EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

DECISION

Application no. 29276/17
Gary CAMPION
against Ireland

The European Court of Human Rights (Fifth Section), sitting on 10 October 2017 as a Committee composed of:
Nona Tsotsoria, *President,*
Síofra O'Leary,
Lətif Hüseynov, *judges,*
and Anne-Marie Dougin, *Acting Deputy Section Registrar,*
Having regard to the above application lodged on 12 April 2017,
Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Gary Campion, is an Irish national, who was born in 1983 and is detained in Mountjoy Prison, County Dublin. He was represented before the Court by Mr. P. Madden of Madden & Finucane Solicitors, a lawyer practising in Belfast.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

1. The criminal charge

3. The applicant was charged with murder in respect of an incident wherein the deceased ("FR") was shot twice in the back of the head while seated in his car in Moyross, County Limerick on 17 September 2006.

2. The evidence against the applicant

4. The prosecution alleged that FR had picked up the applicant in his car, where he had sat in the rear before leaning forward and shooting FR twice in the back of the head. The area was not covered by CCTV cameras at the time. The prosecution relied on statements allegedly made by the applicant after arrest (but later denied), including a statement that "if you left me out longer I would have killed more people. Fucking scumbags is all you are. I will clean up Moyross, not ye. I have lots more to kill...". In addition, the prosecution relied on out-of-court statements made by an eye witness ("EI"), who was a friend of FR and had been a front-seat passenger in the car when FR was killed.

5. EI had telephoned the emergency services in the immediate aftermath of the incident, and was noted to be in a state of 'considerable distress'. EI attended the Garda (police) station on the evening of the murder and made a first witness statement in which he denied knowing who had shot and murdered FR. He repeated this assertion the following day. He was then arrested and detained on suspicion of withholding information pursuant to the Offences Against the State Act 1939. He maintained his position over two days and six interviews.

6. Between EI's sixth and seventh interviews, whilst in police detention, a family member of the deceased attended the station wishing to talk to him. The family member was brought into an investigation room with EI, who was known to him. He told EI that he should tell the truth and that if he did so, he would not be labelled a "rat".

7. After the encounter with the family member of the deceased, EI stated during his seventh interview that the applicant was the person who had shot FR twice in the back of the head. This declaration was not videotaped, but a short memorandum was made by Gardaí (police) which was signed during the course of the last interview conducted with EI on 20 September 2006. EI repeated this statement during five subsequent videotaped interviews with Gardaí.

8. At trial and on appeal the question whether this encounter with the family member of the deceased was an "interview" and thus should have been recorded pursuant to the relevant provisions of domestic law was examined in detail. The Court of Appeal held that the encounter did not constitute an interview as it did not involve the detainee being questioned.

3. The criminal trial and application to admit evidence

9. When EI was called to give evidence at trial, he reverted to his original account to Gardaí that he did not know the identity of the person who had killed FR. EI claimed that he had lied while making the out-of-court statements identifying the applicant because he had been detained and he would have said anything to get out of custody.

10. During the trial, the prosecution made a successful application to admit into evidence the previous statements made by EI identifying the applicant as the person who had killed FR (see paragraph 7 above). The application was made pursuant to section 16 of the Criminal Justice Act 2006 ("the 2006 Act"), which sets out the circumstances in which out of court statements of a hostile prosecution witness can be admitted at trial (see paragraphs 23-25 below).

11. After "extensive arguments" were made by counsel during the hearing of the prosecution application which was conducted over a number of days (the "*voir dire*"), the trial judge decided that the statutory conditions for admission of the out-of-court statements were met and the statements were admitted into evidence. After viewing all the taped interviews with a view to assessing the mood and atmosphere as well as EI's demeanour, the trial judge concluded that EI had identified the applicant due to the "moral pressure" exerted on him by the family member of FR and not because of threats or inducements by the Gardaí as he had claimed. The trial judge noted that the defence had availed of the opportunity to cross-examine EI during the *voir dire.* In an *ex tempore* ruling, the trial judge gave oral reasons to support his conclusion that the statements were made voluntarily and were reliable. He indicated that he would give formal reasons later in writing (though in fact he did not).

