Neutral Citation Number: [2006] IEHC 34

THE HIGH COURT
JUDICIAL REVIEW

[2004 No. 369 JR]

BETWEEN

ROBERT PAYNE

APPLICANT

AND
DISTRICT JUDGE JOHN BROPHY THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

Judgment of Mr. Justice Clarke delivered 3rd February, 2006.

1. Introduction

1.1 In these proceedings the applicant ("Mr. Payne") seeks judicial review for the purposes of quashing an order made by the respondent District Judge on 23rd February, 2004 at Trim District Court, whereby Mr. Payne was convicted of an offence contrary to s. 48(1) of the Diseases of Animals Act 1966 as provided for in s. 35 of the National Beef Assurance Act 2000. The charge in question related to an allegation that Mr. Payne had in his possession a bovine animal bearing an ear tag number which could be confused with ear tags attached to or required to be attached to animals pursuant to the Bovine Tuberculosis (Attestation of the State and General Provisions) Order 1999 in contravention of s. 15(2) of that order. On foot of the conviction the applicant was sentenced to 12 months imprisonment and fined €1,904 and was further required to pay expenses in the sum of €870.

1.2 Leave to seek judicial review was given by Murphy J. on 10th May, 2004 on the grounds set out at paragraphs E 1, 2, 5, 6 and 7 of the statement of grounds. Each of the relevant grounds concerns alleged deficiencies in the process whereby Mr. Payne was brought before the District Court. It would not appear to be disputed that the summons actually served upon Mr. Payne was not dated, did not have the name of the appropriate District Court Clerk appearing on it and did not contain a date upon which an application to the District Court office for the issuing of the summons was made.

1.3 There is no doubt but that the question of the adequacy of the summons was raised both before and at the hearing in question. For reasons which will become apparent in the course of this judgment it will be necessary to analyse in more detail the precise manner in which the relevant objection was taken on behalf of Mr. Payne and was dealt with by the respondent District Judge. However it is contended that the District Judge erred in the manner in which he dealt with the issue in such a fashion as to deprive him of jurisdiction to proceed with the case. On that basis it is sought to quash the conviction which followed on from the hearing. It is now necessary to turn to the manner in which objection was taken and the manner in which the objection was dealt with.

2. The Objection

2.1 While there was, at one stage of the hearing before me, a possibility that there might be a dispute as to what, in fact, transpired at the hearing before the respondent District Judge, such dispute would no longer appear to exist. The following would, therefore, appear to be the facts. While the hearing, in respect of which the issues in this case arise, occurred on 23rd February, 2004, the case had, on an earlier occasion, (i.e. 12th September, 2003) been before the District Court at Trim. The matter was adjourned on that date on the application of the notice party ("DPP"). On that occasion the solicitor representing Mr. Payne indicated to the respondent District Judge that he had an application to make in respect of the summons based upon the fact that the summons was undated, was unsigned by an appropriate District Court Clerk and that there was no date on the summons indicating when the alleged complaint was made, if at all, to the District Court office. On that occasion the respondent District Judge indicated that any such application could be made on the adjourned date.

2.2 The matter was further adjourned on a subsequent occasion but ultimately was listed for hearing on 23rd February, 2004. It should also be noted that prior to the hearing on 12th September, 2003 the solicitor acting for Mr. Payne had sent a letter to the prosecuting Garda indicating that Mr. Payne was reserving the right to challenge the validity of the summons.

2.3 There had, therefore, been two intimations prior to the hearing in February 2004 that Mr. Payne intended challenging the validity of the summons. In any event the matter was called for hearing on 23rd February, 2004 and the solicitor acting on behalf of Mr. Payne made his application concerning the validity of the summons on the same grounds as had been intimated on the previous occasion. The actual summons which had been served on Mr. Payne was handed into court (and indeed was available to me at the hearing). It is clear that that summons does not contain the various items which I have outlined above in respect of which complaint had been made.

