

THE HIGH COURT

JUDICIAL REVIEW

[2004 No. 146 J.R.]

BETWEEN

AARON JUDGE

APPLICANT

AND

DISTRICT JUDGE JAMES SCALLY AND

THE SUPERINTENDENT OF AN GARDÁ SÍOCHÁNA AT PEARSE STREET AND THE DIRECTOR OF PUBLIC PROSECUTIONS

AND THE DISTRICT COURT RULES COMMITTEE

AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Herbert delivered the 4th day of November, 2005

1. In this matter an Order granting leave to the Applicant to seek judicial review was made by this Court, (Mr. Justice O'Neill) on the 23rd day of February, 2004, and the Court reserved the costs of that application to this hearing.

2. On 31st August, 2003, the Applicant was arrested and brought to Pearse Street Garda Station and there charged, under the procedure recognised by Order 17 Rule 1 of the District Court Rules, 1997, with an offence under Section 49 subsection (4) of the Road Traffic Act, 1961 as inserted by Section 10 of the Road Traffic Act, 1994, as amended by Section 23 of the Road Traffic Act, 2002. He was released on station bail under the provisions of Section 3 of the Criminal Justice, (Miscellaneous Provisions) Act, 1997, to appear at District Court No. 45 on 5th day of September, 2003.

3. On that occasion he was remanded on continuing bail to the 3rd October, 2003. The Applicant appeared on that date but the prosecuting Garda, as stated in her affidavit in these proceedings, sworn 15th June, 2004, was unable to attend the court. She stated that she was completing a training course at the Garda Training College in Templemore, "and was unable to get a Garda to represent [her] in court on that date". In exercise of his jurisdiction under Order 23 Rule 3 of the District Court Rules, 1997, the first named Respondent struck out the case.

4. At paragraph 7 of her said affidavit, the prosecuting Garda states that following a report sent to the office of the third named Respondent on 15th January, 2004, she received directions on 31st January, 2004, to re-enter the matter without delay. At paragraph 8 of her said affidavit, the prosecuting Garda avers that she did so at 10.30am on 10th February, 2004, by way of sworn information before the first named Respondent and applied for the issue of a warrant for the arrest of the Applicant. It appears to me that this averment must be incorrect as to the date of the application because the warrant issued by the first named Respondent, which is exhibited in the affidavit grounding this Application, is dated 5th February, 2004. An unsigned and undated copy of the Information sworn before the first named Respondent by Garda Diana Campbell is exhibited at paragraph 5 of the Grounding Affidavit of Micheál Corry, Solicitor, sworn on 23rd February, 2004. It is accepted on all sides of this Application that it is a copy of the Information as sworn. It is entitled,

"INFORMATION FOR ARREST WARRANT"

District Court Area of Dublin Metropolitan District

Warrant Pulse HD 12805

District No.

Prosecutor Garda Diana Campbell

Accused Aaron Judge

The Information then continues as follows:-

"THE INFORMATION of Garda Diana Campbell of Harcourt Terrace, who says on oath;

I am a member of the Garda Síochána of Harcourt Terrace.

On the 31st/8/2003 the accused Aaron Judge while driving a mechanically propelled vehicle registered number 01 D 85388 was stopped and arrested under suspicion of committing an offence under Section 49 of the Road Traffic Act, 1961 on the Shellburn Road at 5.10am and was conveyed to Pearse Street Garda Station where the accused Aaron Judge was requested to give two samples of his breath. The specimens the accused Aaron Judge provided had a concentration of 56 Microgrammes of alcohol per 100 Millilitres of Breath committing an offence under Section 49(4) of the Road Traffic Act, 1961. He was later charged on charge sheet No. 204257 and was handed a true copy of the charge sheet and bail bond. The Accused Aaron Judge had no reply after caution. On the 3/10/03 the case was struck out because there was no Garda present to deal with the case when called. This case is now being re-entered before the courts.

I therefore apply for the issue of a warrant of arrest of the accused Aaron Judge of 37 Portersgate Gate, Cres, Clonsilla, Dublin 15."

5. Section 49(8) of the Road Traffic Act, 1961, as inserted by Section 10 of the Road Traffic Act, 1994, (as amended), provides that:-

"A member of the Garda Síochána may arrest without warrant a person who in the member's opinion is committing or has committed an offence under this section."

6. By Order 16 rule 5 of the District Court Rules, 1997, it is provided that:-

"Where at common law or under any statute there is power to arrest a person without a warrant, a warrant for his or her arrest may be issued in accordance with the provisions of rule 1 of this Order."

