THE COURT OF APPEAL

CIVIL

UNAPPROVED

Neutral Citation Number [2020] IECA 292

[2019 No. 493]

The President

Kennedy J

Ní Raifeartaigh J

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

E.C. AND MEDIA OUTLETS

APPELLANTS

JUDGMENT of the President delivered on the 29th day of October 2020 by Birmingham P

1. This case raises the question of whether restrictions apply to the identification of a child homicide victim when an individual stands trial in relation to the homicide; and whether, if the effect of identifying the person charged with an offence would be to identify the deceased child victim, that means that the person charged cannot be named or identified.

Background

2. The background to the case is that it was alleged that the respondent, Ms. C, had suffocated her three-year old daughter. In fact, Ms. C accepted responsibility for the death of her daughter, but when charged with murder, pleaded not guilty to murder by reason of

insanity. A jury was empanelled in this matter on 21st October 2019 before White J. who had charge of the list in the Central Criminal Court on the date in question. On the application of the DPP, with the apparent concurrence of the accused, White J. ordered that reporting restrictions be imposed which would prevent the identification of the deceased child. The practical effect of the restriction meant that the accused could not be identified. The trial did not commence that day, but was assigned to Stewart J. to start on 22nd October 2019. Before the case was opened by the prosecution, an application was made by counsel on behalf of the appellant, seeking to lift the reporting restrictions that had been imposed by White J. It appears that counsel on behalf of a number of media outlets, who are now the appellants in the present proceedings, initially made an application to White J. on 22nd October 2019, but that he took the view that Stewart J. now had *seisin* of the proceedings and that it was more appropriate that any such application should be made to her. Stewart J. declined to interfere with the order made by her colleague, but instead, determined to continue the order that had already been made by White J. The order of Stewart J. was set out in the following terms:

> "IT IS ORDERED that no report in respect of the within proceedings which reveals the name, address or school of the deceased or includes any particulars likely to lead to the identification of the deceased and no picture which purports to be or includes a picture of the deceased or which is likely to lead to an identification of the deceased shall be published or included in a broadcast pursuant to section 252(1) of the Children Act 2001."

3. In moving the application to annul the order that had been made by White J., counsel on behalf of the media commented that s. 252 related to circumstances where the victim of the crime is still alive and exists to protect that child in circumstances where they may be a witness. This prompted the judge to intervene to ask "but where does it say that in the section?", to which counsel was forced to answer "[w]ell, it doesn't explicitly say it, Judge, in

fact". However, counsel said that the point he was making was that a reasonable reading would be that the section was about protecting living children and that the knock-on effect of the order of White J. was that it prohibited the identification of the accused in this case. He observed that the effect of the order was to unfairly prohibit the Press from reporting on the case as they were entitled to do under Bunreacht na hÉireann.

4. Counsel on behalf of the Director, responding, said that the wording of s. 252 was, in his submission, very clear indeed. Replying, counsel on behalf of the media pointed out that there had been a number of cases, some in the recent past and some very high-profile indeed, where the trials were reported with the victims and accused being named. Ruling on the matter, Stewart J. commented that the wording of s. 252 was clear and that she did not think that it was in conflict with the constitutional imperative in relation to the administration of justice in public. Accordingly, she felt it appropriate to continue the reporting restrictions.

The Present Appeal

5. This appeal has turned almost entirely on the correct interpretation of s. 252 of the Children Act 2001 which, for ease of reference, reads:

> "252(1) Subject to subsection (2), in relation to any proceedings for an offence against a child or where a child is a witness in any such proceedings—
>
> (a) no report which reveals the name, address or school of the child or includes any particulars likely to lead to his or her identification, and
>
> (b) no picture which purports to be or include a picture of the child or which is likely to lead to his or her identification, shall be published or included in a broadcast.
>
> (2) The court may dispense to any specified extent with the requirements of *subsection (1)* if it is satisfied that it is appropriate to do so in the interests of the child.

(3) Where the court dispenses with the requirements of *subsection (1)*, the court shall explain in open court why it is satisfied it should do so.

(4) *Subsections (3) to (6)* of *section 51* shall apply, with the necessary modifications, for the purposes of this section.

(5) Nothing in this section shall affect the law as to contempt of court."

The phrase within the section that seems particularly in point would, it seems to me, be "in relation to any proceedings for an offence against a child".

6. The media appellants argue that the definition of 'child' in the Children Act 2001 does not include a deceased person who died before attaining their majority. Reliance is placed on a judgment of mine in the case of *Health Service Executive v. McAnaspie (Deceased)* [2012] IR 548. The proceedings in that case concerned a child who was the subject of a care order pursuant to s. 18 of the Childcare Act 1991. An order under that section commits a child to the care of a Health Board for so long as she/he remains a child, or for such shorter periods as the Court may determine. The child in question went missing when he was aged 17 and his body was subsequently discovered; he had died following a stabbing incident.

