Neutral Citation: [2013] IEHC 575

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 307 JR]

BETWEEN

MARK BEATTY

APPLICANT

AND

THE MILITARY JUDGE AND THE DIRECTOR OF MILITARY PROSECUTIONS

RESPONDENTS

AND

THE HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Keane delivered on the 18th November 2013

Introduction

1. The applicant in this case seeks an Order for discovery directed to the Court- Martial Administrator, who is an officer of the Permanent Defence Forces of senior rank, appointed by warrant of the Judge Advocate General under the Defence Acts 1954 to 2007 for the purpose of discharging certain specified functions in respect of the Court-Martial system in military law that are analogous to the functions discharged by the Courts Service in respect of the ordinary criminal courts system.

2. The Court-Martial Administrator is not a party to these proceedings. Hence, this is an application for non-party discovery.

3. The applicant seeks an Order directing the Court-Martial Administrator to make discovery of all documents within his possession, custody or power "referring to all of the summary court-martial proceedings entitled 'The Director of Military Prosecutions -v- No. 861073 Corporal Mark Beatty of the 2nd Cavalry Squadron' which commenced at the Military Justice Centre, McKee Barracks, Dublin 7 on the 5th February 2013, under reference number SCM(A) 2012/006."

4. This discovery application is grounded on an affidavit of the applicant's solicitor, sworn on the 19th September 2013, from which it is apparent that the applicant is, in substance, seeking a copy of the transcript of the court-martial proceedings. In that regard, the uncontroverted evidence of the Court-Martial Administrator ('the non-party'), contained in an affidavit sworn on his behalf by Commandant Noel Conway on the 1st November 2013, is that no such transcript exists. However, it appears to be common case that a Digital Audio Recording ("DAR") of the court-martial proceedings does exist and so the application before this Court has narrowed in scope to one seeking discovery of that recording from the non-party.

Background

5. The applicant has issued the present motion in the context of pending Judicial Review proceedings that he has been given leave to bring against the Military Judge who presided over the applicant's summary court-martial, and against the Director of Military Prosecutions, a statutory office holder with, as his title suggests, responsibility for the conduct of military prosecutions.

6. The summary court-martial at issue took place over three days (on the 51h, 7th and 81h February 2013). At the conclusion of that hearing, the applicant was found guilty of the single charge then remaining before the Military Judge, which was one that he behaved "in an insubordinate manner towards a superior officer", contrary to s. 133 of the Defence Act 1954. The Military Judge imposed a fine of €300 in respect of that charge.

7. Peart J. granted the applicant leave to bring the present proceedings by Order made on Monday, the 29th April 2013. In these proceedings, the applicant seeks three substantive reliefs. The first is a Declaration that the particulars of the offence laid against him, contrary to s. 133 of the Defence Act 1954, do not disclose an offence known to law. The said particulars are "that he, 861073 Cpl Beatty M, at approx. 12:00 Hrs on Monday 16 July 2012, 2 Cavalry Squadron HQ, Cathal Brugha Barracks, Rathmines, Dublin did behave in an insubordinate manner when paraded by A0766 Lt J Forde- Adjt, 2 Cav Sqn, when given a verbal order did, 'ask for the conformation (*sic*) of the order in writing' or words similar to that effect."

8. The second relief sought by the applicant is an Order of Certiorari quashing the determination made by the Military Judge on the 81h February 2013that the applicant was guilty of an offence under military law, contrary to s. 133 of the Defence Act, 1954. The third relief that the applicant seeks is damages.

9. In the applicant's Statement Grounding Application for Judicial Review, dated the 24th April 2013, two grounds are put forward in support of the relief claimed. The first simply mirrors the Declaration that the applicant seeks. It asserts that the offence that the applicant was convicted of is not known to law in that the particulars of offence stated in the charge do not disclose the offence of insubordination, contrary to s. 133 of the 1954 Act, or any offence.

10. The second ground on which the applicant relies is that "the appeal was conducted in a manner contrary to the rules of constitutional justice, fair procedures and the European Convention for the Protection of Human Rights in that, despite the objections of the solicitor for the Applicant, considerable irrelevant and prejudicial evidence was admitted in evidence."