7. It is provided by Order 16 rule 1 that a complaint should be made to a Judge and should be made by information on oath and in writing. Rule 2 of Order 16 goes on to provide that having received such complaint, the Judge may issue a warrant if the offence is stated to have been committed or if such person resides within the Judge's district. It was accepted on behalf of the Applicant and the Respondents that Order 15 rule 10 and Order 16 of the Rules of the District Court 1997, derive their authority from and, the source of the powers of the first named Respondent are ultimately to be found in Section 11 of the Petty Sessions (Ireland) Act, 1851, 14 and 15 Victoria, Chapter 93. The decision of the Supreme Court in the case of *Dunphy v. His Honour Judge Timothy Crowley and The Director of Public Prosecutions*, (unreported – 17/2/1997) was cited as authority for this proposition.

8. Section XI of the Act of 1851 provides as follows:-

"XI The Manner in which Persons against whom any such Informations or Complaints as aforesaid shall have been received by any Justice shall be made to appear to answer to the same shall be subject to the following Provisions:

1. In all Cases of Indictable Crimes and Offences (where an Information that any Person has committed the same shall have been taken in Writing and on Oath) the Justice shall issue a Warrant (Bb.) to arrest and bring such Person before him, or some other Justice of the same County, to answer to the Complaint made in the Information (and which Warrant may be issued or executed on a Sunday as well as on any other Day); or if he shall think that the Ends or Justice would be thereby sufficiently answered, it shall be lawful for him, instead of issuing such Warrant, to issue a Summons in the first instance to such Person, requiring him to appear and answer to the said Complaint; but nothing herein contained shall prevent any Justice from issuing a Warrant for the Arrest of such Person at any Time before or after the Time mentioned in such Summons for his Appearance; and whenever such Person shall afterwards appear or be brought before any such Justice he shall proceed according to the Provisions herein-after contained as to taking the Evidence against such Person and committing such Person for Trial:

2. In all Cases of Summary Jurisdiction the Justice may issue his Summons (Ba.) directed to such Person, requiring him to appear and answer to the Complaint, and it shall not be necessary that such Justice shall be the Justice or One of the Justices by whom the Complaint shall be afterwards heard and determined; and in all Cases of Offence where such Person shall not appear at the required Time and Place, and it shall be proved on Oath either that he was personally served with such Summons or that he is keeping out of the Way of such Service, (the Complaint being in Writing and on Oath,) the Justice may issue a Warrant to arrest and bring such Person before him or such other Justice of the same County, to answer to the said Complaint; and when such Person shall afterwards be arrested under such Warrant, the Justice before whom he shall be brought may either by Warrant (Eb.) commit him to Gaol, until the Hearing of the Complaint or may discharge him upon his entering into a Recognizance (C.), with or without Sureties, at the Discretion of the Justice, conditioned for his Appearance at such Hearing;

And each Summons or Warrant shall be signed by the Justice or One of the Justices issuing the same, and it shall state shortly the Cause of Complaint, and no Summons or Warrant shall be signed in Blank; and in every Case where the Offence shall have occurred or the Cause of Complaint shall have arisen within the Petty Sessions District for which the Justice issuing any such Summons or Warrant shall act, but the Party or Witness to whom such Summons shall be directed or against whom such Warrant shall be issued shall reside in an adjoining County, it shall be lawful for such Justice to compel the Appearance of such Party or Witness at the Hearing of the Charge or Complaint within such District, in light Manner as if such Party or Witness resided in such District, although such Justice may not be a Justice of such adjoining County."

9. While I cannot be certain as to His Honour Judge Timothy Crowley at the time of the events which gave rise to that decision of the Supreme Court, the first named Respondent was undoubtedly at all material times acting and purporting to act as a Judge of the Dublin Metropolitan District. This is stated on the face of the Warrant dated 5th February, 2004, and signed by him. It also appears on the Sworn Information, which Information is in the form of Form 15.3 of Schedule B of the Rules of the District Court 1997, and to which Information I have already adverted.

10. Section 41 of the Petty Sessions (Ireland) Act, 1851, provides as follows:-

"Nothing in this Act shall extend to the Police District of Dublin Metropolis, or alter or affect in any Manner whatsoever any of the Provisions or Enactments contained in any Act regulating the Powers and Duties of Justices of the Peace or of the Police of the District of Dublin Metropolis, or be deemed applicable in any way to the same save so far as relates to the backing or executing of any Warrant..."

11. This Section 41 of the Petty Sessions (Ireland) Act, 1851 was referred to, even if entirely obiter, by O'Dálaigh, J., (as he then was), in the course of his judgment in the Supreme Court in the case of *The State (O'Flaherty) v. O'Flóinn and Kavanagh* [1954] I.R. 295 at pps. 309 and 310.

