Neutral Citation Number: [2010] IEHC 266

THE HIGH COURT

2009 1259 JR

BETWEEN

PATRICK DORAN

APPLICANT

AND

DISTRICT JUDGE BRIDGET REILLY AND THE JUDGES OF THE EASTERN CIRCUIT

RESPONDENTS

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

THE HIGH COURT

2009 1290 JR

AMANDA GILBERT

APPLICANT

AND

DISTRICT JUDGE BRIDGET REILLY AND THE JUDGES OF THE EASTERN CIRCUIT

RESPONDENTS

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

JUDGMENT of Mr. Justice McMahon delivered on the 7th day of July, 2010

Introduction and Background

1. Leave to bring these judicial review proceedings was granted by Peart J. on the 21st December, 2009. For the background to the application, I set out the grounds on which the applicant seeks relief. Because of the complexity of the matter, I am obliged to do so in detail:-

> "1. On the 23rd February, 2007, the first named Respondent made an Order returning the Applicant, together with 3 co-accused persons, Stephen Moorehouse, Amanda Gilbert and Natasha O'Connor, for trial to Wicklow Circuit Criminal Court. The Applicant and his co accused were accused of, inter alia, aggravated burglary, arson and hijacking a car. When the matter came before the Circuit Court, an application was made on behalf of the Respondent [the Applicant here] and his co-accused that the Circuit Court should decline to receive the matter as the Court had no jurisdiction due to a defect in the return for trial. On 15th May, 2007, his Honour Judge Michael White, having heard the application relating to the alleged defects in the return for trial which consisted of the failure to enumerate the charges upon which each accused was being returned in the said Order, made an Order finding that the Circuit Court had no jurisdiction due to the aforesaid defect.
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> 2. On the 14th December, 2007, the Notice party brought an application to the first named Respondent seeking to amend the defective return for trial Order by virtue of the slip rule provided for in the District Court Rules. This application was opposed on the grounds that, inter alia, the District Court was functus oficio *(sic)* and had no jurisdiction to make the order pretended for by the Notice Party. The first named Respondent, on the suggestion of the Notice Party, adjourned the matter at that stage for the preparation of a case stated to the High Court on the issue of her jurisdiction to determine the application before her pursuant to Order 12 of the District Court Rules (the slip rule).
>
> 3. No further application was brought to the first named Respondent and on the 21st day of July, 2008, proceedings by way of an application for judicial review were commenced against the first named Respondent whereby certiorari of the defective return for trial was sought and an order of mandamus was sought against the first named Respondent by reason of her supposed refusal to hear the Notice Party's application under the slip rule.
>
> 4. The judicial review proceedings brought by the Notice Party herein were opposed by the Applicant herein and his co-accused on the grounds that, inter alia, there had been excessive delay between the making of the defective return for trial order and the seeking of the relief and secondly that mandamus should not lie, in view of the conduct of the first named Respondent herein, against her. These issues were litigated before the Honourable Mr Justice Cooke, on the 15th December, 2008 who refused the Notice Party's application for certiorari on the grounds of delay but granted the relief of mandamus against the first named Respondent. The second part of this order was appealed by the Applicant herein to the Supreme Court and a cross-appeal was brought by the Notice Party herein to the first part of the Order. The matter came on for hearing before the Supreme Court on 10th June, 2009 whereupon, Denham J., giving the unanimous judgement *(sic)* of the Court, granted the appeal of the Applicant herein and overturned the order of mandamus granted against the first named Respondent and refused the Notice party's cross appeal…. The Court, in the hearing of the Appeal, felt that the proceedings before the District Court had not been concluded and that the correct procedure would be for all other

matters raised by the Applicant to be argued before the first named Respondent and as such it was premature to raise them in the appellate proceedings. [In view of this decision, the Court did not find it necessary to enter into or determine the other points raised by the Applicant herein in challenging the Order of mandamus.]

5. The matter was re-entered, pursuant to the existing order of the first named Respondent, before her on 29th July, 2009 in Court 50, Dublin Metropolitan District whereupon the Notice Party renewed his application to amend the defective return for trial Order under the slip rule. The matter was fully argued before the first named Respondent with Counsel appearing for the Notice Party, for the Applicant and for the Applicant's co-accused (save for Stephen Moorehouse). The relief being sought by the Notice Party was challenged by the Applicant on a number of grounds [all of which were repeated in these proceedings and which will be outlined in detail below]….(iii)…The Notice Party disputed the arguments put forward by the Applicant and furthermore invited the first named Respondent to consider the judgement *(sic)* of Cooke J. as an authority compelling her to act in the way advanced by him and expressly stated that the amended return for trial would be used to continue the prosecution of the offences alleged against the Applicant in the next sittings of Wicklow Circuit Criminal Court commencing on 8th December, 2009.

