THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Mahon J.

232CPA/15

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Philippe Cauneze

Appellant

Judgment of the Court delivered on the 21st day of December 2015 by

Mr. Justice Birmingham

1. Mr. Cauneze has brought an application pursuant to s. 2 of the Criminal Procedure Act 1993, alleging that by reason of a new or newly discovered fact a conviction recorded against him ought to be set aside and declared to be a miscarriage of justice.

2. The background to this application is an extraordinarily convoluted one. After a lengthy trial, at this remove even the duration of the trial is a matter or controversy, Mr. Cauneze was convicted on 10th March, 2000, on count No. 3 of the indictment which had been proffered to the Court, a charge of aggravated sexual assault. He was acquitted on count No. 1 and count No. 2, those being charges of rape and rape under s. 4 of the Criminal Law (Rape) (Amendment) Act 1990. The complainant in this case was the applicant's then wife. Following the conviction on the single count, the applicant was ordered by the Central Criminal Court (Carney J.) to undertake 100 hours of community service. The DPP sought a review of this sentence on grounds of undue leniency and that matter came before the Court of Criminal Appeal on the 20th November, 2000, which substituted a three year term of imprisonment, suspended in its entirety, for the community service order of the Central Criminal Court. At that stage Mr. Cauneze had lodged a notice of appeal, but that was withdrawn by him. One might have thought that the withdrawal of the notice of appeal against conviction would have meant that the conviction had become final; however, as far as Mr. Cauneze was concerned, that was far from the situation. It appears that the applicant sought to re-open his appeal and then brought an application pursuant to s. 2 of the Criminal Procedure Act 1993 when that attempt failed. At that stage eighteen separate matters were advanced, each of which was said to involve new evidence or newly discovered evidence. In a judgment of the Court of Criminal Appeal delivered on the 17th October, 2011, by Finnegan J. the Court rejected the application commenting that it was satisfied that there was no basis upon which an order pursuant to s. 2 could be made.

3. The comments of Finnegan J. in delivering the judgment of the court are of some significance for the present application. He commented:

> "Having regard to the jurisprudence of this Court [these eighteen grounds advanced] are all matters which would not qualify either as new evidence or as newly discovered evidence or indeed in most cases evidence at all. What is even more significant is this. At the trial in evidence, the applicant gave a frank account of his recollection of the events of the evening which gave rise to him being charged. That account, as remarked upon at the trial, is such that there was ample evidence before the jury which would enable them and indeed if they believed him would require them in fulfilling their oath as jurors to convict him of this offence.
>
> It is perhaps important to note that there were other more serious offences charged and that the jury, it would appear, had no difficulty in accepting Mr. Cauneze's account of the evening in that they found him not guilty of the other more serious offences, but taking him at his word found him guilty of the present offence.
>
> To this Court it seems to follow inevitably from that, that there was no miscarriage of justice in this case."

4. Subsequently, Mr. Cauneze brought a further s. 2 application. This was dealt with initially by Finnegan J. sitting alone in accordance with the provisions of s. 5 of the 1993 Act. Mr. Cauneze's application was rejected by Finnegan J. and from there he appealed, as he was entitled to do, to a full court of the Court of Criminal Appeal. On the 17th February, 2014, the Court of Criminal Appeal dismissed Mr. Cauneze's appeal. In his appeal to the Court of Criminal Appeal, he sought to expand on his grounds, in effect presenting a new application. That attempt was the subject of rulings by Hardiman J. and, when Mr. Cauneze was dissatisfied with those rulings, that aspect too proceeded to a full court of the Court of Criminal Appeal presided over by MacMenamin J. In the course of the judgment on the substantive matter by the Court of Criminal Appeal, reference was made to the scope of the application, to the fact that nine reliefs were sought, six of which were entirely outside the jurisdiction of the court, and McKechnie J. commented:

> "He makes several allegations covering a range of events including, the manner in which the original complaint of his wife was investigated by An Garda Síochána, the way in which the book of evidence was prepared and the identity of those who did or did not give evidence at the original trial, with the evidence of at least two witnesses being allegedly fabricated. Running through these complaints is a suggestion, expressed in various moderations of tone, of the existence of a conspiracy involving, amongst others, members of An Garda Síochána, the DPP and his own solicitor. He now also takes issue with the transcript and whether or not it is a true and accurate record of what occurred in the original trial.
>
> His point with regard to the latter matter is a discrete one and can be dealt with very simply. In support of this submission the appellant refers to one sentence contained in page seven of the judgment of Finnegan J. which as I say was given in December, 2011. We are perfectly satisfied that it is an entire misreading of that sentence, to ascribe to it

the meaning that Mr. Cauneze alleges. If one goes back to page six it can readily be seen that the learned judge commenced, at that point, to describe the multiple grounds of complaint raised in the case. He was continuing to describe these when he made the comment that the transcript of the trial is not a true transcript. This was part of a narrative with its purpose being to simply record and reflect what was part of the case made by Mr. Cauneze. It was nothing more than that.

