

## THE HIGH COURT

## JUDICIAL REVIEW

[Record No. 2017 1 J.R.P.]

BETWEEN

FRANK WARD

APPLICANT

AND

GARDA RAY FRANCIS DERMODY AND BY ORDER THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENTS

**JUDGMENT of Mr. Justice Eagar delivered on the 10th day of May, 2017**

1. This is a judgment in relation to an application for leave to apply for judicial review for an order prohibiting the prosecution of Case No. 202164/2016. This is a summons which has been sought by the Director of Public Prosecutions in relation to offences alleged to have been committed by the applicant on the 20th of February, 2016 at Dublin Road, Portlaoise by assaulting Louise Prendergast contrary to s. 2 of the Non-Fatal Offences against the Person Act 1997.
2. The application was made before Flaherty J. on the 15th March, 2017. Flaherty J. adjourned the application to the 26th of April, 2017 to enable the applicant to obtain legal representation in the interim. She also ordered that the proceedings be stayed, and that the respondent deliver outline written submissions by the 7th of April, 2017.
3. On the hearing of this application for leave on the 26th of April, 2017 Mr. Ward confirmed that he had not obtained legal representation but was prepared to act for himself in the matter. Legal submissions had been served on Mr. Ward and on the Court.
4. The original statement of grounds was dated the 20th of February, 2017 and on the 7th of April, 2017 an amended statement of grounds was lodged by the applicant in response to the outlined legal submissions of the respondents dated the 7th of April, 2017.
5. The applicant is an inmate in the Midlands Prison, Portlaoise. He is serving a twenty year sentence on foot of several convictions relating to an armed robbery and a shooting on the 6th of October, 2003.
6. The background to the summons is that he allegedly assaulted a prison officer, Louise Prendergast, as she was accompanying him in a taxi back to the prison in the early hours of the 20th of April, 2016. A criminal complaint was made by Louise Prendergast and Garda Ray Dermody of Portlaoise Garda Station applied for a summons to prosecute a single charge of assault against the applicant on the 19th of October, 2016.
7. The summons is headed "Courts (No. 3) Act 1986". Section 1 identifies the prosecutor as the Director of Public Prosecutions, and the accused as Frank Ward of 38 Knockmore Park, Tallaght, Dublin 24. The applicant is Garda Ray Francis Dermody of Portlaoise. The body of the summons states:

"Whereas on the 19th of October, 2016 an application was made to Portlaoise District Court Office by the above named applicant on behalf of the above named prosecutor for the issue of a summons to you the above named accused alleging the offence, particulars of which are set out hereunder. This is to notify you that you will be accused of this offence at a sitting of the District Court to be held at [...] the Court House, Portlaoise, Co. Laois on the 16th of March, 2017 at 11:00 o'clock and to require you to appear at the said sitting to answer the said accusation.

Offence Alleged – That you on the 20th of April, 2016 at Dublin Road, Portlaoise, Laoise in the District Court area of Portlaoise assaulted Louise Prendergast, contrary to s. 2 of the Non-Fatal Offences against the Person Act 1997."

8. In the original statement of claim, the applicant argued that the summons was secured against him out of the lawful time.
9. The applicant exhibited an extract from a book by Robert Pierce published in 1995 which states:

"By virtue of s. 10(4) of the Petty Session (Ireland) Act 1851, proceedings must be commenced by a complaint being made within a six months of the commission of the offence. The summons need not necessarily be issued within the six months, what is important is that the complaint is made."

10. He recites the offence and then sets out his argument as follows. He said that even if the complaint was made one day in excess of the statute's six months time limit, it is in breach of the law. He analyses the number of days and says that it is a total of 183 days from the date of the alleged offence to the date of the issue of the summons - this is in excess of the time limit. He also quotes section 49 of the Civil Liability and Courts Act 2004 wherein at s. 49:

"The Courts (No. 3) Act 1986 is amended by the substitution of the following section for section 1:

"(1) Proceedings in the District Court in respect of an offence may be commenced by the issuing, as a matter of administrative procedure, of a document (in this section referred to as a 'summons') to the prosecutor by the appropriate office.

(3) An application for the issue of a summons may be made to the appropriate office by or on behalf of the Attorney General, the Director of Public Prosecutions, a member of the Garda Síochána or any person authorised by or under an enactment to bring and prosecute proceedings for the offence concerned.

(4) The making of an application referred to in subsection (3) of this section may, in addition to being effected by any method by which the making of an application for a summons could be effected immediately before the enactment of section 49 of the Act of 2004, be effected by transmitting it to the appropriate office by electronic means."