6. The first named Respondent made an order making the amendments sought by the Notice Party and expressly stated that the same was to return the Applicant and his co-accused for trial to the next sittings of Wicklow Circuit Criminal Court…."

Reliefs Sought

2. The reliefs sought by the applicant, Mr. Dolan, in the present proceedings are orders of *certiorari* quashing the order of the first named respondent, District Judge Reilly, made on the 29th July, 2009, which (i) purported to return the applicant for trial to the Michaelmas sittings of the Wicklow Circuit Criminal Court and (ii) amended the return for trial order originally made on the 23rd February, 2007, pursuant to the slip rule provided for by the District Court Rules. The applicant also seeks a declaration that the amendments made by the first named respondent on the 29th July, 2009, to the defective return for trial order of the 23rd February, 2007, do not properly seize the applicant before, or give jurisdiction to, the second named respondents (the Circuit Court Judges) in the prosecution, the subject matter of the original criminal proceedings against the applicant which bear bill number 12/07J Wicklow. The applicant also seeks an injunction and interlocutory orders staying the relevant proceedings pending the determination of this application.

3. The applicants argue that the first named respondent acted in excess of or without jurisdiction in making the orders for the following reasons:-

(i) Once the first named respondent ordered the applicant's return for trial and the said order was adjudicated on by the second named respondents, the District Court became *functus offico* and, by reason of the same, had no jurisdiction to entertain the notice party's application under the "slip rule", as set out in Order 12, rule 17 of the District Court Rules 1997 (discussed below).

(ii) The extension of the slip rule to cover the remedying of defects of the nature before the Court, would require an interpretation of the law and an extension of the jurisdiction of the District Court amounting to judicial legislation.

(iii) In exercising her powers under the slip rule, the first named respondent was acting judicially and the application should therefore have been brought within District No. 16 (where the original order was made).

(iv) There was no evidence, or no sufficient evidence, before the first named respondent, entitling her to make the orders pursuant to the slip rule sought by the notice party. Further, in making the order of the 29th July, 2009, the first named respondent acted at naught, since the order which she purported to amend, dated 23rd February, 2007, referred to "the next sitting of the Circuit Court at Wicklow sitting at Bray", a date which had long since past when the amendments were made in 2009.

4. I will deal with each of these matters in turn.

5. (i) The applicant relies on s. 4(A)(1) of the Criminal Procedure Act 1967, as inserted by section 9 of the Criminal Justice Act 1999, in support of his argument here. This section reads as follows:-

"4A. -(1) Where an accused person is before the District Court charged with an indictable offence, the Court shall send the accused forward for trial to the court before which he is to stand trial (the trial court) unless –

(a) the case is being tried summarily,

(b) the case is being dealt with under section 13, or

(c) the accused is unfit to plead."

Subsection (1)(c) was repealed by the Criminal Law (Insanity) Act 2006. The applicant's counsel argues that by virtue of the return for trial order in this case, jurisdiction is passed from the District Court to the Circuit Court for the trial of normal indictable offences. Further, being a court of local and limited jurisdiction, the District Court cannot have an inherent, residual or regional jurisdiction; it only has that jurisdiction as is provided by primary law. Once, therefore, it returns a matter for trial to the trial court it loses jurisdiction over the matter save as is specifically provided for by statute. The jurisdiction of the District Court cannot be extended by secondary legislation (such as the District Court Rules) and even if the order contended for came within the powers permitted by the slip rule, the jurisdiction could not be extended for this reason. The applicant relies on *The State (O'Flaherty) v. O'Floinn* [1954] I.R. 295.

