Neutral Citation Number: [2005] IEHC 198

THE HIGH COURT
JUDICIAL REVIEW

[Record No. 2003 498JR]

BETWEEN

J. F.

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS AND
JUDGE MICHAEL REILLY

RESPONDENTS

AND
THE MIDLAND HEALTH BOARD

NOTICE PARTY

Judgment delivered by Macken J. on the 10th day of June, 2005

1. On 7th July, 2003 this Court (Peart, J.) made an order granting the applicant leave to issue judicial review proceedings for:

> 1. An order of *certiorari* quashing the decision of the second named respondent made on 13th July, 2003 at Birr District Court refusing to allow sight of or order production to the applicant's legal representatives of a document or documents in the possession of a witness during the taking of depositions pursuant to s. 7 of the Criminal Procedure Act, 1997.
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> 2. An Order of *certiorari* quashing the decision of the first named respondent refusing to compel the said witness to read from the document in her possession during the taking of the said deposition.
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> 3. An order of mandamus directing the first named respondent to allow the applicant through his legal representatives to view the file relevant to the applicant in the possession of the Notice Party and which was in Court during the said deposition hearing.
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> 4. A declaration that the applicant, having previously served a subpoena *duces tecum* on a witness, could not be lawfully precluded from requiring the production of a relevant document in the witness's possession during the taking of depositions pursuant to s. 7(2) of the Criminal Procedure Act, 1967.
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> 5. A declaration that the applicant having called a witness on deposition and having previously served a subpoena *duces tecum* on the witness can seek to have a document read out in Court by the witness as part of the deposition hearing pursuant to s. 7(2) of the Criminal Procedure Act, 1967.
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> 6. An order of prohibition or such further or other order as this Honourable Court may seem fit to issue so as to preclude the learned respondent District Judge or any other District Judge from making any further or other orders concerning the applicant in respect of the various matters concerning the applicant which stand adjourned by virtue of the order of the learned respondent District Judge until 11th July, 2003 at Birr District Court.
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> 7. An order of prohibition or such further or other order as this Honourable Court may seem fit to grant precluding the Director of Public Prosecutions from seeking to further prosecute the applicant in respect of the various matters concerning the applicant which stand adjourned by virtue of the Order of the learned respondent District Judge until 11th July at Birr District Court.
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> 8. A Stay upon the proceedings entitled *Director of Public Prosecutions v. Joseph Finnerty* pending the determination of these judicial review proceedings pursuant to order 84 Rule 20(7) of the Rules of the Superior Courts.
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> 9. Such further or other order as to this Honourable Court shall seem meet
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> 10. An order for the costs of the proceedings.

2. The grounds upon which the said order was granted were as follows:

> (1) Upon the ground that the applicant was deprived of his lawful right to require a witness to give evidence by way of sworn deposition during preliminary examination pursuant to s. 7(2) and 7(3) of the Criminal Procedure Act, 1967.
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> (2) Upon the ground that the Learned District Court Judge erred in law, exceeded his jurisdiction or acted without jurisdiction in not allowing a witness called by way of sworn deposition to produce to the applicant's legal advisers relevant documents in her possession and if necessary receive the contents of same in evidence in circumstances where a *subpoena duces tecum* had been served upon the witness.
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> (3) Upon the ground that the Learned District Court Judge erred in law and/or acted without jurisdiction in not allowing to the applicant's legal advisers the production to them of a document in circumstances where the Learned District Court Judge did not himself read the document to assess its relevance or admissibility in evidence.
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> (4) Upon the ground that the Learned District Court Judge erred in law and/or acted without jurisdiction in failing to direct a witness, called by way of sworn deposition to put in evidence content of a document in her possession in circumstances where the Learned District Court Judge did not himself read the document to assess its relevance or admissibility in evidence.
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> (5) Upon the ground that the Learned District Judge erred in law and acted without jurisdiction in failing to direct the witness to produce the document or to read it's contents because of the fact that there was no statement from the said witness in the Book of Evidence served upon the applicant pursuant to Part 2 of the Criminal Procedure Act, 1967.
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> (6) Upon the ground that the Learned District Court Judge erred in law and acted without jurisdiction in failing to compel the witness produce or read the document described as a referral by a social worker during the taking of her deposition on the basis that there is no third party disclosure known in the Irish Law.

