



THE COURT OF APPEAL

Record Number: 278/2023

**Edwards J.
McCarthy J.
Burns J.**

Neutral Citation Number [2024] IECA 181

BETWEEN/

DAVID JAMES BOURKE

APPELLANT

- AND -

**THE COMMISSIONER OF AN GARDA SÍOCHÁNA, THE DIRECTOR OF
PUBLIC PROSECUTIONS, IRELAND AND THE ATTORNEY GENERAL**

RESPONDENTS

STEPHEN O’SULLIVAN

NOTICE PARTY

**JUDGMENT of Ms. Justice Tara Burns delivered on the 14th day of
June, 2024.**

1. This is an appeal against the judgment of the High Court (Barr J.) [2023] IEHC 606 refusing to grant the appellant leave to apply by way of judicial review for a range of reliefs relating to a decision of the President of the Circuit Court (Ryan P.) whereby she refused to order disclosure of documents sought by the appellant in advance of his forthcoming trial before the Circuit Criminal Court.

Background

2. The appellant is a serving member of An Garda Síochána. He is charged with two counts of corruption contrary to ss. 5(2)(b) and 7(2) of the Criminal Justice (Corruption Offences) Act 2018.
3. From 2011 to 2014, the appellant served in the Limerick division of the Regional Source Management Unit of An Garda Síochána which has responsibility for the recruitment and management of covert human intelligence sources ("CHIS"). The appellant asserts that after he concluded his duties with this unit, he continued to have an involvement with informants he had cultivated.
4. On 22 December 2018, an authorised audio surveillance device placed on the appellant's motor vehicle, recorded a conversation between the appellant and his co-accused, the notice party. The second respondent's case against the appellant is that this conversation details that the appellant provided the notice party with information about a criminal investigation into the business affairs of the notice party; the appellant received the sum of €20,000 from the notice party in return for this information; and the appellant gave the notice party advice in relation to what actions he should take to protect his position.
5. The appellant has disclosed the defence which he intends to pursue at trial - he accepts this conversation took place but asserts that this was with the intention of recruiting the notice party as a police informant. He asserts that the meeting with the notice party was "*motivated and co-ordinated*" by JC (a police informant who was recruited by the appellant) who is "*motivated by animus*" and "*acted as an agent provocateur to engineer what appeared to be a bribery offence.*"

6. On 17 January 2022, the appellant's solicitors wrote to the second respondent in the following terms seeking disclosure of specified material:-

"We have instructions that suggests the recorded meeting which took place between then Garda Bourke and his co-accused, Mr O'Sullivan was arranged by an individual by the name of [JC], who was present that evening and remained in close proximity as the meeting took place.

[JC] was well known to our client in his capacity as an agent of An Garda Síochána (AGS) in respect of whom Garda Bourke acted as his CHIS handler. [JC] is understood to have held grievances against this accused and AGS in general concerning his time as an active Covert Human Intelligence Source and in October of last year issued (although not served) legal proceedings citing this accused and the Commissioner of AGS as co-defendants. [...]

The role of [JC] is therefore a highly relevant issue in these criminal proceedings, and we submit that full disclosure should be made of any information or material that could potentially shed light on this important issue.

The defence also notes that a decision of 'no prosecution' was taken in respect of a second file in relation to alleged attempts to pervert the court of justice in which this accused, among others was considered for prosecution. We believe there is likely to be considerable material in that file, which is relevant to the matters at the centre of this trial as there is a close connection between the two.

We therefore seek disclosure of the following materials:

...

2. Copies of any statements made by [JC].

3. Any disclosable material relating to the status of [JC] as a CHIS (Covert Human Intelligence Source) to include documentation touching upon all previous engagement between the defendant and [JC].

....

5. Interview transcript with [PB]."

7. On 20 January 2022, the notice party provided a pre-prepared statement to Gardaí and engaged in a voluntary interview under caution. In the pre-prepared statement, the notice party stated that he had met the appellant on four occasions; that each meeting had been organised by JC; that JC called to his business premises repeatedly and had pressurised him into meeting the appellant; that JC sought €120,000 from him for the appellant; that other members of An Garda Síochána began to follow and harass him after he first met the appellant; and that he gave the appellant €20,000 as he felt he had no alternative option open to him.