6. It may be true that the court in the instant case sent the accused forward for trial, but the order made by the first named respondent was incorrectly made up and was transmitted to the Circuit Court judge in that form. When Judge White of the Circuit Court looked at the order he identified the defect and refused jurisdiction on that basis. He made no further order. His order, in effect, amounted to no more than a recognition that the District Court order was incomplete. In this sense, he merely looked at the District Court order, saw it was incomplete on the face of it and refused to hear on that basis, he did not engage further with the District Court order. As a result of this, the applicant was released from his recognisance. In my view, if the District Court order was a proper

order when made in the District Court, but when made up and transmitted to the Circuit Court it was imperfect, the first named respondent failed to send "the accused forward for trial" in accordance with s. 4(A) of the Criminal Procedure Act 1967, as amended. In my view, in these circumstances jurisdiction has not passed from the District Court to the Circuit Court because of the accidental omission in the District Court order as transmitted. The first named respondent intended to transfer jurisdiction and made an order reflecting that intention in court, but unfortunately it was incorrectly made up and, to use a sporting phrase, 'the pass was not successfully completed' because the order as received by Judge White accidentally omitted the charge sheet as an attachment. In these circumstances, in my view the District Court is not *functus officio*: the first named respondent made the order, but because of the defect in the written up order, it failed to properly send the applicant forward for trial in accordance with s. 4(A). The first named respondent never divested herself in these circumstances of her jurisdiction in the first place.

7. I am not convinced by the applicant's concession that the slip rule might be applicable where the District Court has full first instance jurisdiction, as in summary cases, but does not in indictable offences, where it has only a preliminary or transitory jurisdiction. In either case, in my view, the slip rule is capable of being applied without doing violence to the jurisdictional argument advanced by the applicant. Further, I do not accept, as the applicant contends, that the District Court and the Circuit Court had jurisdiction of the same matter at the same time. It is quite clear that Judge White refused jurisdiction on looking at, and considering, the order from the District Court.

8. I acknowledge that corrections under the slip rule may be inappropriate in some circumstances where, because of intervening events and reliance by third parties, an injustice would be done to allow a simple correction. While I have no difficulty in acknowledging this, I am not convinced, however, that an amendment under the slip rule in this case would amount to any serious injustice to the applicant on the facts of the case.

9. For these reasons, I do not accept the applicant's argument that the first named respondent had become *functus officio* or that in exercising her power of amendment under the slip rule she was exercising any legislative function.

10. (ii) Order 12, rule 17 of the District Court Rules 1997, provides as follows:-

> "Clerical mistakes in decrees, orders or warrants, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court."

The first point to note in this rule, commonly referred to as the slip rule, is that where there is a clerical mistake which arises from any accidental slip or omission, the court may correct the error "at any time". It is clear on the facts of this case that there was a clerical mistake (*i.e.* an accidental omission) when the original District Court order of the 23rd February, 2007, was being made up as the schedule was not attached. If this is the case, then under the rule the court may correct the error "at any time". On the face of it, there is no time limit as to when this correction may be made. This is not surprising as the District Court is a court of record and the court should always have the power to correct the record at any time, where it is shown to be incorrect. The language of the rule is clear. In *Bellville Holdings Ltd. v. Revenue Commissioners* [1994] 1 ILRM 29, the Supreme Court in considering the equivalent slip rule in the Superior Court Rules confirmed that the correction may be made at any time by the court. Finlay C.J. referred to the judgment of Romer J. in *Ainsworth v. Wilding* [1896] 1 Ch. 673 where Romer J. stated at p. 677:-

> "So far as I am aware, the only cases in which the court can interfere after the passing and entering of the judgment are these:
>
> > (1) Where there has been an accidental slip in the judgment as drawn up, in which case the court has power to rectify it under O. 28, r. 11;
> >
> > (2) When the court itself finds that the judgment as drawn up does not correctly state what the court actually decided and intended."

Romer J. in turn quoted from the Court of Appeal case of *In Re Swire* 30 Ch. D. 239 at p. 678:-

> "Cotton L.J. says: 'It is only in special circumstances that the court will interfere with an order which has been passed and entered, except in cases of a mere slip or verbal inaccuracy, yet in my opinion the court has jurisdiction over its own records, and if it finds that the order as passed and entered contains an adjudication upon that which the court in fact has never adjudicated upon, then, in my opinion, it has jurisdiction, which it will in a proper case exercise, to correct its record, that it may be in accordance with the order really pronounced.'
>
> Lindley L.J. says: 'If it is once made out that the order, whether passed and entered or not, does not express the order actually made, the court has ample jurisdiction to set that right, whether it arises from a clerical slip or not.'
>
> And Bowen L.J. says: 'An order, as it seems to me, even when passed and entered, may be amended by the court so as to carry out the intention and express the meaning of the court at the time when the order was made, provided the amendment be made without injustice or on terms which preclude injustice.'"

