THE COURT OF APPEAL

(CIVIL)

Sheehan J
Mahon J.
Edwards J.

Appeal No.: 2016/46

J. C.

Appellant

- and -

The People at the suit of the Director of Public Prosecutions

Respondent

Judgment of Mr. Justice Mahon delivered on the 16th day of June 2016

1. This is an appeal against the order and judgment of the High Court (Humphreys J.) dated the 1st February 2016 (and perfected on 2nd February 2016) refusing leave to seek judicial review in relation to the decision of the respondent to prosecute the appellant for the offence of indecently assaulting a female, E. C., contrary to Common Law.

2. The application for leave to apply for judicial review sought the following reliefs:-

> (i) An order restraining the respondent herein from continuing to prosecute the applicant on Bill No. DUDP0375/2015, count numbers 2 and 3 of the Indictment filed in Dublin Circuit Court;
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> (ii) in furtherance to the relief sought in para. (i) above and without prejudice thereto, an injunction (including interim and/or interlocutory injunction pending the determination of these judicial review proceedings), restraining the respondent from prosecuting and/or further prosecuting the applicants upon count numbers 2 and 3 of the Indictment on Bill Number DUPDP0375/2015 filed in Dublin Circuit Court;
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> (iii) an interim order pursuant to O. 84, r. 20(8)(b) of the Rules of the Superior Courts staying the further prosecution of the appellant on Bill No. DUDP0375/2015 until the determination of these proceedings;
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> (iv) if necessary an order pursuant to O. 84, r. 21(3) of the Rules of the Superior Courts extending time for the bringing of the within judicial review proceedings;
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> (v) such further relief as to this honourable court deems fit;
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> (vi) costs.

3. In relation to the appellant's costs in the High Court, the learned High Court judge recommended their payment by the State, including two counsel, in accordance with the Legal Aid Scheme – Custody Issues.

Background facts

4. It is alleged that the appellant sexually assaulted his sister, E. C., between 1st January 1972 and 31st January 1972. The appellant accepts that one (and only one) incident of sexual abuse occurred, and this incident is the subject of count number 1 namely, that on a date unknown between 1st January 1972 and 31st December 1972, both dates inclusive, on an occasion other than referred to in charge number 15459364, at 55 Carrickmount Drive, Rathfarnham, Dublin 14 in said District Court Area of Dublin Metropolitan District, the appellant did indecently assault E. C. contrary to Common Law. The similarly worded counts numbered 2 and 3 relate to the alleged separate sexual assaults, and are vehemently denied by the appellant.

5. The case was set down for trial on 15th May 2015. On 18th June 2015, the appellant indicated his intention to plead guilty to the count admitted by him, count 1. The remaining two counts were then scheduled for trial on 9th February 2016.

6. On 5th May 2015 the appellant's solicitors wrote to the Respondent seeking disclosure for the first time. Disclosure was initially made by the Respondent on 18th September 2015, and again on 22nd December 2015. Included in this disclosure was a statement from the complainant's mother who maintained that complaints that been made against the complainant's father, which were denied, and that a doctor had examined the complainant in the early 1970's contemporaneous with the complaint being made by her, and that she had attended with a psychiatrist in the presence of the complainant when further disclosures were made. It appears to the appellant from what his mother had stated that she did not believe the complaints made by his sister to be valid. Furthermore, on the 6th January 2016 additional evidence was served in the form of a statement from the complainant's other brother.

7. It is contended by the complainant that it appears from this documentation that the complainant has a psychiatric history, has displayed attention seeking behaviour in the past, has made allegations against her father, and has shown psychotic systemology. These difficulties, the appellant contends, are compounded by the fact that the complainant is also suffering deficits associated with a brain haemorrhage and/or alcoholism.

8. It is also claimed by the appellant that proper disclosure in respect of a previous rape allegation involving another party was not made, nor has there been full disclosure in relation to a rape allegation by the complainant against her brother which, it is suggested, was proved to be false by a medical examination. It would further seem that the complainant has made allegations of a sexual nature against her father which seemingly were denied by him. The appellant's father is deceased since 2004.

9. It also would appear that disclosure to the complainant's former husband had allegedly been made by the complainant but no

statement had been disclosed from him, or from the other persons she identified in her statement namely, Linda, Marie, Irene and Ester, all of whom are said by the complainant to be now deceased.

10. The appellant's solicitors sought additional disclosure of identifiable medical records on 13th January 2016. There has been no response from the respondent to this letter.

