Neutral Citation: [2015] IEHC 269

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 688 JR]

BETWEEN

MICHAEL FURLONG

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Kearns P. delivered on the 7th day of May, 2015

It is probably an understatement of significant proportion to say that the facts of this case are unusual. The applicant was charged with the murder of Patrick Connors at Carraig Tur Apartments in Enniscorthy on a date unknown between the 28th and 29th April, 2011. The trial of the applicant commenced in the Central Criminal Court on the 14th November, 2013 and continued until the 18th November when the jury were discharged on the application of the prosecution arising out of a dramatic intervention in the proceedings by State Pathologist, Professor Marie Cassidy. She was not the pathologist who had given evidence at the trial as to cause of death, such evidence having been given by Deputy State Pathologist, Dr. Khalid Jaber. At the time of Prof. Cassidy's intervention, the defence had gone into evidence and had called their own pathologist, Dr. Declan Gilsenan, who disagreed significantly with Dr. Jaber in relation to the cause of death.

From the material put before this Court, it appears that Prof. Cassidy happened upon the murder trial in the Criminal Courts of Justice as she had been in a nearby court. She heard only a "few minutes" of the evidence but was sufficiently concerned to write to the respondent concerning Dr. Jaber's evidence and raised an issue as to its correctness in certain material respects.

Before detailing the contents of Professor Cassidy's letter, the following brief account sets out the disputed factual issues as to cause of death. The body of Mr. Connors was found lying in a communal stairway inside the apartment building in Enniscorthy on the morning of the 29th April, 2011. At the time, the applicant was living in Apartment No. 6 and it was common case that both he and the deceased were together in the apartment on the night before Mr. Connors died.

The post-mortem on the deceased was conducted by Dr. Khalid Jaber, then Deputy State Pathologist, who found the deceased had sustained a number of injuries which included two significant scalp wounds and bilateral jaw fractures. He stated that the cause of death was "sharp and blunt force trauma to the head (and neck)" and "acute alcohol intoxication". The sharp force trauma resulting in the scalp wounds were likely, in his view, to have been caused by two separate knives which were located in the kitchen sink of apartment No. 6. The blunt force trauma had caused the bilateral jaw fractures and had also resulted, in his opinion, in a subluxation injury to the ligaments of the neck with resultant damage to the upper spinal cord. In the opinion of Dr. Jaber, these injuries were most likely caused by a direct blow to the side of the face.

There was a considerable measure of disagreement between the prosecution and the defence not only in relation to cause of death but more particularly in relation to the means by which the various injuries had been sustained. In cross-examination, a number of propositions were put to Dr. Jaber in relation to the injuries which included: (a) that the scalp wounds could have been self inflicted (in this regard the witness was referred to various remote scars found on the body of the deceased and the medical records which indicated a history of self harm); (b) that the bilateral jaw fractures and any associated neck injury could have been sustained in a fall directly on the hard surface of the stairs in the circumstances where the deceased was weak and disorientated from blood loss and intoxication; and (c) that hypothermia was a causative factor in the death of Mr. Connors.

It should be said that Dr. Jaber firmly disagreed with these propositions. Following the close of the prosecution case, evidence was given on behalf of the applicant by Dr. Declan Gilsenan who offered as his opinion that death was due to a combination of blood loss (hypoxic ischemia) from scalp wounds, intoxication of alcohol and drugs and hypothermia. Dr. Gilsenan was never cross-examined as the prosecution initially sought time within which to take instructions from Dr. Jaber in relation to certain matters raised in the evidence of Dr. Gilsenan. On the following day, further time was sought in order to take instructions arising out of a development in the case and the trial was adjourned to Monday, 18th November, 2013.