2.4 Mr Payne also gave evidence to verify that the summons produced was, in fact, the document actually served on him. While certain affidavits were filed in these proceedings which appeared to create a controversy over precisely what happened next, no dispute would now appear to exist. It would seem that the respondent District Judge took the view, and indicated to the parties, that the presence of Mr. Payne's solicitor (and, indeed, Mr. Payne,) cured all defects in the summons. While it was suggested at one stage that the respondent District Judge may have looked at the court file as part of the process, there is now no evidence that that in fact occurred. The solicitor who acted on behalf of the notice party at the hearing before the respondent District Judge did exhibit to an affidavit a copy of what was apparently the summons on the court file. That summons would appear to have had none of the defects raised by Mr. Payne's solicitor. However there is no evidence that the court file copy of the summons was considered by or, indeed, brought to the attention of, the respondent District Judge on the occasion in question.

2.5 The case then proceeded and resulted in the conviction to which I have referred.

2.6 Finally, so far as the facts are concerned, it should be noted that Mr. Payne appealed against the decision of the respondent District Judge. While the question of Mr. Payne being precluded from maintaining these judicial review proceedings by virtue of such appeal was not raised on behalf of the notice party in the original notice of opposition I gave, at the hearing, leave to the notice party to file an amended notice of opposition raising that issue.

In the light of all of the above I should now set out what seem to me to be the issues.

3. Issues

The issues are:-

1. Whether the respondent District Judge was correct in the view which he took that the attendance of Mr. Payne and his solicitor cured any defects;

2. Even if the respondent District Judge was incorrect in that view would such an error be sufficient to lead to a quashing of the conviction and order made on foot of the hearing which followed and which is not otherwise objected to; and

3. Has Mr. Payne lost his entitlement to pursue a judicial review of his conviction and sentence by virtue of having lodged an appeal.

In the context of those issues it is now necessary to turn to the legal principles involved.

4. The Law

4.1 There is undoubtedly authority for the proposition that in certain cases the attendance of a defendant in court on the day specified in a summons may cure defects in the summons. In *DPP v. Clein* [1983] ILRM 76 Henchy J. (speaking for the Supreme Court) approved a conclusion by Gannon J. in this court in the same case [1981] ILRM 465 at p. 468 to the effect that:-

> "When a defendant, as in this case, to whom a summons has been addressed and issued for service, attends in court with solicitor and counsel representing him and submits to the jurisdiction of the court and to the hearing by the court of the charges laid and the evidence thereon, the summons to which he responded ceases to have any significance".

4.2 However it is important to note that no objection or submission would appear to have been made in *Clein* contesting the validity of the summons. In *DPP v. Garbutt* (Unreported, High Court, Murphy J. 4th May, 2004) this court was concerned with a case stated which raised issues concerning the validity of a conviction. In the course of the judgment (at p. 5) Murphy J. quoted with approval from Woods: District Court (on Procedure in Criminal Cases) (1994) (at p.133) to the effect that:-

> "Where the accused does not appear or appears merely for the purpose of objecting to the validity of the summons, then a fundamental defect in the summons will be fatal to proceedings".

Further reference was made to a passage from *Woods* at p. 149 to the following effect:-

> "The actual attendance of an accused in court will cure a defect relating to the process of securing his attendance unless his attendance is specifically to take objection to the irregulatory".

4.3 On that basis, and in considering the facts of the case before him, Murphy J. went on to hold that:-

> "It is clear that on 28th November, 2002 the accused appeared pursuant to the summons to challenge its validity. Where there is a fundamental defect in the summons it would be unfair to proceed where the accused appeared for the sole purpose of objecting to the defect. Such an appearance would not be a step in the proceedings.
>
> Where a defect objected to was one of form or of service the attendance of the accused may indeed cure the defect".