In any event on the 16th October, 2000, the trial judge certified, under section 33 of the Courts of Justice Act 1924, which was substituted by section 7 of the Criminal Justice (Miscellaneous Provisions) Act 1997, that the transcript as then produced was a true and accurate record of Mr. Cauneze's trial, which was conducted and presided over by Mr. Justice Carney. This is a conclusive answer to any suggestion that the transcript, which was produced of the trial, is not a true and accurate one of what transpired thereat."

5. Then, on the 15th September, 2015, Mr. Cauneze brought a further application under s. 2 of the Criminal Procedure Act 1992. The documents submitted by Mr. Cauneze *inter alia* contend:

i. Newly discovered facts arising from the 17th February, 2014, appeal show that the transcript has been falsified to mislead the court.

ii. The court erred in law in regard to the primary and second legislation referred to in ss. 1, 2, 3 and 9 of the 1993 Act.

iii. Interference by some members of the justice system itself in the administration of justice.

iv. Interference by the executive in the administration of justice.

v. The Willoughby principles apply to this application (See pp. 39 and 40). (It is presumed that the reference of Willoughby is a reference to a decision in the case of *Willoughby v. DPP* [2005] IECCA 4)

vi. Page 86 of the notice of application must be taken into account by the court in the context of the conspiracy.

vii. The justice system itself must produce:

a. The original short notes from trial;

b. Day 1 of the transcript;

c. The word index from the transcript

viii. It was held in *DPP v. Meleady* [2001] 4 I.R. 1 and approved in *DPP v. Shortt (No.2)* [2002] 2 I.R. 696 that the exercise with which the court is concerned under the Act of 1993 extended to the administration, in the given case, of the justice system itself.

6. Pausing to look at these issues in a little more detail, the question of falsification of the transcript has been a recurring theme, as explained by McKechnie J. this seems to have its origin in a complete misunderstanding by Mr. Cauneze of a single sentence in the judgment of Finnegan J. of the 6th December, 2011. The sentence of interest to Mr. Cauneze appears at p. 7 of the judgment. It is a brief one of just ten words. The sentence is "The transcript of the trial is not a true transcript". However, as McKechine J. made absolutely clear, if the judgment is read as a whole and in particular if the section of the judgment from the middle of p. 6 onwards is read, it is absolutely clear that Finnegan J. was doing no more than quoting or paraphrasing the submissions of Mr. Cauneze.

7. So far as the reference at ground (ii) to the Court erring in law is concerned, there are two comments that can be made. First of all there is no indication whatever that the Court of Criminal Appeal presided over by McKechnie J. erred when it came to dealing with ss. 1, 2, 3 and 9 of the 1993 Act. But in any event, this Court has no role in reviewing legal rulings and interpretations of the Court of Criminal Appeal. At ground (iii), so far as the reference to interference by members of the justice system is concerned, it is far from clear what Mr. Cauneze is attempting to suggest here, but is must be said that there has been no basis laid whatever which would support such a suggestion. The position is exactly the same in relation to the observations at ground (iv) about interference by the executive in the administration of justice.

8. So far as the Willoughby principles issue is concerned, in *Willoughby v. DPP* [2005] IECCA 4, the Court in that case, having reviewed the relevant case-law, enumerated the following principles:-

"Drawing these various strands together, it seems to this court that the following principles are appropriate to an application to introduce new or fresh evidence in the Court of Criminal Appeal:

(a) Given that the public interest requires that a defendant bring forward his entire case at trial, exceptional circumstances must be established before the court should allow further evidence to be called. That onus is particularly heavy in the case of expert testimony, having regard to the availability generally of expertise from multiple sources.

(b) The evidence must not have been known at the time of the trial and must be such that it could not reasonably have been known or acquired at the time of the trial.

(c) It must be evidence which is credible and which might have a material and important influence on the result of the case.