12. These "provisions and enactments", referred to in Section 4 of the Act of 1851 are in my judgment to be found contained in 'An Act for Improving the Dublin Police', 1842, 5 and 6 Victoria. chapter XXIV, (as amended). This Statute provides, by the words of enactment, that the Dublin City, - Dublin Police District Act, 1808, the Dublin Police District Act, 1824, the Dublin Police District Act, 1836, the Constabulary Ireland, - Dublin Police District Act, 1837, the Dublin Police District Act, 1837-8, the Dublin Police District Act, 1839, the Dublin Police District Act, 1840 and, that Act should be construed together as One Act.

13. Section 49 of the Act of 1842, provides as follows:-

"And be it enacted, That upon any Information or Complaint to be laid or made before any Divisional Justice of any Matter

which such Justice is authorised to hear and determine summarily he may summon the Party charged, and if such Party shall not appear according to the Tenor of the Summons, any one of the Divisional Justices upon Proof of the Service of the Summons, ... in all Criminal Cases shall issue his Warrant for apprehending and bringing such Party before him or some other Divisional Justice, in order that the said Information or Complaint may be heard and determined."

14. Section 51 of the same Act of 1842 is in these terms:-

"And be it enacted, That every such Justice may, without issuing any Summons, forthwith issue his Warrant for the Apprehension of any Person charged with any Offence cognizable before him whenever good Grounds for so doing shall be stated on Oath before him."

15. Section 79 is the Interpretation Section of the Act of 1842 and, it provides, *inter alia* that, "Divisional Justice or Divisional Justices" shall be understood to signify a Divisional Justice or Divisional Justices of the Police District of Dublin Metropolis.

16. It was provided by Part III, Section 78 of the Courts of Justice Act, 1924 as follows:-

"there shall be transferred to the District Court all jurisdiction which at the commencement of this Act was vested in or capable of being exercised by ... the Divisional Justices of the Police District of Dublin Metropolis"

17. It was provided as follows by section 23 of 'An Act to facilitate the Performance of the Duties of Justices of the Peace out of Quarter Sessions in Ireland, with respect to Summary Convictions and Orders', 1849, 12 and 13 Victoria. chapter 70:-

"XXXIII. And be it enacted, That nothing in this Act contained shall alter or affect in any Manner whatsoever any of the Powers, Provisions or Enactments contained in an Act passed in the Forty-eight year of the Reign of King George the Third, intituled An Act for the more effectual Administration of the Office of a Justice of the Peace, and for the more effectual Prevention of Felonies, within the District of Dublin Metropolis, or any Act or Acts amending the same, or an Act of the Sixth and Seventh Years of the Reign of King William the Fourth, intituled An Act for improving the Police in the District of Dublin Metropolis, or an Act of the Second and Third Years of the Reign of Her present Majesty, intituled An Act to make further Provisions relating to the Police in the District of Dublin Metropolis or an Act of the Fifth and Sixth Years of the Reign of Her present Majesty, intituled An Act for improving the Dublin Police, or any Act or Acts amending the same or either of them."

18. These are the Dublin Police Act, 1842 and, the various earlier Dublin Police District Acts, to which I have already adverted which it was enacted by the provisions of the Act of 1842, were to be read together and construed together as One Act with it. In my judgment therefore the provisions of Sections 49 and 51 of the Dublin Police Act, 1842, were unaffected by the provisions of the 1849 Act, with regard to the issuing of warrants.

19. This important distinction between cases heard in the Petty Sessions Districts of Ireland and those heard in the Police District of Dublin Metropolis is clearly reflected in, for example, the preamble to the Summary Jurisdiction (Ireland) Act, 1851, 14 and 15 Victoria. chapter 92, (the Petty Sessions (Ireland) Act, 1851, being 14 and 15 Victoria. chapter 93), and the Summary Jurisdiction (Ireland) Act, 1862. Section 2(9) of the Interpretation Act, 1889, as applied by the Interpretation Act, 1923 and restricted by the Interpretation Act, 1937, provides the following definition:-

"The Expression, 'the Summary Jurisdiction (Ireland) Acts,' shall mean as respects the Dublin Metropolitan Police District, the Act regulating the powers and duties of justices of the Peace or of the police of the District and as respects any other part of Ireland, the Petty Sessions (Ireland) Act, 1851, and any Act, past or future amending the same."

