Neutral Citation Number: [2013] IEHC 115

THE HIGH COURT

[2013 No. 36 JR]

BETWEEN

JAMES KENNEDY

APPLICANT

AND

HIS HONOUR JUDGE MARTIN NOLAN

RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

JUDGMENT of Mr. Justice Hogan delivered on the 19th March, 2013

1. Under what circumstances should the court of trial to whom an accused person has been returned for trial on indictment be prepared to direct that a witness be deposed before the District Court in advance of that trial? This, in essence, is the question which is posed in this application for judicial review.

2. Prior to 1999, the position was straightforward, in that an accused had a statutory right by virtue of s. 7(2) of the Criminal Procedure Act 1967 ("the 1967 Act") to have a witness deposed before the District Court. This sub-section provided:

> "The prosecutor and the accused shall each be entitled to give evidence on sworn deposition and also to require the attendance before the [District Judge] of any person, whether included in the supplied list of witnesses or not, and to examine him by way of sworn deposition."

3. All of this was changed with the abolition of the former preliminary examination procedure by s. 9 of the Criminal Justice Act 1999 ("the 1999 Act") and its replacement with a new procedure whereby the return for trial of an accused charged with indictable offence which is not being dealt with summarily to the court of trial is, in substance, automatic. Thus, instead of the former procedure whereby the District Court was charged with the task of determining whether there was a sufficient case to answer, the accused can now apply to the court of trial to have the charges dismissed: see s. 4E of the 1967 Act (as inserted by s. 9 of the 1999 Act). A further change is that an accused may no longer insist on having a witness deposed as of right, but he or she may rather apply to the court of trial for this purpose and that court, should it consider that it is in the interests of justice to do so, may direct that such a witness be deposed before the District Court: see 4F(2).

The background facts of the case

4. Before proceeding to any examination of the import of the changes effected by the 1999 Act, it is necessary first to consider the background facts. Mr. Kennedy is a businessman who stands charged with some sixteen separate offences of corruption under s.1(2) of the Public Bodies Corrupt Practices Act, 1889 (as amended by s.4(2) of the Prevention of Corruption Act 1916 and s. 38 of the Ethics in Public Office Act 1995). In essence, it is contended that Mr. Kennedy made corrupt payments to various named local authority councillors on various dates in 1992 and 1997 to influence re-zoning motions which were coming before Dublin City Council or, as the case may be, Dún Laoghaire Rathdown County Council.

5. Mr. Kennedy was originally arrested on these charges in October 2010 and a book of evidence was served on him on 28th October 2010. He was returned for trial to the Circuit Court where a trial date was originally scheduled for 5th October 2011. In the interval Mr. Kennedy sought to prohibit his trial on grounds of undue delay. This application for judicial review was originally rejected by this Court (Hedigan J.) in a judgment delivered on the 28th July 2011: [2011] IEHC 311.

6. The applicant appealed immediately to the Supreme Court and that Court granted a stay on the Circuit Court proceedings on 31st July 2011. The Supreme Court (by a majority) dismissed his appeal on 7th June 2012: [2012] IESC 34. A trial date was subsequently fixed for June 2013.

7. It is common case that the prosecution case depends entirely on the credibility of a Mr. Frank Dunlop, a former Government press secretary and public relations consultant who engaged in the lobbying of councillors on behalf of land developers. Mr. Dunlop now alleges in effect that he was the conduit of payments to councillors on the part of Mr. Kennedy, so that in his witness statement he states that "it was my understanding that Mr. Kennedy expected me to pay money on his behalf to county councillors to secure their support for rezoning."

8. Much of this ground has already been the subject of detailed investigation by the Flood/Mahon Tribunal of Inquiry which investigated allegations of planning corruption in the Dublin region. It is not disputed but that Mr. Dunlop has given contradictory versions of his activities. In some cases it seems that Mr. Dunlop maintained that he received payments which were later given by him to councillors as legitimate political donations. In other cases it appears that Mr. Dunlop contends that the payments were corruptly given to and received by the councillors. Indeed, at the Tribunal Mr. Dunlop maintained (in February 2003) that he spent the IR£25,000 he says he received from Mr. Kennedy in 1992 for the purposes of promoting a rival development project of another individual and did not use this money for the purposes of bribing councillors.

