Neutral Citation [2015] IEHC 403

THE HIGH COURT

[2014 No. 1865SS]

IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT OF 1857

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA SANDRA KIRWAN)

PROSECUTOR

AND

CALVIN FITZSIMONS

DEFENDANT

JUDGMENT of Kearns P. delivered on the 26th day of July, 2015.

This is a case stated from the District Court pursuant to s.2 of the Courts (Supplemental Provisions) Act 1961 for the opinion of the High Court as to whether, in the context of a prosecution for an offence under s.5 of the Criminal Justice (Public Order) Act 1994, an accused person must be specifically advised that failure to comply with a request made under that section is a criminal offence prior to the possibility of any conviction by the court for failure to comply with such a request.

The facts as stated by the learned District Judge may be summarised as follows:-

> On the 25th March, 2014 at a sitting of the Dublin District Court the defendant stood charged with an offence that on the 18th April, 2013 at Sean O'Casey Avenue in Dublin he did *"engage in offensive conduct in that you did pull down your trousers and underwear and expose yourself to members of the public present after having been requested by a member of the Garda Síochána … to desist"* contrary to s.5(1)(b) of the Criminal Justice (Public Order) Act 1994.

Garda Sandra Kirwan gave evidence that on the evening of the 18th April, 2013 she was on foot patrol on North Great Charles Street with her colleague Garda Caitriona Brody when she observed a crowd of young males drinking alcohol. She spoke to the defendant and observed that he was very intoxicated. She warned Calvin Fitzsimons that he was committing an offence under s.4 of the Criminal Justice (Public Order) Act 1964 which relates to excessive intoxication. As she was speaking to him, he pulled down his trousers and underwear and exposed himself to all present. She requested, as did Garda Brody, that he desist from this behaviour, but he failed to do so and ran off down the street before turning the corner at the junction of the North Circular Road. The defendant was not apprehended at the time but was subsequently summonsed to appear before the District Court.

In evidence, it was accepted by the two gardaí that they had not specifically warned the accused that it would be an offence if he did not desist from the form of exposure he was engaging in.

At the conclusion of the prosecution case, the solicitor applied to the Court for a direction to acquit the accused.

Section 5 of the Criminal Justice (Public Order) Act 1994 provides as follows:-

> *"5.—(1) It shall be an offence for any person in a public place to engage in offensive conduct—*
>
> *(a) between the hours of 12 o'clock midnight and 7 o'clock in the morning next following, or*
>
> *(b) at any other time, after having been requested by a member of the Garda Síochána to desist.*
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> *(2) A person who is guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding £500.*
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> *(3) In this section "offensive conduct" means any unreasonable behaviour which, having regard to all the circumstances, is likely to cause serious offence or serious annoyance to any person who is, or might reasonably be expected to be, aware of such behaviour."*

The solicitor for the accused argued that there must be read into the offence an implied obligation to warn the subject of a request made pursuant to the section that a failure to comply with the direction was an offence.

Having considered the submissions, the learned District Judge indicated that he was not inclined to agree with the submissions made on behalf of the defendant, stating that such a warning would not be required unless there was a demonstrated lack of capacity or something similar and that such had not been shown to be the case. Accordingly, he refused the application for an acquittal by way of direction and later convicted the accused and remanded him for a probation report. On the 15th July, 2014, he took this matter into account when placing the defendant on a six month probation bond.

The defendant then requested the District Judge to state a case as to whether an accused person, being charged under the section, must be specifically advised that failure to comply with the request made under the section is a criminal offence prior to any entitlement by the court to convict for a failure to comply with such request.

SUBMISSIONS OF THE DEFENDANT

It was submitted on behalf of the defendant that the offence created by s.5 falls to be considered in the same way as any other statutory offence in the nature of failing to comply with a requirement. In this regard it was submitted that the case of *Director of Public Prosecutions (Garda Ryan) v. Mulligan* [2009] 1 I.R. 794 provided clear authority for the proposition that where a power of compulsion, enforceable by sanction, is exercised, a person should be informed of this power and also the consequences of a refusal to comply.

