



Approved Judgment

Neutral Citation: 2024 IECA 107

THE COURT OF APPEAL

Record Number: 290/2023

**Kennedy J.
Ní Raifeartaigh J.
Burns J.**

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

PHILIP BYRNE

APPLICANT

JUDGMENT of the Court delivered (*ex tempore*) on the 22nd day April 2024 by Ms. Justice Isobel Kennedy.

1. This is an application to extend the time for appealing against sentence. This application is made in circumstances where the applicant pleaded guilty to one count of assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997, one count of threatening to kill or cause serious harm contrary to s. 5 of the 1997 Act, one count of false imprisonment contrary to s. 15 of the 1997 Act and one count of production of an article contrary to s. 11 of the Firearms and Offensive Weapons Act, 1990 and was sentenced to a

term of imprisonment of seven years' imprisonment with the final two years suspended on conditions on the false imprisonment count.

2. A further sentence of three and a half years' imprisonment was imposed concurrently on the balance of the counts to which he pleaded guilty. The focus of this application concerns the sentence imposed on the false imprisonment count. In essence, it is argued that the judge erred on the facts of this case in determining that the assault offence served to aggravate the false imprisonment count. It is said that the primary offence was that of assault.

Background

3. The counts on the indictment relate to an incident occurring on the 2nd December 2020 at the applicant's home. The injured party is the applicant's wife. The offences were committed in the context of a domestic argument which occurred in the presence of a third party, a painter who was working in the house at the time.

4. The applicant threatened to stab the injured party, she ran towards the front door, the applicant followed her with a large knife and stabbed her to her abdomen. The painter pulled him from her and tried to assist. It seems that this occurred outside the house. The injured party then ran back into the house, the appellant got away from the painter and put his foot in the door, swung the knife and stabbed her again, the applicant stopped her going further into the house, grabbing her by the hair and swinging the knife again.

5. The painter in his statement said that the front door was locked at this stage, and he saw the applicant through the window with the knife. This was the substance of the false imprisonment count; the applicant prevented the injured party from leaving the house while he perpetrated the assault and issued threats to her.

Grounds for Enlargement of Time Within Which to Appeal

6. The applicant relies on the following grounds in his application for an enlargement of time:-

"1. The appellant had lodged appeal papers with the authorities in the prison. The appellant initially was unhappy with his legal team and lodged the papers himself. As time progressed, he contacted his solicitors and instructed them to press his appeal. His solicitors discovered that there was no appeal lodged with This Honourable Court. Counsel has now been instructed to assist in this application.

2. It is clear that the appellant always intended to appeal the sentence imposed upon him by the Learned Sentencing Judge in this matter.

3. This intention was reflected by him drafting and completing appeal papers and lodging them with the prison authorities."

Affidavit of the Appellant

7. In his sworn affidavit dated the 8th July 2023, the applicant avers that he personally lodged a Notice of Appeal with the Governor of Wheatfield Prison. He says that he was of the bona fide belief that once he had provided the appeal form to the Governor within the period of 14 days after the imposition of his sentences that he had met the appropriate requirements for appealing the sentences imposed upon him in the Circuit Criminal Court in time.

8. The applicant avers that after a period of time of which he is unable to ascertain, it was brought to his attention upon enquiry with the Governor that there existed no record of his appeal on file nor of it being lodged with either the Governor or indeed, with this Court and that he was not provided with any explanation as to why the Irish Prison Service kept no record of his appeal

having been lodged nor why his appeal had not been filed on his behalf with this Court.

9. He further avers that he engaged his solicitors to deal with his appeal and to make enquiries in relation to whether a Notice of Appeal had been filed and that subsequently it was confirmed by the Court of Appeal (Criminal) Office that no such appeal had been received by the Court and that it was now necessary for the applicant to process an Enlargement of Time Application in respect of his intention to appeal the sentences imposed upon him.

Submissions of the Applicant

10. The judge nominated a headline sentence of 9 years' imprisonment on the false imprisonment count. The applicant takes issue with the judge's view that the false imprisonment count was perpetrated in order to commit the assault offence and that the other offences served to aggravate the false imprisonment count.

11. He maintains that the headline sentence nominated was excessive and that the judge erred in determining that the false imprisonment count was the most serious in light of the particular offending. Reference is made to *People (DPP) v Lennon* [2021] IECA 30 and *People (DPP) v FE* [2021] 1 IR 217 and *People (DPP) v Schaufler* [2020] IECA 299; this Court noted that the offences of assault causing serious harm and false imprisonment were each cross-aggravating offences of significant gravity. The within applicant argues that the primary offence was that of s. 3 assault. The false imprisonment offence took a matter of moments and can be readily distinguished from the facts in *Schaufler*.