7. For my part, I believe the *McAnaspie* decision is of little relevance in the present context. This is because what is in issue is not the definition of 'child' *per se*; the Children Act 2001 provides a statutory definition. Rather, as I've mentioned above, what is really in issue is the phrase "in relation to any proceedings for an offence against a child". When questioned by members of the Court, counsel on behalf of the media appeared to accept that the trial of Ms. C was a trial relating to "proceedings for an offence against a child", but says that the question posed and the concession offered does not dispose of the matter.

8. It is urged that interpreting the section in the way contended for by the DPP would give rise to a number of anomalies. First, it is pointed out that there have been many cases involving offences, in particular, homicides, where the child was a victim at the time of the offence, but no similar application was made in any one of them. Indeed, it is said that the present case provides a good example of the sort of anomalies that would arise from interpreting the section in the way the Director suggests. In this case, for example, Ms. C was ultimately found not guilty by reason of insanity, but that fact has not been reported. It is pointed out that the entitlement of the media to report on criminal trials is an important aspect of the constitutional imperative that justice be administered in public. Reference is made in that regard to the cases of *Irish Times v. Ireland* [1998] 1 IR 359 and *Independent Newspapers (Ireland) Limited v. Anderson* [2006] 3 IR 341.

9. The second alleged anomaly is that the effect of the restriction is at odds with the purpose of the Children Act 2001 itself. The appellants argue, as they did in the court below, that the order serves only to protect the anonymity of Ms. C. The Children Act 2001 does not, however, concern itself with the protection of an accused's anonymity *per se*. Its focus is on the protection of child victims from further victimisation which due to the nature of the case is not a factor here.

10. The position of the DPP is that s. 252 is an exception to the general constitutional rule that justice shall be administered in public and it extends to circumstances where the offence alleged involved the killing of a child. Reference is made to s. 265 of the Children Act 2001 which provides a statutory presumption that the victim was a child at the time the offence was allegedly committed until the contrary is shown. It is said that the media appellant is attempting to "rewrite history" to the extent that they argue a deceased child ceases to be either a "child" for the purposes of the act or that proceedings no longer relate to "an offence against a child" in those circumstances. It was open to the legislature to create such an

exemption, but it did not do so. Counsel on behalf of the Director submits that the sole basis for the lifting of reporting restrictions in this case is if the applicant/appellant demonstrated that doing so was in the best interests of the child. It is their case that no such basis has been provided either at first instance or before this Court.

11. The appellants also say that regard must be had to the fact that a breach of the restrictions potentially involves the commission of a criminal offence; therefore, it is said that the new provision should be the subject of a restrictive interpretation to give effect to the well-established principle that penal statutes are to be construed strictly.

12. On behalf of the media, it is said that s. 252 is open to an interpretation which would achieve the desirable objective of protecting the rights, including privacy rights, of children, but where the child is dead and reporting restrictions would serve no useful purposes, allow reporting. They say that can be achieved if the word 'child' appearing in subsection (2) is interpreted as meaning a live child, while the word 'child' in subsection (1), appearing as it does in the context of the phrase "any proceedings for an offence against a child", means a child living or dead. On behalf of the Director, it is said that the interpretation contended for is a contrived and artificial one. For my part, I think that objection is well-founded. The arguments about the possibility of interpreting the word 'child' in the same section in two different ways, and the further argument about the fact that a restrictive interpretation is called for, have not caused me to have any doubt about my view.

13. In my view, it is so clear as to be almost beyond argument that the Court proceedings involving Ms. C were Court proceedings in respect of an offence against a child. In my view, it is not possible to interpret this section as not including a deceased person who was a child at the time of death. Neither, in my view, is it possible to exclude proceedings relating to offences committed against a child, as a child, if they come on for hearing after the child has attained his or her majority.

14. I appreciate the media may find the ruling surprising and that they may say that it involves a radical departure from what had been a long-established practice. They may say that the outcome is an undesirable one and may be in a position to make that argument with some force. Nonetheless, the language of the statute is clear and unequivocal and, enjoying a presumption of constitutionality as it does, must be given effect to. If change is required and if it is desired to return to previous practice where it was possible to report cases involving the deaths of children, then it is a matter requiring intervention by the Oireachtas.

15. While the outcome may not be a particularly welcome one, I am of the view that the interpretation of the section in issue by the High Court judge was correct, and accordingly, I would dismiss the appeal. As the events of the COVID-19 pandemic required this judgment to be delivered electronically, the views of my colleagues are set out below.

Kennedy J.

I agree.

Ní Raifeartaigh J.

I also agree.