THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 63

Finlay Geoghegan J.
Irvine J.
Hedigan J.

Article 64 Transfer

App. No. 2014 771 (89/2013 SC)

App. No. 2014 794 (131/2013 SC)

BETWEEN

PATRICK NEVIN AND MARGARET LAVELLE (FORMERLY NORA NEVIN)

PLAINTIFFS/RESPONDENTS

AND

CATHERINE NEVIN

DEFENDANT/APPELLANT

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 7th day of March 2017

1. These are two appeals against orders made by the High Court (Kearns P.) on the 14th February 2013, in the defendant's motion and on the 1st March 2013, on the plaintiff's motion. The single judgment was given by the High Court on the 1st March 2013, which includes the reasons for which the order refusing the defendant's application was made and also for its determination on the plaintiffs motion that "the conviction of the defendant for her husband's murder is admissible in the within proceedings as *prima facie* evidence of the fact that she committed such murder".

2. The order of 1st March 2013 was made on a motion brought by the plaintiffs on the 11th April 2012, seeking the preliminary trial of an issue of law on "the admissibility of the evidence of the defendant's trial and subsequent conviction for the murder of her husband, Thomas Nevin".

3. The background to the proceedings is that the defendant's husband, Thomas Nevin, was killed on the 19th March 1996. The defendant was subsequently charged with the murder, and also soliciting the murder, of her husband. On the 11th April 2000, following a trial of 42 days before a judge and jury in the Central Criminal Court, the defendant was found guilty of:-

> "(i) Murder, contrary to common law and s. 4 of the Criminal Justice Act 1964 and s. 2 of the Criminal Justice Act 1990 of Thomas Nevin at Jack White's Inn aforesaid;
>
> (ii) soliciting to murder, contrary to s. 4 of the Offences Against the Person Act 1861, one John Jones to murder Thomas Nevin;
>
> (iii) soliciting to murder contrary to s. 4 of the Offences against the Person Act 1861, one Jerry Heapes, to murder Thomas Nevin;
>
> (iv) soliciting to murder, contrary to s. 4 of the Offences against the Person Act 1861, one William McClean to murder Thomas Nevin."

4. These plenary proceedings were commenced initially by the mother of the deceased, and subsequent to her death have been continued by two siblings of the deceased. The proceedings seek, primarily, declarations at common law and pursuant to s. 120 of the Succession Act 1965, ("the 1965 Act") that the defendant is disinherited or precluded from taking any share either as a legal right or otherwise in the estate of the deceased.

5. The plenary proceedings have had a protracted history. This was primarily caused by the criminal proceedings, appeals against the conviction, an application for a miscarriage of justice, an application for a certificate under s. 29 of the Courts of Justice Act 1924, and an application to the European Court of Human Rights, all of which had been dismissed or struck out by February 2013. The defendant has filed a full defence denying any involvement in the murder of the deceased.

6. These two appeals were initially made to the Supreme Court, and, in October 2014, transferred to this Court pursuant to Article 64 of the Constitution.

7. The appeal against the order of the 14th February 2013 was moot at the time of the hearing before the Court of Appeal. That order refused the defendant's application for a stay on the hearing of the plaintiffs' motion. The basis of the application was that there was an outstanding application to the Court of Criminal Appeal for leave to re-enter to apply for a certificate pursuant to s. 29 of the 1924 Act. That has since been refused. Notwithstanding that it is now moot, the defendant/appellant contended that it had a costs implication. Insofar as that is relevant, I would dismiss that appeal and uphold the decision of Kearns P. to refuse the application for a stay on the plaintiffs' motion for the reasons he set out in his judgment of 1st March, 2015.

8. The appeal to this Court was principally focused on the determination as a preliminary issue that the conviction of the defendant for her husband's murder is admissible in the plenary proceedings as prima facie evidence of the fact that she committed such murder.

The Issue in the High Court and on Appeal

9. Kearns P. in his judgment expressed the view that the issue "in the present proceedings", by which I think he meant the application on the motion before him, was "a simple one". I respectfully disagree. He identified the issue in the following terms:

"The issue in the present proceedings is a simple one. Is a criminal conviction for murder admissible in a later civil proceeding brought against a person convicted of that murder? If not admissible, then it would follow that a defendant in a civil case would be in precisely the same position as a person who was acquitted or never charged with the offence in question. The conviction could not be used in any way whatsoever in the civil case.