(7) Upon the ground that the taking of a deposition pursuant to s.7 of the Criminal Procedures Act, 1967 is not discovery in any legal sense.

(8) Upon the ground that the Learned District Judge erred in law in holding that the defence was engaging in a fishing expedition in circumstances where the Book of Evidence disclosed evidence of other complaints of sexual misconduct being perpetrated upon the complainant.

(9) Upon the ground that the Learned District Court Judge erred in law and acted without jurisdiction in holding that the taking of the deposition was tantamount to allowing the defence engage in a fishing expedition in circumstances where the Learned Judge himself had not read the document.

(10) Upon the ground hat the Learned District Court Judge erred in law in holding that the manner of the taking of the deposition by the applicant's legal representative during the deposition hearing amounted to cross-examination.

(11) Upon the ground that the Learned District Court Judge exceeded his jurisdiction and misdirected himself as to the law of the doctrine of complaint in sexual cases and of the right of the defence to establish the fact of and content of previous inconsistent statements and further the Learned Judge exceeded his jurisdiction and erred in failing to consider such legal principles in refusing to direct the production or the testimony of the content of the material sought.

(12) Upon the ground that the Learned District Court Judge erred in law and acted without jurisdiction in holding that the functioning of the Health Board would be difficult if not impossible if the witness was to produce a document or give evidence of the contents of the document.

(13) Upon the ground that the learned District Court Judge failed to vindicate the applicants right to trial in due course of law pursuant to Article 38.1 of Bunreacht na hÉireann.

3. The facts in this case can be set forth very briefly since, for the most part, the issues involved are predominantly questions of law.

4. The applicant was arrested on 11th November, 2000, and detained pursuant to s. 4 of the Criminal Justice Act, 1984. He was released and subsequently, on 11th May, 2001, rearrested and charged with charges of sexual assault, aggravated sexual assault and false imprisonment against a female complainant. The charges are made pursuant to the Criminal Law (Rape) (Amendment) Act, 1990 and the Non Fatal Offences of the Person Act, 1997.

5. The applicant was subsequently served with a book of evidence and required the taking of depositions, on foot of legal advices received. In the events which occurred the decision to send forward the applicant for trial was quashed by order of this Court (Ó Caoimh J.) on 22nd July, 2002, and the matter was remitted back to the District Court. That order is not relevant to the issues which arise in this action. A request was made, in January, 2002, for copies of relevant material on the Garda investigation file, including social work reports and materials referring to or dealing with the complainant, as well as assessments and other reports.

6. Between the 17th January, 2002, and the end of the year 2002 there were exchanges of correspondence between Mr. O'Neill solicitor on behalf of the applicant, and the chief prosecution solicitor's Office, concerning the provision or availability of reports and assessments of the complainant, her family and her circumstances prior to the commission of the alleged offences. These exchanges did not procure for the applicant the materials which he was seeking.

7. Depositions were set down for hearing on 10th January, 2003. According to the affidavit of Mr. O'Neill sworn on 7th July, 2003, counsel for the applicant drew the Court's attention to the fact that materials had been sought but had not been provided. During the deposition hearing it became clear that the complainant had an involvement with social workers from the Midland Health Board, the notice party, for some years, as well as an involvement with professionals since the alleged offences, and had counsellors dealing with her. The complainant and members, or at least some members, of her family came under the care or advice of one such person, a Ms. Brady.

8. Further requests for material, together with reasons for the same, were made on behalf of the applicant to the chief prosecuting solicitor. Certain material was disclosed by a letter dated 5th March, 2003, upon which the said solicitor for the applicant took the view that sight of material concerning the complainant, on the files of the notice party, should be made available and further correspondence in that regard took place.

9. Arising from the foregoing hearing, the applicant's solicitor on 29th January, 2003, wrote to Ms. Brady of the Midland Health Board seeking certain reports, interview notes and further material. Solicitors for the Midland Health Board responded indicating, inter alia, that the said reports were privileged on the basis that the dealings with the complainant were essentially of a therapeutic nature.

