Neutral Citation No: [2010] IEHC 231

THE HIGH COURT

JUDICIAL REVIEW

2009 835 JR

BETWEEN

RORY BRADY

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Kearns P. delivered on the 23rd day of April, 2010

This is a case in which the applicant seeks a declaration that the charge of breach of the peace contrary to common law (with which the respondent seeks to prosecute the applicant) is not an offence known to law and for an order restraining the respondent from taking any further steps to prosecute the proceedings against the applicant on the charges set out in Cabinteely Charge Sheet 8844588.

That charge sheet alleges that on the 10th May, 2009 at Arranmore, Church Road, Killiney, County Dublin the applicant did threaten to stab Bo Owens and then did engage in threatening and abusive behaviour thereby causing a breach of the peace, contrary to common law.

The applicant duly appeared before a sitting of Dun Laoghaire District Court on 5th June, 2009 where evidence of arrest, charge and caution was given. The presiding District Court Judge then remanded the applicant on bail to a subsequent date to enable him to consider the evidence against him and to enter a plea of either guilty or not guilty to the charge.

However, on the advices of his solicitor, the applicant then brought the present judicial review application. By order of the High Court (Peart J.) dated 27th July, 2009 the applicant was given leave to seek relief on the sole ground that the offence of breach of the peace contrary to common law is not know to Irish law and that the applicant could not lawfully be tried for it.

A statement of opposition was delivered on behalf of the respondent in January, 2010 putting that issue in contention.

On the hearing before this Court, the respondent further argued that the substantive point raised by the applicant has already been determined by the High Court in Thorpe v. Director of Public Prosecutions [2007] 1 I.R. 502.

While the applicant also sought relief on the basis that the charge sheet contained two alleged offences and was thus bad for duplicity, counsel on behalf of the respondent has argued, correctly in my view, that as Peart J. had not granted leave to argue this latter point, the applicant was precluded from doing so. Mr. Paul Anthony McDermott, B.L., counsel for the respondent, cited the decision of the Supreme Court in Eviston v. Director of Public Prosecutions [2002] 3.I.R. 260 as the relevant authority in this regard. I believe I am bound to follow the decision of the Supreme Court to that effect. Even if I were not so bound, I am satisfied that the charge sheet does not contain two alleged offences, but that it contains only descriptive words which describe the matters constituting the offence of breach of the peace on the occasion in question.

More importantly, however, it is Mr. McDermott's argument that this Court is bound by the doctrine of stare decisis to follow the decision of Murphy J. in Thorpe v. Director of Public Prosecutions [2007] 1 I.R. 502.

DECISION IN THORPE AND OTHER CASES

The case of Thorpe v. Director of Public Prosecutions [2007] 1. I.R. 502 was a consultative case stated in which a judge of the District Court specifically sought the opinion of the High Court as to whether the offence of breach of the peace contrary to common law was "known to law".

The accused in that case appeared before the District Court on a charge of causing a breach of the peace contrary to common law, after he was alleged to have used threatening and abusive language and become aggressive when asked to leave a private dwelling house. Counsel for the accused applied to have the matter dismissed on the basis that the charge before the court showed no offence known to law or alternatively that the District Court had no specific jurisdiction to impose a penalty in respect of such a charge. It was submitted that a breach of the peace contrary to common law was a power of entry and arrest but was not, of itself, an offence. No specific penalty was known in respect of the charge of breach of the peace contrary to common law. The prosecutor submitted that it was clear that a person could be arrested and charged with breach of the peace contrary to common law, that the offence was known to law and could be prosecuted in a summary manner in the District Court with the penalty resultant on conviction subject to the sentencing limits of the District Court.

It was specifically held by Murphy J., in answering the consultative case stated, that breach of the peace contrary to common law was an offence known to law. He further held that the common law offence of breach of the peace was not abolished by the Criminal Justice (Public Order) Act, 1994.

Mr Colman Fitzgerald, S.C., counsel for the applicant, submitted that this case was inadequately reasoned and wrongly decided and that this Court should not in consequence regard itself as being bound to follow the decision of Murphy J.