If, on the other hand, the conviction is admissible, is it conclusive of the fact that the defendant murdered her husband or is it simply prima facie evidence of that fact, leaving to the defendant the right to argue that she should not have been convicted? In this regard, it is important to state at the outset that the plaintiffs do not contend that the conviction, if admitted, is conclusive against the defendant, nor do they any longer contend that evidence given at the criminal trial is in some way admissible in the civil proceedings."

10. The reason for which the issue is complex, and for which it appears to me extremely important that this Court make clear the very limited issues with which it was dealing on appeal, is first, the fact that the plaintiffs indicated that the claim is being pursued both at common law and pursuant to s. 120(1) of the 1965 Act, which perhaps explains the general formulation of the issue as relating to the admissibility of the conviction "in civil proceedings" as distinct from its admissibility in a claim pursuant to s. 120(1) of the 1965 Act. Second, is the approach taken by Counsel for the plaintiffs of only seeking an order of admissibility of the conviction as *prima facie* evidence, even in relation to the claim pursuant to s. 120(1) of the 1965 Act, which is likely to be the central issue in the full hearing of the proceedings.

11. The proper construction of s. 120(1) of the 1965 Act was not in issue before this Court. It is unclear to what extent it was argued in submissions before the High Court. Notwithstanding this, views were expressed by the trial judge in the course of his judgment and I am concerned that we might be taken to agree with them if they were left without comment. I therefore propose briefly considering them.

12. Kearns P. set out s. 120 of the 1965 Act, of which ss. (1) and (4) are principally relevant. These provide:-

"(1) A sane person who has been guilty of the murder, attempted murder or manslaughter of another shall be precluded from taking any share in the estate of that other, except a share arising under a will made after the act constituting the offence, and shall not be entitled to make an application under s. 117.

. . .

(4) A person who has been found guilty of an offence against the deceased, or against the spouse or any child of the deceased (including a child adopted under the Adoption Acts 1952 and 1964, and a person to whom the deceased was loco parentis at the time of the offence), punishable by imprisonment for a maximum period of at least two years or by a more severe penalty, shall be precluded from taking any share in the estate as a legal right or from making an application under section 117."

13. He then said:

"In making his submissions to the effect that the criminal conviction was admissible as prima facie evidence in this case, Mr. Brady on behalf of the plaintiffs accepted that a significant difference in wording appears in subsection (4) of s. 120 from that contained in subsection (1). The former contains the words 'found guilty', whereas the wording of subsection (1) states only that the person be 'guilty of the murder'.

It is far from easy to see why the legislature, when inserting the words 'found guilty' in subsection (4), omitted the same term from subsection (1), given that the overall thrust of the section is to provide that certain forms of conduct should have particular consequences in terms of succession rights. In McGuire's commentary on the Succession Act, 1965 (2nd Ed., at 291) the author does not address this particular difficulty, noting merely that:-

> 'It was a rule of public policy at common law that a person should not be permitted to benefit from a crime. For that reason, where a sane person was guilty of murder or manslaughter, he was precluded from taking any benefit from the will or intestacy of his victim.'

A similar statement appears in Spierin's Succession Act 1965 (3rd Ed. at par 757) who in addition notes: -

> 'In the previous edition of this book it was suggested that the wording of the section, referring as it does to a person 'who has been guilty' rather than to a person 'who has been found guilty' (as in sub-s (4) does not appear to require a conviction before the disqualification on benefit applies. However the terms 'murder', 'attempted murder' and 'manslaughter' are terms of art in the criminal law and it is perhaps difficult to imagine that a court would apply the disqualification if there is no conviction.'

It is an extraordinary omission from s. 120 (1) for which it is difficult to find any rational explanation, given that a 'finding of guilt' is required under s.120 (4) for lesser offences and having regard further to the fact that 'guilt' is a finding appropriate to the criminal rather than the civil process. One is left not knowing what the section is to mean, unless one supplies the word 'found' to subsection (1) where in the text it does not appear. In those circumstances of uncertainty, and given that the section is undoubtedly punitive and conclusive in both nature and effect, its terms must clearly be subject to rules of strict construction in favour of the person against whom it is sought to enforce it.

It seems to me the defendant must be the beneficiary of this ambiguity so I am satisfied that the issue before the Court cannot be resolved by reference to the specific provisions of section 120 (1). I am satisfied that, as presently worded, the section cannot be invoked in aid by the plaintiffs to determine the issue in the conclusive way provided for by its terms. Indeed counsel for the plaintiffs, in arguing only that the criminal conviction is admissible as *prima facie* evidence in the civil case, implicitly accepts that this is the correct approach. It seems to me that s.120 (1) only goes so far as to be declaratory of a public policy which is that the perpetrator of the crime of murder should not be its beneficiary."

