THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 321

[2019 No. 538]

The President
Kennedy J
Ní Raifeartaigh J

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

D.H.

RESPONDENT

JUDGMENT of the President delivered on the 23rd day of November 2020

1. This is an appeal against an order of the High Court (White J.), sitting in the Central Criminal Court, of 17th May 2019, and also, or in the alternative, an appeal from an order of the same judge of 14th November 2019. The effect of the orders sought to be appealed is that there is in place a prohibition on naming a person who has been convicted and sentenced following a trial in the Central Criminal Court for a number of offences of rape and sexual assault of a child.

Background

2. The background to the case is that the complainant, who was born in 1978, and the applicant both resided in a small housing estate in a village in the Dublin commuter belt. The respondent to this appeal is some eight years older than the complainant. In 2013, the complainant reported to Gardaí that during the course of a particular summer, she was raped on four separate occasions. She was not entirely precise about what year it was, though the evidence suggested that it was 1987, when she would have been nine years old and the respondent would have been aged 17.

3. The DPP directed that the accused be prosecuted in respect of four counts of rape and two counts of indecent assault. The trial came on in May 2016 and during the course of that trial, the complainant gave evidence. However, the jury in that trial was discharged.

4. A second trial came on in November 2016 and, on this occasion, the complainant gave evidence before the jury and also during the course of a voir dire. Because of what was perceived as a discrepancy between what the complainant had said in her evidence and what she had told the Eastern Health Board at one point, the trial judge stayed or

purported to stay the four rape charges pending further investigation. The DPP appealed the decision of the High Court to the Supreme Court which upheld the appeal. A third trial took place in March 2019 and, in the course of this trial, the complainant gave evidence on three occasions, twice in the presence of the jury and once in the course of a voir dire. The trial concluded on 16th April 2019 when the accused was convicted on all counts.

5. The matter came on for sentence on 3rd May 2019 when, in the usual way, the Court heard evidence and submissions. The Court adjourned the matter for imposition of sentence until 17th May 2019. On that occasion, the respondent was sentenced to terms of seven years imprisonment on each of the rape counts and terms of five years imprisonment in respect of the two indecent assault counts, all sentences being directed to run concurrently.

6. On 17th May 2019, after the sentence matter was called by the Registrar, the judge opened his remarks by saying:

> "Now, this is an in camera matter, members of the legal profession and members of the media may remain in court and those directly involved in the matter. Others who are not directly involved should leave the court and will be called in when their business is ready."

Senior Counsel for the prosecution then interjected:

> "[Prosecution Counsel]: I am just wondering, Judge, is sentence not in public?
>
> JUDGE: Sorry?
>
> [Prosecution Counsel]: Is sentence not in public?
>
> JUDGE: I'm wrong then. I have to make it in public, is it?
>
> [Prosecution Counsel]: Just when you said that, Judge, I thought it should be in public, the sentence is pronounced in public.
>
> JUDGE: Well, I'm incorrect then.
>
> [Prosecution Counsel]: I haven't got the legislation in front of me, if it I can put it that way.
>
> JUDGE: Obviously -- thanks for reminding me, Mr. Murray, thank you. I'll direct that obviously the in camera restriction doesn't apply because it's the sentence hearing, that's in public, but the reporting restrictions still apply, that's the identification of the victim and the accused person. So, that's the appropriate order to make."

7. The court order, which was perfected on 11th December 2019, was in the following terms:

"The matter coming into the list for sentence on this day [17th May 2019] in the presence of Counsel for the Director of Public Prosecutions and Counsel for the Accused

THE COURT DOTH DIRECT that the reporting restrictions provided for under section 7 of the Act of 1981 still apply and that no information which may lead to the identification of the Complainant, including the identity of the Accused, be published or broadcast accordingly"