4.4 Similarly in Walsh, Criminal Procedure (2002) the author notes that:-

> "Technical defects in the form of the summons are equally unlikely to form the basis for a successful defence. They do not automatically render the proceedings void or relieve the respondent of the obligation to answer the summons, so long as the form used is otherwise sufficient to express the intention of the person who issued it. It is the making of a valid complaint, and not the issue of a summons, which gives the court jurisdiction in the matter. The summons is merely a device to secure the attendance of the defendant in court to answer the complaint. If it has not been validly issued or the defect on its face is fundamental, the defendant will be relived of the obligation to appear in response to it".

4.5 While that passage concerns the traditional manner of initiating criminal proceedings in the District Court by means of a complaint followed by the issue of a summons, there would not appear to be any reason in principle why the same logic should not apply to the procedure now available whereby proceedings can be commenced by an application for the issuing of a summons. This latter procedure was the one adopted in the case under consideration.

4.6 It is therefore clear that a fundamental distinction needs to be made between:-

1. Defects which go to the jurisdiction of the court; and

2. Defects which are purely procedural in nature.

It would seem that a defect which goes to the jurisdiction of the court (such as the fact that no proper complaint had been made under the former procedure or no proper application had been made under the new procedure) cannot be cured by the attendance of the defendant. Similar consequences would seem to flow from a situation where the summons itself is fundamentally flawed. However, technical or procedural defects concerning the manner in which the attendance of the accused was secured before the court are capable of being cured by attendance.

4.7 That leads to the question of the proper approach which should be adopted by a judge of the District Court when a contention is made that the proceedings are not properly before him. In *Duff v. District Justice Mangan and Others* [1994] ILRM, the Supreme Court had to consider such a question. Denham J. (speaking for the court at p. 91) said:-

> "The question (the validity of the summons) having been raised by the defence herein, it was for the District Court to hear evidence and determine the issue".

4.8 It seems to me, therefore, that where an issue as to the validity of a summons is raised by or on behalf of the defendant in any proceedings before the District Court it is incumbent upon the District Judge concerned to enter into an inquiry for the purposes of ascertaining the following matters:-

1. Whether the defects complained of are such as go to the jurisdiction of the court or are merely technical or procedural in nature.

2. Where it is possible that the defects complained of may be sufficiently fundamental to go to the jurisdiction of the court then it will be necessary, in accordance with *Duff*, to hear evidence to enable the District Judge to ascertain whether the court has jurisdiction.

3. If, having heard such evidence as may be necessary, the District Judge concerned is satisfied that the court has jurisdiction then it will be necessary for the court to consider whether any measures (such as an adjournment) may be necessary to render the proceedings fair in the light of any technical defects identified.

5. Applications to the Facts of this Case

5.1 It is clear that serious issues were raised as to the jurisdiction of the court in this case. On the evidence before the District Judge the summons served did not contain any information which would tend to show that an application for the summons had been made to the appropriate District Court Clerk. While it might have been possible for the District Judge to conclude that any application which might have been made to the District Court Office must have been made in time (because the hearing itself occurred within the specified two year limitation period provided for offences of the type with which the court was concerned) the absence of any of the material details on the summons which had been served on Mr. Payne at least gave rise to a requirement for an inquiry into whether there had been a proper application for a summons sufficient to give the District Court jurisdiction.

5.2 In that context it seems to me that the respondent District Judge was incorrect when he took the view that the presence of Mr. Payne and his solicitor cured any such defect. If the defect was simply that the relevant details had not been included in the form of the summons used to procure Mr. Payne's attendance then it may be that such defects could be regarded as technical and capable of being cured by attendance. However there was no basis upon which the respondent District Judge could have concluded that the defects were merely technical (rather than substantive) without embarking upon the sort of inquiry mandated by *Duff*. Not having done so it seems to me that the consequence which the Supreme Court determined flowed from such a failure in *Duff* must also flow in this case, that is to say that by embarking upon the hearing the respondent District Judge was acting in excess of jurisdiction. Prima facie, therefore, it seems to me that the order which resulted from that hearing should be quashed.

That leads to the question of the appeal.

