Neutral Citation: [2014] IEHC 68

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 616 JR]

BETWEEN

ALAN FREEMAN

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

JUDGE GERARD GRIFFIN AND JUDGE DESMOND HOGAN

RESPONDENTS

JUDGMENT of Kearns P. delivered on the 21st day of February, 2014.

This is an application for judicial review brought by the applicant in which he seeks an order quashing the decision of the second named respondent of the 29th July, 2013, which refused to allow the applicant to vacate the plea of guilty entered by him towards the end of his trial before the second named respondent and a jury at Kilkenny Circuit Criminal Court on the 28th February, 2013. The application seeks not merely that relief, but also a further order prohibiting the retrial of the applicant.

Along with one Darren O'Regan, the applicant had stood trial charged with a number of serious offences alleged to have been committed on the 9th January, 2009. It was alleged by the prosecution that in the early hours of the 9th January, 2009 at Carrick-on-Suir, Co. Tipperary, the applicant was one of four men who broke into the family home of Thomas Keevan, a rural firearms dealer, and held hostage Mr. Keevan, his wife, his daughter and an elderly family friend for about four hours in their home. The raiders wore balaclavas and are alleged to have threatened the injured parties with a sawn-off shotgun, a knife and a large stick. All four occupants of the house were ultimately tied up and locked in a firearms safe and the armed gang made off with 42 assorted firearms, the family car and some €800 in cash.

Following an intensive garda investigation a number of people were arrested and some of the stolen firearms were recovered. The applicant herein was arrested at his home on the 8th October, 2009, and detained at Clonmel Garda Station under the provisions of s.50 of the Criminal Justice Act 2007. He was interviewed on a number of occasions and it is alleged he fully admitted his role in the crime.

The first named respondent directed a charge of aggravated burglary contrary to s.13 of the Criminal Justice (Theft and Fraud Offences) Act 2001 be brought against the applicant. He was also charged with burglary contrary to s.12 of the Criminal Justice (Theft and Fraud Offences) Act 2001 and with robbery contrary to s.14 of the same Act. He was brought before Clonmel District Court on the 11th October, 2009 and was subsequently sent forward for trial to Kilkenny Circuit Court.

On the 5th February, 2013, at Kilkenny Circuit Court the applicant pleaded not guilty to the three alleged offences and his trial, presided over by the second named respondent then commenced. At all stages the applicant had legal representation including a solicitor and senior and junior counsel. The trial continued for some four weeks during which three separate *voir dire* hearings took place concerning the applicant's arrest, detention and alleged admissions. These various challenges, each of which took a number of days, were all resolved by rulings in favour of the prosecution. Thereafter, on the 28th February, 2003, following consultation with his legal advisors, the second named respondent was informed that the applicant wished to change his plea to one of guilty on a substituted count of theft in relation to the 42 firearms, the family car and the sum in cash taken from the Keevan family home. That plea was deemed acceptable to the prosecution and upon being arraigned on that substituted count pursuant to an amended indictment, the applicant entered his guilty plea. In his affidavit in this case, Sergeant Barry Boland has deposed, without contradiction, that the tendering of the plea occurred at a point in the trial where the applicant's videotaped interviews were about to be shown to the jury.

The applicant at the time of entering his plea was the subject of an eight year suspended sentence imposed by the third named respondent at Dublin Circuit Court on the 11th February, 2008, after he had pleaded guilty to an armed robbery at the Bank of Ireland at Rathdowney, Co. Laois on the 13th February, 2004. In that incident a number of raiders, armed with a sawn-off shotgun, a pistol and sledge hammer, entered the bank and threatened staff and customers and made off in a stolen car with a sum in excess of €10,000. The three perpetrators, one of whom was the applicant, were arrested as they attempted to flee the scene and in the course of his subsequent detention he admitted his role in this serious offence.