20. In my judgment the discretion of the first named Respondent to issue his warrant pursuant to the provisions of Order 16 rule 2 of the Rules of the District Court, 1997 on the application of Garda Diana Campbell, had, in the context of the particular facts of this matter, to be exercised by reference to the powers conferred on him by Sections 49 and 51 of the Dublin Police Act, 1842. The discretion to issue such a Warrant is a judicial act and it is trite law that the learned Judge was obliged to act within his jurisdiction in issuing that warrant: that he had to act within the limits of the jurisdiction conferred on him by Sections 49 and 51 of the Dublin Police Act, 1842.

21. The legal position with regard to the exercise of this discretion by a Judge of the District Court is well summed up at page 133 of, "The Irish Justice of the Peace", James O'Connor, (E Ponsonby Limited, Dublin, 1915) Part I as follows:-

"It is well settled that a justice to whom an application is made for the issue of a summons or warrant (as the case may be) has discretion and if, in the proper exercise of that discretion he refuses to issue the summons or warrant, the High Court will not interfere (*R. v. Fawcett* (1868) 11 Cox 305; *R. v. Huggins* (1891) 55 J.P. 277) 'Nothing can be clearer or more settled than that if the justices have really and bona fide exercised their discretion, and brought their minds to bear upon the question whether they ought to grant the summons or not, this court is no court of appeal from the justices, and has no jurisdiction to compel them to exercise their judgment in a particular way' (per Wills, J., in *ex parte Lewis* (1881) 21 Q.B.D. 191 at p. 195, citing *R v. Adamson*, (1875) 1 Q.B.D. 201 and *R. v. Ingham* (1849) 14 Q.B. 396).

...What is meant by proper exercise of discretion is that the justice must hear the application and reasonably and judicially determinate it, without misdirecting himself in law or allowing himself to be influenced by improper or extraneous considerations".

22. Pages 227 and 228 of the Volume of "The Justice of the Peace", for the 11th April, 1885, (49 J.P.N. 227), contains a note entitled, "the Duty of Justices in issuing Warrants". This note consists of a short account of the facts and of the judgment in a case called *O'Brien v. Brabner*, decided by the Divisional Court on 21st March, 1885. The authors of the note having set out the facts, (which were totally different from the facts in the instant case), state that they are, "desirous of calling attention to the observations of the judges on the duty of a justice in issuing a warrant" and continue as follows:-

"The whole of the mischief arose from the improper issue of the warrant. No doubt the information laid before the magistrate induced him to believe that the assault complained of was more serious than it turned out to be. But for all that there does not seem to have been any reason to believe that a summons would not have been equally effectual in securing the appearance of the accused person and if that was really the case the issuing of a warrant instead of a summons cannot be justified. It ought to be borne in mind that a warrant ought never to be issued when a summons will be equally effectual in procuring the appearance of the person charged, except perhaps when the charge is of a very

serious nature.”

23. As this is a record of the conclusions of the Judges of that Divisional Court, in the absence of any Statutory provisions to the contrary, or of any contrary decision by the Supreme Court or by the High Court, it constitutes a precedent which this Court should follow.

24. This note of the decision in *O'Brien v. Brabner* was cited by Smyth, J. in an ex tempore judgment delivered by him on 17th February, 2004, (unreported), in the Matter of a consultative Case Stated, *Director of Public Prosecutions v. Gary Dwyer*, at p. 7 of the decision. This case is also cited at p. 31 of the second edition of, “Criminal Practice Procedure and Evidence in Eire”, by Robert L. Sands, (Sweet and Maxwell, London, 1939) and, by Professor Dermot Walsh in, “Criminal Procedure”, (Thomson/Roundhall, Dublin, 2002), at p. 212 note 259 at p. 653 note 98. In my judgment that decision of the Divisional Court should be applied in this jurisdiction with even greater rigour by reason of the right to personal liberty guaranteed by Article 40 s. 4 subs. 1 of the Constitution.

25. In my judgment an offence contrary to Section 49(4) of the Road Traffic Act, 1961 as inserted by Section 10 of the Road Traffic Act, 1994, as amended by Section 23 of the Road Traffic Act, 2002 having regard to the fact that it is made triable summarily, having regard to the moral quality of the Act involved and, having regard to the maximum penalty which the Oireachtas has seen fit to provide by the section, must be regarded as a “minor” offence for the purposes of Article 38 of the Constitution. While fully accepting the utter undesirability of a person driving or attempting to drive a mechanically propelled vehicle in a public place with an unlawful concentration of alcohol in his or her body, it would be straining language to describe an offence charged under this Section as being, “of a very serious nature”, in the sense in which this expression was used by the Divisional Court. I am satisfied that this is so despite the statutory power of arrest without warrant given to a member of the Garda Síochána who forms an opinion that such an offence is being or has been committed.

