[Neutral Citation No: 2005 IEHC 353]

THE HIGH COURT
JUDICIAL REVIEW

Record No.2004 31 MCA

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

INDEPENDENT NEWSPAPERS (IRELAND) LIMITED, ISOBEL HURLEY, BRIAN McDONALD AND VINCENT DOYLE

RESPONDENTS

AND
C.D.

NOTICE PARTY

AND
THE HIGH COURT
JUDICIAL REVIEW

RECORD No.2004 32 MCA

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND
SUNDAY NEWSPAPERS LIMITED, NIAMH O'CONNOR AND COLIN MacGINTY

RESPONDENTS

AND
C.D.

NOTICE PARTY

Judgment of Ms.Justice Dunne delivered on the 21st day of July, 2005

1. The above entitled proceedings arise out of publications by the respondents in the course of proceedings then in being between the applicant herein and the notice party herein.It is alleged on behalf of the applicant herein that the said publications constitute a contempt of court.As the publications in question arose out of the same proceedings, it was agreed among the parties that both matters should be heard together.As the issues that arise in both sets of proceedings are the same, I propose to deliver one judgment in respect of both matters.

2. At the outset of these proceedings, it was indicated that one of the respondents in the first set of proceedings, Isobel Hurley, had no hand, act or part in the matters complained of herein.I subsequently heard brief oral testimony from the said respondent to that effect and accordingly I was satisfied that she has no case to answer.

Background

3. In each case the applicant herein seeks an order pursuant to order 44 of the Rules of the Superior Courts giving the applicant leave to serve an order of attachment and committal directed to the respondents for the purpose of their being brought before the court to answer the contempt referred to therein.The grounds upon which the applications were sought were in the case of the first named respondent (herein after referred to as Independent Newspapers) are that Independent Newspapers were responsible for the publication of an article (together with the accompanying images) which amount to a contempt of court being a breach of the *sub judice* rule and or amounting to an interference with the integrity of the trial process then in being between the applicant and the notice party.The article complained of was published in the Irish Independent newspaper on Tuesday 29th April, 2003, entitled *"Farmer Admits to 150 Sex Attacks on His Four Daughters"*.The application was grounded upon an affidavit of Roseann Seale.

4. In the second set of proceedings, the same relief was sought on the basis that the respondents in those proceedings (herein after referred to as "Sunday Newspapers") in respect of the publication of an article which is alleged to amount to a contempt of court being a breach of the *sub judice* rule and/or amounting to an interference with the integrity of the trial process then in being between the applicant and the notice party being an article published in the Sunday World newspaper on 4th May, 2003, under the by-line of Niamh O'Connor.The application was also grounded upon an affidavit of Roseann Seale.

5. At para.4 of her affidavit in each set of proceedings, the said Roseann Seale disposed as follows:-

> "I say and am informed that the notice party pleaded guilty in the Central Criminal Court on 28th April to 12 counts in an indictment containing 153 counts in total.On 20th June, 2003, he was sentenced by Mr.Justice Paul Carney to ten life sentences for rape and five year sentences for sexual assault, with all sentences to run concurrently.The victims were four of the notice party's daughters."

6. She then went on to exhibit relevant transcripts of the proceedings dated 28th April, 2003, 9th May, 2003 and 20th June, 2003.

7. Thereafter in the Independent Newspaper proceedings Ms.Seale referred to an article which appeared in the Irish Independent newspaper on Tuesday 29th April, 2003, under the heading *"Farmer Admits to 150 Sex Attacks on His Four Daughters"* and she also referred to a further article entitled *"All Scrubbed Up in His Sunday Best for Vilest Confession Imaginable"*.She then exhibited the articles.She then quoted extensively from the articles in paras.6 and 7 of the affidavit.Having done so she disposed as follows in para.8:-

> "It may be seen therefore that the article in question gave details of the notice party having left the jurisdiction in an attempt to avoid prosecution.I say and advised that was clearly prejudicial to the notice party, since there was no reference to that in the transcripts of the proceedings herein above referred to.In addition, I say and am advised the details as to how it came about that the notice party was returned to the jurisdiction also constitutes prejudicial material which should not, it is contended, have been published prior to sentencing."

8. In para.9 of her affidavit she expanded on the view of the applicant that the article in question amounted to an interference with the integrity of the trial process and set out the basis for that view, namely, that the article:-

> "1. Referred to prejudicial material about the notice party having left the jurisdiction in an attempt to avoid prosecution in

circumstances where there was no reference to same in the transcripts of the proceedings herein above referred to.

2. Referred to prejudicial material concerning the circumstances that resulted in the notice party being returned to the jurisdiction, where there was no reference to same in the transcript of the proceedings herein above referred to.

3. Referred to specific and prejudicial material against the notice party concerning an alleged incident when the notice party was questioned by police abroad and allegedly 'exploded and became involved in a nasty physical confrontation'.