Accordingly, in the aftermath of his changed plea at Kilkenny Circuit Court, and before that trial concluded with the imposition of any sentence, the case was remitted back to the third named respondent in accordance with s.99 of the Criminal Justice Act 2006. When the case came before the third named respondent on the 14th June, 2013, the applicant indicated to the court that it was now his intention to withdraw the guilty plea proffered by him in Kilkenny on the 28th February, 2013. In those circumstances, the third named respondent adjourned the proceedings to facilitate the bringing of a formal application to the second named respondent for that purpose. The same was heard by the second named respondent at the Circuit Criminal Court in Dublin and was grounded on an affidavit sworn by the applicant on the 10th July, 2013. The learned Circuit Judge also had before him affidavits in reply from Detective Superintendent Dominic Hayes and Mr. Paul Fitzpatrick, State Solicitor for County Tipperary, who had been instructed by the first named respondent in respect of the matter.

As the matters deposed to in these various affidavits constituted the *res* upon which the second named respondent made the decision which is under challenge in this judicial review, it is now necessary to turn to that hearing and to consider the material and facts considered by the second named respondent in reaching his decision not to permit an alteration of the guilty plea.

In his affidavit, the applicant, who does not allege any disability, mental or otherwise, accepts that he instructed his legal advisors to change his plea to one of guilty on the 28th February, 2013. He also accepts that his legal advisors advised against this course. By way of background to his application, the applicant avers that, at an early stage of the trial and at the request of counsel for the prosecution, Judge Griffin had directed that there was to be no contact between the applicant and members of An Garda Síochána for the duration of the trial. In his affidavit, Mr. Fitzpatrick sets out the background to that particular application and direction. He says that the gardaí were concerned that Mr. Freeman was mingling with them during the course of the trial and having discussions about the case in the precincts of the courthouse. This is not contradicted by or on behalf of the applicant. Indeed his legal advisors supported the application.

The applicant deposes that Detective Superintendent Dominic Hayes was one of the most senior ranking gardaí involved in the investigation and alleges that, notwithstanding the direction or order made by the second named respondent, a number of telephone calls and meetings occurred between himself and Detective Superintendent Hayes during the course of the trial. Details of his account of these calls and their duration appear at paragraph 8 of his affidavit, and include reference to a call lasting nine minutes between himself and Detective Superintendent Hayes on the evening before his change of plea. The applicant alleges that in the course of these calls and meetings Detective Superintendent Hayes commented on the progress of the trial, implying that it was not going well, criticising the efforts of his legal team and urging him to plead guilty. He also alleges that arrangements were made for a meeting between them and that during the first week of the trial he met Detective Superintendent Hayes at an activity centre in Tipperary town. He alleges that Detective Superintendent Hayes asked him if he could convince his co-accused Darren O'Regan to plead guilty. He further alleges that Detective Superintendent Hayes told him that if he could achieve this it would "lighten the load" on him because the gardaí would then have several convictions associated with the incident in issue and it would be "better for me". He alleges that four days later a further meeting occurred during which the applicant alleges that the trial was again discussed, including the legal submissions made in respect of one or more of the *voir dire* issues. The applicant alleges that Detective Superintendent Hayes specifically told him that if he entered a guilty plea he would get Inspector Leahy to speak up for him in front of the second named respondent and say that he (the applicant) had only a minor role in the incident and had not been in trouble for five or six years. The applicant alleges that Detective Superintendent Hayes said that the most he would get was three years with one suspended. He alleges that he was also told that if he entered a guilty plea that Detective Superintendent Hayes would "get his people in Dublin to look after the suspended sentence".

The applicant deposes that these were the considerations which persuaded him to change his plea to one of guilty. Accordingly, on the 29th July, 2013, he deposes that he told his legal advisors that Detective Superintendent Dominic Hayes had advised that if he entered a guilty plea he would not go into custody straight away and that there would be no objection to bail until June, 2013. He told his legal advisors, without divulging the rest of the 'offer' made by Detective Superintendent Hayes, to go to the prosecutor and see if there would be any objection to bail. They did this and were informed that if he did enter a plea to theft there would be no objection to bail until June, 2013.

