Neutral Citation: [2013] IEHC 4

THE HIGH COURT

[2011 No. 1153 J.R.]

BETWEEN/

GERARD HUDSON

APPLICANT

AND

JUDGE ANTHONY HALPIN AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on 15th January, 2013

1. In these judicial review proceedings the applicant seeks to quash a conviction in respect of a breach of a place of safety order imposed by the respondent District Judge. The applicant maintains – and the District Judge stoutly denies – that the judge interfered with the cross-examination and otherwise conducted the hearing in an unfair manner. The issue which I am here required to consider at this juncture is whether this Court can and should make an order for the production of the digital audio recording of the hearing before the District Court following an application in that behalf by means of a discovery application brought on behalf of the applicant. In these circumstances I propose to say as little as possible concerning the underlying dispute.

2. This discovery application raises again the age-old problem of bringing before this Court in judicial review proceedings the record of what has happened in proceedings before either the District Court or the Circuit Court. This problem really dates back to the creation of courts of summary jurisdiction, since before the days of electronic recording devices, a tendency emerged whereby such courts recited at length in their record of proceedings all that had happened before them. But judicial review by certiorari led to a situation whereby many criminal convictions of this kind were quashed for what was then judicially described as "lamentable and disgraceful technicalities". As Griffith L.J. put it in *R. v. Crown Court, ex p. International Sporting Club Ltd*. [1982] QB 304, 312, it had been legislatively determined:-

> "to put a stop to the over-formalistic approach of the lawyers which allowed the conviction by the lower courts to be quashed for any defect in form in any of the documents that in the 17th and 18th centuries the Court of Queen's Bench required to be kept as part of the record of the inferior court. These included the charge, the evidence and reasons for the conviction. The result was that many convictions were quashed for want of form rather than merit."

3. This state of affairs led to legislative intervention by means of the Summary Jurisdiction Act 1848 (England and Wales) and Summary Jurisdiction (Ireland) Act 1851, the effect of which was that "criminal convictions need be supported only by a very short record, omitting the charge and the evidence and the reasoning which were required to be set out previously." As Lord Sumner was famously to explain in *R. v. Nat Bell Liqours Ltd.* [1922] 2 A.C. 128, 159, these legislative changes:-

> "did not stint the jurisdiction of the Queen's Bench, or alter the actual law of certiorari. What it did was to disarm its exercise. The effect was not to make that which had been error, error no longer, but to remove nearly all opportunity for its detection. The fact of the record 'spoke' no longer: it was the inscrutable face of the sphinx."

4. This problem continued after the creation of the District Court and the Circuit Court by the Courts of Justice Act 1924, for the problem of establishing what exactly transpired in a disputed court hearing in those courts continued unabated. While it is true that technology had made great strides, until recently the opportunity for recording of sometimes lengthy court exchanges remained haphazard and sporadic. This created its own problems given that sometimes parties made allegations regarding comments made by individual judges – to which the judge in question understandably wished to respond by giving evidence in judicial review proceedings – yet the Supreme Court has steadfastly cautioned against judges entering the forensic fray in this manner and exposing themselves to possible cross-examination: see, *e.g., O'Connor v. Carroll* [1999] 2 I.R. 160, 166, *per* Murphy J.

5. It is only in recent times that this problem can be comprehensively addressed through the introduction of the digital audio recording system, a comprehensive recording system which keeps an audio recording system of all that is said in all courts. While the digital audio recording is operated by the Courts Service, the Courts Service has made it clear in a letter of 10th December 2012 from the Chief Executive Officer supplied to this Court that the actual recording itself remains under the control of the presiding judge and that the Courts Service will itself abide by any order which this Court might make in relation to the production of the recording.

6. Given that the proceedings effectively involve imputations against the District Judge, I directed that the applicant serve the proceedings on the respondent judge. The judge has very helpfully supplied the Court with a detailed account and response, a copy of which has also been made available to the parties. The judge has indicated that he has no objection to the production of the DAR recording.

7. Given that the resolution of this factual issue is absolutely central to this case, it seems to me that it would be only just to direct the production of the DAR recording. One must, of course, be mindful of the cost implications of this course of action – not least in an age of austerity – so that a direction of this kind must be nonetheless be regarded as an exceptional measure. Nor could this procedure be invoked for the purposes of returning to the ultra zealous approach of the English Queen's Bench in the 16th and 17th centuries. Yet, in a case such as the present one where the parties are agreed that an account of what happened in the District Court is central to the fair resolution of the present case, then this Court must be prepared to give the direction that appropriate record and transcript be prepared.

8. As Griffith L.J. said in his classic judgment in the International Sporting Club case ([1982] QB 304, 315):-

"But the courts must adapt their procedures to modern conditions. In the last century the facilities available for recording spoken reasons were not comparable to those which exist today. Shorthand had only recently been invented and there was no electronic

recording apparatus with which many courts are now equipped. This court can now rely with confidence upon a transcript of the oral judgment given by a lower court or tribunal as accurately setting out its reasons which may not have been the case 100 years ago."

Conclusions

9. These comments of Griffiths L.J. are apt to describe the present state of affairs. It would, of course, be most undesirable for the respondent judge to get personally involved in the proceedings by giving evidence, although his offer to do so is greatly appreciated. Given, however, that this Court can confidently rely on the DAR system of recording and in view of the fact that an accurate account of what transpired is essential to doing justice in the present case, it was for those reasons that I directed the production of a transcript of the hearing which took place in the present case.