4. Referred to the above matters in a sensationalist manner, calculated to prejudice the mind of the sentencing judge.

5. Suggested to the sentencing judge that when considering the question of sentence he ought to take into account 'the deadly cunning shown by the rapist' and that '[the notice party] sought to escape the inevitability of the hugely serious charges by fleeing the country'."

9. At para.10 of her affidavit she deposed as follows:-

> "I say and believe that by letter dated 24th June, 2003, Mr.Liam Convey, registrar to the Central Criminal Court, wrote to the applicant and stated that Mr.Justice Carney had directed him, in the light of the principles set out in *Kelly v.O'Neill* [2000] 1 I.R., p.354, to refer to the applicant for prosecution for criminal contempt a number of journalists and newspapers.The letter enclosed two volumes of transcripts relating to hearings before Judge Carney on 9th May, 2003, and 20th June, 2003, as well as copies of the offending material.The letter concluded by pointing out that Judge Carney had found as a fact that he was prejudiced by the offending material and he was leaving it to the Court of Criminal Appeal to decide if his professionalism had successfully overcome that prejudice…"

10. She then exhibited the letter of Mr.Convey together with the enclosures therein.She went on in her affidavit to refer to the fact that the notice party applied to the Court of Criminal Appeal for leave to appeal the severity of his sentence.She explained that because of the appeal it was the view of the applicant that it was appropriate for him to await the judgment of the Court of Criminal Appeal before initiating these proceedings.She therefore prayed for the relief sought in the proceedings herein.The affidavit of Roseann Seale in the Sunday Newspaper proceedings followed a similar pattern.At para.5 of that affidavit she referred to an article which appeared in the Sunday World Newspaper on Sunday 4th May, 2003, entitled *"Rape Dad Glad to be Put Away".*She then referred in paras.6, 7, 8 and 9 to passages from the article complained of including reference to an interview with the notice party.At para.10 she deposed as follows:-

> "It may be seen therefore that the article in question gave details of the notice party having left the jurisdiction in an attempt to avoid prosecution.I say and am advised that that was clearly prejudicial to the notice party, since there was no reference to that in the transcripts of the proceedings herein above referred to.In addition the details as to how it came about that the notice party was returned to the jurisdiction also constitutes prejudicial material which should not, it is contended have been published prior to sentencing."

11. She then went on to indicate that the applicant had considered the article and was of the view that it amounted to an interference with the integrity of the trial process then in being between the applicant and notice party and set out the following matters in that regard:-

> "1. Stated that the notice party's 'self pity reveals with textbook accuracy, the utter lack of remorse and conscience which a paedophile displays.'

> 2. Refers to the notice party's refusal to try and understand his crimes.

> 3. Refers to the notice party's resentment of the fact that his daughters involved the Gardaí, attributing to the notice party the words 'they should have kept it in the family.'

> 4. Referred to prejudicial material about the notice party having left the jurisdiction in an attempt to avoid prosecution in circumstances where there was no reference to same in the transcript of the proceedings herein above referred to.

> 5. Referred to prejudicial material concerning circumstances that resulted in the notice party being returned to the jurisdiction, in circumstances where there was no reference to same in the transcript of the proceedings herein above referred to.

> 6. Referred to specific and prejudicial material against the notice party concerning an alleged incident when the notice party was questioned by police abroad and allegedly assaulted a police officer.

> 7. Referred to the above matters in a sensationalist manner calculated to prejudice the mind of the sentencing judge.

> 8. Prejudiced the notice party by claiming that he 'boasted that he was safe and could not be touched by Irish law because no formal extradition treaty existed'.

> 9. Prejudiced the notice party by stating that 'somewhere in his thinking, he seems to think his daughters should have been grateful to him for their existence', and that 'even when it comes to confessing his crimes he cuts himself enough slack to let himself off the hook in his own mind'.

> 10. Improperly sought to influence the sentencing judge by comparing the notice party's offences with those of Joseph McColgan." The said Roseann Seale then referred to the manner in which the case was referred to the applicant herein in similar terms to those referred to in the Independent Newspapers proceedings.Again the reference was made to the fact that the within proceedings were not commenced until after the conclusion of the notice party's appeal to the Court of Criminal Proceedings.

12. A short replying affidavit was furnished in respect of the Independent Newspapers proceedings.That affidavit was an affidavit of Paula Mullooly, solicitor on behalf of the respondents and the purpose of the affidavit was stated to be the placing before the court of a newspaper report published in the Connaught Tribune on July 5th, 2002, relating to the remand of the notice party.That newspaper report was exhibited in the affidavit.

