

APPROVED

[2020] IEHC 542

THE HIGH COURT
JUDICIAL REVIEW

2019 No. 563 J.R.

BETWEEN

K.

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 4 December 2020

INTRODUCTION

1. These judicial review proceedings seek to challenge a decision of the Circuit Criminal Court to refuse to permit the applicant to change his plea in criminal proceedings. To preserve his anonymity and that of the complainant, the applicant will be referred to in this judgment simply as “*the accused*”.
2. The accused had initially entered a plea of not guilty to an offence of sexual assault. During the course of his trial, however, the accused entered a plea of guilty. This change of plea occurred *subsequent* to a ruling by the trial judge to the effect that certain “similar fact” evidence would be admitted at the trial. The accused had been advised by his legal team that this ruling on the admissibility of the “similar fact” evidence greatly reduced his prospects of successfully defending the proceedings. The accused was also advised that if he was convicted on the basis of a continued plea of not guilty, then he was likely to

NO FURTHER REDACTION REQUIRED

receive a significant custodial sentence. Were he to enter a plea of guilty, however, this would be taken into account in mitigation of his sentence.

3. The accused now maintains that his plea of guilty was entered in circumstances of panic following this advice. It is also said that both his memory and ability to comprehend had been impaired by the fact that the accused had taken certain medication (Xanax) on the morning in question. This is not, however, borne out by the consultant psychiatrist's report.
4. Some days thereafter, the accused informed his legal team that he wished to withdraw his plea of guilty. A formal application in this regard was ultimately listed for hearing before the court a number of months later. Following that hearing, the trial judge delivered a careful and comprehensive written ruling on the application ("*the ruling*"). The application to withdraw the guilty plea was refused. The accused now seeks to have this ruling set aside by way of judicial review.
5. One of the principal issues for determination in this judgment is whether any challenge to the ruling should, instead, be brought by way of an appeal to the Court of Appeal following upon the sentencing of the accused. The resolution of this issue turns on whether this is one of those exceptional cases where the High Court will intervene by way of judicial review in ongoing criminal proceedings.
6. Finally, it might be of assistance to the reader to flag from the outset that, as a result of events, it became necessary for the accused's original legal team to cease their representation. The accused was instead represented by a new legal team at the application to withdraw the plea of guilty. Save where otherwise

stated, all references in this judgment to the accused's lawyers should be understood as referring to "*the former*" or "*the original*" legal team.

PROCEDURAL HISTORY

7. The accused had initially been charged with two offences of sexual assault pursuant to section 2 of the Criminal Law (Rape) (Amendment) Act 1990 (as amended). The offences are alleged to have occurred in August and September 2015, respectively, and involved two complainants. (A separate indictment in respect of *further* offences involving a third and fourth complainant had been laid subsequently, but had not yet been listed for hearing).
8. The trial of the offences had initially been scheduled for January 2018. The accused was arraigned, and a jury empanelled. The trial did not proceed at that time, however, in circumstances where counsel had to be excused because of a family emergency.
9. The trial was rescheduled, and, ultimately, came on for hearing at the end of June 2018. Following legal argument, the trial judge determined two preliminary applications as follows. First, the trial judge ruled that the indictment should be severed, with the consequence that the trial would be confined to only one of the two alleged offences. Secondly, the trial judge ruled that certain evidence from two other women who alleged that they too had been sexually assaulted by the accused would be admitted at the trial on the basis that it represented "similar fact" evidence. (These two women are the complainants in the further indictment referenced above). Thus, the jury would hear not only from the complainant in respect of the offence charged, but also from two other witnesses

who would claim that they too had been sexually assaulted by the accused when attending as customers at his place of business.

