Neutral Citation No [2020] NICA 19 | *Ref:* **STE11238**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **23-3-2020**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

JOHN PATRICK MAUGHAN
and OWEN JOHN MAUGHAN
(Number 2)

Before Stephens LJ, Treacy LJ and Keegan J

Stephens LJ (delivering the judgment of the court)

Introduction

[1] John Patrick Maughan and Owen John Maughan ("the appellants") brought an appeal against the sentences imposed on them by HHJ Miller QC. The appeal raised a number of issues including the appropriate reduction to a sentence when an offender pleads guilty at arraignment but does not indicate his intention to plead guilty at the outset. On 25 November 2019 this court dismissed their appeals under citation [2019] NICA 66 but granted legal representation in relation to the appeal for solicitor and two counsel. By notices dated 28 November 2019 and 4 December 2019 the appellants sought leave to appeal to the Supreme Court under section 31(2) of the Criminal Appeal (Northern Ireland) Act 1980 ("the 1980 Act"). On 17 December 2019 we certified that a point of law of general public importance was involved in our decision dated 25 November 2019 but refused leave to appeal to the Supreme Court. In the order dated 17 December 2019 we granted the parties liberty to apply for legal aid in relation to the application before this court for leave to appeal to the Supreme Court. By letter of the same date an application was made on behalf of Owen Maughan for "legal aid" and this judgment relates to that application.

The issue certified as a point of law of general public importance

[2] After their arrest both of the appellants refused to be interviewed by the police but they subsequently pleaded guilty to a series of offences. The guidance of this

court is that "to benefit from the maximum discount on the penalty appropriate to any specific charge a defendant must have indicated his intention to plead guilty to that charge *at the earliest opportunity*. In this regard the attitude of the offender during interview is relevant. The greatest discount is reserved for those cases where a defendant indicates his intention to plead guilty *at the outset*" (emphasis added), see *Attorney General's Reference (No. 1 of 2006)* [2006] NICA 4 at paragraph [19] and the judgment in this case at paragraph [72]. Article 33(1) of the Criminal Justice (Northern Ireland) Order 1996 ("the 1996 Order") provides that "(1) In determining what sentence to pass on an offender who has pleaded guilty to an offence a court shall take into account— (a) the *stage in the proceedings* for the offence at which the offender indicated his intention to plead guilty, and (b) the circumstances in which this indication was given" (emphasis added). The appellants contended that a police interview is not a "stage in the proceedings" within Article 33(1) so that taking into account a failure by a defendant to indicate his intention to plead guilty at police interview does not conform to the terms of that Article. For the reasons set out in our judgment we rejected that ground of appeal. However we considered that the proper construction of Article 33(1) did raise a point of law of general public importance and accordingly we certified the question "Whether in Article 33(1)(a) of the Criminal Justice (Northern Ireland) Order 1996 the word "proceedings" should be confined to court proceedings which have been formally initiated."

The application for "legal aid"

[3] By letter dated 17 December 2019 John J Rice & Co, solicitors for Owen Maughan applied for "legal aid" for solicitor and two counsel in relation to the application to this court for leave to appeal to the Supreme Court. They asserted that the application for legal aid was pursuant to section 37 of the Criminal Appeal (Northern Ireland) Act 1980. However section 37 had been repealed by the Access to Justice (Northern Ireland) Order 2003 ("the 2003 Order") and this court directed that the office should reply to that application by informing the solicitors of the repeal of that section.

[4] By notice dated 8 January 2020 the solicitors for Owen Maughan then applied for "legal aid" pursuant to Article 26 of the 2003 Order. It was not clear whether this application was limited to the application before this court for leave to appeal to the Supreme Court or whether it was also an application for legal representation to make an application to the Supreme Court for leave to appeal and if successful to be granted legal representation before the Supreme Court.

[5] By e mail dated 2 March 2020 the solicitors for Owen Maughan resolved that ambiguity by expanding the application to not only seek "legal aid" for the application before this court for leave to appeal to the Supreme Court but in addition to seek "legal aid" to petition the Supreme Court and if that application was successful for "legal aid" to appear before the Supreme Court.

[6] In order to deal with the application for "legal aid" and by letter dated 6 February 2020 we invited representations from the parties and from the Northern Ireland Legal Services Agency ("the Agency") in relation to a number of points. For

instance we pointed out that this court had granted "legal aid" in relation to the substantive appeal and enquired of the Agency and of the parties as to whether that grant also covered an application to this court for leave to appeal to the Supreme Court on the basis that the application was an incidental proceeding to the substantive appeal. We indicated that once a reply had been received from the Agency then thereafter the parties would have an opportunity to submit a written reply. Furthermore we stated that if there was a need for an oral hearing then one would be convened.