8. A pre-trial application for disclosure of documents relating to JC and the interview with PB was made before Her Honour Judge Crowe on 25 November 2022 pursuant to s. 6 of the Criminal Procedure Act 2021 ("the 2021 Act"). Disclosure of the documentation was objected to by the second respondent on the grounds that the documentation was not relevant to the trial and/or was privileged material. Documentation was provided to Judge Crowe by the second respondent for her perusal. She determined not to order disclosure of the requested documentation on the basis that it was not relevant.

9. Very unusually, the appellant's solicitor wrote directly to the first respondent seeking urgent access to the records of all of the appellant's CHIS related activity during his career. He advised that any engagement which the appellant had with the notice party was *"entirely related to his work as a detective attached to Henry Street Garda Station in Limerick"* and was *"highly relevant"* to his *"extensive professional experience as a former member of the CHIS department"* and his *"role in recruiting a number of individuals for this programme when engaged in the detection of serious crime in the Limerick area."*
10. A further application pursuant to s. 6 of the 2021 Act was brought by the appellant seeking disclosure of the appellant's employment records within the Regional Source Management Unit relating to his work as a CHIS recruiter; documents supporting the information of Sergeant Robert Madden; and all documents and materials concerning JC. This matter came before the President of the Circuit Court, Ryan P. on 22 May 2023. Material was again provided to the Court by the second respondent. Having considered the material and the submissions of the parties, Ryan P. determined not to order disclosure of the requested material as she did not consider this material to be relevant to the State's case. This is the Order which the appellant seeks to quash. A suggestion made by Ryan P. that a redated index of the material which was produced to her be provided to the appellant's solicitors was complied with by the second respondent. No further application in relation to disclosure was made before Ryan P. on receipt by the appellant of this index.
11. Ryan P. has indicated that she will be assigned as the trial judge in the criminal trial.
12. At the judicial review leave application, it was ordered that the respondents be put on notice of the application. The respondents opposed the grant of leave to the appellant.

The Reliefs Sought

13. The reliefs which the appellant seeks to apply for by way of judicial review are:-

"1. An Order of Certiorari sending forward to this Honourable Court for the purpose of being quashed the Order issued by the Dublin Criminal Circuit Court on 23rd May 2023 and made under s.6(1) of the Criminal Procedure Act 2021 (the "2021 Act") refusing the Applicant's application for an Order directing disclosure of certain categories of documents as set out in the Applicant's Particulars of Application for Preliminary Trial Hearing;

2. An Order of Mandamus to compel An Garda Síochána to provide copies of the categories of documents as set out in the Applicant's Particulars of Application for Preliminary Trial Hearing dated 4th May 2023;

3. A Stay and/or Order of Prohibition restraining the Director of Public Prosecutions ("DPP") from proceeding to trial of the Applicant in respect of the alleged offences charged in LKDP0120/2019 pending resolution of these proceedings;

4. A Declaration that the rights of defendants to disclosure of documents in criminal proceedings have been impaired by the State's failure to transpose Article 7 of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, which provides for the right of access to the materials of the case;

5. A Declaration that the failure of the prosecution to disclose documents which a defendant seeks to rely upon for his/her

defence is in breach of the right to fair procedures under Article 38.1 of Bunreacht na hÉireann and/or is incompatible with the State's obligations under s.3 of the European Convention on Human Rights Act 2003, having regard to procedural rights guaranteed by Article 6 of the European Convention on Human Rights ("ECHR");

High Court Determination

14. Applying *G v. The People (Director of Public Prosecutions)* [1994] 1 IR 374 and *McD v. The People (Director of Public Prosecutions)* [2016] IEHC 210, the High Court determined not to grant the appellant leave to apply by way of judicial review for the various reliefs he sought, as an arguable case had not been established.
15. Having regard to *Fitzgerald v. Director of Public Prosecutions* [2022] IECA 271, the Court noted that it was not concerned with the merits of the application before Ryan P., but rather was concerned with whether an arguable case had been made out that her decision should be set aside on the basis that she had not held a fair hearing; failed to give a reasoned decision; or had acted outside of her jurisdiction.
16. The Court determined that because of the unitary nature of a criminal trial as referenced in *ER v. Director of Public Prosecutions* [2019] IESC 86, and in light of s. 6(14) of the 2021 Act, it was not appropriate for the appellant to seek to quash the ruling of Ryan P. by way of judicial review as the complaint made by the appellant did not fall within an exceptional category.
17. With respect to the argument that the State had failed to properly transpose Article 7 of Directive 2012/13/EU, the Court found that the obligation to make disclosure to an accused in advance of his trial had existed in Irish law prior to the enactment of the Directive, and

was "at the very least, comparable, if not more extensive than those provided for in the Directive relating to pre-trial disclosure." Accordingly, a failure to transpose the Directive did not arise.