10. Mr. O'Neill avers in the foregoing affidavit that he then served subpoenas *duces tecum* on several witnesses, including three named persons attached to the Midland Health Board. At an in camera hearing held on 10th April, 2003, it was confirmed by a witness that the Midland Health Board file was in Court. In his affidavit, Mr. O'Neill describes the evidence given during the taking of depositions, and that counsel for the applicant sought sight of the notes on the file of the witness, at which stage counsel for the respondent intervened and objected on the basis that such an approach was tantamount to the use of the deposition hearing to secure third party disclosure. In turn counsel for the applicant submitted the material was both relevant and admissible in the preparation of the applicant's defence.

11. Following legal argument the learned judge of the District Court refused to direct the witness to produce and show the document sought, indicating that he would review the file and decide if anything on it should be disclosed, which approach was consented to by counsel for the applicant and counsel for the Notice Party. On an adjourned date the learned judge ruled, having reviewed the appropriate authorities, that there were no settled Irish legal cases on the issue, that there was an important legal question on which he would wish to have the opinion of the High Court and the possibility of preparing a consultative case was considered. On a further adjourned date, the learned judge decided that as the matter was not one being dealt with summarily in the District Court, he did not appear to have jurisdiction to state a case for the opinion of the High Court on the issues.

12. The applicant, on advice, proceeded with the deposition hearing. On the adjourned date of 12th May, 2003 when the matter was then dealt with, further requests for sight of the documents were made of the witness, and the witness was also requested to read out the content of a letter of referral. This was rejected by the witness. The legal representative of the notice party objected to disclosure of any material on the file, *inter alia*, because the information related to members of the family in question and was confidential. Further legal argument took place on the part of all parties to the hearing.

13. On 13th June, 2003, the second named respondent, without having read the documents gave a ruling on the applicant's submission for access to or sight of the materials in question. The ruling was to the following effect:

> (i) Certain material in addition to that appearing in the book of evidence had been disclosed to the applicant's legal advisors. This material was to be considered as being confidential.
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> (ii) The prosecution has a duty to disclose all documents in their possession, power or procurement to an accused, and this had been done.
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> (iii) The additional documents being sought were those of the Midland Health Board. They were not within the procurement of the prosecution, there being no third party discovery available in Irish criminal law.
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> (iv) The case of *D.H. v. His Honour Judge Groarke* was not the same as the present case. In the latter case the social worker had made statements and as a result the applicant's solicitor required the presence of the social workers at deposition stage. In their deposition they had referred to the notes in question. In the present case the social worker had made no statement whatsoever and was not referred to in any way in the book of evidence.
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> (v) Ms. Brady had been called as a witness by the defence and having provided no statement, in accordance with the Criminal Procedure Act, 1967, the defendants must accept the deposition as given. Otherwise it would permit the defendants to embark on a fishing expedition, since they did not know the content of the file or of any document and this would amount to cross-examination of the defendant's own witness by the defence, which is not permitted.
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> (vi) Additionally, the second named respondent indicated that the Health Board carried out its functions as a statutory body charged, *inter alia*, with the protection of the family, including the complainant. If the files of the Health Board were to be opened up for scrutiny, it would be difficult if not impossible to the functioning of the Health Board. While being mindful of the right of the accused to ensure a fair trial, public policy dictated that such sensitive information should be maintained by the Board as confidential.
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> (vii) That the issue of privilege did not arise in the present circumstances.

14. On the foregoing basis, the second named respondent refused to compel the Health Board employee to read out or to produce the report which is the referenced documentation from the social worker. The same approach would also apply to all the documents and memoranda in the possession of the Health Board relating to the relationship between that body and the complainant's family created pursuant to that body's exercise of its statutory functions.

15. Against the foregoing background, the above leave was granted.

16. A Notice of Opposition was duly filed on behalf of the first named respondent on the 25th September 2003. Apart from several paragraphs which formally put in issue the several pleas of the Applicant, the Notice of Opposition specifically pleads, inter alia:

