

THE HIGH COURT

[2012] IEHC 522
[2020 No. 663 JR]

BETWEEN

WAYNE NASH

APPLICANT

– AND –

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 22nd July 2021.

SUMMARY

These are successful judicial review proceedings arising from a refusal of the District Court to allow the release of the digital audio recording (DAR) of certain District Court proceedings. This summary forms part of this Court's judgment.

1. By notice of motion of 24th September 2020, Mr Nash seeks the following principal reliefs: (i) an order of prohibition or an injunction preventing the DPP from prosecuting the applicant for an offence contrary to s.6 of the Criminal Justice (Public Order) Act 1994 alleged to have been committed in a named hotel on 13th January 2019; (ii) a declaration that Mr Nash is

entitled to a copy of any recording of the evidence given by certain named persons on 7th September 2020 in Tullamore District Court; (iii) a declaration that the proposed criminal proceedings against Mr Nash, without access to such recordings, are currently contrary to law, natural justice, constitutional justice, and fair procedures; (iv) a declaration that the refusal of the learned District Judge to provide the DAR of Mr Keogh's hearing to Mr Nash is contrary to law.

2. Mr Nash is accused of engaging in threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace might have been provoked contrary to s.6 of the Criminal Justice (Public Order) Act 1994. The alleged offence took place in a nightclub in a hotel in Tullamore on the late night/early morning of 12th/13th January 2019. Mr Nash denies that he engaged in the criminality of which he stands accused and maintains that he was assaulted on the late night/early morning in question. He attended at Tullamore Garda Station on 13th January 2019 to make a complaint of having been assaulted and returned again on 22nd January, having been invited to do so, and made a formal statement.

3. Mr Nash was accompanied at the hotel in Tullamore by Mr Keogh, a longstanding friend of his. Mr Keogh was later charged with an offence of assault arising from the same incident. During the course of the Garda investigation of matters, statements were taken from Mr Keogh and from Mr Nash. Statements were also taken from various other individuals and have been disclosed to both men. CCTV footage of the locus was also recovered and, the court understands, has now been provided to Mr Nash's solicitor.

4. Mr Keogh's case was heard on 7th September 2020. Certain witnesses were called and at the conclusion of the case the trial judge dismissed the charges against Mr Keogh on the basis that there were material inconsistencies in the prosecution evidence. Following Mr Keogh's acquittal, Mr Nash arranged a consultation with his solicitor. Having been advised that prior inconsistent statements are of use in discrediting witnesses, Mr Nash instructed that an adjournment be sought, *inter alia*, in order that he might obtain a copy of the digital audio recording (DAR) of Mr Keogh's trial. While the preparation of a transcript of audio evidence is a costly exercise, the court understands that the provision of a digital copy of the DAR, either on disk or by email, is a straightforward process which happens on a regular basis. The software whereby the DAR can be accessed is, the court understands, available free of charge.

5. The application for an adjournment, which was opposed by the garda prosecutor, was moved before District Judge Staines in Tullamore District Court on 21st September 2020, in advance of the intended trial date of 28th September 2020. This adjournment application did not involve a formal application for the DAR. The procedure for such an application is prescribed by Order 12B of the District Court Rules and requires a notice grounded on affidavit to be served seven days prior to the hearing of any application to release the DAR (at which point the District Judge can direct further service of notice of the application on any person believed to be impacted by the potential release of the DAR).¹ In the view of Mr Nash's solicitor, there was adequate time to allow a full and proper application for the DAR to be made prior to the scheduled hearing of the criminal case on 28th September 2020 and for this reason the adjournment was sought.

6. District Judge Staines refused the application for an adjournment and also stated that she would refuse an application for the release of the DAR on the basis that Mr Nash had been free to attend court for Mr Keogh's case. On the particular facts presenting, this reasoning appears flawed: Mr Nash was actually excluded from the hearing as a possible witness for the State. But even if this were not so (and it was so) Mr Nash enjoys a constitutional right against self-incrimination which would be breached if he were required to give evidence of what happened at Mr Keogh's hearing. Nor, as will be seen, would such an approach conform to the procedure as required under s.4/5 of the Criminal Law Procedure Act 1865.

