Neutral Citation Number: [2010] IEHC 44

THE HIGH COURT

JUDICIAL REVIEW

2009 1048 JR

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

(AT THE SUIT OF GARDA ROSALEEN O'CONNOR)

APPLICANT

AND

DISTRICT JUDGE MANGAN

RESPONDENT

AND

ALAN CONSIDINE

NOTICE PARTY

JUDGMENT OF MR. JUSTICE HEDIGAN, delivered on the 24th day of February, 2010

1. By order of O'Neill J. dated the 14th day of October, 2009 the applicant was granted leave to apply for judicial review of a decision of District Judge Joseph Mangan on the following grounds:

> (i) A declaration that the Respondent exceeded his jurisdiction and/or was wrong in law in his refusal to sign a summons on the 24th of July 2009 on foot of a complaint made to him on the 22nd of July 2008;
>
> (ii) An order of mandamus directing the respondent to sign a summons relating to the aforesaid offence.

Factual Background

2. On the 2nd of February 2008, the Notice Party was arrested by Garda O'Connor for offences under the Road Traffic Acts after Garda O'Connor had formed the opinion that the Notice Party was in control of his vehicle while under the influence of an intoxicant. The Notice Party was found to be over the legal limit and, upon receiving instructions from the applicant, Garda O'Connor sought to prosecute the Notice Party for the said offences, and a complaint was made by her in respect of this offence on the 22nd of July 2008.

3. The issuance of a summons against a member of an Garda Síochána requires that the summons be signed by a District Judge. On the 22nd of July 2008, Garda O'Connor had a summons signed and issued pursuant to the Courts (No. 3) Act, 1986. The correct summons for such a procedure is one issued pursuant to the Petty Sessions (Ireland) Act, 1851. On the 19th of May 2009, an objection was raised by counsel for the Notice Party in relation to the form of the summons, and the same was struck out on the grounds that the correct summons had not been issued.

4. On the 24th of July 2009, the applicant applied to the respondent to issue a fresh summons grounded on the original complaint made on the 22nd of July 2008. Counsel for the Notice Party was present at this application, and argued that by virtue of the decision in *Carpenter v. Kirby* [1990] I.L.R.M. 764, the effect of the order striking out the first summons was that the original complaint was struck out. The respondent accepted this submission and declined to issue the summons. The applicant argues that this was a misinterpretation of the *Kirby* decision and that the Notice Party can validly be charged again pursuant to the original complaint.

The Applicant's Submissions

5. The applicant's submissions were prefaced by a mutual acknowledgement between the parties that the original complaint was validly made. The applicant sought to challenge the decision of the respondent on the basis that the decision in *Kirby* is not applicable, as it involved an indictable offence, and furthermore, that the jurisdiction of the respondent is predicated upon the validity of the original complaint and not the summons.

6. The applicant first submitted that the respondent erred in applying the decision in *Kirby* to the case before him. In that case, the DPP sought to reissue a summons upon the applicant for a firearms offence so as to include the words "in the Dublin Metropolitan District". The District Judge was of the opinion that this was necessary, believing that without the said amendment he would not have jurisdiction to hear the matter. As a result, the District Judge made an order striking out the charge. The applicant was subsequently charged with an amended summons, and sought to argue that this constituted a fundamentally unfair procedure.

7. Although the application in that case was refused, Barr J. remarked that there was "no significant distinction" between striking out a charge or a complaint, and held the order of the District Judge amounted to a striking out of the complaint. The applicant argued that as the offence in *Kirby* was an indictable offence triable in the Circuit Court, the jurisdiction of

the Court in that case did not depend on the making of a valid complaint within six months of the date of the offence, and the decision is therefore inapplicable to the instant case.

8. The applicant's second contention was that a summons is merely a notification of a complaint, its purpose being to compel the accused to appear before the Court. Relying on the judgment of Gannon J. in *DPP v. Sheerin* [1986] I.L.R.M. 579, the applicant drew attention to the summary of the law on this issue contained therein:

> *1. A complaint is a statement of facts constituting an offence.*
>
> *2. Such a complaint is the initiative proceeding: it must be made to a person having authority to receive it.*
>
> *3. Such person receiving the complaint must have authority to issue a summons and may do so.*
>
> *4. The summons is a mere statement of the complaint notifying that a complaint has been made to an authorised person.*
>
> *5. The summons of itself does not afford proof of the fact that a complaint was made.*
>
> *6. Neither defect of form of a summons nor failure to serve or proceed on foot of it will invalidate the proceeding.*
>
> *7. The court at which the person charged is present may proceed with a hearing notwithstanding deficiency in the form, contents or service of the summons.*
>
> *8. The attendance of the person charged may be procured by the issue of a second summons issued by the same or a person other than one who has issued the first summons.*
>
> *9. In the trial of an offence coming within s. 10 (4) of the Petty Sessions (Ireland) Act 1851 it is a matter of proof that a complaint to an authorised person was made within six months from the commission of the offences alleged.*
>
> *10. The issue of the summons and the making of the complaint need not be contemporaneous.*

9. The applicant submitted that, on this basis, the complaint was validly made and, as per *Sheerin*, it would have been wholly within the jurisdiction of the respondent to issue a new summons.