A reading of the judgment of Murphy J. makes it clear that the learned trial only reached his conclusion after hearing and considering

wide-ranging submissions from both sides. These submissions are set out in considerable detail in the judgment.

Significantly, Murphy J. derives support for his conclusion on the basis of two other important decisions, Attorney General v. Cunningham [1932] I.R. 28 and Kelly v. O'Sullivan (1991) 9 I.L.T.R. 126.

Attorney General v. Cunningham is a decision of the Court of Criminal Appeal and one that has stood the test of time. While the court was primarily concerned with the issue of the sufficiency or otherwise of the indictment, the judgment of O'Byrne J. makes it clear that the court was satisfied that the offence of breach of the peace existed at common law, stating as follows at p. 33-34:-

> *"In order to constitute a breach of the peace an act must be such as to cause reasonable alarm and apprehension to members of the public, and it seems to us that this is the substantial element of the offence. There is nothing in the charge as framed to allege, nor is there anything in the finding of the jury to show, that there was any person in the vicinity who could be alarmed by the firing, nor is there anything either in the indictment or in the charge of the learned judge to show that this aspect of the matter was ever presented to or considered by the jury. In the circumstances the court is of opinion that count 4 of the indictment does not contain a statement of the offence of having committed a breach of the peace within the meaning of sect. 4, sub-sect 1 of the said Act, nor does it describe such offence within the meaning of Rule 4, Clause 3, and accordingly we have come to the conclusion that this appeal must be allowed and the conviction reversed.*
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> *Though we have arrived at this conclusion we must not be taken as deciding that the accused could not have been properly convicted on an indictment aptly framed. On the contrary, having regard to the finding of the jury that the accused did fire a shot into the house, and to the clear and uncontradicted evidence that there were persons in the house at the time, we consider that a jury not only might but must, unless it acted perversely, find the accused guilty of having committed a breach of the peace."*

In Kelly v. O'Sullivan [1991] 9 L.T.R. 126, Gannon J., in a case in which the proceedings were instituted by summons in respect of a complaint that the applicant engaged in conduct of an offence of an threatening kind likely to lead to a breach of the peace, concluded that facts required to be proved before any binding over could take place and stated:-

> *"What is in issue here is not so much whether the Justice had jurisdiction to bind to the peace without a conviction for an offence, but rather if he did so in such circumstances is it necessary to make an adjudication of fact and to declare such adjudication to warrant the Order binding to the peace? I think the answer must be yes."*

The importance of this case lies in the fact that at no stage during the course of his judgment did the learned trial judge query whether such an offence existed.

Of more recent origin, the decision of Charleton J. in Clifford v. D.P.P. [2008] I.E.H.C. 322, which related to the statutory offence of causing a breach of the peace contary to s.6 of the Criminal Justice (Public Order) Act, 1994, contains useful observations from Charleton J. by way of obiter in relation to the common law offence of breach of the peace. He states:-

> *"7. The common law offence of breaching the peace was not abolished by this section. Instead, the ease of proof of the mischief of abusive behaviour in public was reformed by relieving the prosecution, where they charge under the section, of proving that a breach of the peace actually occurred. In the charge before the District Court it was only necessary to prove a particular form of conduct accompanied by the mental element of intent or recklessness, as set out in the section. A breach of the peace implies conduct which goes beyond boisterousness. Instead, the offence involves a situation which imminently threatens a person, through the conduct of those involved in the breach of the peace, but not necessarily directly, of being harmed through an assault, an affray, a riot, an unlawful assembly or any other serious disturbance…*
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> *8. It is apparent to me, from these helpful discussions of the crime of breach of the peace, that it occurs where a person finds himself, or herself, in a situation where they reasonably fear that if they do not withdraw from it quite promptly, they may either be assaulted or that the disturbance in respect of which the accused stands charged may create the risk of a response which is disorderly and in consequence potentially violent whereby, through direct or indirect means, bystanders may be caught up in violence…"*

This passage, from a Judge eminently qualified in criminal law, is - inferentially at least - supportive of the view expressed by Murphy J. in Thorpe that the offence of breach of the peace is indeed an offence well known and long known to Irish law.

