THE COURT OF APPEAL

Mahon J.
Edwards J.
Hedigan J.

273/2016

Anthony Buck

Applicant

V

Director of Public Prosecutions

Respondent

JUDGMENT of the Court delivered on the 23rd day of February 2018 by Mr. Justice Hedigan

1. This is a motion brought on behalf of the respondent for the following orders:

> (i) an order dismissing the miscarriage of justice application brought by the applicant insofar as it is advanced on the grounds, first amended grounds and second grounds with addendum material filed by the applicant on 24th October 2016, 16th February 2017 and 1st October 2017 on the basis that they do not disclose any new or newly discovered fact within the meaning of s. 2 of the Criminal Procedure Act 1993 as set out in the section and in jurisprudence on the section and that the application insofar as it is advanced on those grounds all of which were known to the applicant and his legal team in December 2015 when this Court dealt with the first miscarriage of justice application is bound to fail and therefore constitutes an abuse of process;
>
> (ii) such further or other order as may appear just and convenient to the Court.

The background

2. The applicant was convicted in the Central Criminal Court following a trial before Quirke J. and a jury on 20th February 1998 of the murder of David Nugent on the evening of the 8th and the morning of the 9th July 1996 at Clonmel, Co. Tipperary and was sentenced to imprisonment for life. He was also convicted of robbery on the same occasion and a sentence of 12 years imprisonment was imposed in respect of that offence. His application at the time for leave to appeal was refused and he appealed to the Court of Criminal Appeal. This appeal was dismissed on 4th December 1999 but the court certified that the decision involved a point of law of exceptional public importance and that it was desirable and in the public interest that an appeal should be taken to the Supreme Court pursuant to the provisions of s. 29 of the Courts of Justice Act 1924. The point of law certified by the Court of Criminal Appeal was as follows:

> *"In circumstances where a member of An Garda Síochána arrests a person suspected of a serious crime (in the instant case murder) at a time and in circumstances where it is likely that there will be difficulties in getting a solicitor for the arrested person should such be requested, and;*
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> *where the arrested person is detained in a Garda Station, pursuant to the provisions of s. 4 of the Criminal Justice Act 1984 and does in fact request access to a solicitor and is questioned for a substantial period of time by relays of Gardaí in relation to the offence for which he was arrested before he has access to a solicitor;*
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> *whether the conduct of the Gardaí in so questioning the arrested person before he has access to a solicitor but after he has sought access constitutes a conscious and deliberate violation of the arrested person's constitutional right of access to a solicitor (not being a violation which has extraordinary excusing circumstances) rendering inadmissible in evidence any statement, admissions or confessions which may thereafter be made by the arrested person;*
>
> *notwithstanding that the arrested person may after the said questioning have a visit from a solicitor (while still in s. 4 detention) and make the statements, admissions or confessions after such visit from the solicitor."*

3. The Supreme Court delivered a reserved judgment on 17th April 2002 dismissing the applicant's appeal and answering the questions certified by the Court of Criminal Appeal in the negative.

4. Pursuant to s. 2 of the Criminal Procedure Act 1993, on 10th September 2014 the applicant applied to this Court contending that there were new or newly-discovered facts within the meaning of s. 2 of the said Act which showed that there had been a miscarriage of justice in respect of his convictions. That application was heard and dismissed by this Court on 11th December 2015. The applicant then brought an application to the Supreme Court to appeal against the decision of this Court of 11th December 2015 on the basis that the point raised in the application to this Court involved a matter of general public importance. In a determination dated 20th January 2017, the Supreme Court declined leave to the applicant to bring an appeal from the judgment of this Court in December 2015.

5. The applicant now brings a second miscarriage of justice application pursuant to s. 2 of the Criminal Procedure Act 1993 in which he seeks to introduce material which he asserts is admissible evidence of new or newly-discovered facts which, in his submission, show that there has been a miscarriage of justice in respect of his convictions. He initially brought the second application on 25th October 2016 setting out two grounds. An amended application including three grounds was filed on 16th February 2017 and on 11th October 2017 a second amended application was filed together with what is classified as "addendum material" and submissions. This application sets out 13 grounds on foot of which the application is brought.