13. In the Sunday Newspapers proceedings a lengthy affidavit was filed on behalf of the respondents, sworn by Colin MacGinty, the editor of the Sunday World Newspaper.At para.4 of his affidavit he sets out his explanation in relation to the publication of the article concerned.He states as follows:-

> "The events of 28th April, 2004, had occurred in open court, and the case was therefore a legitimate subject of report and comment.As editor, I viewed the case as being one of considerable public importance given the savagery and extent of the crimes committed by the notice party, the fact that they had been committed by a father in respect of four daughters over a 20 year period and the fact that they had occurred in what appeared to be a quiet country village.I believe that it is in the public interest that there should be open discussion, both in the press and elsewhere, about the facts of such cases and the issues thereby raised.Any explanation that might be offered by the person who carried out these acts would clearly be an important part of this picture, and was something that I felt would contribute to any article to be written about the case.In the particular circumstances, it seemed to be both relevant and important to interview the notice party himself if he was willing to be interviewed, with a view to obtaining his explanation and understanding his attitude.It was against this background that Ms.O'Connor went to interview the notice party."

14. In para.5 of his affidavit he goes on to explain the interview that took place between Ms.O'Connor and the notice party as follows:-

> "Ms.O'Connor therefore went and talked to the notice party.I have spoken to her, and the following contents of this paragraph are based upon what she had told me.The notice party was aware of Ms.O'Connor's identity and was clearly aware that his comments were being sought with a view to the same being the subject matter of an article in the immediate future.The interview was not off the record although later in the day the notice party's solicitors telephoned Ms.O'Connor and suggested that it had been.There is no inaccuracy in Ms.O'Connor's reporting of what said by the notice party.In particular, Ms.O'Connor accurately reported what the notice party told her about his reasons for leaving the country and what had been said in 'the papers' about those reasons."

15. He then identifies the passages in the article complained of to which it appears the applicant takes most offence, namely:-

> (a) that the notice party said that he had left the jurisdiction to attempt to effect a reconciliation with his daughter,
>
> (b) that the papers had said that his true reason for going abroad was to escape,
>
> (c) that in fact "the court" had been informed that he had boasted he could not be touched because of the absence of an extradition treaty between Ireland and the country to which he had been gone,

and

> (d) that there was a significant element of self pity in the remorse that he expressed in respect of his crimes.

16. Mr.MacGinty then went on to deal with the particular matters referred to above.Insofar as (a) and (b) are concerned he argued that exception could not reasonably be taken to the publication of that material which was an accurate repetition of what was said by an accused person awaiting sentence when his comments were made in the knowledge that the same would be published.He says that there was no intention of prejudicing the accused or the sentencing hearing.In relation to the item at (c) he deposed to the fact that Ms.O'Connor was not certain where she obtained that information but believed it had been read by her in the Irish Independent of 29th April, 2003.He deposes that the material was in the public domain and was believed to be accurate and correct.He goes on to say there was no intention of repeating anything not before the court.Notwithstanding this he said that the publication of this material was inconsequential having regard to the nature of the counts to which the notice party admitted.He repeated that there was no intention of prejudicing the accused.Finally in relation to the material complained of at (d) his explanation is that Ms.O'Connor was of the view that the remorse expressed by the notice party seemed to contain a strong element of self pity.He makes the point again that the notice party was aware that his comments were to be reported and that that being so he should have expected the comments made by him to be the subject themselves of comment.He expressed the view that a comment upon the nature of the remorse expressed by a person in the position of the notice party is legitimate and reasonable and could not prejudice the administration of justice and again argues that it was not intended to prejudice the administration of justice.He went on then to deal with what are in effect legal submissions and I don't propose to refer to those and finally he complains of the delay in bringing the application.

17. Mr.Feichin McDonagh, S.C.for the applicant, referred to the hearing before the Central Criminal Court on 28th April, 2003.The hearing consisted of the entry of guilty pleas in respect of 12 counts on the indictment involving four victims.The notice party was certified as a sex offender and the matter was then adjourned for sentence on 20th June, 2003, and victim impact reports were ordered.

18. The following day, Independent Newspapers published the articles referred to, of which there were two.One referred to matters that the trial judge "will have to consider" when he delivered sentence, namely, "the deadly cunning", "fleeing the country", and his reaction when confronted by police in that country that "a nasty physical confrontation.A police officer had to use mace gas to contain him…".Mr.McDonagh submitted that these were not matters appropriate to be led at the hearing before the sentencing judge.He further submitted that the assertion that those matters were matters which the trial judge would have to consider amounted to and was calculated to interfere with the administration of justice.

19. Insofar as Sunday Newspapers are concerned he referred to the fact that a journalist interviewed the accused and then proceeded to suggest that remorse was absent.He pointed out that at this stage the sentencing judge had yet to consider a sentencing plea.A plea in mitigation would have been likely to be made and indeed remorse was referred to in the course of the plea in mitigation.Mr.McDonagh argued that the publication in question was entirely inappropriate.Sunday Newspapers also referred to the notice party having left the jurisdiction, the circumstances surrounding his return to the jurisdiction, the incident involving the use of mace gas and finally it is argued that the reference to a similar case was an attempt to influence the sentencing judge by comparing the two cases and he made the same argument in respect of these matters as he had in the case Independent Newspapers.

