Neutral Citation Number: [2006] IEHC 96

THE HIGH COURT
JUDICIAL REVIEW

[2004 No. 381 JR]

BETWEEN

EMMETT O'DONNELL

APPLICANT

AND
JUDGE JOHN COUGHLAN
THE DIRECTOR OF PUBLIC PROSECUTIONS AND
GARDA MICHAEL SHEA

RESPONDENTS

Judgment of Mr. Justice Quirke delivered the 28th day of March 2006.

By order of the High Court (Murphy J.) dated the 10th May, 2004, the applicant was given leave to seek relief by way of judicial review including orders of *certiorari* quashing convictions of the applicant of offences contrary to the provisions of s. 52(1) of the Road Traffic Act, 1961 (as amended) and s. 49(4) and (6), (a) of that Act. The applicant was convicted of the offences by the first respondent on the 17th February, 2002, Leave was granted *inter alia* on the following grounds:

> (1) that the orders of conviction were made *ultra vires* in the absence of evidence of charge as required by law and in the absence of evidence of complaint to the District Court within the six months period prescribed by s. 10(4) of the Petty Sessions (Ireland) Act, 1851,
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> (2) that, because of inordinate and inexcusable delay on the part of the DPP in prosecuting the applicant, the orders were made in violation of the applicants right to an expeditious trial and
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> (3) that remarks made by the first respondent during the hearing gave rise to an apprehension that the first respondent would not bring an impartial mind to the proceedings. It is alleged that this apprehension was sufficient to amount to objective bias and that the convictions should be quashed on that ground.

Undisputed Facts

1. The applicant was arrested on 20th April, 2002, released and requested to attend at the District Court in Kilmainham on 3rd May, 2002.

2. Sergeant Gabriel McGrath was the Court Presenter on behalf of the DPP at the District Court in Kilmainham on that day. At that time it was his practice to adduce evidence of arrest, charge and caution in the cases of which he had charge by handing into court, certificates which, he believed, satisfied the requirements of s.6 of the Criminal Justice (Miscellaneous Provisions) Act, 1997 ("the Act of 1997).

He stated in oral evidence that it is his belief that, in accordance with his practice, he handed two certificates into the District Court in Kilmainham on the 3rd May, 2002, in respect of the charges which the applicant faced of offences contrary to the provisions of s. 49 of the Act of 1961.

He has no express recollection of doing so. It was his practice to do so and he assumes that he did do so. He stated that his identification of the two certificates was achieved by way of a process of deduction based upon an examination of the District Court file. He had conducted that examination shortly before hearing of these proceedings.

3. The case against the applicant was first listed before the District Court on the 3rd May, 2002. It was adjourned to the 31st May, 2002.

The case was then adjourned until 20th November, 2002, when it was further adjourned until 25th June, 2003, pending the outcome of a challenge in the Supreme Court in another similar case. That case was relevant to the charge preferred against the applicant.

Thereafter the case was adjourned from time to time. It was ultimately heard on the 17th February, 2004, by the first respondent in the District Court in Kilmainham.

4. On that date evidence was adduced on behalf of the DPP in support of the prosecution. At the conclusion of the evidence the applicant's solicitor applied to the first respondent to dismiss the charges. The grounds relied upon in support of the application were;

> (a) that no evidence had been adduced that the applicant had been notified that it was intended to prosecute him in respect of the offences and
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> (b) that no evidence had been adduced that the applicant had ever been charged with the offences or that any complaint had been made to a Judge of the District Court as required by the provisions of s. 10(4) of the Petty Sessions (Ireland) Act, 1851.

The first respondent rejected the submissions. When asked for his reasons for rejection he apparently stated that "*there is a certificate before me*."

The District Court clerk who was sitting in front of the first respondent gestured and indicated that the first respondent was referring to a document contained within a court file which was then in the possession of the District Court clerk.

No certificate was produced in Court.

5. The applicant was convicted in respect of both offences. Immediately after his conviction, his solicitor spoke to the District Court clerk. He requested access to the file to which the first respondent had referred. He was provided with access, examined the file and took a note of its contents. He found only one certificate on the file.

The certificate was signed by Garda Michael Shea and dated 20th April, 2002. It purported to certify that Garda Michael Shea had arrested the applicant on 20th April, 2002, in respect of an offence allegedly committed contrary to the provisions of s. 49 of the Road Traffic Act 1961.