10. These rulings had been delivered on a Friday. The hearing had then been adjourned until the following Tuesday. The accused's former solicitor has averred on affidavit that the full implications of the rulings had been explained to the accused, and that the court had facilitated a weekend adjournment (Friday to Tuesday) to allow the defence to absorb the rulings and the accused to confirm his instructions. The accused has averred that he has no recollection of this purpose. At all events, it seems that the accused had a telephone consultation with his solicitor on the following Monday, and the accused confirmed that his instructions were to maintain his plea of not guilty.
11. The trial was set to resume the following day (Tuesday, 3 July 2018). On that date, the accused's legal team asked for time to consult with their client, and a consultation took place between the accused and his wife, and the members of his legal team, including senior counsel. The accused's legal team have since filed affidavit evidence to the effect that it was explained to the accused at this consultation that there was the probability that he would be convicted if he was to embark upon the trial on a "not guilty" basis. It was further explained that, in consequence of the ruling on the admissibility of the "similar fact" evidence, there would now be three complainants giving evidence against him in respect to three separate incidents on separate dates. All of these incidents were said to have occurred when the complainants were attending at the accused's business premises as customers for [details redacted]. It was also explained that a post-trial conviction would be heavier in comparison to an early plea as the complainant would not yet have gone into evidence, nor been subject to the rigor

of cross-examination. The legal team confirmed that it had been agreed, in principle, with the prosecution that, in the event of a guilty plea, the accused could remain on bail pending sentence.

12. It is apparent that the accused accepted this advice. Specifically, the accused was arraigned and pleaded guilty to one count of sexual assault in front of the jury. The jury were subsequently discharged.
13. The proceedings were then adjourned briefly to address the position in relation to the outstanding charge of sexual assault. There appears to have been some confusion at this stage as to whether—contrary to its earlier confirmation—the prosecution now intended *to object* to continuing bail. This confusion was ultimately resolved, and the accused remains on bail albeit subject to revised terms.
14. On 10 July 2018, that is, one week after he had pleaded guilty to the first count of alleged sexual assault, the accused formally indicated to his legal team that he now wished to change his plea. (The accused maintains that this indication was first conveyed a week earlier, but nothing much turns on this for the purposes of this judgment). The accused’s original legal team, very properly, came off record and ceased to represent the accused in circumstances where they were now professionally compromised as a result of the earlier plea of guilty. This also allowed the accused to waive legal professional privilege for the purposes of an application to withdraw the guilty plea. See paragraph 36 of the judgment in *E.R. v. Director of Public Prosecutions* [2019] IESC 86 as follows.

“[...] A plea of guilty is a very serious matter. Changing a plea is at the discretion of the court and should involve hearing all the relevant evidence. Therefore, any solicitor or barrister representing and advising the accused should immediately withdraw once the accused seeks to go back on his or her formal admission of guilt. That leaves their

evidence available to the accused who is not obliged to waive legal professional privilege but who thereby is given that option. The trial court will then have a proper view of the circumstances. [...]"

15. The accused had been assigned a new legal team with the benefit of the legal aid scheme. The accused's application to change his plea to one of not guilty was listed for hearing before the trial judge a number of months later in November 2018.
16. As part of his application, the accused submitted a report prepared by a consultant forensic psychiatrist from the NFMHS Central Mental Hospital. This is flagged now as it is relevant to one of the criticisms made by the accused of the trial judge's ruling. I return to this point at paragraph 32 below.
17. The ruling of the trial judge is careful and comprehensive. Having set out the procedural history and the submissions of the parties, the rationale for the decision is set out as follows.

"Having given this matter careful consideration, I am absolutely satisfied that the accused had full capacity and fitness to plead when he changed his plea from not guilty to guilty on 3 July 2018. I am further satisfied that the accused entered into the guilty plea voluntarily albeit in the pressurised context of an ongoing trial. I [am] satisfied that the accused's constitutional right to a fair trial was completely vindicated in this case, in that the jury were empanelled, a voir dire had taken place and had been ruled upon and the trial was about to recommence when the accused indicated his intention to enter a guilty plea. It is also worth noting that when the accused was re-arraigned it was in front of the jury that had been empanelled to try the case. The evidence of his legal team and indeed the evidence of [the consultant psychiatrist] all point to the accused being competent and capable both mentally and physically to enter the guilty plea. The accused had the benefit of extensive and complete legal advice together with the opportunity to discuss and consult with his wife before changing his plea from not guilty to guilty. It would appear on the evidence before me that the rationale behind the accused's attempt to change his plea from guilty to not guilty arises from the change in attitude of the state in respect of him remaining on

