Neutral Citation: [2015] IEHC 835

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 336 JR]

BETWEEN

SEAN CARRAHER

APPLICANT

AND

JUDGE DOIRBHILE FLANAGAN, THE DIRECTOR OF PUBLIC PROSECTIONS AND AN GARDA SÍOCHÁNA

RESPONDENTS

EX TEMPORE JUDGMENT of Mr. Justice McDermott delivered on the 22nd day of October, 2015.

1. Mr. Carraher who is not legally represented, seeks a declaration or order of certiorari of the order of Her Honour Judge Flanagan made following a hearing on appeal on the 1st February, 2011 at Bray Circuit Court in Case No. A 2009/3272. The grounds upon which leave to apply for judicial review was granted are set out in the statement of grounds and those of most relevance are those set out at Grounds 3, 4, 5, 6, 7, 8, 9, 11, 13, 14, 15, 16 and 17.

2. The applicant claims that the Appeal Hearing was fundamentally flawed on the grounds that Garda witnesses, and others, admitted in evidence that secret recordings were made, sent out of the country, altered and brought back into the country, of telephone conversations relied upon in the course of a prosecution, in respect of harassing telephone calls allegedly made to his wife.

3. It is said that the evidence of these alleged recordings was tampered with, and altered, and that false records of these calls were admitted in evidence by the learned judge. This is said to be evidence of bias and prejudice against him. The applicant now denies making any telephone calls and maintains that the telephone records show that the messages said to have been "left" on the telephone are falsified. These records are said to relate to calls made on the 16th and 17th March, 2011 and it is submitted that the actual time recorded, in respect of the telephone calls made to the relevant number, on those dates, would not have afforded sufficient time for the exchanges alleged to have occurred between the parties to have taken place.

4. In support of the latter proposition, the applicant relies upon the conclusions of the Garda Síochána Ombudsman Commission (GSOC) investigation of a number of complaints made by him, against the Gardaí who were involved in investigating the charges subsequently brought. The applicant complained that the Gardaí falsified evidence and harassed him. In a letter of the 16th March 2012, which followed the District Court hearing in the matter, GSOC reached a number of relevant conclusions. Paragraph 3 of this letter states:-

> "Corrupt or improper actions – You allege that data on voice recorders that were in the possession of Shankill Gardaí may have been given to your ex-wife and subsequently used to falsify telephone messages used in Court against you. The voice recorders that you refer to were seized at the same time you were interviewed by Shankill Gardaí for harassment during which time mobile telephone messages were played. The transcript of the messages provided by you, which you stated were used in Court and were false correspond entirely with those played to you during the interview. It would therefore be impossible for Gardaí or Ms.G to have used the data from your recorders to falsify these messages as they were only in Garda custody minutes before the interview in which they were played. These allegations are denied by the Garda members concerned."

The letter then deals with a number of other complaints and states:

> "In your complaint reference 840030-10-11, it is noted that the allegations made are an extension of your previous complaint in which one of your allegations was that Gardaí falsified the telephone messages used as evidence against you. This has been dealt with above.
>
> In this complaint you alleged Gardaí were knowingly aware of the inconsistencies relating to the message left by you and the phone records produced. The discrepancy in the phone records is acknowledged and has been questioned with the telecoms service provider and is without explanation. However, I draw your attention to the recorded caution interview with Gardaí where you were played these messages and you did not dispute you left the messages nor their contents. I also draw your attention to the fact that the phone records were provided to your solicitor in advance of the hearing. The evidence produced has been decided on by the Judge and in this case your avenue of redress is through appeal of the Judge's decision. This is not a matter for the Garda Ombudsman Commission."

It continues:

> "Similarly, it has not been established that the Gardaí presented falsified evidence to the court. The evidence presented is that which was provided to your solicitor, and was deemed sufficient to prove the offences by the Director of Public Prosecutions (DPP). In the absence of court transcripts it is not possible to establish the context in which this evidence was presented however, the court was the forum for your solicitor to allege it was falsified and this is now a matter for your appeal."

5. For similar reasons, GSOC found that it was not possible to revisit the evidence of Garda Clancy concerning the existence of electronic recordings of voicemail messages. The letter notes:-

> "As you state, the messages are on the Garda interview tape. You did not, under caution, dispute the contents of the

messages or deny leaving them. This has also been decided on by the Judge and is a matter for your appeal."

6. It was in those circumstances that the GSOC determined that the matter had been dealt with by the District Court and that the disclosure by the Gardaí to Mr. Carraher's solicitor of the material used in the prosecution provided the opportunity for his solicitor to dispute its contents. Other matters in relation to the conduct of the District Court hearing were not thought to be a matter for GSOC, which concluded that further investigation was therefore not necessary or reasonably practicable.