9. While Mr. Dunlop famously changed his overall story in the course of giving evidence before the Tribunal in April 2000 – to the point whereby he now acknowledged that he had corruptly paid councillors with a view to influencing their votes – the Flood/Mahon Tribunal concluded that "Mr. Dunlop did not make the transition from being an untruthful witness to a truthful witness with any sense

of completeness" and that "in many and important and fundamental respects, Mr. Dunlop continued, post April 2000, to actively and purposely mislead the Tribunal": *Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments* (Vol. III)(2012) at para. 5.02. Indeed, at the hearing of the application before the Circuit Court, counsel for the Director at that hearing, Mr. Sean Gillane S.C., did not resile in the least from this and very fairly acknowlegded:

> "Mr. Dunlop engaged in an attempted subornation of democracy; he engaged in practices which were corrupt; he engaged in practices which were illegal. And in relation to all of those things to told lies about them. And I openly indicated to the Court that that is not, in fact, in contest and, in fact, I do not think it is a case that could be opened on any other basis."

10. Mr. Dunlop has since pleaded guilty to corruption charges arising from activities uncovered by the Flood/Mahon Tribunal. He was sentenced to two years' imprisonment on these charges by the Circuit Court in May 2009.

11. I should state at this point that at the commencement of this hearing I disclosed to the parties that I had acted for certain named individuals at the Flood/Mahon Tribunal, albeit that I had no involvement in relation to matters which involved Mr. Kennedy. Both sides expressly waived any objection to my dealing with this matter on that account and it was on that basis that I agreed to hear this matter.

Some preliminary matters

12. Before turning to the merits of the application, it is necessary first to examine some preliminary points of objection raised on behalf of the Director.

13. It is first said that judicial review would lie only where the "alleged error would cause [the applicant] irremediable prejudice in the conduct of the trial process" which was not capable of being remedied at a later stage. For my part I would reject this as an entirely unmeritorious objection. If accepted, it would be tantamount to saying that the court of trial could dispense with the statutory restraints on the exercise of a jurisdiction imposed by the 1967 Act (as amended by the 1999 Act). The Supreme Court has previously confirmed (albeit in the context of the 1967 Act) that the jurisdictional requirements which related to the earlier preliminary examination procedure are mandatory: see *The State (Williams) v. Kelliher* [1983] I.R. 112 119-120, per Henchy J. I see no reason to take a different view with regard to the jurisdiction limits attending the new version of that procedure inserted by the 1999 Act.

14. Next it is said that the applicant is not entitled to any relief by reason of material non-disclosure at the leave stage. It is accepted that the applicant's affidavit failed to disclose that he had previously sought on 28th July 2011 to have Mr Frank Dunlop and his wife, Ms. Shelia Dunlop, deposed. It also appears that the applicant did not disclose that he had previously sought to have the prosecution dismissed pursuant to s. 4E, but that he did not proceed with the application and it apparently stands adjourned.

15. So far as the earlier deposition application is concerned, it appears that it was heard by Her Honour Judge Yvonne Murphy on 28th July 2011. She was due to give her ruling on this application on 31st July 2011, but, as it happens, the Supreme Court granted a stay on the prosecution on that day in the context of the (then pending) appeal in the judicial review proceedings. That stay was lifted in the aftermath of the Supreme Court decision in June 2012, but by this stage Judge Murphy had retired. It follows, therefore, that there was never any prior judicial ruling on the earlier s. 4F application.

16. For my part, I do not consider that the failure to mention either of these two matters could be regarded as material non-disclosure. Here it may be noted that these earlier applications were not brought to Judge Nolan's attention by the Director in the course of the earlier s. 4F(2) application, presumably because their relevance to the exercise of the jurisdiction he was about to exercise was deemed to be marginal. I take a similar view. If anything, the fact that Mr. Kennedy previously sought to have Mr. Dunlop deposed – albeit that there was ultimately no judicial ruling on the point – might be said to re-inforce his case, in that it shows a consistent endeavour on his part to seek have the s. 4F(2) procedure deployed for this purpose.

17. In any event, even if (contrary to my view) it was considered that the failure to disclose these matters was material, I do not think that the grant of leave should be set aside on this ground alone, since any such non-disclosure was not fundamental to the issues presented to the Court.

18. Here I would venture to repeat what I said on the topic in *O. v. Minister for Justice, Equality and Law Reform* [2012] IEHC 1:

> "It is true that, as Clarke J. noted in *Bambrick*, the court retains a discretion not to vacate the injunction, the failure to make appropriate disclosure notwithstanding. This would not, however, be an appropriate case in which such a discretion should be exercised, since the non-disclosure here goes to the very heart of the order which the court made *ex parte*. The exercise of the set aside jurisdiction in a case such as the present one is not intended to be punitive although, of course, different considerations might well apply where a litigant acted *mala fide*. Nor is the jurisdiction to be exercised in a formalistic or mechanical fashion: it is rather essentially restitutionary in nature. In other words, by setting aside the original order the court is acting in the interests of two fundamental constitutional values, namely, the integrity of the administration of justice itself (as reflected in Article 34.1) and the importance of fair procedures (as reflected in Article 34.1 and Article 40.3.1).
>
> By thus setting aside the original order, the court thereby seeks to restore the *status quo ante* insofar as it is feasible to do so. This does not mean that the court cannot grant the applicant further relief (cf. the comments of Glidewell L.J. in *Bowmaker Ltd. v. Britannia Arrow Holdings Ltd.* [1988] 3 All E.R. 178). It does mean, however, that in the event that the court were to grant an applicant further injunctive relief, it would do so now afresh in circumstances where it has been armed with all the relevant facts and where it is not now operating under a misunderstanding or misapprehension as to those facts."

19. In the present case the non-disclosure objections are fundamentally formalistic and not central to any issue which this Court has to consider. It is for these reasons that I would reject any argument based on non-disclosure.

20. Finally, it is said that the entire object of this exercise is simply to delay the trial and the Court is effectively invited to refuse any relief on discretionary grounds. Yet it may also be noted that counsel for the Director never suggested to Judge Nolan that this was the object of the s. 4F application before him.

21. The short answer to this objection is accordingly that if the court of trial were properly satisfied that the entire object of the depositions procedure application was merely for the purposes of delay, then it would have been entitled to refuse the application on this ground, as in those circumstances, it would have been made for collateral purposes. Nevertheless, if this argument has not been

advanced to the court of trial in the course of the original s.4F application, it is hard to see how it can be advanced before this Court by way of response to a judicial review application.

The changes effected by the 1999 Act

22. At this juncture we may conveniently consider the relevant provisions of the new sections which were inserted into the 1967 Act by s. 9 of the 1999 Act. While the old preliminary examination procedure was abolished, the new provisions retained features of the old regime. The entire preliminary examination – whether as it existed before or after the 1967 Act – was designed to ensure that no person was arbitrarily charged with an indictable offence (cf. the comments of Lavery J. in *The People v. Boggan* [1958] I.R. 67,81). While the entire apparatus of the preliminary examination procedure was thought to have become unnecessarily complex and burdensome, there is clear evidence that the Oireachtas when enacting the 1999 Act nonetheless sought to retain some of the traditional protections for an accused.

23. The accused is accordingly entitled to have copies of the Book of Evidence (s. 4B and s. 4C) and to inspect the exhibits (s. 4D). The applicant may then apply to have the prosecutions dismissed on the ground that there "is not a sufficient case to put the accused on trial for any charge to which the application relates" (s. 4E(4)(e)). Section 4F deals with the right to seek depositions (albeit that these would no longer be ordered as of right on the part of the prosecution and defence) and s.4G deals with the admissibility of the deposition evidence and videolink evidence at the ultimate trial.

24. The relevant sections inserted by s. 9 of the 1999 Act may thus be set out:

> "4A. (1) Where an accused person is before the District Court charged with an indictable offence, the Court shall send the accused forward for trial to the court before which he is to stand trial (the trial court) unless—
>
> (a) the case is being tried summarily,
>
> (b) the case is being dealt with under section 13, or
>
> (c) the accused is unfit to plead.
>
> (2) The accused shall not be sent forward for trial under subsection (1) without the consent of the prosecutor.
>
> (3) Where the prosecutor refuses to give a consent required under subsection (2) in relation to an indictable offence, the District Court shall strike out the proceedings against the accused in relation to that offence.
>
> (4) The striking out of proceedings under subsection (3) shall not prejudice the institution of proceedings against the accused by the prosecutor.
>
> (5) The accused shall not be sent forward for trial under subsection (1) until the documents mentioned in section 4B(1) have been served on the accused.
>
> 4B.(1) Where the prosecutor consents to the accused being sent forward for trial, the prosecutor shall, within 42 days after the accused first appears in the District Court charged with the indictable offence or within any extension of that period granted under subsection (3), cause the following documents to be served on the accused or his solicitor, if any:
>
> (a) a statement of the charges against the accused;
>
> (b) a copy of any sworn information in writing upon which the proceedings were initiated;
>
> (c) a list of the witnesses the prosecutor proposes to call at the trial;
>
> (d) a statement of the evidence that is expected to be given by each of them;
>
> (e) a copy of any document containing information which it is proposed to give in evidence by virtue of Part II of the Criminal Evidence Act, 1992 ;
>
> (f) where appropriate, a copy of a certificate under section 6(1) of that Act;
>
> (g) a list of the exhibits (if any).
>
> (2) As soon as the documents mentioned in subsection (1) are served, the prosecutor shall furnish copies of them to the District Court.
>
> (3) On application by the prosecutor, the District Court may extend the period within which the documents mentioned in subsection (1) are to be served if it is satisfied that—
>
> (a) there is good reason for doing so, and
>
> (b) it would be in the interests of justice to do so.
>
> (4) An application may be made and an extension may be granted under subsection (3) before or after the expiry of —
>
> (a) the period of 42 days mentioned in subsection (1), or
>
> (b) any extension of that period granted under subsection (3).
>
> (5) Where it refuses to grant an extension, the District Court shall strike out the proceedings against the accused in relation to the offence.
>
> (6) The striking out of proceedings under subsection (5) shall not prejudice the institution of any proceedings against the accused by the prosecutor.