11. On 26th January 2016, the appellant's solicitors wrote again to the respondent requesting that she either confirm that full disclosure would be made within one week or alternatively provide a reason as to why it would not be made, and in circumstances where it cannot be made, seeking confirmation that a *nolle prosequi* would be entered in respect of the two contested counts on the indictment. This letter further advised that if there was no confirmation by Friday 29th January 2016 that these requests would be dealt with, the appellant would have to consider seeking orders from the court restraining the trial from proceeding. No response was received to this correspondence within the time indicated, and it was therefore unclear whether the documentation sought was no longer available or if its request had simply not been followed up.

12. The mother of the appellant and the complainant is deceased since 2015.

Discussion
13. The appellant contends that because of deficiencies in disclosure on the part of the respondent he is prejudiced and hampered in his ability to defend himself, and is therefore being denied a fair trial, in contravention of his rights pursuant to Article 38.1 of the Constitution, and Article 6 of the European Convention of Human Rights.

14. The grounds for relief for consideration by the High Court were extensive and detailed. They related to disclosure of documentation, on fairness of trial, the duty to seek out and preserve all potentially relevant material, delay, the right to an expeditious trial, a breach of the European Convention of Human Rights and other exceptional circumstances. The exceptional circumstances include the following:-

> (a) Both the appellant and the complainant were minors in the early 1970s, when the events, the subject of the within proceedings are alleged to have occurred.
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> (b) Although complaints of abuse were made repeatedly by the complainant, in circumstances where the records of disclosures made have not been retained and / or disclosed against the appellant and / or others, these complaints were not pursued with the gardaí until 2011 and / or 2013.
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> (c) By the time complaints were pursued and most of the identified persons to whom disclosures were allegedly made over the years were dead or unavailable.
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> (d) The complainant's father against whom allegations were made is dead since 2004 and the doctors and professionals who assessed the complainant at material times remain untraced.
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> (e) Another individual against whom an allegation of rape is made dating to the early 1990s remains untraced.
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> (f) In addition the complainant is known to suffer from a psychiatric history with psychotic components and has been assessed as having a personality disorder with attention seeking behaviour.
>
> (g) The complainant had suffered memory impairment consequent upon alcoholism and / or brain haemorrhage.
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> (h) The appellant is an alcoholic and is living in homeless accommodation. He has pleaded guilty to one count on the indictment but has steadfastly maintained that there was only one instance of abuse. He is significantly impaired in dealing with a complaint concerning alleged events more than forty years ago by reason of the passage of the time and the impact of him during that time of alcoholism and later homelessness.

15. In a supplementary affidavit sworn by the appellant on 3rd March 2016, the appellant seeks to advance additional grounds and has exhibited with his affidavit all grounds with the additional grounds underlined. (The underlined portion of para. (h) in the preceding paragraph is one of the additional grounds). Essentially the additional grounds relate to additional information which has become available to the appellant since the matter was heard in the High Court. In particular, the appellant refers to a letter dated 2nd February 2016 from the respondent, but not received by him until 3rd February 2016, having been delivered by courier on that date. This was three days after the conclusion of the hearing in the High Court. The letter contained a further statement from the complainant dated 1st February 2016. This new correspondence from the respondent, and the new statement made by the complainant, gave rise to a further request for additional disclosure by the appellant, and an acknowledgement on 9th February 2016 by the respondent that there was, to quote the appellant in his affidavit, *"still that there was a large quantity of outstanding disclosure"*. It was also disclosed at that time that the appellant's mother had recently died. The recent death of the mother of the appellant and the complainant is, the appellant maintains, of crucial importance in relation to his application for leave as evidence that she was in a position to give would, he believes, be particularly supportive of his position.

16. The appellant maintains that his late mother was a crucial witness, particularly in circumstances whereby she had outlined in her statement how the complainant had made false allegations as against her father which he, her father, had denied at around the same time that allegations are now being made relating to the appellant. The relevance of this evidence which is no longer available to the appellant, has further increased by reason of the content of the statement of the complainant dated the 1st February, 2016, in which she denies ever making an allegation against her father. As both the complainant's father and mother are now deceased, the appellant is deprived of the ability to rely on their evidence to undermine the credibility and consistency of the complainant thereby undermining his right to a fair trial.

17. On 18th February 2016, additional medical records from the Rotunda hospital were provided to the appellant. These relate to a second rape allegation from 1990.