11. The applicant swore a grounding affidavit, in addition to the required verifying affidavit, on the 24th April2013. In that affidavit, the applicant avers to the submissions that his solicitor made to the Military Judge in support of the proposition that the particulars of

offence provided did not disclose any offence known to the law. The applicant then avers in some detail to the objections that his solicitor made both to the military prosecutor's opening of the case and to much of the evidence adduced from the three witnesses who were called on behalf of the prosecution to prove the allegation of insubordination against the applicant.

12. The respondents have delivered a Statement of Opposition, dated the 29th July 2013, in which, amongst other matters, they deny that the particulars of offence laid do not disclose an offence known to law and deny that any of the evidence adduced by the prosecution at trial was irrelevant or unfairly prejudicial.

13. Commandant Fintan McCarthy swore both a verifying affidavit in respect of the respondents' Statement of Opposition and a substantive replying affidavit on the 29th July 2013. Commandant McCarthy conducted the prosecution of the applicant. In the latter affidavit, Commandant McCarthy avers at some length to what occurred in the course of the court-martial, describing the various submissions and objections made by the applicant's solicitor, the response of the prosecution to each, and the ruling on each made by the Military Judge.

14. The applicant's solicitors wrote to the non-party on the 9th September 2013 requesting voluntary discovery of the documentation now the subject of the present motion. The reasons given for seeking that discovery are as follows:

> "1. To provide an accurate record of the said proceedings for the administration of justice in the High Court Judicial Review proceedings mentioned herein including the prevention of any disparity in the position of the respective parties thereto.
>
> 2. To assist in the efficient discharge of the said Court's time.
>
> 3. To save costs."

The test for non-party discovery

15. The criteria against which a request for non-party discovery must be assessed are well settled. While it is necessary for an applicant to establish that the documents sought exist and are likely to be in the possession of the non-party concerned, that is not in issue here, since the non-party accepts that he is in possession of the DAR.

16. The next criterion to be considered is that of relevance. Under O. 31, r. 29 of the Rules of the Superior Courts, non-party discovery may be ordered of documents "which are relevant to an issue arising or likely to arise." Despite the variation in wording, the test of relevance does not differ between the application of the rule just described and that of O. 31, r. 12, which deals with the discovery *inter partes* of documents "relating to any matter in question" between the parties. I will return later to the application of the relevance test to the circumstances of this case.

17. Morris P. identified a further relevant criterion in *Chambers v Times Newspapers* [1999] 2 I.R. 424 when he stated:

> "In my view...the court should be slow to put someone, not a party to the action, to the trouble of making discovery if it can be avoided and I am satisfied that such an order should only be made against a third party in circumstances where the documents in question are not readily available to be discovered by a party to the action or where in the particular circumstances of the case the court in the interests of justice requires that it should be done."

The application of that criterion in the circumstances presented will also be considered below.

Discovery of the record of proceedings before inferior courts

18. In *Hudson v Judge Halpin & Anor.* [2013] IEHC 4, unreported, High Court, 15th January 2013, Hogan J. addressed what he described as "the age-old problem of bringing before this Court in Judicial Review proceedings the record of what has happened in proceedings before the District Court or the Circuit Court." The competing considerations appear to be these. On the one hand, the too ready availability of a comprehensive record of proceedings in every case was found historically to give rise to an over-formalistic approach by lawyers that led in turn to the quashing of many convictions for want of form rather than on merit by reference to what were described as "lamentable and disgraceful technicalities." In more modern parlance, the courts have frequently deprecated the practice of combing through (or "trawling") a transcript in the hope of identifying a technical error in the conduct of proceedings before an inferior *court ex post facto*.

19. On the other hand, permitting "criminal convictions to be supported only by a very short record, omitting the charge and the evidence and the reasoning", which was the effect of the Summary Jurisdiction (Ireland) Act 1851, did not eliminate the occasional errors that are inevitable in criminal (or any other) proceedings but did substantially diminish the opportunity to detect them on review. In the striking phrase of Lord Sumner in *R. v Nat Bell Liqours Ltd* [1922] 2 A.C. 128 (at 159), "[t]he fact of the record spoke no longer: it was the inscrutable face of the sphinx."

