THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 139

Record Number: 2014/825

Birmingham P.
Whelan J.
McCarthy J.

BETWEEN/

KENNETH CULLEN

APPLICANT/APPELLANT

- AND -

DISTRICT JUDGE DAVID McHUGH AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT delivered by Ms. Justice Máire Whelan on the 9th day of May 2019

1. This is an appeal against the judgment and consequential order of Mr. Justice Hedigan made on the 16th April, 2013 and perfected on the 19th April, 2013 wherein he refused an application for *certiorari* seeking to quash the order of the first named respondent District Judge made on the 24th January, 2012 refusing to state a case on a point of law in the case of *DPP (At the Suit of Garda Cian Peter Stears) v. Kenneth Cullen*, Charge Sheet No. 12286326. The appellant had sought to impugn the District Judge's refusal to state a case pursuant to s.2 of the Summary Jurisdiction Act, 1857, in respect of his conviction for criminal damage to property as more particularly set out hereafter.

Background

2. On the 13th January, 2012 Kenneth Cullen was prosecuted at Tallaght District Court on foot of the aforementioned garda charge sheet which specified as follows: -

> "That you the said accused/defendant on 29/11/2011 at 1 Glen [*sic*] na Smol Old Bawn Tallaght Dublin 24 in said District Court Area of Dublin Metropolitan District, did without lawful excuse damage property, to wit part of a front door to the value of €20 belonging to Sinead Purdy intending to damage such property or being reckless as to whether such property would be damaged, contrary to Section 2 Criminal Damage Act, 1991."

3. The uncontested evidence before the District Court of two gardaí, Cian Stears and Caroline Breslin, was that on the 29th November, 2011 they were twice called to domestic incidents at the premises 1 Gleann na Smol in Tallaght.

Their evidence was that on the first occasion they attended the premises on the said date they witnessed the appellant, Kenneth Cullen, being arrested at the property following a domestic incident involving his partner Ms. Sinead Purdy. Both gardaí gave evidence that at their initial visitation to the property they had observed the door to the property to be in good working order. Mr Cullen had given his address to the gardaí as 32 Bow Bridge Court, Kilmainham.

4. Both gardaí gave evidence that they had opened and closed the sliding door and it was not hanging loose as they found it to be at their subsequent visit.

5. On the second occasion when they were called to the premises they observed Mr. Cullen kicking and pulling at the sliding door of the property. They observed that the door was hanging loose from its fittings. The gardaí gave evidence that they carried out repairs to the door for Ms. Purdy free of charge.

6. At the close of the prosecution case, a direction of no case to answer was sought by Mr. Cullen's solicitor. The application was based on four grounds:

> (i) There was no evidence that the accused damaged the property;
>
> (ii) There was no evidence that the property belonged to another;
>
> (iii) There was no evidence that the applicant had no authority to damage it; and
>
> (iv) There was no evidence that the damage to the property amounted to €20.00.

7. The application for a direction was refused by the District Judge whereupon he was requested to state a case to the High Court on the issue and he refused. Mr. Cullen then went into evidence stating that he had lived in the house at the time along with his partner and children. His evidence was that the door was already damaged at the time the couple had moved into the premises. Under cross-

examination Mr. Cullen admitted that he was aware he was not welcome at the house, and he had been attempting to gain admittance to the property at the time of his arrest.

8. The appellant was convicted and fined €200. He thereafter sought to appeal to the High Court by way of case stated pursuant to the Summary Jurisdiction Act 1857.

9. A notice requiring a case stated was filed on the 17th January, 2012. This was refused by certificate dated the 24th January, 2012 on the grounds that the application was frivolous.

Judgment of the High Court

10. It is noteworthy that the application before the High Court was grounded on the affidavit sworn by the appellant on the 24th February, 2012. Of relevance are the following averments: -

> "Arising from an incident that occurred on 29th November, 2011 in what was then my home, namely 1 Glen [*sic*] na Smol, Old Bawn, Tallaght, Dublin 24 I was charged per Garda charge sheet number 12286326, that I did without lawful excuse damage property, to wit, part of a front door to the value of €20 belonging to Sinead Purdy intending to damage such property or being reckless as to whether such property would be damaged contrary to s. 2 Criminal Damage Act, 1991."

