



THE COURT OF APPEAL

**Ryan P.
Birmingham J.
Mahon J.**

The People at the Suit of the Director of Public Prosecutions

And

David Cashin

No. 81 of 2016

Respondent

Appellant

JUDGMENT of the Court (ex tempore) delivered on the 14th day of November 2017 by Mr. Justice Birmingham

1. This is an application brought by Mr. Cashin seeking to extend the time within which to appeal his conviction and sentence. In July, 2014, he was convicted on nine counts of sexual assault and 13 counts of buggery in the Dublin Circuit Court and was then, on 11th July, 2014, sentenced to a total term of seven years imprisonment. It should be explained that the trial related to assaults perpetrated on the sister of the girlfriend of the appellant at a time when she was between 14 years and 17 years of age. The applicant brought a notice of motion dated 21st April, 2017 seeking an order enlarging the time within which to appeal against his conviction and sentence. The notice of motion was grounded on an affidavit of 19th April, 2017. In the course of that affidavit the applicant avers as follows:-

- (i) That he wanted and intended to appeal at all times and at all stages since his conviction and that he maintains his innocence.
- (ii) That his former solicitors advised him that he could not appeal.
- (iii) That he encountered extraordinary difficulties trying to contact and recruit new solicitors because the Irish Prison Service greatly restricts the number of named persons that any prisoner may telephone.
- (iv) That he has now instructed Danny Nolan Solicitors and a new counsel in order to appeal both his conviction and sentence in the interest of justice.
- (v) That Danny Nolan's office awaits transfer of his file papers from his former solicitors in order to commence work on his appeal.
- (vi) That he did not know there was a time limit to appeal his sentence or conviction.
- (vii) That nobody will be prejudiced by allowing an extension of time for his appeal.
- (viii) That a miscarriage of justice will result if he is not permitted to appeal both his conviction and sentence.

2. The initial application to extend time set out 21 grounds of appeal against conviction and seven grounds of appeal against sentence. It is fair to say that the grounds of appeal in relation to conviction are essentially generic in nature and could have been filed in respect of pretty well any conviction for sexual assault. They are not specific to the facts of this case or to the rulings during the course of the trial. By way of example, ground 15 states that the judge erred in failing to direct the jury that Garda witnesses lack appropriate post graduate qualifications in DNA forensic science in order to be classified as expert witnesses such that the trial was unfair and the verdict unsafe. However, it appears that there was no DNA evidence at trial.

3. A second affidavit was filed by Mr. Cashin on 10th July, 2017.

4. When the matter appeared in a management list, a list that I was taking, I directed that the solicitors who acted for Mr. Cashin at trial should be made aware of the fact that it was being stated in court that they had advised their client that he could not appeal. As a result, an affidavit has been put before the Court by Mr. Dara Robinson, Solicitor of Sheehan & Partners Solicitors. Mr. Robinson explains how he came to be instructed in the matter and how he in turn instructed Mr. Patrick Gageby S.C. and Mr. Kevin White B.L. for a trial which commenced on 24th June, 2014. Mr. Robinson then refers to the fact that in the aftermath of the trial, on 25th July, 2014, along with a paralegal from his office, he attended at the Midlands Prison where Mr. Cashin was incarcerated. He explains that he brought with him draft grounds of appeal that had been prepared by counsel and a draft notice of appeal which it was proposed that the applicant would sign. He exhibits copies of the draft notice of appeal and the draft grounds of appeal. However, Mr. Robinson states that the applicant indicated that he did not wish to appeal following a discussion about the wisdom of pursuing an appeal. Mr. Robinson says that he took a note of the conversation while in the prison and subsequently dictated this for his file upon his return to the office and he exhibits that memorandum. In the light of what Mr. Cashin has said in subsequent affidavits, it is of note that the memo refers to the fact that Mr. Robinson and his client parted on good terms.