18. As the appellant failed to produce a transcript of the hearing that had taken place before Ryan P., the Court held that the assertion that Ryan P. failed to provide reasons could not be determined.
19. With respect to the Order of *Mandamus* sought, the Court did not have jurisdiction to direct disclosure be made in the course of a criminal trial which the second respondent had carriage of.
20. In relation to an argument advanced at the oral hearing to the effect that Ryan P. had not been given sight of additional documentation which had been sought, the High Court determined that relief could not be granted in this regard as it was not referred to in the Statement of Grounds.

Appeal Before This Court

21. The appellant suggests that the following questions arise from the grounds of appeal lodged by him:-
 - Did the High Court err in finding that the appellant's only effective remedy for the Prosecution's alleged breach of pre-trial disclosure obligations was by way of an appeal to the Court of Appeal?
 - Did the High Court otherwise err in finding no breach of the duty to give reasons, no grounds for mandamus relief and a failure to plead that the Circuit Court erred in making a relevance decision without sight of materials responsive to the appellant's request for disclosure?

- Has the State's failure to transpose Article 7 of the Directive impaired the appellant's right of access to materials?

Whether Judicial Review is Available to the Appellant?

22. The significance of the unitary nature of a criminal trial has long been recognised. Cases such *The Director of Public Prosecutions v. Special Criminal Court* [1999] 1 IR 60, *ER v. Director of Public Prosecutions* [2019] IESC 86, and *Fitzgerald v. Director of Public Prosecutions* [2022] IECA 271, establish that an application by way of judicial review seeking to quash a ruling of a trial judge in the course of a criminal trial is not appropriate unless there is some exceptional reason arising.
23. The recent enactment of s. 6 of the 2021 Act reinforces this position with respect to pre-trial applications having regard to s. 6(14) and (18) of the 2021 Act which provide:-

"(14) Subject to subsection (15) and section 7, where the trial court makes an order at a preliminary trial hearing or under subsection (11)—

(a) the order shall—

(i) have binding effect, and

(ii) where the court considers it appropriate and so directs, have effect as though it had been made in the course of the trial of the offence, and

(b) without prejudice to the generality of paragraph (a)(ii), no appeal shall lie against the order, pending the conclusion of the trial of the offence.

...

(18) Nothing in this section shall affect the right of the accused to appeal against conviction in respect of an offence, including insofar as any ground of such appeal relates to matters arising

from a preliminary trial hearing in respect of the trial of the offence concerned.”

24. Other relevant provisions of s. 6 of the 2021 Act provide:-

“6. (1) Where an accused has been sent forward for trial in respect of an indictable offence, the court before which the accused is to stand trial (in this Part referred to as the “trial court”) may, of its own motion or upon the application of the prosecution or the accused, hold one, or more than one, hearing pursuant to this section (in this Part referred to as a “preliminary trial hearing”) where the court is satisfied that—

(a) it would be conducive to the expeditious and efficient conduct of the proceedings, and

(b) it is not contrary to the interests of justice,

for the hearing to be held.

...

(8) Without prejudice to the generality of subsection (7), the trial court may, at a preliminary trial hearing, make any one or more of the following orders:

...

(c) a relevant order;

(d) in the case of proceedings before the Circuit Court or the Central Criminal Court, any other order that could be made by the court in the absence of the jury;

...

(f) any other order relating to the conduct of the trial of the offence concerned as appears necessary to the court to ensure that due process and the interests of justice are observed."

25. The appellant asserts that his case falls within the category of exceptional circumstances as envisaged in the case law. He is vehemently of the view that the material he seeks is relevant and suggests that without disclosure of this material, he cannot properly run his defence (which he unusually has already disclosed). He submits that he therefore cannot avail of a fair trial in accordance with Article 38.1 of the Constitution. He further asserts that a determination that the material is not relevant is "*incomprehensible*".
26. The respondents assert that the issue arising in the appellant's case is not exceptional such as would permit him to avail of the remedy of judicial review during the currency of his criminal trial. They submit that what is at issue is a disagreement with the trial judge with respect to her view as to relevancy. This, quintessentially, is not a matter in respect of which judicial review can be availed of.

