Neutral Citation Number: [2008] IEHC 378

THE HIGH COURT

2006 858 JR

BETWEEN

L. Mc G.

APPLICANT

AND
HER HONOUR JUDGE YVONNE MURPHY
JUDGE OF THE CIRCUIT COURT AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND
P.C.

NOTICE PARTY

Judgment delivered by Mr. Justice Hanna on the 9th day of December 2008

1. The applicant in this case was a victim of sexual assault perpetrated upon her by the notice party many years ago. The notice party stood trial on the 27th January, 2003. He faced seven charges. Five of those charges related to indecent assault contrary to common law provided in s. 6 of the Criminal Law Amendment Act 1935. The notice party faced two further charges of incest contrary to s. 1 of the Punishment of Incest Act 1908, as amended by s. 12 of the Criminal Law Amendment Act 1935, s. 12 of the Criminal Justice Act 1993 and s. 5 of the Criminal Law (Incest Proceedings) Act 1995.

2. Thus, the notice party faced five counts alleging indecent assault and two alleging incest. The charges involving incest involved allegations of penetrative sexual intercourse. He pleaded guilty to one indecent assault count and was found guilty by the jury on one other such charge. In sentencing the first named respondent, the learned trial judge observed that the guilty finding was in respect of an omnibus charge which seemed to cover the period material to the notice party's guilty plea. The jury disagreed on three charges of indecent assault in respect of which the State have entered a *nolle prosequi*.

3. The jury acquitted the notice party on the incest charges. The notice party received a suspended sentence of twelve months, suspended for a period of two years on his own bond to keep the peace in the sum of €200. In addition, the notice party's name was placed on the Sex Offenders Register.

4. Following upon the sentence, the prosecuting counsel drew the learned trial judge's attention to the provisions of s. 3(1) of the Criminal Law (Incest Proceedings) Act 1995, which provides for anonymity both for the alleged perpetrator of an act of incest and the victim in terms of publication. I will set out the section hereafter in detail.

5. The learned trial judge, it is asserted by the applicant, then proceeded to make an order prohibiting the reporting of the case by the media.

6. In one of a couple of peculiar twists which this case took after it opened before me, it transpired that there were two different forms of order, a fact which only came to light during the course of the hearing. Indeed, when the matter first opened before me, Mr. Fitzgerald S.C., on behalf of the applicant, was relying essentially on the transcript of the proceedings which undoubtedly did refer to a prohibition on reporting the names of the parties as provided for in the Incest Act. Shortly prior to the case beginning, a form of order was produced which made no reference to any restriction on the reporting. This gave rise to an adjournment since the order, on its face, as then constituted, was not amenable to the relief sought by the applicant. Subsequently, another order was produced which does refer to a prohibition on reporting of the case by the media. How two orders came into being has never been made clear to me. However, for the sake of clarity all parties settled on the order certified on the 24th October, 2003, as being as near to the mark as we were likely to get even though the actual title of the order bears the wrong date.

7. The other twist, I should observe, arose from a letter that was sent prior to the last occasion on which we met dated 22nd July, 2008, in which the Chief Prosecution Solicitor writing to the solicitors on behalf of the applicant stated by letter dated 22nd July, 2008, sent at 14.25 per fax as follows:-

> "Dear Sirs,
>
> I am instructed to inform you that in light of what has now transpired in this case the Director will not be objecting to the reliefs sought when the case resumes on Thursday."

8. Hot foot from the same author came a letter bearing time line same date 17.20 the following:-

> "Dear Sirs,
>
> I refer to my fax this afternoon informing you that the Director will not be objecting to the reliefs sought when this case comes on for hearing on Thursday and I have to inform you that my instructions have changed and that the Director intends to continue to oppose your application. I apologise for the fact that you were misled by my first fax and for any inconvenience that this may cause you."

9. This placed Ms. McDonagh, BL acting on behalf of the respondents in something of a pickle. However, it was clear the first letter had been written by an appropriately instructed solicitor on behalf of the respondents withdrawing any opposition to the applicant's case. Absent the consent of the applicant, I took the view that unless there had been some unfortunate oversight or ghastly mistake or some unauthorised person had sent out an erroneous fax that the respondent's solicitor could not resile from the first letter. No such reasons were offered and the respondent was therefore bound by it.