The statutory framework

6. Section 2 of the Criminal Procedure Act 1993 provides as follows:

"2. (1) A person

(a) who has been convicted of an offence either –
(i) on indictment, or

(ii) after signing a plea of guilty and being sent forward for sentence under section 13 (2) (b) of the Criminal Procedure Act, 1967 , and

who, after appeal to the Court including an application for leave to appeal, and any subsequent re-trial, stands convicted of an offence to which this paragraph applies, and

(b) who alleges that a new or newly-discovered fact shows that there has been a miscarriage of justice in relation to the conviction or that the sentence imposed is excessive,

may, if no further proceedings are pending in relation to the appeal, apply to the Court for an order quashing the conviction or reviewing the sentence.

(2) An application under subsection (1) shall be treated for all purposes as an appeal to the Court against the conviction or sentence.

(3) In subsection (1) (b) the reference to a new fact is to a fact known to the convicted person at the time of the trial or appeal proceedings the significance of which was appreciated by him, where he alleges that there is a reasonable explanation for his failure to adduce evidence of that fact.

(4) The reference in subsection (1)(b) to a newly-discovered fact is to a fact discovered by or coming to the notice of the convicted person after the relevant appeal proceedings have been finally determined or a fact the significance of which was not appreciated by the convicted person or his advisers during the trial or appeal proceedings.

(5) Where –

(a) after an application by a convicted person under subsection (1) and any subsequent re-trial the person stands convicted of an offence, and

(b) the person alleges that a fact discovered by him or coming to his notice after the hearing of the application and any subsequent re-trial or a fact the significance of which was not appreciated by him or his advisers during the hearing of the application and any subsequent re-trial shows that there has been a miscarriage of justice in relation to the conviction, or that the sentence was excessive,

he may apply to the Court for an order quashing the conviction or reviewing the sentence and his application shall be treated as if it were an application under that subsection."

The applicable principles

7. The principles which the Court should apply in an application under section 2 are set out in *The People (Director of Public Prosecutions) v. Willoughby* [2005] IECCA 4. These principles have been endorsed by the Supreme Court in *The People (Director of Public Prosecutions) v. O'Regan* [2007] 3 IR 805. The principles are as follows: -

"(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."

The grounds of the section 2 application

8. The applicant's grounds may be summarised as follows;

(i) The same solicitor, a Mr John Joy, ended up representing both the applicant, Mr Roche and another person, a Jonathan Dennehy, in prosecutions arising out of the robbery and murder of Mr Nugent. The plaintiff complains that this involved a clear conflict of interest in Mr Joy representing Mr Roche and Mr Dennehy whilst also representing the applicant in a trial arising out of the same incident albeit that he faced the additional charge of murder.

(ii) The evidence received by the trial judge in the course of a *voir dire* concerning the applicant's arrest and detention was unreliable and inadmissible. In particular, the evidence given by Ciaran Cleary, Solicitor, was materially different to that which the applicant's solicitor understood it would be. This material difference came to his attention in June 2014 when preparations were being made for the first s. 2 application which was heard by this Court in December 2015. The applicant contends that the implications of his waiving his right to legal professional privilege to allow Mr Cleary to give evidence were not fully explained to him by his solicitor at trial.

(iii) The trial judge erred in his ruling on the admissibility of statements made by the applicant during the course of his detention at Cahir Garda Station on 14th and 15th July 1996. In particular the applicant argues that the trial judge erred in finding that no statement of admission was made by him during the period when he says he had requested a solicitor and efforts were being made to find one. The applicant argues that questions asked of him by Gardaí during this period, specifically in an interview conducted between 3.24 pm and 4.50 pm on 14th July constituted admissions notwithstanding that he repeatedly denied involvement in the murder of Mr Nugent at this time.

(iv) The decision of investigating Gardaí to accede to an alleged request by Lee Ahearn to meet and speak to another suspect Francis Hawkins while in Garda custody was a procedurally incorrect operational decision or manoeuvre and calls into question the integrity and veracity of the statements and the subsequent corroborative evidence given at the trial stage by Lee Ahearn. Both suspects were arrested on suspicion of joint involvement in the murder. The meeting was arranged so as to allow both suspects "manufacture" a contrived and highly suspect form of corroboration in furtherance of building an even stronger case against the applicant.