bail. I am confirmed in this view on the evidence of [the former solicitor and counsel]. Furthermore I am further assured as to the correctness of this view by the confirmation received from [...] counsel for the state during the course of this hearing that the first time [the] state became aware that there might be a change of plea was after the state indicated it was going to object to bail. This is completely at variance with the averment in the accused's affidavit that the state changed its attitude towards bail after he had indicated his intention to change his plea. Accordingly there are significant credibility issues in relation to the accused's version of events. Furthermore I do not accept that as alleged by the accused matters changed within a space of five minutes in relation to the circumstances surrounding his decision to plead guilty on the morning of 3 July 2018. It is abundantly clear that at all stages of this process the significance of the ruling in respect of the similar fact evidence was the subject matter of significant discussion between the accused and his legal advisors. I am also satisfied that on 29 June the accused was advised to consider matters over the weekend and the fact that he did this is reflected in the fact that he phoned [the former solicitor] on the following Monday. Accordingly the accused's assertion that he has no recollection of this is not sustainable.

In light of [the psychiatrist's report], the evidence of [the former solicitor and counsel] together with the court's own observations and clear recollection when the accused entered his guilty plea during the course of the trial on 3 July 2018, the court is satisfied that the accused had full mental capacity to give instructions to his legal advisors, to understand the nature of the charges and the consequences of the plea.

In other words the accused was fit to enter into his guilty plea. I am further satisfied that given that the accused had the benefit of legal advice he understood the nature of the charge against him and entered a clear and informed plea of guilt. I do not accept his contention that his state of mind was such that he didn't know what he was doing and that he panicked into entering a guilty plea. I am absolutely satisfied that the accused knew exactly what he was doing when he entered the guilty plea. In the circumstances I am refusing the application to vacate the guilty plea.”

18. These judicial review proceedings were instituted on 31 July 2019. The High Court (Noonan J.) granted leave to apply for judicial review and placed a stay on the further prosecution of the first count.

JUDICIAL REVIEW AND ONGOING CRIMINAL PROCEEDINGS

19. As noted in the introduction, one of the principal issues for determination in this judgment is whether the High Court should decline to entertain the challenge to the trial judge's ruling on the basis that any challenge should, instead, be brought by way of an appeal to the Court of Appeal. Such an appeal could be lodged following upon the sentencing of the accused.
20. As it happens, the Supreme Court has addressed the question of the appropriateness of judicial review in detail in its recent judgment in *E.R. v. Director of Public Prosecutions* [2019] IESC 86 ("**E.R.**"). This judgment was delivered on 6 December 2019, that is, a number of months *after* the institution of the within judicial review proceedings.
21. The Supreme Court endorsed the well-established principle that the taking of judicial review proceedings in the course of a criminal trial will only be appropriate in exceptional circumstances, citing *Director of Public Prosecutions v. Special Criminal Court* [1999] 1 I.R. 60, and *Freeman v. Director of Public Prosecutions* [2014] IEHC 68.
22. The case law indicates that there are two strands underlying the principle. The first is that the taking of judicial review proceedings prior to the conclusion of a criminal trial has the effect of disrupting the unitary nature of the trial. It also has the capacity to create chaos in the criminal justice system and is open to abuse. One obvious example of potential abuse is where a person charged with a criminal offence submits to a criminal trial to test the waters as to whether a confession will be admitted into evidence, with a view to challenging the ruling on the *voir dire* if it goes against them. Even if such an application for judicial

review were ultimately to be heard on its merits and determined against an applicant, the original trial will have had to be abandoned. In this hypothetical scenario, the person charged will have a second trial in front of a different jury and possibly a different trial judge.

23. The second strand underlying the principle against the taking of judicial review proceedings in the course of a criminal trial concerns the limitations of the High Court's judicial review jurisdiction. Judicial review is concerned principally with the legality of the decision-making process and not with the underlying merits of the ruling under challenge (save in cases of irrationality). Put otherwise, the function which the High Court exercises in determining judicial review proceedings is far more limited than that which the Court of Appeal would exercise in determining an appeal against conviction and sentence.
24. The inherent limitations on the High Court's judicial review jurisdiction have been described, in more eloquent terms, by the Supreme Court in *E.R.* as follows (at paragraph 17).

