



THE COURT OF APPEAL

Record No.: 114/20

**Edwards J.
McCarthy J.
Donnelly J.**

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

-AND-

XY

APPLICANT

JUDGMENT of the Court delivered (*ex-tempore*) on the 14th day of January, 2021 by Ms. Justice Donnelly

1. The applicant is applying for an enlargement of time to appeal his conviction and sentence for the offence of rape. Having pleaded not guilty, the applicant was ultimately found guilty by a unanimous jury verdict on the 27th January, 2020. On the 21st February, 2020, the applicant was sentenced to four and a half years' imprisonment, backdated to the 27th January, 2020.
2. The applicant however, only signed his notice of application for enlargement of time to appeal on the 9th June, 2020, amounting to almost three months after the time limit to appeal had elapsed. The applicant filed a notice of appeal on the 30th June, 2020.
3. There is a dispute between the parties as to whether the delay is 2 months and 27 days or 2 months and 17 days. In the Court's view in the circumstances of the case this is not a decisive factor and the Court will proceed on the basis that the delay was one of almost 3 months.

The Relevant Legal Principles

4. The parties are in agreement that the relevant test to be applied for the enlargement of time in criminal cases is contained in *The People (DPP) v. Kelly* [1982] I.R. 90 and agree that the guiding principle is whether the interests of justice require that the application be granted. Both parties refer to *The People (DPP) v. Walsh* [2017] IECA 111 which endorses the test set out in *The People (DPP) v. Kelly*. The respondent submits that in practical terms, in order to establish that it is in the interests of justice that time be extended, an applicant must address two things:-

- (i) an explanation for the delay; and

- (ii) an engagement with the facts of the case so as to establish reasonable grounds of appeal.
5. The respondent submits that it was a matter for the Court to consider whether an intention to appeal had been formed within 28 days of the final hearing at first instance. In other words, it was not 28 days from the conviction but from the date when sentence was finalised.
 6. The applicant submits that while finality and certainty are important objectives in criminal litigation, as stated in *The People (DPP) v. O'Donoghue* [2019] IECA 339, the present case is distinguishable on the basis that (a) the applicant has always maintained his innocence and (b) the fact that the delay in *The People (DPP) v. O'Donoghue* was significant in contrast with the present case.
 7. The respondent also refers *The People (DPP) v. O'Donoghue*, but also relies on *The People (DPP) v. Faisal Ellahi* [2019] IECA 152 which confirmed the principle in *The People (DPP) v. Cashin* [2017] IECA 298 wherein the Court held, as submitted by the respondent, that when a Court is determining an application for the enlargement of time in which to appeal sexual offence cases, the interests of the victim has to be considered.
 8. In this case the victim is also a complainant in two other cases wherein it is alleged the applicant's brothers, AB and DE raped and sexually abused her. The respondent submits that the applicant was originally charged alongside his brother, AB but the indictment was severed. The trial of AB proceeded in 2019 but the jury were discharged following a medical emergency for AB. As a result of injuries inflicted in that incident, AB claimed he was unfit to stand trial, which was due to resume in December 2020. Due to Covid-19 restrictions, this had to be adjourned. A preliminary issue in relation to AB's fitness to plead is ongoing. The victim is also a complainant in a third trial involving another brother of the applicant, DE in the Circuit Criminal Court. This trial was adjourned due to Covid-19 and is currently listed for next month. The respondent submits that this shows the extent of the ongoing distress suffered by the complainant and that this application gives the victim a lack of finality to this case.

The Applicant's Explanation for the Delay

9. The explanation provided by the applicant for the delay is threefold. The applicant submits that he has issues with his hearing and does not have a properly functioning hearing aid. This, coupled with the Covid-19 pandemic restricting visits to prisoners thereby requiring communication *via* telephone, affected the applicant's inability to communicate in a comprehensive and proper manner with his legal advisors. This was particularly so where the applicant was over the age of 70 and essentially "cocooning" in the prison. The applicant also submits that he undertook to instruct different legal advisors for the purpose of lodging an appeal and this added to the delay in lodging a notice of appeal within the prescribed 28-day period.
10. The applicant submits that he was labouring under a physical disability and throughout the trial, he was using a hearing aid. The applicant submits that towards the conclusion

of his trial, he expressed difficulty with his hearing aid and the fact he could not hear properly. It is submitted that this infirmity continued following his imprisonment and hindered his ability to communicate effectively.

