Neutral Citation Number: [2008] IEHC 89

THE HIGH COURT
JUDICIAL REVIEW

2005 No. 880 J.R.

BETWEEN

PAT JENNINGS

APPLICANT

AND
DIRECTOR OF PUBLIC PROSECUTIONS

FIRST NAMED RESPONDENT

AND
JUDGE DONAGH McDONAGH

SECOND NAMED RESPONDENT

Judgment of Mr. Justice Garrett Sheehan delivered on the 7th day of April, 2008

1. On the 10th August, 2005, this court granted the applicant leave to apply by way of application for judicial review for:-

(1) An order of prohibition restraining the first named respondent from dealing further with the prosecution of the applicant presently before the Circuit Criminal Court, Castlebar on Bill No. 0031/04MO and for,

(2) An injunction restraining the second named respondent from dealing further with the prosecution of the applicant presently before the Circuit Criminal Court, Castlebar on Bill No. 0031/04MO.

2. The leave to apply was granted on the grounds set out at D in the applicant's statement to grant the application. These read as follows:-

(a) The applicant was denied his right to a fair trial in accordance with law and governed by fair procedures in that

(i) The first named respondent served a Book of Evidence which contained a list of witnesses but intimated to the applicant that the additional witnesses (herein after described as "the additional witnesses") would be called by the prosecution

(ii) The first named respondent informed the applicant's advisors that subpoenas had been served on the additional witnesses.

(iii) The first named respondent served subpoenas on the additional witnesses.

(iv) The first named respondent engaged in a cat and mouse game by reserving his position on the status of the additional witnesses and by refusing to inform the applicant's advisors as to whether or not the additional witnesses would be called to give evidence on behalf of the prosecution.

(v) The first named respondent refused to inform the applicant's advisors in the course of the trial which commenced on the 24th day of May, 2005, as to whether the prosecution was prepared to make the additional witnesses available for cross examination by counsel for the applicant.

(vi) The first named respondent completed the prosecution case without calling the additional witnesses to give evidence on behalf of the prosecution and/or refusing to make the additional witnesses available for cross examination by counsel for the applicant in circumstances which as a matter of basic fairness and procedure required that this should be done.

(vii) The first named respondent wrongfully engaged in a cherry picking exercise in failing to place all available relevant evidence before the jury.

(b) The first named respondent failed to discharge his duty to put all available relevant evidence to the jury.

(c) The second named respondent failed to accord fair procedures to the applicant in the course of the aforesaid trial in that he

(i) Failed to rule on the application for a dismissal of the charges at the close of the prosecution case.

(ii) Discharged the jury before making the said ruling which the applicant was entitled.

(iii) Discharged the jury where there had been no mis-trial and thereby placed the applicant in a position of double jeopardy.

(iv) Discharged the jury without giving any adequate or reasonable consideration to alternative courses of action.

(d) The applicant was *autrefois acquit.*

Background

3. The applicant is charged with two offences alleged to have been committed in the early hours of the 27th December, 2003, at the Travellers Friend Hotel in Castlebar, Co.Mayo. He and two other persons are alleged to have assaulted one Thomas McIntyre causing him harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997, and also to falsely imprisoning Thomas McIntyre on the same date contrary to s. 15 of the said Act. The applicant was served with a Book of Evidence on the 6th October, 2004, and was returned for trial to the Circuit Criminal Court on that date.

4. In due course the applicant and his co-accused were arraigned before the Circuit Criminal Court at Castlebar on Wednesday 25th May, 2005, on which date a jury was sworn in to try the case. The matter was then adjourned to Friday, the 27th May, 2005, when the trial proper began.

5. On Wednesday, the 1st June, 2005, when the prosecution case closed counsel on behalf of each of the accused applied for a direction. The trial judge received lengthy submissions. He indicated that he needed time to consider the submissions and that he would rule the following morning, Thursday the 2nd June, 2005 . At that point on Wednesday, the 1st June, 2005, certain difficulties came to light in respect of the jury. First it became clear that one juror had arranged to fly from Shannon Airport to Dubai the following day at about midday.