He frankly accepts that he was advised by counsel that the contacts which had taken place between him and Detective Superintendent Hayes were improper and a possible breach of the direction given by the second named respondent and could amount to a contempt of court. He also accepts that his legal team advised him against the proposed course of action of changing his plea. He does not state at any point that his legal team considered or advised that the option of making an application to have the jury discharged in the particular circumstances was discussed. It appears that the applicant was determined to make the entry of a plea to the substituted offence as the best course open to him in the particular circumstances.

For his part Detective Superintendent Hayes reiterates that it was only in the aftermath of the various *voir dire* hearings that the applicant changed his plea from not guilty to guilty. He accepts there were two meetings and a number of telephone discussions with the applicant during the trial but is adamant that he did not offer any inducement or promise to the applicant and any interaction he had with him during the course of the trial related to other matters of a secret and sensitive nature. He deposes that prior to, during and after his trial the applicant informed him of matters not relating to this particular investigation on an incremental basis. These were significant matters which caused Detective Superintendent Hayes to submit a report to the highest levels of Garda Management on the 27th February, 2013.

He deposes that the mobile phone calls identified in the applicant's affidavit were calls made by the applicant. He says that the initial contact in the first week of February, 2013 was made by the applicant who sought a meeting with him. He agrees that a meeting took place. It concerned secret and sensitive matters which involved imminent threat to the lives of a number of applicants including the applicant himself. Detective Superintendent Hayes also deposes that in the course of conversation the applicant indicated he was clearly aware that if he was convicted in Kilkenny he would have to be returned before the third named respondent in respect of the sentence which had been suspended in February, 2008. Detective Superintendent Hayes deposes that he was not in any position to advise the applicant on legal matters which he told the applicant he should discuss with his own legal advisors. He himself was only in Kilkenny rarely during the course of his trial as he was directly involved in three other trials at the time. Having checked his own calls, he believes he was in contact with the applicant by telephone on seven occasions, but avers that the purpose of these calls was to try and arrange a meeting between the applicant and a trained member of another garda unit for the purpose of discussing other operational matters. He says he met the applicant on two occasions during the trial. He denies that he requested the applicant to convince his co-accused Darren O'Regan to plead guilty. He further states that he had no involvement in discussions with counsel for the prosecution regarding his plea of guilty and was not present in court when that plea was entered. He had later discussions with the applicant in April, 2013 and had a meeting with him at the end of that month, again one which he says related to other matters of which the applicant had informed him.

His second meeting with the applicant during the course of the trial took place on Sunday, 24th February, 2013, at the request of the applicant. The applicant requested him to drive to an identified location where matters were discussed other than his trial but relevant to the particular location. He specifically denies all of the allegations raised by the applicant, including the assertion that he would "get my people in Dublin to look after his suspended sentence". He deposes that he would have no such power and that the applicant was well aware of the fact he would have to appear before Judge Hogan for his sentence to be activated. He denies that he told the applicant he would get Detective Inspector Leahy to give favourable evidence before the court should he plead guilty. Accordingly, he says he had only two meetings with the applicant during the course of the trial and not four as alleged by the applicant. He denies offering any inducement to the applicant at any stage and deposes at para. 20 of his affidavit:-

> "I have little doubt that had I made a promise or inducement it would have been raised by him with his legal representatives. I did not have any involvement in Mr. Freeman's previous conviction for robbery for which he received a suspended sentence. I say and believe that Detective Sergeant Sean Grennan, National Bureau of Criminal Investigation, retired, gave evidence before Judge Desmond Hogan in respect of that case."

