Determination

Title:	Director of Public Prosecutions -v- Herda
Neutral Citation:	[2018] IESCDET 76
Supreme Court Record Number:	S:AP:IE:2017:000156
Court of Appeal Record Number:	2016 No. 226
Date of Determination:	2018-05-21
Composition of Court:	O'Donnell J., McKechnie J., Finlay Geoghegan J.
Status:	Approved

Supporting Documents:

156-17 Respondants Notice.pdf

156-17 AFL.doc

THE SUPREME COURT

DETERMINATION

Between:

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

AND

MARTA HERDA

Applicant

APPLICATION FOR LEAVE TO APPEAL TO WHICH ARTICLE 34.5.3° OF THE CONSTITUTION APPLIES

RESULT: The Court does not grant leave to the applicant to appeal to this Court from the judgment and order of the Court of Appeal

ORDER SOUGHT TO BE APPEALED

COURT: Court of Appeal

DATE OF JUDGMENT OR RULING: 12th October, 2017
DATE OF ORDER: 12th October, 2017
DATE OF PERFECTION OF ORDER: 6th November, 2017
THE APPLICATION FOR LEAVE TO APPEAL WAS MADE ON THE 1ST DECEMBER, 2017 AND WAS IN TIME.

REASONS GIVEN

1. This determination relates to an application for leave to appeal to the Supreme Court from a judgment of the Court of Appeal (Birmingham, Mahon and Whelan JJ.) delivered on the 12th October, 2017, and from the resulting Order of that Court made on the same date and perfected on the 6th November, 2017.

2. Marta Herda, referred to in this Determination as "the accused" or "the applicant", seeks leave to appeal to this Court from the said judgment and Order of the Court of Appeal. The Director of Public Prosecutions, who opposes the application, is referred to in this Determination as "the DPP" or "the respondent".

Jurisdiction

3. The jurisdiction of the Supreme Court to hear appeals is set out in the Constitution. As is clear from the terms of Article 34.5.3° thereof and from the many determinations made by this Court since the enactment of the Thirty-third Amendment, it is necessary, in order for this Court to grant leave to appeal from a decision of the Court of Appeal, that it be established by the applicant that the decision sought to be appealed involves a matter of general public importance, or that it is otherwise necessary in the interests of justice that there be an appeal to this Court.

4. The general principles applied by this Court in determining whether to grant or refuse leave to appeal having regard to the criteria incorporated into the Constitution as a result of the Thirty-third Amendment have now been considered in a large number of determinations and are fully addressed in both a determination issued by a panel consisting of all of the members of this Court in *B.S. v. Director of Public Prosecutions* **[2017] IESC DET. 134 and in a unanimous judgment of a full Court delivered by O'Donnell J. in** *Price Waterhouse Coopers (A Firm) v. Quinn Insurance Ltd. (Under Administration)* **[2017] I.E.S.C. 73. It follows that it is unnecessary to revisit the new constitutional architecture for the purposes of this determination.**

5. It should be noted that any ruling in a determination is between the litigants. It is final and conclusive as far as these parties are concerned, as it is in relation to the subject matter of that application only. The issue determined on the application is whether the facts and legal issues meet the constitutional criteria to enable this Court to grant leave. It will not, save in the rarest of circumstances, be appropriate to rely on a refusal of leave as having any precedential value in relation to the substantive issues if such were to arise in the context of a different case. Where leave is granted, any issue so permitted will be finally disposed of in due course in the substantive decision of the Court.

Background and Procedural History

6. The full facts and background of the case are more fully recited in the judgment of the Court of Appeal and in the parties' respective documents on this application for leave. Accordingly, what is presented here is a summary for contextual purposes only.

The Central Criminal Court

7. On the 28th July, 2016, following a seventeen-day trial in the Central Criminal Court, the accused was convicted by a majority verdict of the murder of a Mr. Csaba Orsas on the

26th March, 2013. She received the mandatory sentence of life imprisonment.

8. The accused is a Polish national; the deceased was a Hungarian national. They lived in different parts of Arklow, County Wicklow. They both worked for the same hotel and had known each other for approximately two years. At the time of the incident the accused had been living and working in Ireland for approximately seven years and had a good, though not perfect, command of the English language. The accused alleged that the deceased had been infatuated with her for some time and regularly followed and harassed her.