“[...] an accused in a criminal trial who is advised to forego an appeal and instead pursue a judicial review, faces a burden different to an argument as to right and wrong. Judicial review is not about the correctness of decision-making, nor is it the substitution by one court of a legal analysis or factual decision for that of the court under scrutiny. On judicial review, where successful, the High Court returns the administrative or judicial decision to the original source and, implicitly in the judgment overturning the impugned decision, requires that it be redone in accordance with jurisdiction or that fundamentally fair procedures be followed. If the decision-maker has no jurisdiction, that may be the end of the matter but the High Court never acts as if a Circuit Court case were being reconsidered through a rehearing, which is a circumstance where a court will be entitled to substitute its own decision. Judicial review is about process, jurisdiction and adherence to a basic level of sound procedures. It is not a reanalysis.”

25. The Supreme Court judgment goes on, in the next paragraph, to emphasise that an applicant for judicial review in criminal proceedings has the “substantial burden” of showing the deprivation of a right. It is not enough to ground a successful application for judicial review that the trial judge might have made an error of fact, nor even an incorrect decision of law.
26. In summary, the general principle is that the High Court will, normally, in the exercise of its discretion decline to entertain judicial review proceedings taken against rulings made in the course of a criminal trial. This is because an appeal to the Court of Appeal almost always represents an adequate alternative remedy. The case law indicates, however, that judicial review will be allowed in exceptional circumstances. Thus, for example, in *Director of Public Prosecutions v. Special Criminal Court* [1999] 1 I.R. 60, the Supreme Court held that the High Court had been correct to entertain an application for judicial review in the “exceptional circumstances” of that case, and having regard to the importance that there should be a definitive ruling on the question of “informer privilege”. The Supreme Court noted that whereas the trial before the Special Criminal Court had been formally “opened”, the ruling of the Special Criminal Court impugned in the judicial review proceedings was, essentially, a ruling which had been sought and given by way of *preliminary ruling* before the trial proper was embarked upon.

DETAILED DISCUSSION

27. I turn now to apply the principles summarised under the previous heading to the present case. Counsel for the accused submits that there are exceptional circumstances justifying intervention by way of judicial review. The first matter

relied upon in this regard concerns the *timing* of the trial judge's ruling in the overall context of the criminal proceedings. The ruling under challenge, namely the refusal to allow the accused to withdraw his guilty plea, was one made well after the jury had been discharged and the substantive hearing thus brought to an end. Whereas counsel accepts that the ruling nevertheless forms part of the overall criminal trial, it is submitted that the rationale underlying the disinclination to allow judicial review of criminal proceedings applies with less force to such a late-stage ruling. In particular, it is suggested that the concern as to chaos in the criminal justice system, highlighted in the judgment in *Freeman*, is absent.

28. With respect, the timing of the impugned ruling does not justify a departure from the general principle. The judgment in *E.R. v. Director of Public Prosecutions* [2019] IESC 86 (at paragraph 4) confirms that, in the context of the consideration of the appropriateness of judicial review, a criminal trial is to be regarded as beginning when the accused is indicted, and as ending when the accused is sentenced. The trial judge's refusal to allow the withdrawal of the guilty plea is thus clearly part of the overall criminal trial. Any possible doubt in this regard is dispelled by the fact that the judicial review proceedings in *E.R.* similarly sought to impugn a ruling by a trial judge on an application to permit a change of plea. The Supreme Court treated such a ruling as part of the criminal trial, and highlighted the disruptive effect of an application to withdraw a plea of guilty. See paragraph 36 of the judgment as follows.

“Furthermore, what is required on an application to change a plea is complete evidence as to the circumstances allegedly bearing on an accused. The entry of a plea of guilty is not to be taken lightly. To enter a plea and then, as in this case, seek to change it a month later, completely disrupts the course of a criminal trial and undermines its unitary nature.