[7] Mr Paul Andrews of the Agency by a full and detailed letter dated 27 February 2020 addressed the questions raised by this court. We are grateful for the care that has been taken in replying to this court's enquiries and for the assistance that has been provided by Mr Andrews.

[8] By e mail dated 2 March 2020 the solicitor on behalf of Owen Maughan stated that he had discussed Mr Andrews' very helpful letter with Counsel and it was their position that they had nothing further to add to the views expressed in the letter. In those circumstances we did not convene an oral hearing.

Article 26 of the Access to Justice (Northern Ireland) Order 2003, the 2016 Regulations and the 2015 Commencement Order

[9] In general terms, those parts of the 2003 Order which deal with criminal defence services have not been commenced. For the purposes of this judgment we note that the Access to Justice (2003 Order) (Commencement No. 8) Order (Northern Ireland) 2015 ("the 2015 Commencement Order") commenced provisions but only in respect of appeals, including applications for leave to appeal, brought under Part 1 (appeal to the Court of Appeal from the Crown Court) and Part 2 (appeal to the Supreme Court from the Court of Appeal) of the 1980 Act, and the other proceedings specified in Schedule 2 to that Order. Accordingly applications for legal representation in the Crown court continued to be granted by the court pursuant to Article 29(2) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981. However the 2003 Order repealed section 37 of the 1980 Act which meant that for a period there was no statutory provision covering legal representation in this court in respect of criminal cases. That position has now been rectified but the rectification explains why relevant proceedings are defined in a Commencement Order rather than by Articles 2 and 25 of the 2003 Order given that there has only been limited commencement of Articles 25 and 26 under the 2015 Commencement Order.

[10] The Criminal Defence Services (General) Regulations (Northern Ireland) 2016 ("the 2016 Regulations") are regulations made by the Department of Justice in exercise of the powers conferred by Article 26(2)(b) and (3) of the 2003 Order. As the explanatory text states the purpose of the 2016 Regulations is to provide that the Court of Appeal may grant a right to representation under Part 2 of the 2003 Order in respect of criminal appeals in the Court of Appeal and the Supreme Court, and in

the case of an appellant who is to be retried before the Crown Court. In relation to a retrial the Agency has no power to grant criminal legal representation. We consider in relation to a retrial legal representation can be granted either by this court or by a judge in the Crown Court.

[11] Regulation 3 of the 2016 Regulations provide that "(the) Court of Appeal or a judge of that Court may at any time grant a right to representation in respect of any *relevant proceedings* in the Court of Appeal, the Supreme Court or the Crown Court"

[12] Relevant proceedings in relation to this court are defined by regulation 2(2) and schedule 3 of the 2015 Commencement Order. Schedule 2 under the rubric "Proceedings in which a right to representation may be granted by the court of appeal" includes as relevant proceedings an appeal under Part 1, Part 2 or section 47A of the Criminal Appeal (Northern Ireland) Act 1980" ("the 1980 Act"). The appeal in this case being an appeal against sentence following conviction on indictment was an appeal under Part 1 of the 1980 Act and was therefore a relevant proceeding. The application for leave to appeal to the single judge under section 16 of the 1980 Act was also a relevant proceeding. Appeals to the Supreme Court are relevant proceedings as they are proceedings under Part 2 of the 1980 Act.

[13] In so far as relevant Article 26(1) of the 2003 Order provides that a "court before which any relevant proceedings take place, or are to take place, has power to grant a right to representation in respect of those proceedings." It is clear from the 2003 Order, the 2016 Regulations and the 2015 Commencement Order that this court or a judge of this court has jurisdiction to grant legal representation in relation to (a) an application for leave to appeal to this court; (b) the appeal to this court; (c) an application to this court to appeal to the Supreme Court; (d) an application to the Supreme Court for leave to appeal; and (e) an appeal to the Supreme Court. Furthermore this court is the only court with power to grant legal representation for the purpose of an appeal to the Supreme Court whether for the purposes of seeking leave to appeal to the Supreme Court and if successful for representation before the Supreme Court. The Supreme Court Practice Direction 12 – Criminal Proceedings, states under the cross heading "Public funding and legal aid" at 12.3.6:

> "Paragraph 8.12 of Practice Direction 8 applies to appeals in criminal proceedings. In criminal proceedings, depending on the route of appeal, application should be made to the court appealed from or, in Northern Ireland, to the Legal Aid Committee."