In this regard it was submitted that s.5 of the Act should be read in conjunction with s.8 of the same Act which provides:-

> *"(1) Where a member of the Garda Síochána finds a person in a public place and suspects, with reasonable cause, that such person—*

(a) is or has been acting in a manner contrary to the provisions of section 4 , 5, 6 , 7 or 9 , […]

the member may direct the person so suspected to do either or both of the following, that is to say:

(i) desist from acting in such a manner, and

(ii) leave immediately the vicinity of the place concerned in a peaceable or orderly manner.

(2) It shall be an offence for any person, without lawful authority or reasonable excuse, to fail to comply with a direction given by a member of the Garda Síochána under this section."

It was argued that the power of compulsion exercisable under s.5(1)(b) of the Act is to all intents and purposes identical to that found at section 8(1)(a)(i). The defendant was thus entitled to rely on the unreported case of *Director of Public Prosecutions (Sheehan) v. Galligan & Daly* (Unreported, High Court, Laffoy J., 2nd November, 1995), in which the court held, at p.5:-

"In a prosecution for an offence contrary to s.8 (2) of the 1994 Act there should be evidence before the court of trial that the accused was informed or was aware of the fact that if he did not comply with the direction being given to him by a member of An Garda Síochána he would be committing a criminal offence; no particular formula of words need be used to convey such a warning."

It was argued that a different interpretation should not be applied to the two sections because, quite apart from the cases cited, it would be illogical and unreasonable to do so.

Reference was also made to the case of *Director of Public Prosecutions (Lanigan) v. Freeman* [2011] 1 I.R. 301, a case in which, in relation to offences under the Road Traffic Act 1961, an accused had to be informed of the consequences of failing to comply with the statutory requirement in order for an offence to be committed. At p. 308 of that judgment, Charleton J. commented that in some instances proof that an accused is informed of the consequences of failing to comply with an authoritative direction may not be necessary to ground an offence. Having so stated, he also however observed that the Act of 1994 did not come *"within that category since members of An Garda Síochána were acting pursuant to complex powers that were not part of notorious legal tradition …"*.

In further support of the submission that the question posed to this Court should be answered in the affirmative, the further observation of Charleton J. in that case (at p.308) was relied upon where he stated:-

"The court notes a series of authorities on disparate statutory police powers that indicate that it is both desirable and legally necessary for a garda to indicate in a basic way in exercising police powers that a demand is made pursuant to law and that there may be consequences in terms of a criminal offence in failing to comply."

SUBMISSIONS ON BEHALF OF THE D.P.P.

It was argued on behalf of the respondent that s.5 of the Act differs in material respects from s.8 of the Criminal Justice (Public Order) Act 1994 in that as between midnight and 7.00am an offence under s.5 is committed merely by committing the offensive behaviour, and at other times is committed by persisting in that behaviour despite being requested to desist. The other offences are committed by reason of the failure to desist and/or to leave an area when so required, and/or by a failure to provide a name and address when properly demanded. Unlike s.8, it is the activity, or rather the offensive behaviour, rather than the failure to comply with a garda direction or request that is captured by section 5. In this regard it was noteworthy that an offence under s.8 is committed when one fails to comply with a direction to cease offensive behaviour, including the commission of a breach of section 5. Accordingly, as a matter of statutory interpretation, there is a clear distinction between sections 5 and 8 of the Act as otherwise the Legislature must be deemed to have acted irrationally to enact identical provisions.

In any event, the offending behaviour perpetrated by the defendant in this case in exposing himself and then running off down the street was "notorious" in the sense cited by Charleton J. in *Director of Public Prosecutions (Lanigan) v. Freeman* [2011] 1 I.R. 301.