Witnesses will be sent away, the victim may have some sense of closure, and the scarce time of the court which could have been used on completing the trial will be otherwise used up. [...]”

29. The second argument advanced on behalf of the accused for saying that judicial review is appropriate is to the effect that the trial judge erred in law in his approach to the application to withdraw the plea. In particular, it is alleged that the trial judge did not asked himself the correct question. Counsel submits that the paramount consideration in the exercise of the discretion to permit the withdrawal of a guilty plea is to ensure that the constitutional right of the accused to a fair trial is protected (citing *Dunne v. McMahon* [2007] 4 I.R. 471). The trial judge is said to have erred in treating the issue as whether the accused was fit to be tried. This is a separate issue, regulated by section 4 of the Criminal Law (Insanity) Act 2006.
30. Counsel submitted that whereas these arguments were made in response to the Director of Public Prosecution’s objection that judicial review is inappropriate, it is difficult to distinguish the jurisdictional objection from the substance of the case. It is submitted that were the High Court satisfied that the trial judge’s ruling was vitiated by an error of law, then it should entertain the judicial review proceedings.
31. I am not persuaded that the trial judge’s ruling evinces any error of law of the type which would justify the High Court exercising its supervisory jurisdiction by way of judicial review. This is because judicial review is concerned principally with the legality of the ruling and not necessarily its correctness. There is no doubt but that the trial judge had jurisdiction to embark upon a consideration of the application to withdraw the guilty plea. The accused had been properly before the Circuit Criminal Court at all times. Of course, a

decision-maker who has jurisdiction at the outset may nevertheless lose jurisdiction if, for example, they act in breach of the requirements of constitutional justice. Similarly, a decision-maker might, in principle, lose jurisdiction if they ask themselves the wrong question. It cannot seriously be contended, however, that either of those contingencies arose in this case. The accused, through his new legal team, had been afforded a meaningful opportunity to make submissions to the trial judge as to why the accused should be permitted to withdraw his plea. These submissions were addressed in detail in a careful and comprehensive written ruling subsequently delivered by the trial judge. It is apparent from a reading of that ruling as a whole that the trial judge was cognisant of the correct legal test to be applied. In particular, the trial judge expressly refers to the detailed discussion, in *Walsh on Criminal Procedure* (2nd ed, 2016, Round Hall), of the court's broad discretion to permit an accused to change his plea from guilty to not guilty at any stage of the trial right up until sentence is passed. The ruling also cites the judgment of the Court of Appeal in *Director of Public Prosecutions v. Judge* [2018] IECA 242 where the principles in *Walsh on Criminal Procedure* were endorsed.

32. The suggestion that the trial judge mistakenly treated the application as if it were one directed to the accused's fitness to be tried is not borne out. It will be recalled that it had been the accused himself who had introduced evidence in respect of his mental health, by exhibiting a report from a consultant psychiatrist. It was entirely proper for the trial judge to refer to this report in his ruling. Indeed, the trial judge might have been criticised by the accused had he not done so. It is obvious, however, from the terms of the ruling that the trial judge was not purporting to carry out an assessment confined to the question as to whether

or not the accused had been fit to be tried. It is significant that, in the operative part of his ruling, the trial judge makes no reference to the Criminal Law (Insanity) Act 2006. This legislation would, of course, have been central if the issue had been one of the accused's fitness to be tried.

33. Crucially, the trial judge's ruling expressly addresses the question of whether the guilty plea had been entered voluntarily and whether the accused had made a clear and informed plea. The ruling also considers whether the accused's constitutional right to a fair trial had been vindicated. The trial judge ultimately concluded that the accused had the benefit of extensive and complete legal advice and that the accused knew exactly what he was doing when he entered the guilty plea. The trial judge thus properly identified and addressed the criteria to be applied in the exercise of his discretion to permit the withdrawal of a guilty plea.
34. Counsel on behalf of the accused is also critical of what are said to be a number of erroneous findings of fact in the ruling. These findings concern (i) whether the accused's decision to seek to withdraw his plea was informed by a seeming change in the attitude of the prosecuting authorities to bail; (ii) the credibility of the accused's averment that he has no recollection of being told, following upon the ruling on the admissibility of the "similar fact" evidence, that he had the weekend to reconsider the question of pleading guilty; and (iii) whether the legal advice had changed in a matter of minutes on the morning the guilty plea was entered.
35. The appropriate forum before which to challenge such alleged errors of fact is the Court of Appeal. The making of an error of fact is an error within jurisdiction, and, as such, is not normally amenable to correction by judicial

review before the High Court. By contrast, the Court of Appeal, in exercising its appellate jurisdiction, is well placed to correct any error which may have been made.

