

**Michael O'Sullivan, Applicant, v. District Judge
Hamill and The Director of Public Prosecutions, Re-
spondents [1997 No. 129 J.R.]**

High Court

25th February, 1998

Criminal law - Evidence - Procedure - Capacity - Deposition by means of live television link - Whether prior finding that person involved had mental handicap necessary - Whether unsworn testimony admissible at trial - Criminal Evidence Act, 1992 (No. 12), ss. 13, 19 and 27.

Section 13(1) of the Criminal Evidence Act, 1992, provides:-

“In any proceedings for an offence to which this Part applies a person other than the accused may give evidence, whether from within or outside the State, through a live television link -

- (a) if the person is under 17 years of age, unless the court sees good reason to the contrary,
- (b) in any other case, with the leave of the court.”

Section 19 of the Act of 1992 provides that the reference in s. 13 to a person under 17 years of age shall include a reference to a person with mental handicap who has reached that age.

Section 27 of the Act of 1992 provides that in any criminal proceedings the evidence of a person with mental handicap may be received otherwise than on oath or affirmation if the court is satisfied that he is capable of giving an intelligible account of events which are relevant to those proceedings.

The applicant was charged with having sexual intercourse with a person who was mentally impaired, contrary to s. 5(1) of the Criminal Law (Sexual Offences) Act, 1993. The applicant applied to have the alleged victim of the offence called on deposition. No argument was directed to the first respondent about holding an inquiry as to the alleged victim's capacity to give evidence and there was no refusal by the first respondent to hold such inquiry.

The applicant sought an order of *certiorari* quashing the order of the first respondent directing that the alleged victim should be permitted to be called on deposition by means of a live television link and an order of prohibition precluding the taking of such deposition. He contended that in making the said order the first respondent had acted without jurisdiction or alternatively, had exceeded his jurisdiction in that he heard no evidence that the alleged victim was a person with a mental handicap. He argued that it must be proved that a person is mentally handicapped before allowing such a link and because a person with a mental handicap can give an unsworn statement in certain circumstances and that evidence can be used at trial, there must be an inquiry as to whether that person has a mental handicap prior to allowing such evidence.

Held by the High Court (O'Higgins J.), in refusing the relief sought, 1, that as s. 13(1)(b) of the Act of 1992 provided that evidence could be given by way of a live television link in all cases with the leave of the court, the jurisdiction of the court to allow evidence to be given by way of television link was not based on a prior finding that the person involved had a mental handicap.

2. That the capacity or competence of a witness to give evidence, sworn or unsworn, was an entirely different matter to the jurisdiction of the court in relation to the television link.

3. That, before a video recording of a person with a mental handicap at a preliminary examination could be admitted as evidence at the trial of an offence, pursuant to s. 16 of the Act of 1992, there must be an inquiry as to whether that person's unsworn testimony was admissible under s. 27 of the Act of 1992, by considering whether the person had a mental handicap and whether the person was capable of giving an intelligible account of events relevant to the proceedings.

4. That there was no evidence in the instant case to indicate whether the provisions of s. 27 of the Act of 1992 would be invoked.

Seemle: That since the issue of the mental handicap of a witness may be a key issue before the jury at a trial, it may be preferable to rely on the provisions of s. 13(1)(b) rather than s. 13(1)(a) at a preliminary examination.

No cases are mentioned in this report.

Judicial review.

The facts have been summarised in the headnote and are fully set out in the judgment of O'Higgins J., *infra*.

On the 7th April, 1997, the High Court (Shanley J.) granted leave to the applicant to apply, by way of judicial review, for an order of *certiorari* quashing the order of the first respondent directing that a witness in a criminal prosecution against the applicant should be permitted to be called on deposition by means of a live television link and an order of prohibition directing that the first respondent be precluded from taking such deposition.

The application was heard by the High Court (O'Higgins J.) on the 6th February, 1998.

John Major for the applicant.

Adrienne Egan for the second respondent.

Cur. adv. vult.

O'Higgins J.