8. It would seem that the order as to anonymity was made without any prior discussion. It is understood that at the time the order was made, the complainant was not aware of the possibility of seeking to waive her anonymity. However, within a short period of time, she informed Gardaí that she did, in fact, wish to waive her right to anonymity. That was then communicated to the DPP who arranged to list the matter before the Central Criminal Court on an ex parte basis on 23rd May 2019, with a view to having the reporting restrictions lifted. The Court directed that the convicted man be put on notice. Oral and written submissions were provided on behalf of both the DPP and the convicted man to the trial judge who reserved judgment and then delivered that judgment on 14th November 2019. On that day, the trial judge ruled that he was functus officio and that he was not, therefore, in a position to vary his order of 17th May 2019. It is in those circumstances that the DPP seeks to appeal against the order of 17th May 2019, and/or to appeal against the trial judge's ruling of 14th November 2019 that he could not lift the prohibition on publication.

The Provisions in Issue

9. The statutory provision in issue is s. 8 of the Criminal Law (Rape) Act 1981 which deals with the anonymity of accused. Because some of the arguments addressed to the Court have referred both to that section and to the preceding section 7 (which deals with anonymity of complainants), it is convenient to set out both sections in full:

"7.—(1) Subject to subsection (8) (a), after a person is charged with a rape offence, no matter likely to lead members of the public to identify a woman as the complainant in relation to that charge shall be published in a written publication available to the public or be broadcast except as authorised by a direction given in pursuance of this section.

(2) If, at any stage before the commencement of a trial of a person for a rape offence, he or another person against whom the complainant may be expected to give evidence at the trial applies to a judge of the High Court or Circuit Court for a direction in pursuance of this subsection and satisfies the judge—

(a) that the direction is required for the purpose of inducing persons to come forward who are likely to be needed as witnesses at the trial, and

(b) that the conduct of the applicant's defence at the trial is likely to be adversely affected if the direction is not given,

the judge shall direct that subsection (1) shall not, by virtue of the charge alleging the offence aforesaid, apply to such matter relating to the complainant as is specified in the direction.

(3) If at a trial of a person for a rape offence he or another person who is also charged at the trial applies to the judge for a direction in pursuance of this subsection and satisfies the judge—

(a) that the direction is required for the purpose of inducing persons to come forward who are likely to be needed as witnesses at the trial,
(b) that the conduct of the applicant's defence at the trial is likely to be adversely affected if the direction is not given, and
(c) that there was good reason for his not having made an application under subsection (2) before the commencement of the trial,

the judge shall direct that subsection (1) shall not, by virtue of the charge alleging the offence aforesaid, apply to such matter relating to the complainant as is specified in the direction.

(4) If, at a trial for a rape offence, the judge is satisfied that the effect of subsection (1) is to impose a substantial and unreasonable restriction on the reporting of proceedings at the trial and that it is in the public interest to remove or relax the restriction, he shall direct that that subsection shall not apply to such matter relating to the complainant as is specified in the direction; but a direction shall not be given in pursuance of this subsection by reason only of an acquittal of an accused person at the trial.

(5) If a person who has been convicted of an offence and given notice of appeal against the conviction, or, on conviction on indictment, notice of an application for leave so to appeal, applies to the appellate court for a direction in pursuance of this subsection and satisfies the court—

(a) that the direction is required for the purpose of obtaining evidence in support of the appeal, and
(b) that the applicant is likely to suffer injustice if the direction is not given,

the court shall direct that subsection (1) shall not apply to such matter relating to a specified complainant and rape offence as is specified in the direction.

(6) If any matter is published or broadcast in contravention of subsection (1), the following persons, namely:

(a) in the case of a publication in a newspaper or periodical, any proprietor, any editor and any publisher of the newspaper or periodical,
(b) in the case of any other publication, the person who publishes it, and
(c) in the case of a broadcast, any body corporate which transmits or provides the programme in which the broadcast is made and any person having

functions in relation to the programme corresponding to those of an editor of a newspaper, shall be guilty of an offence.