7. It will be recalled that among the reliefs sought by Mr Nash are the following declarations: (ii) a declaration that Mr Nash is entitled to a copy of any recording of the evidence given by certain named persons on 7th September 2020 in Tullamore District Court; (iii) a declaration that the proposed criminal proceedings against Mr Nash, without access to such recordings, are

¹ Order 12B, rule 6 provides that (6) *Subject to sub-rule (7), the Court may, where it considers it necessary in the interests of justice so to do, permit the applicant to have such access to all or such part of the relevant record concerned as is specified in the order made on the application, by such means and at such time or times as may be specified in that order and on such terms and under such conditions (including terms restraining the publication, dissemination or further disclosure of all or any part of the relevant record by the applicant, and the giving of an undertaking to such effect) as the Court may direct*" [Emphasis added]. The court notes the relatively low threshold for obtaining a copy of the DAR that is identified in O.12B, r.6 ("where [the District Court]...considers it necessary in the interests of justice so to do"). The court cannot see how it could properly be said that the release of the DAR in the particular circumstances presenting in the within application was/is other than "necessary in the interests of justice".

currently contrary to law, natural justice, constitutional justice, and fair procedures. When it comes to these declarations the statement of grounds states as follows:

“The Applicant does not dispute the existence of a public interest right that criminal prosecutions take place and that they happen expeditiously. However, the applicant is aware that inconsistencies [in witness evidence] have been cited by a judge as a reason for dismissing a prosecution arising from the same facts. He [Mr Nash] is entitled to be able to rely on earlier statements, should they prove inconsistent with the evidence given viva voce during the hearing of his case. The only way he can prove such statements were made is if he has access to the DAR....The evidence previously given in a related criminal case clearly has the potential to be relevant, particularly when that related case was dismissed on the basis of inconsistencies in the evidence....The right to effective cross-examination is an essential aspect of the right to a fair trial; as is the right to confront witnesses with prior inconsistent statements. These rights cannot be vindicated without reasonable access to the reliable materials on which such cross-examination and confrontation can be grounded and time to prepare such cross-examination.”

8. It will be recalled that among the reliefs sought by Mr Nash is the following declaration: (iv) a declaration that the refusal of the learned District Judge to provide the DAR of Mr Keogh’s hearing to Mr Nash is contrary to law. When it comes to this declaration the statement of grounds states as follows:

“In refusing access to the DAR, the District Judge erred in grounding that refusal on the basis that the Applicant could have attended Mr Keogh’s hearing. The Applicant, who did attend Mr Keogh’s hearing cannot give evidence of what was said during that hearing without opening himself to cross-examination on all other matters. The ruling, and the basis for it, set the right to silence at nought....Given the relative ease with which DAR records can be generated and

transferred, the refusal of the District Judge to order the release of the DAR is unreasonable and/or disproportionate.”

9. The garda prosecutor in this case has sworn an affidavit in which he avers, *inter alia*, as follows:

- “4. *I say and believe that this matter was first listed before the District Court on 6 November 2019....*

5. *On that same return date Mr Nash and...Mr...Keogh’s prosecutions became separated on Mr Nash’s application, when he requested of District Judge Staines that she recuse herself....I say that ultimately, after a number of adjournments, the respective hearings were scheduled to be heard on 7 September 2020 (in respect of Mr...Keogh) and 28 September 2020 in respect of Mr Nash.*

6. *...I was myself present in Tullamore District Court on 7 September 2020 when Mr...Keogh’s case was heard and when he was acquitted by District Judge Staines after the Court had heard from the witnesses in the case, some of whom would have been expected to give evidence in Mr Nash’s case also. My own recollection is that the judge considered that there was a possibility of self-defence arising, and that she therefore afforded Mr Keogh the benefit of the doubt.*

- 7 *...I say that [the] said hearing on 7 September 2020 was attended by Mr Nash, who was not called to give evidence as far as I can recall, and also by one Mr...Donnelly. I say that Mr Donnelly requested of the District Judge that he be permitted to stay in the body of the courtroom for the giving of the sworn evidence, so that he could take a note of the proceedings – indicating that he was a freelance journalist*

– and Mr Donnelly appeared to me to be taking notes throughout the hearing. I say and believe that Mr Donnelly and Mr Nash are associates: both men were in close contact and in conversation after the hearing concluded and both men attended the local Garda station together to demand that the charges against Mr Nash be withdrawn.