11. Relying on these authorities Finlay C.J. concluded:-

> "I am satisfied that these expressions of opinion validly represent what the true common law principle is concerning this question."

12. In *G. McG. v. D.W. (No.2) (Joinder of Attorney General)* [2000] 4 I.R. 1 the five judge Supreme Court approved of *Bellville Holdings* in this regard.

13. In the first set of proceedings in this litigation, *Director of Public Prosecutions v. District Judge Bridget Reilly* [2008] IEHC 419 (Unreported, High Court, Cooke J., 19th December 2008), Cooke J. also relied on this authority and in doing so, I am satisfied he was correct.

14. In amending her earlier order on 29th July, 2009 under the slip rule, I do not see how the first named respondent is exceeding her jurisdiction or how this Court, in light of the particulars just referred to, is interpreting the law in a way that amounts to the usurpation of legislative function. It certainly does not stand up to analysis when the first named respondent is not *functus officio* as I have already found. In my view there is no question of extending her jurisdiction.

15. (iii) The next argument advanced by the applicant is that the amendments sought by the Director of Public Prosecutions, the notice party to these proceedings, under the slip rule are not a "purely ministerial act" as defined by the jurisprudence of our courts, and, therefore, the application should have been brought within District No. 16 where the original order was made. This, the argument runs, was why the notice party in applying for the amendment under the slip rule did so on notice to the applicant. Were it otherwise, no such notice would have been required. On this issue, in my view, it would, to say the least, be ungracious to conclude from an act of courtesy the existence of a legal obligation that had to be observed from the outset. Moreover, the applicant continues, the necessity for the first named respondent to receive evidence as to what order was actually made on 23rd February, 2007 must first be given to allow the correction. In this regard, the applicant relies on the decision of *Creaven v. Criminal Assets Bureau* [2004] 4 I.R. 434. In addition, the applicant relies on the dictum of May C.J., in the case of *The Queen v. Corporation of Dublin* [1878] 2 L.R.Ir. 371 at p. 377 where the learned judge states:-

> "…for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others."

16. Without entering into a jurisprudential debate as to whether the finding of Cooke J. in this matter still stands in spite of an appeal from his decision being allowed on other more technical grounds, I agree, *having examined the matter independently*, with the learned judge's analysis on that issue. Paragraphs 32 and 33 of his judgment states:-

> "32. Finally, the Court considers that the point raised on the ***Creaven*** case is not an obstacle to that course. Recourse to the slip rule is not a judicial act in the sense of that case, namely, the exercise of a power of adjudication. The judicial act in that sense of the exercise of a statutory power of adjudication was in these cases the decision to order the return of the notice parties for trial in the Circuit Court. That power was correctly and validly exercised by the respondent in court on 23rd February, 2007. The problem is that the completion of the printed form giving effect to that order failed to fully and accurately transpose that decision because of the omission of the charges in the schedule. The making good of that mistake under the slip rule is a purely ministerial act of the judge in that it is a necessary and automatic step in reproducing correctly the content and effect of what was decided and pronounced in court.
>
> 33. As such, the application of the slip rule to the defective orders is ancillary to, consequential upon and therefore relates back to, the judicial act taken in court on 23rd February, 2007, and it completes that act as it was intended. It is the residual exercise of the jurisdiction exercised on that date and not something that could only be done if the respondent was again assigned to and sitting in Bray."

17. Of course it is true that the first named respondent had to hear a submission from the notice party on the matter but the only evidence she needed to hear did not relate to the substance of the issue, but rather to the defective form of the order and its failure to reflect the true order for that reason. The error was clear on the face of it: there was no attachment to the order. In these circumstances, I do not agree with the applicant's argument that it must be shown that the first named respondent, in amending under the slip rule, recalled all the circumstances which caused the original order to be made in 2007. And, apart from adding the word "court" to the description "Judge of the District Court" in the order, the only amendment made related to the attachment.