It purported to further certify that Garda Shea had cautioned the applicant in the manner prescribed by law. It was silent in relation to charge.

6. Having sought and failed to obtain from the District Court clerk a copy of the certificate which he had seen and had recorded the applicant's solicitor attended, by appointment, at the District Court office on 30th April, 2004. He was again provided with access to the file.

He found that the following two certificates had been added to the file since he had examined it on 17th February, 2004;

> 1. An unsigned certificate which appeared to record *inter alia* that detective Garda Michael Shea had charged the applicant in respect of "*…offence(s) set out in .. Kevin St. ..charge sheet(s) no(s)…. 75285,…. a copy of which/are annexed hereto.*"

Apparently no charge sheet was annexed to the certificate.

The certificate then purported to record that the applicant had been cautioned in the manner prescribed by law. At the foot of the certificate the charge was seemingly identified as "*52(1)*". Under the heading "*Charge Sheet No*" the numbers "*75285*" were handwritten. Under the heading "*Reply to Charge*" the words "*nothing to say*" was handwritten.

The certificate was unsigned.

7. The second certificate added to the court file after the convictions on 17th February 2004 was a certificate signed by Sergeant John Kelly. That certificate recorded that on 20th April, 2002, at Pearse St. Garda Station, Sergeant Kelly charged the applicant with the commission of an offence described on the certificate as "*set out in Kevin St. Charge Sheet No. 63167*". It recorded further that a copy of that charge sheet was annexed to the certificate. No charge sheet was, apparently, annexed.

The certificate also recorded inter alia that the applicant had been cautioned in the prescribed manner.

The charge preferred against the applicant was recorded as "*s. 49(4) and (6),(a) Road Traffic Act, 1961 as inserted by s. 10 Road Traffic Act, 1994*".

8. Mr John Forde who is a solicitor in the office of the Chief State Prosecutor solicitor requested and obtained certified copies of the orders which were purportedly made in the District Court on 3rd May, 2002, and 31st May, 2002, and which are relevant to the applicant and to these proceedings. They were;

> (1) The certified copy of an order allegedly made by District Judge Lucey on 3rd May, 2002, which recorded *inter alia* that the District Court heard a complaint on the date of the alleged commission of an offence by the applicant contrary to s. 49(4) and (6)(a) of the Road Traffic Act 1961 as amended. It also recorded that; "*Evidence of the arrest, charge and caution given by certificates.*" and
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> (2) The certified copy of an order allegedly made on 31st May, 2002, which provided inter alia that on 31st May, 2002, a District Judge (whose name is difficult to decipher) heard a complaint against the applicant of the commission of an offence contrary to the provisions of s. 52(1) of the Road Traffic Act, 1961 as amended. It recorded that, "*Evidence of arrest, charge and caution given by certificates.*"

Disputed Facts

1. The applicant, in evidence, averred that when the case was called on the 17th February, 2004, the first respondent immediately observed "*I presume that it is a plea*". The applicant stated that when told that the applicant was contesting the proceedings, the first respondent indicated that the applicant "*might change (his) mind*".

Garda Michael Shea, in evidence, contested the allegation that the first respondent had made the remarks ascribed to him by the applicant. He averred that when the case was called the first respondent inquired "*Is this a plea?*".

2. The applicant's solicitor averred that on 20th November, 2002, his application for an adjournment was initially refused by the District Court. He said that the case was subsequently adjourned to the 25th June, 2003, because it had not been reached on the 20th November, 2002.

On the 24th June, 2003, the case was adjourned on the application of the Chief State Solicitor who required the attendance of witnesses from the Medical Bureau of Road Safety.

3. Garda Michael Shea averred that on 31st May, 2002, he charged the applicant outside Kilmainham District Court with the commission of an offence contrary to the provisions of s. 52(1) of the Act of 1961.

He stated that he then went into the District Court where he gave oral evidence that he had charged the applicant outside the Court and had cautioned him in relation to the commission of an offence contrary to the provisions of s. 52(1) of the Act of 1961.

In oral evidence in these proceedings he confirmed his affidavit evidence. He candidly stated that he could not recall the identity of the District Judge who heard the evidence or any other details associated with the events in question. He concluded his testimony with the remark "*I am doing my best – four years later.*"

Objective Bias

The applicant has failed to discharge the onus of proving that the first respondent made a remark or a series of remarks which would have given rise to an apprehension in the mind of a reasonable person, (occupying the applicant's position), that the first respondent would not bring an impartial mind to the matter upon which he was required to adjudicate.