Discussion and Determination

27. The system regulating disclosure in criminal trials in this jurisdiction is a robust regime which involves many checks and balances. The obligation on the second respondent to disclose all relevant material was defined in *The Director of Public Prosecutions v. Special Criminal Court*, to include all material "*which could be of assistance to the defence in establishing a defence, in damaging the prosecution case, or in providing a lead on evidence that goes to either of those two things.*". Material will not be disclosed to an accused when it is not relevant, or where a claim of privilege arises under a recognised privilege claim. It can occur, as it did in the instant matter, that material is deemed by the second respondent to be irrelevant to the

defence of the criminal proceedings but also subject to a claim of privilege and when this occurs refusal to disclose the material will be on these dual grounds. The role of prosecution Counsel in the disclosure process is of fundamental importance. An onus rests on prosecution Counsel to review any material which is not being disclosed to an accused to ensure that the material is not relevant within the meaning of *The Director of Public Prosecutions v. Special Criminal Court*, or that it is properly subject to a privilege claim. This special role of prosecution Counsel is in keeping with the role they perform as a Minister of Justice in an individual case to ensure that justice is done. A trial judge can choose to rely on the views expressed by prosecution Counsel in light of the particular onus which is placed on them. However, an accused can request the trial judge to review the material at issue either from the perspective of relevance, or a privilege claim, to determine whether the non-relevance or privilege asserted is properly claimed. The onus placed on prosecution Counsel and the trial judge to ensure that all relevant and non-privileged material is provided to an accused remains under review throughout the trial.

28. Accordingly, having reviewed material, the person best placed to determine the relevancy of material and the question of any privilege arising is the trial judge. This is a continuing duty which lasts throughout the trial process.
29. In light of the actual regime in place in this jurisdiction, the appellant is fundamentally incorrect in his assertion that the second respondent is the sole arbiter of issues with respect to relevancy. While the second respondent may take a view in relation to relevancy, her Counsel has an important role in that regard and the trial judge is the ultimate arbiter, who can be called upon by an accused to determine this issue, to include viewing the documentation at issue.

30. In the instant matter, Ryan P. has indicated that she will be the trial judge assigned to this matter. She was presented with material and has heard legal argument in relation to the disclosure issues arising. She has a continuing duty in relation to the material which has been presented to her to ensure that if it becomes relevant in the course of the trial that it be disclosed or that a claim of privilege be determined. She also has a continuing duty in relation to any disclosure issue which emerges.
31. The appellant's argument that this case falls within the exceptional category of case such that he is entitled to proceed by way of judicial review because in his view it is "*intelligible*" that the requested documents were found to be irrelevant and that therefore the withholding of the documents will render his trial unfair, misunderstands the essence of the requirement of exceptionality; the role of the trial judge; the unitary process of a criminal trial; and the limited nature of judicial review. The trial judge has decided that the documents are not relevant. The appellant clearly takes grave issue with that determination, but the fact of the matter is that the appropriate person to determine that issue has made that determination. As judicial review cannot relate to the merits of the decision but rather relates to the decision-making process, the avenue of judicial review will never result in a determination that the documents are relevant. If Ryan P. is incorrect in her assessment that the documents were not relevant, then the appropriate venue to litigate that issue is on appeal to this Court, should there be a conviction in the matter. The onus on the trial judge to keep the issue of disclosure under review throughout the trial, together with the availability of a full appeal where the merits of the legal determination that the documents were irrelevant, if that remains to be the case, can be fully ventilated, ensures that his fair trial rights are adequately

protected. Accordingly, exceptionality is not established to permit the appellant to avail of the remedy of judicial review.

