Neutral Citation: [2015] IEHC 117

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 71 JR]

BETWEEN

PETER FARRELLY

APPLICANT

AND

DISTRICT JUDGE ANNE WATKIN

RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

JUDGMENT of Kearns P. delivered on the 3rd day of March, 2015

By order of the High Court (Peart J.) dated the 3rd February, 2014, the applicant was given leave to apply by way of judicial review for an order of *certiorari* to quash the District Court order of conviction and sentence made by the first named respondent on the 5th December, 2013 at Court 17, Dublin Metropolitan District Court in respect of the following offence with which the applicant had been charged namely, an offence of sexual assault contrary to s.2 of the Criminal Law (Rape) (Amendment) Act 1990 (as amended).

In essence, the allegation in this case was that the applicant assaulted the complainant while both were present on the premises of The Palace Night Club, Camden Street, Dublin on the 1st July, 2012. The complainant at the relevant time had been present with her brother in the night club, together with some other friends. The applicant was unknown to her. Her complaint was that the applicant, at about 1.20 am came alongside where she was standing and pressed his hand against her genital area, thereby causing her considerable distress. The incident took place very quickly and the applicant is alleged to have then headed for the gents cloakroom. He was followed by the complainant who endeavoured to remonstrate with him. It was alleged that the applicant pushed her away causing her to fall to the ground. The complainant's brother joined into the incident by following the applicant into the gents' toilet where a significant physical altercation ensued resulting in injuries to the applicant, including head injuries.

The case was heard on the 5th December, 2013 before the respondent at Court 17 of the Dublin Metropolitan District Court. The prosecuting garda was Garda Mark Costello of Kevin Street Garda Station. The prosecution was represented by counsel. The applicant in turn was represented by counsel instructed by Messrs. Murphy Coady & Co., solicitors.

The following matters are deposed to in the affidavit of the applicant's solicitor in relation to the evidence given at the hearing:-

> *"(a) CCTV from the Palace Night Club, Camden Street, was shown to the Court at the outset. This showed the injured party and others dancing in a circle and having drinks. The Court concluded that it could not see any assault, merely that something happened to cause the injured party to react and follow the defendant in the direction of the male toilets.*
>
> *(b) The complainant outlined the alleged assault (that the applicant while passing by, placed his hand on top of her dress and pressed or squeezed her private parts) and stated that she then followed the applicant into the toilets. She further stated her brother, who had not seen any incident, followed her into the toilets and assaulted the applicant.*
>
> *(c) A friend of the injured party, Ms. Dillon also gave evidence but stated that whilst she had been in the circle of friends present at the scene, she did not see the incident and could not be of any assistance.*
>
> *(d) Garda Mark Costello gave evidence of arriving at the scene shortly after the alleged incident to respond to a call in relation to the assault that had taken place on the applicant. Garda Costello also spoke with the injured party who alleged that she had been assaulted by the applicant.*

7. I say that in summary the case put forward by the defence was as follows:

> *a) The applicant gave evidence that he remembered walking to the toilet and thereafter he only had snippets of recall in relation to the night.*
>
> *b) The applicant stated that he could remember parts of being assaulted himself, namely being on the ground in the toilets and being heavily beaten.*
>
> *c) The applicant gave evidence that he was brought to hospital and had received a significant injury and bang to his head. He stated that as a result of which he could not fully remember the night.*
>
> *d) The applicant denied that the CCTV showed any incident, or the incident as alleged by the injured party. He stated that he had never been in trouble before and would not have done such a thing. It was contended that the complainant gave evidence that was at odds with the CCTV and indeed at odds with the statement previously given by her to the gardaí.*

8. I say that in convicting, the respondent held as follows, in summary:

> *a) The applicant was telling lies and she did not believe a single word that the applicant was saying. She stated that it was quite clear that something did happen. She further stated that if the incident had been concocted by the injured party and her friends then they would have done a better job in ensuring it was a better story.*
>
> *b) The respondent agreed that there were inconsistencies but that this was only to be expected. She stated that the applicant did not recall what happened and said that he had been assaulted himself and had little or no memory.*
>
> *c) The respondent stated that the only part the applicant had difficulty remembering was from a 'selective period' and that he now 'conveniently says' he doesn't remember. The respondent stated that she 'didn't believe' this to be the case, that he 'remembers well' and that he was 'lying through his teeth'.*
>
> *d) The respondent went on to express concerns about such offences being committed by very dangerous people and raised an issue in relation to the applicant re-offending."*

The applicant gave evidence in his own defence, effectively stating that he had no memory of any alleged incident of assault on the complainant, possibly because he was assaulted.