(v) There was a failure on the part of the Garda investigation to take forensic samples from Lee Ahearn during his detention on 14th July in spite of the fact that authorisation had been given to do that. This failure is particularly relevant in relation to Mr Ahearn as he admitted to having visited the scene of the crime on two separate occasions the morning after Mr Nugent's death. The applicant contends that the failure to carry out forensic tests was not known to him or its significance was not appreciated by him or his legal team at the trial or at subsequent appeals.

(vi) The applicant contends that there are differences in the times at which Mr Hawkins, in different statements to Gardaí, placed himself in the grounds of St Joseph's Hospital, Clonmel. He argues that the Gardaí deliberately and without the consent of Mr Hawkins altered a time for his being in these grounds in such a way that the time is illegible. This he claims calls into question the impartiality and integrity of the Garda investigation. He complains of a failure to include Mr Hawkins's Garda interviews in the book of evidence.

(vii) The applicant refers to "discrepancies" in the typed-up memoranda of interview with Lee Ahearn recorded on 14th July 1996 as compared with the handwritten notes. He complains that these memoranda did not appear in the book of evidence and further says that alterations were made to the memoranda of these interviews by the Gardaí without the consent of Mr Ahearn. He relies upon typed-up memoranda of interviews with Mr Ahearn and handwritten notes of the same interviews.

(viii) The applicant complains that the jury received his entire custody record arising from his detention at Cahir Garda Station on 14th and 15th July 1996. This record contained a reference to a comment made by him to his mother about Lee Ahearn. Details of this comment had not been adduced during the trial. The applicant contends that he was prejudiced in this record being given to the jury and that the significance of this was not appreciated by his legal team at the trial or at any subsequent appeals.

(ix) The grounds upon which the applicant relies in relation to grounds 9, 10 and 11 all complain of alleged inaccuracies in the trial judge's summing up of the evidence in the case in his charge to the jury. He maintains that the significance of these alleged inaccuracies have not heretofore been appreciated by his legal team.

(x) In ground 12 of his application, the applicant points to gaps in the Garda investigation concerning a failure to speak to persons named in a statement of Adrian Doyle. These persons were in the area around the time of Mr Nugent's murder. He contends that Adrian Doyle's first statement was only received by his former legal team in 2015. He also complains of the manner in which his legal team dealt with the evidence of prosecution witness Helen Wall.

(xi) In ground 13 of his application, the applicant complains of inconsistency between the statement of evidence of Garda Donal O'Connell as contained in the book of evidence and the evidence that he gave at the trial. He complains that the statement does not refer to two matters in which he gave oral evidence at the trial. He argues that the significance of the additional evidence given by Garda O'Connell concerning attempts to contact a solicitor for the applicant and facilitating a meeting between the applicant and Mr Hawkins was not appreciated by his legal team at the time of the trial or in subsequent appeal proceedings. He argues that a failure to provide the telephone records from the Garda station is unfair because he continues to dispute the bona fides of Gardaí who were seeking a solicitor for him.

The respondent's submissions

9. Insofar as the grounds set out in the second amended application filed on 11th October 2017 are advanced on the basis of documents included in the addendum material accompanying that application, none of this material can constitute new or newly discovered facts within the meaning of s. 2(1)(b)(iii) and (iv) as interpreted in *DPP v. Willoughby* [2005] IECCA 4 and *DPP v. Thomas O'Regan* [2007] IESC 38. Insofar as the grounds set out in the second amended application filed on 1st October 2017 are advanced on the basis of the applicant's dissatisfaction with the advice received and the approach taken by his legal team at his trial, appeals and in the first s. 2 application, this cannot form the basis of a second such application. The Court of Appeal, its predecessor and the Supreme Court have repeatedly emphasised that the threshold in relation to s. 2 applications is a high one. This is intended to prevent the rerun of trials on new grounds in the appellate courts. It is submitted that the applicant has not for the reasons set out put forward any material that supports a second s. 2 application. The material advanced does not include new or newly discovered facts as defined or interpreted by the Superior Courts. In the circumstances therefore, the application should be dismissed.