There could not have been the slightest doubt in the mind of the defendant that his conduct was unlawful and this was evidenced by the fact that he ran away from the scene while the Garda was in the course of asking him to desist. That behaviour could only be interpreted as an implicit acknowledgment by the defendant that he knew he was engaging in unlawful behaviour and, second, it rendered impossible any further dialogue with the Garda. In this case the Garda could not, even if so minded, further warn the defendant so that even if an explanation by the Garda was appropriate, as a matter of law or policy, the defendant's flight from the scene should not afford him a defence.

The respondent also argued that, because of the defendant's failure to comply with the statutory pre-requisites for launching a case stated as ordained by the Summary Jurisdiction Act 1857, as amended, that this Court did not have jurisdiction to hear or determine the matter and that the appeal should be dismissed for that reason.

DISCUSSION AND DECISION

The Court might begin by addressing the point that the case stated was brought either out of time or without compliance with the procedural requirements for bringing a case stated.

These issues are comprehensively addressed in the affidavit of Gareth Noble, solicitor for the defendant. He deposes that the matter appeared before the High Court on the 24th November, 2014 and no issue was raised at that time about the manner in which the case stated appeared in the list. The matter was then confirmed as ready to proceed for hearing in the High Court and Monday 8th June, 2015 was assigned as the date for the hearing. The first time any objections about the jurisdiction of the High Court to hear the matter were raised was upon receipt of the prosecutor's written submissions which were received on Friday, 5th June, 2015. On receipt of same, Mr. Noble re-mentioned the matter before Judge O'Connor on the 12th June, 2015 and says that Judge O'Connor took the view that he did not wish to disturb or interfere with the proceedings as presently constituted. He deposes that the learned District Judge invited both parties to communicate to the High Court his view that he had "no difficulty with the case going forward". Mr. Noble states that Mr. Donal Forde, on behalf of the Chief Prosecution Solicitor's Office, outlined to the court that the position of the DPP was that there would be no objection taken if the High Court declined to deal with the matter and that the matter would then be remitted back to the District Court for a further fresh referral by way of case stated. Mr. Noble deposes, and this Court agrees, that such a process would be a waste of court time and resources in circumstances where the matter has been listed before the High Court since November 2014. Furthermore, the hearing before the court proceeded without further reliance on any procedural

point with regard to the bringing of the case stated. The Court therefore is satisfied to deal with this request from the learned Judge of the District Court in the usual manner.

One might begin by posing the question: what is the purpose of warning that any form of continuance of certain behaviour might, if not desisted from, constitute an offence?

The answer must, of course, be that the person the subject of the request and warning, may be unaware that his conduct may give rise to a criminal offence.

This is particularly the case where procedural or formal requirements of law arise, such as the failure to provide a name and address in the context of a road traffic offence, or any other conduct which might be characterised as *malum prohibitum* rather than *malum in se*.

There may indeed be certain categories of "offensive conduct" under s.5 of the Criminal Justice (Public Order) Act 1994 which may fall into the former category, but the behaviour of the defendant in exposing himself in a public place, presumably with the intention of humiliating two female members of An Garda Síochána in front of his companions, can only be regarded as conduct *malum in se*. Indeed such behaviour could have attracted other more serious charges for indecent exposure. The Court would venture to suggest that, from time immemorial, such conduct and behaviour has been regarded as disgraceful, offensive and criminal in countries of common law jurisdiction.