I return to the affidavit of the applicant's solicitor for the recital of what then transpired:-

> *"10. I say that the respondent after convicting the applicant remarked that this was the kind of offence committed by very dangerous people and that she had huge concern in relation to the likelihood of re-offending. The respondent asked counsel on behalf of the applicant whether he now wished to admit the offence and say that he was only pretending that he didn't remember any incident and if he would now show remorse. The respondent told counsel to take instructions and that if the applicant was willing to adopt this position that it may ultimately influence the court in ordering a psychiatric assessment and probation report.*
>
> *11. I say that the respondent continued saying that this was a very serious case and that any person who does something like this was a dangerous person. She stated that most men do not sexually assault women and those that do often start small. She further stated that it is a serious, serious condition in most cases and that she would be concerned he would re-offend. I say that counsel stated that she would take instructions.*
>
> *12. I say that I stepped outside with counsel and spoke with the applicant. The applicant maintained his innocence. I say that approximately 45 minutes later the matter was re-called and the respondent stated that a jail sentence was very likely, that it was a very serious matter and that the applicant was lucky the matter had not been sent forward for trial in the Circuit Court.*
>
> *13. I say that, as per the discussion outside of court, counsel on behalf of the applicant asked the respondent to consider seeking a probation report and advanced the position that this may be of some assistance to the respondent in dealing with the matter in light of the fact that the applicant was a young man with no previous convictions. A probation report would also have addressed the issue of any potential risk of offending, in respect of which, it was submitted, the respondent had raised an unfounded concern.*
>
> *14. I say that the respondent stated 'my mind does not need any assistance'. I say that it was only after this statement that counsel on behalf of the applicant got the opportunity to address the respondent to outline the applicant's personal circumstances and make a plea in mitigation. In doing so, the following matters were put forward, in summary:*
>
> > *a) The applicant was a 26 year old gentleman who was the manager of a State run financial institution. That he held a very responsible job and was well regarded in his employment.*
> >
> > *b) The applicant had no previous convictions and had never been in any kind of trouble whatsoever before.*
> >
> > *c) The applicant had not come to the attention of the gardaí since this incident.*
> >
> > *d) The applicant was supported in court by his older sister and comes from a very well regarded and upstanding family in County Meath.*
>
> *15. I say that the respondent indicated that a sexual assault of any kind warranted a jail sentence. The respondent imposed a 4 month custodial sentence, stating that she believed it should be 6 months but ultimately imposed 4. The respondent refused to consider suspending any part thereof."*

At para. 19 of the affidavit, the essential ground relied upon in this application is detailed as follows:-

> *"19. I say and believe that the respondent ought not to have indicated that a sexual assault of any kind warrants a jail sentence. I say and believe that it appears from those remarks that justice was not seen to be done in that the respondent failed to give consideration to the personal circumstances of the applicant and appeared to be applying an inflexible policy and to fail to take into account relevant considerations."*

It is common case that the respondent, prior to the imposition of sentence, did not accede to the defendant's request for a probation report. It is also clear from the transcript that the respondent did not give - nor could realistically be understood or taken to have given - any consideration to the possibility of the imposition of a community service order as provided for by the Criminal Justice (Community Service) Act 1983 (as amended), notwithstanding that the applicant had no previous convictions.

The statement of opposition filed herein on the 2nd October, 2014 asserts that the applicant is not entitled to relief by way of judicial review because any "grievance" that he may have in relation to the outcome of the District Court proceedings or the conduct of those proceedings is most appropriately and effectively addressed by way of an appeal to the Circuit Court.

It is further asserted that the respondent approached the question of sentence in a careful manner and that the sentence ultimately imposed was significantly lower than the maximum sentence which was available to the court. It is further asserted that the applicant and his legal representatives were afforded every opportunity, including an adjournment during the hearing itself, to make any submissions they considered appropriate in relation to sentence.

