



THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 69

Record Number 2018/242

The President.  
McCarthy J.  
Kennedy J.

BETWEEN/

GARETH HILL

APPELLANT

- AND -

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

**JUDGMENT delivered on the 28th day of February 2019 by Kennedy J.**

**Introduction**

1. This is an appeal from a decision of the High Court (Binchy J.) delivered on the 24th April 2018 refusing an application for an order of *certiorari* and declaratory relief. This appeal is concerned with the refusal of declaratory relief.

**Background**

2. The appellant is currently awaiting trial concerning offences contrary to ss. 3, 15 and 15A of the Misuse of Drugs Act 1977 (as amended). These offences are alleged to have been committed in August 2016 ("the 2016 charges").

3. The appellant came before Cork Circuit Criminal Court on the 27th February 2017. A trial date was set for the 24th May, 2017 in respect of the 2016 charges, but prior to that date, the appellant made an application to transfer his trial to Dublin. That application was refused and the matter was adjourned for trial to the 23rd October 2017.

4. In January 2017, whilst on bail for the 2016 charges, the appellant was found to be in possession of controlled substances. He was arrested and charged with offences contrary to ss. 3 and 15 of the Misuse of Drugs Act as amended (the 2017 charges). On this occasion, he was refused bail and was remanded in custody. He signed pleas of guilty before the District Court and on the 26th May 2017, he affirmed those pleas of guilty before the Circuit Court and sought to be sentenced forthwith. The respondent made a successful application before the Court to adjourn the sentencing hearing to the 3rd November 2017 in order to allow the trial for the 2016 charges to proceed in the interim period. The reason for this application was because certain statutory consequences would arise if the appellant was found guilty of the 2016 charges. Section 11 of the Criminal Justice Act 1984 as amended states as follows:-

"(1) Any sentence of imprisonment passed on a person for an offence –

(a) committed while on bail..

(b) [not relevant]

(c) shall be consecutive on any sentence passed on him or her for a previous offence or, if he or she is sentenced in respect of two or more previous offences, and the sentence last due to expire...

(2) [not relevant]

(3) [not relevant]

(4) Where a court-

(a) is determining the sentence to be imposed on a person for an offence committed while he or she was on bail, and

(b) is required by sub section (1) to impose two or more consecutive sentences, Then, the fact that the offence was committed while the person was on bail shall be treated for the purpose of determining the sentence as an aggravating factor and the court shall (except where the sentence for the previous offence is one of imprisonment for life or where the court considers that there are exceptional circumstances justifying it not doing so) impose a sentence that is greater than that which would have been imposed in the absence of such a factor"

5. The appellant opposed the application before the Circuit Court. On the 24th July 2017, he was granted leave to apply for judicial review seeking an order of *certiorari* to quash the decision of the Circuit Court adjourning sentence and seeking declaratory relief. Along with this, a stay was granted on the trial of the 2016 charges and the sentence hearing of the 2017 charges.

6. On the 24th April 2018, the appellant's application for judicial review was refused and the appellant now seeks to appeal from this

decision insofar as it concerns the declaratory reliefs.

### **Decision of the High Court**

7. In the High Court, the High Court judge rejected the application of the appellant and found that it was permissible for the Circuit Court judge to adjourn the sentencing hearing in respect of the 2017 charges in order to await the conclusion of the trial of the 2016 charges.

8. In coming to this conclusion, the trial judge held, *inter alia*, that there was no infringement of the presumption of innocence of the appellant and stated:-

"...the right is one enjoyed by an accused person in the defence of specific criminal charges. If that appears to be stating the obvious I make the point because of the context in which the right is asserted in these proceedings. Two points need to be made in this regard. The first is that the applicant makes no complaint at all about s. 11 of the Act of 1984. His complaint is about the decision of the Circuit judge to adjourn sentencing in connection with the 2017 charges. The second and more substantive point is that the applicant is not arguing that he will not receive a fair trial in respect of the 2016 charges. As to the 2017 charges, he has already pleaded guilty and the question of a fair trial does not arise. *In the State (O'Hagan) v. Delap* [1982] 1 I.R. 213, O'Hanlon J. noted that "the presumption of innocence ceased to apply to the prosecutor [the accused in the District Court] when he indicated his intention to plead guilty to both sets of offences". That this is so can hardly be in dispute. The presumption is a protection against conviction; once convicted, whether on foot of a plea or following a trial, the status of an accused person changes from being that of an accused to that of a convicted person and the presumption of innocence on the charges concerned is necessarily spent."