The affidavit further deposes –

> "When the case came on for hearing before Tallaght District Court on 13th January, 2012 in consequence of my 'not guilty' plea the Director of Public Prosecutions adduced evidence to the effect that on 29th November, 2011 Gardaí Stears and Breslin observed me kicking a door of 1 Glen [*sic*] na Smol causing the sliding door to come off its rails. The prosecuting Garda testified he was able to fix the damage before leaving the scene by securing the door back to its original position."

The affidavit also claims that –

> "The injured party as cited in the charge sheet is my ex-partner, Sinead Purdy. Together we were renting and residing in the property at the relevant time. The relevant door was broken when we moved in and it regularly slipped out from its rails. The owner of the apartment was one Sean Cullen and when we eventually vacated the apartment he returned our full deposit to us and acknowledged there was no damage occasioned."

11. In his judgment delivered on the 16th April, 2013, Hedigan J. identified the issues arising in the application as: -

> (a) Was there any evidence before the District Court that Mr. Cullen caused damage to the door;
>
> (b) Was the presumption in s.7(2)(a) of the Criminal Damage Act 1991 set aside by reason of the charge sheets having named the person to whom the property allegedly belonged;
>
> (c) Was the presumption of no authority to damage provided by s.7(2)(b) of the 1991 Act rebutted by the evidence of the applicant given in the District Court;
>
> (d) Did this specification in the charge sheet of the quantum of damage at €20.00 require the gardaí to prove the amount of damage at €20.00;
>
> (e) Was the District Judge correct to refuse to state a case on the basis that it was frivolous.

12. Hedigan J. noted that Garda Stears was not cross-examined on his evidence at the hearing in the District Court. He and his colleague had attended the *locus in quo* earlier in the day. The sliding door was in good working order at that time. His evidence was that he saw Mr. Cullen pulling at the door. The gardaí observed the door had broken free from its rails and was hanging loose. Hedigan J. noted "The applicant himself in his affidavit admits to kicking the door but pleads the door regularly slipped out of its rails".

13. The High Court judgment noted that damage is defined by s.1 of the Criminal Damage Act 1991 as, *inter alia* "… dismantle, whether temporarily or otherwise, render inoperable, or unfit for use or prevent or impair the operation of…" He concluded that knocking the door off its rails, albeit quickly replaced thereon by the gardaí, clearly amounted to damage to the door. He concluded that there was compelling evidence before the District Court of damage.

14. With regard to the statutory presumption of ownership, Hedigan J. considered the language in s.7(2)(a) of the Criminal Damage Act 1991 and noted that the presumption is a mandatory one. "It shall be presumed. That presumption on a literal reading of the Act may only be set aside by showing the contrary. That has not been shown and thus the presumption must stand. The fact the charge sheet specifies a named person and that person's ownership is not proved in Court cannot change the presumption."

15. The High Court was satisfied that the presumption that the applicant had no authority to damage as provided by s.7(2)(b) had not been rebutted, observing "His mere rental of the property does not rebut a presumption against no authority to damage".

16. Hedigan J. noted that "The fact the charge sheet measures the damage at a particular level where such particularisation is not necessary cannot and does not amend the Act."

17. The High Court noted that the District Judge's refusal to state a case was certified by him as being by reason he considered the application frivolous. The judgment notes that: -

> "In *State (Turley) v. O'Floinn* Ó Caoimh P. held that the High Court when considering such an application may consider whether on the merits it is frivolous. The High Court may form its own opinion on whether the facts warrant consideration by it by way of appeal."

Hedigan J. concluded: -

> "I have already considered each of the grounds above and rejected them. Since, as cited above, this Court may itself consider whether the case warrants an appeal, I consider that, even where the High Court believed that the application

did give rise to a point of law but that it would be a pointless waste of time to grant a request for a case stated, it should refuse the request. See *Fitzgerald v. DPP* [2003] 3 I.R. 247. As I have rejected each of the grounds sought to be raised, I must therefore also refuse this application for an order under s. 5."

Notice of Appeal

18. In the notice of appeal dated 3rd May, 2013 the grounds of appeal include: -

(1) That the judge erred in law and fact in his interpretation of the Criminal Damage Act 1991 particularly ss. 1, 2, and 7 thereof.

(2) That the judge erred in law and fact in his assessment of the relevant issues and so erred in his determination that the presumption at s.7(2)(a) of the Criminal Damage Act 1991 creates a presumption of ownership that can only be set aside by an accused showing the contrary, and that the judge erred in determining that the statutory presumption "must stand" even in circumstances where the charge preferred against the accused specified damage to the property of a named person and where the said person's ownership was not proven.