It is also asserted that the terms of the Criminal Justice (Community Service) (Amendment) Act 2011 were not brought to the respondent's attention by either side.

In the alternative, it is asserted that any errors made by the respondent were errors within jurisdiction.

DISCUSSION
While counsel on behalf of the applicant has based his challenge to this conviction on pre-determination and the adoption of a "fixed policy" in relation to sexual offences by the respondent judge, the Court was also referred to authorities which indicate that intervention by way of judicial review may also be warranted where, in the opinion of the Court, the conduct of the hearing is unfair to such a degree as to divest the trial from the requirements of constitutional justice.

Historically, it has been a source of considerable annoyance to District Court Judges, and in my view rightly so, to read in judicial review court papers, or worse, in national newspapers, what they regard as wildly distorted accounts by applicants or their solicitors of the judge's conduct of a particular case or cases.

However, in this case it was the Director who sought and obtained for the purpose of this hearing a transcript of the entire proceedings in the District Court. It was the view of the Director that reference to the Digital Audio Recording (DAR) would prove the "most effective" way to resolve factual issues as to what had transpired in court and would constitute the most efficient use of court time.

Having read the transcript the Court finds, regrettably, that the contentions advanced on behalf of the applicant are borne out to a significant degree. In fairness to the respondent, the lack of clarity in the CCTV and in other parts of the prosecution evidence was such as to fully justify attempts by her to clarify exactly what had happened. Unfortunately, the frequency of the respondent's interventions during both witness evidence and the questioning by counsel on both sides went, however unintentionally, well beyond the mere seeking of clarification. Despite significant discrepancies between the complainant's statement, her evidence and what was visible on the CCTV, remarks indicating the respondent's belief in the credibility of the complainant were being expressed by the respondent before the conclusion of the prosecution case (see p.29). When the complainant's friend who gave evidence said "something different" from the complainant, the respondent said (at p 30) that she would "be more worried about exact statements", and that "If two people concocted a story they would concoct the story properly". When the applicant gave his evidence, he in turn was interrupted throughout by questions in the nature of cross-examination by the respondent (see pp 30 – 39).

Perhaps of greater concern is the apparent belief of the respondent that the applicant might re-offend notwithstanding that the applicant had no previous offences. On being told that the applicant "was certainly not a person who attacks females" the following exchange occurred between the Judge and counsel for the defendant:-

> "Judge: *How do we know? How do we know? That's my point. A person in a nightclub who is very drunk, very, very drunk, can do something which is …*
>
> Counsel: *Well, there was no evidence of that before you, Judge.*
>
> Judge: *I'm saying – I'm assessing what he did and this is the kind of offence which can be committed by very seriously dangerous people, on the one hand, or by people who very stupidly and very drunkenly are acting stupidly and acting the idiot. I have no way of knowing, I've had people come in and plead guilty to doing stupid things, not usually that bad, they don't usually. Most people, no matter how drunk, don't behave like that but maybe some immature person could behave like that and its not unknown that they do and it's really stupidity and nonsense and drunkenness and they know it and they take responsibility for it. I've huge concerns about a man who would, for no reason, grab a woman in that fashion and as it was described, he didn't just touch her, he grabbed her, as was described clearly by the victim, that is a serious thing to do. I have serious concerns about a person like that and their likelihood of re-offending and that's what I have to be concerned with in sentencing. If I thought it was a drunken stupid behaviour on the night that he felt sorry for and understood and apologised for it would be different but in circumstances where he blatantly sits here and pretends he recalls nothing of it, in circumstances where he is not showing any remorse for his actions, is claiming he wouldn't do it, I have to have serious concerns about how serious it is and whether he should go to jail for a serious length of time.*
>
> *I believe in the circumstances it's going to be very difficult to deal with it. In cases where people accept responsibility they're happy to have a psychiatric assessment. I'll allow you take instructions as to whether or not your client is interested in having a probation report and a psychiatric assessment but obviously that's not going to work without his cooperation. Alternatively he can hold his stance as he is, and he is quite entitled to, and appeal my decision but I will, in the interests of fairness to your client, allow you to take further instructions while I take the next case and I do take the view that a person who would do something like this and express no remorse might be a very dangerous person."*

