



## THE COURT OF APPEAL

[119/17]

The President

McCarthy J.

Kennedy J.

### BETWEEN

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**AND**

**E.I.**

**APPELLANT**

### **JUDGMENT (Ex tempore) of the Court delivered on the 2nd day of April 2019 by Birmingham P.**

1. On 12th December 2016, at Waterford Circuit Court, Mr. I was convicted of two counts of sexual assault and subsequently he was sentenced to a term of three years imprisonment with one year of the sentence suspended on terms which included that he keep the peace and be of good behaviour for a period of three years post-release. He appealed his conviction and this Court, in a judgment delivered by McCarthy J. on 9th March 2019, quashed the conviction.
2. The background to the prosecution and to the issues that arose on the appeal are set out in some detail in the course of that judgment and we will not repeat that exercise today. Suffice to say that the complainant was the daughter of the accused. She gave evidence alleging untoward conduct on the part of her father in January 2015 at a time when she was aged 13 years. The issue that led this Court to quashing the conviction related to a factual error made by defence counsel in the course of her closing speech and how that error was responded to and dealt with by the trial Judge. It is noteworthy that at the time this Court delivered judgment, that the accused had, at that stage, served his sentence, having been released from custody in November 2018. He was, however, still subject to the suspended portion of the sentence and he was also subject to the obligations arising from the provisions of the Sex Offenders Act in relation to the Sex Offenders' Register. In Mr. I's case, those obligations were lifelong ones.
3. Following conviction, the case was put back to allow the DPP to consider whether she would seek a retrial. She has decided to do so. Her application is opposed, and in those circumstances, the matter was listed this morning to allow both sides to address the issue and to make submissions on the issue to the Court.
4. Cases where sentences which have been served in full, or which have been substantially served, see applications for retrial are rare. One such case, though, was that of DPP. v Frederick Forsey, a case that was before the Supreme Court in recent times. In that case, Mr. Forsey had been convicted at trial of a number of offences of corruption in public office and had received a sentence of six years imprisonment with two years suspended, that, in a situation where the maximum sentence for an offence of corruption is one of seven years imprisonment. The custodial sentence had been served in full when matters came before the Court of Appeal, which declined to quash the conviction and obviously had been long since served in full by the time that the matter was in the Supreme Court with the conviction being quashed.
5. The approach to whether retrial should be ordered was the subject of a judgment delivered by O'Malley J. At para. 8 of her judgment, she commented:

"8. The jurisdiction conferred on an appellate court to order a re-trial, conferred by s. 4 of the Criminal Procedure Act 1993, is a discretionary one and is clearly to be exercised on the basis of a consideration of the competing interests involved.

In this case, there are, in reality, only two relevant factors. On the one hand, the public interest in bringing a trial on the serious offence to a valid verdict, and on the other, the right of the individual accused not to be subjected to an unfair and oppressive process. The Director cannot claim that any other interest points to a retrial, apart from the unlikelihood that any trial Judge would think it appropriate to impose further punishment, the offence is not one involving any practical consequential orders, unlike, for example, registration of convicted sex offenders. There is no identifiable victim whose interest might require vindication."
6. In contrast to the situation in the Forsey case, in the present case, there are practical consequences in play. A significant suspended sentence remained in place on the day that the conviction was quashed. In that regard, counsel for the DPP submits that a suspended sentence is in part punitive, but also protective of the public. There is also the question of the Sex Offenders Register and the obligation that arise, something specifically referred to by implication as a matter requiring consideration where in issue by O'Malley J. It is the case that counsel for the DPP responsibly acknowledges that it is unlikely that Mr. I will be required to serve any additional period in custody, even if convicted following a retrial. On behalf of Mr. I, counsel says that a retrial would be disproportionate and he draws attention to remarks by O'Malley J. towards the end of her judgment in Forsey. There, at para. 15, she had said:

"15. Bearing in mind that the sentencing process has a number of objectives, it seems to me that a person who has served a sentence is entitled to feel that any debt to society arising from his actions has already been paid, and that he can attempt to rebuild his life without further engagement with the criminal courts."

Then she went on to address what the situation was in that case.

7. The Court is conscious that it is required to exercise its discretion in this matter and that there are competing interests to be addressed, as indicated will sometimes be the case, by O'Malley J.

8. The Court has addressed those competing interests and has concluded that a retrial should be ordered. In coming to that view, we have been influenced by a number of factors. Firstly, this was a case of a sexual offence, and more specifically, of a sexual assault committed within a family context. The position of the complainant requires consideration. In contrast to the situation in Forsey, in the present case, there is a clearly identifiable alleged victim whose interests require vindication. The order quashed the conviction at a time when the conviction had practical effects. There was a suspended sentence in place and there was the question of the obligations under the Sex Offenders' Register.

9. In the Court's view, the circumstances in which the conviction was quashed are relevant. This was not a case where the prosecution had sought out and obtain inadmissible evidence and argued for its admission. The error which occurred, and ultimately resulted in the conviction being quashed, was not of the complainant's making, it was nothing whatever to do with her, nor was it of the prosecution's making. In the Court's view, the circumstances in which the conviction came to be quashed, while not decisive, are relevant.

10. Overall, on consideration of the competing factors, the Court is satisfied that the public interests and the interests of justice are best served by permitting a retrial.

11. The Court will so order.