When the applicant rang him on four occasions on the 27th February, 2013, he is adamant that he could not and did not offer any

comfort to the applicant that he would receive only a suspended sentence on a plea of guilty. He further denies that he made any representations on behalf of the applicant in relation to a number of outstanding charges at Kilmallock District Court in Limerick. (This had been also alleged to have been discussed by the applicant.) He further deposes that he was not aware of any order having been made by Judge Griffin banning contact between the applicant and members of An Garda Síochána. He was not in court when any such order was made. He now believes that the order was made out of concerns on the part of the prosecuting gardaí that the applicant was attempting to mingle with them during the course of the hearing. His contacts with the applicant were in quite a different context and at no stage did the applicant refer to the court order or request that he not contact him. On the contrary, contact was initiated by the applicant in respect of the sensitive operational matters relating to subversive crime to which he had already referred. He thus categorically denies that he made or gave any promise or inducement of any sort to the applicant in this matter.

The affidavit of Paul Fitzpatrick confirms the background against which the trial judge gave the direction that contact between the applicant and members of the gardaí should cease. It seems clear from his affidavit that the context in which the order was made was one where the applicant was noted to have been mingling with members of the gardaí and discussing the case in and around the courthouse building. He says he did not advise Detective Superintendent Hayes of any order of the trial judge.

A further feature of the hearing before the second named respondent appears from the transcript of the hearing which took place on the 29th July, 2013. At a point in the hearing when his senior counsel was confirming that they had advised the applicant not to change his plea, the second named respondent enquired of counsel why it took until the 10th July, 2013 to bring a motion to vacate that plea in the light of the matters now being alleged. In response counsel stated that the delay arose because they had to obtain the phone records or obtain some evidence that telephone contact had been made. At this point counsel for the prosecution offered to furnish to the judge and to the applicant's legal team (though not to the applicant himself) the report which he had submitted to garda senior management on the 27th February, 2013, and a further letter or report prepared some time after the trial had been concluded. The basis of the request to the judge that he read these documents, in respect of which privilege was claimed, was to indicate that the documents showed that the Kilkenny case had not been discussed, but rather that the contacts between the applicant and Detective Superintendent Hayes were in relation to other operational matters. When an objection was raised by counsel on behalf of the applicant on the basis that the documents were "self-serving" and "self-corroborating", the second named responded over-ruled that objection, read the documents and then gave an opportunity to the applicant's legal advisors to read the letter or report having done so himself. This invitation was taken up by the applicant's legal team. In subsequent exchanges with the second named respondent, counsel for the applicant accepted that the document itself did not specifically refer to the case at hearing, but counsel nonetheless contended that while the report made no such reference it did not change the fact that there had been 'improper contacts' going on behind the backs of the applicant's legal advisors and the same had been going on during the course of the trial and in circumstances where contact between members of the gardaí and the applicant had been prohibited by the trial judge.

In his ruling, the second named respondent stated that, having read the affidavits and having heard the submissions by both sides and having had regard to the privileged document which had been handed into him dated the 27th February, 2013, he was satisfied that any discussions between Detective Superintendent Hayes and the applicant were in relation to matters unconnected with the trial then in the course of hearing. He also found that Detective Superintendent Hayes was unaware of the making of the order as to "no contact during the trial" and was satisfied there had been no contempt of any order of the court. He also indicated his view that the applicant, having gone through three *voir dire* hearings during the course of the trial, must have been well aware that he had a suspended sentence of eight years hanging over him for armed robbery and must further have known that had he been offered any inducement to change his plea that he should and would have reported it straight away. Indeed one of the *voir dire* hearings had in fact related to an allegation by the accused that he had been induced by one Detective Garda O'Gorman to make statements of admission, an allegation in respect of which the trial judge had delivered a decision adverse to the applicant on the 22nd February, 2013. From that fact alone, the applicant must have understood how important it would have been to inform his legal team if any inducement had been offered to him.

The second named respondent, relying on the decision of the Supreme Court in *The People (D.P.P.) v. Redmond* [2006] 3 I.R. 188 then concluded that "very exceptional circumstances", would require to be demonstrated before a trial judge should actively intervene to second guess the accused and his legal advisors when they opt to plead or conduct their defence in a particular way. Applying that test to the instant case, he found there were no exceptional circumstances and he accordingly refused the relief sought.

It is from that decision and ruling that this judicial review application has been brought.

