THE COURT OF APPEAL

UNAPPROVED **NO REDACTION NEEDED**

[230/20]

Neutral Citation: [2021] IECA 185

The President
McCarthy J
Kennedy J

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

MARIAN LINGURAR (JUNIOR)

APPELLANT

JUDGMENT of the Court delivered (*via* electronic delivery) on the 1st day of July 2021 by Birmingham P.

1. This is an application to extend the time for appealing against conviction and sentence. The application is made in circumstances where the appellant was convicted by a jury of the offence of manslaughter and, on 8th May 2019, sentenced to a term of nine years imprisonment. A burglary charge which had also been on the indictment was taken into consideration.

Background

2. The background to the trial is to be found in events that occurred on 25th September 2011 at Kenny's Public House in Oughterard, County Galway. After the premises had closed

for the evening, a burglary occurred in the course of which the publican, the late Mr. John Kenny, was killed. His body was discovered in the licensed premises during the afternoon of 25th September 2011. There were a number of injuries consistent with an assault and/or rough handling. He had been tied up with wire and left lying face down in a toilet. The appellant was initially charged with manslaughter, as was his father, Marian Lingurar Senior, and one Floran Fitzpatrick. Both Mr. Lingurar Senior and Mr. Fitzpatrick were also charged with a count of withholding information. Two other individuals were identified as persons of interest but were not apprehended and brought before the courts. The matter was listed for trial in 2015 but the appellant failed to attend for trial. It appears that he secured travel documents from the Romanian Embassy in breach of his bail terms, and then left the jurisdiction. Subsequently, on 13th April 2018, the appellant was arrested. He had re-entered the State and was operating under a false name, but was identified by one of the investigating team when he went to draw social welfare using the false name.

3. On the night of the incident, the appellant had been working as a doorman. He had held this position for some time, though he was 16 years and nine months of age on the date of the incident. There was evidence that on the date in question, the appellant's father had driven him and Mr. Fitzpatrick from Galway to Oughterard and then drove them back to Galway after the pub had closed. The prosecution case was that the appellant and his father then returned to Oughterard and spent some 40 minutes there before once more returning to Galway.

4. At trial, a significant element of the prosecution case related to telephone evidence, in terms of cell phone analysis tracking the movements of the appellant's phone from Oughterard to Galway and back to Oughterard, and then being in Oughterard. There was also evidence of significant contact between the appellant's phone and a number of other phones

of particular interest, including phones linked with the people identified as persons of interest who have not been brought before the courts.

5. At trial, there was a challenge to the admissibility of the telephone evidence with a contention that the Communications (Retention of Data) Act 2011 was contrary to EU law. There was also an issue, giving rise to a *voir dire*, in respect of the admissibility of memoranda of interview conducted with the appellant prior to his arrest. There was also an issue raised (and a *voir dire* held) in respect of the admissibility of interviews after arrest and detention. The appellant points to these three issues – the issues as to telephone evidence, interviews during detention and interviews outside detention – as relevant to the question of whether time should be extended. In essence, he contends that these three issues show that he has substantial issues to be litigated in the context of an appeal.

6. Separately, it is contended on behalf of the appellant that the sentence imposed was excessive given that the offence was committed at a time when he was less than 17 years, and at a time when it is suggested that he was acting in concert with a number of older men from his own community, including his father.

7. According to an affidavit sworn by John Quinn, solicitor, the appellant instructed his office, following the conviction, that he wished to appeal and has always maintained those instructions. There is a reference to a notice of appeal of 5th June 2019, though it is said that it indicated that grounds of appeal would be provided later.

8. The application to extend time is resisted. It is pointed out that on 22nd April 2012, having been sent forward for trial on 27th February 2012, the appellant applied to the Romanian Embassy for travel documentation and left the country. The case was listed for trial in Galway Circuit Court in June 2013, but the appellant and his father failed to attend and bench warrants were issued. The appellant's father was apprehended in France and returned to Ireland on foot of a European Arrest Warrant. Reference is made to the fact that

the appellant was arrested on 13th April 2018 while attempting to claim social welfare using false documentation under a false identity. The appellant was subsequently convicted on 31st January 2019 and sentenced on 8th May 2019. The investigating Garda indicates that he knows nothing about the suggested notice of appeal of either 5th June 2019 or 15th June 2019.

9. Reference is made to the strength of the case against the accused. In essence, it is suggested that the conviction was a sound one which would not likely be interfered with on appeal. The issues identified as grounds of appeal are addressed in some detail in the course of a replying affidavit sworn by Detective Sergeant Mac Donnachadha and it is suggested that they are not of substance. There was also an affidavit opposing the extension of time from Gillian Kenny, daughter of the deceased, who, in very powerful terms, describes the impact that the killing of their father has had on the Kenny family and how difficult they have found the very lengthy criminal process, the length of which was contributed to by the decision of the appellant and his father to flee the country rather than face trial. Ms. Kenny makes the point that any progress that was made since trial and sentence has been undone when they learned, at this remove, that the appellant was seeking to appeal conviction and sentence.