25th February, 1998

By order of Shanley J. dated the 7th April, 1997, the applicant was given leave to apply by way of application for judicial review for the reliefs set out in paras. D(i) and D(ii) of the statement of grounds and to apply on five of the seven grounds contained in the grounding statement.

The reliefs sought were:-

- (i) an order of *certiorari* directing the quashing of an order made by the first respondent dated the 5th March, 1997, directing that a witness in the case against the applicant entitled *The Director of Public Prosecutions v. Michael O'Sullivan* should be permitted to be called on deposition (pursuant to s. 8(1) of the Criminal Procedure Act, 1967) by means of a live television link pursuant to s. 13(1) of the Criminal Evidence Act, 1992;
- (ii) an order of prohibition directing that the first respondent be precluded from taking a deposition or depositions (pursuant to s. 8(1) of the Criminal Procedure Act, 1967) from a witness in the case against the applicant entitled *The Director of Public Prosecutions v. Michael O'Sullivan* by means of a live television link pursuant to s. 13(1) of the Criminal Evidence Act, 1992.

It is common case today that four of the five grounds on which the reliefs were sought were based on a misapprehension of the state of the law at the relevant time. Apparently it was not adverted to that by virtue of the provisions of s.16(f) of the Criminal Justice (Miscellaneous Provisions) Act, 1997, an offence under s. 5 of the Criminal Law (Sexual Offences) Act, 1993, is made a "sexual offence" for the purpose of the Criminal Evidence Act, 1992. I am told by counsel that the Act came into effect a day before the proceedings in the District Court. The applicant has therefore abandoned grounds one to four and the sole remaining ground is as follows:-

"That in making the said order the first respondent acted without jurisdiction, or alternatively exceeded his jurisdiction in that he heard no evidence that the witness sought to be called on deposition was a person with a mental handicap."

The following are the uncontested or agreed facts:-

1. The applicant was charged with having sexual intercourse with a person who was mentally impaired contrary to s. 5(1) of the Sexual Offences Act, 1993.

2. All the argument in the District Court was as to whether the offence alleged came within the ambit of Part III of the Criminal Evidence Act, 1992 - which allows evidence by television link in certain circumstances.
3. The application to have the alleged victim of the offence called on deposition was made by the defence.
4. There was no argument directed to the judge about holding an inquiry as to the capacity of the witness to give evidence.
5. The judge was not asked to inquire into the mental capacity of the alleged victim.
6. There was no refusal to hold such inquiry.

Counsel for the applicant argues that the court had no jurisdiction to order that the evidence be taken on live television link. He made two main submissions.

- (1) If a victim can give deposition by way of video link because she is mentally handicapped then it must be proved that she was handicapped before allowing such video link.
- (2) Because a person with a mental handicap can give an unsworn statement in certain circumstances, and because that evidence may be used at a trial, there must be an inquiry as to whether that person has a mental handicap, prior to allowing video link evidence.

The relevant legal provisions are as follows:-

Sections 12 and 13 of the Criminal Evidence Act, 1992, provide as follows:-

“12. This Part applies to -

- (a) a sexual offence,
- (b) an offence involving violence or the threat of violence to a person, or
- (c) an offence consisting of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence mentioned in paragraph (a) or (b).

13. (1) In any proceedings for an offence to which this Part applies a person other than the accused may give evidence, whether from within or outside the State, through a live television link-

- (a) if the person is under 17 years of age, unless the court sees good reason to the contrary,
- (b) in any other case, with the leave of the court.

- (2) Evidence given under subsection (1) shall be video-recorded
...