6. The Appeal

6.1 In *State (Roche) v. Delap* [1980] I.R. 170, Henchy J. (speaking for the Supreme Court at p.173) and, having concluded that the order of the District Court in that case was bad on it's face, said:-

> "However it does not follow from this conclusion that certiorari should have issued. The Prosecutor elected to appeal to the Circuit Court. There he allowed the appeal to be opened and did not contend that his conviction (as opposed to his sentence) was other than correct."

6.2 In *Stefan v Minister for Justice* [2002] 2 I.L.R.M. 134, Denham J., speaking for the Supreme Court at p.147 revisited the issue in the following terms:-

> "It is clear that whilst the presence of an alternative remedy, an appeal process, is a factor, the court retains jurisdiction to achieve a just solution.
>
> The stage of the alternative remedy may be relevant, though it may not be determinative of the issue. This is a case where an appeal had been lodged but had not been opened. It is therefore a situation to be distinguished from *State (Roche) v. Delap*…"

and later added, at p.148,

> "In considering all the circumstances of the matters, including the existence of an alternative remedy, the conduct of the applicant, the merits of the application, the consequences to the applicant if an order of *certiorari* is not granted, the degree of fairness of the procedures, should be weighed by the court in determining whether *certiorari* is the appropriate remedy to attain a just result."

6.3 It seems to me clear on those authorities that the question of a defendant being debarred from challenging a conviction in a lower court by reason of having embarked upon an appeal is dependent, *inter alia*, upon the following matters:-

> 1. If the defendant has actually embarked on the appeal, by permitting an appeal on the merits to commence, the court will lean in favour of exercising it's discretion so as to debar him from thereafter proceeding with a judicial review in respect of the lower court decision.
>
> 2. Where the defendant has lodged an appeal but has not proceeded with it to the point of the commencement of the hearing of the appeal, then the question will be resolved by reference to the factors identified in *Stefan* including whether the nature of the issue raised is one which is more properly within the remit of judicial review on the one hand or an appeal on the other hand, and the justice of the case generally.

6.4 Applying those principles to the facts of this case it is clear that Mr. Payne did not actually embark upon the appeal concerned which remains pending before the Circuit Court. In those circumstances it seems to me that an important issue is as to whether the point which is now raised is more properly a judicial review point rather than an appeal point. As the issue concerns the very jurisdiction of the District Court to embark upon the hearing in the first place (rather than any matter which transpired at the substantive hearing) it seems to me that the issue is clearly of a type more properly dealt with by judicial review. In those circumstances it does not seem to me that Mr. Payne should be debarred from pursuing these judicial review proceedings by virtue of the fact that there is an appeal pending before the Circuit Court.

6.5 In all of those circumstances it seems to me that *certiorari* should issue as to the impugned order. The only remaining question is as to whether the matter should be remitted to the District Court.

7. Remittal

7.1 In assessing the factors to be taken into account in considering whether to remit Murray J. (speaking for the Supreme Court) in *Nevin v. Crowley* [2001] 1 I.R. 113 said:-

> "This court, in *Sweeney V. Judge Brophy* [1993] 2 I.R. 202 at p.211, held that the proper exercise of a court's discretion in such a case 'would require that the matter should not be remitted to the District Court in circumstances where the applicant has endured enough and the prosecution cannot be acquitted of all the blame for some, at least, of what went wrong at the trial'. This is not to be considered an exhaustive list of relevant considerations concerning the exercise of discretion which could include such matters as the passage of time, any period of imprisonment already served, whether the offence was a serious one or a minor one."

7.2 In this case, having regard to the limitation period provided, the passage of time is not excessive. The seriousness of the offence might be described as moderate. While the sentence has been hanging over Mr. Payne for some time, no sentence has actually been served. Finally the nature of the error by the respondent District Judge, while going to jurisdiction, does not represent a flagrant breach of Mr. Payne's rights.

7.3 In all those circumstances I will remit the matter back to the District Court.