The development in question was a letter or report sent to the respondent by the State Pathologist, Professor Marie Cassidy, dated the 14th November, in which she wrote as follows:-

> "14th November, 2013
>
> Mr. Liam Mulholland,
>
> Head of Superior Court Section,
>
> Office of the Director of Public Prosecutions,
>
> 90 North Kind Street,
>
> Smithfield,
>
> Dublin 7
>
> *Dear Mr. Mulholland,*
>
> *It is my duty as State Pathologist to bring to your attention my concerns re the report and opinion of Dr. K. Jaber*

regarding the death of Patrick Connors. The case came to my attention while I was attending the Central Criminal Court on 13th November giving evidence in a trial. I noticed Dr. Jaber was to give evidence and took the opportunity to see him give evidence. I only heard the last few minutes of the cross-examination and the re-examination. However, this was sufficient to cause me some concern.

I was unfamiliar with the case, despite having instructed that all homicide cases undertaken on behalf of the State must be peer reviewed. My colleagues, Dr. M. Curtis and Dr. M. Bolster have since reviewed this report and share my concerns.

In his report, Dr. Jaber described two incised wounds to the scalp and a fractured mandible. The internal examination was largely unremarkable and there was no evidence of internal trauma. Toxicology showed that he was intoxicated by alcohol and drugs (Diazepam, Quetiapine). Expert opinion was sought from Professor Michael Farrell on sections of spinal cord and brain tissue.

While we are in agreement that Mr. Connor's injuries are more likely the result of an assault, my main concern is Dr. Jaber's opinion regarding the mechanism of death.

1. With regard to the mechanism of death, Dr. Jaber has postulated that the deceased had sustained damage (subluxation) to the ligaments of the upper neck where the base of skull articulates with the upper cervical spine. He states that there would have been damage to the upper spinal cord.

There is no anatomical evidence of such an injury in the text of the post-mortem report, save for a reference to perceived increased mobility of the neck. Furthermore, the spinal cord was examined microscopically by Professor Michael Farrell, Consultant Neuropathologist, who reported no evidence of injury, only the presence of artefactual changes.

Dr. Jaber continues to advance his hypothesis of spinal injury at this site on the basis of expected changes on radiological imaging. However, reading of the post-mortem report reveals that no such radiological investigation was ever carried out.

2. Dr. Jaber postulates that this injury was caused by a blow to the jaw. Indeed, he identified two fractures of the mandible, both with surrounding bruising in the soft tissues, which he correctly attributes to blows to either side of the face. This would not be a likely mechanism for the hypothetical neck injury.

3. The post-mortem report does not include a section regarding the history or background information to the case. There is no mention of the amount of blood present at the scene of death. Dr. Jaber does say that the two scalp wounds would have bled profusely. This profuse haemorrhage, in all probability, would have made a significant contribution to his death. Also to be taken into consideration is the likelihood of hypothermia; allegedly, Mr. Connors had lain outside, injured, for a period of several hours overnight, in an ambient temperature of 5 degrees Celsius.

4. The cause of death in this case is complex and most probably multifactional. The relevant factors include blood loss (from the scalp wounds), concussion (due to facial injuries), hypothermia and acute alcohol intoxication.

Yours sincerely,

Signature

_____

Prof. Marie Cassidy

State Pathologist"

Acting with complete propriety, the respondent's legal advisers immediately disclosed to the defence the fact that this communication had been received and furnished a copy to the applicant's legal representatives. When the trial resumed on the morning of the 18th November, 2013, counsel for the applicant brought the contents of Professor Cassidy's letter to the attention of the court, submitting that in the light of the contents of the letter, it would be unsafe to allow the case to go to the jury and that accordingly the court should direct a verdict of not guilty. In response, counsel for the prosecution accepted that they could no longer rely on the evidence of Dr. Jaber as to mechanism of death, but applied instead to have the jury discharged. This application was opposed by the defence but was acceded to by the trial judge. In the context of exchanges which then took place with the trial judge, prosecuting counsel stated that if the case was put back into the list to fix dates, the Director at that stage could review the state of the evidence. The trial judge in ruling on the issue himself stated that "it may well be that when the Director has the opportunity to consider matters further that this matter does not proceed any further".

The possibility of a retrial being thus left open, the matter was adjourned to a list to fix dates on the 13th December 2013. On that date the Central Criminal Court fixed the 12th January, 2015 for the retrial of the applicant.