> (a) that the applicant is not entitled as of right, by virtue of the serving of a subpoena *duces tecum* upon a witness as part of the deposition hearing, to production to the applicant's legal advisors of documents in the possession of that witness, or to receipt of the contents thereof into evidence;
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> (b) The use of the deposition procedures provided by Section 7 of the Criminal Procedure Act 1967 for the purpose of discovering, identifying, uncovering or otherwise locating evidence for the substantive trial is misconceived and wrong in law;
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> (c) The relevance of the documentation the subject of the application to issues arising in the trial was not established sufficiently or at all, or sufficiently so as to outweigh the public interest in the preservation of the confidentiality attaching to the particular materials;
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> (d) That the taking of a deposition pursuant to Section 7 of the Criminal Procedure Act 1967 is not a form of discovery;
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> (e) That a learned judge of the District Court in the course of such deposition is not required, for the purposes of determining the relevance or admissibility of the content of the same, to read such documentation as may be sought by or on behalf of an accused from a witness in possession of the same;
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> (f) That the learned judge had not erred in law in holding that the manner of the taking of the deposition amounted to cross examination of the witnesses in question.
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> (g) That the learned judge had not erred in law in holding that the functioning of a Health Board would be rendered difficult, if not impossible, if the witness was to produce a document or give evidence of the content of the same, and that the determination by the learned judge arose upon a legitimate consideration and acknowledgement of the public interest in preserving the confidentiality of information reposed in the Notice Party in the discharge of its statutory functions.

17. The notice party supports the position adopted by the respondent in these proceedings. In particular the notice party contends that the only challenge to the procedure adopted by the second named respondent in adjudicating between the competing contentions of the applicant and the notice party are that the respondent (a) made his ruling without reading the content of the file, (b) ruled that the applicant's counsel was in effect seeking to cross-examine his own witness, and (c) failed to consider the right of the accused to establish the fact or content of previous consistent/inconsistent statements.

18. The notice party also contends that the second respondent, while being entitled to view the documents if he wished, was not obliged to read the file in order to adjudicate on the question of disclosure of its content. That decision was therefore made *intra vires*. So also was the second named respondent's finding that counsel was in effect cross-examining the defendant's own witness, and the accused's entitlement to pursue issues of previous consistent/inconsistent statements is to be considered within the broader issue of whether or not disclosure should be permitted in the context of the standing which discovery has in the course of the taking of depositions.

19. Before me, matters had moved on from the factual position arising at the date of the above ruling, and indeed from the date of

the filing of the said Notice of Opposition.

20. It was explained to me the court that:

> (a) The Midland Health Board file in question had now been handed over to the Chief Prosecution Solicitor;
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> (b) In line with what I am informed is the usual practice in criminal matters, the documents had been examined by or on behalf of the prosecution and several documents had been furnished to the legal representatives of the applicant, being those documents which in accordance with the obligations imposed on the prosecution, ought to be disclosed to the applicant's legal advisors, (and following the test referred to in *DPP v. Special Criminal Court (Paul Ward)* (1998) 2 I.L.R.M.493;
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> (c) The applicant proposes to continue with this motion for judicial review notwithstanding the handing over of those documents.
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> (d) An issue has arisen as to whether or not the foregoing arrangement was to be the end of the matter when this motion first came on for hearing in the month of October, 2004;

21. The arguments put forward by the applicant are fairly straight forward. It is argued that arising from the decision In *Re Haughey*, 1971 I.R. 217 and the case of *Murphy v. Dublin Corporation (cited)* and *The State (Healy) v. Donoghue* [1976] I.R. 325, Article 38 of the Constitution clearly enjoins that basic fairness of procedures should always be observed, *inter alia* in criminal trials. Therefore, the power to compel the attendance of witnesses and the production of evidence is an inherent part of the judicial power and the ultimate safeguard of justice in the State and that where there is a conflict of interest it is exclusively the judicial power which is entitled to decide which public interest will prevail. If this were not so, the dignity of the individual would be ignored and the State would have failed to vindicate his personal rights, including the right to see all relevant documentation which might be of assistance to his defence, at least through his counsel.

22. The applicant submitted that the ruling of the first named respondent was in conflict with the judgments in the foregoing cases in particular *Murphy v. Dublin Corporation, supra*, in which the Supreme Court had stated:-

> "Under the Constitution the administration of justice is committed solely to the judiciary in the exercise of their powers in the Courts set up under the Constitution. Power to compel the attendance of witnesses and the production of evidence is an inherent part of the judicial power of Government of the State and is the ultimate guardian of justice in the State."