4C.(1) At any time after service of the documents mentioned in section 4B(1), the prosecutor shall cause the following documents to be served on the accused or his solicitor, if any:

(a) a list of any further witnesses the prosecutor proposes to call at the trial;

(b) a statement of the evidence that is expected to be given by each witness whose name appears on the list of further witnesses;

(c) a statement of any further evidence that is expected to be given by any witness whose name appears on the list already served under section 4B(1)(c);

(d) any notice of intention to give information contained in a document in evidence under section 7(1) (b) of the Criminal Evidence Act, 1992 , together with a copy of the document;

(e) where appropriate, a copy of a certificate under section 6(1) of the Criminal Evidence Act, 1992 ;
(f) a copy of any deposition taken under section 4F;

(g) a list of any further exhibits.

(2) As soon as any documents are served in accordance with this section, the prosecutor shall furnish copies of them to the trial Court.

4D.The accused shall have the right to inspect all exhibits mentioned in the list of exhibits served on the accused or his solicitor under section 4B or 4C.

4E.(1) At any time after the accused is sent forward for trial, the accused may apply to the trial court to dismiss one or more of the charges against the accused.

(2) Notice of an application under subsection (1) shall be given to the prosecutor not less than 14 days before the date on which the application is due to be heard.

(3) The trial court may, in the interests of justice, determine that less than 14 days notice of an application under subsection (1) may be given to the prosecutor.

(4) If it appears to the trial court that there is not a sufficient case to put the accused on trial for any charge to which the application relates, the court shall dismiss the charge.

(5) (a) Oral evidence may be given on an application under subsection (1) only if it appears to the trial court that such evidence is required in the interests of justice.

(b) In paragraph (a) 'oral evidence'

includes—

(i) any evidence given through a live television link pursuant to Part III of the Criminal Evidence Act, 1992 , or section 39 of the Criminal Justice Act, 1999, or

(ii) a video recording of any evidence given through a live television link pursuant to that Part or section in proceedings under section 4F.

(6) Where the trial court is satisfied that it is in the interests of justice that any document required under this Part to be served on the accused or his solicitor be served at the hearing of an application under this section—
(a) the prosecutor shall serve the document on the accused or his solicitor, if any, at the hearing, and

(b) the court may, if it considers it appropriate to do so, adjourn the hearing for that purpose.

(7) Where a charge is dismissed by the trial court under subsection (4), the prosecutor may, within 21 days after the dismissal date, appeal against the dismissal to the Court of Criminal Appeal.

(8) On an appeal under subsection (7), the Court of Criminal Appeal may—

(a) affirm the decision of the trial court, or

(b) quash the decision of the trial court, in which case the trial of the accused may proceed as if the charge had never been dismissed.

4F(1) At any time after the accused is sent forward for trial, the prosecutor or the accused may apply to the trial court for an order requiring a person to appear before a judge of the District Court so that the person's evidence may be taken either—
(a) by way of sworn deposition, or

(b) in case the person's evidence is to be given through a live television link pursuant to Part III of the Criminal Evidence Act, 1992 , or section 39 of the Criminal Justice Act, 1999, through such a link.
whether or not the person's name appears in the list of witnesses served on the accused under section 4B or 4C.

(2) If satisfied that it would be in the interests of justice to do so, the trial court may order a person who is the subject of an application under subsection (1) to attend before a judge of the District Court in the District Court district—
(a) in which the offence was committed, or
(b) in which the accused was arrested or resides, so that the judge may take the person's evidence

accordingly.

(3) The following rules shall apply to the taking of evidence under this section—

(a) when the evidence is being taken, both the accused and a judge of the District Court shall be present;

(b) before it is taken, the judge shall inform the accused of the circumstances in which it may be admitted in evidence at the accused's trial;

(c) the witness may be cross-examined and re-examined;

(d) where the evidence is taken by way of sworn deposition, the deposition and any cross-examination and re-examination of the deponent shall be recorded, read to the deponent and signed by the deponent and the judge.

