

Neutral Citation No: [2019] NICA 73

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Ref: STE11051

Delivered: 06/09/2019

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

18/6721-/A01

R

-v-

KEVIN ANTHONY McLAUGHLIN

Before Stephens LJ, Treacy LJ and Mrs Justice Keegan

STEPHENS LJ (delivering the ex tempore ruling of the court)

[1] This is an application by the prosecution to obtain clarification prior to the hearing of this appeal as to the extent of the appellant's waiver of legal professional privilege. The circumstances are that the appellant alleges that he notified his solicitor of literacy difficulties and also mental health and educational issues so that these matters ought to have been investigated by his previous solicitors and evidence about it admitted at the trial.

[2] The appellant wishes to limit the waiver of legal professional privilege so that the disclosure of information solely relates to the issue as to whether to not that was or was not said in effect by the appellant to his solicitor. Whereas, the Crown say that even if there are these difficulties the reason why the appellant did not give evidence may be related to entirely different matters. Secondly, that in order to properly assess whether or not such a conversation took place one would need to see, for instance, the number of consultations that took place and the quality of the attendance notes that were made by the solicitor in relation to those consultations. So that is the dispute between the parties about the extent of legal professional privilege.

[3] No authority has been opened to us today in relation to the impact of incorrectly claiming legal professional privilege in circumstances where as here an allegation has been made against previous legal advisors. In the court's recollection there is (i) no power in this court to compel somebody to waive legal professional privilege, (ii) if an individual incorrectly refuses to waive legal professional privilege in circumstances such as this then the consequence may be that this ground of

appeal will be dismissed. So in circumstances where as here we have had no legal authorities opened to us it is only appropriate that we indicate that there may very well be a substantial issue at the hearing of this appeal as to the adequacy of the waiver of legal professional privilege that has been made on behalf of the appellant. If the appellant fails in that argument then one of the consequences that may well be anticipated is that this ground of appeal will be dismissed. Obviously the matter will be looked into extremely carefully by those advising the appellant as will the ramifications of that because if legal professional privilege is waived in its entirety it may potentially have an impact on the other ground of appeal.

[4] The test for this court is whether the conviction is unsafe therefore whether someone has literacy difficulties potentially, has absolutely no impact unless those literacy difficulties led to that person not giving evidence as opposed to some other aspect of the case leading that person not to give evidence.

[5] So we make no ruling whatsoever. We expressly reserve this to the hearing of appeal. We have issued what we consider to be a fairly clear warning to the appellant in relation to the issue. We repeat our present understanding (though we have been referred to no authority) is that we have no jurisdiction to compel somebody to waive legal professional privilege and at this stage we do not so.

[6] There is one other matter and that is at present there are no particulars given and no details as to the circumstances in which this conversation took place between the appellant and his previous legal advisor. We direct that an affidavit be sworn by the appellant giving as much detail as possible. Obviously it may well not be possible to give dates or times but there has to be ultimately an assessment of whether or not this indication was or was not given to the previous solicitors and the obligation is now on the appellant to set that out on affidavit to the best of his ability.