23. The applicant further submits that the cases of *The People (Director of Public Prosecutions) v. Sweeney* [2001] 4 I.R. 102 and *D.H. v. His Honour Judge Groarke and the North Eastern Health Board* [2002] 3 I.R. 522, make it clear that while discovery of the type existing in civil proceedings, does not apply to criminal cases, nevertheless there is no inhibition on an accused person being given access to all materials relevant to the preparation of his defence. According to this argument, these two cases establish only that discovery is not the correct mechanism in law by which to procure the relevant material in the possession of a third party. In that regard, in particular, the applicant invokes the decision in the *D.H.* case, *supra*, of the Supreme Court in which Keane, C.J. stated:-

> "The fact that discovery in the form provided for in the Rules for civil litigation is not available in Criminal Proceedings does not have as a necessary consequence an erosion of the fair procedures to which defendants are entitled. Thus, in the present case, it was open to the solicitor for the applicant to ensure that at the deposition stage any relevant records or notes in the possession of the social workers were produced and, to at least a limited extent that was done. Moreover, the social workers can be required by the applicant to attend the trial and produce any relevant documents by the issue of a *subpoenas duces tecum*."

24. It seems to me, having regard to the arguments put forward by the applicant, the second named respondent and the notice party, that I can deal with the respondents or notice party's answers without having to set forth separately all the arguments put forward by all the parties.

25. There is no dispute between the parties as to the right to a fair trial for every accused and within that constitutional right, a right to fair procedures. Nor is there any dispute between the parties that, in the case of documents in the possession of the prosecution, relevant documents must be disclosed to the accused, whether or not they are of advantage or disadvantage to the prosecution, arising from the obligation to ensure a fair trial.

26. Nor is there any disagreement in reality between the applicant and the second named respondent as to the meaning of the case law of the Supreme Court on the question of the non-availability of discovery in the sense in which this is available in civil or similar proceedings and both parties invoke in that regard the above decisions of *The People (Director of Public Prosecutions) v. Sweeney and D.H. v. His Honour Judge Groarke and anor., supra*.

27. Where the parties are in clear disagreement is on the following:

> 1. As to the procedures open to an accused in circumstances where discovery of the type provided for in civil proceedings is not available.
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> 2. Is it sufficient for an accused to serve a *subpoena duces tecum* at deposition stage, to be guaranteed at that time, an entitlement to disclosure of files or to the reading into evidence of the content of the same when a witness brings a file to Court but has not made any statement and does not form any part of the book of evidence.
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> 3. Who is the person who will determine, if there is any conflict, whether documents or a file which is sought by or on behalf of a defendant in the course of criminal proceedings, and which has been refused, ought to be disclosed.
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> 4. Is the accused entitled to oblige the prosecution to secure documents from third parties for onward transmission to the defendant.
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> 5. If the answer to (4) is in the negative, is a complainant obliged to secure for the prosecution documents from third parties, such as the notice party, for onward transmission to the accused.

28. As to the procedures upon which an accused may rely in the absence of civil type discovery, Mr. Hartnett, S.C. for the applicant argued that at the very least in such circumstances, a listing of documents must be available in order to ensure that a defendant's entitlement to a fair trial is guaranteed. Such a procedure would oblige the prosecution or any person or undertaking requested and having a document or a file which the accused considers might include relevant documents, to list all such documents together with an appropriate description of such documents and to include in such document any plea as to confidentiality or any other ground upon which the person seeks to withhold disclosure of the document. In the event of any dispute about such document a judge would determine whether the document ought to be disclosed. In support of this latter argument counsel for the applicant relied on the decision in *Ward v. The Special Criminal Court, supra*.

29. Counsel for the first named respondent rejected such a contention on the grounds that this matter has already been explored fully by the Supreme Court and it has been determined that discovery of the type available in civil proceedings is not available within the criminal law system.

30. I do not accept the argument put forward by counsel for the applicant on this issue. No matter how the suggested procedure is described, and regardless of what it might be called, the proposition put forward on behalf of the applicant is one by which discovery of the type available in civil proceedings should to be available in criminal matters. In fairness to Mr. Hartnett when pressed to explain the manner in which a procedure of the type contended for would operate, he clearly described that what is sought to be established is a procedure so closely similar to discovery as to be indistinguishable from it, including, for example, the listing of all documents in the hands of a third party; the description of them in sufficient detail to permit a defendant to identify those which might be relevant or of interest; the invoking, if appropriate, of a claim to confidentiality; and the determination by a judge, in the event of a dispute between the parties, as to the disclosure of any particular document, of its fate.