Some considerable time later, on the 10th September, 2014, the Chief Prosecution Solicitor disclosed to the defence a report from Professor Sheppard, Consultant Forensic Pathologist based in Liverpool. On the 29th September, 2014 a notice of additional evidence was served, effectively outlining the evidence which Professor Sheppard would give on a retrial and indicating that he would be called as a witness for the prosecution in any such retrial.

On the 24th November, 2014, leave to seek judicial review was sought wherein prohibition of a retrial on the basis that in the particular circumstances the same would constitute an "abuse of process" and/or a denial of the applicant's right to trial in due course of law as provided for under Article 38 of the Constitution.

The respondent argued that the applicant did not seek an order prohibiting his trial within the time limit provided for by the Rules of the Superior Courts and that relief should not be granted for this reason alone.

The grounds of opposition filed on behalf of the respondent further contend that a retrial of the applicant would not constitute an abuse of process and would be a trial in due course of law and that the trial judge acted appropriately in discharging the jury on the 18th November, 2014 and in adjourning the matter to the next list to fix dates.

It was additionally argued that the respondent was entitled to serve additional evidence in the context of a retrial and, if there was any unfairness to the applicant by reason of its service, it was within the power of the trial judge to make appropriate rulings and directions to ensure a fair trial. This Court should therefore decline to intervene on a *quia timet* basis.

In submissions before this Court, the respondent also argued that judicial review is an exceptional remedy, referring to a number of well known authorities in support, and should not be granted to prohibit a retrial.

The respondent argued that the applicant was in effect inviting this Court to make a merit based assessment of the evidence which was adduced at the first trial, the contents of a letter of the State Pathologist - which, it was argued - did not amount to evidence, and the proposed evidence of Professor Sheppard at a retrial. The Court should not analyse or assess the credibility of this evidence in order to come to a determination as to whether a future trial would be unavoidably unfair and/or an abuse of process.

DELAY

The first issue which the Court must determine is whether this application is out of time for the reasons offered by the respondent. In short, the application seeking leave was brought only in November 2014, the jury having been discharged in the first trial a year previously. That a retrial was entirely possible was plain from the fact that the trial judge had adjourned the matter to the list of fixed dates on the 13th December, 2013 on which date the 12th January, 2015 was allocated for the retrial of the applicant.

If any of these dates were taken as the date upon which the clock began to operate from the point of view of the time limits set down by Order 84 of the Rules of the Superior Courts, the applicant was plainly out of time with the present application.

The time for bringing judicial review applications is now governed by the Rules of the Superior Courts (Judicial Review) 2011 Regulations (S.I. No. 691 of 2011).

Those regulations came into operation on the 1st January, 2012 and were accordingly operative at all relevant times in this case.

In relevant part, the new rules (Schedule 1) provide as follows:-

> "21. (1) An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose.
>
> (2) Where the relief sought is an order of certiorari in respect of any judgement, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgement, order, conviction or proceeding.
>
> (3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:-
>
> (a) there is good and sufficient reason for doing so, and
>
> (b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either-
>
> (i) were outside the control of, or
>
> (ii) could not reasonably have been anticipated by the applicant for such extension."

Thus, in marked contrast to the previous Rules (which required that there be only good and sufficient reason for extending time) the new Rules not only replicate that requirement but include the further requirement that the circumstances that resulted in the failure to make the application for leave within the prescribed period were either outside the control of the applicant or could not reasonably have been anticipated by the applicant.

This Court has been much exercised in the context of judicial review applications by the fact that many applicants seem to regard the requirements of this rule as an irritant, and one to be either ignored or brushed aside for the flimsiest of reasons or pretexts. Indeed, it is not unusual for applicants to move leave applications without even bothering to apply for an extension of time under Order 84, rule 21.