20. Mr.McDonagh also referred to the replying affidavits filed in respect of both matters and also referred to affidavits of John Rowan sworn in each case dealing with the issue of delay.I should say at this point that having considered the affidavit of Colin MacGinty and the affidavit of John Rowan that I am satisfied that no issue arises by reason of any delay in commencing these proceedings.It was quite proper for the applicant to await the appeal process before instituting these proceedings.

21. Mr.McDonagh having referred to the affidavit of Colin MacGinty referred to the legal principles applicable in this case.He relied on the judgment of the Supreme Court in the case of *Kelly v.O'Neill and Brady* [2000] 1 I.R.354, Supreme Court.That was a case stated in circumstances where the applicant was convicted in Dublin Circuit Criminal Court of two drug related offences.The applicant (Mr.Kelly) sought the attachment of the respondents for contempt of court arising out of an article written after the applicant was convicted but before sentencing.The trial judge held that the article in question constituted contempt of court and imposed a fine.The respondents appealed to the High Court which stated a consultative case for the opinion of the Supreme Court as to whether it could be a contempt of court to publish an article in the terms of that complained of after a criminal trial has passed from the seisin of the jury and where the remainder of the hearing will take place before a trial judge sitting alone and whether the publication of the article complained of could ever constitute a contempt of court when published after conviction and before sentence, given the constitutional right of freedom of expression.Mr.McDonagh referred to the judgment of Denham J.at p.368 thereof where it was stated "the issue is not whether or not the trial judge was affected.He held, and it was accepted, that he had not been affected.Thus, the interference with the administration of justice submitted was not related to the judicial decision maker." In dealing with cases relating to pre-trial publicity where it was alleged that there had been an interference with the due administration of justice she stated at p.367 of the judgment as follows:

> "The test for the court is as to whether there was a real risk that an accused would not receive a fair trial."

22. Mr.McDonagh also relied on the judgment of Keane J.(as he then was) at p.374 of his judgment he stated:

> "contempt of court is committed, however, when a person publishes material which is calculated to interfere with the course of justice: it is not a necessary ingredient of the offence that it results in such an interference."

23. At p.376 he stated:

> "there are special considerations, however, arising where the sentencing of convicted persons are concerned, which must at least be borne in mind.In such cases, depending on the nature of the publication, the inference may be drawn that a court responded to a popular demand for an exemplary sentence and such an inference, however, unjustifiable, might on one view, be regarded as damaging to the administration of justice."

24. Mr.McDonagh pointed out in relation to the present case that in sentencing the notice party herein, an exemplary sentence was imposed.

25. Mr.McDonagh then referred at length to the conclusions of Keane J.in relation to the circumstances of that case and Mr.McDonagh pointed out that *Kelly v O'Neill* has a particular resonance in the context of the present case.The dangers to the administration of justice referred to by the Supreme Court in that case arise in the present case.He acknowledged the importance of the need to balance the constitutional right of freedom of expression to the right of an accused to a fair trial.Finally he submitted that a prima facie case for the attachment and committal of the respondents herein had been made.

26. Mr.Shane Murphy S.C.appeared on behalf of the Independent Newspapers.He referred to the fact that in effect two points were made in the proceedings against Independent Newspapers, namely that there had been a breach of the sub judice rule and an interference with the administration of justice.He referred to para.9 of the affidavit of Roseann Seale and pointed out that there was no reference therein to the judgment of the Court of Criminal Appeal in the case between the applicant and the notice party.In the course of the hearing before the Court of Criminal Appeal he said that the D.P.P.sought to stand over the sentences imposed in that case.

27. He referred to the fact that the application in the present case is a rare type of application and he argued that judges are able to deal with the type of situation that arose herein in a manner that is robust.He referred also to the judgment of the Supreme Court in the case of *Kelly v O'Neill* and pointed out the nature of the article complained of in that particular piece had identified the accused as having been a person involved with drugs and a person who had previous convictions.He referred also to the comments of Keane J.at p.374 of that judgment and I quote:

> "there can also be no doubt that, in the area with which this case is concerned, i.e.the sub judice rule, and that of 'scandalising' the court, to give it the traditional, archaic description, the contempt of court jurisdiction should not be likely invoked by the courts: the freedom of expression guaranteed by the constitution should not be curtailed save to the extent necessitated in protecting the administration of justice."

28. He then referred to a number of other passages from the judgment of Keane J.at p.380 of the judgment:

> "First, the circumstances of the case, particularly the applicant's previous record, indicated that the likelihood of the publication being seen to influence a sentence, let alone actually influence it, was clearly of a low order.Secondly, no notice to cross-examine the second respondent on his affidavit appears to have been served and, if that remains the position, the trial judge would be entitled to conclude that the article had been published in good faith on a matter of public interest without any intention of influencing the court…on any view, the circumstances of this case would clearly have called for the imposition of no more than a modest penalty and for the reason I have suggested, the respondents might have been found innocent of any contempt.
>
> The questions the court had been asked in this case are not, however, whether, in the light of the circumstances to which I have referred, the High Court would have been entitled to acquit the respondents of the charge of criminal contempt or whether the factors to which I have referred could be taken into account by the court in imposing a penalty."