31. Given that the law relating to this very matter has been the subject of several cases of as recent a vintage as 2000 and 2002, cases in which the issues have been argued in very significant detail, and in particular the case of *D.H. v. His Honour Judge Groarke, supra*, a unanimous decision of a court of five judges, I do not find any reason for considering that the suggested procedure would fall outside the ambit of those judgments. Indeed in the latter case Keane C.J., having analysed the earlier jurisprudence, and returning to basic principles, stated:-

> "I am, in any event, satisfied that the decision in *The People (D.P.P.) v. Sweeney* [2001] 4 I.R. 102 was correct in point of law. The function of discovery in civil proceedings, whether it be *inter partes* or third party discovery, is to enable both parties to advance their own case or damage their opponent's case. The court in such cases is normally in a position to ascertain from a consideration of the pleadings what the issues are between the parties and accordingly what documents will be relevant to those issues and, specifically, whether, if discovered and inspected, they will enable a party to advance his own case or damage that being made by his opponent. In a trial on indictment, such as the present, the issue which the court has to determine is not defined until the accused has been arraigned and has pleaded to the counts made against him. Even then, he is not required to do more than plead guilty or not guilty. There are some rare statutory exceptions to that, such as the requirement to notify the prosecution in advance of a proposed alibi. But in every other respect, while the prosecution must disclose comprehensively and in detail the case they propose to make against the accused he is under no such obligation. Discovery, accordingly, in a trial on indictment would be a wholly one sided process, which was certainly not what was envisaged by the procedure for *inter partes* and third party discovery provided under the rules of Court. It is clear, accordingly, that, in the case of the rules of Court dealing with discovery, to treat the word "cause" as extending to criminal proceedings would be clearly repugnant to the context in which it was being used."

32. Even if this court were not bound by this particular extract from the decision of the Supreme Court in that case, I am entirely in agreement with the judgment of the learned Chief Justice, as he then was, on the principle of the non applicability of discovery in criminal proceedings. In the circumstances, a defendant is not entitled to rely on the proposition that a procedure akin to discovery, and having a format of the type suggested above on behalf of the Applicant not being available to him, infringes the applicant's right to a fair trial.

33. The next area of dispute between the parties concerns the entitlement of the applicant, as defendant in criminal proceedings, if he seeks a deposition hearing, to oblige a witness who has made no statement, and who does not form any part of the book of evidence, to produce and/or read notes or extracts or in some other way disclose the content of a file in the hands of that witness.

34. In the present case the file is that of the notice party, The Midland Health Board, but was, in effect, the file which contained the professional notes of a person working as a contact or advisor between The Midland Health Board and the family of the complainant, including the complainant herself.

35. According to the applicant, a witness is obliged to furnish any document which the defendant seeks to secure from the file, notwithstanding that the file content is unknown to the defendant. The plea is made on the basis that there may be in the file material which may assist the defendant in his defence and he should therefore be permitted to have full access to that file, subject only to such preconditions as to the distribution of the file as the judge before whom the deposition hearing is taking place, shall determine. In the alternative, the applicant argues that the file should be ruled on as to its content by the Judge of the District Court and that judge should consider what documents may be made available, subject only to the aforesaid caveat as to its distribution.

36. The first named respondent argues that the learned judge was correct in his assessment of this exercise as being a fishing expedition, since the defendant has no knowledge of the content of the files he seeks, the person having charge of the file having made no statement and not being referred to in any way in the book of evidence. In those circumstances it is also argued that the second named respondent was correct in finding that the process would amount to a cross-examination of the witness who, at that stage in the course of the proceedings, was the defendant's own witness. This respondent submits that the learned judge analysed the position correctly and came to the correct legal conclusion and there was no ground upon which that view ought to be set aside. Further it is argued that he had performed an appropriate balancing exercise, in which case this Court should not intervene by way of judicial review in relation to that exercise unless it could be shown that the particular decision was in some way irrational or otherwise wrong in law.

