THE COURT OF APPEAL

Record No. 258 2017

Mahon J.
Edwards J.
Hedigan J.

IN THE MATTER OF A BAIL APPLICATION

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND–

MICHAEL SHINE

APPELLANT

JUDGMENT (ex tempore) of the Court delivered on the 21st day of December 2017 by Mr. Justice Mahon

1. This is the appellant's application for bail pending the hearing and conclusion of his appeal to this Court against his conviction at Dublin Circuit Criminal Court on the 2nd November 2017 and his appeal against sentences of two consecutive prison terms of ten months, a total of twenty months imprisonment, imposed on the 1st December 2017.

2. The appellant was tried in respect of eight offences of indecent assault relating to six complainants. One count was withdrawn from the jury in relation to one complainant. The jury found the appellant not guilty in respect of four of the remaining counts, while the remaining three counts were the subject of majority guilty verdicts.

3. The appellant is eighty five years of age. He is a retired consultant surgeon and in 1975 and 1976 when the offences where said to have taken place, worked in that capacity in Our Lady of Lourdes hospital in Drogheda. The indecent assaults were said to have occurred in the course of medical examinations by the appellant of the complainants at the hospital. The appellant is in poor health, and has a number of significant medical conditions including advanced coronary heart disease, a prostate problem with urinary symptoms, cognitive impairment, abnormal cholesterol and hypertension. The appellant was on bail for a considerable period of time prior to his trial and subsequent to his trial while he awaited sentence, and was always compliant with the conditions of his bail.

4. The notice of appeal to this Court relies on seventeen separate grounds. Two of them, it is contended on behalf of the appellant, present a *"strong possibility"* of the conviction appeal being successful. These are:-

> *(i) The learned trial judge erred in law and in principle in permitting the prosecution to re-examine the complainant, DK and two other complainants, in order to adduce evidence that he had settled civil proceedings taken against the hospital at which the appellant worked and also allowed the prosecution to adduce the particular amount of the settlement.*

5. The Court has been advised that the following will be relied upon in the substantive appeal in relation to this particular ground:-

> • That the settlement of civil proceedings by a third party (the hospital) which was without admission of liability cannot be relevant probative evidence in a criminal trial.
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> • That, in particular to lead evidence of the amount of the settlement was extremely prejudicial in circumstances where it could not be said to be relevant.
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> • That the complainants were required to attend court and give evidence as they were all subject to witness orders. Thus, whether or not civil proceedings had settled in 2012 was simply not relevant, as either way they were required by law to attend and give evidence as prosecution witnesses (having made statements prior to settlement).
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> • That having allowed the prosecution to introduce this evidence for a very particular purpose, apparently to rebut the suggestion that they were financially motivated to give evidence, the learned trial judge failed to direct the jury in this regard.
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> • As a result, without justification, in an extremely old case, with six (uncorroborated) complainants, the jury heard that in relation to three of these complaints, the hospital was prepared to pay a sum of €70,000 to the complainants and this evidence is irrelevant and prejudicial.

6. The second ground of appeal strongly relied upon is:-

> *(ii) The learned trial judge erred in law and in principle in allowing the question of system evidence to be considered by the jury in circumstances where he refused to direct them on its potential effect and where the prosecution had requisitioned him to so advise the jury.*

7. The Court has been advised that the following will be relied upon in the substantive appeal in relation to this ground:-

> • That the failure by the prosecution and the learned trial judge to engage with the question of the possibility of *suggestibility, contamination of evidence, copy cat evidence, or collaboration* (and as suggested by the Court of Criminal Appeal *per* O'Donnell J. *in CC (No. 2)* at the outset of trial, led to a fundamental unfairness which the learned trial judge failed to remedy in his charge to the jury on system evidence.
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> • That the emphasis by the learned trial judge in his charge on system evidence on *collusion* (as opposed to suggestibility or contamination) was unfair.

• That the failure of the learned trial judge to explain to the jury how to assess the potential system evidence in terms of the weight that they could attach was unfair.

• That the failure of the learned trial judge to explain to the jury what the impact on the system would be if they were not satisfied beyond a reasonable doubt in respect of a number of complainants.

• That in circumstances where the accused in this case was acquitted in respect of the allegations made by four of the six complainants, there is a real risk that the jury were influenced by evidence which they heard, on counts where the appellant was acquitted, when considering the remaining counts.

8. In relation to the first ground, the references to €70,000 settlement of civil actions taken against Our Lady of Lourdes hospital in 2012 by some of the complainants related to civil proceedings claiming damages. The appellant had no involvement in either agreeing the amount of the settlement or the decision to settle. Further, the settlement of these cases was without admission of liability. An application was made to the trial court for permission to introduce this evidence to establish that the complainants were not financially motivated to give evidence at the trial. This Court has been advised that the learned trial judge charged the jury to the effect that they should draw no adverse inference in relation to the evidence of the settlement of the civil claims.

9. In relation to the second ground indicated above, this relates to an application at the outset of the trial to sever the Indictment and confirmation from the prosecution that they wished to try all six complainants together in order to rely on system evidence as between them. In the course of his charge to the jury the learned trial judge refused to direct the jury, despite a requisition by prosecuting counsel, as to how they should approach the issue of system evidence.

10. This Court has jurisdiction to grant bail pending the determination of an appeal pursuant to s. 32 of the Courts of Justice Act 1934 (as amended) and Ord. 86 of the Rules of the Superior Courts.