10. In a sense this did not greatly affect matters as the notice party maintained his opposition to the reliefs sought and adopted the respondent's arguments as part of his case. Further, although technically entitled to pack up and leave, Ms. McDonagh accepted my invitation to remain in the capacity of *amicus curiae* and to offer such assistance as she could to the court.

11. At this juncture, it is important to acknowledge the role of the applicant in this. She has been the victim of a sexual assault perpetrated upon her by the notice party, her older brother. I did not receive viva voce evidence from her during the course of the hearing. However, it is evident from reading the papers, that she was grievously affected by the crime visited upon her.

12. After the verdict, and I do not mean this in any pejorative sense, the plaintiff engaged in a campaign involving writing to various parties, including the Minister for Justice and the Director of Public Prosecutions. Her aim was to lift the anonymity which attached both to herself and to the notice party. The intensity of her feelings on this issue is readily apparent, from reading the correspondence.

13. In time, her efforts led her to the One in Four organisation which concerns itself, *inter alia*, with victims of inter-familial sexual abuse. In 2005, they corresponded with State authorities on her behalf. Subsequently, in late 2005, she instructed solicitors, Messrs Pearse Mehigan and Co. To this point, the applicant had neither copy transcript nor copy order reflecting what had happened in court in 2003 following upon the sentence at which, of course, she had no personal professional representative. Copious further correspondence and applications to the learned trial judge followed. The primary objective was to effect the uplifting of the perceived order prohibiting publication of the parties' identities. Ultimately, the first named respondent refused to make any further order on 5th April, 2006. A purported copy of the 2003 order (the first in time and that which all parties agreed did not reflect the true will of the Court) was first received by the applicant's solicitors on the 10th May, 2006.

14. An application was made for leave to bring the judicial review proceedings on Monday 24th July, 2006. The applicant sought an order of *certiorari* by way of an application for judicial review of the first named respondent's above mentioned order made on the 19th February, 2003, that there be no reporting by the media of the names of the accused or the alleged injured party following the conclusion of the criminal proceedings. In addition, an order extending the time within which to make such an application was sought. (This was a live issue at the hearing of this matter). The notice party was joined at that application and thereafter became actively involved in the proceedings.

15. On behalf of the applicant it was urged that s. 3(1) of the Criminal Law (Incest Proceedings) Act 1995, (hereinafter referred to as "the Act of 1995") did not give rise to the blanket ban on publication which was urged upon the learned trial judge by prosecution counsel. The notice party had, after all, pleaded guilty to one count of indecent assault and had been found guilty on another. The case advanced on behalf of the applicant, seemed to be analogous to the matters which were dealt with in the High Court in the judgment of Kearns J. in *Independent Star v. O'Connor and Others* [2002] 4 I.R. 166, which involved an interpretation of s. 7 of the Criminal Law (Rape) Act 1981, as amended by the Criminal Law (Rape) (Amendment) Act 1990, with regard to the identification of the complainant in the sexual offence case as well as the identification of a convicted person.

16. On behalf of the respondents, it had been argued (prior to the fax problem earlier referred to) that s. 3(1) of the Act of 1995, admitted of no exceptions. Once the charge of incest was laid, all matters of publication were illegal. The learned trial judge's order was, at best, superfluous to requirements. Section 3(1) did amount to a blanket ban on publication.

17. On behalf of the notice party, support was offered for the respondent's arguments. In addition, it was urged that the notice party had been sentenced and the learned trial judge, in sentencing the notice party must have taken into account in measuring the sentence, of the anonymity provisions of the Act of 1995, and must have factored those provisions into the sentence which the learned trial judge handed down upon the notice party. In addition it was contended that it would do a profound injustice to the notice party were the matter to be resurrected now given the fact that many years had elapsed since the unhappy events and the notice party had "moved on" with his life and had married and had children.