Section 16 of the Act of 1992 provides as follows:-

“16. (1) Subject to subsection (2) -

- (a) a video-recording of any evidence given by a person under 17 years of age through a live television link at the preliminary examination of an offence to which this Part applies, and

- (b) a video-recording of any statement made by a person under 14 years of age (being a person in respect of whom such an offence is alleged to have been committed) during an interview with a member of the Garda Síochána or any other person who is competent for the purpose, shall be admissible at the trial of the offence as evidence of any fact stated therein of which direct oral evidence by him would be admissible;

Provided that, in the case of a video-recording mentioned in paragraph (b), either-

- (i) it has been considered in accordance with section 15 (2) by the judge of the District Court conducting the preliminary examination of the offence, or
- (ii) the person whose statement was video-recorded is available at the trial for cross-examination.
- (2) (a) Any such video-recording or any part thereof shall not be admitted in evidence as aforesaid if the court is of opinion that in the interests of justice the video-recording concerned or that part ought not to be so admitted.
- (b) In considering whether in the interests of justice such video-recording or any part thereof ought not to be admitted in evidence, the court shall have regard to all the circumstances, including any risk that its admission will result in unfairness to the accused or, if there is more than one, to any of them.
- (3) In estimating the weight, if any, to be attached to any statement contained in such a video-recording regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.
- (4) In this section “statement” includes any representation of fact, whether in words or otherwise.”

Section 19 of the Act of 1992 provides as follows:-

“The references in sections 13(1)(a), 14(1)(b), 15(1)(b) and 16(1)(a) to a person under 17 years of age and the reference in section 16(1)(b) to a person under 14 years of age shall include references to a person with mental handicap who has reached the age concerned.”

Section 27(1) of the Act of 1992 provides that:-

“Notwithstanding any enactment, in any criminal proceedings the evidence of a person under 14 years of age may be received otherwise than on oath or affirmation if the court is satisfied that he is capable of giving an intelligible account of events which are relevant to those proceedings.”

Section 27(3) provides that:-

“Subsection (1) shall apply to a person with mental handicap who has reached the age of 14 years as it applies to a person under that age.”

It is clear from the provisions of s. 13(1)(a) that in the case of a person under the age of 17 (which, by virtue of the provisions of s. 19, shall include references to a person with a mental handicap who has reached that age) that person may give evidence through a live television link - unless the court sees good reason to the contrary. Likewise it is clear from the provisions of s. 13(1)(b) that in any other case to which Part III of the Act applies, evidence may be given through a live television link with the leave of the court.

The court, therefore, has jurisdiction to allow evidence by live television link in all cases to which Part III of the Act applies. Since Part III of the Act applies to the case in question it follows that the court has jurisdiction to allow television link to be used.

The jurisdiction of the court in the present case to allow evidence to be given by way of television link is not therefore based on a prior finding that the person involved had a “mental handicap”. Indeed, it might be possible to argue that, since the issue of the mental handicap of a witness might be a vital issue before the jury at the trial, it would be preferable to rely on the provisions of s. 13(1)(b) rather than s. 13(1)(a) at the preliminary examination.

The capacity or competence of a witness to give evidence (sworn or unsworn) is an entirely different matter than the jurisdiction of the court in relation to the television link.

The second argument of the applicant relates to the capacity or competency of the alleged victim to give unsworn evidence.

Section 16 of the Act of 1992 makes provision, *inter alia*, for a video recording of a person with a mental handicap to be evidence of any fact stated herein of which "direct oral evidence" would be admissible. Direct oral evidence is only admissible if a person is competent to give evidence.

Unsworn evidence is provided for from a person with a mental handicap "if the court is satisfied that he is capable of giving an intelligible account of events which are relevant to those proceedings". In my view, before that section comes into play there are two requirements on which the court has to be satisfied -

- (1) that the person has a mental handicap, and
- (2) that he is capable of giving an intelligible account of events which are relevant to the proceedings.

Clearly there must be an inquiry. However, in the proceedings in this case - there is nothing to indicate as to whether the provisions of s. 27 of the Criminal Evidence Act, 1992, are to be invoked. Neither is there any evidence that, if the provisions of the section are applied, that will be done incorrectly.

Accordingly, the reliefs sought by the applicant are refused.

Solicitors for the applicant: *McCartan & Hogan*.

Solicitor for the second respondent: *The Chief State Solicitor*.

Brian Kennedy, Barrister

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