29. He referred again to the grounding affidavit in this case and argued that the fact that something is published which is not in the transcript does not of itself mean that the published material is a breach of the *sub judice* rule.

30. Mr.Murphy then referred to two Canadian decisions namely *Depoe and Lamport* 66 DNR (2D) 46, a judgment of Donohue J.That case involved a group of people who had conducted a demonstration which involved sitting down on a roadway and refusing to make way for pedestrians and vehicles.The police were called, a struggle ensued and a number of people were taken into custody and charged with creating a disturbance in a public street.A city controller interviewed by a newspaper reporter said he would urge the court to impose a certain penalty.Subsequently an application was made to have the city controller and the publisher of the newspaper committed for contempt.In the course of the judgment it was stated as follows:

"In my view, Mr.Lamport had the right and in view of his office, perhaps the duty to reprobate the behaviour of the obstructers.I must still consider however, whether by saying that he would urge the court to bind the accused over to remain away from the area for a year, he said something that was intended or calculated to prejudice the right of the accused to a fair trial.

The statements taken at their worst imply an assumption of the guilt of the accused and an attempt on the part of Mr.Lamport to prescribe a certain punishment for the offence.

It is to be remembered that the alleged offences would be tried not by juries but necessarily by a magistrate.The magistrates are professional judges and I cannot conceive that any of them would be affected by Mr.Lamport's opinion as to the guilt of the accused.Likewise, in the matter of the punishment for the offence it is inconceivable that Mr.Lamport's views would exert the slightest influence."

31. He also referred to the decision in the case of *Bellitti v.Canadian Broadcasting Corporation* 44 DLR (3D) 407.Mr.Murphy described that case as being similar to the present one and referred to the judgment of Zuber J.where it was stated as follows:

"In *Attorney General v.Times Newspapers Limited* [1973] 3 All ER 54 at p.65, Lord Reid said '…It is scarcely possible to imagine a case where comment could influence judges in the court of appeal…' and Lord Simons stated at p.83 '..any comment on pending appellate proceedings could only rarely be intrinsically an interference with the due course of law'."

32. Accordingly Mr.Murphy argues that it would be a rare case in which there would be a serious risk that an article such as that complained of herein would have a serious risk of interfering with the administration of justice.He also referred to the decision in the case of *Cullen v.Toibin* 1984 ILRM 577 and in particular to the judgment of O'Higgins J.at p.581 where it was stated:

"the basis for the application for the injunction which Mr.Cullen has been granted is that the publication of the article would be prejudicial to the conduct of the appeal in that in one way or another the judges hearing the appeal would be biased in regard to the consideration of that appeal.I can see no basis for this suggestion.The Court of Criminal Appeal will be asked to consider pure questions of law relative to the appeal.It cannot be suggested that in considering such questions, publication of this or any number of articles in any number of periodicals would have the slightest effect on the objective consideration of legal arguments.It seems to me that such an argument is unsustainable."

33. He also referred to a similar passage in the judgment of McCarthy J.in the same case at p.582.Having regard to the passages referred to he argued that it would only be in the most exceptional cases that the evidence in an application to attach and commit for contempt of court would be sufficient to satisfy the threshold namely that a professional judge would be affected by the publication.

34. He then went on to examine para.9 of the affidavit grounding the application in detail and suggested that an examination of the transcript of the sentence hearing at p.15 of the transcript demonstrated clearly that the comment made about the cunning of the notice party was a fair comment (although as Mr McDonagh in reply pointed out the hearing took place after the publication).He said that the article complained of was not sensationalist.He pointed out that the proceedings between the applicant and the notice party involved a very unusual case having regard to the gravity of the matters involved.He then argued that in this particular case there was nothing to suggest that there was a real or serious risk to the trial process because the appeal did not raise the issue of the publication.Equally there was nothing to suggest that the notice party did not receive a fair trial.

35. He then went on to say that these submissions were made in the light of the standard of proof, namely beyond a reasonable doubt.He argued that there must be a real doubt in this case as the sentence was upheld.Therefore, a fair trial was found to have taken place.He made an application for a direction on that basis and finally argued that the article in question was not sensationalist, did not deal with matters which were not in the public domain and did not urge a particular sentence.He said that the fundamental point was that the jurisdiction referred to by the applicant herein was one rarely appropriate and rarely applied.The court in order to convict of contempt of court had to be satisfied that the articles in question raised a real and serious risk as to the interference with the administration of justice.