14. As appears, the persons precluded from taking a share in an estate pursuant to s. 120(4) include a person "who has been found guilty of an offence [emphasis added]" whereas the exclusion under subs. (1) is of a person "who has been guilty of the murder". As pointed out by Kearns P. it is far from easy to see why the Oireachtas used this different form of wording. Nevertheless in so far as

the above passages may indicate that Kearns P. concluded that proof of a conviction for murder (with all appeals exhausted) does not of itself meet the proofs required by s.120(1), I respectfully disagree.

15. The interpretation of section 120(1) may not be considered obvious by reason of the difference in wording with s. 120(4). However, one potential interpretation is that a court asked to make a declaration that a person is precluded from taking a share in the estate may be satisfied that the person "has been guilty of the murder . . ." by proof that such person has been convicted or found guilty of the crime of murder of the deceased and any appeal has been dismissed or time for appeal expired. If this is the true construction (and I am not so holding), then proof in the plenary proceedings that the defendant was convicted of the murder of her husband would be sufficient to meet the requirements of section 120(1). If, however, it is determined at the full hearing this is the true construction then the only question on admissibility would be whether the order of the Central Criminal Court recording the conviction of the defendant is admissible in the plenary proceedings as proof of the conviction. Such admissibility is not in dispute. It is expressly accepted in the written submission on behalf of the defendant that this is the position. Such order or certificate is a public document and as such admissible as *prima facie* evidence of the facts stated therein i.e. of the conviction or finding of guilt of the murder.

16. It is only if some other construction is the proper interpretation of s. 120(1) that the question of the admissibility or otherwise of the conviction as *prima facie* evidence of the fact that the defendant was guilty of the murder of her husband becomes relevant.

17. I wish to make very clear that I am not expressing any concluded view on the proper interpretation of s. 120(1). It remains to be fully considered by the High Court following submissions from both parties at or prior to the full hearing of the plenary proceedings. It is not an issue which should be considered as already determined either by the judgment of Kearns P. or this Court.

18. I have drawn attention to this by reason of the views expressed on s. 120(1) by Kearns P. in his judgment which if left without comment might have lead to an implication that this Court agreed with same. It is also appropriate to draw attention to the phrase used "guilty of the murder" and to recall that, as noted in the extract from *Spieren* referred to by Kearns P., murder is a term of art defined by s. 4(1) of the Criminal Justice Act 1964. Further there appears to have been no consideration in the High Court of the judgment in *Cawley v. Lillis* [2011] IEHC 515 [2012] I.R. 281 where a conviction for manslaughter was received in evidence (albeit it would appear without objection) and Laffoy J., having referred to it and the absence of an appeal, stated at p.284:

> "[4] The conviction of the defendant for the manslaughter of the deceased has certain implications in relation to the distribution of the estate of the deceased by virtue of the application of s. 120 of the Succession Act 1965."

Having referred to s.120(1) and (5) she continued:

> "[6] By application of those provisions, the defendant is precluded from succeeding to any interest in the estate of the deceased. . . ."

19. In *Cawley v Lillis* it does not appear that there was any dispute in relation to the above interpretation of s. 120 of the 1965 Act. If, however, the approach in Cawley v. Lillis is followed at the full hearing of these proceedings, the admissibility issues on this appeal do not arise.

20. If, however, on a proper construction of s. 120(1) it is decided that proof of the conviction of the appellant for the murder of her husband does not satisfy the requirements of s. 120(1) of the 1965 Act, then the question as to whether or not Kearns P. was correct in deciding that the conviction is admissible as prima facie evidence of the fact that the defendant, committed or was guilty of the murder of the deceased may become relevant.

21. For my part, it appears to me unfortunate that this Court is now in the position of being asked to determine, as a preliminary issue, the admissibility of evidence in proceedings which seek as a primary relief a declaration or order pursuant to s. 120(1) of the 1965 Act, in advance of the proper construction of that section being determined by the trial court. If, as might well have been done, a hearing on a preliminary issue was sought as to the proper construction of s. 120(1), it might be that the more general issue which Kearns P. was asked to decide, and which this Court is now being asked to review on appeal, might not fall for decision. This Court is being asked to review the correctness of a decision of the High Court upon an assumption (but without in any way determining) that the admissibility of such evidence might become relevant at the hearing of the proceedings.

22. However, as no ground of appeal was advanced against the determination of this issue as a preliminary issue, and in advance of the determination of what the court requires in order to be satisfied on the proper construction of s. 120(1), this Court is now required to consider whether or not it should uphold the determination made by Kearns P.