There was a conflict between the evidence of the applicant and that of Detective Garda Shea in relation to precisely what was said by the first respondent. The Applicant said that the first respondent said "*I presume that this is a plea*" and went on to suggest that the applicant "*..might change his mind*" Garda Shea's recollection was that the first respondent simply enquired "*is this a plea?*".

The words ascribed to the first respondent by the applicant, if uttered, might well have given rise to an apprehension of the type alleged. That is acknowledged on behalf of the respondents.

However the evidence of what precisely was said by the first respondent is quite unclear.

No clarity is added by the fact that no application was made to the first respondent when the remarks were made that he should disqualify himself on grounds of real or perceived bias. Indeed it would appear that no particular exception was taken on behalf of the applicant to the respondent's remarks during the proceedings.

The onus of proving real or perceived bias rests with the applicant. As I have indicated, the applicant has failed to discharge that onus. In the circumstances, I am satisfied that the applicant is not entitled to the relief which he seeks against the first respondent on the ground of objective bias.

Delay
A period of approximately 22 months elapsed between the 3rd May, 2002, (when the applicant was first required to attend at the District Court in Kilmainham) and the 17th February, 2004, (when this case was finally heard and determined).

There is a conflict of evidence between the parties in relation to the seven month period between the 20th November, 2002, and the 25th June, 2003.

The conflict is not acute. It is acknowledged on behalf of the applicant that his solicitor applied for an adjournment on 20th November, 2002, pending the outcome of a Supreme Court challenge relevant to his prosecution. The applicant says that the adjournment was refused. However the case was not reached on that date and was adjourned anyway to the 25th June, 2003.

After the arrest of the applicant in respect of the alleged offences the investigation was completed very speedily and the applicant was brought before the court on 3rd May, 2002.

Thereafter what is complained of is now called "*Court Process Delay*".

The applicant cannot point to any prejudice which he has suffered by reason of the alleged delay. He concedes that an adjournment was sought on his behalf which, if successful, would, in any event, have delayed the proceedings by at least seven months. Explanations have been offered which sought to explain the remaining fifteen months complained of. There is some conflict of evidence in relation to the explanations.

Delay of itself can sometimes be so unconscionable that it will require the prohibition of the trial of a criminal offence. (see *P.P. v. Director of Public Prosecutions* –[2000] 1 I.R. 403).

Whilst there has, in this case, been delay in the prosecution of the applicant, it cannot be described as inordinate and inexcusable delay on the part of the prosecuting authorities. No evidence of delay caused by "*slovenly and lackadaisical*" investigation (see P.P v. DPP) has been proved. The delays have, in the main, been caused by applications for adjournments and pressure of work in the District Court. Not all of the applications for adjournment were made by the prosecuting authorities.

No evidence has been adduced which suggests that the applicant will be prejudiced in his capacity to defend himself in respect of the charges preferred against him by any delay on the part of the prosecuting authorities. He will not be exposed to the risk of an unfair trial by reason of the delay complained of.

For the reasons outlined I am satisfied, on the authorities, that the applicant is not entitled to the relief which he seeks on the grounds of prosecutorial delay.

Complaint to the District Court
Section 10 of the Petty Sessions (Ireland) Act, 1851 provides *inter alia* as follows:

> *"Whenever information shall be given to any justice that any person who has committed or, is suspected to have committed any treason, felony, misdemeanour, or other offence within the limits of the jurisdiction of such justice…….it shall be lawful for such justice to receive such information or complaint and to proceed in respect to the same…".*

It continued:

> *"The complaint shall be made within six months from the time when the cause of complaint shall have arisen, but not otherwise."*

Evidence of Charge
Section 6 of the Criminal Justice (Miscellaneous) Provisions Act, 1997 provides:

> *(1) Where a person, who has been arrested otherwise than under a warrant, first appears before the District Court charged with an offence, a certificate purporting to be signed by a member and stating that that member did, at a specified time and place, any one or more of the following namely-*
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> *(a) arrested that person for a specified offence,*
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> *(b) charged that person with a specified offence, or*
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> *(c) cautioned that person upon his or her being arrested for, or charged with, a specified offence, shall be admissible as evidence of the matters stated in the certificate."*

It is to be noted that the section provides that a certificate which satisfies the requirements of the section and is signed by a

member of the Garda Siochána "*…shall be admissible as evidence of the matters stated in the certificate.*"

The purpose and effect of that statutory provision is to reduce inconvenience and delay in prosecuting certain offences by eliminating the need for the attendance of witnesses to prove routine procedural matters by way of oral evidence.