In this instance, however, the Court is satisfied that the applicant can meet the threshold requirements imposed by Order 84, rule 21. Firstly, there can be no doubt but that the extraordinary background event which undermined this trial could never fail to play anything other than a substantial role in any subsequent trial, given that any subsequent trial would involve trawling backwards over the evidence given by two pathologists in the original trial, the views of Professor Cassidy and two of her colleagues in the Office of the State Pathologist, together with those of Professor Sheppard - and indeed possibly those of other expert witnesses also - such as Professor Michael Farrell, Consultant Neuropathologist, to whom reference was made by Professor Cassidy in her letter.

During the course of the hearing before this Court, the Court was informed that in the aftermath of these events Dr. Jaber resigned his position and has since left the jurisdiction.

Effectively, therefore, the prosecution seek in the context of any retrial to make, if not an entirely new case, then one substantially different from that offered by Dr. Jaber in relation to cause of death at the original trial. In other words, this is not a case where a retrial arises by reason of jury disagreement or some routine mishap which can affect any criminal trial. Indeed, no suggestion has been made on behalf of the applicant that the holding of a retrial is, *per se*, oppressive. Instead they confine themselves to a more simple argument that, in the particular circumstances of this case, to permit a retrial would be oppressive as it could not in reality be a trial in due course of law.

While all of these contentions will be addressed in this judgment, the first limb of the requirements elaborated in O.84 for extending time is, in the opinion of this Court, clearly met.

As regards the second limb, the Court takes the view that it was reasonable for the applicant to wait and see if additional evidence would be furnished in this case, the service of which would manifest the respondent's intention to proceed with a retrial. The applicant argues, I believe correctly, that against a background where the trial judge himself had expressed doubts as to whether there would ever be a retrial, the mere fixing of dates in the usual administrative process of the Central Criminal Court, did not of itself necessarily imply that a trial would actually follow once the Director had fully considered the implications of what had occurred in this case.

The prosecution having withdrawn the evidence of its original pathologist, could not have proceeded with a retrial without serving as additional evidence a report from a new pathologist. I think the applicant is entitled to rely on the proposition that, until such time as that was done, he was entitled to anticipate that, instead of the matter proceeding to a retrial, a *nolle prosequi* might well have been entered. It is argued on behalf of the applicant that the situation only crystallised with the formal service of the notice of additional evidence containing the report of Professor Sheppard on the 28th October, 2014. The application for leave to seek judicial review was brought four weeks after that date. Had the proceedings been commenced prior to that time, simply on the basis of the unfairness to the applicant in discharging the jury, relief might have been refused on discretionary grounds on the basis that the application was premature or that a retrial might never in fact take place. As it transpired, a period in excess of eleven months elapsed from the date of collapse of the first trial to the service of the notice of additional evidence and no explanation was provided by the respondent in respect of this delay, a delay which caused the trial date of the 12th January, 2015 to be vacated.

The clock begins to run under O.84 from "the date when grounds for the application first arose". It is impossible for an applicant to know what grounds may exist until such time as he has sight of the evidence which it is proposed to lead against him. In this case, therefore, the date of either a return for trial or the date of service of an indictment have no relevance whatsoever. This is a retrial situation where the service of the additional evidence of Professor Sheppard confirms not only that the prosecution intend to proceed with such retrial but also from which the complexities and difficulties of any retrial now stand starkly revealed.

While such an application should have been made in the context of the leave application – in which context the Court would again reiterate that practitioners must address this issue with appropriate seriousness and at the appropriate time – the Court will extend the time for bringing this particular challenge having regard to the unique, and one might say compelling, circumstances of this case.