(7) In this section—

'a broadcast' means a broadcast by wireless telegraphy of sound or visual images intended for general reception, and cognate expressions shall be construed accordingly;
'written publication' includes a film, a sound track and any other record in permanent form but does not include an indictment or other document prepared for use in particular legal proceedings.

(8) Nothing in this section—

(a) prohibits the publication or broadcasting of matter consisting only of a report of legal proceedings other than proceedings at, or intended to lead to, or on an appeal arising out of, a trial at which the accused is charged with a rape offence, or
(b) affects any prohibition or restriction imposed by virtue of any other enactment upon a publication or broadcast.

(9) A direction in pursuance of this section does not affect the operation of subsection (1) at any time before the direction is given.

(10) If, after the commencement of a trial of a person for a rape offence, a new trial of the person for that offence is ordered, the commencement of any previous trial of that person for that offence shall be disregarded for the purposes of subsections (2) and (3)."

10. Section 8 of the Criminal Law (Rape) Act 1981, as amended by the Criminal Law (Rape) (Amendment) Act 1990, provides as follows:

"8.—(1) After a person is charged with a rape offence no matter likely to lead members of the public to identify him as the person against whom the charge is made shall be published in a written publication available to the public or be broadcast except—

(a) as authorised by a direction given in pursuance of this section or by virtue of section 7 (8) (a) as applied by subsection (6) of this section, or
(b) after he has been convicted of the offence.

(2) If a person charged with a rape offence applies in that behalf to a judge of the High Court before the commencement of the trial or to the judge at the trial, the judge shall direct that subsection (1) shall not apply to the person in relation to the charge, provided that, if it appears to the direction were given, the publication of any matter in pursuance of the direction might enable members of the public to identify a person as the complainant in relation to the charge, the judge shall not give the direction unless he is satisfied that a direction could properly be given in relation to that person in pursuance of section 7.

(3) If, at any stage before the commencement of a trial of a person for a rape offence, another person who is to be charged with a rape offence at the trial applies to a judge of the High Court or Circuit Court for a direction in pursuance of this subsection and satisfies the judge—

(a) that the direction is required for the purpose of inducing persons to come forward who are likely to be needed as witnesses at the trial, and
(b) that the conduct of the applicant's defence at the trial is likely to be adversely affected if the direction is not given,

the judge shall direct that subsection (1) shall not, by virtue of the charge alleging the offence aforesaid, apply to such matter relating to the first-mentioned person as is specified in the direction.

(4) If, at a trial of a person for a rape offence, another person who is also charged at the trial applies to the judge for a direction in pursuance of this subsection and satisfies the judge—

(a) that the direction is required for the purpose of inducing persons to come forward who are likely to be needed as witnesses at the trial,
(b) that the conduct of the applicant's defence is likely to be adversely affected if the direction is not given, and
(c) that there was good reason for his not having made an application under subsection (3) before the commencement of the trial,

the judge shall direct that subsection (1) shall not, by virtue of the charge alleging the offence aforesaid, apply to such matter relating to the first-mentioned person as is specified in the direction.

(5) If, at a trial at which a person is charged with a rape offence, the judge is satisfied that the effect of subsection (1) is to impose a substantial and unreasonable restriction on the reporting of proceedings at the trial, and that it is in the public interest to remove or relax the restriction in respect of that person, the judge shall direct that subsection (1) shall not, by virtue of the charge alleging the offence aforesaid, apply to such matter relating to that person as is specified in the direction.

(6) Subsections (6) to (9) of section 7 shall have effect for the purposes of this section as if for references to that section there were substituted references to this section.

(7) If, after the commencement of a trial of a person for a rape offence, a new trial of the person for that offence is ordered, the commencement of any previous trial of that person for that offence shall be disregarded for the purposes of subsections (2), (3) and (4).

(8) If, at any time after a person is charged with a rape offence, the Director of Public Prosecutions applies in that behalf to a judge of the High Court, the judge, if he is

satisfied that it is in the public interest to do so, shall direct that subsection (1) shall not apply to such matter relating to the person charged with the offence as is specified in the direction."