Decision

18. Section 3 of the Criminal Law (Incest Proceedings) Act 1995, provides as follows:-

> "3(1) After a person is charged with an offence under the Act of 1908, no matter likely to lead members of the public to identify that person as the person charged or to identify any other person as a person in relation to whom the offence is alleged to have been committed shall be published in a written publication available to the public or broadcast.
>
> (2) If any matter is published or broadcast in contravention of *subsection (1)* of this section, the following persons shall be guilty of an offence namely:
>
> > (a) in the case of matter published in a newspaper or periodical publication, the proprietor, the editor and the publisher thereof,
> >
> > (b) in the case of matter published in any other written publication, the publisher thereof, and
> >
> > (c) in the case of matter broadcast, any person who transmits or provides the programme in which the broadcast is made and any person who performs functions in relation to the programme corresponding to those of the editor of a newspaper.
>
> (3) Nothing in this section shall be construed as –
>
> > (a) prohibiting the publication or broadcasting of matter consisting only of a report of legal proceedings other than proceedings at, or intended to lead to, or an appeal arising out of, a trial of a person for an offence under the Act of 1908, or
> >
> > (b) affecting any prohibition or restriction imposed by virtue of any other enactment upon the publication or broadcasting of any matter.
>
> (4) In the section –
>
> > 'broadcast' means broadcast by wireless telegraphy of sound or visual images intended for general reception, and cognate words shall be construed accordingly;
> >
> > 'written publication' includes a film, or a recording (whether of sound or images or both) in permanent form but does not include an indictment or other document prepared for use in particular legal proceedings"

19. Severe penalties may be imposed upon any party acting in breach of section 3. Upon indictment, an offending party could face a

fine of £10,000 or imprisonment for a term not exceeding three years or both. On summary conviction a guilty party would face imprisonment of up to twelve months and/or be fined £1,500. Section 4(2) *inter alia* pierces the veil of incorporation to the extent that a manager, secretary or other officeholder of a body corporate could find themselves facing personal exposure to the aforementioned penalties where it can be shown that they have consented to or connived at the publication of the offensive material. Thus, it is clear that the Oireachtas viewed the provisions of s. 3 as being of the utmost seriousness.

20. In my view, s. 3(1) of the Act of 1995, is declaratory of the will of the Oireachtas to the effect that once the charge of incest is made, nothing likely to identify the actors involved in such alleged offence shall be published, either in written form or in broadcast form. It admits of no exceptions. Even conviction of a guilty party does not alter the situation. This contrasts with the position under s. 8(1)(b) of the Criminal Law (Rape) Act 1981, which provides as follows:-

> "8(1) After a person is charged with a rape offence no matter likely to lead members of the public to identify him as the person against whom the charge is made shall be published in a written publication available to the public or be broadcast except –
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> (a) as authorised by a direction given in pursuance of this section or by virtue of section 7 (8) (a) as applied by subsection (6) of this section, or
>
> (b) after he has been convicted of the offence."

21. In *Independent Star Ltd. v. O'Connor and Others*, [2002] 1 I.R. 166, the first named respondent who was then a judge of the Circuit Court, purported to prohibit the publication of the identity of the perpetrator of several acts of sexual assault, notwithstanding the fact that the complainant wished to have the convict's name published. The learned trial judge refused to this on the grounds that it would not be in the complainant's best interest. Kearns J. stated at p. 171 as follows:-

> "On behalf of the applicant, it was submitted that any protection which an accused enjoyed under s. 8 of the Criminal Law (Rape) Acts disappeared on conviction, as was made clear by s. 8(1)(b). From that moment onwards, counsel submitted, the legal landscape was governed by s. 8, so that the trial judge was not called upon, nor had he any function in, making orders thereafter. If in publishing a report of the proceedings, a newspaper thereafter published anything which might tend to identify the complainant, the statute contained its own clear mechanisms for dealing with that situation."

22. Addressing this argument at p. 175, Kearns J. stated:-

> "Any rights which the accused may have are dealt with by s. 8 which is quite explicit in removing the protection of his identity following a conviction. It goes without saying that careless or irresponsible reporting of the identity of the accused might, in certain circumstances, lead to identification of the complainant, but this is a matter regulated by the Act which provides, as already indicated, that any such publication shall constitute an offence and provides penalties in respect thereof. In short, the sanction operates by law and not as a result of any direction to be given by the court."

23. Of course, under the Act of 1995, nothing changes upon conviction. No publication ban is lifted. It is the act of charging alone which triggers the publication ban. There is no temporal limit upon it. The ban on publication is not regulated by order of the court, but rather operation of law and any person or organisation which seeks to publish that which is prohibited by s. 3(1) will face the penalties imposed by section 4. Notwithstanding any sympathy one may have for the applicant in this case and the inner turmoil I am sure she suffers. in my opinion there is clear meaning and purport to s. 3(1). To interpret it otherwise than I have done would be to fly in the face of the legislation and to amount, in effect, to an attempt to amend the Act of 1995. That is the function of the Oireachtas and is not an area into which the Courts can stray.