This Court would adopt entirely the observations of Charleton J. in *Director of Public Prosecutions (Lanigan) v. Freeman* [2011] 1 I.R. 301 where at paras. 13-15, the learned Judge stated as follows:-

> *"13. Earlier decisions establish that a person arrested is entitled to know, in general terms, the reason for their arrest, when arrested, and to be shown a search warrant, where it is proposed to search their premises, or in the absence of a search warrant otherwise informed of, again in general terms, the power that was being exercised. These decisions proceeded from the balance that is inherent within a Christian and democratic society. It is a mark of totalitarian rule that people can be arrested for no reason, or held without communication, not knowing anything as to the focus of the inquiries that the police may, or may not, be pursuing. The dwelling of a citizen is, for the similar reasons, entitled to be free from lawless invasions by agents of the State. There is also a possible danger that citizens on the public highway could be subjected to bullying or arbitrary actions on the part of the police. The argument made for basic information to be given to a subject of a police power that there is a power in law and that the consequence of failing to disobey may be the commission of criminal offence derives from the same origin.*
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> *14. It is not necessary to imply it, however, into every circumstance. The court notes that the Oireachtas may enact statutory requirements which carry a high level of particularity in the information to be given to citizens in the event that police or administrative powers are to be exercised. For instance, s. 19A of the Criminal Justice (Public Order) Act 1994, as inserted by s. 24 of the Housing (Miscellaneous Provisions) Act 2002, requires a detailed level of information to be given to a person who is subjected to a demand that they move from land. Unless the Oireachtas so specified, then basic information is all that can be argued to be implied into the exercise of statutory police powers. Further, in circumstances where the origin of a legal power cannot readily be stated, it is clearly the will of the Oireachtas that this is not necessary. Gardaí may stop vehicles on the road without brandishing a sign indicating a common law or statutory power in that regard. In circumstances of a riot or affray, the gardaí are entitled to act appropriately with reasonable and proportionate force to quell a disturbance pursuant to their duty to keep the public peace without issuing words of legal notice in all directions. In the context of the regulation of traffic, it has always been part of the power of the State both to regulate traffic and to check compliance with the basic statutory requirements for driving and for public safety through stopping and examining vehicles. Searching vehicles would be another matter and, absent a valid power of arrest, such an action would be founded on a police power provided by statute.*
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> *15. The fact that powers are specified to be exercised in particular ways in a statute may add to aspects of the interpretation of the proper exercise of that power. The context is important. It would not be necessary, to take another example, for every traffic sign to indicate that it was erected pursuant to law, or the consequences of failing to comply with it, or the statute or regulation on which it was founded. Failing to comply with a direction by road sign is still an offence: no one is entitled to say about a one way street sign that as it does not make clear an origin in law that it is to be disobeyed. Finally, there may be matters that are so notorious that proof is not required. It does not seem to me that the Criminal Justice (Public Order) Act 1994 could have come within that category since members of An Garda Síochána were acting pursuant to complex powers that were not part of notorious legal tradition and which, further, infringed the entitlement of the citizen to walk the public highway lawfully."*

While the learned trial judge did express a particular view which might in one context be said to have excluded from the provisions a "warning necessary" category of the Criminal Justice (Public Order) Act 1994, it is quite clear that what the judge had in mind was the requirement for a warning in circumstances which "*infringe the entitlement of the citizen to walk the public highway lawfully*". The conduct in the instant case could not be more different and the observations of Charleton J. are appropriately understood by reference to his emphasis on the fact that powers conferred on the gardaí and the exercise of same must be understood in context (see para. 15).

In the instant case the section does not specifically require that a warning be given and the Court is quite satisfied that the conduct of the defendant was so self-evidently and so notoriously criminal in nature, that no such warning was required in the particular context of the events on the night of the offence.

Even if the Court is mistaken in this regard, the Court must also take cognisance of the fact that the respondent ran away from the scene, thereby precluding any possibility of any such warning, assuming same were necessary in the particular circumstances. It would completely subvert the relevant exercise of the statutory powers conferred on the gardaí if those powers could be so easily rendered ineffective should an accused person flee the scene of his criminal behaviour.

In all of these circumstances, the Court is quite satisfied that the answer to the case stated must be that any requirement to specifically advise that failure to comply with the request made under s.5 of the Criminal Justice (Public Order) Act 1994 is a criminal offence before a court may convict in respect of a failure to comply must depend on context and in the particular context of this case, that answer is no.