At p. 47 the respondent stated:-

> *"I am very concerned that he would offend more serious legion (sic) I am concerned with that. I have nothing to say he wouldn't … therefore I'm going to allow you take instructions. Of course it's your client's right to take whatever course but you understand I am sentencing for a case that I consider to be very serious in circumstances where I have no reason to believe he's going to take action to make sure it doesn't happen again. That's the problem. And in the interests of fairness, and lest it be said I'm in any way suggesting he … I'm not suggesting he needs to do anything. … I am allowing you to talk to him, give him my finding as to what he wants to say. You understand?"*

Having adjourned the matter briefly, the case was taken up again and counsel for the defendant indicated that the court might be minded to order a probation report in relation to the matter. In response, the respondent indicated that she needed a reason.

At p.49 the judge stated:-

> *"I'm saying before I consider sentence, and it is a sentence where a jail sentence is very likely obviously in a case like this, very seriously likely, obviously factors such as remorse are hugely important and if your client has any to express I'd like to hear it but of course, given the stance he has taken, he may be proceeding to just appeal it and not accept it, t that's fine but I have given him that chance."*

At p.50 she stated:

> *"There's no benefit in the probation service dealing with a person who says I have nothing to deal with."*

In finally arriving at sentence, the judge stated (at p.52):-

> *"[The applicant] never came to any garda attention. He is 26. He is employed. There is nothing on his record to indicate a problem. The problem is there's always a first time for these things and this is serious. Mostly, it might not have been per se, but mostly serious by his failure to recognise it and do anything about it. That causes me, in this type of offence, huge type of concern. In fact in the normal case it's a lack of remorse and lack of doing anything about it but in this case I'd have a fear that it's even more serious if nothing's being done about it. Yes. I take the view that I don't like to send anyone to jail on a first conviction however when it involves assault of any kind, particularly a physical assault, and in this case a serious enough sexual assault, obviously a jail sentence is warranted but particularly in these circumstances. I believe in the circumstances its four months imprisonment. That's probably pretty low. I've taken on board in making it only four months that he is 26 years of age, that he has no previous … I actually think it should be six months but I'm just making it four months to give him all possible -benefit of all possible doubt in relation to the offence."*

DECISION

This Court finds it impossible to interpret the respondent's remarks as indicating anything other than a view that, because of her finding, any consideration of leniency, yet alone seeking a probation report or considering a community service order, could not arise in the absence of some sort of confession of post-conviction guilt by the applicant. At p.45 of the transcript, the respondent stated:-

> *"I believe he remembers very well what he did and he has lied through his teeth to get out of it. … Had he accepted responsibility and said he was drunk and out of line that would be one thing. In this case I believe … I don't even know how drunk he was. We can't even say it was drunkenness. He might be a person who attacks females. He might be a person with a major problem, I don't know, but I'm quite satisfied that he committed this offence."*

This Court does not accept contentions that that the respondent pre-determined this case or adopted a fixed policy which inevitably led to the imposition of a four month prison sentence. However, that does not equate with the requirement that a trial be conducted fairly and be seen as having been so conducted.

In this regard the relevant test is that formulated by the Supreme Court in *The State (Hegarty) v. Winters* [1956] I.R. 320 where at p.336 Maguire C.J. stated:-

> *"The action of the arbitrator in going upon the lands the subject-matter of the arbitration might, in the view of this Court, reasonably give rise in the mind of an unprejudiced onlooker to the suspicion that justice was not being done. The fundamental rule that it is necessary not alone that justice be done, but that it must seem to be done was broken and in our opinion the award cannot be allowed to stand."*

As Morris J. pointed out in *Dineen v. Delap* [1994] 2 I.R. 228, examples of the way this rule is being relied upon and reaffirmed are to be found in cases such as *The State (Collins) v. Ruane* [1984] I.R. 105 and *The State (Cole) v. The Labour Court* (Unreported, High Court, Barron J., 29th July, 1983).

In the circumstances I do not find it necessary to consider the other points relied upon by the applicant, because I am satisfied, regrettably, that the hearing of this particular case on this particular day could not be viewed by a reasonable onlooker as manifesting the qualities of constitutional justice appropriate to a criminal trial where the liberty of an individual was at stake.

I would therefore quash the conviction.

I will hear further submissions later in relation to the question as to whether or not this matter should be remitted for re-trial to the District Court.