37. The Notice Party agrees with these submissions. In particular, Mr. Mulloy, S.C., on its behalf, submits that the taking of depositions pursuant to Section 7 of the Act of 1967 are so as to enable a judge of the District Court make a decision pursuant to Section 8 of the Act, or to be used as evidence at the trial pursuant to Section 15 of the said Act. He says that in the instant case there was no attempt at all on the part of the Applicant to contend that in some way the evidence of Ms. Brady or the content of her file were going to be used for the purpose of influencing the learned judge in connection with the application of Section 8 of the Act, nor that the evidence adduced would be used at the trial pursuant to Section 15.

38. Although acknowledged by the Applicant that the taking of depositions is not discovery in any legal sense, counsel for the Notice Party submitted that in the present case the preliminary examination procedure was in fact being used as a facility to achieve third party discovery, and that without any reference whatsoever to the objects of such an examination, under the Act of 1967.

39. I agree with counsel for the second named respondent and the notice party in regard to these two related matters. As to the first, it seems to me impossible not to conclude that the exercise sought to be carried out is, in reality, a fishing expedition. It is equally true that where the person in question has made no statement whatsoever and is not even mentioned in the book of evidence, such a witness when called by the defendant, as the defendant is entitled to do, remains the defendant's witness and cannot be cross-examined. Further, at the stage of taking depositions, I am not satisfied that the mere summoning of a witness, even *duces tecum*, has as its consequence that the witness must disclose all or any of the content of the file. As Mr. McDermott for the first named respondent submitted, the deposition stage in criminal proceedings is intended as a means of ascertaining whether there is sufficient evidence or material upon which a judge of the District Court may determine to send forward a defendant for trial. And in addition, as Mr. Mulloy for the notice party contended, there was no suggestion that the information sought was to be used during the trial. It is true of course that in the case of *D.H. v. His Honour Judge Groarke and Anor., supra*, Keane, C.J. stated:

> "The fact that discovery in the form provided for in the rules for civil litigation is not available in criminal proceedings does not have as a necessary consequence an erosion of the fair procedures to which defendants are entitled. Thus, in the present, it was open to the solicitor for the applicant to ensure at the deposition stage that any relevant records or notes in the possession of the social workers were produced and, to at least a limited extent that was done. Moreover, the social workers can be required by the applicant to attend the trial and produce any relevant documents by the issue of a subpoena *duces tecum*".

40. Two things are relevant to note in relation to this statement. First, it was, as counsel for the first named defendant submitted, a statement made obiter. Secondly, however, it must be read in context. In that case, the social workers had actually made a statement and appeared in the book of evidence, and therefore it was appropriate, if a defendant thought so, to have that person examined in the course of a deposition hearing.

41.. The second possibility mentioned by Keane, C.J., as providing possible access to information or to files was that the issue of a *subpoena duces tecum* was possible for the purposes of ensuring that a witness and a file or document would be available "at the trial itself". The extract is not to be taken as a statement of law that, by the mere issuing of a *subpoena duces tecum* at any time in the course of criminal proceedings, a person issuing the same is ipso facto entitled to have sight of the documents in question or is entitled to have their content read out in court, so as to prepare for the defence of a case at an eventual trial. Such a witness can of course be compelled to attend at the trial itself, as the above extract makes clear.

42. A *subpoena duces tecum* is a process of the Court, not of the parties. Its usual purpose is to compel the production of specific documents that are relevant to pending judicial proceedings. It is a long established principle that a *subpoena duces tecum* is not however a disclosure device, and cannot be said to be capable of being used as a substitute for discovery. In the present case it is in reality being sought to be used as such.

43. But even if it could be said that there is a defendant is entitled, by whatever means adopted for doing so, at deposition stage, to seek an adjudication as to whether any document should be disclosed or the content of any notes read out, on the basis that the same might form part of the defendant's defence and therefore assure his entitlement to a fair trial, even on the Applicant's case, the exercise which must be carried out in such circumstances is one of balancing two possible competing public interest rights, having regard also to the question of confidentiality raised in this case by the notice party in relation to the content of the file which concerns not only the therapeutic treatment of the complainant but also matters concerning other family members.

44. I am satisfied that the trial judge carefully examined this matter and balanced the public interest which arises in such circumstances and I am satisfied that he was entitled to conclude this balancing exercise in the way in which he did, there being no evidence to suggest that his conclusion was biased, irrational or in any way an incorrect exercise of his function.