(3) The trial judge erred in his assessment of the duty that rests on the prosecution in the particular circumstances of this case.

(4) The judge erred in law and in fact in his determination that the prosecution was not obliged to prove all the facts specifically alleged against the appellant.

(5) The judge erred in law in his assessment of the burden and standard of proof that rested on the prosecution and the facts of this particular case, it having been specifically alleged against the appellant that he had damaged "part of a front door to the value of €20.00 belonging to Sinead Purdy". There was no evidence adduced of any complaint by Sinead Purdy or any attendance or evidence from her, no evidence to support the alleged quantum of damages and no evidence to support the contention that "part of a front door" had been damaged.

(6) The trial judge erred in his assessment of the evidence adduced by the prosecution in the District Court up to the point where the application for a direction was made on behalf of the appellant and further erred in his assessment of the duty resting on the prosecution to prove its case. The trial judge erred in relying on evidence adduced when the appellant went into evidence.

(7) The judge erred in law and fact in his interpretation of the Summary Jurisdiction Act 1857 and erred in his determination that the application for a case stated was frivolous.

(8) The judge erred in law and in fact in upholding the refusal of the District Judge to state a case on the grounds that the application was frivolous and further erred in refusing the appellant's application under s.5 of the Summary Jurisdiction Act 1857 and in declining to require the District Judge to show cause or otherwise to state a case.

Submissions of the appellant

19. It is submitted by the appellant that the High Court erred in its consideration and determination and that the application for a case stated was not frivolous when it was made and accordingly the District Judge was obliged to state a case. It was contended that no evidence was adduced of any complaint made by or on behalf of the alleged injured party Sinead Purdy or of the landlord as to their ownership. No evidence was adduced to support the €20 quantum of damage alleged in the charge sheet, no evidence was proffered to support the allegation that "part of a front door" had been damaged, and no evidence was adduced to rebut the appellant's contention that he had taken a lease of the property and resided there. Relying on *Woolmington v. DPP* [1935] A.C. 462 and *DPP v. Rostas and Maughan* [2012] I.E.H.C. 19 it was submitted that the prosecution made specific particularised allegations against the appellant but failed to prove them. It was contended that the High Court in determining legal points acted outside its remit:

"The very fact that it could identify them at all is sufficient of itself to undermine the determination of the application as 'frivolous' and that, of itself, is sufficient to determine this appeal."

It was contended that the High Court had made fundamental errors of law, particularly in its interpretation of the Criminal Damage Act 1991 and of the onus that rests on the prosecution to prove the case it alleges against an accused.

Submissions of the second named respondent

20. It was submitted on behalf of the second named respondent that there was ample evidence that the property was damaged by the appellant. It is further contended that there was no requirement on the prosecutor to prove the quantum of the damage. Reliance is placed on s. 7(2) of the Criminal Damage Act 1991 as creating statutory presumptions resulting in there being no need for the prosecution to call evidence to prove the property was owned by another and further that there was a presumption of a lack of authority to damage the property in question which was not rebutted at the close of the prosecution's case. It was contended that the nomination by the gardaí in the charge sheet of a value in respect of the damage caused does not render it a required proof in a criminal damage trial since the elements of the offence of damage to property as set forth in s. 2 of the Criminal Damage Act 1991 do not include proof of the value of the damage caused.

The Law

21. The relevant statutory provision is s.2 of the Criminal Damage Act 1991, which defines the offence of damaging property thus: -

"2(1) – A person who without lawful excuse damages any property belonging to another intending to damage any such property or being reckless as to whether any such property would be damaged shall be guilty of an offence."

22. Section 7 of the Criminal Damage Act 1991 provides at subs. 2: -

"2(a) – where a person is charged with an offence under s.2, 3 or 4 in relation to property belonging to another: -

(i) It shall not be necessary to name the person to whom the property belongs,

and

(ii) It shall be presumed, until the contrary is shown, that the property belongs to another.

(b) – Where a person is charged with an offence under s. 2 in relation to such property as aforesaid, it shall also be presumed until the contrary is shown, that the person entitled to consent to or authorise the damage concerned has not consented to or authorised it…"

23. The appellant has sought relief both by way of rule pursuant to s. 5 of the Summary Jurisdiction Act 1857 as well as *mandamus* compelling the District Judge to state a case.