[Court Note: Mr Nash has sworn that he was not aware that Mr Donnelly was taking notes. However, that seems to the court to be somewhat off-point. The true point presenting in this regard is that Mr Donnelly’s notes and such evidence as he might give are no substitute for the DAR, not least though not only as the accuracy (and in the particular circumstances, the impartiality) of Mr Donnelly’s evidence would be open to question in a way that the DAR is not.]

8. *I say and believe that Mr Nash’s own case was listed for mention two days later, on 9 September 2020, and it was on that date that the 28 September 2020 was fixed as the hearing date.*

...

11. *I say and believe that on 21 September 2020 an adjournment application of the case scheduled for hearing the following week was moved before District Judge Staines at Tullamore District Court, though I was not personally present. In regard to what occurred I have had the benefit of an account which was given to me by [a garda colleague]...who is the court presenter at Tullamore District Court. He informed me that on 21 September 2020 he had spoken to Mr Nash’s counsel to inform him that the prosecution were opposing the application for the DAR and to vacate the hearing date of 28 September 2020, but [the*

garda presenter]...had left the court to find out the whereabouts of some prisoners coming from Cloverhill (at the judge's request) when the matter was called. Accordingly, the application was made and refused in his absence, though he was subsequently informed of the outcome by [a]...State Solicitor who was present.

...

13. ...[A]lthough these will ultimately be matters for the court to assess, I say and believe that the Applicant's solicitor was given full witness statements and CCTV in disclosure, which was a significant amount of disclosure for a District Court prosecution, particularly given the relatively minor charges at issue in this case. Furthermore, I say and believe that the District Judge conducting the scheduled hearing of the case would have been able to hear from all of the witnesses, under examination and cross-examination, see the CCTV and observe any inconsistencies arising for him or herself, and that the release (and/or transcription) of the DAR was not necessary in order for Mr Nash to get a fair hearing of a straightforward public order charge.

14. ...I therefore pray this...Court to refuse the reliefs sought [by Mr Nash].”

10. Given the obligation on the State, in light of its unique prosecutorial role, to seek out and preserve all evidence, whether inculpatory or exculpatory of an accused, it is not clear to the court how, consistent with that obligation the State would seek to obstruct Mr Nash in obtaining what in the particular circumstances of this case is clearly material evidence (the DAR).

11. Sections 4 and 5 of the Criminal Law Procedure Act 1865 govern the procedure in criminal cases for cross-examination of a witness as to proof of contradictory statements and also as to previous statements made in writing. They provide respectively as follows:

“[s.4] *If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.*

[s.5] *A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit”.*

[Court Note: Although s.5 contemplates that a witness may be cross-examined on a previous inconsistent statement “*without such writing being shown to him*”, there is case-law which indicates that the cross-examining party must have a copy of the document in court. So, for example, *R. v. Derby Magistrates’ Court, ex parte B* [1996] A.C. 487 was a case where B told police that he was solely responsible for a murder but withdrew the statement shortly before his trial, blaming his stepfather, and was then acquitted. The stepfather was subsequently charged with the murder. In an appeal by the stepfather concerning, *inter alia*, the availability to him of certain documentation regarding the interactions between B and his solicitor, Lord Taylor CJ, in the House of Lords, observed, at p.500, that “*Lord Denman’s Act [i.e. the Act of 1865] contemplates cross-examining counsel having the inconsistent*

statement (e.g. a deposition) in his hand so that the procedure which may culminate in the document becoming admissible can be begun”].]

12. The wording of s.4 is apt to cover both oral and written statements. By contrast, s.5 clearly refers only to written statements.

13. In broad terms, ss. 4 and 5 of the Act of 1865 operate as follows:

– first, if a witness admits under cross-examination that they have made a previous statement inconsistent with their testimony then, the credibility of the witness having been impeached, no further proof of that statement is allowed. This much is clear from *People (AG) v. Cradden* [1955] I.R. 130. There, Mr Cradden was convicted on a count of indecently assaulting a young girl contrary to s.6 of the Criminal Law Amendment Act, 1935. In a successful appeal it was contended, *inter alia*, that the trial judge had misdirected himself in law in refusing to allow counsel for the accused to continue his cross-examination of the prosecutrix so as to induce her unequivocally to admit/deny certain statements made by her in the course of her evidence in the District Court. The Court of Criminal Appeal was of the view that counsel should have been allowed to question the prosecutrix further, observing, *inter alia*, as follows, at p.138: “*Had the witness agreed that she had made the statement put to her...it would have been unnecessary and in our view not permissible to put the deposition in evidence.*”