Discussion

10. The role of a Court dealing with an application to extend time to appeal on the criminal side was considered by the Supreme Court in the case of *The People (DPP) v. Kelly* [1982] IR 90, the case generally referred to as the Sallins train robbery case. There, the Supreme Court commented:

> " …since a question of delay and enlargement of time is involved, the court is bound to act 'as the justice of the case may require.' In other words, the court's approach

> must be flexible and its discretion guided not by any general test or criterion but by what appears to be just and equitable on the particular facts of the case in question.
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> […]
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> In my view, the matters to be considered are the requirements of justice on the particular facts of the case before the court. A late and stale complaint of irregularity with nothing to support it can be disposed of easily. Where there appears to be a possibility of injustice, of a mistrial, or of evidence having been wrongly admitted or excluded, the absence of an earlier intention to appeal or delay in making the application or the conduct of an appellant should not prevent the court from acting. This seems to me to be the practical result of considering what the 'justice of the case may require."

11. In seeking to identify the outcome which would serve the interests of justice, it seems to us that there are number of factors to be considered. Firstly, there is the very significant delay that has occurred between the commission of the offence in Oughterard in September 2011 and the present date, and the fact that if time is to be extended, a further delay is inevitable. Indeed, in that regard, the possibility cannot be excluded that if time is extended, that there would be suggestions that the case should not be given an early listing, but that the determination of the appeal should await unconnected litigation dealing with issues relevant to the appeal.

12. The affidavits of Detective Sergeant Mac Donnachadha, and more particularly, the affidavit of Ms. Kenny, only daughter of the deceased, leaves absolutely no room for doubt about how the family of the deceased have been impacted by the very protracted nature of the proceedings to date.

13. Apart from the delay since the commission of the offence, there has now been a significant delay since conviction and sentence. While we fully appreciate the frustration of

the family of the deceased at efforts to revive the proceedings at a significant time remove from conviction and sentence, we feel that in identifying where lies the interests of justice, that we have to approach the case on the basis that there was an intention on the part of the accused, communicated to his lawyers, that he wished to appeal and that he never resiled from that. It appears that there was an attempt to take action in relation to a notice of appeal on 5th June 2019, which would have been the last day for filing an appeal, albeit that the notice was incomplete and defective in that no grounds of appeal were provided.

14. Thereafter, a degree of confusion entered the picture because an appeal of Marian Lingurar appeared in various Court of Appeal lists and it appears there was an understanding on the part of the appellant's lawyers that this was a reference to the appeal of the present applicant, Marian Lingurar Junior, whereas in fact it related to an appeal that had been lodged by Marian Lingurar Senior, father of the appellant, which had been allowed become dormant.

15. In assessing where the interests of justice lie, it seems to us necessary to approach the case on the basis that the applicant had, immediately post-conviction and sentence, formed a desire to appeal and had communicated that fact, and insofar as delay has followed, it does not seem to us that that delay can in any way be laid at the door of the appellant. For the delay post-conviction and sentence, he is, in our view, blameless.

16. When this application to extend time first came before the Court for a substantial hearing, as distinct from a listing in a management list, we expressed concern that there had been no adequate engagement with the issues in the case. We felt that the obvious obstacles that were present to an extension meant that it was necessary that there should be the fullest engagement and put the matter back for further hearing to allow that to happen. In the intervening period between the original listing and the more recent listing, further information was provided which essentially focused on the period post-conviction and sentence, and provided further information about the applicant's early and persistent desire to

appeal and why an appeal was not lodged in time. There was not, however, any attempt to engage with the substantial merits of the appeal which is what we would have hoped to see happen.

17. In fairness to senior counsel on behalf of the applicant, when he appreciated what was expected of him, he addressed the Court's concerns and did so in a manner which we found very helpful and which, it must be said, was very realistic. Counsel says that there were significant legal issues identified at trial and that a number of these, in particular, the three identified earlier in the course of this judgment, provide serious grounds for appeal. He properly acknowledges that this is not a case where the defence can point to a "knockout" point or a "slam-dunk". He accepts that the situation would be different were the defence in a position to point to what, at least at first sight, appeared to be a clear error on the part of the trial judge in a material respect, but he says that the points raised are substantial points which he should be entitled to argue on appeal. He says that while success at any such appeal hearing cannot be guaranteed, that neither can it be said with any confidence that the points will necessarily fail. Counsel on behalf of the appellant places emphasis on the point in relation to call data records and the point in relation to the admissibility of what the appellant was recorded as saying post-detention. He accepts that the ground relating to the pre-detention interaction with the appellant, when he was in the presence of his mother, does not carry the same weight.

18. So far as the grounds of appeal proposed to be relied on are concerned, it seems to us that it is necessary to make an assessment of the strength of grounds and the prospect of success.

