

### Judgment

**Title:** Hannigan -v- Director of Public Prosecutions & anor

**Neutral Citation:** [2001] IESC 10

**Supreme Court Record Number:** 209/98

**High Court Record Number:** 1997 60 JR

**Date of Delivery:** 30/01/2001

**Court:** Supreme Court

**Composition of Court:** Murray J., Hardiman J., Fennelly J.

**Judgment by:** Hardiman J.

**Status:** Approved

**Result:** Allow And Vary

Judgments by	Link to Judgment	Concurring
Hardiman J.	<a href="#">Link</a>	Murray J., Fennelly J.

[2001] IESC 10

### THE SUPREME COURT

**209/98**

**Murray J.,  
Hardiman J.,  
Fennelly J.,**

**Between:**

**THOMAS HANNIGAN**

**Applicant/Appellant**

**and  
THE DIRECTOR OF PUBLIC PROSECUTIONS  
and  
HIS HONOUR JUDGE PETER SMITHWICK**

**Respondents**

**JUDGMENT delivered on the 30th day of January, 2001 by Hardiman J. [Nem Diss].**

1. These are two appeals (209/1998 and 250/1998) taken by the Appellant against the orders of the High Court (Mr. Justice Geoghegan) relating to applications by the Appellant in relation to discovery in these proceedings. The first order is dated the 15th July, 1998 and related to the Applicant's claim that the Respondents affidavit of discovery was deficient in form and that he was entitled to the production for inspection of the documents listed in the schedule to that affidavit, which the Respondent had objected to produce. On this application, a further affidavit was directed to be filed by the Director. The balance of the motion was adjourned to the 28th July, 1998 with a view to the Courts reading the documents in respect of which privilege and/or public interest immunity was claimed.

2. The second order, which was dated the 28th July, 1998, provided that one particular document, should be produced for inspection. The Applicant appealed this order, seeking discovery of all the documents mentioned in the schedule.

3. In the course of the hearing, the scope of the relief sought was dramatically narrowed. Dr. Whyte S.C. on behalf of the Appellant confined his application, in the end, to one additional document only. This will be referred to in more detail below. Mr. Collins B.L. also narrowed the range of the issues in the appeal by conceding the relevance of the document in question on the basis that its inclusion in the affidavit of documents sworn on behalf of the first-named Respondent was conclusive on this point.

4. In order to render comprehensible the Court's judgment on the outstanding issue, some details of the proceedings must be given.

### **Background**

5. By summons dated the 26th September, 1996 the Applicant was charged with the offence of sexual assault against a male person. This assault was alleged to have taken place on the 23rd June, 1995. The Applicant makes numerous complaints about the manner in which this allegation was investigated, about the circumstances in which the summons was served on his mother, and about events which occurred when the complaint came before the District Court, in particular on the question of whether the charge was to be dealt with on indictment or summarily. He ventilated these complaints at great length at the hearing before the learned second-named Respondent, and when the results of this hearing were unsatisfactory to him he sought relief by way of Judicial Review.

6. By order of the High Court by Morris J. (as he then was) made the 17th February, 1997, the Applicant was granted leave to apply for an order of prohibition on two of the five grounds he put forward. The two relevant grounds are those set out at paragraph 19 (A) (2) and (5) of the statement grounding the application for judicial review. These, and especially the first, are somewhat obscurely expressed. Indeed, the first is expressed in a single sentence 31 lines long. I am satisfied however that their purport is correctly summarised in the submissions on behalf of the first-named Respondent as follows:-

- That the first-named Respondent was guilty of oppression in withholding his consent to the summary disposal under Section 12(1) of the Criminal Law (Rape) (Amendment) Act, 1990 of the charge of sexual assault laid against the Appellant unless he were to plead guilty to the said offence in the District Court;

- That there had been a pattern of abuse of process and fundamental unfairness amounting to oppression and a denial of the right of constitutional justice.

7. Since this matter will proceed to hearing in the High Court, it is desirable that I should say no more than is necessary on these grounds and the factual matters said to support them. However it is appropriate to say that the first point relates to the question of whether the offence will be dealt with summarily or on indictment. The Appellant says that it is wrong of the Director of Public Prosecutions to make his consent to summary disposal conditional on the plea of guilty. He claims that the Director changed his position on this matter in the course of proceedings before the District Court. Superintendent P.J. Brennan, in his affidavit sworn the 18th June, 1997, at paragraph 15:-

"Although there was some initial confusion regarding the matter, the Director of Public Prosecutions was not consenting to summary disposal of the matter pursuant to section 12 (1) of the Criminal Law Rape Act, 1981 as amended".

8. Earlier in the Affidavit, in setting out the history of the matter the same deponent said at paragraph 9:-

"On the 29th May, 1996 a letter was received from the Director of Public Prosecutions containing directions as to prosecution and venue for trial. It was the intention of the Director of Public Prosecutions that the matter would proceed on indictment although if there was a plea of guilty proffered, it might be that the case could be dealt with in the District Court. The letter also raised certain queries in relation to certain matters contained in the statements of proposed evidence. Copies of the correspondence were sent to me at Mayfield on the 4th June, 1996 by the State Solicitor. On the following day I passed the correspondence to Sergeant Brosnan with a request that the queries raised by the Director of Public Prosecutions be dealt with".

9. The letter referred to in this paragraph is the sole additional document whose disclosure is sought.

10. For the purpose of dealing with the present application, no further details of the history of the criminal proceedings and of the judicial review application are necessary. It is however appropriate to note that the Applicant relies on other factual contentions in addition to those summarised above. I am expressing no view whatever about these and the omission to record them here is simply on the basis of their irrelevance to the present point.