DISCUSSION

One may commence any discussion and consideration of the matters arising in this case by stating the somewhat obvious fact that trials may collapse or result in jury disagreement for all sorts of reasons. In fairness to the applicant, and as already noted, no case has been argued that the mere holding of a second trial is, *per se*, oppressive or a circumstance that demands or even justifies seeking prohibition. Thus in *McNulty v. DPP* [2009] 3 I.R. 572, Hardiman J. stated (at p.581):-

> *"Once the Defendant has been returned for trial, the Circuit Criminal Court (to which he was returned) remains seized in the matter until the trial ends in either conviction or acquittal or the moving party, the respondent, enters a nolle prosequi.*
>
> *The trial process may involve two or more hearings for a number of reasons. The jury may disagree, as happened in this case, and happens not infrequently. Or the first jury may be discharged for one reason or another. In either event the prosecution may bring the case on again for trial before a separate jury unless the defendant can show that such a step would be oppressive.*
>
> *Where there is a second trial, neither side is bound to approach the case in the same way that they approach the first trial. New witnesses may be called, or witnesses called on the first occasion may be omitted. Almost every trial, especially if it proceeds to the point where the Defendant is given in charge to the jury, will develop in a way which could not be wholly predicted before it started. Each side will have learned a good deal more about the other side's case. A witness who looked very impressive on paper may appear to some disadvantage in giving oral evidence, cross examination may put an entirely different complexion on certain evidence, and legal argument, where there is any, may reveal weaknesses in the case of either side in the way they address certain topics, which had not previously occurred. It is perfectly legitimate for either the prosecution or the defence to adapt these discoveries by looking again at how it will present its own case. Where there is a second trial, almost inevitably, each side will know more about the other side's case than it did when the first trial started.*
>
> *I do not consider that it is in any way oppressive of the other side for a party or his advocates to deploy more or different evidence on a second trial. It would be a wholly artificial exercise to say that because something had not occurred to the prosecution (or defence) for the first trial it could not benefit from the knowledge and information that the trial had given to them. It would be a wholly unrealistic form of gamesmanship to hold that because the prosecution had not thought it necessary to prove a particular fact at the first trial, they were stuck with that decision at a retrial."*

This Court agrees entirely with that summation, but notes the important qualification which Hardiman J. then proceeded to add to the foregoing when he stated:-

> *"This is not to say that there could not be circumstances where it would be oppressive of a party to permit the other to change front in a particular way as between the two trials. But that is a matter for the judge presiding at the second trial and not for judicial review."*

Arising from the foregoing, the Court feels free to state unequivocally that any proposed retrial falls or would fall well short of the "abuse of process" test relied upon by the applicants in this case. This was not a trial the collapse of which was "engineered" by the prosecution in order to reassemble its troops and put forward a stronger case the second time round. Indeed, it is hard to imagine the degree of shock which must have been felt in the offices of the respondent when Professor Cassidy's communication was received, revealing as it did a very significant breakdown in normal practice in the Office of the State Pathologist. It must have been a matter of significant concern to the respondent to learn that an office instruction to the effect that all homicide cases undertaken on behalf of the State be peer reviewed, was not complied with in this particular instance. This Court is not aware of any other murder trial in this jurisdiction collapsing for the sort of reason which obtained in this particular case. It clearly betokened significant communication difficulties in the Office of the State Pathologist of such a degree that led Professor Cassidy to make the dramatic intervention which

she did in this case.

However, the Court, on the question before it, has only one question in reality to address: would it be oppressive on the applicant to permit a further trial to take place having regard to what occurred in the original trial?

The Court must, of course, address and answer this question, not by reference to any merit based assessment of the evidence, but by reference to the test laid down in *The State (O'Callaghan) v. O'hUadhaigh* [1977] I.R. 42. In that case, a ruling had been made by the Central Criminal Court whereby in effect the prosecution were not permitted to amend the indictment by the addition of numerous charges in addition to the single count placed on the original indictment. Accordingly, a *nolle prosequi* was entered by the Director with a view to commencing a fresh prosecution. In making absolute the conditional order of prohibition, Finlay P. (as he then was) stated as follows (at p.52):-

> *"If the contention of the respondent in this case is correct, then it means that in any criminal trial the Director, on meeting a situation in which a ruling or proposed ruling by the trial judge on a matter within his discretion at the trial is unsatisfactory, from the point of view of the prosecution, can deal with that problem by entering a nolle prosequi and so avoid the consequences of technical matters that may have arisen in the course of the proceedings up to that time by instituting an entirely fresh prosecution freed from, or cured of, the difficulties which have arisen and which are likely to favour the accused."*