24. Section 4 of the Summary Jurisdiction Act 1857 provides as follows: -

"If the justice... be of opinion that the application is merely frivolous, but not otherwise, he… may refuse to state a case, and shall, on the request of the appellant, sign and deliver to him a certificate of such refusal:"

25. Section 5 of the said Act provides that –

"Where the justice… to refuse to state a case as aforesaid, it shall be lawful for the appellant to apply to the Court of Queen's Bench, upon an affidavit of the facts, for a rule calling upon such justice.., and also upon the respondent, to show cause why such case should not be stated; and the said Court may make the same absolute or discharge it, with or without payment of costs, as to the Court shall seem meet; and the justice… upon being served with such rule absolute, shall state a case accordingly, upon the appellant entering in to such recognizance as is herein-before provided."

26. The power of the High Court to form its own determination whether or not an application is "merely frivolous" was established in the case of *The State (Turley) v. O'Floinn* [1968] 1 I.R. 245.

27. Keane C.J. in *Fitzgerald v. DPP* [2003] 3 I.R. 247 made a number of observations on the meaning of "frivolous" in s. 4 at page 253: -

"Since s.2 is designed to facilitate an appeal by a person dissatisfied with the District Judge's determination as being 'erroneous in point of law', a District Judge might well consider a request for a Case Stated as frivolous, if there is no conceivable ground on which his determination could be so described. Section 4 seems plainly intended to ensure that the power to appeal to the Superior Courts on the ground that the determination was erroneous in law, is not abused by litigants pursuing pointless appeals with no prospect of success and consequences in both costs and delay."

In the course of the same judgment Keane C.J. observed: -

"A decision that it is frivolous may be on the ground that no question of law arose or, that if a question of law did arise, it would, depending on the circumstances, be a pointless waste of time to grant the request for a Case Stated."

28. In relation to s. 5 of the Summary Jurisdiction Act 1857, Ó Caoimh P. stated in *The State (Turley) v. O'Floinn* that: -

"Section 5 of the Act of 1857 entitles an appellant to apply to the High Court for a rule calling upon the justice to state a case, and this section appears to me to enable the High Court to form its own opinion on whether the facts warrant consideration by the High Court by way of appeal or not."

29. The determination of Ó Caoimh P. was appealed against and his approach was upheld by the Supreme Court on appeal.

In the Supreme Court, Ó Dálaigh C.J. observed: -

"The question of whether there is sufficient evidence in law to support a conviction is not a question of fact but a question of law."

30. Hardiman J. considered the dicta of Ó Dálaigh C.J. in *Fitzgerald v. The DPP and Ors.* [2003] I.E.S.C. 46 and indicated at para. 50 that: -

"This is so because the ingredients of an offence are always known as ascertainable and the question of whether there is evidence to support the existence of each of them is a wholly legal question. But if the question raised related not to the existence of evidence but to its credibility or to inferences of fact which could reliably be drawn from it, that would be a question of fact."

The judgment continued –

"A useful method of approaching the question of whether a particular issue, in a criminal case, is a matter of fact or of law, is to ask whether, if the case was being tried by judge and jury, the issue would be one for the judge or for the jury."

Presumption in s.7(2) of the Criminal Damage Act 1991

31. Section 7(2) of the Criminal Damage Act, 1991 was considered in Charleton et al., *Criminal Law* (Butterworths Ireland, 1999) where at 9.192 the authors state: -

"The 1991 Act is a fine example of law reform. Its provisions are clear and self-explanatory. It proceeds on a coherent basis which recognises and defines, in simple terms, both the mental and external elements of the offences created."

At 9.193 the authors state: - –

> "In the context of ss 2,3,4 and 5 the phrase 'a lawful excuse' indicates the existence of such property right, or permission, over the damaged article as would give the accused an entitlement to act either intending to damage it, or being reckless as to whether damage to it occurred. The civil law is relevant here only to the extent necessary for determining whether such an excuse existed for the purpose of the criminal law." (emphasis added)

32. Section 7(2)(a) provides: -

> "Where a person is charged with an offence under section 2, 3 or 4 in relation to property belonging to another –
>
> (i) it shall not be necessary to name the person to whom the property belongs, and
>
> (ii) it shall be presumed, until the contrary is shown, that the property belongs to another.
>
> (b) Where a person is charged with an offence under section 2 in relation to
>
> such property as aforesaid, it shall also be presumed, until the contrary is shown, that the person entitled to consent to or authorise the damage concerned had not consented to or authorised it,…"