23. The trial judge reached his decision for a number of reasons. First, he considered that the permissible starting point was what he perceived to be the law as enunciated in *Crippen (In the estate of Cunigunda (otherwise Cora) Crippen deceased)* [1911] P. 108. Second, he was persuaded by the reasoning of the Court of Appeal of New Zealand in *Jorgensen v. News Media (Auckland) Limited* [1969] NZLR 961, that the conviction should be admissible as an exception to the hearsay rule. As such an exception he considered that it should be admissible as *prima facie* evidence only of guilt. He also added the following at pp. 59-60 of his judgment:-

> "To rule out the conviction as completely inadmissible would, in my view, be contrary to logic and common sense and offend any reasonable person's sense of justice and fairness. An alternative interpretation whereby it is admitted as prima facie evidence is clearly open on the authorities in this jurisdiction. There is the clearest public policy consideration for so holding and it is set out starkly and unambiguously in s. 120 of the Succession Act 1965. That policy consideration may be characterised as being no more and no less than that the perpetrator of the crime of murder should not be the beneficiary of it."

Submission on Appeal

24. Ms. Fitzgibbon, the solicitor who appeared for the appellant, primarily focused her submissions on the incorrect reliance placed by Kearns P. on the decision in Crippen's case. She submitted that the matters relied upon therein by the trial judge were in fact obiter and did not form part of the ratio of the case. Second, she submitted that in accordance with the Supreme Court judgment *in Eastern Health Board v. M.K.* [1999] 2 I.R. 99, Kearns P., prior to admitting the conviction as an exception to the hearsay rule, ought to have considered and conducted an inquiry as to whether it was necessary to adduce such hearsay evidence and also as to the reliability of the proposed hearsay evidence.

Discussion and Decision

25. At the outset, I repeat again that it is unsatisfactory that this Court has to decide only upon the admissibility of the conviction as *prima facie* proof of the guilt of the defendant of the murder of her husband. I deliberately put the issue in that way as whilst the actual order made pursuant to the judgment of Kearns P. is that it is admissible "as *prima facie* evidence of the fact that she committed such murder" nevertheless as the issue which will require to be determined by the trial judge on any construction of s. 120 is whether or not the trial judge is satisfied that she "has been guilty of the murder" and having regard to the judgment of the trial judge the intent appears to have been that it be admitted "as *prima facie* evidence of the fact that [the defendant] is or has been guilty of such murder".

26. I accept the submission made on behalf of the appellant that insofar as Kearns P. considered the law in this jurisdiction to be that as stated by Sir Samuel Evans in his judgment in *Crippen's* case, where he said:-

> "In my opinion, where a convicted felon, or the personal representative of a convicted murderer who has been executed, brings any civil proceeding to establish claims, or to enforce rights, which result to the felon, or to the convicted testator from his own crime, the conviction is admissible in evidence, not merely as proof of the conviction, but also as presumptive proof of the commission of the crime."

that Kearns P. was in error. Ms. Fitzgibbon is in my view correct in her submission that upon a full reading of the judgment in Crippen's case, this observation should properly be considered as obiter as distinct from part of the ratio of the case. I would add however, that it was cited with apparent approval by McCarthy J. in the Supreme Court in *Ireland v Kelly and Concannon* [1992] ILRM 582, a case concerning an application for an order for administration with will annexed to the Chief State Solicitor pursuant to s.27(4) of the 1965 Act, where the executor had been convicted of the murder of the testator's sister. That judgment refers to the conviction of the executor (without any issue relating to the admissibility of such evidence) and also contains observations on the policy behind s. 120 of the 1965 Act.

27. Notwithstanding, I am of the view that the decision of the trial judge should be upheld and insofar as it may be considered that the admission of the conviction in the present proceedings involves an extension of the exceptions to the rule against hearsay it is justified both upon grounds of necessity and relevance. I am in agreement with the trial judge that the reasoning in *Jorgensen v. News Media (Auckland) Limited* [1969] NZLR 961 is compelling against following *Hollington v. F Hewthorn & Company Ltd* [1943] K.B. 587 which is not binding on the courts in this jurisdiction.

28. The evidence of the conviction is of one following a trial before judge and jury in due course of law with all appeals exhausted. Its reliability is undeniable, as is its relevance to the claim where the issue is whether the defendant is "guilty of the murder of . . ." It is also necessary as to exclude admission of the conviction as evidence would, as put by Kearns P., "be contrary to logic and common sense and offend any reasonable person's sense of justice and fairness".

Conclusion
29. I would dismiss both appeals.