24. As I have already observed, the order sought to be impugned recites the judge's order to the following effect:-

> "And the Court Doth Further Order that there be No Reporting of this Case by the Media."

25. The parties have, in effect, agreed that this most closely represents what occurred and insofar as any order is to be impugned, that is it. In fairness to the learned trial judge, a perusal of the transcript reveals that the following words were spoken by Her Honour Judge Murphy when the Act of 1995 was brought to her attention:-

> "I see the members of the press here. I am sure they will understand that it comes under the provisions of the Incest Act. So neither party's names should be named in any report of the proceedings."

26. This does not, to my mind, go to the lengths enunciated in the perfected order. To my mind, the learned trial judge did no more than remind the ladies and gentlemen of the press there present of their obligations under the Act. She did not appear to prohibit publication as is reflected in the order. Even though I do not wish to go behind what the parties have agreed as constituting the order, I should observe that what the learned trial judge appears to have said was entirely appropriate and in accordance with law.

27. There was, in fact, no need for any recitation of any restriction or prohibition on the reporting of the case. This was already governed by the law and any observations to that affect in the order are superfluous and unnecessary. Were I to quash the order of the learned trial judge, the position of the parties with regard to protection of their respective identities would not change one jot. No useful purpose therefore, would be served by quashing the order and I decline to do so. (See *Barry v. Fitzpatrick* [1996] 1 I.L.R.M. 512).

28. Insofar as the applicant must remain anonymous by operation of s. 3(1) of the Act of 1995, so too must the notice party. Again, the Act permits of no exception. As regards the argument that the provisions of the Act were factored in to the sentence imposed by the court, that is not immediately apparent from reading the transcripts. The Act of 1995 was raised after the penalty had been imposed. Since the learned trial judge was still deliberating, it could, I suppose, be argued that she could have revisited the question of penalty. However, the fact that so many years have elapsed since the undoubted wrong done to the applicant and the fact that the notice party appears to have got his life on track (all relevant matters having been taken into account by the sentencing judge) such matters would reinforce ones reluctance to interfere with the learned trial judge's order.

29. For the sake of completeness, I should make some observations on the issue of delay. The onus rests upon the applicant to establish that there is good reason to extend the time for bringing judicial review proceedings as provided for in O. 84, r. 21(1) of the Rules of the Superior Courts. It seems to me that the landmark dates in this case are as follows. Firstly, on the 19th February, 2003, the notice party was sentenced. Within a matter of a fortnight the applicant commenced a two year long course of correspondence

with, *inter alia*, the Minister for Justice concerning her perceived plight. In May 2003, the applicant was advised to seek legal advice. She did not do so at that point. The correspondence concluded in March 2005, and the following month there was contact between the applicant and the organisation known as "One in Four". The applicant, on the 7th September, 2005, then made contact with her solicitors. Mr. Peter Boylan, solicitor, tells us that the applicant did not have any court documents and he promptly wrote to the office of the Circuit Criminal Court in relation to the transcript of the trial. The attempts to obtain the relevant portions of the transcript of the trial ultimately succeeded. The matter then had to be listed on a number of occasions before the learned trial judge and nothing came of that and the learned trial judge declined to make any alteration in her order. As has already been observed, leave was granted on 24th July, 2006.

30. The applicant in this case cannot be accused of sitting still and being inactive in her own cause which she perceives to be just and good. She has been active on three different fronts, in writing as a lay person, in contacting the One in Four organisation and invoking the good offices of Messrs Mehigan and Company. Efforts to alter the 2003 Order continued until April, 2006 at which point the learned trial judge, having previously entertained a number of applications and having heard legal arguments from the applicant, the prosecution and the notice party made an order in effect declining to change it. In May, 2006 a copy, albeit incomplete, of the Order came into the possession of the applicant's lawyers. It may fairly be argued that, only at this point, the final form of the Order became crystallised.

31. Within approximately two and a half months from this point in time the application for leave was made. Given the nature of the case and the persistent and trojan efforts by and on behalf of the applicant up to that point to confront and resolve the perceived injustice she had suffered, in all the circumstances it would be unfair and unjust to penalise her on time. Further, I am not persuaded that the additional years have given rise to any prejudice whatsoever to any of the other parties involved.

32. Were I of the view that she was entitled to the relief she sought I would have extended the time to bring this application. I am not of that view and regretfully I must refuse it.