The point to be taken from the Practice Direction is that the Supreme Court does not envisage it determining whether applicants should receive legal representation. The same point can be taken from Supreme Court Practice Direction 8 – Miscellaneous Matters which states under cross heading "Public Funding and legal aid" at 8.12.1:

> "The Court does not provide public funding or legal aid. Application for public funding must be made in England and Wales to the Legal Aid Agency (3), in Scotland to the Scottish Legal Aid Board, and in Northern Ireland to the Legal Aid Committee."

Again this makes clear that the Supreme Court does not grant legal representation. We understand that the Agency is drawing to the attention of the Supreme Court office that the present position is that it is this court rather than the Legal Aid Committee that is the body responsible in Northern Ireland for the grant of legal representation in relation to appeals in criminal cases to the Supreme Court. The terminology of the "Legal Aid Committee" is no longer appropriate. In relation to legal representation in a civil case in respect of an appeal to the Supreme Court the application is no longer to the Legal Aid Committee but rather it is to the Agency under paragraph 2(a)(i) of Schedule 2 to the 2003 Order and if unsuccessful to the independent appeal mechanisms of the Agency. As we have indicated in a criminal case the application is to this court.

[14] Article 26(2) of the 2003 Order provides that "(where) a right to representation is granted for the purposes of relevant proceedings then, … (a) it includes the right to representation for the purposes of … any … incidental proceedings; and regulations may make provision specifying whether any proceedings are or are not to be regarded as … incidental." The question arises as to whether an application to this court for leave to appeal to the Supreme Court are incidental proceedings so that the grant of legal representation in respect of the substantive appeal also covers legal representation in respect of an application to this court for leave to appeal to the Supreme Court. We consider that the answer is to be found in regulation 4(1) of the 2016 Regulations which in so far as relevant under the rubric "Advice and assistance" provides that "… a right to representation in respect of relevant proceedings in the Court of Appeal includes the right to advice and assistance as to any further appeal from that Court to the Supreme Court." It is clear that the grant of legal representation for the substantive appeal before this court also includes legal representation in respect of advice on the merits of an appeal to the Supreme Court. In the Agency's view the absence of an express reference to extend this to include an actual application for leave to appeal must be presumed to be intentional. We agree. The application for legal representation in respect of an application to this court for leave to appeal to the Supreme Court is not an incidental proceeding and is not covered by the grant of legal representation for the substantive appeal. To obtain legal representation in respect of an application for leave to appeal to the Supreme Court there needs to be a separate application to this court.

[15] The current practice which we endorse is that (a) applications for leave to appeal to the single judge are made without having obtained an order for legal representation; (b) if the single judge grants leave then ordinarily this court deals with the grant of legal representation in relation to the appeal and ordinarily will

grant that application regardless as to whether the appeal is successful; (c) if the single judge refuses leave to appeal then ordinarily legal representation will be refused in relation to the application for leave to appeal; (d) if the application for leave to appeal is renewed before the full court then ordinarily legal representation will be refused if at the hearing of the appeal the court does not call on the prosecution to respond; (e) applications to this court for legal representation in respect of an application to appeal to the Supreme Court will be dealt with by the full court that heard and determined the appeal; (f) ordinarily if an application for leave to appeal to the Supreme Court is refused then this court will not make an order for legal representation in relation to that application; (g) if there is a successful application to the Supreme Court for leave to appeal to that Court then ordinarily this court will grant legal representation in relation to both that application and the hearing before the Supreme Court.

Consideration

[16] In accordance with the practice which we have set out in paragraph [15] (a) legal representation in relation to the application before this court for leave to appeal to the Supreme Court should be refused; and (b) the question as to legal representation in respect of the application to the Supreme Court for leave to appeal and for any hearing before the Supreme Court should be dependent on there being an application to that court for leave to appeal and if there is then it should await the outcome of that application.

[17] We have considered whether to depart from the ordinary practice in the circumstances of this case. We do not consider it appropriate to do so.

Conclusion

[18] We refuse to grant legal representation in relation to the application before this court for leave to appeal to the Supreme Court.

[19] The solicitors for Owen Maughan are to confirm in writing to the court of appeal office by noon on 30 March 2020 whether there is an application to the Supreme Court for leave to appeal. If there is such an application then we adjourn the application for legal representation in relation to that application and the application for legal representation for any hearing before the Supreme Court until the outcome of any application to that Court for leave to appeal.