36. Mr.Eoin McCullough, S.C., appeared on behalf of Sunday Newspapers.He referred to the facts of the case alleged against him.In that regard, he said there was no suggestion of an intention to interfere or prejudice the accused in respect of his trial.The considerable bulk of the material published had been furnished by the notice party to the journalist in question.He pointed out that the evidence given by the solicitor for the notice party and which was given in the course of the sentence hearing as to whether or not the comments made by the notice party were on or off the record was not evidence in this matter.He referred to the ten separate points raised in the affidavit of Roseann Seale grounding the application in relation to the matters alleged to be prejudicial to the accused.He then dealt with the decision in *Kelly v.O'Neill* referred to above which establishes the general principles applicable.He accepted that that case allows for the possibility of contempt arising between the entry of a plea and sentence being imposed.However, he pointed out that that will not necessarily arise in every case in which material is published.He then referred to the judgment of Denham J.and the passage referred to previously at p.367 thereof and to the judgment of Keane J.and the passage already referred to at p.380 of his judgment.His argument was that it will be an unusual and rare circumstance that a publication will amount to contempt.He went on to argue that it is clear from a number of authorities referred to that such a situation would be highly unlikely.He then referred to Miller on Contempt of Court and to para.7.99 at p.336 :

"It is singularly unlikely that a finding of contempt would be based on there being a substantial risk of prejudicing a judge of Crown Court – whether a High Court Judge, Circuit Judge, or a recorder.It now seems to be generally accepted that their professional experience enables them to discount that which might affect a jury, although this still leaves room for an argument based on the danger to public perceptions which may be caused by, for example, an orchestrated media campaign.The decisions in point are mainly concerned either with civil proceedings or criminal proceedings pending on appeal…"

37. He also referred to a lengthy passage at para.7.107 on p.340 as follows:-

"In *Duffy, ex parte Nash*, the second of the two English cases directly in point, a different approach was adopted by a strong divisional court.Here an article had been published in the Daily Sketch the day after one Nash had been convicted on charges of causing grievous bodily harm.It contained the following passage:

A CID Officer pointed a finger in an East End pub and said 'that man will end up in the dock on a charge of violence'.That was a year ago and the finger pointed to a vicious looking man who was sipping a grapefruit and was surrounded by

admiring young tearaways and adoring street girls.Jimmy Nash was his name – the 28 year old muscleman jailed for five years yesterday for causing grievous bodily harm to a Soho club manager, Selwyn Keith Cooney… this, then, is the villain of the piece.A man who, until he stepped into the Penn Club just after midnight on February 6th, was just an obscure thug.

Nash later applied for leave to appeal against conviction and sentence and instituted contempt proceedings against those responsible for the publication.Delivering the judgment of the divisional court dismissing the proceedings, Lord Parker E.J.emphasised that liability for contempt required an intention to prejudice, or a real risk of prejudicing, a fair hearing.It was not sufficient, as the *Delbert Evans* case appeared to suggest, that a judge had been 'embarrassed' by the material, in the sense that it had imposed on him 'quite unnecessarily the task of dismissing the offending matter from his mind'.Applying the more stringent test, Lord Parker concluded that:

> Even if a judge who eventually sat on the appeal and seen the article in question and had remembered its contents, it is inconceivable that he would be influenced consciously or unconsciously by it.A judge is in a very different position to a jury man.Though in no sense superhuman, he has by his training no difficulty in putting out of his mind matters which are not evidence in the case.This indeed happens daily to judges on assize.
>
> This seems entirely realistic even if one can overcome the difficulty of imagining senior appellate judges reading the Daily Sketch or its modern tabloid equivalent, it is singularly unlikely that they would be influenced, consciously or otherwise by its contents."

38. He referred again to the standard of proof in this particular case, namely reasonable doubt and submitted that Mr.McDonagh in his application had not shown that there was a real and serious risk that the notice party would not receive a fair trial.He argued that the test in question is that there is a real and serious risk not a remote or mere possibility of a risk of prejudice.

39. Mr.McCullough then referred to the crimes committed by the notice party and described them as having been of the utmost gravity.He pointed out that a long sentence was bound to follow.He argued that a question of fact arises in this case, namely, is there a real risk of prejudice.He argued that it is necessary to look at all the circumstances.According to Mr.McCullough the parts of the article which are allegedly contempt are minimal.At least some of the material was in the public domain, indeed it had already been published by Independent Newspapers.He stated that the article in question was careful and moderate in tone and was in its nature a reflective piece.He also pointed out that the Court of Criminal Appeal did not interfere with the sentence but as he accepted, that is not in fact the test to be applied.He did, however, argue that that helps to establish that the article did not in fact have a serious risk of interfering with the administration of justice or of prejudicing the accused.He also referred to the comments made by Mr.Justice Carney in the course of dealing with sentence in the proceedings.Mr.McCullough stated that the comments of Mr.Justice Carney do not establish a contempt.In any event he stated that that comment made by Mr.Justice Carney does not form part of the evidence in the application before this court for contempt.

40. He made the point that insofar as contempt is argued, contempt is designed to protect the right of an accused to a fair trial.In this particular case much of the material that is at issue was furnished by the notice party himself.He contended that a person who could make an application to attach for committal in the circumstances of this case is the notice party himself but as that was the person who was interviewed and furnished the information contained in much of the article he was not in a position to complain.In those circumstances he posed the question that if the notice party could not have succeeded in bringing an application surely the applicant herein, i.e.how could the D.P.P., do so.

