THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 111

The President
Birmingham J.
Edwards J.
250CPA/12

Joseph O'Reilly

Applicant

V

The Director of Public Prosecutions

Respondent

Judgment of the Court delivered on the 11th day of May 2015

by Mr. Justice Birmingham

1. Before the court is a motion grounded on an affidavit brought by the Director of Public Prosecutions seeking an order dismissing an application brought on behalf of Mr. Joseph O'Reilly pursuant to the provisions of s. 2 of the Criminal Procedure Act 1993, on the grounds that the s. 2 application is not based on any new or newly discovered facts, is therefore bound to fail and is therefore an abuse of process.

2. The jurisdiction to dismiss a s. 2 application as an abuse of process, on the basis that it was bound to fail or not grounded on a new or newly discovered fact was considered in the case of *DPP v McKevitt* [2013] IECCA 22. It clear from the judgment in that case that while the jurisdiction to make orders of the type now sought by the Director of Public Prosecutions undoubtedly exists, that it is a jurisdiction to be exercised sparingly indeed. The threshold to be crossed by the Director of Public Prosecutions when seeking such an order is a high one. That is the approach that will inform the court's consideration of this issue. Only if it is very clear that the application brought by Mr. O'Reilly is one that is bound to fail and/or that the application is not grounded on a new fact or a newly discovered fact will the court consider making the order sought by the DPP.

3. The background to the matter now before the court is that Mr. O'Reilly was charged with the offence of murdering his wife on the 4th October, 2004 at the Naul, Co. Dublin. Following a trial which lasted 21 days he was convicted on the 21st July, 2007, and the mandatory life sentence was duly imposed. Thereafter, Mr. O'Reilly sought leave to appeal from the Court of Criminal Appeal and on the 6th March, 2009, that application was rejected. Leave to appeal had been sought on a number of grounds, none of which are relevant to the matters now sought to be advanced in the s. 2 application.

4. The s. 2 application brought by Mr. O'Reilly had its origin in an unusual development which occurred on the fourth day of the trial, the 28th June, 2007. The account what follows draws very heavily on the affidavit sworn by Mr. O'Reilly on the 11th July, 2014, along with extracts from the transcripts referenced in the course of an affidavit sworn by Mr. Seamus Cassidy, the head of the Appeals Section in the Solicitors Division of the Office of the Director of Public Prosecutions which grounds the motion seeking the dismissal of the s. 2 application.

5. On day in question, a copy of the book of evidence which had been prepared for the trial, or perhaps more likely a portion thereof was found in the jury room. The matter was drawn to the attention of the Court Registrar by the jury who inquired whether the document was intended for them. That information was immediately brought to the attention of the trial judge, who in turn immediately brought the matter to the attention of leading counsel for the prosecution and for the defence, meeting them outside court in order to inform them of what had occurred. It appears that in deciding to see counsel that the judge was anxious that they should have a degree of advance warning as to what had occurred, and be given an opportunity to consider the situation before the matter was mentioned in court and should be given an opportunity to consider the situation.

6. Mr. O'Reilly accepts that he was informed as to what had occurred by his legal team and that it was explained to him that the judge intended to inquire of the jury whether the document had been read, if it had been read by any of them, the jury would have to be discharged. Even if the document had not been read, there was the option to seek a discharge. The tactical and strategic considerations were discussed with him, though it was made clear that ultimately the decision as to how to proceed was his. The tactical considerations identified, were that the jury was down to eleven and that this advantaged the defence, as it meant that there could not be a conviction if there were two jurors opposed to convicting.

7. In addition, even at that early stage of the trial, the defence had obtained a number of favourable rulings on issues of admissibility and there were indications that other rulings were also going to be positive from a defence perspective. Mr. O'Reilly's legal team pointed out to him that the judge assigned to the case, had extensive criminal defence experience and expertise, with the result which would "afford me (Joseph O'Reilly) as good a trial as I would ever get in Ireland".

8. It would appear therefore, that following this discussion with his legal team, that Mr. O'Reilly was of the view that unless it emerged that the jury had read the book of evidence, that there were tactical and strategic advantages in allowing the case proceed before the jury which had been sworn to try the case, with the trial judge who had been assigned the case presiding.