The Court's decision

10. The applicant is a lay litigant. He has nonetheless prepared his written application with great skill and in considerable detail. Moreover, at the hearing the court was impressed by the manner in which he presented his case. He was as brief as he could be and answered all questions of the court with courtesy, skill and care. In our judgment however, this second application puts forward no material that supports a second s. 2 application. Such as it is, it does not include new or newly-discovered facts as defined or interpreted by the Superior Courts. In our view the application is bound to fail and thus the respondent's motion must succeed. Our reasons for this conclusion are as follows;

(i) Dealing with the applicant's first ground that is advanced on the basis of the custody records of Colm Roche and Jonathan Dennehy arising from their arrests on 15th July and their re-arrest on 31st July and in respect of Dennehy, on 7th August. The identity of the lawyers representing the other persons prosecuted as a part of this investigation is a matter of public record. Moreover the custody records in respect of these persons must clearly have been known both to

the applicant and to his legal team at the time of his trial and subsequent appeals.

(ii) As to the second ground, the applicant himself states that the difference in the evidence given by Ciaran Cleary, Solicitor, in the witness box as opposed to what he had said to the applicant's solicitor was something which was known to him at least in June 2014 when he was preparing his first s. 2 application heard by this Court in December 2015. This ground relating to evidence received by the trial judge in the course of the *voir dire* is something that would have been known to the applicant's legal advisors at the time of the trial. Even allowing that it were not, on his own case, the material difference in the evidence for which he contends, came to his attention in June 2014 when preparations were being made for the first s. 2 application. As to the complaint about his not understanding or being properly advised as to the significance of his waiving his right to legal professional privilege, this is put forward as an assertion devoid of any evidence such as an affidavit from legal representatives and would not appear to be credible evidence.

(iii) As to the third ground relating to the admissibility of statements made by the applicant and the trial judge's finding that no statement of admission was made by him during this period, nothing has been put forward that could be considered as evidence supporting this ground. In this regard, the trial judge conducted a thorough and extensive enquiry into this issue in the course of which he heard evidence of all of the interviews held with the applicant during that time. It is clear that the applicant did indeed repeatedly deny involvement in the murder of Mr Nugent. Moreover this ruling of the trial judge on admissibility was upheld by the Court of Criminal Appeal and the Supreme Court in the judgments delivered on 6th December 1999 and 17th April 2002 respectively.

(iv) As to the fourth ground concerning the meeting between Mr Hawkins and Mr Ahearn at Cahir Garda Station, the applicant's contention that the significance was not appreciated by his legal team at the time of the trial is highly speculative and the height of improbability. The applicant's experienced legal team was headed by Patrick McEntee, Senior Counsel, who at the time of the trial would have been rightly regarded as the leader of the criminal bar. He could hardly have had more expert legal advice. It is clear from the cross examination of the applicant to which this Court was referred by the respondents herein that the fact of this meeting was well known to the applicant during his trial. Anything arising from that meeting could have been fully explored during the trial.

(v) As to the fifth ground concerning the failure to take forensic samples from Lee Ahearn during his detention on 14th July despite its having been authorised, and that the failure to carry out these forensic tests was not known to him or its significance was unappreciated by him or his legal team at the trial or subsequent appeals, the applicant relies on the custody record of Mr Ahearn. This was available at the time of the trial and thus any issues arising in relation to it could and should have been explored at that time. It may be noted that the significance of the argument in this regard is doubtful bearing in mind that Mr Ahearn only placed himself at the scene of the murder the morning after it and the only forensic evidence adduced at the trial related to blood recovered from a rock located in the field which was found to be the blood of the deceased man, Mr Nugent. The same improbability of the applicant's claim that his legal team did not appreciate the significance of this matter either at trial or on subsequent appeals is very high bearing in mind the level of expertise of the legal advice available to him at the time.