(d) The assessment of credibility or materiality must be conducted by reference to the other evidence at the trial and not in isolation."

In *Willoughby*, the appellant attempted to introduce new evidence on appeal from a retired pathologist as to the cause of death in that case in order to challenge the finding of the jury as unsafe. However, that application was unsuccessful. It is thus not clear how these principles are applicable to the present case as they concern the admittance of new evidence on appeal and not a s.2 Miscarriage of Justice Application.

9. The reference at ground (vi) to a conspiracy is a recurring theme. The suggested conspiracy becomes ever broader, but again there is absolutely no evidence whatever adduced to support the suggestion that there was a conspiracy. As has been pointed out to Mr. Cauneze time and time again, his conviction back in 2000 was not the result of any conspiracy, it occurred because jurors accepted the evidence given by Mr. Cauneze himself which amounted to an admission of guilt in respect of count No. 3 on the indictment, the aggravated sexual assault count.

10. At ground (vii) this amounts to a further rehashing of the complaint that the transcript is not a genuine one. In the perhaps forlorn hope that even at this stage Mr. Cauneze might realise that there is no substance in this criticism, the Court has appended to this judgment a schedule setting out the dates on which the court sat and information as to the business transacted by the court on each such date.

11. At ground (viii), once more there is a vague and unsubstantiated criticism of the justice system, and nothing is offered in support of it.

12. This is the third attempt to bring a s. 2 Miscarriage of Justice Application on the part of an applicant who withdrew his appeal against conviction. Nothing whatever has been produced which could possibly be regarded as a new or newly discovered fact. Regrettably, it must be said that this attempt to re-litigate what has already been decided is vexatious and an abuse of process. The Court must therefore dismiss the application.

Schedule of Trial

1. Arraignment (28th February, 2000)

The accused was arraigned on counts no.1, 2 and 3 of the indictment and pleaded not guilty to each. The jury were selected. Proceedings were adjourned to 1st March, 2000.

2. Day 1 of Trial (1st March, 2000)

The interpreter for Mr. Cauneze was sworn, and Ms. Clark S.C., counsel for the prosecution, gave her opening speech. The first witness Mrs. Cauneze was examined by Ms. Clark. On application by the defence counsel, cross-examination of that witness was postponed until the following day. Dr. Maloney was then interposed and examined by Mr. Zaidan, Barrister at Law, counsel for the prosecution, and cross-examined by Mr. Phelan S.C., counsel for the defence.

3. Day 2 of Trial (2nd March, 2000)

There was a cross-examination and a re-examination of Mrs. Cauneze by Mr. Phelan and Ms. Clark. Thereafter, witnesses Marie Butler and Garda McLoughlin were each called.

4. Day 3 of Trial (3rd March, 2000)

In the absence of the jury, a *voir dire* was conducted as to whether Mr. Cauneze's statement to Gardaí was admissible. The Court heard evidence from Sergeant Oliver Keaty, Sergeant Dermot Fitzgerald, Sergeant Pat O'Connor and Mr. Cauneze. The application to refuse the statement was rejected by Carney J. and the statement was deemed admissible. The jury was recalled, and Sergeant Keaty was once more examined by Ms. Clark before the signed statement was exhibited as exhibit 3.

5. Day 4 of Trial (6th March, 2000)

The examination and cross-examination of Sergeant Keaty concluded. Sergeant Fitzgerald and Sergeant O'Connor were then recalled as witnesses.

6. Day 5 of Trial (7th March, 2000)

There was an application to have the jury discharged, which was rejected. On agreement, Dr. John Farrell gave evidence for the defence out of turn. Garda McLoughlin was then recalled to deal with a specific aspect of the evidence. The Court heard forensic evidence from Garda Stephen Doak followed by evidence from Garda Thomas Kelly. That concluded the State's case. Mr. Cauneze was called to give his evidence in chief.

7. Day 6 of Trial (8th March, 2000)

The Court continued to hear evidence from Mr. Cauneze.

8. Day 7 of Trial (9th March, 2000)

Ms. Clark and Mr. Phelan each addressed the jury. Carney J. then delivered his trial judge's charge to the jury. The jury retired to begin their deliberations.

9. Day 8 of Trial (10th March, 2000)

The jury returned from their deliberations finding the accused not guilty on counts 1 and 2, but finding the accused guilty on count 3 by a majority of 11 to 1.

10. Sentencing Hearing (19th May, 2000)