9. The judge also addressed the issue of a right to an expeditious trial and pointed out the following:-

"The first point I note in regard to this argument is that the applicant was himself responsible for the first adjournment of the trial of the 2016 charges, in applying as he did to have those charges transferred from Cork to Dublin. While he was entitled to make that application, it necessarily caused some delay. Secondly, the trial of the 2016 charges has been delayed since only on account of these proceedings, and has been stayed pending the determination of these proceedings on the application of the applicant himself. Thirdly, the applicant has consented to his remand in custody pending the outcome of these proceedings and his trial on the 2016 charges will assuredly take place without any appreciable delay upon the conclusion of these proceedings."

10. The complaint made in the latter respect before this Court is that the trial judge considered the delay argument in the context of the 2016 trial, whereas this argument was advanced regarding the expeditious disposal of the sentence matter (the 2017 charges).

### **Issues on appeal**

11. The issues can be summarised as follows:-

(1) whether it was permissible for the Circuit Court judge to adjourn sentencing in respect of the offences to which the appellant had pleaded guilty pending the determination of earlier charges to which the appellant had pleaded not guilty and

(2) the expeditious disposal of the sentence matter.

### **Submissions of the parties**

#### **Appellant**

12. The appellant in his written submissions submits that the judge did not have adequate regard to the fact that s.11 does not make provision for the adjournment of sentence. The appellant accepts that there is a general power at common law to postpone sentencing, however, the appellant advances the argument that to continuously remand an accused person on the basis that they might have committed another offence is not a valid exercise of a court's discretion. The appellant relies on the decision of O'Neill J. in *Olafusi v. Governor of Cloverhill Prison* [2009] IEHC 558 in this regard.

13. The appellant says that the trial judge misunderstood the appellant's complaint in respect of the right to an expeditious disposal of sentence. The appellant submits that his complaint is not concerned with the delay in the trial in respect of the 2016 offences but the unfair delay as contended in proceeding to sentence him for the 2017 charges.

14. It is also said that the trial judge erred in concluding that the presumption of innocence only arises in the context of criminal trials. The appellant submits that the presumption applies in respect of all procedural steps within the operation of the criminal justice system leading to trial. The appellant argues that he is entitled to the presumption of innocence regarding offences in respect of which he is awaiting trial, and that if that presumption is to have a real and meaningful effect, he is entitled to be dealt with in respect of separate and discreet matters in a way which is consistent with the presumption of innocence. In this respect, the appellant relies on the judgment of Ní Raifeartaigh J. in *Gifford v. Director of Public Prosecutions* [2017] IEHC 423 where she held that in the absence of expressed statutory reference to previous convictions as a relevant consideration for a District judge when considering whether to not to accept jurisdiction, it was not appropriate for a District judge to have regard to previous convictions. The appellant submits that s.11 of the Criminal Justice Act 1984 as amended does not permit or require a sentencing judge to adjourn a sentence hearing pending the determination of other matters which may then bring the provisions of s.11 into play on a subsequent date.

#### **Respondent**

15. The respondent in reply submits that the Circuit Court judge was acting *intra vires* in adjourning the sentence and as such the decision is not amenable to judicial review. Moreover, that the courts are entitled to organise their own affairs, including the allocating of dates for trials and the sequence in which trials are set down for hearing. It is submitted that it is entirely logical for a court to decide that matters should be determined in a chronological order.

16. The respondent further says that there is no expressed requirement in s.11 of the Criminal Justice Act 1984 or elsewhere that mandates the immediate passing of sentence and that there is nothing from which such a requirement can be inferred. The argument is advanced that the Circuit Court is entitled to await the outcome of the trial before holding the sentence hearing in respect of the 2017 charges and that there is no authority to support a contrary contention.

17. Furthermore, it is argued that there has been no infringement of the appellant's right to a fair trial and that he cannot credibly claim that he has been deprived of his right to a fair trial in circumstances where he has prolonged the process to his own end. The respondent submits that there is no legal or logical basis for permitting him to do so as the Circuit Court adjournment was in accordance with the law and therefore the High Court did not err in its findings.

### **Discussion**

18. Much the same arguments were advanced orally by the parties in the course of this appeal and elaborated upon.

19. I have already identified the matters in issue. Firstly, whether it was permissible for the Circuit Court to adjourn the imposition of sentence pending the outcome of the trial concerning the 2016 charges and secondly, the expeditious disposal of sentence regarding the 2017 charges.

20. The appellant's contention is that whilst a judge has a right to adjourn a sentence hearing, the discretion must be exercised judicially and in accordance with well-known legal and constitutional principles.