4. The charge to the jury and outcome of the trial

12. During the course of the trial and particularly when ruling at the conclusion of the *voir dire* the trial judge had referred to the need for extreme caution in relation to the evidence of EI and how the jury would need to be directed in that regard. When subsequently delivering the charge to the jury, the trial judge described the case as "wholly different" from a normal scenario where all evidence was given on oath. He noted that the "essential evidence" relied on by the prosecution was not spoken by EI on oath and "is something which is denied by him on oath in the present proceedings". The trial judge explained the effect of section 16 of the 2006 Act and stressed that the jury was not obliged to accept all the evidence put before them. The jury was instructed that the weight to be accorded to the evidence was "entirely a matter" for them.

13. The prosecution and defence arguments about the manner in which the identification of the applicant had come about were both summarised during the jury charge. The trial judge was subsequently requested by the defence to further remind the jury that there had been no cross-examination in respect of the particular content of EI's out-of-court statements on which the prosecution sought to rely (content which was not repeated by EI as sworn oral evidence during the trial) and that he may have had a motive for lying. The trial judge duly did so.

14. The applicant was convicted of murder by a jury (by majority decision) on 28 May 2009 at the Central Criminal Court. He received a mandatory life sentence.

5. Appeal proceedings before the Court of Appeal

15. The applicant appealed his conviction on several grounds. He argued that the trial judge had erred in granting the application to admit the statements made by EI under section 16 of the 2006 Act. He argued that EI had not made the statements voluntarily, that he had been shown to be a liar and that his statements were not reliable. The applicant relied on *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, ECHR 2011, arguing that the statements were the "sole or decisive" evidence against him and he had not had an adequate opportunity to challenge them.

16. The applicant further submitted that the trial judge had failed properly to direct the jury as to the appropriate weight to be attached to the out-of-court statements. Finally, the applicant submitted that the trial judge had erred in failing to give reasons for his decision to admit the evidence.

17. In a decision dated 30 November 2015, the Court of Appeal recalled that the evidence at trial had also included self-incriminating remarks made by the applicant. The court considered that the encounter between EI and the family member of FR was not unacceptable psychological pressure, but was a legitimate effort by the Gardaí to seek information to solve a serious crime. The court noted that the trial judge, who had considered section 16 of the 2006 Act "in very great detail", was in the best position to decide on the voluntariness of the statements made, having seen the videotaped evidence and observed EI in court. The court agreed with the trial judge that EI did understand the importance of telling the truth (although he had previously chosen not to) and that the statements were reliable.

18. The Court of Appeal considered any unfairness to the applicant as a result of the admission of the statement on which the prosecution sought to rely. It noted that the provisions of the 2006 Act establish a high bar for the prosecution when seeking its admission. It was recognised "that the capacity to conduct an effective cross-examination in relation to the statements was reduced when the witness was resiling from them". However, the court also recalled that the applicant had not been required to prove his innocence as a result of the admission of the evidence. It was for the jury to decide what to make of the statement and it was far from certain that they would have felt they could rely on it. The jury, having had an opportunity to view EI in the courtroom as well as during interview on videotape, were well-positioned to decide that they were in no reasonable doubt that EI had been speaking the truth.

19. The defence had relied on *Al-Khawaja and Tahery* as establishing that the rights of an accused under Article 6 § (3) (d) of the Convention are

free-standing rights independent of the general right to a fair trial in Article 6. The Court of Appeal noted, however, that the Grand Chamber of the Court had moved emphasis away from a consideration as to whether the challenged evidence was the sole and exclusive evidence to one which focused on the overall fairness of the trial. It considered that in this respect, the applicant's legal representatives had had the opportunity to cross-examine EI on the sworn oral evidence he chose to give during the application to admit the out of court statements and during the trial proper. They had availed of those opportunities on both occasions "at very considerable length" and "to some considerable effect". The Court of Appeal found that the charge to the jury included all the major elements required in the circumstances, including an emphasis on the unusual nature of the particular evidence presented and the caution with which it should be approached.