The judgment of Humphreys J.
18. Humphreys J. delivered an *ex tempore* judgment on 1st February 2016. In the course of his judgment, Humphreys J. considered and applied principles enunciated in the Supreme Court decision in *Byrne v. DPP* [2011] 1 I.R. 346, the recent Court of Appeal decision in *Sirbu v. DPP* [2015] IECA 238 and *MS v. DPP* [2015] IECA 309 and concluded that this is not a case where leave should be granted.

19. The learned High Court judge indicated that in order to grant prohibition, an inevitability of unfairness to the appellant must be

shown. He expressed the view that the appellant had the means available to him in the course of the trial process to defend himself, including cross examination, the right to make submissions, and his closing speech to the jury.

20. The following extracts from the judgment indicate the basis upon which the learned High Court judge refused the leave application.

> *".. The applicant complains that cross examination will be hindered. This is a matter that can be pursued at trial in the appropriate way either by cross examination in the first instance, submission to the judge in the close of the prosecution case or as a jury point having regard to the very clearly established law that the primary locus for such complaints is the trial."*
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> *"Sirbu" establishes that prohibition will only arise where there is a real risk of an inevitability of unfairness, and there is no such inevitability here. No grounds have been shown as to why any complaints about unfairness caused by a failure to seek out, preserve and disclose evidence, the inadequacy of evidence and any resulting inability to cross examine cannot be canvassed before, and dealt with by, the trial judge. The trial judge will certainly be in a much (better) position to ensure fairness to the applicant than a judicial review court which must determine the matter in the abstract. At trial any issue the applicant takes with the complainant's evidence can be pursued in the normal way which is cross examination, submissions to the judge at the close of the prosecution case are speech to the jury. Those three options give an effective remedy. There is no inevitability of unfairness and there are no exceptional circumstances warranting prohibition and nothing to suggest the trial judge will not be able to ensure fairness in this case."*

21. The learned High Court judge went on to state:-

> *"The trial judge will certainly be in a much (better) position to ensure fairness to the applicant than a judicial review court which must determine the matter in the abstract. A trial, any issue the applicant takes with the complainant's evidence can be pursued in the normal way which is cross examination, submissions to the judge at the close of the prosecution case, or a speech to the jury. Those three options give an effective remedy. There is no inevitability of unfairness and there are no exceptional circumstances warranting prohibition and nothing to suggest the trial judge will not be able to ensure fairness in this case."*
>
> And
>
> *"Finally, the application is grounded on the affidavit of the solicitor rather than the applicant himself and is therefore hearsay for the purposes of this application".*

Discussion

22. The appellant maintains that the learned High Court judge erred in law and, or, in fact in that he applied the incorrect test in consideration of the leave application. He also contends that the learned High Court judge erred in law by stipulating that the appellant had to prove an inevitability of an unfair trial, and that this was not a requirement or proper test for granting leave in judicial review applications.

23. The appellant maintains that he has reasonable grounds for contending that he has an arguable case in law in that the respondent has wrongly refused and/or delayed in disclosing all material evidence and has thereby denied fair procedures and a right to a fair trial. He also argues that there has been unreasonable delay in the bringing of the prosecution in consequence whereof he is prejudiced and is denied his entitlement to a fair trial.

24. The appellant further contends that a judicial review is an appropriate remedy, and that the finding of the learned High Court judge to the effect that the appellant's solicitors affidavit is hearsay, was inappropriate as the appellant's solicitor swore his affidavit from facts within his own knowledge by reference to the evidence contained in the book of evidence, the disclosure received and the correspondence between his office and the respondent's office.

25. Order 84, r. 20(1) of the Rules of the Superior Courts stipulate that no application for a judicial review shall be made unless the leave of the court has first been obtained. In *G v. Director of Public Prosecutions* [1994] 1 I.R., Denham J. (as she then was) described the requirement to obtain leave as a screening process to prevent trivial and unstateable cases proceeding. She also described the burden of proof on an applicant seeking judicial review to be *"light"*.

26. In G, Finlay C.J. summarised the matters that must be *prima facie* established by an applicant in order to be granted leave to apply for judicial review. They are:-

> *"(a) That he has a sufficient interest in the matter to which the application relates;*
>
> *(b) that the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by judicial review;*
>
> *(c) that on those facts an arguable case of law can be made that the applicant is entitled to the reliefs which he seeks;*
>
> *(d) that the application is being made promptly and in any event within the time limits provided for in O. 84, r. 21(1), or that the court is satisfied that there is a good reason for extending the time limit.*
>
> *(e) that the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial or, if there be an alternative way, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure."*

27. In relation to the burden of proof the following observation is made in "Civil Procedure in the Superior Courts", (3rd edition), (Delaney and McGrath), at p. 1024:-

> *"He is simply required to establish that he has made out an arguable case in law and the court is not concerned with trying to ascertain whether the grounds put forward are strong or weak, or what the eventual result will be. Further, in deciding whether this threshold has been met, it is the version of the facts put forward by the applicant "which should*

normally (i.e. in the absence of arguments concerning non disclosure or absence of the upmost good faith).. be presumed to be correct for the purposes of determining the existence of an arguable case."