19. In the context of an application for bail post-conviction, the Supreme Court spoke of the need to identify a discrete ground with a strong chance of success (*DPP v. Corbally* [2001] 1 IR 180). In the context of a case where there has been very considerable delay, much

of it caused by the appellant's own actions, and where there are victims of crime who would be very significantly affected by any decision to extend time and so further prolong the proceedings, it seems to us appropriate to apply a similar threshold.

20. In the context of the call data records point, counsel for the appellant has made reference to what is sometimes described as the 'Graham Dwyer litigation' before the domestic courts and on reference to the Court of Justice of the European Union. Counsel accepts that even if the European law points are determined in a manner which would be seen as favourable to his position, that it is inevitable that there would be a necessity for further consideration of admissibility issues and the question of whether the impugned evidence should, as a matter of discretion, be admitted or excluded would arise. In this case, as we understand it, there was evidence at trial that the Gardaí who formed part of the investigation team acted in accordance with and indeed pursuant to the Communications (Retention of Data) Act 2011.

21. Putting matters at their lowest, we cannot say that we have been persuaded that there is a strong case for believing that an appellate court would conclude that evidence obtained pursuant to a recently-enacted statue, the legislation having been introduced to give effect to an EU directive, should be excluded when the evidence was obtained following targeted access to records and not as a result of some broad or all-encompassing trawl. We have not been persuaded that it is at all likely that a court would, as a matter of discretion, exclude evidence into the commission of serious crime. It seems to us that the most that can be said is that the point is arguable, in the sense that phrase is used in cases such *G v. DPP* [1994] 1 IR 374, but it seems to us that the appellant has not been able to establish a strong likelihood of success.

The Memoranda of Interview

22. As we have already referred to, it appears that there was a *voir dire* at trial relating to the pre-detention interaction and what was recorded by the Gardaí as having been said by the appellant, and a further *voir dire* in relation to post-detention interviews and the recorded memoranda that were produced. It is the post-detention recorded memoranda that are the focus of attention at this stage. No information has been put before us which would lead us to the view that there is a strong likelihood of the judge's ruling on these issues being reversed, with the consequence of the conviction being quashed. To put the issue in context, it should be explained that both when speaking to Gardaí pre-detention in the presence of his mother, and in the course of subsequent formal post-detention interviews, the appellant made no admissions. Rather, the prosecution interest was in having him on record denying, falsely they would say, that he had returned to Oughterard with his father from Galway. It is in that context that it has been asserted that the member in charge made a decision to detain the appellant before a formal request was made to her to do so by the arresting member.

23. If we apply the *Corbally* test to the issues in relation to memoranda of interview, it does not seem to us that the required threshold is crossed, or indeed, threatened to be crossed.

24. Overall, it seems to us that so far as the conviction aspect of the proposed appeal against conviction and sentence is concerned, that the interests of justice would not be served by extending the time, but rather by refusing the application.

Sentence Appeal

25. There remains for consideration the appeal against severity of sentence. It must be said that this has not been a major source of focus in either the written or oral submissions, but we can understand why that would be so. Very many sentence appeals boil down to a contention that the sentence was too high and should be interfered with. It is, of course, the case that sometimes the sentence hearing will be presented in terms of a complaint that

gravity was mis-assessed or over-assessed, or that factors present by way of mitigation were ignored or that inadequate weight was given to them, but at the end of the day, however packaged, the complaint is one that the sentence was too high.

26. It appears from the papers that in the present case, the appellant will wish to argue that the sentence imposed was unduly severe having regard to his youth at the time of the offence and that, according to the prosecution, it was committed at a time when he was in the company of a number of adult members of his ethnic community, including his father. We express no view on the likelihood of that argument or arguments along those lines ultimately carrying the day, but we are prepared to go so far as to say that it seems to us that a point of some substance has been identified. The appellant was a juvenile at the time of the commission of the offence and the sentence imposed was a substantial one. That a substantial sentence would be imposed is not at all surprising, particularly in a situation where the substantial mitigation that a plea of guilty would be provided was not available.

27. Moreover, it seems to us that while the position of the victims – in this case, family members of the deceased – have to be considered, the impact of allowing an appeal against severity of sentence is not as great. It does not open up the possibility of a retrial and what would, from the victims' perspective, be interminable further delay. It does not give rise to the same risk of family members being required to give evidence as witnesses, and so impeding efforts to in trying to move forward. For these reasons, it seems to us that a different assessment of where the interests of justice lies should be made in the case of the appeal against severity.

28. We would draw attention to the case of *DPP v. PC* [2017] IECA 71 where an attempt to bring a very late appeal against conviction was refused, but the appellant was permitted to appeal the severity.

29. In summary, we have concluded that the appropriate course of action is to permit a late appeal against severity of sentence, but to refuse the application so far as it seeks to appeal conviction.