26. I believe that it would be singularly inappropriate for this Court to endeavour to formulate any general definition of what might be regarded as a ‘very serious charge’ in the context of the decision in *O'Brien v. Brabner* (above cited).

27. In my judgment there is nothing in the Information which was stated on Oath by Garda Diana Campbell before the first named Respondent which could constitute, “good Grounds”, for his issuing his Warrant for the arrest of the Applicant in this case. There were, for example, no circumstances pointing to an intention on his part to abscond. The nature of the charge in itself, for the reasons which I have already stated, could not have justified the first named Respondent, actually exercising his discretion, in issuing his warrant, for to do so would run contrary to the principle of Law as stated in *O'Brien v. Brabner* (above cited). I find that the first named Respondent in issuing his Warrant unfortunately misdirected himself in Law and acted ultra vires his powers in failing to remain within the limits of the jurisdiction conferred upon him by Sections 49 and 51 of the Dublin Police Act, 1842. In my judgment the first named Respondent issued his Warrant for the arrest of the Applicant in this case without any evidence being sworn before him, other than as to the nature of the alleged offence charged and, the reason why the case was struck out. In such circumstances he could not “have really and bona fide exercised [his] discretion”. I find that the first named Respondent clearly failed to address at all the essential question which Section 51 of the Act of 1842 required him to address. This resulted in his making an order which he had no jurisdiction to make. There was simply nothing in the sworn information before him to enable the first named Respondent to be satisfied that there were any, much less any sufficient, “good grounds” to justify the issuing of a Warrant in this case.

28. Unfortunately, the very plain impression which I have formed from what is averred at paragraphs 9 and 12 of the Affidavit of Garda Diana Campbell is that both the Prosecuting Garda and the first named Respondent operated on this occasion what had in all probability become an established practice of convenience in cases of this nature. This enabled the case to be reinstated expeditiously on a mutual, even if unexpressed, understanding that the arrest would be effected at such a time and place as to cause a minimum of inconvenience and embarrassment to the party charged so that the arrest when effected bore only the merest semblance to the execution of a Warrant. However convenient, expeditious and even discrete this procedure might have been, in my judgment it flew entirely in the face of Article 40 Section 4 subs. 1 of the Constitution, of Sections 49 and 51 of the Dublin Police Act, 1842, and, of the principles of Law as stated in *O'Brien v. Brabner* (above cited).

29. It is unnecessary for this Court to consider the argument advanced on behalf of the Applicant in this case that Order 16 rule 5 of the District Court Rules 1997, insofar as it purports to confer on a Judge of the District Court, a power to issue a Warrant in circumstances which are not provided for in Section 11(2) of the Petty Sessions (Ireland) Act, 1851, is *ultra vires* the powers of the District Court Rules Committee as conferred by Section 91 of the Courts of Justice Act, 1924. This submission, if required to be addressed, would also have raised a preliminary point as to whether this alleged lack of powers should first be established in an ordinary action rather than in the course of Judicial Review proceedings.

30. In regard to the jurisdiction which I find was conferred on the first named Respondent by Section 51 of the Dublin Police Act, 1842, to issue a Warrant “in any event”, - that is, without first having to issue a summons, - in the circumstances stipulated in the Section, I do not have to consider the submission on behalf of the Applicant that the Provisions of Section 27 of the Criminal Justice Administration Act, 1914, Section 49(8) of the Road Traffic Act, 1961 as inserted by Section 10 of the Road Traffic Act, 1994 and, Order 16 rule 5 of the District Court Rules, 1997 cannot amend or extend the provisions of Section 11 of the Petty Sessions (Ireland) Act, 1851 so as to entitle a Judge of District Court to issue a Warrant in cases triable summarily where by common law or by statute there is a power to arrest a person without a warrant.

31. The Court will therefore grant an order of Certiorari directing that the Order of the first named Respondent, made 5th February, 2004, be delivered up for the purpose of being quashed.

OTHER CASES REFERRED TO IN ARGUMENT

Attorney General v. Healy [1927] I.R. 460

Attorney General v. Bruen [1935] I.R. 617 *Welch v. Bowmaker (Ireland) Limited and The Governor and Company of the Bank of Ireland* [1980] I.R. 251

Holloway v. Belenos Publications Limited and Others [1987] I.L.R.M. 790

Hutch v. The Governor of Wheatfield Prison and Others (Unreported – Supreme Court – 17th November, 1992).

National Authority for Occupational Safety and Health v. Fingal County Council [1997] 2 I.R. 547

Great Southern and Western Railway Company v. Leyden [1907] 2 I.R. 160