9. Early on the morning of the 26th March, 2013, the accused drove her car, with the deceased in the front passenger seat, through a barrier and railing at Arklow harbour and into deep water. The accused escaped from the car and swam to safety. The deceased's body was later found washed up on the nearby shore; he had died from drowning. The prosecution's case against the accused was that she had deliberately and intentionally driven her car, at speed, into the water with the intention of killing the deceased or of causing him serious harm. She denied deliberately driving into the water or intending to kill or seriously harm the deceased, and claimed to have little recollection of the events in question. Her version of events was that what had happened was an accident.

10. Part of the prosecution's case consisted of evidence from people who came to the accused's assistance after she exited the water, from ambulance personnel and also from two nurses who originally tended to her when first brought to a local hospital. The DPP suggested that the proper interpretation of comments made by the accused to witnesses last mentioned, and of statements she later made during interviews with investigating gardaí, was that the same amounted to admissions of having murdered the deceased. The accused robustly challenged the evidence of these witnesses and the prosecution's interpretation thereof, alleging that her comments after the crash and in interview did not convey the information which the prosecution claimed they did. It is evident from the manner in which cross-examination of the prosecution witnesses was conducted by counsel on behalf of the accused that her imperfect command of the English language was alleged to be at least partly to blame for any apparently incriminating statements she may have made. The applicant did not have the assistance of an interpreter while speaking to the nurses in the hospital or when making an initial statement to the gardaí, though she was accompanied by an interpreter during later garda interviews.

The Court of Appeal

11. The accused appealed her conviction to the Court of Appeal. She raised seventeen grounds in her Notice of Appeal. The judgment of the Court ([2017] I.E.C.A. 260) was delivered by Mahon J., with whom Birmingham and Whelan JJ. concurred, on the 12th October, 2017. The Court considered and rejected each of the grounds of appeal so advanced. Accordingly, her appeal was dismissed.

Appeal to this Court

12. The applicant now seeks leave to appeal against the said judgment and Order of the Court of Appeal, and if ultimately successful wishes to have her conviction for murder set aside. Although maintaining in the first instance that the case should be resolved in her favour on the application of domestic law, the applicant reserves her position to seek to have this Court make a reference to the Court of Justice of the European Union in the event that she does not otherwise succeed on the basis first mentioned. Such a reference would concern, *inter alia*, **the proper interpretation of the Charter of Fundamental Rights of the European Union and the implementation of EU law in the applicant's circumstances, having particular regard to the requirements of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings. The DPP opposes the application for leave and intends to ask this Court to dismiss the appeal if leave is granted.**

13. It should be noted that the applicant does not seek to have a provision of any Act of the Oireachtas declared unconstitutional or incompatible with the European Convention on Human Rights, nor does she or the DPP seek to have this Court depart from or distinguish one of its own decisions. Neither party has requested a priority hearing.

14. The reasons submitted by the applicant in support of her application are set out in detail in her Application for Leave and Notice of Appeal. The DPP's reasons for opposing the granting of leave are likewise set out in her replying document. All such documentation is available together with this determination on the Courts Service website; it is therefore unnecessary to repeat these arguments in this ruling.

Decision

15. In its determination in the case of *O.M.R v. Minister for Justice and Equality & ors* **[2017] IESC DET. 14 ("O.M.R"), dated the 10th February, 2017, this Court stated as follows:**

> **"The application for leave in this case runs to 18 pages and the respondents' response covers 15 pages. The Court wishes to take this opportunity of reminding those who are preparing applications for leave of the necessity of the concise, precise and accurate presentation of the issue. In all cases in which applications for leave come before this Court there will be at least one written judgment. Since the constitutional criteria require either the identification of a point of law of general public importance or the interests of justice, it ought to be possible to identify the point of law, and to explain its asserted importance (or if a respondent to contest it) in a focussed way. Diffuse and repetitive submissions can often obscure the points sought to be made and inhibit rather than facilitate the Court's consideration of them."**

16. The application as filed by the applicant in this case ran to some 27 pages. In correspondence the Court drew the applicant's attention to the above passage and indeed the respondent herself also invited the applicant to file an amended application in conformity with the guidelines and jurisprudence of the Court; such invitation was not taken up. Nonetheless, the application was accepted by the Supreme Court office in circumstances where the deadline for filing same was close to expiring. However, the Court wishes to reiterate the general point made in *O.M.R.* **In addressing the reasons why the constitutional threshold for leave to appeal to this Court have been satisfied, it will not be appropriate, save in the rarest of cases, for an applicant simply to re-run each and every ground of appeal and legal submission that was made to the Court of Appeal. This Court is not a forum for a second wide-ranging appeal which traverses each and every ostensible grievance which an applicant may have with the judgment of that appellate court, or for that matter with every ruling given or decision made by the trial court**