(4) A judge of the District Court shall have the same powers for—

(a) enforcing compliance by a prospective witness with this section or with an order under this section, and

(b) securing the attendance of the accused,

as the District Court has in relation to witnesses in criminal proceedings.

4G(1) A deposition taken under section 4F may be considered by the trial court on an application under section 4E(1).

(2) Such a deposition may be admitted in evidence at the trial of the accused if it is proved that—

(a) the witness—

(i) is dead,

(ii) is unable to attend to give evidence at the trial,

(iii) is prevented from so attending, or

(iv) does not give evidence at the trial through fear or intimidation,

(b) the accused was present at the taking of the evidence, and

(c) an opportunity was given to cross examine and re-examine the witness;

unless the court is of opinion that to do so would not be in the interests of justice.

(3) Subject to section 16 (admissibility at trial of video recording of evidence given by witness under 17) of the Criminal Evidence Act, 1992 , a video recording of evidence given through a live television link in proceedings under section 4F shall, if the accused was present at the taking of the evidence and an opportunity was given to cross-examine and re-examine the witness, be admissible at the trial of the offence with which the accused is charged as evidence of any fact stated therein of which direct oral evidence by the witness would be admissible, unless the court is of opinion that in the interests of justice the video recording ought not to be so admitted."

The ruling of Judge Nolan

25. This was the general background against which the applicant applied to the Circuit Court (as the court of trial) for an order pursuant to s. 4F(2) directing that Mr. Dunlop be deposed as a witness before the District Court. That application was made on the 18th December 2012 and His Honour Judge Nolan delivered a very careful ruling rejecting the application on the following day. This is the ruling which Mr. Kennedy now seeks to quash in these present proceedings.

26. The material part of this ruling is in the following terms:-

"The defence in this case has made an application to have depositions taken before the District Court. Obviously, I suppose some time ago this was a District Court matter solely or still a District Court matter, there was a natural right to have depositions taken if the parties wanted to do so. The new Act has indicated that this Court shall order depositions where it perceives in the interests of justice to do so. Obviously, in interpreting this section, I have to take into account s. 4G. It appears that this deals with the admissibility of the depositions when taken. But the overriding discretion given to the court is in s. 4F(2). This provides:-

'…if satisfied will be in the interests of justice to do so…'

So that is the overriding discretion given to this Court.

Now, in exercising that discretion, I have to exercise it and I think that what Mr. Kennedy is entitled to in this Court is a fair trial. So, therefore, I must order depositions unless I perceive or believe that Mr. Kennedy's right to a fair trial would not be inhibited by not ordering the depositions.

In this case…I think probably the State's case rises and falls on the evidence of Mr. Dunlop. Mr. Dunlop now is well known to the public and to the courts. He has attended at certain Tribunals and gave evidence before those Tribunals. It seems from the evidence and the submissions and the affidavit produced before this Court, is given contradictory evidence. Now obviously he has given [a statement] to the State and the Gardaí for the prosecution and the Gardaí served a Book of Evidence upon Mr. Kennedy. They also served upon Mr. Kennedy substantial disclosure. And Mr. O'Higgins S.C. [counsel for the applicant] submits to me that in the absence of depositions essentially his client would not get a fair trial before this Court.

Now, I have to consider that seriously, I do not think that this is a frivolous avocation obviously, but it seems to me that the State has given the Book of Evidence to the defendant at this stage. They have also given substantial disclosure. It seems to me sort of, I suppose, informal type of deposition has taken place in certain Tribunals where Mr. Dunlop has been extensively cross examined and Mr. O'Higgins and the defence team has had that available to them.

> So, therefore, it seems to me from all the submissions that are made to me and from reading the material handed into court, I do not think Mr. Kennedy's right to a fair trial would be inhibited by not ordering the depositions in this case. I think that he has plenty of material to defend himself. Obviously Mr. Dunlop's evidence could be termed very challenging for the Prosecution, but not more challenging that other witnesses in these types of cases and Mr. O'Higgins will obviously…have the ample opportunity to cross examine Mr. Dunlop and it seems to me that there is ample material available to cross examine Mr. Dunlop in relation to these matters. And, therefore, it seems to me that the ends of justice does not demand a deposition to be taken in this case and, therefore, I am refusing the application."