28. Order 84, r. 24(2) of the Rules of the Superior Courts provide that a court may, with the consent of all the parties, or where there is good and sufficient reason, and it is just and equitable in all the circumstances to do so, treat the application for leave as if it were the hearing of the application for judicial review. In the application before the High Court, no such consent was forthcoming, but it does, nevertheless, appear to be the case, that the learned High Court judge treated and heard the application for leave as if it was the hearing of the application for judicial review.

29. While, the learned High Court judge's judgment briefly refers to the appellant seeking leave to apply for judicial review in order to prohibit his trial, it is quite clear that he decided the case on the basis of a full judicial review hearing. He refers to a number of cases, including the recent decision of this court in *Sirbu v. DPP* [2015] IECA 238, clearly in the context of their relevance to deciding substantive issues in judicial review proceedings. He refers specifically to his view that *No grounds have been shown as to why any complaints about unfairness caused by failure to seek out, preserve and disclose evidence, the inadequacy of evidence and any resulting inability to cross examine cannot be canvassed before, and dealt with by, the trial judge.*

30. In relation to the learned High Court judge's finding that *the "application is grounded on an affidavit of the solicitor rather than the applicant himself and is therefore hearsay for the purposes of this application"*, the affidavit in question is that of Mr. Edward O'Connor, the appellant's solicitor.

31. Order 84, r. 20(2) of the Rules of the Superior Court requires that an application for leave for judicial review should be grounded upon, *inter alia*, an affidavit *In Form 14 in Appendix T, which verifies the facts relied upon*.

32. Form 14 indicates that the *affidavit verifying statement grounding an application for leave to apply for judicial review or a statement of opposition* be sworn by either the applicant or the respondent, as the case may be.

33. In *DPP v. Hamill* [2000] ILRM 150, McGuinness J. rejected the contention that it was necessary for an affidavit to *verify* the facts relied on in the applicant's statement of grounds. In her view this submission was based on a mis-understanding of the phraseology of the rule and Order 83, Rule 20(2) did not require that the word *verify* actually be used in the affidavit. In that case, the first paragraph of the affidavit in question which was in the standard form, averred to the truth of what was set out in the body of the affidavit and this was confirmed in the jurat. The body of the affidavit set out the same facts as were relied upon in the statement of grounds and so stated that they were true or *verified* them. This conclusion was upheld on appeal to the Supreme Court. In his judgment Keane C.J. stated that the word *verify* does not require an applicant to state that he is verifying the petition or the application for judicial review or to use any phrase of that nature, and that it is sufficient if he sets out the facts in the affidavit grounding the application.

34. In this case the affidavit is that of Mr. Edward O'Connor, the appellant's solicitor. It sets out in some detail the factual basis for the grounds upon which the relief is sought. It purports to verify the facts relied about in relation to the statement of grounds. Mr. O'Connor confirms in the affidavit that it is made with the appellant's instructions, and with his knowledge and consent.

Conclusion

35. While the affidavit of Mr. O'Connor does not strictly conform with Form 14, Appendix T, this fact alone should not, in the particular circumstances of this case, disentitle the appellant to seek leave to apply for judicial review. Furthermore, the affidavit, while not in conformance with Form 14, Appendix T is not, as suggested, by the learned High Court judge, *hearsay*.

36. It is evident from the judgment of the learned trial judge that he determined the application for leave on the basis that it was a full hearing of the application for judicial review, in effect, the application for the prohibition of the prosecution of the appellant in relation to the two counts in question. However, the matter which required a determination was merely the application for leave to apply for judicial review.

37. On the basis of the grounds presented to the High Court, I am satisfied that the appellant satisfies the matters identified by Finlay C.J. in G and which must be *prima facie* established before leave is granted. In particular, I am satisfied that:-

(i) The facts averred in the affidavit of Mr. O'Connor would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review; and

(ii) that on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks.

38. I should also say that the grounds for leave, as originally relied on, are, in my view, sufficient in themselves for leave to be granted irrespective of the extent to which they were subsequently added to.

39. I would therefore allow the appeal.