7. On the appeal, the issues which were addressed in that letter were also "live issues" before the learned Circuit Judge. Initially, there were three appeals listed for consideration, numbered 2009/3272, 2009/82704 and 2009/7728.

8. The appeal regarding case number 2009/3272 concerned a prosecution, for the applicant, of harassment contrary to section 10 of the Non-Fatal Offences Act 1997 in relation to the applicant's estranged wife during the period from August 2007 to May 2008. It is alleged there were persistent abusive telephone calls over the period. In April 2009, the applicant was convicted of this offence in Bray District Court and a suspended sentence of six months imprisonment was imposed. This was appealed and the applicant was convicted on appeal by the first named respondent; the sentence was affirmed.

9. The second appeal, number 2009/82704, concerned a prosecution for breach of a barring order. He was also charged in the District Court with harassment on the 16th/17th March, 2009, but was acquitted. He was sentenced to six months imprisonment which was suspended. The third appeal, number 2009/77728 was a prosecution for a breach of a barring order and harassment contrary to section 10 of the Non-Fatal Offences against the Person Act on the 18th June, 2009. This related to an incident at a school. The applicant was convicted and sentenced to six months imprisonment which was suspended. On appeal, the learned first named respondent granted an application at the conclusion of the prosecution's case to dismiss these two charges.

10. The matter in relation to the second appeal number 2009/82704 was dealt with by His Honour Judge James O'Donohue who allowed the appeal on the 8th November, 2012.

11. The evidence which was adduced in relation to case number 2009/3272 by the prosecution is summarised in the affidavit of Garda Clancy at paragraphs 22-28. It is clear that evidence was given of the complaint received, the arrest, and interviewing, of the applicant.

12. Evidence was given of the interviews carried out with the applicant in relation to the allegations: the memoranda of interviews were opened to the Court in which there were detailed answers, given by the applicant, to allegations made against him by the complainant. Evidence was also given of the recording of the telephone conversations, which were the subject of the prosecution, which was played to the Court. A transcript had been prepared which was referred to in the hearing as exhibit RMC2.

13. She said that she confirmed that the recording was played by An Garda Síochána. The complainant told her that she had had the original recording transferred into another form which was enhanced by her brother to make it more audible. She also said that she had listened to the original which was audible, but faint, and indicated that the original was available in Court.

14. Sergeant Gilmartin then gave evidence of participating in the applicant's interviews and in relation to the recordings of the applicant's telephone conversations. He confirmed that they had been adjusted to make them audible. He confirmed that he had listened to both the original and the enhanced recordings and that they were the same, except for the volume enhancement. The enhanced recordings were played in Court and it is stated in the affidavit that the applicant could be heard shouting and being abusive to the complainant during the calls.

15. The affidavit goes on to state that Sergeant Gilmartin identified the complainant and the applicant from the recordings, but denied that there was any recording of conversations between the complainant and the applicant made by the Gardaí unknown to both parties. It was indicated in the affidavit that at no stage during the course of the trial before the learned Circuit Judge was any objection made to the admissibility in evidence of the recordings. There was no suggestion made by the applicant, through counsel, that there was anything wrong with the recordings or that they were inadmissible. This becomes relevant having regard to one of the more important grounds relied upon which is contained at paragraph 14 of the Statement of Grounds.

16. The applicant contends that Sergeant Gilmartin and the main witness both admitted under oath that secret recordings were made, sent out of the country, altered and brought back into the country and that the Circuit Judge was made aware of this. He complains that notwithstanding what he describes as evidence of tampering with, or alteration of evidence, and false accounts by the witnesses of what was contained in the transcripts, the prosecution was permitted to rely upon this evidence and it was relied upon by the Judge in the course of her judgment.

17. This is said to amount to bias and prejudice on the part of the Judge, by which, I take to mean that there was a bias in the decision made regarding the admittance of this evidence, which was prejudicial to the applicant.

18. The applicant relies upon the fact that no telephone records were produced in relation to the matter. It is claimed that the records show that the extent of the conversation alleged or the utterances alleged to have been made by him in the course of the conversations could not have occurred within the time limit indicated on the records.

19. I have considered this submission and the suggestion that there are inaccuracies in relation to the evidence adduced on behalf of the Director of Public Prosecutions in relation to this matter in the affidavits submitted. I have also considered the disagreement which the applicant has with aspects of the conclusions reached by GSOC.