17. The general right of appeal from the High Court now lies to the Court of Appeal; in the ordinary course, that will bring the appellate process to an end. In order to make out the case for a second appeal to this Court, attention must be focussed on demonstrating why a particular point arises and how that point meets the constitutional threshold for leave to appeal. The benefits of the new constitutional appellate hierarchy would be entirely circumvented if appeals to this Court were conducted on the same extensive basis as are appeals to the Court of Appeal: there must be a deliberate differentiation between issues which meet the relevant criteria and those which do not. It would entirely defeat the purpose of having a Court of Appeal if every point initially raised was to be heard again. Self-evidently not every ground of appeal that an appellant might legitimately raise before the Court of Appeal will be one which satisfies the threshold for leave to this Court. It is incumbent upon applicants, as ably aided by solicitor and counsel where that be the

case, to pursue only those issues which can be said to satisfy the requirements for leave to appeal and to demonstrate how this is so. This may well necessitate the identification of those points most likely to meet the threshold and the sensible abandoning of those that patently will not: such a demarcation is not only more conducive to the Court's consideration of the issues but ultimately is also far more beneficial from the perspective of the individual seeking leave.

18. The applicant groups her arguments into seven categories: the first relates to the application of the statutory presumption contained in section 4(2) of the Criminal Justice Act 1964 in cases where the possibility of accident or misadventure arises on the evidence; the second issue is whether there is a requirement for a trial judge to give a direction to the jury that although the material act of an accused may have been deliberate, nonetheless there remained a reasonable possibility that she did not intend to kill or cause serious harm; the third concerns the required direction to the jury in respect of the issue of recklessness in murder trials; the fourth point relates to the extent of the duty on the trial judge to put the defence case to the jury at the close of the trial, in particular by summarising key points of conflict between the parties; the fifth, discussed in more detail below, is about confession warnings; the sixth issue concerns the direction which the trial judge gave to the jury on the meaning of the standard of proof, namely "beyond reasonable doubt"; and the final point relates to whether there is a requirement in a criminal trial for the judge to charge the individual members of the jury that they are bound by their oath not to subscribe to a verdict with which they do not truly agree in the exercise of their independent judgment.

19. The DPP responds that none of these are matters of general public importance, nor is it, in the interests of justice, necessary that there be an appeal to this Court. It is submitted that the applicant is seeking to re-visit exactly the same issues which were canvassed at length, both orally and in writing, before the Court of Appeal. It is submitted that, in reality, this case revolved on proven factual matters; it unfolded in a similar way to many other cases and is not in any way exceptional. The case turned very much on its own facts, with numerous pieces of evidence pointing to the applicant having deliberately driven the deceased to his death. The respondent does not accept that the trial judge made any error of law, nor does she accept that the Court of Appeal erred in upholding the rulings of the learned judge and in dismissing the appeal as a result. Moreover it is also said that many of the proposed arguments in support of the granting of leave are based on a misreading of what actually happened at trial.

20. In respect of the first, second, third, fourth, sixth and seventh points raised by the applicant, the Court agrees with the respondent that what is sought is merely a re-run of arguments which were comprehensively addressed in the judgment of the Court of Appeal, without any real engagement with the constitutional criteria which must be satisfied in order for leave to appeal to be granted. These issues all relate to alleged errors in, or omissions from, the judge's charge to the jury. In respect of each and every such ground as advanced, the Court of Appeal carefully engaged with the submissions of the applicant, read in light of the transcript of the charge, and found that the relevant legal issues had been satisfactorily explained to the jury. It will of course always be possible to argue that a certain concept might have been better described, that a term of art could have been explained in a more readily understandable manner, or that certain examples or hypotheticals could have been better phrased. There is no such thing as a perfect charge or one that cannot be improved with the benefit of hindsight: that, however, is not the standard or test which is demanded. As stated in the judgment of the Court of Appeal, the trial judge's task was to explain the relevant legal principles to the jury in as comprehensible a manner as possible. In the view of this Court, that is precisely what was achieved. The Court does not consider that the applicant's submissions on these grounds raise any uncertainty or ambiguity in the law regarding the judge's charge in a murder trial, nor has it been shown that the said charge in any way rendered the

applicant's trial unsafe or unsatisfactory. Accordingly, the constitutional threshold has not been met and leave in respect of these grounds will be refused.