20. Finally, the court considered that the trial judge had adequately reasoned his decision to admit the evidence orally during the trial without written expansion being required. What was required was that the parties know why they have won or lost, and that an appellate or review court will know on what basis the decision had been made. This had been the case. As such, the Court of Appeal concluded that the trial had been conducted with overall fairness and the appeal was dismissed.

6. Appeal proceedings before the Supreme Court

21. The applicant sought leave to appeal before the Supreme Court. The latter acknowledged that section 16 of the 2006 Act was a "novel provision in Irish law" (having recently been enacted), but it considered that the Court of Appeal had delivered a "careful and comprehensive judgment". The court concluded that the question of unfairness had been addressed fully by the application of section 16 of the 2006 Act to the particular facts at stake.

22. The court, having found that no issues of general public importance had been raised, refused leave to appeal on 21 October 2016.

B. Relevant domestic law

23. Under section 16 of the Criminal Justice Act 2006 ("the 2006 Act") previous inconsistent witness statements are admissible in court when certain statutory conditions are met. A statement made by a witness may be admitted as evidence if the witness, although available for cross-examination, refuses to give evidence, denies making the statement or gives evidence that is materially inconsistent with it.

24. The legislation provides that a statement may be admitted if the witness confirms it or it is proved that he made it, and the court is satisfied that direct oral evidence of the contents would be admissible, that it was made voluntarily, and that it is reliable. In addition, the court must be

satisfied that either the statement was made on oath, affirmation, or similar statutory declaration, or that when the statement was made the witness understood the requirement to tell the truth.

25. In addition, when deciding whether the statement is reliable the court shall consider how the statement was made. The court shall also have regard to any explanation offered by the witness for the refusal to give evidence or inconsistencies with previous statements. Finally, the statement shall not be admitted into evidence if the court, having regard to all the circumstances, including any risk of unfairness, is of the opinion it ought not to be admitted or its admission is unnecessary in view of the other evidence in the proceedings.

26. Section 16 of the 2006 Act was adopted in the context of criminal trials arising from gangland and organised crime. The provision aims to tackle the problem of witness intimidation and subsequent recanting of evidence (which in the past had led to trial collapse). When signing the order introducing the provision in 2007, the Tánaiste (deputy Prime Minister) and Minister for Justice, Equality and Law Reform at the time described the legislative changes as 'necessary to deal with the new challenges presented by gangland activity'.

COMPLAINTS

27. The applicant complains under Article 6 §§ 1 and 3(d) of the Convention that he was denied a fair trial because the out-of-court statements made by EI were admitted in evidence, he was unable to effectively cross-examine in relation to them, and the courts misapplied the 2006 Act by failing to apply the statutory safeguards set out therein. Alternatively, the applicant argues that section 16 of the 2006 Act is not compliant with Article 6 of the Convention.

THE LAW

28. Article 6 §§ 1 and 3(d) of the Convention provide as relevant:

> "In the determination of ...any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ... ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

A. The fairness of the proceedings

29. Before this Court and the Court of Appeal, the applicant relied on *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, ECHR 2011. In that case the Grand Chamber examined the requirements of Article 6 § 3 (d) in the context of absent witnesses. In that context, the Court set out two considerations in determining whether the admission of statements was compatible with the right to a fair trial. First, it had to be established that there was a good reason for the non-attendance of the witness. Second, even where there was a good reason, where a conviction was based solely or to a decisive extent on statements made by a person whom the accused had no opportunity to examine, the rights of the defence might be restricted to an extent incompatible with the guarantees of Article 6. Accordingly, where the evidence of an absent witness was the sole or decisive basis for a conviction, sufficient counterbalancing factors were required, including the existence of strong procedural safeguards, which permitted a fair and proper assessment of the reliability of that evidence to take place (see *Al-Khawaja and Tahery,* cited above, §§ 119 and 147). The Grand Chamber reiterated that the guarantees in Article 6 § 3 (d) are specific aspects of the right to a fair hearing set forth in Article 6 § 1 which have to be taken into account in the assessment of the overall fairness of the proceedings.