11. The applicant also referred to the *State (at the Prosecution of John Clarke) v Maura Roche* [1986] IR 619. He quoted from Barron J. as follows:

"(b) For the purpose of the six months' time limit in the Petty Sessions (Ireland) Act 1851, once the complaint was delivered to the District Court office, irrespective of whether it was communicated to the clerk or not, a complaint had been duly made."

12. The second ground which is argued by the applicant is that the summons is in violation of rule 45 of the District Court Rules 1948, by virtue of the fact that it is not signed on its face by the District Court Clerk Catherine Magner, as required by rule 45. Rule 45 of the District Court Rules states:

"A summons shall be signed by the Justice, Peace Commissioner or Clerk issuing it and a warrant shall be signed by the Justice or Peace Commissioner issuing it. No warrant or summons shall be signed in blank. That every summons shall be issued a copy of per service on each defendant named therein."

13. The applicant stated that in support of this, he relies on an excerpt from section 49(13) of the Civil Liability and Courts Act 2004:

"The procedures provided for in this section in relation to applications for, and the issue of, summonses are without prejudice to any other procedures in force immediately before the passing of this Act whereby proceedings in respect of an offence can be commenced and, accordingly, any of those other procedures may be adopted, where appropriate, as if this Act had not been passed."

14. The next argument of the applicant is that the summons is bad in law, as on its face it fails to state "such particulars of the offence as may be necessary" in violation of rule 44 of the District Court Rules 1948. He quoted section 2 of the Non-Fatal Offences against the Person Act 1997 where s. 2 states under the heading Assault,

"2(1) A person shall be guilty of the offence of assault who, without lawful excuse, intentionally or recklessly –

(a) directly or indirectly applies force to or causes an impact on the body of another, or

(b) causes another to believe on reasonable grounds that he or she is likely immediately to be subjected to any such force or impact, without the consent of the other."

The applicant's contention is that the allegation of assault is not sufficiently set out in the summons of the grievances, to the standard of that contained in s. 2 of the Non-Fatal Offences against the Person Act 1997.

15. The applicant's next argument is that the summons is bad in law on its face for its failure to cite the wrong statutory authority for the issuing of the summons. He says that the statute cites section 1(3) of the Courts (No. 3) Act 1986, and he argues that this section was substituted by the Civil Liability and Courts Act 2004.

16. Mr. McBride B.L. on behalf of the respondents made the following submissions.

#### **The Date of the Summons**

17. He first of all stated that it was not in dispute that a six month time limit is and was operative in respect of the charge of assault against the applicant.

18. The applicant is incorrect however, that the summons was issued outside the time limit prescribed by the 1851 Act. He referred to section 18(h) of the Interpretation Act 2005. One of the matters applying to the "construction of an enactment" is

*"Where a period of time is expressed to begin on or be reckoned from a particular day, that day shall be deemed to be included in the period and, where a period of time is expressed to end on or be reckoned to a particular day, that day shall be deemed to be included in the period."*

19. Section 2 of the Interpretation Act 2005 describes an enactment as:

"An Act or statutory instrument or any portion of an Act or statutory instrument". An Act is defined as

"(a) an Act of the Oireachtas, and

(b) a statute which was in force in Saorstát Éireann immediately before the date of the coming into operation of the Constitution and which continued in force by virtue of Article 50 of the Constitution."

20. He argued that section 18(h) of the 2005 Act applied to the construction of the 1851 Act. Accordingly, the time began to run with regard to the six month time limit on the day that cause for complaint had arisen, that is the 20th of April, 2016 and the last date for the issuing of the summons was the 19th of October, 2016. He argued that the summons was therefore issued in time. He said that the applicant suggested that the six months does not mean six calendar months, but 182 or 182 ½ days out of the 365 days in the year. In any event section 21 and the first schedule to the 2005 Act make it clear that a reference to "a month" in a statute is to a calendar month. The consequences for calculating of time periods where months have different numbers of days was discussed in the *DPP (Clarke) v. Stafford* [2005] 2 I.R. 586 where Finlay-Geogheghan J. stated:

"Statutory time periods must be capable of certain computation. The submission on behalf of the accused when fully analysed leads to considerable uncertainty. If it were to be accepted how does one for example determine the date of expiry of a six month period which commences on the 28th August, 2002. Upon the contention made on behalf of the accused, as the 28th August is the fourth last day of the month of August it would have to be the 24th February being the fifth last day of the month of February. Following this pattern to its logical conclusion the obvious question is what is six months from a period which commences on the 2nd August? On the accused's contention it would not be a date in February, 2003 as it should be thirty days from the end of February. As the period is six calendar months that cannot be correct. If one stops applying this rule at some date during a month when should it be?"