36. For the sake of completeness, I should note that the findings of fact complained of were all ones which were open to the trial judge to make on the basis of the affidavit evidence before him. In particular, the chronology of events has been set out in detail in the affidavits filed by the former solicitor and former junior counsel. The accused did not seek to cross-examine either deponent. As explained by the Supreme Court in *E.R.*, once a plea of guilty is entered, the accused bears the burden of demonstrating undue pressure in order to be permitted to withdraw the plea.
37. In summary, the trial judge had jurisdiction to determine the application to withdraw the plea of guilty; afforded fair procedures to the accused; and correctly identified the legal principles governing the application. Thereafter, the assessment of the evidence (including the evidence of the former legal team), and the exercise of the discretion, were matters firmly within the jurisdiction of the trial judge. If and insofar as the trial judge may have erred in the exercise of that jurisdiction, same is amenable to correction by way of an appeal to the Court of Appeal. As recently reiterated by the Supreme Court in *E.R.*, the range of matters which can be considered on appeal are much broader than those in judicial review. Crucially, there is nothing in the papers before me which suggests that the trial judge committed any error outside jurisdiction.
38. The third and final matter relied upon by the accused in support of an application for judicial review relates to the risk of a custodial sentence. More specifically, it is submitted that the accused would have to undergo sentencing before he

would be able to invoke his right of appeal to the Court of Appeal. In the event that a custodial sentence were to be imposed by the Circuit Criminal Court, then the accused would be on hazard of being detained in prison pending the hearing and determination of his appeal. By contrast, the accused has been able to pursue these judicial review proceedings whilst on bail pending sentencing.

39. This submission is predicated on an assumption, first, that a custodial sentence will be imposed by the trial judge; and, secondly, that the accused will not be granted bail pending an appeal to the Court of Appeal. It is neither appropriate nor necessary for this court to make an assessment as to the likelihood of either of these outcomes eventuating. It is sufficient to observe that the procedures governing an appeal to the Court of Appeal allow for the grant of bail pending the hearing and determination of an appeal. This is sufficient safeguard for the accused. The invocation of the High Court's judicial review jurisdiction is not needed.

CONCLUSION AND FORM OF ORDER

40. The application for judicial review is dismissed on the basis that there is an adequate alternative remedy available to the accused, namely his right of appeal to the Court of Appeal against conviction and sentence. None of the three factors relied upon by the accused represent exceptional circumstances such as to justify the invocation of the High Court's supervisory jurisdiction. (*E.R. v. Director of Public Prosecutions* [2019] IESC 86 applied).
41. An order will also be made prohibiting the disclosure of any material which would tend to identify any of the three complainants who allege that they were

sexually assaulted by the applicant/accused. To ensure their anonymity, the identity of the applicant for judicial review is not to be published.

42. The attention of the parties is drawn to the statement issued on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

“The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate.”

43. The parties are requested to correspond with each other on the question of the appropriate costs order. In default of agreement between the parties on the issue, short written submissions should be filed in the Central Office by 11 January 2021. The order granting leave notes that the accused intends to apply for a recommendation under the Legal Aid – Custody Issues Scheme. If this is to be pursued, this should also be addressed in written submissions by reference to the principles in the judgment in *O’Shea v. Legal Aid Board* [2020] IESC 51.

Appearances

Colman Fitzgerald, SC and Karl Monahan for the applicant instructed by John M. Quinn & Co Solicitors

Conor McKenna for the respondent instructed by the Chief Prosecution Solicitor

Approved
Gareth S. Mans