There are thus explicit statements, some of long standing, that there is an offence in this jurisdiction of breach of the peace at common law. Moreover, in the case of Thorpe, such a finding was the express subject matter of the case stated.

STARE DECISIS

The issue of the extent to which a judge of the High Court should extend deference to a decision and judgment of a colleague was dealt with in the recent decision of Worldport Ireland Ltd. (In liquidation) [2005] I.E.H.C. 189.

In that case, somewhat ironically, Clarke J. was asked to demur and depart from a previous decision of my own in Re Industrial Services Co. Limited [2001] 2 I.R. 118.

It is not necessary for present purposes to detail the facts of either case, but rather to move immediately to consider the role of a judge in the High Court when such an issue arises. In rejecting the submission that he should revisit an issue which I had recently determined, Clarke J. stated:-

> *"I have come to the view that it would not be appropriate, in all the circumstances of this case, for me to revisit the issue so recently decided by Kearns J. in Industrial Services. It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. Huddersfield Police Authority –v- Watson [1947] K.B. 842 at 848, Re Howard's Will Trusts, Leven & Bradley [1961] Ch. 507 at 523. Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the*

> *past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all of the relevant authorities and which was, as was noted by Kearns J., based on forming a judgment between evenly balanced argument. If each time such a point were to arise again, a judge were free to form his or her own view without proper regard to the fact that the point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered. In the absence of a definitive ruling from the Supreme Court on this matter I do not, therefore, consider that it is appropriate for me to consider again the issue so recently decided by Kearns J. and I intend, therefore, that I should follow the ratio in Industrial Services and decline to take the view, as urged by counsel for the Bank, that that case was wrongly decided."*

Nothing has been placed before me to suggest that the decision by Murphy J. is manifestly wrong. Both sides were legally represented in that case which was argued at length and in detail before Murphy J. and all of the relevant authorities, including, in particular, King v. Attorney General [1981] I.R. 233 were opened to him.

As Parke J. stated in Irish Trust Bank v. The Central Bank of Ireland [1976-7] I.L.R.M. 50 at p.53:-

> *"I fully accept that there are occasions in which the principle of stare decisis may be departed from but I consider that these are extremely rare. A court may depart from a decision of a court of equal jurisdiction if it appears that such a decision was given in a case in which either insufficient authority was cited or incorrect submissions advanced or in which the nature and wording of the judgment itself reveals that the judge disregarded or misunderstood an important element in the case or the arguments submitted to him or the authorities cited or in some other way departed from the proper standard to be adopted in judicial determination."*

The Law Quarterly Review (Vol. 69/January 1953) at pp. 25-29 records that Black J., who by then had retired as a justice of the Supreme Court, spoke on this theme during the course of a lecture on "The Doctrine of Precedent in Modern Irish Law" at Trinity College, Dublin, in the course of which he stated at p. 26:-

> *"If I were confronted with a decision of a court of co-ordinate jurisdiction, which appeared to me of merely doubtful soundness, I nonetheless applied the rule of comity and followed it leaving it for an appellate court to settle the matter, and the longer the other decision remained unchallenged the more ready I was to follow it. But, if I was presented with a decision of a co-ordinate jurisdiction, my dislike of which went beyond mere doubt, and amounted to a firm conviction that it was wrong, then I declined to follow it."*

I simply cannot conclude that the decision in Thorpe v. Director of Public Prosecutions [2007] 1 I.R. 502 was decided without the matter having been properly argued. On the contrary, the accused in that case was represented by counsel who ranked amongst the most experienced senior counsel in criminal law at the Irish bar at the time. Nor do I find the reasoning of Murphy J to be in any way deficient or such as to persuade me that he reached an incorrect conclusion.

I would therefore decline to grant the relief sought in this case.