### **The submissions**

11. Dr. Whyte agreed that the question of whether the Director is entitled to require a plea of guilty as a condition of consent to summary disposal is a discrete point of law in relation to which the Director's motives or expressed views are irrelevant. It is either permissible or it is not. But he relies on the proposition that the leave granted allows him also to argue that the Director was guilty of oppression, abuse of process and fundamental unfairness. He says that in dealing with these aspects he requires to establish a pattern of conduct. The document, he says, is relevant to the manner in which the relevant sections were operated. He relied on the cases of *Breathnach v. Ireland (3)* [1993] 2 IR 458 and *Corbett v. DPP* [199 ] 2 IR 81. These, he says, establish that no document is entitled to exemption from disclosure on the basis merely that it belongs to a particular class of documents. The proper approach is set out at page 469 of the report in *Breathnach*:

"the Court, as I understand the law, is required to balance the public interest in the proper administration of justice against the public interest reflected in the grounds put forward for non-disclosure in the present case it is only where the first public interest outweighs the second public interest that an inspection should be undertaken or disclosure should be ordered".

12. Mr. Whyte submits that no specific public interest in nondisclosure of the single document now in question has been suggested. Indeed, the contents of part, and probably the major part, of the document were set out in the affidavit of Superintendent Brennan, and the rest of it summarised.

13. Dr. Whyte argued that the relevance of the document was beyond dispute since it had been included in the Respondent's affidavit. He should not be permitted to go behind that, and the only question arising was whether the document partook of

privilege on the basis of public policy, and he submitted that it clearly did not. Alternatively, any privilege or immunity had been waived.

14. Mr. Collins, for the Director, agreed that the fundamental issue is public policy privilege or immunity and not relevance. He said this because he felt that he had to accept that, once disclosed in an affidavit of discovery, documents are conceded to be relevant. He placed on record, however, his view that the Director had discovered more documents than he needed to disclose in an effort to allay certain of the Applicant's concerns. This was also the view of the learned High Court judge. It does not appear that the Respondent had made this concession of the relevance of the document in the High Court.

15. Mr. Collins, like his opponent, relied on the two cases cited above. He specifically submitted that the degree of relevance of a document was a matter to be taken into account in performing the balancing exercise described in the passage cited. An order for disclosure of this document could, he submitted, adversely affect the freedom of communication between the Gardai and the Director of Public Prosecutions (as envisaged at page 472 of *Breathnach*) and this should not be permitted to occur.

### **Conclusions**

16. It appears to me that, in order to resolve the issue of disclosability of the single relevant document, it is not necessary to reach a conclusion as to the disclosability in general of a letter from the Director of Public Prosecutions giving directions as to what charge or charges are to proceed, and in what form. The facts of this case are peculiar to it and, in themselves, suggest a resolution of the issue in the present case.

17. Firstly, the Director of Public Prosecutions has not attempted to challenge the relevance in principle of the document, on the basis that he is precluded from doing so by what he says is his own over wide disclosure of documents in the affidavit of discovery.

18. Secondly, the affidavit of Superintendent Brennan specifically referred to, and summarises the contents of, the document at issue. This, presumably, was for the purpose of rebutting the Applicant's point that summary disposal was at first available but that the Director withdrew his consent to it when it became clear that the Applicant was not going to plead guilty. Superintendent Brennan did not merely mention the existence of the document but relied on a summary of its contents. This reference to the letter, in some degree of detail, seems to me to support (if support is necessary) the view that the letter has or may have a degree of relevance beyond the merely tangential. It also appears to support the proposition that disclosure of the terms of the letter may occur without deleterious effect from the Director's point of view.

19. Apart from these observations, the status of a document from the point of view of privilege or immunity from disclosure, changes once it has been referred to in pleadings or affidavit. In *Matthews and Malek's "Discovery"* (London 1992, at paragraph 9.15) stated:-

"The general rule is that where privilege material is deployed in Court in an interlocutory application, privileged in that and any associated material is waived..

20. The basis of this rule is discussed in *Nenea Karteria Maritime Company Ltd. v. Atlantic and Great Lakes Steamships Corporation* [1981] Com. L.R. 139 as follows:-

"the opposite party must have the opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question ".

21. It appears to me that this document was indeed "deployed" in the present proceedings and that no other conclusion is open on the basis of a reading of paragraph 9 of the Superintendent's Affidavit. Complex issues may occasionally arise as to whether a reference by a witness, as opposed to a party, can have the effect of waiving privilege. These do not seem to arise here because of the Superintendent's express statement at paragraph 1 that he made the affidavit on behalf of the Director. Accordingly the position seems to be that the document in question was referred to and its contents summarised, for litigious purposes, by the party entitled to claim privilege in it. This deployment seems inconsistent with an assertion either of irrelevance or of harmful effects following from its disclosure.

22. Furthermore, no grounds specific to the document itself has been urged against disclosure. The document seems clearly capable of advancing one party's case or damaging that of the other, to adopt the classic statement in *Compagnie Financiere du Pacifique v. Peruvian Guano Company*[1882] 11 QBD 55. As summarised in the affidavit, the document is relied upon as evidencing the intention of the Director at the date of its writing, presumably to place in context the "initial confusion" which had admittedly arisen in the course of the District Court proceedings about what those intentions were.

23. This being so, it seems just and equitable that the Director having deployed the letter for this purpose, the Appellant should be entitled to have access to it to see whether, indeed, it supports the proposition in support of which his opponent has deployed it.

24. I would allow the appeal and order the production for inspection of the communication from the Director of Public Prosecutions referred to at paragraph 9 of the affidavit of Superintendent Brennan.