JUDICIAL REVIEW OR APPEAL?
A threshold question arises as to whether an issue of this sort is more properly an issue to be left to the Court of Criminal Appeal rather than to intervention by the High Court by way of judicial review.

In *Director of Public Prosecutions v. Special Criminal Court* [1999] 1 I.R. 60, the Supreme Court made clear that it was undesirable to seek judicial review during the currency of a criminal trial, subject to the jurisdiction of the court to grant cases stated on occasion, or where a legal point of such importance arose such that there should be a definite ruling on the matter (which in that case related to informer privilege). Neither consideration arises in the instant case.

The rationale for such an approach is obvious. If every ruling or decision given by a trial judge during the course of a criminal trial could be challenged by way of judicial review, the resultant outcome would be chaos and the criminal justice system would become totally incapable of operating effectively. At the very least the process could be open to abuse at every turn.

In this context the following dictum of O'Dálaigh C.J. in *The People (Attorney General) v. McGlynn* [1967] 1 I.R. 232 at p. 239 is apt and often cited:-

> "The nature of a criminal trial by jury is that, once it starts, it continues right through until discharge or verdict. It has the continuity of a play".

As further emphasised by Hedigan J. in the recent case of *Berry v. Judge Hickson & Ors* [2012] IEHC 320 (Unreported, High Court, Hedigan J., 26th July, 2012) at para. 5.5:-

> "As this court has repeatedly stated, save for the most exceptional cases, criminal proceedings belong in the criminal courts. Where an accused who is convicted of an offence believes that he has not had a fair trial he can appeal to the Court of Criminal Appeal who will have a transcript of all the evidence and can judge the case for fairness in the light of all the evidence given. The court of judicial review does not have access to all the evidence given and is thus in a weak position to judge the fairness of a trial overall. It is vital for the efficient conduct of criminal matters that criminal trials

proceed through the criminal courts and are not dispersed between the court of trial and other courts. In *Corporation of Dublin v. Flynn* [1980] I.R. 357 at 365, Henchy J. stated:-

> 'It is the essence of a criminal trial that it be unitary and self-contained, to the extent that proof of the ingredients of the offence may not be established as a result of a dispersal of the issues between the Court of trial and another tribunal.'"

In O'Malley, *The Criminal Process* (Round Hall, 2009), Prof. Tom O'Malley at pp. 464-466 writes of the "Continuity of Trial" concept, citing the case of *D.P.P. v. Special Criminal Court* referred to above, and in particular to the following observations of Carney J. in the High Court when (at pp. 69-70) he stated:-

> "It cannot be emphasised strongly enough that an expedition to the judicial review court is not to be regarded as an option where an adverse ruling is encountered in the course of a criminal trial. I am undertaking this application for judicial review during the currency of the trial because a need has presented itself to urgently balance the hierarchy of constitutional rights including, in particular the right to life. In the overwhelming majority of cases it would be appropriate that any question of judicial review be left over until after the conclusion of the trial."

Having referred (at p. 465) to various other cases which stress the long-recognised undesirability of interrupting criminal trials to enable judicial review applications to be made, Prof. O'Malley concludes (at p. 466) :-

> "At present the general orthodoxy, as noted, is that trials should not be interrupted"

It follows *a fortiori* that the further the trial process has proceeded, the less desirable it becomes for any such interruption. The plea of guilty in this case was tendered only after three *voir dire* hearings had been resolved against the applicant and the trial was entering its final phases. The trial process has not concluded because there has been no sentence yet imposed by the trial judge.

The points raised by the applicant are vigorously contested by the respondents. This court has no note or clear idea of what the trial judge meant when he directed that there be no contact between the applicant and members of the gardai, but it appears to have related to overt exchanges going on in the courtroom and court precincts rather than anything else. This again underlines how the points raised in this case are really points better taken in the Court of Criminal Appeal which will have the full trial transcript in the event of an appeal.