33. In the instant case it is noteworthy that the appellant did not seek to cross-examine Garda Stears before the High Court on his affidavit, notwithstanding the fact that said affidavit contradicts the averments of the appellant in several material respects. In that regard the decision of Hardiman J. in *Boliden Tara Mines v. Cosgrave* [2010] I.E.S.C. 62 is relevant where the learned judge observed that: -

> "In a case where there is no contradictory evidence an attack on the evidence which is before the Court must include cross-examination unless the contradicting party is prepared to rely wholly on a submission that the plaintiff has not made out its case, even taking the evidence it has produced at its height." (Para. 43 of the judgment.)

34. In the present case, it to be observed that an appeal offered a more appropriate remedy on the facts. In *Sweeney v. Brophy* [1993] 2 I.R. 202 Hederman J. stated at page 212 of the judgment that: -

> "In my judgment *certiorari* is an appropriate remedy to quash not only a conviction bad on its face or where a court or tribunal acts without or in excess of jurisdiction but also where it acts apparently within jurisdiction but where the proceedings are so fundamentally flawed as to deprive an accused of a trial in due course of law. I take this opportunity of emphasising that *certiorari* is not appropriate to a routine mishap which may befall any trial; the correct remedy in that circumstance is by way of appeal." (emphasis added)

Conclusion

35. The High Court was correct in its analysis as to the essential elements of the challenges being brought by the appellant and the issues which arose in the application for determination.

36. The trial judge correctly identified the material facts in the context of the conduct of the proceedings including that Garda Stears, the prosecuting garda, was not cross-examined as to his evidence and the material elements of that evidence in the context of the applications pursuant to s.4 and s.5 of the Summary Jurisdiction Act, 1857.

37. The trial judge was correct in his analysis of the statutory presumptions in s. 7(2) of the Criminal Damage Act and the legal effect of same. It is clear that the appellant mischaracterised the various statutory presumptions arising pursuant to s. 7 of the Act as evidential deficits on the part of the prosecution.

38. Beyond a bare assertion, the appellant did not on any measure rebut the presumption of ownership within s.7(2)(a) of the 1991 Act.

39. There was clear evidence from the two Garda witnesses that the appellant had earlier on the same day identified his normal place of residence as being 32 Bow Bridge Court, Kilmainham, Dublin 8 and the appellant admitted he knew that he was not welcome at the premises 1 Gleann na Smol in Tallaght.

40. The reference to a named individual, Sinead Purdy, in the charge sheet was wholly superfluous in light of the clear language of the statute.

41. The trial judge was correct in his conclusion that every element of the offence must be proven beyond reasonable doubt and he correctly applied the principles in *Woolmington v. DPP* to the facts.

42. Further, the trial judge was correct in his conclusion that the presumption that the appellant had no authority to damage the property had not been rebutted, nor had the contrary been shown within the meaning of s. 7(2)(b) of the 1991 Act. The trial judge correctly held that an assertion of mere rental of the property does not rebut the statutory presumption of no authority to damage pursuant to s. 7(2)(b).

43. The trial judge was correct in finding that the value of the damage referenced in the charge sheet was wholly superfluous. There was clear evidence of damage having been caused to the property and it is noteworthy that the Garda was not cross-examined in the District Court on his evidence in that regard.

44. The trial judge correctly applied the principle in *State (Turley) v. O'Floinn* and exercised his jurisdiction to form his own opinion on whether the facts warrant consideration by it by way of appeal. His review of the facts was comprehensive, and having considered each of the grounds he rejected them based on the statutory framework, the operation of the presumptions and the evidence before him.

45. The trial judge was correct in reaching his conclusion that the case did not warrant an appeal even if the High Court had come to a conclusion that the application did give rise to a point of law, on the basis that it would be a pointless waste of time to grant a request for a case stated on the facts of this case, and accordingly the request was correctly refused.

46. The trial judge rejected each of the grounds sought to be raised for good and sufficient reason and was entitled to refuse the application for an order pursuant to s. 5.

47. The High Court judge was entitled to deal with the substantive legal issue rather than making an order pursuant to s. 5.

48. The trial judge was correct in concluding that the District Judge was entitled to refuse to state a case on the grounds of it being merely frivolous within the meaning of s. 4 of the 1857 Act in all the circumstances.

49. Accordingly, for the reasons set out above the appeal ought to be dismissed.