While the applicant submits that a retrial has, in effect, been "engineered" by the respondent so as to overcome the adverse development in relation to the pathology evidence, the Court believes that this is a misnomer for what occurred. The Court accepts however the validity of the applicant's remaining contention that no other party, confronted with such a development in terms of their case, has the opportunity of collapsing a trial with a view to mending their hand at a new trial. An accused person, on suffering a similar development in his case cannot, on that basis alone, ask the court to stop the trial and proceed afresh on another occasion. To allow the prosecution to adopt such a course in this case would undoubtedly create an imbalance between the rights of the powers of the prosecution and those of the accused, a matter adverted to by Finlay P. in *O'Callaghan's* case in the following terms:-

> *"In this way the prosecutor would have the entire of his remand awaiting trial set at nought and he would have to start afresh to face the criminal prosecution in which the Prosecution, by adopting different procedures, could avoid the consequences of the learned trial judge's view of the law. No such right exists in the accused: if the trial judge makes decisions adverse to the interests of the accused, the latter cannot obtain relief from them otherwise than by appeal from the Central Criminal Court, or by appeal or review in the case of an inferior court.*
>
> *It seems to me that so to interpret the provisions of Section 12 of the Act of 1924 as to create such an extraordinary imbalance between the rights and powers of the Prosecution and those of the accused respectively, and to give the Director such a relative independence from the decision of the Court in any trial, would be to concur in a proposition of law which signally failed to import fairness and fair procedure."*

In this regard, it is pointed out on behalf of the applicant, that the circumstances of this case are to be distinguished from those which pertained in *McNulty v. DPP*. In that case the prosecution sought to take advantage of the fact that there had been a jury disagreement to mend their hand by serving additional evidence for the purpose of the retrial. The Supreme Court, as we have seen, held that there was nothing in this course of conduct which gave the applicant the right to have the retrial prohibited. In this case, however, the very reason for which the jury was discharged was to provide the prosecution with an opportunity to mend its hand, perhaps even fully remake it, in relation to the pathology evidence.

In considering the question of oppression, the Court must take all the circumstances into account, and it seems to this Court that an "object or effect" test is the appropriate test to apply. If the object is to manipulate the trial process in such a way as to secure an unfair advantage for the prosecution, then the Court should intervene to prevent that happening. Likewise, if the unintended effect of a particular event at trial is such as to create a genuine oppression, then the Court should also be at liberty to intervene appropriately. By "genuine oppression", the Court would mean a retrial being sought in circumstances where a real unfairness would result to an accused person.

In this case the applicant's trial was nearly over when the prosecution's pathology evidence came asunder. The argument that Professor Cassidy's letter was not "evidence" is a very poor point to make in trying to resist the applicant's claim in this case. The prosecution, the defence and the trial judge were all aware of the contents of this letter which was written and sent with what can only be described as the obvious intention of undermining Dr. Jaber's evidence already given to the court. While another trial judge might there and then have directed the jury to enter a "not guilty" verdict, this Court would not fault the trial Judge for adopting the course which he did adopt, in the hope, as he put it himself, that the DPP, on considering the entire matter, might elect not to proceed further with the prosecution.

If there were to be a further trial in this case, the Court cannot imagine how the difficulties surrounding the pathology evidence might be addressed, yet alone resolved. Would a retrial have to investigate and refer back to not merely the evidence adduced by Dr. Jaber at trial, but would it also have to adjudicate on interpersonal staff issues within the Office of the State Pathologist at that time? Just how many pathologists and witnesses might be required to address and rectify matters which had been so spectacularly derailed in the course of the original trial?

In the meantime, the applicant would remain at peril of ultimate conviction after what inevitably would be a protracted process in a situation without any precedent of which the Court was appraised. In addition, such a retrial would be likely to place the trial judge in the invidious position where directions and rulings could not untangle the web of confusion and contradiction now present in the pathology evidence.

This could hardly be a trial in due course of law and accordingly the Court will grant the order of prohibition sought by the applicant.