11. In his affidavit, the solicitor for the applicant avers that the applicant was made aware of the time limits within which to lodge an appeal. However, in the weeks which followed his conviction and sentence, no contact was made by the applicant with his solicitor. The solicitor for the applicant avers that the applicant "had in fact engaged with the services of alternative Counsel with regard to advices regarding an appeal. However, subsequent thereto contact was made with my officers whereby the Applicant indicated that he wished to retain his original legal team." The applicant avers that by the time he engaged with his original legal team on the prospect of an appeal, the time limit to appeal had already expired.
12. The respondent submits that the assertion by the solicitor for the applicant that the applicant indicated an intention to appeal did not set out when this intention was formed. The applicant submits that in circumstances where the delay of the applicant is attributed to the lack of "real" legal advice in the intervening period of time and therefore, there could have been no malintent in failing to appeal within the prescribed time limit; a reason provided in *The People (DPP) v. Walsh* to deny an application for enlargement of time. The respondent submits that while the applicant avers that he formed an intention to appeal his conviction "when I was taken into custody", the respondent submits that the applicant was taken into custody on the 27th January, 2020 after conviction but before sentencing. The applicant does not swear, as submitted by the respondent, that he formed an intention to appeal *within the 28 day period*.
13. The applicant avers that the Covid-19 pandemic further compounded his already existing issues with his hearing as he could not effectively communicate *via* telephone as a result of his hearing difficulties and the lack of a proper hearing aid. The applicant avers that he has been "cocooned" as a person of high vulnerability. This has restricted visits [to the prison] which have not been allowed." It was not until the 27th May, 2020 that his solicitor attended the prison. The respondent submits that it is notable that no specific occasion was referenced by either the applicant or his solicitor where a visit could not be conducted when it was sought or attempted prior to the 27th May, 2020. The applicant does not aver that he attempted to telephone his solicitor on a given date but that it failed due to his hearing difficulties.

Proposed Grounds of Appeal

14. If the Court were to grant the applicant an enlargement of time within which to appeal, the applicant proposes to advance nine grounds of appeal in respect of his conviction. The applicant submits that the grounds are unique and are not generic in their terms. While the respondent concedes that the grounds are not generic, they are unmeritorious.
15. In essence, the first main issue raises an issue about communication post trial from a juror complaining about the level of comprehension the jurors had of the evidence at trial

of the matters upon which they were charged and also about other issues in the jury room during the course of trial.

16. Somewhat unusually, the respondent referred to the grounds of appeal pertaining to the jurors in a more detailed manner than the applicant and outlined what allegedly transpired after the trial. The respondent submits that a juror, after the unanimous verdict, appeared to have later questioned his decision to convict the applicant and apparently proffered a retrospective review of his engagement with the jurors. The juror contacted the senior counsel for the applicant after conviction but prior to sentencing and subsequently, the applicant's solicitor received a letter from the juror which was sent to the Court and furnished to the Director of Public Prosecutions. The trial judge was satisfied however, that the matter could proceed to sentencing. The respondent submits that this incident could not amount to a basis for setting aside a conviction.
17. Another ground relates to alleged hearing difficulties of the applicant during the trial. The applicant submits that the trial judge erred in law and fact by failing to withdraw the case in circumstances where it became obvious that the applicant was unable to wholly engage in the proceedings because of a hearing disability and not having access to hearing aids. The respondent refutes this and submits that the applicant's hearing limitations were accommodated carefully and properly by the trial judge and that there was no application to stop the trial. The applicant appears to wish to rely upon an audiologist's report that has not been placed before the Court.
18. The applicant also seeks to appeal against his sentence. He advances the two grounds that the trial judge failed to afford any or any sufficient weight to the applicant's medical condition or other mitigating factors and that the trial judge failed to give any or any adequate consideration to a period of suspension of the sentence.

Analysis and Decision

19. The Rules of Court allow this Court to extend the time in which to appeal. The principles on which the Court should exercise its discretion have been developed over a long number of cases some of which have been cited above and others of which were referred in the submissions of the parties. As the Court has observed the overriding consideration is one of the interests of justice. A number of factors will help a court determine where the balance of justice lies in a given case. Undoubtedly the Court has to take into account the interests of a victim in reaching finality.
20. There is no doubt in the present case, the victim has a real interest in finality given especially her involvement in other cases. This Court is mindful of that.
21. The Court must start its consideration by looking at the delay. The delay in this case is one of less than 3 months. That delay has taken place against the background of the totally exceptional circumstances of the global pandemic. The Court is aware that the Irish prison service in the interests of the health and welfare of prisoners and prison staff reduced access to the prisons by outsiders including a reduction in the amount of legal visits. The Court is also aware that particular rules relating to shielding or cocooning of

the over 70's applied. The period of time of the delay in this case encompassed the early stages of the pandemic and the first lockdown. While the applicant has been less than helpful in setting out precise details as to how and why these restrictions affected his ability to instruct his legal advisers, we still consider it a factor the Court cannot ignore.