20. A difficulty for the applicant's case arises from the fact that the jurisdiction of the Court on judicial review is limited in its terms to a consideration of whether a decision was legally fundamentally flawed. An appeal to the Circuit Court is of a much wider nature than an application to this Court. This Court is confined in its jurisdiction to considering whether in fact there is such an error of law as to vitiate and undermine the lawfulness of the decision made by the Circuit Court.

21. In that respect it is important to bear in mind that this Court is bound by the authority of other Court decisions in this case. The decision that is most relevant is that of O'Hanlon J., in the case of *Lennon v. District Judge Clifford* [1992] 1 I.R. 382 in which he described the jurisdiction of judicial review in a passage quoted from Halsbury's Laws of England (3rd Ed),Vol.11 para. 119 as follows:

> "Where the proceedings are regular on their face and the inferior tribunal had jurisdiction, the superior court will not grant an order of certiorari on the ground that the inferior tribunal had misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it misconstrues a statute or admits illegal evidence, or

> rejects legal evidence or misdirects itself as to the weight of the evidence, or convicts without evidence), be deemed to exceed or abuse its jurisdiction…
>
> Certiorari will not be granted to quash the decision of an inferior tribunal within its jurisdiction on the ground that the decision is wrong in matters of fact and the Court will not hear evidence impeaching the decision on the facts… If there is any evidence, the Court will not examine, whether the right conclusion has been drawn from it."

22. In that case, the accused was charged in the District Court with various revenue offences and it was complained that the proofs which were adduced before the Court were inadequate to secure a conviction. O'Hanlon J. refused the relief sought because it was not properly the subject matter for judicial review. He stated at page 386:-

> "The general tenor of the decisions is that the High Court is not available as a court of appeal from decisions of other tribunals except where it is given such a function by statute, and that the scope for challenging the validity of orders made by lower courts by way of judicial review proceedings is confined to those cases where reliance can be placed on want of jurisdiction, or excess of jurisdiction; some clear departure from fair and constitutional procedures; bias by interest; fraud and perjury; or decisions containing an error of law apparent on the face of the record."

23. This case is also to be considered from another angle, namely that the issues which are raised by the applicant on this application are matters which could properly have been raised and canvassed before the Circuit Court. In particular, there is an extensive body of law which allows for challenges when appropriate, on the basis of allegations that it would be unfair or unlawful to receive evidence that has been illegally or unfairly obtained. The admissibility of such evidence is at the discretion of a trial judge but the ground has to be laid first. It is apparent from the report of GSOC and the submissions made and evidence advanced by the applicant in this case that the issues which he now canvasses before this Court were apparent and opened to a considerable degree in the Circuit Court. The applicant was legally represented. There was extensive criticism of the evidence adduced and allegations were made against the Gardaí and civilian witnesses. However, there was no challenge to the admissibility of the recordings in evidence. When an issue arises in respect of a challenge to the admissibility of evidence, it must be made during the trial. For example, if the challenge is not made during the course of a criminal trial on indictment, the Court of Appeal is most unlikely to consider or allow such a point to be canvassed. The point must be taken during the course of the trial. It is not a point ordinarily to be taken on judicial review for the first time.

24. Even if, exceptionally, this was a point properly taken by way of judicial review, the Court would have to examine the circumstances and the extent to which the point was available or taken in the Circuit Court. Though much of the material and the applicant's complaints were canvassed, there are elements which, he feels were perhaps not emphasised as strongly as he desired. The learned Judge heard and considered the evidence (including that of the applicant and his concerns about interference with the recordings) before convicting him of the offence.

25. In any event, it was a matter wholly within the jurisdiction of the Circuit Court Judge to determine whether in fact evidence is admissible or inadmissible and to determine, if and when requested, whether evidence has been illegally or unfairly obtained. That is exactly the kind of decision that is within her jurisdiction and that is the jurisdiction in which that application must be comprehensively brought.

26. In this instance it would appear to me, that it was open to the applicant in respect of the admissibility of, and weight to be attached to the telephone records, about which so much argument is now made, to open and press home those issues with the learned Circuit Judge at that time; insofar as any rulings in relation to admissibility may be sought and made, they are entirely within the trial judge's jurisdiction. Having regard to the decision in Lennon, this Court has no basis upon which to interfere with such a decision, or any findings of fact made by the learned trial Judge.

27. That is the law in relation to the matter. The extent to which these matters can be canvassed by way of judicial review is limited by authority. Having considered the grounds advanced (which include other matters which are not directly relevant to the issues that arose in this prosecution), all the submissions made, and the affidavits opened to the Court, I am not satisfied that a sufficient basis has been laid to warrant this Court's intervention by way of judicial review to quash the decision, or to make the declaration sought.