The Notice Party's Submissions

10. The Notice Party reiterated that the original summons issued was the incorrect summons and, furthermore, had not been issued pursuant to the Courts (No. 3) Act, 1986 as it had not been signed by a District Court clerk. As this was a summary offence, the period within which a complaint could be validly made had expired. As a consequence of this, a new summons would have to be grounded on the original complaint. Counsel for the Notice Party submitted that, as per the decision in *Carpenter v. Kirby*, the resultant effect of the respondent's order was to strike out the complaint.

11. Counsel for the Notice Party cited, in support of this proposition, the Supreme Court judgment in *Kennelly v. Cronin* [2002] 4 I.R. 292, in which Geoghegan J., referring to *Kirby*, remarked that setting aside a charge "effectively strikes out the complaint also". Therefore, with no valid complaint, a fresh summons could not be issued.

12. The Notice Party concluded by submitting that this was also a decision within the jurisdiction of the District Judge. In this regard, it was submitted that the decision of the respondent to refuse to reissue a summons was formed from the view, having heard submissions from both parties, that no valid complaint subsisted.

Decision of the Court

13. The decision of Gannon J. in *DPP v. Sheerin*, set out in the respondent's submissions, outlines the status of a summons and the matters which are to be considered by the District Judge. The crucial point derived from these principles is the well accepted fact that a summons is merely a process to compel the accused to appear before the Court. The summons does not confer jurisdiction; jurisdiction to enter upon a hearing of the charge derives from the making of the complaint. No deficiency of form in the summons can invalidate any proceeding taken there under. Where a summons has been struck out a new summons may be issued to procure the attendance of a person. The summons and the complaint are two entirely different things. I accept the submission of the applicant that the decision in *Kirby* is to be distinguished because it was dealing with an indictable offence.

14. The issue in *Kennelly v. Cronin*, which referred to the decision in *Kirby*, concerned the re-entry of charges which had previously been struck out. In his appraisal of the facts, Geoghegan J noted that setting aside the charges would, in effect, strike out the complaint. This scenario can be wholly distinguished from the present circumstances. In this case it was a summons that was struck out and a summons is merely a document compelling one's appearance before a court. A complaint may be equated with a charge.

15. Although a decision has ostensibly been made within jurisdiction, this Court may exercise its supervisory jurisdiction where that decision is premised on a manifest error of law. The basis of this ground of review is found in the dicta of Lord Reid in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147 ; "although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity." This statement has been approved by the Supreme Court in this jurisdiction in the case of *Killeen v. Director of Public Prosecutions* [1997] 3 I.R. 218. In that case, Keane J. held that it is not possible for any tribunal, including the District Court, upon which a particular jurisdiction has been conferred by statute, to extend or confine the boundaries of that jurisdiction by an erroneous determination of fact. Keane J.;

"It may be that an error of law committed by a tribunal acting within its jurisdiction is not capable of being set aside on certiorari : see State (Davidson) v. Farrell [1960] I.R. 438 . It is otherwise where the error of law has as its consequence the making of an order which the tribunal had no jurisdiction to make."

16. The complaint was made before an authorised person, that is, a District Judge. The complaint was, therefore, validly made. The first summons issued to the Notice Party could be described as one with a "defect in form". This should not have impeded the District Judge from hearing the matter. However, through excess of caution or misunderstanding, the summons was struck out. Did the striking out of this summons also strike out the complaint. Clearly not. All the Judge did was strike out the process whereby the attendance of the notice party had been procured. The complaint was not heard and has never been determined.

Was the District Judge entitled to refuse to sign the second summons because of his mistaken view the complaint had been dismissed by the strike out of the first summons. In my view in refusing to sign the second summons the District Judge acted on the basis of an incorrect interpretation of the law. This error of law led to an incorrect finding of fact i.e. that the complaint no longer existed. He thereby unduly restricted his jurisdiction by an erroneous determination of fact resulting from an error of law. Upon this basis it appears to me that this court may intervene.

Conclusion
17. In light of the foregoing, the Court is satisfied that it is appropriate for the Court to grant the order and the declaration sought. The decision of the respondent is subject to judicial review being one that was based on an underlying error of law which led in turn to an erroneous determination of fact. The initial complaint was validly made and still subsists. The respondent unlawfully restricted his jurisdiction when he declined to sign the second summons arising from this complaint.