21. The fifth ground, referenced above, contains a number of sub-issues regarding confession warnings under section 10 of the Criminal Procedure Act 1993. Many of the general points made therein can be rejected on the same basis as were the grounds in the previous paragraph. However, one matter of note was the occasional references in the application to the lack of an interpreter. It was said that this may have had significance in two ways. The first related to what turned out to be important conversations with the triage nurses. The applicant questioned whether any particular form of direction or warning to the jury may be required where alleged confessions were made by someone whose first language is not English and where no interpreter was present, in circumstances where the meaning of the words used was challenged and the exchanges were not video recorded. The applicant also raised a related point concerning the criteria for admissibility of such admissions. The second issue, identified by a single reference, was whether an interpreter ought to have been present during the interview with Garda Crehan in light of the requirements of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings ("the Directive"). That, however, is as far the applicant's case went on the point. It was only in subsequent correspondence from the applicant's solicitor received in January, 2018, that the issue assumed a more central importance, with it being suggested that the lack of an interpreter on such occasions may have imperilled the fairness of the proceedings. In light of such correspondence, the Court sought trial transcripts from the applicant relevant to these issues concerning the lack of an interpreter.

22. It is important to note at the outset that, as acknowledged by the applicant in her application for leave, no complaint regarding non-compliance with the Directive was made during the course of trial, nor was any ground of appeal to that effect advanced in the Court of Appeal. In normal circumstances, if this was intended as a point of substance, the failure to raise it previously would be unsatisfactory insofar as it deprives this Court of an appropriate framework within which to assess the point raised. However, on the run of the case this can easily be explained by the manner in which it was decided to raise this issue with the jury.

23. The fact that the applicant's mother tongue was not English was used by defence counsel on many occasions throughout trial; the purpose of this was to use her language difficulties to explain any incriminating statements she may have made. It was suggested to various witnesses that what she had said may have had a meaning other than what they initially ascribed to it. This was a feature of the cross-examination and on several occasions witnesses agreed with counsel that what the accused may have meant might have been at variance with what they understood at that moment, or with what she was recorded as having said: it was repeatedly suggested that her imperfect English may have been to blame for this. This was a clear strand throughout the defence case and evidently was the product of a legitimate and strategic decision taken by her legal team to exploit whatever issues she may have had with the English language. However, any difficulties she may have had were never elevated beyond this attempt to explain the statements in question. Furthermore, the Directive was never mentioned, nor was there any attempt to rely on comparable domestic law to suggest that the fairness of her trial suffered from the absence of an interpreter, or that there had been a breach of fair proceedings.

24. The applicant's complaint regarding the lack of an interpreter could apply only to the conversations with Nurse Best, Nurse Ging and Garda Crehan, as on all subsequent occasions she had the benefit of an interpreter. The Court would note first that it does not appear that the Directive would apply to the conversations with the nurses. The scope of the Directive is defined in Article 1(2), which provides that the right to interpretation and translation in criminal proceedings applies "from the time that [the person concerned is] made aware by the competent authorities of a Member State ... that they are suspected or

accused of having committed a criminal offence until the conclusion of the proceedings". The conversations with the nurses happened before such time and would not be captured by the Directive.

25. With regard to Garda Crehan, it was clear during his examination-in-chief and his re-examination that this witness, when taking the first two statements from the accused (during which no interpreter was present) regarded himself as doing no more than hearing her side of the story; though there is a suggestion that he was aware at that stage of possible issues concerning criminal damage and dangerous driving, the accused was not in Garda custody and was not regarded as a suspect in respect of any criminal offence ***per se*****, much less in the murder of the deceased. Thus as a strict matter of interpretation of the terms of the Directive, it is not clear that the issue truly arises.**

26. Moreover, even if one were to approach the issue of alleged "unfairness" of the trial from a broader perspective, it still does not appear that the threshold for a second appeal has been satisfied. It is clear that the defence being run by the applicant was that she did not deliberately drive into the water and that her language skills were to blame for any ostensibly incriminating statements she may have made. This case was pressed repeatedly on cross-examination of the various prosecution witnesses. It was abundantly clear to the jury that Ms Herda resiled from the confessions being attributed to her and that she blamed them on her language skills. Each inculpatory phrase was deconstructed at length with a view to providing an innocent explanation, or at the very least to cast doubt on whether it had the meaning initially attributed to it. That being so, the assessment of this defence became a classic matter for the jury to consider in light of the submissions made. To this end the jury saw much video footage of the applicant in interviews with the gardaí on later occasions. It was in a position to assess her competency in English, in addition to the usual matters such as credibility, demeanour, body language and so on.