The object and purpose of the depositions procedure

27. It may seem curious that the object and purpose of the right to apply to have a witness deposed has hitherto largely escaped judicial scrutiny, although doubtless this issue really did not arise prior to the enactment of the 1999 Act, given that both the prosecution and the accused enjoyed a statutory right to have any witness examined by way of sworn deposition. This issue was, however, touched on in *The State (Sherry) v. Wine* [1985] I.L.R.M. 196 where the applicant – who was facing charges of rape – sought to have the complainant cross-examined in the course of a deposition hearing.

28. This argument was rejected by McCarthy J. based on a close examination of the statutory provision itself. He first said ([1985] I.L.R.M. 196, 198):

> "The plain meaning of s. 7(2) is that either the prosecutor or the accused or both of them is entitled "to require the attendance before the [District Court Judge] of any person, whether included in the supplied list of witnesses or not, and to examine him by way of sworn deposition". This admits of no meaning other than the right of either party to have a listed witness attend. Such witness is examined by way of sworn deposition and may (subs. (3)) to be cross examined and re-examined on his evidence. Who is to examine him in the first instance but that person who requires his attendance?"

29. McCarthy J. then concluded by saying ([1985] I.L.R.M. 186, 199):

> "It is beyond question that there must be fairness and fair procedures that an accused person must be given the opportunity of confronting his accuser and having whatever is necessary and proper examination carried out. An accused person is in a preliminary examination of indictable offences under Part II of the Act of 1967 is not denied such a right; is not given to him at the examination but such right, of course, exists at the trial, if such takes place. The examination is preliminary in every sense; it is for the purpose of determining whether or not, on the face of the statements and/or depositions in cases made out; it does not attempt to measure the strength of the case, it does not purport to express a view as to whether or not there will be a conviction; it merely determines whether or not, assuming the truth of all relevant detail that is given by way of statement or in deposition, the accused person could be convicted. For that reason, no concept of justice requires an accused person *at that time*, should be afforded the opportunity of testing the credibility or accuracy of the statement or the deposition, unless such deposition is being given at the instance of the prosecution itself."

30. It is true that on one reading that this passage may be thought tacitly to assume that the depositions procedure was simply in aid of an application – which was then made to the District Judge – to have the court determine that there was no sufficient case for the accused to answer. But this cannot have been the only purpose of the depositions procedure, as s. 7(2) of the 1967 Act expressly provided that both the prosecutor and the accused should have the right to have witness so examined by means of sworn deposition. Section 4F(1)(as inserted by the 1999 Act) confirms that this remains the position today.

31. The only other authority on the point is a ruling of Carney J. in *The People v. DL* delivered in the Central Criminal Court on 19th July 2002. The accused in that case had been charged with rape and his applied to have the complainant deposed. It was contended that the accused wished to have certain aspects of her proposed evidence "clarified", albeit that Carney J. noted that "no indication was given of what it was intended to clarify." Carney J. refused the application on the ground that it was intended was essentially to cross-examine the complainant, the prohibition against the applicant as moving party doing so notwithstanding.

32. Some further assistance regarding the object of the depositions procedure may be gleaned from a consideration of s. 4G. Section 4G(1) envisages that the deposition is admissible for the purposes of a s. 4E(1) application. It follows, therefore, that depositions may be taken where it may be thought that the evidence thereby gathered as a result of utilising this procedure would be of material assistance to an accused in making such an application at some future stage.

33. Section 4G(2) also envisages that the deposition evidence taken pursuant to s.4F(2) of an absent witness may be admissible at the trial under certain conditions, chief among them that the accused was present and was afforded the opportunity of cross-examining the witness. It is under such circumstances that the deposition evidence of a witness who later dies or is otherwise unavailable to give evidence in person at the trial may nonetheless be admitted.

34. These two sub-sections provide us with strong textual evidence that the Oireachtas envisaged that the power to order depositions might be liberally employed. If, for instance, the deposition evidence is admissible in support of an application under s. 4E to dismiss the prosecution on the basis that there is insufficient evidence to sustain it, this presupposes that the District Court should exercise its s. 4F(2) jurisdiction where it may be reasonably be supposed that the taking of depositions might possibly lend support to such an application.

35. It is also noteworthy that s. 4G(2) addresses itself to the situation where, for a variety of reasons, the witness who has been deposed *simply happens to be no longer* available to give evidence, whether by reason of death, illness or otherwise. But these contingencies are not expressed to be a *predicate* to the exercise of the s. 4F(2) jurisdiction. In other words, the court is not invited to make the order for deposition evidence *simply* because, for example, *at that time* a particular witness is already gravely ill (although this factor would in itself naturally justify the making of such an order). Rather, the deposition evidence is in principle admissible at the subsequent trial in such circumstances via s. 4G(2) even though this fact (*i.e.,* grave illness) may not have been present or known when the order for the taking of depositions was made in the first place. The very fact that the sub-section makes provision for the reception of such evidence in such circumstances leads to the inference that the Oireachtas assumed that deposition evidence would be not infrequently given and that it was accordingly necessary to make special provision for those instances where, for example, a witness who had been deposed in accordance with s. 4F(2) subsequently fell gravely ill or who had died or who had emigrated to distant lands.