22. The respondent has raised the question of whether there is any indication that his intention to appeal was formed within 28 days of the finalisation of the hearing. While in some cases the imposition of a sentence might deter a person from pursuing an appeal against conviction we do not consider that to be an overriding consideration in this case. The evidence from both the applicant and his solicitor was that after his conviction he indicated to them an intention to appeal.
23. The applicant has given various other explanations for the intervening delay. It appears he contacted other lawyers but decided to return to his current solicitors. An applicant who delays matters by seeking to instruct other solicitors cannot use this as a justification for delay. This applicant was aware of his time limits and on the basis of his affidavit had formed an intention to appeal. In the normal course he ought to have appealed within the time limit.
24. We do note however that the actual period of delay by that factor must have been somewhat limited. There was at least a delay in his solicitors getting to have a more constructive meeting with him in custody because of the pandemic rules. It is also the case that even after he gave instructions there was a two week delay by his solicitors in seeking the extension. Where there has been a delay in appealing there is a concomitant duty to act expeditiously thereafter. However, this two week period was limited and the Court has to recognise that a certain period of time to draft relevant papers must be granted.
25. The main concern of the Court in this case is with the requirement that the grounds of appeal be identified and be at least arguable. The respondent has relied upon the following quote from *The People (DPP) v. Ellahi* to submit that that there had to be a realistic ground with a reasonable chance of success. In fact the Court in *The People (DPP) v. Ellahi* held as follows:-

" In Cashin and in other cases, we have made the point that in the case of a late appeal in relation to a sexual conviction, the interests of the victim have to be considered. In this case, the victim's position is particularly acute. Having regard to the long delay that has occurred, to the fact that we have not been persuaded that there is a substantial ground of appeal present with a realistic prospect of success and the particular circumstances of the complainant/victim, we do not believe that the justice of the case would be served by extending time and so we refuse the application."
26. We consider that the reference to "substantial ground" with a "realistic prospect of success" has to be seen in the context of assessing where the interests and indeed the balance of justice lies in a particular case. *The People (DPP) v. Ellahi* involved sexual

offending and a long delay. There is no question here of any similar long delay. It is less than 3 months. We consider that the appropriate test to apply in this case is whether there are arguable grounds of appeal.

27. Both parties agree that the grounds advanced are not generic. Indeed, some are unusual. We refer here to the grounds involving the subsequent letter from the foreman complaining about the behaviour of the jury. This, it appears was raised before the trial judge. The respondent states that this was a retrospective view taken by a juror and could not succeed as a ground of appeal. Perhaps that is correct but we do not have to decide that. We only have to consider if it is arguable. We have seen no authority to suggest that a juror's view of what transpired in the jury room could never be taken into account in these circumstances. We are satisfied that the grounds related to this are arguable.
28. The issue then is where the interest of justice lies. This is a finely balanced decision. While we are conscious that the victim has an interest in finality justice requires us to have specific regard to the relatively short period of delay amid the unprecedented global pandemic. This was an unusual issue raised in the court below and the interest of justice requires that an appeal be allowed arising from this issue.
29. In relation to the ground about a juror perhaps overhearing discussions, we are not satisfied that we have sufficient information that this ground is arguable or was even raised at the trial. The appeal must arise out of the trial. If a ground was not raised at trial there must be an explanation as to why it was not done so sufficient to establish that the interests of justice require it to be admitted. Similarly, where seeking to enlarge the time for an appeal the onus is on the applicant to place all the information before the Court to satisfy the Court that the ground is at least arguable. This is not present here and we disallow this ground.
30. The same position applies in relation to the issue of deafness as a ground of appeal. Counsel for the applicant has referred to an audiologist's report. We have not had sight of this report. It appears from information given to the Court by counsel that the audiologist's report was in the possession of the applicant and his lawyers prior to the end of the trial. It also appears from the information that this Court has been given, that no application was made to discharge the jury. We also have no details of how or what specific difficulty the applicant had at the trial by way of evidence on affidavit. At best this appears an attempt to bring in a ground of appeal that again was not based upon what actually took place at the trial *i.e.* there appears to have been no application to discharge the jury based upon his hearing difficulties. Indeed, this Court has been told in the respondent's submissions that every facility was given to him as regards hearing difficulties.
31. The applicant has simply not placed any evidence before this Court to show this as an arguable ground of appeal. The onus was on him to establish where the interests of justice lie. For this reason, there is no basis upon which to permit him time to appeal on any ground related to his hearing.

32. The deafness issue was also presented as an explanation for the delay. This explanation was somewhat vaguely presented but in light of our views relating to the overall delay, the effect of the pandemic, we do not have to consider whether the deafness is an additional factor at play.
33. Although details on the sentence appeal are scant, we consider it appropriate in the circumstances, to allow the applicant to pursue his appeal against sentence.
34. Therefore, we will permit an enlargement of time on which to appeal on grounds:- (i) (ii) (iii) (iv) and (v) as indicated under the conviction part of the appeal and grounds (i) and (ii) under the sentence appeal.
35. This Court also grants the applicant legal aid in relation to this application and to his appeal.