9. What transpired when the court reconvened after the information about the document in the jury room had come to light forms the basis of Mr. O'Reilly's present application. It is necessary, therefore to quote from the transcript at some length.

> "In absence of jury legal argument:
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> Judge: Mr. Buckley, Mr. Gageby, as I have already advised you, apparently a portion of the book of evidence made its way into the jury room either overnight or this morning and the jury inquired of the Registrar as to whether or not the book was intended for them and the juror was advised that no, that it was not. It seems to me that it is appropriate at

this stage that I make inquiry of the jury as to whether or not anybody read any portion of the book of evidence.

Mr. Gageby (Senior counsel for the defence): Yes judge.

Judge: It seems to me that if any member of the jury has read any portion of the book of evidence I will have to discharge this jury and if it is a situation in which nobody has read the book of evidence, it seems to me that it is appropriate that the trial proceeds.

Mr. Vaughan Buckley (Senior counsel for the prosecution): Well, other than this, My Lord, I think, I certainly agree with your Lordship on that, but if the only thing they read was the charge in the foot of the book of evidence, which would be the first thing anyone would see, I cannot see how that would prejudice anybody. As long as they did not go any further than that.

Judge: Certainly that would appear to be so, or even read the list of witnesses, but if they read any portion of any statement.

Mr. Buckley: I'd certainly agree that they should be discharged if that is the case.

Judge: Then we will have the jury down please.

In the presence of the jury

Registrar: The Director of Public Prosecutions and Joe O'Reilly.

Judge addressed jury.

Judge: Mr. Foreman, ladies and gentlemen, before we proceed any further, I wan to make an inquiry of you. In the course of the past several days, you have perhaps heard Mr. Buckley refer to a witness as being perhaps witness No. 1, p. 11 and that reference by Mr. Buckley has been to a document that is colloquially referred to as a book of evidence, but more properly known as a book of documents. That book of documents is prepared by the Director of Public Prosecutions, it is made available to the court and it is made available to the defence, and that book of documents sets out the charge that has been preferred against and accused person, it sets out a list of the witnesses whose statements are contained in the book of evidence, it contains those statements, and it contains a list of the exhibits that the State might perhaps intend to rely upon. And the book of evidence is not a document that is intended for the jury's use. Simply put, there may be matters in a book of evidence that are not legally admissible in evidence before a jury. A member of An Garda Siochána will go and take a statement from a witness and that statement is not edited on the basis that, well, such and such is not legally admitted, or for instance, in which we take a commons example, what is known as hearsay evidence is not permitted in our courts, and hearsay evidence will be perhaps Mr. Gageby saying that Mr. Buckley passed some comment in relation to what I have been doing or have not been doing. Mr. Buckley could obviously give that evidence, but Mr. Gageby could not give evidence that this is what he was told by Mr. Buckley.

I understand, somehow or other, the book of evidence made its way into your jury room and was there this morning, and it was brought to the attention of the registrar and an inquiry was made of her as to whether or not it was intended for your use and at this stage, I must ask did anyone of the eleven of you read any portion of that book of evidence in particular did you read any portion of any person's statement? Clearly, if somebody simply read the charges that were proffered by Mr. O'Reilly or the list of witnesses, which does not present any difficulties, but did anybody read any portion or indeed any complete statement or statements contained in that book of evidence?

Foreman: Not to my knowledge, your Honour, no.

Mr. Buckley: In these circumstances, my Lord, I would submit that we should proceed with this trial.

Mr. Gageby: If your Lordship is happy, I am happy. I am not casting aspersions on anyone.

Judge: I am not casting aspersions on anybody either, Mr. Gageby, I am simply making an inquiry. Very well, Mr. Foreman, ladies and gentleman, we will proceed, and as I say, I perhaps make it clear to you now that the book of evidence is not for your use. It is a regular occurrence that, where juries have retired, they often come back with the question can we have the book of evidence and the judge has to say "I am afraid you cannot" as I say, I am explaining to you the reason you cannot have it is because there may be witnesses in the book of evidence are not called, for instance, there are matters that may be legally inadmissible and there may be issues that were dealt with by a judge in the course of a trial where you rule something as being in admissible and it is still there in the book of evidence. There may be, as I say, portions of people's statements that they do not swear up to giving evidence and they are matters that are still there and it is for those reasons that the book of evidence is a document that is for the assistance of the defence in presenting their case and defending the matter and for the assistance of the judge to follow what is going on. It is my practice not to read the book of evidence, because I don't think a trial judge should. If any issue arises, then clearly he might be required to read in advance, but I simply have the book of evidence here and I will be reading through the statement as it goes on. That is how, for instance this morning when Mr. Buckley was going through the various matters, I was able to suggest that there were in excess of 100 items there because I was reading ahead so to speak and doing a head count of the number of items that were there, but otherwise I don't read the book of evidence.