18. As noted above, the applicants rely on *Creaven v. Criminal Assets Bureau* [2004] 4 I.R. 434 which held that the District Judge could not issue warrants outside the district in which he was sitting. I have no quibble with that case. Clearly, in deciding to issue a warrant, the District Judge is exercising a power which must be exercised judicially. Fennelly J. who gave the principal judgment in the Supreme Court in *Creaven* (with whom Murray C.J., Denham J. and McGuinness J. agreed; Geoghegan J. also agreed, but added some comments of his own) carefully examined the nature of the power being exercised by the District Judge in issuing a warrant. He concluded that the District Judge, since he/she must be satisfied that there is reasonable ground for suspicion before he/she issues the warrant, is relying on a power which must be exercised judicially and must be done within the area in which he sits. It is the requirement that he/she must reach this conclusion independently, in a matter which seriously affects the rights of others, that obliges the judge to act in a judicial fashion in those circumstances. At p. 477, Fennelly J. quotes Hamilton P. in *Byrne v. Grey* [1988] I.R. 31 at p. 40, in this regard, who states:-

> "He is not entitled to rely on a mere averment by a member of the Garda Síochána that he, the member of the Garda Síochána, has reasonable grounds for suspicion."

19. Having meticulously examined the history of the District Court in this jurisdiction, Fennelly J. then concluded that the power to issue warrants in that case, being of a judicial nature was done without jurisdiction, as the District Judge was not sitting in the district in respect of which he issued the warrants.

20. It is fair to infer from his judgment, because he carefully distinguished powers which must be judicially exercised from powers, variously described as "executive" or "ministerial", that in the case of the latter, they need not be exercised in the district where the judge is sitting.

21. When the judge is exercising a power to correct an error under the slip rule, in my view, the judge cannot be said to be acting judicially in any real sense of the word. It is doubtful if the judge can even be described, in many such instances, as making any "decision", as the word is used in this context. Rather he/she is, when the error is brought to his/her attention, making a correction. To suggest otherwise, when he/she is alerted to the error, is in my view, forcing the natural meaning of the word to accommodate an artificial argument. Can one seriously say that a judge who made an order sentencing someone to thirty days imprisonment, and which is transposed incorrectly in the order to "three days", is making a "decision" of any kind, when he makes the correction? I think not. The decision has already been made; the correction is just that, a correction.

22. My conclusion, therefore, is that Creaven is clearly distinguishable from the present case for that reason. In the case before this Court, it is my conclusion that the first named respondent was not acting judicially when she amended her earlier order on 29th July, 2009.

23. (iv) This analysis is valid, however, only if the assumption I have made, that the original order made on 23rd February, 2007, in court differs from that which is subsequently made up by the court officials. When the first named respondent made the amendment on 29th July, 2009, it is reasonable to assume that she was aware of her earlier order, and the onus is on the applicant who wishes to prove otherwise. The evidence on affidavit advanced by the respondent is contained in the affidavits of Mr. James A. Boyle, State Solicitor for Kildare who in an affidavit sworn on 29th November, 2007 makes the following averments. At para. 9 he says:-

> "9. The Inspector on the instruction of the Director of Public Prosecutions sought and was duly granted a return for trial in respect of the matter. I beg to refer to a copy of the said Order returning the accused for trial upon which marked with

> the 'A' I have endorsed my name prior to the swearing hereof.
>
> 10. The accused was present in Court at the time of this application and represented by Maguire McNeice & Co Solicitors. No objection was made in respect of this return for trial….
>
> 13. On or about the 27th day of August 2007, I wrote to the Solicitor for the Accused to notify him of my intention to bring an application pursuant to the slip rule (Order 12, Rule 17 of the District Court Rules) to request their client's consent to do so. However to date, no reply appears to have been received by my office…During a subsequent telephone conversation, Joe Maguire of Maguire McNeice, he indicated his consent to this application."

24. The applicant in this case states that nowhere in the affidavit is there an explicit reference to the original order made orally by the first named respondent and this absence of evidence is fatal to the application. Counsel for the applicant points out that at para. 9, the deponent relies on hearsay evidence from the inspector. It is also noteworthy that the affidavit does not contain the usual averment at para. 1, *i.e.* "I do so from facts within my knowledge save where otherwise appears and where so appearing, I believe those facts to be true and accurate".

25. In a second affidavit sworn on behalf of the Director of Public Prosecutions by Mr. Eoin McDonald, a solicitor in Mr. Boyle's office, it is stated that in delivering her judgment, the first named respondent stressed that she was being guided by the judgment of Cooke J. in the High Court. At para. 8 he says:-

> "As appears from that judgment, Cooke J. set out the relevant principles applicable to a Slip Rule application. These principles are not affected by the Court's decision to withhold a discretionary remedy of judicial review."