27. It must also be acknowledged that, whatever about the quality of her English, the applicant's story was inconsistent in several important ways, notably in respect of the manner in which the deceased came to be in her car on the morning in question. Indeed it was alleged by the DPP that in several respects her story simply did not stack up. Moreover numerous witnesses gave evidence that although the applicant struggles with tenses, her English is in fact quite good. These were all matters that the jury was entitled to have regard to in coming to a verdict.

28. As this Court stated in *DPP v. Cronin (No. 2)* **[2006] 4 I.R. 329, it is only where, due to some error or oversight of substance, a fundamental injustice has occurred that the Court will permit a point not raised at trial to be argued on appeal. Here a point is sought to be raised for the first time at a second appeal. Having reviewed the transcripts at length, the Court is satisfied that nothing therein gives rise to any cause of concern as to the fairness of the applicant's trial or any question as to whether it was a trial in due course of law. The jury was fully aware of the applicant's capacity to speak and understand English and it was at all times clear that her case was that her "confessions" had not been correctly understood as a result of her language skills. It was the jury's function to weigh that explanation against the evidence presented by the prosecution and to reach a verdict on that basis. That is precisely what it did. Accordingly, since it cannot be said that it involves a matter of general public importance or that any fundamental injustice has been done, it is not appropriate to grant leave on such ground.**

29. In the circumstances, the Court is not satisfied that the fifth point raised by the applicant satisfies the constitutional threshold for leave to appeal. Moreover, the Court is of the view that it is not necessary in this case to refer any question of law to the Court of Justice of the European Union.

30. As noted above, this Court received additional correspondence from the applicant's

solicitor in January, 2018. This included a letter dated the 24th January, 2018, indicating that the solicitor had been contacted by the Ambassador of the Republic of Poland in relation to this application for leave, and that the Ambassador was considering seeking permission from the Court to file a brief written submission as an *amicus curiae* **in support of the application. It was said in the letter that it is a matter of significant public concern in Poland that the applicant's conviction involves a miscarriage of justice.**

31. In this jurisdiction the courts are constitutionally obliged, at every level and for the entire duration of the case, to ensure that a trial and all applications relating thereto take place in due course of law. In the discharge of this duty and obligation the courts do not receive or consider any approaches or submissions from any third party, save those with a sufficient interest recognisable by law, and then only where an application to that effect is lawfully moved before and duly permitted by the court in question. The principles governing such an application to be heard as an *amicus curiae* **were recently reiterated in a ruling of the Court delivered by O'Donnell J. on the 7th February, 2018, in** *M v. Minister for Justice & Equality & ors* **[2018] I.E.S.C. 7. Had any such application been made by the Ambassador, then, having regard to the principles articulated in** *M,* **the Court would in all probability have declined it, in accordance with the principles in its established jurisprudence.**

32. Amongst the reasons for so doing would have been, first, the fact that it would have to be clear that the proposed intervener would be in a position to make submissions of substantive value which would not otherwise be available to the Court. In this case all parties to the leave application, and in particular the appellant, are legally represented by experienced and professional lawyers who made detailed and comprehensive submissions. Indeed, so thorough were such submissions that the same well exceeded the established guidelines when seeking a further appeal to this Court. Accordingly, it was unlikely that there would have been a basis upon which an intervention by a third party could have succeeded. Secondly, it would only be in truly exceptional circumstances that an *amicus* **submission would be considered appropriate at the leave stage. The very fact that the parties to the leave application are legally represented would typically, of itself, provide a basis for refusing any attempted intervention by a proposed** *amicus***.**

33. Further in this context, on the 16th February, 2018, the Supreme Court Office directly received a letter from the Polish Ambassador. In fact it did not contain any application to make *amicus* **submissions but expressed general concerns in relation to the case. The Court read this letter pursuant to paragraph 14 of Supreme Court Practice Direction SC16. However, consistent with our principles of law and the proper administration of the criminal justice system, which require that both the parties and the public are aware of material to which the Court has regard in coming to any decision, the Court was satisfied that its content should be disregarded in coming to the conclusion which the Court has reached. It should be said, however, that nothing in the letter could be understood as advancing any issue or affecting the Court's consideration of it beyond what had already been submitted by the parties**

34. In conclusion, for the reasons recited above, this Court will refuse leave to appeal under Article 34.5.3° of the Constitution.

AND IT IS HEREBY SO ORDERED ACCORDINGLY.

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