The Judgment of 14th November 2019

11. In the course of his judgment, the trial judge first noted that the DPP was not contesting the standing of the accused to contest the matter. He then observed that there were three main issues that required to be determined by the Court:

> "(1) Does the Court have jurisdiction pursuant to s. 7 of the Act [of 1981] to make such an order?
>
> (2) Is the Court functus officio and prohibited from revisiting an order made six days prior to the application to vary?
>
> [(3)] Has a victim of a sexual offence within the meaning of the Act the right to wave his or her anonymity irrespective of the provisions of s. 7 of the 1981 Act?"

12. The judge went on to address the legal submissions that had been advanced on behalf of the accused (now respondent). He made note of the fact that the accused in legal submissions had stated:

> "… the legislature cannot have implicitly created a right of a defendant to wave his or her anonymity by virtue of the provisions of s. 8.5 given that such a right had already been expressly given by virtue of the provisions of s. 8.2. Equally it is further submitted as a matter of interpretation that the provisions of s. 7. 4 implicitly create such a right for a complainant given the wording of that subsection is effectively identical to subs. 8. 5."

The judge then commented:

> "That is not a correct interpretation of the law, ss. 7(1) and 7(4) are clear. The Court has a jurisdiction in accordance with s. 7(4) to vary s. 7(1). Ss 7 and 8 as already stated by the Court are separate sections dealing with the anonymity of the complainant and accused."

13. The judge then addressed the question of whether he was functus officio. He said:

> "There was no error made by the Court in the pronouncement of the order on 17th May 2019 […].
>
> The Court made an order on 17th May, 2019, in compliance with the wishes of the Director of Public Prosecutions at that time. The complainant subsequently decided that she wished to waive her anonymity and the Director considered it prudent in view of the order made by this Court on 17th May, 2019, to apply ex parte to the Court.
>
> […]

Order (28) rule 11 of the Superior Court Rules which is known colloquially as the Slip Rule allows the Court where an error has been made to correct it subsequently. The court has jurisdiction to decide if it was an error capable of rectification by the rule. That is not the position in this case no error was made on the face of the order. The order was made in compliance with the information at the disposal of the Court at the time."

14. The judge then referred to what he described as "in the breast of the Court" jurisprudence, referring, in particular, to the decision of O'Malley J. in the case of Richards & Byrne v. Judge James O'Donoghue & The DPP [2017] 2 IR 157. He distinguished the application that was facing him on that basis that it was not made within the day of the original order, nor was it made the next day. The original decision was made in accordance with the wishes of the DPP and the complainant, and then there was a subsequent change of mind. The judge then made reference to the fact that s. 7(4) states "if at a trial". He said that the Court could not conclude that it was still "at trial" in circumstances where the verdict of the jury had been delivered and sentence had been pronounced on 17th May 2019; there was nothing remaining for the trial judge to deal with. Instead, he concluded that he was not in a position to make an order pursuant to section 7(4) as the Court was functus officio and that, he said, was the procedural decision of the Court. He observed that the contention that had been advanced by the accused that the Court had no jurisdiction to make an order pursuant to s. 7 to allow a complainant to disclose her identity was incorrect.

The Approach of the DPP on the Appeal

15. As her starting point, the Director says that there was no necessity at all for the trial judge to make a formal order in relation to reporting restrictions in respect of either the complainant or the accused during the currency of the trial. The Director describes the order of 17th May 2019 as superfluous. She says that such an order was not in accordance with the wish of the complainant, though it is acknowledged that the complainant's wish only subsequently manifested itself and that the trial judge would not have been aware of this at the time. The Director submits that in the absence of any familial relationship, the publication of the name of the accused would not, at this stage, tend to identify the complainant, while adding that it is ultimately a matter for the media, which has to satisfy itself that whatever course of action it decides to take is in accordance with law. As we will see, the Director is criticised by the respondent for now seeking to argue issues on the appeal which were never argued in the High Court.