32. In reality, the appellant disagrees with the decision of Ryan P. made on foot of an application pursuant to s. 6 of the 2021 Act and is now seeking to circumvent the provision of s. 6(14) by launching these judicial review proceedings.
33. Having made two applications for disclosure before the Circuit Court, the appellant made a bizarre submission before this Court to the effect that the 2021 Act does not apply to disclosure applications referring to the continuing duty of the trial judge during the trial to keep the matter of disclosure under review. Clearly s. 6 of the 2021 Act encompasses pre-trial disclosure applications having regard to s. 6(8)(c), (d) and (f). The fact that practical arrangements might have to be made around disclosure applications does not result in s. 6 not applying to such applications.
34. Furthermore, the High Court did not determine that judicial review could never be brought in a criminal matter having regard to s. 6(14) of the 2021 Act. The High Court determined that this case did not fall within the category of exceptional circumstance which would permit a derogation from the rule that judicial review cannot be launched in the course of a criminal trial and that s. 6(14) of the 2021 Act reflected that rule. The interpretation which is sought to be made by the appellant with respect to this aspect of the High Court judgment is not open to be made.
35. This application does not fall within the exceptional category of case which would permit an accused to seek judicial relief in the course of a criminal trial and it was inappropriate that this avenue was pursued. The consequence of seeking this relief has been that two trial dates

have been required to be vacated. On the basis that exceptionality had not been established, the refusal to grant leave to the appellant to proceed by way of the discretionary remedy of judicial review, in respect of any of the reliefs sought, was an appropriate order for the High Court to make.

36. However, for the sake of completeness, I will deal with the separate reliefs sought by the appellant to demonstrate that an arguable case was not, in any event, established in relation to any of the reliefs.

Certiorari

37. For the reasons already set out, an arguable case with respect to the relief of *Certiorari* of Ryan P's decision has not been made out.

Failure to Transpose the Directive

38. I have set out in detail the regime of disclosure which exists within the Irish Criminal Justice system. I agree with the High Court that this regime provides for a process of disclosure which meets if not surpasses the requirement of the Directive and, for that reason, the State has not failed to transpose the Directive.

39. The disclosure system operational within the State sufficiently protects the fair trial rights of an accused. Contrary to what is asserted in the appellant's submissions, there is an independent arbiter available to determine whether a claim of irrelevancy asserted by the second respondent is correct, namely the trial judge, who is best placed to determine the relevancy of material in light of a defence either notified to her in advance of a trial, or one which becomes apparent in the course of the trial. Furthermore, the remedy of an appeal to the Court of Appeal is an effective remedy which is capable of being operated on a rational basis.

40. This issue has already been determined by this Court in *Fitzgerald v. Director of Public Prosecutions* [2022] IECA 271 and is an unarguable ground of relief.

Failure to Provide Reasons.

41. Despite the High Court commenting that the transcript of the hearing should have been produced if the appellant seriously wanted to pursue this relief, the appellant bizarrely produced the decision of Ryan P. rather than the entire two days relating to the application for disclosure. Accordingly, the difficulty averted to by the High Court remains for the appellant. The relief sought is unarguable in any event.

Mandamus

42. The relief of *Mandamus* is not available in the circumstances of this case. Making such an order in effect necessitates overruling Ryan P. on the question of relevancy. This is a jurisdiction which is not available to the Court exercising its judicial review capacity.

Documents Not Produced Before the Trial Judge

43. At the conclusion of the appellant's submission, an argument was advanced that certain documents were not produced to the trial judge so she could not have determined that they were irrelevant. Nothing to this effect is referred to in the Statement of Grounds. The portions of the Statement of Grounds referred to by the appellant do not reflect this ground as it is now sought to be argued and no relief is claimed. This argument was rehearsed before the High Court where it was determined that as no relief was sought in relation to this issue, a determination could not be made.
44. The High Court did not err in this regard. This was a contested leave application. The respondents were notified of the issues arising and

came to meet those issues. In those circumstances, it would completely defeat the purpose of a contested leave application should the appellant be permitted to obtain leave in relation to a ground and a relief not notified to the respondents.

45. However, a further issue arises. As the transcript of the disclosure hearing was not produced, this Court is in the dark as to what actually occurred at the hearing. This is further compounded by the fact that Counsel appearing on behalf of the respondents were not present at that hearing with the second respondent being represented by different counsel for the purposes of the trial and the State parties not parties to the criminal proceedings.
46. This aspect of the application highlights how futile this application is and how important it is that matters relating to the criminal trial remain within the criminal trial arena which is specifically designed to appropriately deal with all matters arising.
47. An arguable ground does not exist in relation to this issue.

Conclusion

48. The appellant has failed to establish that his case falls within the exceptional category which would permit him to proceed by way of judicial review in the course of a criminal trial. Furthermore, the reliefs he sought have no prospect for success and are unarguable. The High Court did not err in refusing to grant leave. I therefore am of the opinion that the appeal against the High Court's refusal to grant leave to apply for judicial review should be dismissed.