11. *In DPP v. Sweetman* [1997] 3 I.R. 448 the Court of Criminal Appeal held, in relation to applications to that Court for bail post conviction, that the situation of a convicted person was different to that of a person awaiting trial as he no longer enjoyed the presumption of innocence and that the criteria relevant to pre trial bail applications was different to that which operate post conviction. This decision was approved by the Supreme Court in *DPP v. Corbally* [2001] 1 I.R. 180 wherein it held that bail should be granted where, notwithstanding that the appellant came before the Court as a convicted person, the interest of justice require it, either because of the apparent strength of the appellant's grounds of appeal or the impending expiry of the sentence, or some other special circumstance. The Supreme Court held that it must always be borne in mind that the appellant for bail in this situation was a convicted person and that the appellate court should exercise its discretion sparingly. Bail, it decided, should only be granted where, in the absence of considering the entire transcript of the trial, some definite or discrete ground of appeal can be identified and isolated, and which was of such nature that there was *a strong chance of success* on appeal. There should be enough material before the Court to enable it hold that there was *at least a strong chance of success* before granting bail.

12. The obvious disadvantage facing this Court in reaching its decision on this bail application, as it almost always is with such applications, is the lack of a transcript in what was a lengthy trial. It is apparent that the conviction appeal grounds on which this application is focussed are complex and are the consequence of lengthy and detailed submissions and rulings in the course of the trial and are also concerned with the learned trial judge's charge to the jury. The criticism levelled at the learned trial judge's decision to permit evidence of separate settlements of civil claims by a number of the complainants is that such evidence was highly prejudicial to the appellant's defence, and that such prejudice greatly exceeded any probative value attaching to such evidence, notwithstanding that the settlement of €70,000 each were agreed to and paid by Our Lady of Lourdes Hospital without any involvement or agreement on the appellant's part, and were agreed and paid without admission of liability.

13. For her part, the respondent argues that admission of that evidence was necessary and appropriate because the appellant's counsel had cross examined the complainants in relation to the circumstances in which they came to make similar type complaints of indecent assault against the appellant to the same solicitor who in turn referred each to the same psychiatrist. In the course of that cross examination reference was made to what might be described as a partly media backed campaign to identify individuals who made, or were prepared to make, allegations of indecent assault against the appellant. Mr. Hartnett S.C. (for the appellant) contends that this was done to establish copy cat evidence or corroboration or suggestibility or contamination of evidence as between the complainants. It was, he maintained, undertaken in the interest of establishing the precise circumstances in which the complainants came to make allegations against the appellant both to the gardaí and a solicitor engaged in civil litigation.

14. Counsel for the respondent, Mr. Condon S.C., maintains that this line of cross examination required and justified the learned trial judge's decision to permit evidence disclosing the civil action settlements in order to disavow any suggestion that the criminal allegations made against the appellant were made to support their quest for financial reward. Mr. Condon submitted that the learned trial judge's direction to the jury not to draw inferences from the facts of the settlement was sufficient to dispel any suggestion that they were not be taken as proven or assisting in the proof of criminal culpability on the appellant's part. Mr. Harnett's response to that submission is simply, how could anyone expect a jury not to be influenced by such evidence to the appellant's detriment. A lay person's appreciation and understanding of the legal consequences and effect of a civil claim being settled without admission of liability may well be different to that of somebody with legal training.

15. The Court accepts that the appellant has established that at least a strong chance of success of this ground of appeal. Whether or not it is ultimately successful must await a full hearing of the appeal. It is impossible for this Court at this juncture to express any more certain view. The precise nature of this ground and the facts relevant to it are quite novel in many respects.

16. In relation to the second conviction related ground, that concerning system evidence, the Court is neither in a position to identify its strength in the absence of the transcripts, nor is it necessary for it to do so in the light of the decision in relation to the first ground.

17. While equally unnecessary to make any determination as to the strength of the sentence appeal for the purposes of this application, the Court is nevertheless of the view that it is undoubtedly strongly arguable that a total custodial term of twenty months for two offences of the nature of those committed by the appellant was unduly harsh in respect of offences which carry a two year maximum sentence, and where the appellant is elderly and in poor health. It is in particular strongly arguable that the learned trial judge placed the offences too high on the gravity scale and may have been influenced by the fact that similar type offending today carries a much higher maximum sentence. Whether these criticisms of the sentence are ultimately borne out must await a full appeal hearing, if and when that takes place.

18. What is clear is that the conviction appeal will be lengthy - Mr. Harnett suggests possibly more than one day - and is unlikely to

be accommodated with a hearing date until well into next year. Should that appeal be unsuccessful, a hearing date for a sentence appeal would not take place until later again in 2018, and there is every possibility, if not probability, that by then the appellant's sentence, with normal remission for good behaviour, will have been served. Such a scenario could not be deemed fair or proportionate for an eighty five year old man in poor health and unlikely to reoffend, and in circumstances where the offences in question occurred over forty years ago.

19. Accordingly, the Court will grant the appellant bail subject to conditions, to include his own bond of €1,000, that he reside at 25, Wellington House, 85, Wellington Road, Dublin 4, that he does not travel outside the jurisdiction and does not seek to obtain a passport (his passport currently remaining with the gardaí), and that he sign on weekly in Donnybrook garda station between 9 a.m. and 3 p.m. on Wednesday of each week. In the event of illness preventing his signing on he is to ensure that the gardaí at Donnybrook garda station are provided with a satisfactory medical certificate to this effect. The appellant is also under an obligation to expedite his appeal hearings in this Court.