26. This deponent also avers that the grounds on which the present judicial review were instituted were well known to the applicant on that day.

27. Counsel for the Director of Public Prosecutions in response to the applicant's submissions stated that it had urged the first named respondent to adopt the judgment of the High Court to the effect that the slip rule application was appropriately made. There was no bar to the matter being dealt with pursuant to the slip rule according to Cooke J. The fact was the grounds on which that judicial review was instituted were well known to the applicant on 29th July, 2009. The applicants were also well aware of the fact that the application was being brought under the slip rule and of the previous arguments made on those points when the matter was first brought to the court. There is nothing in the Supreme Court judgment, delivered *ex tempore* by Denham J. on the 10th June, 2009, which bars the bringing of an application under the slip rule and there is no suggestion in that decision that the prosecution should recommence proceedings against the applicant.

28. The applicant has not sworn an affidavit contradicting these averments and has not sought to cross examine the above deponents on these matters. In these circumstances, I am entitled to infer that the District Judge when making her order of 29th July, 2009, amending her original order under the slip rule, was well aware of the original order she made and had full knowledge of the error that occurred in the transposition of her order. After all the matter was an unusual one, was argued by counsel at length and was eventually adjourned by the first respondent for the purposes of having a case stated. As far as she was concerned it was still unfinished business and would have to be revisited.

29. An additional argument advanced by the applicant is that the original order returning the applicant for trial is spent by virtue of the fact that even though now amended, it returns him to a criminal session long since over. The original order dated 23rd February, 2007, sent the applicant forward for trial to "the next sitting of the Circuit Court at Wicklow sitting at Bray". This phrase was not altered when the order was amended under the slip rule on 29th July, 2009 and made up on 22nd September, 2009. The applicant argues "that the next sitting" must be interpreted as of the date of the original order and since "the next sitting" after 23rd February, 2007 was May 2007, a date long since past, the amending order of September 2009 can have no effect. I am not impressed with this argument. It is important to remember that the original order of 23rd February, 2007, did not fix a particular date for the return for trial: all it stated was to "the next sitting of the Circuit Court at Wicklow sitting at Bray". Had it said that the applicant was to be returned "for the Wicklow criminal sittings in May 2007", the matter would have been different and the applicant's argument would have greater force. If an amendment is allowed, however, as is the case here, under the slip rule, "the next sitting" must mean the next sitting after the amendment, that is after September 2009. The applicant is, in effect, trying to change the wording of the original order by substituting a fixed date for the phrase "the next sitting". In my view, the phrase "the next sitting" is used in the original order to avoid the certainty which the applicant is urging on the court now. The real question is from what point in time does one calculate "the next sitting". I reject the applicant's argument that one determines "the next sitting" from the date when the original order is made and that this date then becomes a fixed and unalterable date for the return for trial. Where the slip rule allows the amendment, in my view, "the next sitting" is calculated from the date of the amendment.

30. In this context, there is one question of disputed fact which I must address. The applicant avers, through his solicitor, Mr. Whisker, that when the first named respondent made her amending order of 29th July, 2009, she returned the applicant for trial to "the next sittings of the Wicklow Circuit Criminal Court commencing on 8th December, 2009". This is contradicted in a subsequent affidavit filed on behalf of the Director of Public Prosecutions by Mr. Eoin McDonald where at para. 5 he says:-

> "At no point did the first Respondent [the District Judge] purport to alter her original order by purporting to return the Applicant to the sittings of Wicklow Court commencing on the 8th of December, 2009. Indeed the order exhibited by Mr. Whisker makes clear that she did not in fact make such order. As appears therefrom, she only made amendment of the clerical omissions in the Order."

31. The applicant did not file an affidavit contradicting Mr. McDonald's averment on this issue and in any event, as Mr. McDonald points out, the order of 29th July, 2009, when finally made up, on 22nd September, 2009, and exhibited by the applicant's solicitor himself in his own affidavit, clearly supports Mr. McDonald's version of events on that issue. The phrase "the next sitting" in the original order is not changed and the only alterations made in the July order were under the slip rule.