36. Here it must also be recalled that the predicate to the exercise of the s. 4F(2) jurisdiction ("…[i]f satisfied that it would be in the interests of justice to do so is….") is couched in perfectly generally language. It clearly embraces the categories mentioned in s. 4G (such as, *e.g.,* applications in aid of a s.4E dismissal application and the testimony of deposed witnesses who are no longer available), but the operation of the sub-section it is not confined in terms to those categories specified in s. 4G. That is a further indication that the depositions power might be liberally and generally employed.

37. All of this is underscored by the language contained in s. 4F(2). The fact that the court of trial can direct the taking of depositions where it is satisfied that it would be "in the interests of justice to do so", simply means that the Court may take this step where it considers that the application in question is *bona fide* and that there are sound reasons for doing so. In this regard, it may be noted that the application in *DL* was not *bona fide* in that sense, since (as Carney J. found) it was essentially sought for the collateral purpose of cross-examining the complainant.

38. Here it may be noted that precisely the same language as contained in s. 4F(2) is repeatedly used in the amalgam of sections inserted into the 1967 Act by the 1999 Act. Thus, s.4B(3) of the 1999 Act enables the District Court to extend the time for the delivery of the Book of Evidence if it is satisfied that (a) there is good reason for doing so and (b) "it would be in the interests of justice to do so." The court of trial is empowered to dispense with the 14 day notice requirement to which the prosecution are otherwise entitled of an application to dismiss under s. 4E(1) "in the interests of justice": see s. 4E(3). The trial court can likewise direct the further service of documents on the accused or grant an adjournment where "it is satisfied that it is the interests of justice": see 4E(6). The court can likewise admit deposition or videolink evidence if certain specified conditions are met "unless the court is of opinion that to do so would not be in the interests of justice.": see s. 4G(2).

39. The very fact that these sections are replete with references to the phrase "in the interests of justice" – often in the context of routine or straightforward procedural matters – provides further textual evidence that this phrase was simply a convenient one which was designed to vest the court of trial with the jurisdiction to exercise a variety of different powers whenever that court considered its appropriate and seemly to do so.

40. This is underscored by analysis of the decision of the Supreme Court in *Dunne v. Governor of Cloverhill Prison* [2009] IESC 11. Here the Court rejected the argument that the jurisdiction to extend time under s. 4B(3) could only be exercised where formal evidence justifying the extension of time had actually been laid down before the District Court. Kearns J. thought that it was generally sufficient for this purpose that the prosecution advanced "a full, truthful and *bona fide* account of any procedural difficulty which may give rise to the application for an extension of time", although he acknowledged that there might be some instances (particularly where the applicant was in custody) where the District Court might insist that formal evidence be led by the prosecution for this purpose. It is implicit in this judgment that the words "in the interests of justice" as they appear in s. 4B(3) are perfectly general words which vested the Court with a general jurisdiction to make the order in question.

41. This is further supported by a slightly earlier decision of the Supreme Court, *Cruise v. O'Donnell* [2007] IESC 67, [2008] 3 I.R. 360. Here the Supreme Court confirmed that the only issue to be determined in the course of a s. 4E application was whether there was a sufficient case to put the applicant on trial. In his judgment Fennelly J. also dealt with the jurisdiction to admit oral evidence on such applications ([2008] 3 I.R. 230, 250):

> "The first point to note is that the primary rule is that evidence will not be admitted. That follows logically from the fact that the court is to decide whether a sufficient case is disclosed by the documents forming the book of evidence. However, section 4E provides that "*oral evidence may be given on an application under subsection (1) only if it appears to the trial court that such evidence is required in the interests of justice.*" I cannot accept that this provision is to be read as constituting a general power for the judge to admit evidence. The purpose of any such evidence must be to cast light on the issue which the court has to determine, namely whether, on the book of evidence, there is a sufficient case to put the accused on trial. Thus, evidence should be admitted to explain the identity of persons, places or things referred to in the documents. It is necessarily difficult to lay down comprehensive rules about this. The guiding principle is the *interests of justice*, but controlled by the context of the application and the circumstances of the particular case. Always, the issue is whether a sufficient case is disclosed."