– second, if the witness denies or does not admit making the statement, it may (if relevant) be proved against the witness in the proceedings. So, for example, in *Attorney General v. Murray* [1926] I.R. 266. Captain Murray, on trial for murder, was called by his counsel as a witness in his own defence. He admitted on cross-examination that he had written four letters but denied that he had written a document marked ‘E’ (a purported confession). He was cross-examined as to the statements made in the four letters which he admitted having written, and as to Document ‘E’. Witnesses were then called on behalf of the prosecution to prove that Document ‘E’ was in Captain Murray’s handwriting. On appeal, it was held by the Court of Criminal Appeal, *inter alia*, that Document ‘E’ was admissible and properly allowed to go to the jury as a former statement that was inconsistent with Captain Murray’s previous evidence.

14. In *People (DPP) v. Diver* [2005] 3 I.R. 270, it was held that the procedure for the cross-examination of a witness on a previous inconsistent statement, as laid down in *People (AG) v.*

Taylor [1974] I.R. 97 in the context of hostile witnesses, applies equally to the cross-examination of a non-hostile witness. Therefore, if a cross-examining party wishes to contradict the witness using the document, the document should first be given to the witness with an invitation to read the document (or the relevant portion of it) and the witness should then be asked whether he or she wishes to change his or her evidence in the light of the contents of the statement.

15. It follows that to comply with statutory procedure, it will be necessary for counsel on behalf of Mr Nash to be able to prove the DAR and put it to the witnesses whose consistency will be challenged. (And clearly, for the legal advisors to be able to properly prepare Mr Nash's defence in this regard, it will be necessary for them to obtain a prior copy of the DAR).

16. In terms of the interaction between ss.4 and 5 and the requirements of due process and fair procedures, the court has been referred, *inter alia*, to *DPP v. G.K.* [2002] 6 JIC 0601, *B.J. v. DPP* [2003] 4 I.R. 525, *J.F. v. DPP* [2005] 2 I.R. 174, and *O'Callaghan v. Mahon* [2006] 2 I.R. 32, which cases the court turns briefly to consider hereafter.

i. *G.K.*

17. Here, the applicant appealed against his conviction in respect of a number of sexual offences. He submitted that the refusal by the trial judge of his application to be furnished with a copy of the transcript evidence of the original trial constituted a breach of the constitutional guarantee of fair procedures and to a fair trial. It was held by the Court of Criminal Appeal, quashing the conviction and ordering a new trial, that to withhold a transcript of the evidence given at the first trial from an accused person in such a case was tantamount to denying him the opportunity of exposing an unreliable witness. In the course of her judgment Denham J., as she then was, observed as follows, at pp.12-14:

“The Constitution provides for due process....Inherent in that concept is a fair trial. Inherent in both that section and the fundamental rights of the Constitution is the right to fair procedures. This includes, in a criminal trial, sight of previously sworn statements of a witness,...In addition, as modernisation of the courts proceeds same-day transcripts and other uses of information technology will assist the recording and

hence the retrieval of records of court proceedings. Indeed, it is noteworthy that if the applicant had a stenographer in court at his own expense he could have had the benefit of that transcript. However, any such exception would undermine the equality of an accused person.

In a criminal prosecution, when a retrial is ordered, for whatever reason, and a successful prosecution is dependent upon the credibility of one or more of the witnesses for the prosecution, whose evidence is not supported by either forensic or circumstantial evidence, fair procedures require that the accused is furnished with a transcript of the testimony given at the first trial, irrespective of whether or not any inconsistencies in the evidence of witnesses for the prosecution can be demonstrated at the time that the application to be provided with such a transcript is made. Otherwise, the accused is precluded from confronting witnesses for the prosecution with inconsistencies in their evidence which only become manifest during the retrial. This is all the more so when the outcome of the prosecution is, to a large extent, dependant on whether or not the evidence of an alleged victim is accepted by the jury, or by the court, as the case may be. To withhold a transcript of the evidence given at the first trial from an accused in such a case is tantamount to denying him/her the opportunity of exposing an unreliable witness for what he/she is, in that, in the absence of a capacity to compare evidence given at successive trials by the same witness (evidence which is hotly contested) the accused is, in effect, limited in his/her capacity to defend himself/herself, which offends all principles of justice, as they are recognised in this jurisdiction.”

