocence in the strongest terms. I was particularly distressed by the manner in which the trial Judge conducted himself throughout the proceedings. I felt his behaviour was wholly unfair and adverse to my right to receive a fair trial. I was also extremely disappointed with the advices received from my legal team in whom (sic) I entrusted the proper conduct of my defence.
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> 5. I say that I was wholly unprepared for the fallout from the trial and initially lacked the emotional strength to positively engage with the appeal procedure which I imagined to be a long, difficult and drawn out process. During my incarceration, I had the opportunity to properly reflect on the trial and developed the required firmness and determination to prosecute my appeal. I also resolved to instruct a new legal team, although I did appreciate that it could take them some time to sufficiently praise (sic) themselves of the events surrounding the criminal charges and the legal issues which arose during the trial. I say that Connolly Finan Fleming Solicitors agreed to take up my appeal."

He then refers to the affidavit of his solicitor.

5. By reference to the affidavit of Ms. Connolly, solicitor, it seems that the applicant requested a prison visit on 18th August 2016 and was visited on 5th September 2016, at which stage he confirmed instructions in relation to the appeal. His current solicitors received a copy of the book of evidence, with additional evidence from the solicitors who had represented Mr. Ellahi at trial. Mr. Ellahi was represented at trial by solicitor along with Junior and Senior Counsel and had the benefit of Legal Aid. According to Ms. Connolly, she visited the applicant in prison on 3rd February 2017, and at that stage, she was informed that Mr. Ellahi had not actually lodged a formal Notice of Appeal.

6. On 6th March 2017, the applicant's present solicitors contacted the previous solicitors seeking copies of any trial notes. At the same time, the applicant's solicitors were in contact with the Office of the Court of Appeal seeking the release of the transcript, but were told that in accordance with the usual practice of the Court, the transcript would not be released until a notice of appeal and grounds had been lodged. Ms. Connolly says that Counsel advised that broad grounds of appeal would need to be submitted in the absence of transcripts and/or notes from the original trial and that it was the intention to lodge an enlargement application at the end of June 2017. It then transpired the trial notes were located by the applicant's former solicitors. The difficulties in obtaining those notes had arisen in circumstances where the firm that had represented him at trial had been dissolved. Trial notes were received on 30th June 2017 and provided to Counsel on 4th July 2017, but Ms. Connolly says that she had been advised by Counsel that although the notes were voluminous, that they were difficult to decipher, lacked clarity and, on thorough examination did not particularly advance matters.

7. Mr. Ellahi informed his present solicitors that post-trial, he was in contact with two firms of solicitors with a view to having them take over the appeal. However, when initially contacted, both solicitors indicated that their dealings with Mr. Ellahi were pre-trial rather than post-conviction. It subsequently emerged that the said contact had, in fact, occurred post-conviction. Whether it is the case that the contact by Mr. Fergal Boyle, the solicitor now acting, has caused them to recollect that there was indeed some contact, overall, the information put before the Court at this stage leads to the conclusion that Mr. Ellahi was always anxious to

appeal, and to the extent that this is a relevant consideration, it is on that basis that this Court will approach the application.

8. Guidance on how an appellate Court should exercise its jurisdiction to enlarge time for the service of a notice of appeal was provided by the Supreme Court in the case of DPP v. Kelly [1982] IR 90, the Sallins train robbery case. The case came before the Supreme Court in circumstances where the Court of Criminal Appeal had refused to extend time, and in doing so, had essentially applied the test in Eire Continental Trading Company v. Clonmel Foods Ltd. [1955] IR 170. In essence, these were seen as permitting leave to be granted only when an intention to appeal existed at the time of the original decision, where there was some element of mistake, and where there were grounds of appeal which could be described as arguable or substantial.

9. It must be noted that there is a real public interest in having criminal proceedings brought to a conclusion. Certainty and finality are important objectives. The circumstances in which the Supreme Court was prepared to permit a late appeal in Kelly were instructive. Mr. Kelly had faced trial with two co-accused and had absconded to the United States before the conclusion of the trial. He was convicted and sentenced to 12 years penal servitude in absentia. His two co-accused were also convicted and sentenced. They appealed their conviction to the Court of Criminal Appeal, which quashed the convictions, essentially on the grounds that the confessions which had formed the major part of the evidence against them ought to have been excluded at the trial. In a situation where the appellant's confession had been obtained in similar circumstances, he returned to the jurisdiction and sought leave from the Court of Criminal Appeal to enlarge the time within which to bring an appeal.

10. The case of Kelly involved a train robbery. The case here involves very serious sexual offences. In seeking to identify where the justice of the case lies, when the request is to extend time in a case involving sexual offences and the application to extend time is made greatly out of time, the Court has to have regard to the interests of the victim. A victim is entitled to see matters finalised and brought to a conclusion. They are also entitled to be allowed to try and put the events behind them and get on with their life. In the present case, there are factors which reinforce the importance of that consideration. On the indictment, there was also a count of having sex with a mentally impaired person. The question of the complainant's entitlement to closure and her family's entitlement to closure must weigh heavily on this Court.