5. Mr. Robinson, in his affidavit, then goes on to refer to receiving correspondence from Philip Hannon Solicitors on 21st January, 2015 and responding thereto and subsequently receiving a call from Ms. Carroll, partner of the applicant, who requested him to visit the applicant when he, Mr. Robinson, was next in the Midlands Prison. Mr. Robinson said that he did so on 12th February, 2015 and repeated the advice that he had given to him previously, indicating that he would be happy to transfer the file to any solicitor nominated to act on behalf of the applicant. Again, Mr. Robinson exhibits a memorandum prepared by him following that meeting. Then, he refers to correspondence in February, 2016 from another firm of solicitors, Connolly Finan Fleming, and refers to the fact that on 21st April, 2016 he received an e-mail from the Registrar of this Court indicating that an appeal had been filed, as a result of which he confirmed by return of e-mail that his firm did not represent Mr. Cashin on the appeal. Mr. Robinson then goes on to refer to receiving an e-mail on 5th July from Ms. Margaret Moran of the Office of the DPP and to receiving a further letter from Mr. Nolan, a solicitor both of which sought confirmation that Mr. Cashin had not previously been informed of his right to appeal. Mr. Robinson responded in some detail to Danny Nolan Solicitors, doing so broadly along the lines of the narrative that has been set out above. In

response to that, he received an e-mail from Danny Nolan Solicitors dated 14th July, 2017 indicating that his counsel had advised that "it may be more appropriate for you to write a very short letter declining to comment or get involved at all". Mr. Robinson says that he was taken aback at that suggestion and responded by e-mail, indicating that he could not accord with that suggestion. This Court has to say that it also was taken aback at such a suggestion.

6. Mr. Cashin has now sworn a third affidavit dated 7th November, 2017. In the course of that affidavit, he avers that he has instructed his new solicitor, i.e. Mr. Nolan, from the outset that his relationship with his former solicitors, Sheehan & Partners and in particular with his solicitor acting there, Mr. Dara Robinson, irretrievably broke down after his jury trial. He avers that he communicated clearly to Dara Robinson that the client solicitor relationship had irretrievably broken down and did so during a professional consultation at Midlands Prison when Mr. Robinson visited him there after his jury trial with an appeal against conviction only looking for his signature. He avers that he communicated clearly to Mr. Robinson that he wished to appeal but to have a different firm of solicitors acting for him.

7. It will be seen that this diverges radically from what was said in the first affidavit when he had stated without equivocation that he had been told by his solicitor that he could not appeal. Mr. Cashin says that:-

"Somehow a misunderstanding has arisen that has left Sheehan & Partners under the mistaken belief that I was instructing their offices, and not new solicitors' offices to prosecute the appeal of my conviction and sentence."

He avers that he now realises that he may have misunderstood legal advice that to appeal his sentence would be unwise as meaning that he could not appeal.

8. This Court has a number of concerns about this application. These concerns start with the averment, which is clearly incorrect, that Mr. Cashin was told that he could not appeal. The Court's concerns in that regard are compounded by the fact that similar, indeed identical, averments have appeared in other applications to extend time to the extent that this assertion seems to form part of a template.

9. It is now almost three and a half years since the trial took place in the Dublin Circuit Court. No information has been put before this Court which would suggest that the appellant has good grounds of appeal, either against conviction or sentence. The grounds of appeal that have been prepared by the new advisors are, as we have seen, generic in nature. To this it is now proposed to add the grounds of appeal prepared by the original legal team, i.e. the trial legal team. Those grounds were not seen as being strong in the aftermath of the trial. There has been no assessment of the strength or otherwise of the original grounds by the current team. It is said that not having appeared at trial and not having a copy of the transcript available to them, that they are not in a position to do so. The letter from Mr. Robinson to Mr. Nolan of 12th July, 2017 had stated that multiple boxes relating to the trial remained available for collection but this offer was not acted upon so there has not even been a preliminary assessment of whether the grounds of appeal are of substance or not.

10. The affidavits of Mr. Cashin assert that nobody will be prejudiced by allowing an extension of time. This Court cannot agree with this bald assertion. Certainty and finality are objectives of any legal system and to permit an extension of time at this remove absent good and specific reasons would be to undermine those objectives. It is the situation that, in the case of a late appeal in relation to a sexual conviction, the interests of the victim have to be considered. The victim in this case must have believed, and was entitled to assume, that the case was long since completed. In those circumstances on the basis of the information that has now been put before the Court, it would be quite unfair to her to now reopen the case.

11. In the case of *DPP v. Nicky Kelly* in relation to an application to extend time arising from the Sallins Train Robbery, the Supreme Court made clear that in considering whether to grant an application for extension of time that a court must be guided by what is required by the justice of the case. In all the circumstances of the present case, this Court is satisfied that the justice of the case would not be served by extending time and the Court refuses