6. This problem had been flagged to the court on the first day of the trial and counsel had indicated at that point that if necessary they would not object to the trial proceeding with eleven jurors. The juror in question was then released, however, it then came to light that a second juror had a similar problem in that he would not be available after Tuesday of the following week.

7. The following day, Thursday the 2nd June, 2005, when the court resumed, inquiries were made as to difficulties being experienced by the second juror. He confirmed that he was due to go to England the following Tuesday, 7th of June, 2005 for his brothers wedding . Counsel for the defendants indicated that there was little likelihood of the trial finishing in the time available on the Friday in the event of the applications for directions not succeeding. As Monday the 6th June, 2005, was a public holiday and Tuesday was not a sitting day, the trial would not resume until Wednesday, 8th June, 2005, if it did not conclude on the Friday the 3rd of June, 2005. All three defence counsel were clear that they would be most reluctant to request the judge to insist that the juror who was due to go to England for his brother's wedding should cancel his plans and remain on the jury, or to allow the trial to proceed with only ten jurors. Having heard these submissions the trial judge decided to withdraw the case from the jury on the basis that it would not be fair or safe to proceed with ten jurors. He said that as he was deciding to do this, this effectively rendered moot the applications for a direction which he had been considering and it was no longer necessary for him to deliver a ruling on those applications.

8. The more particular background to the case relating to the applicant is set out in his affidavit. He states *inter alia* that the Book of Evidence served on the 6th October, 2004, included four memos of interviews with four different members of the security staff employed on the night in question. These were incorporated in the Statement of Evidence of Garda Murphy and appeared in the exhibit section of the Book of Evidence. He further stated in his affidavit that when his trial was first listed for hearing on the 9th November, 2004, he made inquires leading up to the trial as to the availability of witnesses he wished to have called. Following inquires made by himself and his solicitor he was informed that four members of the security staff had been subpoenaed by the State Solicitor.

9. The applicant stated that when the trial was adjourned in November, counsel for the prosecution mentioned these particular subpoenas to ensure they would remain in force for the new trial date.

10. He states that because of this he assumed that these people were being called as witnesses and did not make any arrangements for their attendance at the adjourned trial date.

11. He further states that on the trial date it was unclear if the prosecution was going to call any of these witnesses and that it only became clear at the conclusion of the State's case, that none of these witnesses was going to be tendered by the prosecution for the purpose of cross examination.

12. With regard to these additional witnesses the applicant further stated:-

> "As they were State witnesses I did not call them as I believed I could not have them interviewed by my solicitor in preparation of my defence."

13. In a further supplemental affidavit, the applicant contended that he had been denied his right to a trial in accordance with law or fair procedures on the basis that the second named respondent did not accord fair procedures to him in that he,

> (1) Failed to rule on the application for a dismissal of the charges at the close of the prosecution case.
>
> (2) Discharged the jury before making the said ruling to which the applicant was entitled.
>
> (3) Discharged the jury where there had been no mis-trial and thereby placed the applicant in a position of double jeopardy.
>
> (4) Discharged the jury without giving adequate or reasonable consideration to alternative courses of action.

14. In a replying affidavit filed on behalf of the respondents, Mr. Seamus Hughes, the State Solicitor for Mayo refers to the transcript of proceedings for the 24th May, 2005, when the prosecution sought an adjournment of the trial which was refused. He refers to that part of the transcript where he stated to the court with regard to the said witnesses:-

> "They are not State prosecution witnesses and the State cannot be compelled to bring them to court when we are not relying on their evidence. They are referred to in question and answer memoranda and statements."

15. In the course of his submissions in support of grounds (a) and (b), upon which the reliefs are sought, Mr O'Higgins submitted that the duty of the first named respondent was to make available and call all witnesses whom he considered to be material such that a jury could reach a correct finding of fact in the case. In support of this submission Mr. O'Higgins relied *inter alia* on the case of *Joseph Francis OLiva* [1965] 49 Cr. App. R. 298 cited with approval in the judgment of the Supreme Court in *O'Regan v. the Director of Public Prosecutions* [2000] 2 I.L.R.M.. 68, Supreme Court which stated at p. 73:-

> "…The general and well-accepted practice in this country is for the prosecution to call or tender for cross examination all witnesses whose names are included in the book of evidence."