11. On the other hand, an applicant who can point to matters suggesting that there is a real risk that a miscarriage of justice may have occurred or that there were matters at trial which might well lead an appellate court, having considered the matter fully, to conclude that the trial was unfair or the verdict was unsafe, would obviously be in a very strong position indeed when seeking to extend time.

12. The Director submits that there are powerful factors present in this case which weigh against an extension of time. They point to the fact that the victim was a 24-year old woman with Down Syndrome. Senior Counsel made reference to the report of Dr. Feargal Rooney, a clinical psychologist, wherein it is said that the complainant falls within the mild range of intellectual disability and has an expressive language equivalent to that of an 8-year old child. It draws attention to the report from the complainant's General Practitioner who points out in very stark terms what effect the original incident had and the ordeal of the trial itself had on her. That report refers to the fact that she suffered seizure-like episodes which started shortly after the incident, and while initially settling, those episodes started again when the Court case was pending. The report notes the considerable diminution in the complainant's quality of life and the independence that she has as a result of the incident and expresses concerns at what might happen to the complainant if she had to face her alleged attacker again.

13. In *DPP v. Cashin* [2017] IECA 298, this Court made the point that finality is an important consideration for the criminal justice system. In this case, there has been very considerable delay. The events at the centre of the trial occurred almost six years ago. The conviction was on 18th December 2015 and the sentence was imposed on 14th March 2016.

14. As far back as 18th August 2016, the appellant was in contact with the solicitors now acting, and on 5th September 2016, following a prison visit, he confirmed his instructions for them to prosecute an appeal. Since then, matters have not moved with any great expedition. That said, certain information has come to light which is of assistance to the appellant, such as the fact that he was in contact with two solicitors post-conviction, when originally, that had not appeared to be the case.

15. Following an earlier listing, the Court made the point that inadequate information had been put before it as to what the substance of the appeal was all about and so as to convince the Court that there was an arguable ground of appeal. On the basis of such information as was made available to it, the Court saw force in the argument of the respondent that the appellant's case, taken at its height, involved him asserting that the complainant had willingly, indeed, actively participated in a spur-of-the-moment sexual encounter with him, having become separated from her mother while out jogging. On behalf of the Director, it is said that on any view of the trial, or how the defence ran its case, this would have to be assessed against the presentation of the complainant on the DVDs as being someone who quite clearly suffered from Down Syndrome and that this would have been apparent to anyone who saw her or interacted with her. This called into question the viability of the defence proposition.

16. However, while recognising the force of what was said on behalf of the Director, the Court, nonetheless, decided not to close out the appellant, but to give him a further opportunity to put additional material before the Court to indicate that there was an arguable ground of appeal and significant matters to be enquired into. The application to extend time was put back to allow this to happen. In those circumstances, the solicitors now acting made contact with counsel, both Senior and Junior, who had acted at trial. Junior Counsel responded with a lengthy letter which was critical of the attitude and tone struck by the trial Judge. In a brief note, Senior Counsel indicated that he agreed with the assessment of Junior Counsel, adding, "the Judge did get angry with the defendant on a few occasions when he was giving evidence". In light of the criticism of the trial Judge, which had featured in the draft grounds of appeal and was referred to in the letter from Junior Counsel, the Court decided that before finalising matters, it ought, as a precaution, to take the opportunity to read the transcript of the evidence of Mr. Ellahi. The Court has done this; the parties have also taken the opportunity to make observations. The Court recognises the limitations of a transcript, but the transcript does not establish any improper conduct on the part of the Judge. There was no intervention whatsoever during the direct examination. There were, it is true, a number of interventions during cross-examination. However, if these are examined more closely, they do not bear out any suggestion of the Judge entering the arena, taking on the role of a co-prosecutor or anything of that nature. A number of the Judge's interventions came following interjections by defence counsel and were in the nature of rulings or clarifications requested. Some other interventions, some of which were successful and others not, were addressed to reformulating questions asked by prosecution counsel when there was an element of doubt as to whether Mr. Ellahi understood the question. On other occasions, the Judge's interventions involved pointing out to Mr. Ellahi that he was not answering the question asked and that he was required to answer the question asked. These interventions were in a context where Mr. Ellahi had a consistent approach of not answering the specific question asked, but rather, repeating an assertion or comment already made and sometimes made many times before. Many a trial judge would have found their patience tried.

17. The transcripts that we have examined fall well short of establishing a sustained pattern of interventions which would give rise to

disquiet. Accordingly, the Court finds itself in a situation where it has not been persuaded that there is any ground of appeal that has a real prospect of success. We see substance in the observations by the Director that any jury was likely to find the defence case very difficult to accept. We acknowledge, of course, that there was no onus on the defence to prove anything, but it is the case that the prosecution evidence was compelling and the defence case strained credibility to, and beyond, breaking point.

18. In Cashin and in other cases, we have made the point that in the case of a late appeal in relation to a sexual conviction, the interests of the victim have to be considered. In this case, the victim's position is particularly acute. Having regard to the long delay that has occurred, to the fact that we have not been persuaded that there is a substantial ground of appeal present with a realistic prospect of success and the particular circumstances of the complainant/victim, we do not believe that the justice of the case would be served by extending time and so we refuse the application.