20. As Hogan J. went on to note in *Hudson*, the haphazard and sporadic system for recording sometimes lengthy court exchanges that existed until recently gave rise to its own problems in that sometimes parties made allegations concerning comments or interventions made by individual judges, to which the judge in question understandably wished to respond by giving evidence in Judicial Review proceedings. However, the Supreme Court has made clear, per Murphy J. in *O'Connor v Carroll* [1999] 2. I.R. 160 (at p. 166), that "[i]t would be inappropriate for any judge to swear an affidavit in any such proceedings as that would leave him open to cross-examination in relation to the judicial process."

21. In accordance with that stricture, the Military Judge has played no part in the present proceedings, although they have been served on him through the Office of the Chief State Solicitor. That fact is pertinent in the following circumstances. The applicant and the non-party have been engaged in an exchange of correspondence concerning the applicant's asserted entitlement to obtain a copy of a transcript of the court-martial under the Rules of Procedure (Defence Forces) 2008 (S.I. No. 204 of 2008), or the Court-Martial Rules 2008 (S.I. No. 205 of 2008), or both. The second-named respondent and the non-party have adopted the position that, in the absence of a transcript, the provision of a copy of the DAR (or of a transcript derived therefrom) is subject to the direction of the Military Judge. In adopting that position they rely largely on the terms of Rule 39 of the Rules of Procedure (Defence Forces) 2008 and partly upon an analogy with the applicable rules in the District and Circuit Courts whereby application must be made to the court concerned for access to all or part of the record (to include the DAR)).. Such applications are required to be determined in each of those courts by reference to what is considered "necessary in the interests of justice". The applicant rejects that interpretation of the Rules of Procedure and contends instead that he is entitled as of right to obtain from the non-party a copy of a transcript drawn

from the DAR. He does so largely in reliance on the terms of Rule 40 of those rules.

The necessity for non-party discovery
22. The controversy between the parties just described brings the Court back to the non-party discovery criterion identified by Morris P. in *Chambers* whereby the court must be satisfied that the discovery sought is not available from a party to the proceedings or that the interests of justice require non-party discovery to be made in the particular circumstances of the case at hand. As I understand the argument advanced on behalf of the applicant in this case, it is that the interests of justice require discovery to be made by the non-party (rather than by the first respondent) for two reasons. First, because the applicant contends he should be able in any event to obtain the DAR (or a transcript drawn from it) from the non-party as of right under Rule 40 of the Rules of Procedure. Second, because the applicant contends that it would be inappropriate for him to seek a direction from the first respondent that he be furnished with a copy of all or part of the DAR (or a transcript derived therefrom) because that would be to improperly draw the first respondent into the forensic fray in these proceedings.

23. It is not necessary for this Court to decide whether the applicant is entitled to require a transcript to be prepared in order that he may obtain a copy of it from the non-party as of right under the terms of Rule 40 of the Rules of Procedure (Defence Forces) 2008, without reference to any direction of the first respondent under Rule 39. Nor is it necessary to decide whether the DAR can properly be described as "a copy of the proceedings" for the purpose of that rule, thereby leading to essentially the same result. However, in the context of the suggestion that the applicant should instead apply to the first respondent under Rule 39 for a direction that a transcript be prepared from the DAR and furnished to him, I do not accept that such a course of action would be an inappropriate one as the applicant contends. It seems to me that there is a significant distinction to be drawn between a judge descending into the forensic arena by swearing an affidavit in Judicial Review proceedings, on the one hand, and the making of an application to that judge for a direction that a transcript be provided in the interests of justice, on the other. Accordingly, the court cannot be satisfied that the discovery sought by the applicant is not otherwise available to the applicant from an existing party to the proceedings, specifically the first respondent. The Court will return later to whether it is nevertheless in the interests of justice in the particular circumstances of this case to order such discovery anyway.

Relevance
24. In *Hudson*, the issue between the parties in those Judicial Review proceedings was whether the respondent District Judge had interfered with cross examination and otherwise conducted the relevant District Court hearing in an unfair manner; an allegation which - Hogan J. noted - the District Judge concerned stoutly denied. There was therefore a specific factual controversy concerning what exactly had transpired in the District Court, the resolution of which was, in the view of Hogan J., absolutely central to the case. Moreover, in *Hudson*, the District Judge had indicated to the Court that he had no objection to the production of the DAR and the parties were agreed that an accurate account of what had transpired in the District Court was central to the fair resolution of the case. In directing the production of the DAR recording by reference to those specific circumstances, Hogan J. was careful to point out: "One must, of course, be mindful of the cost implications of this course of action- not least in an age of austerity - so that a direction of this kind must nonetheless be regarded as an exceptional measure." The court went on, in essence, to note that the discovery procedure should not be invoked to facilitate the raising of technical objections before the High Court based on a trawl of the DAR or of any transcript derived from it.