16. In support of ground (c) Mr. O'Higgins submitted that the trial judge should have given a ruling on the application for a direction before he dealt with the jury issue. He further submitted that the accused was entitled at the end of the prosecution case to apply for a direction and was entitled to receive a ruling from the trial judge and that it was unfair that the accused was exposed to a risk of double jeopardy and the risk of punishment and conviction. He also submitted that fairness of procedure dictated that the accused should not be exposed to the risk of a re-trial without first having had a determination of his application for a direction in the first

trial.

17. He stated that the applicant, was required to fund his defence over a four day hearing and was entitled to require and expect a ruling on his application for a direction.

18. He finally submitted under this ground that the accused was entitled to finality of a finding in respect of his application for a direction. It may have been that the accused would have succeeded in his application and the trial judge would have directed the jury to acquit and consequently he would not be put in jeopardy and in further peril of conviction and punishment had the trial judge made a ruling in his favour.

19. Mr. O'Higgins also relied on the judgment of O'Neill J., delivered in the case of *D.S. v. The Judges of the Cork Circuit Court and the Director of Public Prosecutions* (Unreported, High Court, O'Neill J. 16th October, 2006) in support of his contention that he should not face a further trial.

20. In the course of his replying submissions, Mr O'Malley on behalf of the respondents submitted that there were two grounds on which this court should reject the submissions that the applicant was autrefois convict. The first was that *autrefois convict* was not available by way of judicial review and operates only as a plea in bar of an indictment, and secondly that in any event it only arises where there has been a valid acquittal by a court of competent jurisdiction.

21. With regard to the applicant's submissions that he was entitled to a decision on his application for a direction before the jury was discharged, Mr O'Malley submits that this complaint is misconceived for two reasons. First, when the second named respondent indicated that because he was discharging the jury there was no point in him delivering a decision on that application, there was no objection whatsoever from the applicant or any of the co-accused. He further submits that even if there were any merit in the argument that the second named respondent should have ruled on the application for a direction, it could have no bearing on the remedy which he now seeks which is of course to have any further trial prohibited.

22. He further submits that the applicant is not justified in his complaint that the second named respondent discharged the jury without there having been a mis-trial or without giving adequate or reasonable consideration to other possible courses of action.

23. In further supplementary submissions regarding the failure of the State to call or tender the evidence of the additional witnesses, Mr. O'Malley submits that it is clear from the affidavit of the State Solicitor and portions of the trial transcript that the applicant was under no misapprehension as to the fact that the prosecutor did not intend to call the persons in question as witnesses. He went on to point out that the authorities on which the applicant relied in relation to this question, all involved cases to quash a conviction by way of appeal or judicial review and that the circumstances in this case were entirely different. Finally he submitted that the first trial had concluded with the discharge of the jury and that the applicant had failed to adduce any evidence to support the proposition that he ran a real or serious risk of an unfair trial.

Decision.
24. I hold that the trial judge approached this matter correctly and that he was entitled to terminate the trial at the time and in the manner that he so did.

25. In reaching this conclusion I have looked at some of the circumstances that arose towards the conclusion of the trial. When the trial judge first retired to consider the application he gave himself a short time constraint. When he returned after the luncheon adjournment he told counsel for the applicant that they had given him a lot to think about and that he would not now reach his decision in the time constraint he had initially imposed on himself. He said he would give a decision the following morning at 10.15a.m. There then followed a discussion about the jury difficulties already outlined in the earlier part of this judgment and in the course of which it emerged that the trial had already exceeded the time estimate given by the parties at the start of the trial. The first juror with a difficulty was then released and the trial was adjourned to the following morning.

26. At the start of proceedings the following morning the trial judge clearly stated:-

> "Before going into any issue on the judgment, Gentlemen, I want to find out what the situation is in relation to this extra juror because anything that arises there may well render everything else moot."

There then followed various submissions about when the trial might conclude and the desirability or otherwise about proceeding with ten jurors which ultimately led the judge to discharge the jury. Although not explicitly stated these further discussions can only have proceeded on the basis of the judge rejecting the application for a direction.