In many (perhaps most) cases the fact that necessary statutory and other procedural steps have been taken by the prosecuting authorities will not be in issue.

Accordingly, the section has been enacted for the purposes enabling evidence of certain formal, procedural and largely uncontroversial matters to be adduced more conveniently, more efficiently and less expensively than had formally been the case.

However the section did not abolish the requirement that the requisite evidence should be adduced and admitted in open court as evidence of the commission of the offence with which an accused person has been charged. That is necessary so that an accused person will be openly faced with the evidence upon which the prosecuting authorities rely and will have the opportunity, where appropriate, to challenge that evidence.

On the 17th February, 2004, when the first respondent convicted the applicant in respect of the offences there was no admissible evidence before him of the arrest, the charge or the caution of the applicant in respect of the charges.

The first respondent apparently was under the impression that there were certificates on a court file which complied with the provisions of s. 6 of the Act of 1997 and which would have been admissible as evidence of the arrest charge and caution of the applicant in respect of the offences. He was mistaken.

There was only one certificate on the court file. That certificate was signed by Garda Michael Shea and dated 20th April, 2002. It purported to certify that Garda Shea had arrested the applicant on 20th April, 2002, in respect of an offence pursuant to the provisions of s. 49 of the Road Traffic Acts 1961 to 1994 . It purported to further certify that Garda Shea cautioned the applicant in the manner prescribed by law. However it did not purport to certify that Garda Shea or any other member of the Garda Siochána had charged the applicant with any offence.

Prima facie then the orders of conviction were made *ultra vires* since no admissible evidence was adduced proving that the applicant had been arrested or charged or cautioned in respect of any offence pursuant to the provisions of s. 52(1) of the Act of 1961.

Prima facie the order convicting the applicant in respect of the offences allegedly committed pursuant to the provisions of s. 49 of the Act of 1961 was also made *ultra vires* because it was made in the absence of any admissible evidence that the applicant had been charged in respect of that offence.

Mr. O'Higgins B.L. on behalf of the DPP, contends that evidence of arrest, charge and caution in respect of both offences was adduced and admitted in the District Court on earlier occasions. He says that, since the District Court is a court of record, the evidence was validly adduced as required by law and it was therefore *intra vires* the first respondent to convict the applicant in respect of both offences.

He relies upon evidence that it was the practice of Sergeant Gabriel McGrath to "*hand in*" certificates of arrest charge and caution to the District Court. He says that this Court should infer that certain certificates which were not present on the file of the District Court on 17th February, 2004, but were placed on that file subsequently (before the 30th April, 2004,) were, in fact, handed in to the District Court in Kilmainham by Sgt McGrath on 3rd May 2002 . He contends that this Court should find as a fact that the certificates in question were, *ipso facto*, adduced and admitted in evidence in the District Court in Kilmainham on 3rd May, 2002.

Sergeant McGrath stated that it was his practice to "*hand into court*" certificates of arrest, charge and caution. He said that he believed that he did so in respect of the charges which the applicant faced of offences allegedly committed contrary to the provisions of s. 49 of the Act of 1961.

At the applicant's trial on the 17th February, 2004, there was only one certificate on the court file. It purported to certify that the applicant had been arrested in respect of an offence committed contrary to the provisions of s. 49 of the Road Traffic Act 1961/94. It purported to further certify that the applicant had been cautioned. It was silent as to whether the applicant had been charged in respect of any offence. It was not adduced in evidence.

The applicants solicitors sought to have the charges preferred against him dismissed on the ground that no evidence of arrest charge or caution had been adduced in evidence. That amounted to a clear challenge to the adequacy of the evidence of arrest charge and caution relied upon by the prosecuting authorities. It was a perfectly valid challenge.

The first respondent rejected the challenge on the grounds that there was "*…a certificate before me*". He was mistaken in that understanding. There was no adequate certificate before him or on the court file.

It was not suggested by the first respondent or by the prosecuting authorities that evidence of arrest charge and caution had been adduced at earlier sittings of the District Court on 3rd May, 2002, or on 31st May, 2002. There were no orders or certified copies of orders before the first respondent or on the District Court file which recorded that the District Court had heard complaints of the alleged commission of offences contrary to the provisions of s. 49 or s. 52 of the Road Traffic Act, 1961 as amended or that evidence of arrest charge or caution had been adduced in support of those charges at earlier sittings of the District Court.