30. The Court recalls at the outset that *Al-Khawaja and Tahery* concerned an absent witness, while in the present case EI attended the trial. While the applicant argues that he could not 'effectively' cross-examine EI because he had resiled from the out of court statements which had been admitted into evidence, it is recalled that the defence did avail of the opportunity to cross-examine him at length both during the *voir dire* and during the trial proper. Consequently, given the different circumstances in this case, the question for the Court to address is not whether all the elements of the test set out in *Al-Khawaja and Tahery* (and recently developed in *Schatschaschwili v. Germany* [GC], no. 9154/10, ECHR 2015) have been met, but rather whether the proceedings as a whole were fair.

31. In this regard, the Court has consistently underlined that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among other authorities, *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 50, *Reports of Judgments and Decisions* 1997-III; *Gäfgen v. Germany* [GC], no. 22978/05, § 162, ECHR 2010; and *Al-Khawaja and Tahery*, cited above, § 118, ECHR 2011).

32. Turning to the present case, it should be noted as a preliminary remark that although the statements made were certainly significant, the

prosecution evidence also included self-incriminating remarks made by the applicant. Further, though the Court of Appeal acknowledged that the defence's capacity to cross-examine EI was reduced compared to a normal scenario where all evidence is given on oath (see paragraph 12) it is not the case that the applicant was fully deprived of the opportunity to challenge evidence. As noted by the court, the defence cross-examined EI "at very considerable length" and to "some considerable effect" during the *voir dire* and the trial, thereby making their case that he was a serial liar.

33. Further, the domestic legislation contains numerous procedural safeguards against unfairness to defendants. The reliability of evidence is expressly one of the conditions that must be satisfied before the trial court will admit the evidence. The Court of Appeal comprehensively examined how each element of the statutory test was applied by the trial judge and found no errors. With regard to the reasons given by the trial judge for admitting the evidence, the Court notes that *ex tempore* judgments are not unusual in the domestic context. The oral reasoning delivered at the time the decision was made was well-founded and wholly adequate.

34. Finally, the trial judge's charge to the jury was found by both the Court of Appeal and the Supreme Court to be entirely appropriate. It was made clear to the jury that the situation called for particular caution, and that they were under no obligation to accept the evidence as truth. The combination of EI's presence for cross-examination, the strong procedural safeguards set out in section 16 of the 2006 Act and the careful charge to the jury ensured that in this case, sufficient safeguards were in place during the trial in order to compensate for any difficulties caused to the defence by the trial judge's admission of the evidence.

35. Therefore, having regard to the proceedings as a whole, the Court is satisfied that overall fairness was ensured. This conclusion takes into account the competing interests at stake, including the public interest in the effective administration of justice in such a serious case.

36. Accordingly, the Court concludes that there is no appearance of a violation of Article 6 §§ 1 and 3 (d) of the Convention and the application must accordingly be dismissed as manifestly ill-founded under Article 35 §§ 3 (a) and 4 of the Convention.

B. The compatibility of section 16 of the 2006 Act with Article 6 of the Convention

37. Insofar as the applicant now complains that section 16 of the 2006 Act is not compatible with the Convention, the Court notes that he did not raise this complaint during the domestic proceedings. Consequently, this complaint must be rejected under Article 35 § 1 of the Convention for failure to exhaust domestic remedies.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 2 November 2017.

Anne-Marie Dougin
Acting Deputy Registrar

Nona Tsotsoria
President