41. Finally he referred to the judgment in the case of *Desmond v.Glackin* [1992] ILRM 490 and to the role of the European Convention on Human Rights as dealt with in that decision.The articles complained of herein were written prior to the coming into direct effect of the European Convention and accordingly decisions made under the European Convention can only be of persuasive authority.In this regard he argued that the right to freedom of expression contained in Article 10(1) of the European Convention on Human Rights, insofar as it may be restricted, can only be restricted to the extent justified by reference to a pressing social need and proportionate to the legitimate aim pursued.See para.7.156 of Miller (referred to above).He argued therefore that to find Sunday Newspapers in contempt as a result of the publication in this case would not be proportionate to the aim of Article 10 and would in effect amount to a breach of Article 10.

42. By way of reply Mr.McDonagh referred to the article exhibited on behalf of Independent Newspapers and which was exhibited in the affidavit of Paula Mullooly.He said that that article was quite innocuous and made the point that there would be no issue in relation to this case if the matters complained of had appeared in evidence before the trial judge.The point in issue was that the various matters which appeared in the newspaper articles were not before the court and consequently the question to be considered is whether the material published interfered with the administration of justice.Mr.McDonagh referred again to 370 of the judgment of Denham J.in the case of Kelly v.O'Neill referred to above and pointed out that in the passage quoted above from p.367 of her judgment that Denham J.was there dealing with the circumstances as to when a trial should be stopped.At p.370 of her judgment she had referred to the risk of prejudicing the administration of justice as a whole or the perception of the administration of justice.The final point he made was that the overarching complaint being made in relation to the publications in this particular case was in relation to the public perception of the administration of justice in the circumstances which had occurred.

43. It is clear having regard to the submissions made in this case and referred to at length above that there is no challenge to the proposition that contempt of court may occur in relation to the publication of material in respect of an accused person who has pleaded guilty but who has not at the time of publication been sentenced.*Kelly v.O'Neill* is a clear authority to that effect.I think it is also fair to say that the question to be considered is whether the material published -

(a) Was calculated to interfere with the administration of justice,

Or

(b) created a perception that the administration of justice in a particular case has been interfered with.

44. I think it is also clear that in considering these issues it is necessary for the applicant to satisfy this court that the articles complained of have had that effect, beyond reasonable doubt.

45. It is not unusual following a serious criminal trial for there to be extensive media coverage in relation to that trial.I think it is fair to say that the media perform a valuable and useful service in informing the public as a whole as to the nature of such offences and

indeed, the day to day business of the courts.Further, following a sentencing hearing on pleas of guilty in a notorious case such as is involved here, there is a tendency to have widespread coverage detailing not just the matters outlined in the court proceedings but also much by way of background material which would not have been before a criminal court which had then proceeded to sentence an accused.Material can be provided to journalists by Garda sources, victims, their families and more unusually, perhaps, the accused themselves.This is something that occurs not just in cases involving the type of offences that occurred here but in many other cases involving serious crime.

46. What is unusual in the circumstances of this particular case is that such detailed coverage in the respondents newspapers appeared before the sentence hearing.Indeed no evidence had been heard at the point in time when the articles complained of were published.Counsel on behalf of Independent Newspapers referred to the fact that the jurisdiction being invoked by the applicant herein is one rarely invoked, and rarely appropriate and rarely applied.That rarity may be explained by the fact that it is rare for newspapers to publish the type of material that was published here prior to a party being sentenced.

47. The article complained of and which appeared in the Irish Independent referred to a number of specific matters of which complaint has been made; the accused's alleged deadly cunning; the arrangements he made to avoid the serious charges involved by fleeing the country and going to a country he had boasted he was safe and in which he could not be touched by Irish law as no extradition treaty existed between Ireland and that country; the physical confrontation alleged to have occurred between the notice party and the police in that country.I have no doubt that those matters were highly prejudicial matters in respect of the notice party.It is possible that those matters could have been ventilated before the trial judge at the sentencing hearing.However, they were not then or subsequently before the sentencing judge in evidence.Those matters were reiterated in the Sunday Newspapers article.That article also called into question the notice party's remorse for the offences to which he had pleaded guilty.The question of remorse was one which might be expected to be aired in mitigation on behalf of the notice party at the sentencing hearing.Insofar as Sunday Newspapers were concerned it was sought to justify the publication of matters relating to the notice party's departure abroad and the manner in which he was apprehended there on the basis that that had already been ventilated in the Irish Independent article.I cannot see how that would justify the publication if in fact the article amounts to contempt of court.