18. Denham J.’s reference to the “*principles of justice, as they are recognised in this jurisdiction*” was the subject of elaboration by Hardiman J. in *O’Callaghan*, at p.71, where he observed as follows:

“In my view, the maintenance of what Denham J. described as the “principles of justice, as they are recognised in this jurisdiction” is every bit as much a part of the public interest as the exposure

of wrongdoing. Indeed, in many cases the exposure of the unreliability of a witness will itself amount to the detection of wrongdoing of a particularly noxious sort, one that taints public justice. This, of course, will not be so in every case where evidence proves unreliable.”

19. Although the Court of Criminal Appeal in *G.K.* was dealing with the situation of a retrial, an analogy can be drawn between that situation and that presenting here, where there is an intended trial of a second person on essentially the same facts as a previous trial in which another person was acquitted and where the same evidence is likely to be prayed in aid by the prosecutor. Indeed, a like analogy was drawn by Hardiman J. in *B.J.* There, the applicant had applied for, *inter alia*, an injunction restraining the DPP from taking any further steps in the prosecution of the applicant for various sexual offences on the grounds that his right to a fair trial had been breached by virtue of unexplained and excessive complainant/prosecutorial delay. The injunction was granted and a later appeal to the Supreme Court failed, Hardiman J. observing, at p.5459, that “*There is no rational basis for distinguishing between a previous statement made by a witness in a trial and a previous statement made in some other context*”. Although the offences in *G.K.* were more serious than those of which Mr Nash is charged, the Court of Criminal Appeal does not suggest that the requirements of fair procedures attenuate by reference to the seriousness of the offence/s charged.

ii. *J.F.*

20. In *J.F.*, the applicant sought an order restraining the DPP from proceeding with the prosecution of certain sexual offences on grounds of delay. The complainant in that case had refused to undergo examination by a psychological expert for the applicant. In the Supreme Court, Hardiman J. observed, *inter alia*, of this refusal, at p.183:

“It...deprives him [the applicant/accused] of the third of the Re Haughey [1971] I.R. 217 rights – to be allowed to give rebutting evidence – since it is undisputed that no such evidence can properly be formulated without an assessment of the complainant. I also consider that a refusal of access to the complainant for the applicant’s expert subverts the right to cross-examination. Oral

contradiction in a public forum is the culmination of the work of the cross-examiner but it is by no means the whole of it. All effective cross-examinations, not least of expert witnesses, are the result of intensive preparation. It is of the essence of the right to cross-examine that the cross-examiner, the advocate selected by the person impugned, should have access to the materials for cross-examination. Study and assessment of these materials is a vital part of the process of cross-examination.”

iii. *O’Callaghan*

21. This was a case where the applicant sought disclosure of all documents recording prior oral and written statements given by the notice party to a planning tribunal so that he could be cross-examined in relation to inconsistencies between his prior statements and oral evidence. In the course of his judgment, Hardiman J. observed, at p.55, that *“The cross-examination of a witness on the basis of comparing what he has said on oath with an account given on another occasion is one of the longest established of the conventional methods of contradiction. It has been recognised for centuries”*, Geoghegan J., appearing expressly to agree with this particular observation in his comment, at p.81, that *“For all the reasons put forward by Hardiman J...it was absolutely essential that the documents and materials which were sought for the purpose of carrying out a worthwhile cross-examination in the extraordinary circumstances where wild allegations were flying around the tribunal against the applicant and of which he had no prior notice, be duly produced.”*

Conclusion

22. The right to challenge one or more of the State’s intended witnesses as to prior inconsistent statements is an aspect of the fundamental right to a fair trial in due course of law. The procedure for exercising this right is contained in ss.4 and 5 of the Act of 1865. In the particular circumstances of the within proceedings, as outlined above, having regard to the various factors considered above, and regardless of the timing of the application for the DAR, it seems to the court that Mr Nash will suffer prejudice and will be deprived of his constitutional right to a fair trial in due course of law if subjected to trial in the absence of the DAR being made available to materially aid in his defence. Given the relative ease with which DAR records can be

generated and transferred, the refusal of the learned District Judge in this case to order the release of the DAR appears to the court, with all respect, to be unreasonable and/or disproportionate in the circumstances presenting.

23. The court will discuss with the parties the form of the relief to issue. It seems to it that it would suffice to issue relief (ii) as stated in the notice of motion and identified at para.1 above; the court does not consider that Mr Nash is entitled to relief (i).