16. The Director also submits that the order of 17th May 2019 should not have been made and says that that error was compounded by the error of the High Court judge in taking the view that he was functus officio when asked to vary his order some six days later. The Director makes reference to the finding of the trial judge that section 7(4) vested jurisdiction in the trial court to vary an order pursuant to section 7(1) of the Act of 1981, which discretion, the trial judge noted, should be "exercised reasonably and carefully". She says that it is clear that the trial judge took the view that the application to lift reporting restrictions should have been made earlier. In this regard, the Director relies on

the dicta of O'Malley J. in Richards & Byrne v. Judge James O'Donoghue [2017] 2 IR 157 in submitting that the trial judge fell into error in adopting an overly restrictive view of the window of time within which an application to lift reporting restrictions had to be made. She says that this was a case where six days was a "reasonable time" (as per O'Malley J.'s observations in Richards & Byrne) within which to make an application, with "sufficient reason" being available as to why the application was not made before then.

The Approach of the Respondent on Appeal

17. First, the respondent says that it was never submitted to the trial judge by the Director that he had erred in making his order of 17th May 2019 prohibiting the publication or broadcasting of the identity of the respondent; more particularly, it was never submitted to the trial judge that he erred in holding that the identification of the respondent would tend to identify the complainant. The respondent says that what was involved here was a finding of fact by the trial judge. While the Director could have made submissions, and indeed, could even have adduced evidence on the issue, not having done so in the High Court means that it is not now open to her to seek to raise the issue for the first time in the Court of Appeal.

18. Second, the respondent says that there is no jurisdiction vested in the trial court to dis-apply the statutory prohibition in s. 7(1) of the Criminal Law (Rape) Act 1981. It is said that s. 7(4) provides no basis for dis-applying. It is pointed out that the final part of the subsection, as originally enacted, provided that:

> "… but a direction shall not be given in pursuance of the subsection by reason only of an acquittal of an accused person at the trial."

It is said that the wording has been amended so that the reference now is to the outcome of the trial, but it is argued that this must mean that the fact that a defendant has been convicted cannot be a basis for the trial judge to dis-apply the statutory prohibition contained in subsection (1). The respondent argues that the contrast between s. 7 and s. 8 is striking. Subsection (2) of s. 8 provides that a defendant may, prior to or during his trial, apply to the Court for a direction that the statutory prohibition pursuant to section 8(1) be dis-applied. The respondent submits that, as a matter of statutory interpretation, the provisions of s. 7(4) do not implicitly create a right for a complainant to seek to dis-apply, given that the wording of the subsection is effectively identical to subsection 8(5). It is contended that the application of the maxim expressio unius est exclusio alterius leads to the conclusion that the omission of a provision in s. 7, cognate to the provision in s. 8(2), is inconsistent with the legislative intention to provide a jurisdiction to ground an entitlement by a complainant to a direction dis-applying the statutory prohibition. As an alternative, the respondent says that if, contrary to his submissions, s. 7(4) permits of an application to dis-apply, that the application in the present case came too late. The trial, it is said, had concluded with the sentencing of the defendant on 17th May 2019, six days prior to the application, and, it is said, by the time of the application, the trial Court was *functus officio.*