32. In any event, the Supreme Court has held in *In the Matter of Paul Singer [No. 2]* (1964) 98 I.L.T.R 112 that even in a case where the accused had not been produced before the Circuit Criminal Court at a designated session, the return for trial was still valid for subsequent sittings of the court. The facts in that case were that Dr. Singer had been returned for trial on 23rd January, 1960 to "the next sitting of the Circuit Criminal Court after the return for trial." That sitting took place between 21st March, 1960 and 8th April, 1960. At this sitting, no indictment was preferred against Dr. Singer. The question at issue was whether the return for trial remained valid at a subsequent sitting of the court. O'Daly J. (with whom Maguire C.J., Kingsmill Moore J., Lavery and Maguire JJ. agreed), stated, at p. 132:-

> "Firstly, as to the question as to whether the return for trial of 23rd January last is still valid as a return for trial upon which the appellant can be indicted and tried…
>
> I have come to the conclusion that the better view is that the return for trial survives as a valid return notwithstanding the failure on the part of the prosecution to indict and arraign the appellant at the due sittings of the Circuit Court and notwithstanding the absence of an order of that court formally adjourning the trial.
>
> The order of the District Court returning the appellant for trial in my opinion has not lost its validity as a return although not acted upon in due time. It would, I am satisfied, require an order of the court of trial or of the High Court to set it at nought."

33. If the original return for trial in the *Paul Singer [No. 2]* case remained valid even in the case where he was not indicted or arraigned at the appropriate session, it would seem that in the present case the original order of the District Court dated 23rd February, 2007 also remains valid. When the matter was brought before Judge White on the 15th May, 2007, he did not indicate otherwise, he merely found that it was "defective on its face – it should have set out Charges or attached specific Schedule of Charges". He made no other order as to its validity. Cooke J. in the earlier High Court hearing already found that a valid order returning the applicant before the Circuit Court was made. The original District Court order, albeit amended under the slip rule on 29th July, 2009, still remains in existence and this is what the Director of Public Prosecutions relies on in these proceedings. The fact that the applicant appeared in the Circuit Court on 15th May, 2007 and the fact that the matter could not be progressed further for reasons stated, does not in the light of the *Paul Singer (No. 2)* case, effect the validity of the original order of 23rd February, 2007.

34. Finally, on this issue, I accept the point made by the Director of Public Prosecutions, the notice party herein, that the lawfulness of the District Court order made on 23rd February, 2007, was not challenged on this ground in the first judicial review proceedings when it might easily have been done. In those proceedings, no attempt was made to seek to challenge the lawfulness of the order made in 2007 even though the applicant had full legal representation at the time. It seems to me, given the history of the present proceedings that the applicant should not now be permitted to seek to uphold an order in one set of proceedings as the applicant has done here and then seek to impugn the very same order in a further set of the proceedings on the same matter. It is well settled that a party should bring forward all his grounds of complaint when seeking judicial review. The statement of principle can be found in *Henderson v. Henderson* (1843) 3 Hare 100 at pp. 114 to 115 where Judge James Vikram V.C. said:-

> "…I believe I state the rule of the Court correctly, when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

35. This statement of law has been approved by the Supreme Court in *A.A. v. Medical Council* [2003] 4 I.R. 302 and *F.McK. v. T.H. (Proceeds of crime)* [2007] 4 I.R. 186. In *A.A. v. Medical Council*, Hardiman J. also referred to *Cox v. Dublin City Distillery (No. 2)* [1915] 1 I.R. 345 where Pallas C.B. held (at p. 372) that:-

> "A party to previous litigation, as against the other party in that action, was bound "not only [by] any defences which they did raise in that suit, but also any defence which they might have raised, but did not raise therein"."

36. This principle is particularly applicable in public law litigation where the litigation should be conducted expeditiously with a view to reaching certainty and finality as soon as possible.

37. For this reason also, I am not prepared to accept the applicant's argument under that heading.

38. For the above reasons, I refuse the reliefs sought by the applicant.

39. Counsel for the applicant's co-accused, Amanda Gilbert, has also indicated that this judgment will also bind his client. Her counsel associated himself with the arguments put forward for the applicant here and adopted them in respect of his client. In addition her counsel advanced another argument, namely, that issue estoppel could not apply in criminal cases. For reasons already explained, I need not address this argument. I have already indicated that, although refusing to treat Cooke J.'s judgment as binding precedent on the issue of the slip rule, I have come to the same conclusion by independent analysis of the issue. I do not consider that the District Judge was doing anything different when she revisited the matter on 29th July, 2009. The relevant affidavit stated that she stressed that she was "being guided" by the judgment of Cooke J. in the High Court; she did not say she was "bound by it". In any event, it was not a ground for which leave was granted by Peart J., on 21st December, 2009.