Submissions of the Respondent

12. The respondent objects to the within application. The law relating to enlargement of time applications is outlined: the Supreme Court in the case of

People (DPP) v Kelly [1982] IR 90 stated that a court in determining such an application in a criminal case must consider the justice of the case, in light of all the circumstances. This was reiterated by this Court in *People (DPP) v Walsh* [2017] IECA 111 as follows:-

"We consider that where a putative appellant is out of time, and is seeking an enlargement of time within which to appeal, it is incumbent on him to do more than simply demonstrate that he wishes to pursue intelligible grounds of appeal that appear to be arguable in principle. He must, it seems to us, engage with the actual evidence given, and rulings made, as disclosed in the transcript of the trial and, in relation to any intended ground of appeal, show that the matter complained of is sufficiently grounded to justify at least some optimism that the appeal, if allowed, would succeed...."

13. The respondent emphasises that the applicant was sentenced on the 1st July 2022 and that his affidavit setting out his explanation for his delay in lodging his appeal is dated the 8th July 2023 but that his Notice of Application for Enlargement of Time was not filed until the 6th November 2023. It is submitted that this further delay has not been explained in any way.

14. It is asserted that even if this Court were satisfied that the applicant had formed the intention to appeal within time, it is also necessary to consider whether the interests of justice require that he be allowed to appeal.

15. In this regard, it is submitted that the grounds of appeal that have been put forward are, to a great extent, generic and that this was a case in which the sentencing judge adjourned the sentence for a period to allow her to digest the evidence and additional materials including the probation and psychological reports prepared in respect of the applicant.

16. It is the respondent's position that in circumstances where the delay has not been fully explained, the balance lies in refusing the application to extend time.

Discussion

17. This is a matter where somewhat unusually we have quite an amount of material in that the transcripts of the court below were made available in advance of this hearing. The matter was listed for both the within application and, if successful, to proceed with the sentence hearing. We will now address the within application.

18. The role of a Court dealing with an application to extend time to appeal in the criminal context was considered by the Supreme Court in the case of *People (DPP) v Kelly* [1982] IR 90, where the Court commented:

"...since a question of delay and enlargement of time is involved, the court is bound to act 'as the justice of the case may require.' In other words, the court's approach must be flexible and its discretion guided not by any general test or criterion but by what appears to be just and equitable on the particular facts of the case in question.

[...]

In my view, the matters to be considered are the requirements of justice on the particular facts of the case before the court. A late and stale complaint of irregularity with nothing to support it can be disposed of easily. Where there appears to be a possibility of injustice, of a mistrial, or of evidence having been wrongly admitted or excluded, the absence of an earlier intention to appeal or delay in making the application or the conduct of an appellant should not prevent the court from acting. This

seems to me to be the practical result of considering what the 'justice of the case may require.'"

19. The test has been applied in this Court in many such applications since, including the more recent decision in *People (DPP) v Walsh* [2017] IECA 111 and *People (DPP) v XY* [2021] IECA 34.

20. In seeking to identify the outcome which would serve the interests of justice, it seems to us that there are number of factors to be considered. Firstly, there is the issue of delay and the explanation for that lapse of time and secondly, an applicant must engage with the facts to demonstrate reasonable potential grounds of appeal.

21. It is necessary to examine the particular facts of this case and to examine where the interests of justice lie. In that regard, we have seen the applicant's affidavit who avers that he lodged his notice of appeal from the prison, but that upon later enquiry it transpired that it had not been lodged. He states he formed the intention to appeal within time. The content of his affidavit should be regarded as part of the factual matrix to be taken into account.

22. In our view, even if the content of his affidavit is accurate and taking the matter at its height from the applicant's perspective, we believe that the real issue for our consideration is that of the engagement with the evidence and with any potential ground of appeal in order to assess if the applicant has established reasonable grounds of appeal.

23. The respondent contends that the grounds of appeal are generic which is disputed by the applicant who says that the focus rests with the sentence on the false imprisonment count and contends that the judge erred in considering this offence to be the primary offence in the circumstances of the offending conduct.

24. In that regard, we have had the benefit of the transcript and it is quite clear that the incident of false imprisonment was a serious one which the judge was entitled to view in the context of the assault on the injured party. The injured party was restrained inside the house, while the person, specifically the painter who had intervened was locked outside the house. The level of culpability was high as a consequence as the applicant acted in the knowledge that the person who was trying to render assistance was locked out.

25. Accordingly, the Court finds itself in a situation where it has not been persuaded that there is any ground of appeal that has a real prospect of success. Even if we were to accept that the applicant formed the intention within time, we have not been persuaded that there is a substantial ground of appeal present with a realistic prospect of success, and we do not believe that the justice of the case would be served by extending time and so we refuse the application.

9th May 2024
Evelyn Kennedy.