Discussion

19. In my view, while this was nobody's fault, the manner in which matters proceeded on 17th May 2019 was less than ideal. As we have seen, the question of whether reporting restrictions could or should continue to apply was not the subject of any discussion or debate. The issue emerged almost by accident against the background of the uncertainty about whether the sentence hearing should be in camera. Later, the judge would conclude that at the time of the sentence hearing, the Director and complainant wished for reporting restrictions to continue and that there was a subsequent change of mind. I readily acknowledge that a judge who had presided over a lengthy trial, as had happened here, may well have insights into the attitude of the parties and those with an involvement in the case which are not available to an appellate court. Nonetheless, there was little, if any, information available to suggest that the Director or complainant had ever addressed the issue. In the case of the complainant, there does not appear to have been any information before the Court to establish that she was even aware of the existence of the issue. The Director has sought to question the correctness of the view, which was understood to have been taken by the trial judge, that identifying the person convicted would identify the victim. The judge may well have come to that view, but if he did, it would seem it was a conclusion reached without any in depth analysis. Obviously, there will be cases where there can be no doubt about the fact that to identify an accused is to identify the complainant; a case involving a close family relationship, such as a parent and child, is one that immediately comes to mind. In other cases, there would be no real risk at all. An offence committed by a stranger against a victim previously unknown to him is an obvious example. However, there may be other cases where the position is less clear-cut and there, responsibility falls on the media not publish anything which would, in fact, identify a complainant. An assessment of the extent of the risk may require a consideration of the extent of the material that had been published during the course of the trial and prior to conviction. The more extensive and more detailed the reporting that has taken place, the greater the risk that the publication of the name of the accused post-conviction will provide the missing piece of the jigsaw.

20. In my view, if the judge was considering extending reporting restrictions in relation to the identity of the accused, it would have been appropriate that he would have invited submissions on the issue and sought confirmation of whether the views of the injured party had been canvassed. The question might be asked whether that is necessary in a situation where, strictly speaking, no court order at all was necessary. However, while ultimately the responsibility falls on the media to observe the terms of the statute, it will probably often be the case that an indication from the judge that, in his view, identifying an accused would have the effect of identifying an injured party may prove of assistance to the media.

21. In summary, my position in relation to the order of 17th May 2019 is that it was an order that was superfluous and ought not to have been made. If such an order was under consideration, it was appropriate that the parties would be given an opportunity to consider the matter and express views in relation to it.

22. Therefore, I would allow the appeal in so far as it relates to the order of 17th May 2019. I would remove any reference in a court order to an ongoing restriction on the identification of the respondent who stands convicted of the very serious criminal offences that he does.

23. Notwithstanding my view that the order of 17th May 2019 should not have been made, which at one level is sufficient to dispose of the appeal, I think it is appropriate to make some comments in relation to the issue as to whether the trial judge was functus officio. I do not believe he was correct in that regard. In my view, the approach taken by the trial judge was a very restrictive one; indeed, an unduly restrictive one. Orders imposing reporting restrictions are in the nature of continuing orders and the circumstances which gave rise to the making of the order may vary. Orders are sometimes made in support of fair trial rights, e.g. there may be restrictions if there is a further trial pending, but the need for restriction may disappear once that trial is concluded. Reporting restriction orders impact on people and entities other than those who are the parties at trial. This arises most frequently in the case of the media who will often not be present when the order is made, or certainly, will not be in a position to challenge it as it is made. The courts in cases such as Independent Newspapers v. Anderson [2006] 3 IR 341 have recognised that the media, as parties significantly affected, have a right to apply for a variation of the order that has impacted upon them and judges, who have made the order, have jurisdiction to vary. In this case, the application was made by the Director who was, of course, a party to the trial, but the Director was making her application on behalf of and at the behest of the injured party. An overly-strict view of when a judge is functus officio could deny an injured party the right to be heard on an issue of very major importance to them. In this case, an order was made affecting the victim and that was promptly brought before the Court. In my view, cases such as Independent Newspapers (Ireland) Ltd. v I.A. [2020] IECA 19, offer support to the view that the judge was not precluded from addressing the merits of the application that was made to him. While the case of Richards & Byrne v. Judge James O'Donoghue is not directly on point, in my view, the judgment of O'Malley J and, in particular, her view that applications to rectify mistakes should be made promptly, and her references to the fact that applications to vacate an order should be made within a reasonable time (albeit that she recognised that that concept was not without difficulty), provide further support.

24. Accordingly, if it was necessary to do so, I would also be disposed to allow the Director's appeal in so far as it relates to the order of 14th November 2019. As the events of the COVID-19 pandemic required this judgment to be delivered electronically, the views of my colleagues are set out below.

Kennedy J:

I agree.

Ní Raifeartaigh J:

I also agree.