45. There is nothing in the ruling of the trail judge to suggest that any particular document in the file was essential to the defendant's case, nor was it suggested to me in the course of the submissions made that there was a specific ground raised by the applicant before the trail judge which he did not take into account in the course of his ruling. In the circumstances I am of the view that the trial judge was correct in the manner in which he analysed the position concerning the files, as well as the rights of the accused and those of the statutory body carrying out work of the particular nature in which it is involved as part of its statutory functions.

46. In the present case there is one final matter which also persuades me that no order should be made in favour of the Applicant in the present case and which concerns 4 and 5 in the above list. It is accepted by all parties that when the matter came before the Judge of the District Court the prosecution did not have any of the documents in the hands of the Health Board, nor any automatic legal entitlement to have access to any document on the Health Board's file. The documents were those of the Notice Party and not those of the prosecution. Nor, despite the contention that the prosecution is also obliged to present all documents to the defence which might be relevant and which are within its procurement, were these documents within the procurement or control of the prosecution. While it was suggested that a complainant is obliged to make available to the prosecution all documents which are relevant, and I accept this to be the case, I am not satisfied that the complainant is obliged to pursue a statutory body or is entitled at law to secure from it documents of the type found on the file of the Notice Party in these proceedings, and no authority to the contrary was opened to me.

47. However, subsequent to the deposition hearing, and after the commencement of these proceedings, the file of the Notice Party was in fact made available to the first named respondent. At that stage an exercise was carried out by the second named respondent and several documents were made available, with the consent of the complainant to whom the documents undoubtedly refer, to the applicants solicitors. These documents, according to counsel for the first named respondent, and this was not denied, were supplied to the applicant's legal advisors in the same way and pursuant to the same mechanism as takes place when considering documents already in the hands of the that respondent, that is to say, when its own documents or any documents which come to it as part of a regular prosecution, are similarly made available.

48. It has been suggested to me on behalf of the Applicant that this exercise has not been carried out correctly in that it is not carried out by a judge or other judicial authority as the applicant contends is a necessary requirement pursuant to the jurisprudence *in Re Haughey and in Murphy v. Dublin Corporation, supra*, as well as in *The State (Healy) v. Donohue*, but that in its place the exercise was carried out by a person within the offices of the first named respondent. On behalf of the that respondent the alleged impropriety of such an approach is contested, since the exercise is carried out under the direct control of the first named respondent and in accordance with the statutory entitlement of persons associated with that respondent to carry out certain functions on his

behalf.

49. I do not agree that, without more, the applicant is entitled to say, in effect:

> "I accept that the prosecution has furnished me with the documents which it considers relevant to my case and I accept that this has been done in accordance with the usual practice which operates in such cases but nevertheless I am not satisfied that I have all the documents I wish to have or all of the documents which in my view might be required by me if I had the opportunity of examining the entire file myself, or through my legal advisers. The only person who can decide this is a judge exercising a judicial function."

50. Without having some additional material before the court, it is not reasonable to assume that despite what has been stated on behalf of the first named respondent as being the normal procedure which was adopted and followed in this case in relation to documents of the notice party, there still may remain some document which has not been disclosed and which has as its consequence a real and serious risk that the applicant will be subject to an unfair trial, since this is undoubtedly the test which must apply.

51. Such a contention is speculative, and is based on the erroneous contention that the defendant is entitled to have sight of all the documents on one or other of the bases which I have found to be unsustainable at law.

52. Having regard to the foregoing consequences, I am satisfied that the applicant has not made out a case that there is a real or serious risk to him not having a fair trial in the event that he does not have a type of disclosure of the files or of the documents which is contended for on his behalf, or on the basis that he is not entitled to compel a witness called as his witness at deposition stage, who has not made a statement and who is not part of the book of evidence, to disclose the confidential contents of a file prepared and maintained by that witness as employee of the Health Authority fulfilling its statutory function, or on the basis that full access to all of the documents and notes appearing on the files belonging to such latter party, apart from those already disclosed to the applicant's legal advisors following the normal procedures applicable in the course of a criminal trial, has not been available not available to him, or has not been adjudicated upon by a judge.

53. In the circumstances, I reject the application for the relief sought.