42. It is again implicit in these comments of Fennelly J. that the phrase "the interest of justice" imports a perfectly general test which empowers the court of trial to determine whether to grant the order sought by having regard to general principles governing the exercise of judicial discretion in respect of any given statutory power.

43. To my mind, therefore, this is the approach which should also govern the interpretation of s. 4F(2). It follows, therefore, that the court of trial has a jurisdiction to order depositions where it seems just and appropriate to do so. Where an applicant for such an order can accordingly establish reasonable grounds to justify the making of the order and the court of trial is satisfied that the application is not prompted by some collateral or ulterior purpose, then in principle the order directing depositions pursuant to s. 4F(2) ought to be made.

Application of these principles to the facts of the present case

44. It now remains to consider the application of these principles to the present case. It is plain that His Honour Judge Nolan proceeded from the premise that the order ought only to be made where there was a real risk that the applicant would not otherwise obtain a fair trial. In my view, this is much too restrictive an approach.

45. If that were indeed the test, then it would be hard to see how the sub-section would ever be operated in practice. It would certainly require an exceptional and quite unusual case before it could be said that the failure allow for depositions to be taken in respect of any particular witness or witnesses would *in itself* jeopardize a fair trial. At the same time, one can readily envisage circumstances whereby such a procedure might advantageously be deployed by either the prosecution or the defence.

46. This, after all, is one such case. It is accepted that Mr. Dunlop has at different times and in different places given contradictory accounts of his activities and he has pleaded guilty to corruption offences. Any person in the position of Mr. Kennedy would naturally wish to know what version Mr. Dunlop will actually proffer at the criminal trial. Several possibilities come to mind.

47. First, Mr. Dunlop might confirm the sworn evidence which he gave at the Tribunal as related to the 1992 events, *i.e.,* that while he interpreted Mr. Kennedy's words as implicitly sanctioning the use of money for payment to councillors, he in fact never did so and actually used the money which he says was given to him to advance the project of a rival developer. Second, Mr. Dunlop might confirm what he said in his witness statement and which is contained in the book of evidence. Third, Mr. Dunlop might give a new or at least a significantly different version of these events.

48. In the event, for example, that Mr. Dunlop was to adhere to the version which he gave to the Tribunal, this would – or, at least, might – put the sustainability of at least some the charges relating to the 1992 events in doubt, since a critical element of many of these charges is that an actual payment to named councillors was made. It would certainly be a factor to which regard would have to be had for the purposes of any application to dismiss under s. 4E. Conversely, even if Mr. Dunlop were to adhere to the witness statement furnished for the purposes of these proceedings, he might conveniently be examined in chief as to why no mention is made therein of his previous sworn testimony on the topic at the Tribunal. The failure to address that earlier evidence is surely a singular feature of a witness statement on which the entire prosecution rests.

49. To this might be added the fact that the entire case rests on the testimony of a person who has served a prison sentence for corruption. Not only that: it rests – apparently – on that person's interpretation of certain conversations and actions of the applicant in both 1992 (*i.e.,* twenty one years ago) and 1997 (*i.e.*, sixteen years ago). Here again a person in the position of Mr. Kennedy might justly and reasonably wish to have Mr. Dunlop examined in chief on deposition as to when he first came forward with his present account of matters implicating Mr. Kennedy and why he never advanced this particular evidence to the Tribunal.

50. It follows from the foregoing that Judge Nolan's decision cannot possibly stand. It is plain that he applied the wrong test so far as the application of s. 4F(2) is concerned and this fact alone is fatal to the validity of the decision: see, e.g., the comments of Henchy J. in *The State (Holland) v. Kennedy* [1977] I.R. 193, 201-202 and those of Keane J. in *Killeen v. Director of Public Prosecutions* [1997] 3 I.R. 218, 229.

51. As I have endeavoured to explain, the Oireachtas did not make the depositions procedure contingent on a showing that without resorting to this procedure a fair trial might be put in jeopardy. Rather, the power to order depositions is designed to be used in those cases where either the prosecution or defence can fairly demonstrate that this procedure may be of significant benefit to them and that it is accordingly appropriate and convenient that the power should be exercised.

52. While a further assessment of this matter would be a matter for the Circuit Court, it is nonetheless hard to avoid the impression that this is manifestly one such case. It is true that Mr. Kennedy's constitutional right to a fair trial would not be jeopardised if Mr. Dunlop were not deposed or, indeed, if s. 4F did not exist at all. But it does exist and this Court must ensure that this statutory procedure is properly employed by the proper application of the appropriate statutory test.

Conclusions

53. In these circumstances, I find myself left with no other option but to quash the ruling of His Honour Judge Nolan and to remit the matter to him in accordance with O. 84, r.20.