25. In this case, the applicant has not identified any specific factual issue or controversy that requires to be resolved by reference to a copy of the DAR or a transcript drawn from it. Instead, the applicant seeks that discovery merely for the purpose of "the prevention of any disparity in the position of the respective parties". If it was appropriate to grant the discovery sought in order to address the mere possibility of a disparity in the positions of the respective parties, it is difficult to see how such discovery would not then be appropriate in every case rather than as an exceptional measure. In light of the dictum of Hogan J. in *Hudson*, that cannot be correct.

26. Insofar as it may be argued that there is any conflict of fact evident on the face of the affidavits exchanged between the parties in this case concerning what transpired during the court-martial in question, it is for the applicant to specifically identify any such conflict and to explain why it is so central to an issue or issues between the parties that it is necessary to resolve it in order to do justice between them. In this case, the applicant has not done so.

27. Before concluding this aspect of the Court's judgment, the Court must address the applicant's submission that whether the particulars specified in the charge constitute an offence known to law is a mixed question of fact and law, such that discovery of the DAR (or a transcript drawn from it) is necessary to resolve any conflict of fact there may be between the parties in that regard. The Court is satisfied that the only factual component of that question concerns the particulars of offence that were actually provided in this case. There is no conflict of fact at all between the parties on that point and, hence, no conflict that requires to be resolved by reference to the DAR.

28. As regards the second ground on which the applicant relies in support of his claim to the relief that he is seeking, *i.e*. that considerable irrelevant or unfairly prejudicial evidence was admitted over his solicitor's objections thereby depriving him of a fair trial, it appears from the affidavits exchanged that there is substantial agreement between the parties concerning the evidence that was adduced by the prosecution, the objections that were made to portions of it by the applicant's solicitor, and the rulings of the first respondent in respect of those objections. Insofar as any significant factual conflict is alleged, it is for the applicant to specifically identify that conflict and to explain how it .is relevant to some issue or issues between the parties to the extent that it is necessary to resolve it in order to do justice between them.

29. The only potential conflict of fact between the parties that the Court has been able to identify in respect of the second ground on which relief is sought concerns that part of the evidence of the second prosecution witness, Lieutenant J. Forde, whereby, according to the applicant, that officer stated that the applicant "had disobeyed a lawful command of a superior officer pursuant to Section 131 of the Defence Act 1954 in not moving [his] car", whereas, according to Commandant McCarthy, "Lieutenant Forde did not state that the applicant had disobeyed a lawful order of a superior officer pursuant to s. 131 of the Defence Act 1954 but rather he stated that the applicant was the only one of the four individuals paraded the previous week who had not complied with the order that had been given" to tax and insure his vehicle or to remove it from the barracks.

30. The difficulty for the applicant- and for the Court- in that regard is that the applicant has not made clear, either in the context of the present application or otherwise, whether he is joining issue with the evidence of Commandant McCarthy in that regard or accepting Commandant McCarthy's correction of the applicant's earlier description of the evidence that was given by Lieutenant Forde. No replying affidavit has been filed in response to that of Commandant McCarthy. Nothing is averred in the affidavit grounding the present application that would clarify whether a factual controversy exists or the applicant accepts the purported correction of an error on his part in his description of the evidence of Lieutenant Forde. Even if the Court could be satisfied that a factual controversy exists on this, or any other, point, nothing is offered by the applicant that would allow the Court to determine whether

such controversy is relevant to any issue that the Court is required to address.

Conclusion

31. In all of the circumstances described above, the Court cannot be satisfied that the non-party discovery sought is relevant to an issue arising or likely to arise in these proceedings. Nor can the Court be satisfied that the documentation concerned is unavailable from one of the parties or that it is in the interests of justice to order discovery of it. For those reasons, this application must be refused.