(vi) As to the sixth ground concerning the allegation that the Gardaí altered times at which Mr Hawkins placed himself in the grounds of St Joseph's hospital, his arrest at the time was again well known to the applicant and his legal team at the time of the trial and subsequent appeals. The existence of statements made during his detention would have been well known to the applicant's legal team. Moreover, Mr Hawkins was cross examined vigorously on behalf of the applicant. There is no basis laid to support the allegation that there was a deliberate alteration of the notes of the interview without the consent of the interviewee. There is no evidence from anybody present at the time when these notes were being recorded

(vii) As to ground seven concerning alleged discrepancies in the typed-up memoranda of interview with Lee Ahearn on 14th July 1996 as compared with the handwritten notes, and the non-appearance of these memoranda in the book of evidence, the applicant relies upon the typed-up memoranda of interviews with Mr Ahearn and handwritten notes of the same interviews. These are documents which constitute material that would have been known to the applicant at the time of the trial. There is moreover no evidence to back up the assertion that deliberate alterations and omissions exist within these documents.

(viii) As to the eight ground concerning the jury's receiving his entire custody record containing a reference to a comment made by the applicant to his mother, something not adduced during the trial, and that this was not appreciated by his legal team at the trial or at any subsequent appeals. It is again difficult to accept that the significance of this was not appreciated by his expert legal team at the trial or any of the subsequent appeals.

(ix) Concerning the ninth ground in relation to alleged inaccuracies in the trial judge's summing up of the evidence in his charge to the jury, it is again an unstateable proposition that, bearing in mind that the transcript of the trial was available to his legal team for the original appeal heard in December 1999 containing a full record of the evidence given and the judge's charge to the jury, that they would not have been fully aware of any inaccuracies and any significance thereto. This deals with grounds 9, 10 and 11.

(x) In his twelfth ground, the applicant raises concerns about a failure to speak to persons named in the first statement of Adrian Doyle. There is also criticism levelled at his legal team for the manner in which the evidence of Helen Wall was dealt with. On his own case, details of issues arising from the first statement of Adrian Doyle and the issues he alleges arise, having been received in 2015, were available during the time of the first s. 2 application. They cannot now be considered as part of a second such application. As to the evidence of Helen Wall, she was indeed a witness of some importance and, no doubt, it was in recognition of that fact that she was subjected to cross examination by the applicant's counsel. It again is the height of improbability that the applicant's legal team were unable to appreciate the significance of the evidence that she gave.

(xi) In the last of his grounds, concerning a variation between the evidence of Garda Donal O'Connell as contained within the book of evidence and the evidence which he gave at trial, the same improbability concerning the alleged inability of his legal team to appreciate the significance arises here. The witness in question was cross examined extensively on these points and there is no basis for a submission that the significance of his evidence was not appreciated during the trial process.

11. In the light of the above it is clear that the applicant has in reality produced no new or newly-discovered facts. What he is doing

in his application is examining in detail the record of his own trial and drawing conclusions from matters that seem to him to be contained in the custody records and statements and memoranda of interviews of Messrs Roche, Dennehy, Hawkins and Ahearn. Throughout his pleadings and indeed in his submissions to the Court the respondent refers to his belief and to things he thinks can reasonably be inferred. We agree with the respondents that in fact these very expressions support the view that there are no new facts or newly discovered facts available to ground this application. There is merely further argument based on the facts that existed at the time of the trial capable of being discovered by the applicant and his legal team or that were in fact discovered. Insofar as a s.2 application such as herein requires firstly that the Court ascertain if in fact there is a new or newly discovered fact before moving to the second part wherein it assesses the weight and credibility of that evidence, the applicant does not get past the first stage. It is clear there are no new or newly discovered facts. As to the argument that the applicant made concerning the ability of his legal representatives to appreciate the significance of certain matters at his trial, bearing in mind his representation at the time of his trial by the most distinguished criminal senior counsel of the day, this is an all but unstateable proposition. The same thing applies in relation to suggestions that his legal team did not comply with his instructions in the December 2015 application. In the light of all the above, the application does not meet the requirements as set out in *DPP v. Willoughby* and therefore, in this court's view, must fail. Upon this basis, the respondent's motion to dismiss the application must succeed.