Foreman: It was just brought to the court's attention.

Judge: Yes, it was brought to my Registrar's attention that it had been there and the inquiry was made as to whether or not it was intended for your purposes, but as I say, Mr. Foreman, ladies and gentlemen, I am obliged to make the inquiry, I am not casting any aspersions upon any body. The position quite simply would have been that if anyone of you had read any portion of the statement, I would have to stop this trial and direct that it be tried on another occasion before another jury."

10. The trial then proceeded and there was no further reference to the document in the jury room, nor did the issue of the document feature as a ground of appeal or arise in any other way during the course of the application to the Court of Appeal for leave to appeal. From Mr. O'Reilly's affidavit it emerges that he had a consultation with his legal team on the 1st August, 2007, which was a

considerable time before his application for leave came on before the Court of Criminal Appeal. Mr. O'Reilly was subsequently furnished with an attendance which was taken at the consultation by his senior counsel. As quoted by Mr. O'Reilly that memorandum of attendance was as follows:

> "Joe said that several prisoners were providing him with legal advice and we talked through what people were telling him. He raised the issue of the book of evidence in the jury room and the publicity. As far as the book goes, we said that we had to make a call at the time, and we though that it was better that we had that judge and that jury because it was a great draw and we did not want to lose it. We explained that these calls have to be made and that was why he had been very much involved in these decisions. We can't go back on them. We accepted that there was not a 100% guarantee that the calls we made were the right ones that it is not maths, but that we made what we thought was the right decision at the time and still think it was the right decision."

Submissions

11. Mr. O'Reilly now comes before this Court, claiming that during the course of his trial he did not appreciate, as he now does, the significance of the book of evidence or a portion of it being in the jury room.

12. Mr. O'Reilly has purported to bring his application to the court pursuant to s. 2 of the Criminal Procedure Act 1993. That section so far as material provides as follows:

> "2(1) A person –
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> (a) who has been convicted of an offence either –
> (i) on indictment and who, after appeal to the court, including an application for leave to appeal, and any subsequent re-trial, stands convicted of an offence to which this paragraph applies, and
> (b) who alleges that a new or newly-discovered fact shows that there has been a miscarriage of justice in relation to the conviction or that the sentence imposed is excessive, may, if no further proceedings are pending in relation to the appeal, apply to the Court for an order quashing the conviction or reviewing the sentence.
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> (2) An application under subs. (1) shall be treated for all purposes as an appeal to the Court against the conviction or sentence.
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> (3) In subs. (1)(b) the reference to a new fact is to a fact known to the convicted person at the time of the trial or appeal proceedings the significance of which was appreciated by him, where he alleges that there is a reasonable explanation for his failure to adduce evidence of that fact.
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> (4) The reference in subs. (1)(b) to a newly-discovered fact is to a fact discovered by or coming to the notice of the convicted person after the relevant appeal proceedings have been finally determined or a fact the significance of which was not appreciated by the convicted person or his advisers during the trial or appeal proceedings.

Submissions

13. Mr. O'Reilly submits that the procedure followed on day 4 of the trial was seriously deficient. All that the inquiry that was actually conducted established was that to the knowledge of the foreman of the jury none of the jurors had read the book of evidence. The inquiry did not establish precisely what document was found in the jury room, was it the full book of evidence? Or was it a portion thereof and if a portion, what portion? How long was the document in the jury room, was it there overnight or only from some time that morning? To whom did the document belong, was anything to be established about its provenance or where it came from?

14. Mr. O'Reilly places particular emphasis on the fact that the judge's question was directed to the foreman, who responded immediately without consulting his fellow jurors. He points out that the jurors were not invited to withdraw to their room and discuss the situation among themselves and says that at the very minimum that ought to have happened.