The Court was further referred to the decision of the High Court (Laffoy J.) in *Dunne v. McMahon* [2007] 4 I.R. 471 in which Laffoy J. held that a trial judge has a discretion to allow an accused to change his plea from guilty to not guilty before the case is disposed of by sentence or otherwise but that the paramount consideration in the exercise of that discretion is to ensure that the constitutional right of the accused to a fair trial is protected. At p. 479 Laffoy J. stated:-

> "8. The breadth of a trial judge's discretion to permit an accused to change his plea is illustrated by the decision of the Court of Criminal Appeal (which, unlike a judge in this court hearing an application for judicial review, stands in the shoes of the trial judge) in *The People (Director of Public Prosecutions) v. B.* [2002] 2 I.R. 246. In that case the defendant had pleaded guilty to charges of rape, sexual assault and unlawful carnal knowledge arising out of an admitted incestuous relationship he had with his half sister. At the time he entered his pleas of guilty, both he and a senior counsel, on whose advice he acted, were unaware of a number of statements which were not in the original book of evidence and also one important exhibit, namely a form of diary kept by the complainant. The defendant sought to set aside his guilty plea in respect of the count of rape and the count of sexual assault, although he had already served his sentence in respect of the latter. The Court of Appeal set aside the convictions and ordered a retrial on the count of rape. In delivering the judgment of the court, Geoghegan J. described the case as 'unique'. He concluded at p. 251 as follows:-
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> > 'However, in the light of the undoubted fact that he had strongly expressed the wish to plead not guilty to senior counsel, we think it is quite probable, that, had advice been given to him as to all the pros and cons of a plea, in the full knowledge of the facts, he may have pleaded not guilty. The court further considers that had the defendant pleaded not guilty, it may be that a jury would have taken the view that the complainant was a highly unreliable and possibly unstable witness.
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> > In the light of this, the court considers it would not be safe to allow the conviction to stand and will order a re-trial.'
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> 9.The question which arises in this case is whether, in exercising his discretion, the respondent had due regard for the applicant's constitutional right to a fair trial. In my view, he had. He took measures to ensure that, if it was the applicant's case that either his lawyers misled him or did not represent him competently, that he could make that case in a manner which would withstand challenge from the lawyers who were to be afforded an opportunity to be heard. Further, notwithstanding that the applicant earlier had chosen to waive his right to legal aid, he granted the applicant legal aid for the substantive hearing of the application to change his plea and certified for senior counsel to argue his case. He heard the evidence of the applicant and he heard submissions on his behalf. In a comprehensive, reasoned ruling he explained why he was not allowing the applicant to change his plea. He found as a fact that the applicant understood what he was doing when he change his plea, with the benefit of legal advice. That finding was open to him and it would be wholly inappropriate for this court to interfere with it. I am satisfied that the respondent acted within jurisdiction, judicially and with due regard to the applicant's constitutional right to a fair trial in refusing to allow him to change his plea."

While there may be exceptional circumstances which would warrant this Court in interfering with a criminal trial, the well settled jurisprudence, for obvious reasons, leans strongly against any such intervention.

Overall I am satisfied that the learned trial judge took into account in this case all relevant factors when exercising his discretion not to allow the applicant to change his plea. Rather surprisingly, no application was made to him (or indeed to this Court) for leave to cross-examine the respondents' witnesses on the facts to which they have deposed in their affidavits. The onus of establishing the factual basis upon which an application of this sort is based rests on the applicant.

In so far as this Court in turn also exercises its discretion, it must have regard to the fact that a very considerable delay occurred before this judicial review was brought – indeed it was only brought on the occasion of the hearing before the third named respondent. I therefore refuse relief on the basis that the learned trial judge at all times acted *intra vires*, judicially, and with due

regard to the applicants constitutional right to a fair trial when he refused to allow him to change his plea.

Once sentence has been imposed in this matter, it will remain open to the applicant to raise each and every point canvassed in this judicial review application in the context of an appeal brought to the Court of Criminal Appeal. In view of the unusual nature of this case, it may be possible to apply to the presiding judge of the Court of Criminal Appeal for an early hearing if the applicant decides to further pursue this matter by means of an appeal.