Accordingly, no evidence, documentary or otherwise, was before the first respondent on 17th February, 2004, which could be relied upon as adequate proof that the applicant had been arrested or charged or cautioned in respect of the commission of an offence contrary to the provisions of s. 52 of the Road Traffic Act 1961 to 94 or that the applicant had been charged with the commission of an offence contrary to the provisions of s. 49 of the Road Traffic Act 1961 to 94.

As indicated earlier the applicant's solicitor validly and properly challenged the adequacy of the evidence of arrest charge and caution relied upon by the State in support of the charges preferred against the applicant. Had the requisite evidence been adduced in open court as required by law, he would have had the opportunity to test the adequacy of the evidence.

Many of the documents which are now relied upon by the prosecuting authorities give rise to questions.

One of the certificates now relied upon is unsigned and is wholly ambiguous as to the nature of the charge to which it purportedly

refers. Another certificate purports to refer to a charge pursuant to the provisions of s. 49 of the Act of 1961 but makes no reference to arrest.

The certified copy of the order allegedly made in the District Court on 31st May, 2002, referred to the commission of an offence contrary to the provisions of s. 52(1) of the Act of 1961. It recorded that a complaint (against the applicant), had been made in the District Court on that date and that "*evidence of arrest charge and caution given by certificate*"

Its recorded terms are wholly inconsistent with the oral testimony of Garda Michael Shea who stated in these proceedings that he charged the applicant with the commission of an offence contrary to the provisions of s. 52 (1) of the Act of 1961 on 31st May, 2002, outside Kilmainham District Court and then went into the District Court where he gave oral evidence that he had charged the applicant outside the Court and had cautioned him as prescribed by law.

Although the applicant's solicitor sought to challenge its adequacy he was given no opportunity to investigate serious inconsistencies which are now apparent in the evidence of complaint, arrest charge and caution relied upon by the prosecuting authorities.

Mr. O'Higgins B.L. relies upon certified copies of orders made in the District Court on 3rd May, 2002 and 31st May, 2002. He says that since the District Court is a court of record those orders may be relied upon as evidence that the appropriate evidence was adduced before the District Court on the dates recorded in the orders.

This Court has been asked to infer either, (a) from documents placed on the District Court file after the date upon which the applicant was convicted or, (b) certified copies obtained post facto of orders seemingly made in the District Court on 3rd May, 2002, and 31st May, 2002, that essential evidence was validly adduced in the District Court and grounded convictions for the commission of criminal offences.

No evidence has been adduced indicating when and in what circumstances, documents were placed upon District Court files and when, and in what circumstances, Orders were made and recorded in the District Court. Clarity on this issue might have been provided by evidence from District Court officials. It was not.

Mr O'Higgins B.L. relies upon the principles identified by the High Court, in *Kevin O'Keeffe v. The Governor of St. Patrick's Institution,* (Unreported, High Court, Peart J., 13th December, 2005).

In that case, the Court construed O. 24 r. (2) of the District Court (Criminal Justice) Rules, 2001 as permitting the District Court to decide that a particular criminal prosecution may be "*…one which involves a minor offence fit to be tried summarily…*" and that at a later stage a judge who is not necessarily the judge who formed the opinion "*…may deal with the matter on a plea of guilty and dispose of the matter by way of sentence or otherwise.*"

The facts of that case (which comprised an Inquiry pursuant to Article 40 of the Constitution) can be readily distinguished from the facts of the instant case which is fundamentally concerned with the adequacy of the evidence required to ground a criminal conviction.

The onus of proof of the commission of a criminal offence rests with the prosecuting authorities. That onus must be discharged by the prosecuting authorities adducing admissible evidence in open court for the purpose of proving the commission of the offence beyond a reasonable doubt.

The evidence must be adduced in open court. It may not be placed upon the court file either before or after the trial of an accused person.

In these proceedings it has not been established on the evidence and on the balance of probabilities that the requisite evidence was openly adduced in the District Court as required by law.

I am accordingly satisfied that the orders convicting the applicant of the offences contrary to the provisions of ss. 49(4) and (6)(a) of the Act of 1961 and contrary to the provisions of s. 52(1) of that Act were made *ultra vires* and should be quashed.