21. On the first point, the High Court judge found no authority for the contention that the presumption of innocence should be applied in the manner contended for by the appellant. He stated as follows:-

"It is well established that the courts are entitled to organise their own business, including the allocation of dates for trials and the sequence in which trials are set down for hearing. It is entirely logical for a court to decide that matters should be determined in a chronological order. More than that, in organising the order of business it seems to me that it is also appropriate that the courts should have regard to such policies of the Oireachtas as are set down in legislation insofar as the manner in which the courts organise their business can do so."

### **Conclusion on first issue**

22. I can find no error in the approach expounded by the High Court judge. It is the position that the appellant has a trial pending concerning the 2016 charges. A jury will, in due course, determine whether he is guilty or not guilty of all or some of the alleged offences on foot of that indictment. It cannot be said that adjourning the 2017 offences for sentence to a date after the trial of the 2016 charges has had any adverse effect on the appellant's presumption of innocence concerning those alleged offences. The decision of the Circuit Court to adjourn the sentencing matter was simply that; a decision to adjourn without any predetermination of the ultimate issues for determination by the jury in respect of the 2016 offences. The status of the appellant that he is presumed innocent of the 2016 charges is entirely preserved. Ultimately, he will be sentenced either on the 2017 charges alone, or on some or all of the 2016 charges with the consequential statutory implications pursuant to s.11 of the Criminal Justice Act 1984 as amended.

23. Mr O'Lideadha SC for the appellant argues that in adjourning the sentencing matter, this impacts on the presumption of innocence regarding the 2016 trial does not withstand scrutiny. He says all matters leading to a trial including all procedural matters must be conducted in accordance with the presumption of innocence and in this he is absolutely correct. However, adjourning the sentencing issue in order to await the determination of the 2016 trial does not in my view impact on the ultimate decision of a jury. To say that adjourning the 2017 sentence to await the outcome of the 2016 allegation in some way erodes the presumption of innocence is a step too far. I cannot see how the appellant is prejudiced in any way regarding the 2016 trial. The result of the adjournment will simply be to inform the sentencing judge of the appellant's status post trial. The decision to adjourn the sentencing matter is a decision which was entirely within the proper exercise of the discretion of the Circuit Court judge and gives effect to the intent of the Oireachtas concerning s.11 of the 1984 Criminal Justice Act.

24. I therefore reject the submissions made on behalf of the appellant in this regard and I am satisfied that there was no error in the conclusions of the High Court judge.

25. On the second argument; that the adjournment of the 2017 sentence means that the appellant is being denied his right to the expeditious disposal of the sentencing matter, the appellant says that the High Court judge considered the 2016 trial in this context and failed to consider it in the context of the 2017 sentence.

26. Sentence hearings are frequently deferred for many and varying reasons. The duration of the adjournment in this instance was initially from the 26th May 2017 to the 3rd November 2017. On the 24th July 2017, an application was made on an ex parte basis in the usual manner seeking leave to apply for orders of judicial review and a stay was granted concerning the 2016 and the 2017 matters.

27. It is correct to say that the interval between conviction and sentence should not be unreasonably long. It is also the case that the decision to adjourn must be a proper and proportionate one in the circumstances of any given case. In the present matter, the decision to adjourn was on the basis that a sentencing court when passing sentence should be aware of whether the applicant had a conviction recorded against him which would have an impact on the sentence to be imposed by the sentencing judge in respect of the 2017 charges.

28. I observe that this case does not seem to me to engage the presumption of innocence at all. Insofar as the principle has any application, the appellant retains the presumption of innocence in respect of the charges on which he is facing trial. As regards the sentence matter, the presumption of innocence naturally does not have any application as quite obviously, the appellant has pleaded guilty and must, and no doubt will, be dealt with in due course of law and in accordance with constitutional principles. The adjournment of the sentence hearing in these circumstances does not breach the appellant's rights under law or under the Constitution.

### **Conclusion on second issue**

29. While the High Court judge addressed the issue of the appellant's right to an expeditious trial in the context of the 2016 charges, I am satisfied that the Circuit Court judge exercised his discretion in an appropriate manner in adjourning the sentence hearing to await the outcome of the 2016 charges and that such a decision was entirely proportionate in the circumstances of this case. It cannot be said that adjourning the sentence hearing, as the Circuit Court judge did, was disproportionate in the circumstances. It is entirely within the judge's discretion and four-square within the jurisdiction of the Circuit Court.

30. It follows from the foregoing that this appeal is dismissed.