Two matters that I deem relevant here are:-

> (1) The transcript does not disclose that the trial judge had reached a decision on the application for a direction.
>
> (2) Neither the applicant nor any of his co-accused raised any objection to the trial judge discharging the jury when he so did.

27. Apart from these two matters it is also important that a trial judge should have a degree of latitude in how he or she conducts a criminal trial. Unforeseen events occur, as they did in this case, and the trial judge should not be unduly fettered as to how he deals with such events.

28. The applicant has also argued that the first named respondent should be prohibited from proceeding with a further trial on the ground that it would be unfair to do so and relies in particular on the decision of O'Neill J. in *D.S. v. The Judges of Cork Circuit and the Director of Public Prosecutions* (Unreported, High Court, 16th October, 2006). In that case the applicant was returned for trial on sexual assault charges perpetrated on T.L. and S.L. The indictment was served and the first trial proceeded in respect of three counts on the indictment relating to sexual assaults on T.L. In this first trial the jury was discharged. A second trial in respect of eight charges relating to T.L. resulted in the applicant being acquitted on all those charges. The applicant subsequently went on trial in respect of charges relating to S.L. The first trial resulted in a disagreement. In the second trial the jury acquitted the applicant on count three and disagreed on counts one and two. The applicant applied for prohibition when the Director of Public Prosecutions sought to put him on trial for a third time in respect of counts one and two. In the course of his judgment, O'Neill J. stated:-

> "What is at stake here is not just the safeguarding of this individual applicant but also the public interest in the preservation of the integrity of the criminal trial process. It could not ever reasonably be said, in my view, that a person

could be exposed to say four or five or more trials for the same offence where there had been jury disagreements in all the previous trials. As a matter of common sense and decency reasonable people would say that at some point, enough is enough. In my view, in principle, the point at which there should be a prohibition on a further trial, is after all relevant public interests have been satisfied; namely after the public have had a full and fair opportunity to bring the case to a jury twice. Where two juries in separate trials fail to reach a verdict, because of disagreement, that public interest has been amply protected. In my view, at that point, there should be a prohibition of a further trial of the same person for the same offences in order to safeguard that individual from the risks of a verdict distorted by the dangers of multiple trials and to protect the public interest in preserving the integrity of the criminal trial process.

I have come to the conclusion therefore that the ancient common law prohibition on multiple trials known as the double jeopardy principle has application to this case, although it might more aptly be described as the triple jeopardy principle.

It follows that a third trial of a person for the same offence where in the two previous trials a jury has disagreed, would not in my opinion be a trial in due course of law as required by Article 38(1) of the Constitution".

29. In the present case the applicant has had one trial in which the jury was discharged prior to the facts going to it for consideration. While it is undoubtedly onerous for the applicant to undergo a further trial, one cannot say that the point has been reached that it would be unfair to put him on trial again and accordingly I refuse his application on this ground.

30. Finally the applicant also suggests that there is a real risk that he will not get a fair trial because of the manner in which the first trial proceeded. His essential argument here relates to the failure of the prosecution in the first trial to either call or make available for cross examination four people whose cautioned interviews appeared mistakenly in the statement of evidence in one of the investigating Gardaí. The applicant relied *inter alia* on the decision of the Supreme Court in *O'Regan v. The Director of Public Prosecutions* [2000] 2 I.L.R.M. 68 . In that case the Supreme Court held that it was the general and well accepted practise in this country for the prosecution to call or tender for cross examination all witnesses whose names were included in the Book of Evidence. The court went on to say that that was the high watermark of the practise to be adopted in proceedings heard on indictment.

31. While none of the four people referred to were witnesses on the Book of Evidence and it is clear from the transcript that the prosecution did not intend to call them, it is important to remember that the first trial concluded with the discharge of the jury prior to it being asked to consider its' verdict. A new trial is scheduled to take place and that court will be bound by all the existing authority on the calling of witnesses.

32. Accordingly I hold that the applicant has failed on this ground to establish that he faces a real or serious risk of an unfair trial.