48. As already referred to above it is clear that the decision in Kelly v.O'Neill sets out the principles to be considered in respect of the facts of this case.One significant difference between that case and the present case is that in the case of Kelly v.O'Neill the trial judge had held that he was not influenced by the article complained of.That contrasts with the present case in which the trial judge had found as a fact that he was prejudiced by the offending material and that he was leaving it to the Court of Criminal Appeal to decide if his professionalism had successfully overcome that prejudice.However, it was pointed out at p.368 of her judgment by Denham J.that:-

> "The issue is not whether or not the trial judge was affected.He held, and it was accepted, that he had not been affected.Thus, the interference with the administration of justice submitted was not related to the judicial decision maker."

49. (There was a contention that the views of the trial judge as expressed in the transcript did not form part of the evidence before me but the Affidavit of Roseann Seale deals with this issue and the averments in her Affidavit in that regard have not been challenged.)

50. I think it is clear from the statement in the judgment of Denham J.referred to above that the crucial issue in a case such as this is not whether the trial judge has been affected or not, the question is has there been and interference with the administration of justice.It is worth noting the comments made by Denham J.at p.368 of her judgment under the heading 'Time':

> "In analysing contempt of court the time of the publication in question is of great importance.The time immediately prior to the jury trial is very sensitive.The time after conviction and pre-sentence is not so vulnerable because the decision becomes one for the judge.However, as the administration of justice is still continuing, the trial is not concluded, it is still a critical time.After sentence, the trial becomes less sensitive though it may once again become critical later on prior to and at any, appeal or rehearing.Care must be taken to keep articles which are proximate to key proceedings appropriate to the time.The article in question was written at a sensitive time, pre-sentence.It contained material which would be inadmissible to the court and which was negative to the applicant."

51. She went on to say at p.369 as follows:

> "A balance is required to support the dignity of the court (not the judges personally) and the authority of the court.An article such as that in issue published pre-sentence has elements which prejudice the minds of the public against the applicant, excites feelings of hostility, reveals a past criminal record and questionable activities.It is, in fact, an article predisposing the reader to a negative view of the applicant during the course of the administration of justice."

52. In the same case Keane J.at p.376 of his judgment made the following comment:-

> "There are special considerations, however, arising where the sentencing of convicted persons are concerned, which must at least be borne in mind.In such cases, depending on the nature of the publication, the inference may be drawn that a court responded to a popular demand for an exemplary sentence and such an inference, however unjustifiable, might, on one view, be regarded as damaging to the administration of justice."

53. I am satisfied that had the articles complained of herein been published after the conclusion of the sentencing hearing in this matter that no issue could be taken with their contents.However, in this case, I note that the trial judge stated as a fact that he had been prejudiced by the publication of the offending articles and although I do not think that that alone is determinative of the issue it seems to me that the articles in question contained highly prejudicial material.The Independent Newspapers article did not urge a particular sentence on the sentencing judge but referred to matters the judge would have to consider when delivering his sentence.This to my mind is inappropriate, especially as the matters concerned were not in evidence before the trial court.In the case of Sunday Newspapers, apart from the matters which were apparently repeated as a result of having appeared in the Independent Newspapers article, the article complained of in that newspaper commented extensively on the question of the notice party's remorse or, to be more accurate his alleged lack of remorse.I cannot conclude otherwise than that questioning the remorse of the notice party was highly prejudicial at that point in time.There was also a complaint made that the article sought to influence the sentencing judge by comparing the notice parties offences with those of Joseph McColgan.This perhaps was the least serious aspect of the matters complained of.Nonetheless I am satisfied that by making a comparison with the facts of that particular case there is no doubt that the inference to be drawn was that a commensurate sentence, at the least, should be imposed on the notice party.

54. I have referred above to the important role of the media in bringing to the public information about cases coming before the Courts.That important task is one which must be conducted with great care.If such care is not exercised, it may lead to the type of problem that has arisen in this case.The timing of the publication was critical in that there was a relatively short period of time between the entry of pleas and the sentence hearing.In that period of time, it is difficult to see how the media could publish adverse material in respect of an accused, question the nature of any plea in mitigation that might be made on behalf of an accused, urge on the sentencing court matters to be taken into consideration in sentencing an accused and perhaps, most dangerous of all in the context of prejudice, publish an interview with an accused, together with criticism of the accused based on the interview without running the risk of interfering with the trial process.Such a risk is not likely to arise post sentence.

55. Having considered carefully the principles enunciated in the case of *Kelly v.O'Neill*, it is clear that the publication of material adverse to an accused in advance of or in the course of a trial, or post conviction or guilty plea but before sentence may create a real or serious risk that an accused does not have a fair trial.Such a publication may interfere with the administration of justice.In some cases, it is possible to adjourn proceedings to allow a "fade factor" come in to effect.That may not always be practical.In some cases, the material published may be of little significance such that it does not constitute a real or serious risk but in this case I have come to the conclusion that the articles complained of in this case in respect of the respondents are a contempt of court in that they were highly prejudicial to the notice party thus interfering in the administration of justice.

56. I will hear further submissions from the parties as to the appropriate penalty.

57. Finally, the name of the notice party should not be revealed to protect the victims of his crimes.