She further stated:

"I am supported in this conclusion by the explanations given by Lord Diplock in *Dodds v. Walker* [1981] 1 W.L.R. 1027 of the corresponding date rule in English law, albeit in the context of the giving of a one month notice.

His explanation relates to a period in which the first day is excluded. However, what he states in relation to the expiry of the period is relevant to the view I have formed as to the expiry date. Lord Diplock stated:

"My Lords, reference to a 'month' in a statute is to be understood as a calendar month. The Interpretation Act 1978 says so. It is also clear under a rule that has been consistently applied by the courts since *Lester v. Garland* (1808) 15 Ves. 248 that, in calculating the period that has elapsed after the occurrence of a specified event such as the giving of a notice, the day on which the event occurs is excluded from the reckoning. It is equally well established, and is not disputed by counsel for the tenant, that when the relevant period is a month or a specified number of months after the giving of a notice the general rule is that the period ends on the corresponding date in the appropriate subsequent month, i.e. the day of that month that bears the same number as the day of the earlier month on which the notice was given."

Counsel argued that there can be no serious suggestion that the summons was out of time, it was issued on the last day for the issuing of summons the 19th of October, 2016.

#### **The Signing of the Summons**

21. The applicant's second argument is that the summons was not signed by the District Court Clerk in accordance with rule 45 of the District Court Rules 1948. However, the 1948 Rules were wholly repealed and replaced by the District Court Rules 1997, and subsequently by the District Court (Summonses) Rules 2005. Order 15 of the 1997 Rules has removed any requirement for the signing of a summons alleging an offence except where the summons is issued by a judge or against a member of An Garda Síochána. Section 2(1) of the District Court (Summonses) Rules of 2005 (S.I. No. 167 of 2005) states:

"When, upon application made to an appropriate office (within the meaning of section 1(14) of the Courts (No. 3) Act 1986 as amended pursuant to section 1(3) of the Courts (No. 3) Act 1986 as amended, for the issue of a summons in relation to an offence, a summons is issued such summons shall be in the Form 15.2 Schedule B."

22. Counsel argues that the summons in this case was issued in perfect conformity with Form 15.2 of Schedule B to the 1997 Rules and the absence of a signature of the District Court clerk is irrelevant because it is no longer required.

#### **The Alleged want of Particularity**

23. The applicant alleges that the summons is bad on its face for failing to cite such particulars of the offences in violation of rule 44 of the District Court Rules 1948. However, again the 1948 Rules are no longer in operation and Order 9 of the 2005 Rules provides:

"In alleging an offence contrary to any statute or statutes it shall be sufficient to state the substance of the offence in ordinary language with such particulars of the offence as may be necessary for giving reasonable information as to the nature of the complaint, and it shall not be necessary to negative any exception or exemption from or qualification to the operation of a statute creating such offence."

24. He cited *Hogan v. Judge Lindsay* [2016] IEHC 273 where Faherty J. engaged in a lengthy survey of the authorities with regard to the alleged want of particularity and charges appearing on a summons. She reformulated a test adopted by McMahon J. in *Sherry v. Brennan* [2009] IEHC 262 and indicated that the question to be asked in such cases was whether the summons (or more properly in that case a return for trial) created any uncertainty for the accused, in knowing the offence for which he was charged.

25. Counsel for the respondents stated that there can be no uncertainty whatsoever in the applicant knowing the offence to which he is charged. The relevant date and place of the offence, the statutory provision under which the offence is charged and the identity of the complainant are all set out in the summons. Further the applicant exhibited a report of Prison Officer Paul Cullen to the Governor of Midlands Prison dated the 21st of April, 2014 which describes the circumstances of which the alleged offence took place.

#### **Statutory Authority for the Summons**

26. The applicant states that the summons is bad on its face because it refers to the fact that it is issued under section 1(3) of the Courts (No. 3) Act 1986 rather than s. 49 of the Civil Liability and Courts Act 2004 which substituted a new s. 1(3) of the 1986 Act instead of the original provision. Counsel argued that it is still s. 1(3) of the 1986 Act, it is just a new s. 1(3).

#### **Decision**

27. The Court is satisfied that the arguments of counsel for the Respondent are sound in law. The amended statement of grounds was formulated in response to the additional grounds included in the amended application. The arguments are not as clear therein as in the original statement of grounds. They take the form of legal arguments, but do not appear to be clear to this Court.

28. In all the circumstances the Court will refuse to grant leave to the applicant in respect of his application for judicial review for an order of prohibition in respect of the prosecution Case No. 202164 of 2016.