15. Mr. O'Reilly points out that the inquiry was over in a matter of minutes and says that a very important issue was dealt with in a summary manner. He says that he did not appreciate the significance of what had emerged and that it appeared no one else in court did either. In a situation, where there are no Irish authorities directly in point, Mr. O'Reilly and his legal advisers have looked to the USA where questions of jury "tainting" and jury "tampering" have been the focus of greater attention. Mr. O'Reilly says that the procedures which are required to be followed in the USA when issues of this nature arise support his view that what happened on the 28th June, 2007, was entirely inadequate and unsatisfactory. He also says that support for his position is to be found from the decision of the House of Lords in R. v. Smith and Murcieca. There are differences of approach, he accepts, among the members of the House of Lords but the approach taken by some of them is very helpful to him he feels, but all of them establish that the point that he seeks to ventilate now involves an issue of very substantial public importance.

16. Mr. O'Reilly stresses that the court is not now in the position to finally determine the merits of his complaint and that what is in issue is whether the DPP will succeed in her efforts to have his application pursuant to s. 2 dismissed at this preliminary stage. Dismissing the s. 2 application now, says Mr. O'Reilly would be unwarranted. He contends that he is bringing a point of real substance before the court and that it is a point which by any standards is clearly arguable. This is particularly so, it is urged, if one bears in mind that the threshold for establishing jury bias is the relatively low standard of establishing a real risk, the corollary of this being that any inquiry into whether a real risk arises will have to involve a sufficiently high level and sufficiently detailed level of scrutiny so as to exclude that possibility.

17. On behalf of the DPP, the moving party on the motion now before the court, it is submitted that the procedure followed had been discussed with counsel on both sides. Mr. O'Reilly was informed of the situation, and acting on advice instructed his legal team that the trial should be permitted to proceed. The point is made that matters so well known, could not possibly amount to a new fact or to a newly discovered fact. There can be no scope for argument, but that Mr. O'Reilly was aware of what had transpired. Therefore if there is to be any argument that must be addressed to the significance of what had happened and to the contention that the significance was not appreciated prior to the conclusion of the appeal process. The point is made that unlike other cases where there might be uncertainty as to why a particular course of action was followed or a particular point taken or not taken at trial, that here there is very clear evidence why the trial was allowed proceed which related to the composition of the jury as at that stage of the trial, the way the case had run up to that stage, the fact that certain admissibility rulings had gone the way of the defence and that

there was an expectation that other favourable rulings might follow.

Comment

18. The suggestion that Mr. O'Reilly did not appreciate the significance of the book of evidence is more than a little disingenuous. Mr. O'Reilly had a copy of the book since his return for trial. No doubt he had given instructions in relation to matters that it contained. Even at that early stage of the trial there had been a number of legal debates on whether material that was in the book should be admitted in evidence. Moreover, the trial judge in addressing the jury explained very clearly what the book of evidence was, and how it contained material to which a jury ought not to have access and which would not be presented at trial. The procedure followed was one that had been discussed with and had been agreed to by his senior counsel. While the judge, as is the norm addressed the jury Foreman, it is perfectly clear from the transcript that he was inquiring whether any individual juror had read the material and was saying in terms that if any individual juror had read it that the trial could not proceed further before that jury.

19. As to the procedure followed, it was one that had been discussed with senior counsel for the defence and agreed to by him. Mr. O'Reilly had given instructions to proceed on that basis. If there was any thought that some further inquiries might have been appropriate then requests in that regard could have been made at any stage during the subsequent seventeen days of trial. In the aftermath of the trial and conviction had there been any belief that this was a point worth pursuing, then no doubt there would have been an attempt to canvas the issue at the application for leave to appeal. There was no such attempt. The issue was apparently discussed at a consultation subsequent to conviction and pre leave to appeal stage, but in recognition of the fact that a strategic and tactical decision had been taken the matter was not raised before the Court of Criminal Appeal.

20. In this case it is absolutely clear that a conscious and deliberate decision was taken for tactical and strategic reasons to proceed with the trial. Having made that election, Mr. O'Reilly cannot be permitted to resile from it. His attempt to do so, does indeed amount to an abuse of process and certainly it is an attempt that is bound to fail. In these circumstances the court will accede to the application by the DPP.