Neutral Citation Number: [2009] IEHC 252

THE HIGH COURT

2008 607 JR

BETWEEN:

DEAN O'BRIEN

APPLICANT

AND

DISTRICT JUDGE MARY FAHY and DISTRICT JUDGE AENEAS MCCARTHY and

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

Judgment of Mr. Justice Hedigan, delivered on the 26th day of May, 2009

1. The applicant is an apprentice plumber who stands accused of a number of charges under the Criminal Justice (Public Order) Act 1994 ('the 1994 Act').

2. The first named respondent is a judge of the District Court, before whom the applicant was scheduled to stand trial prior to the initiation of these proceedings.

3. The second named respondent is also a judge of the District Court, before whom the applicant's case was originally listed on the 25th of January 2008.

4. The third named respondent is the authority responsible for the prosecution of criminal offences in Ireland. His statutory authority to carry out this function is derived from the Prosecution of Offences Act 1974.

I. Factual and Procedural Background

5. On the 18th of November 2006, the applicant was arrested as a result of a public order incident at Eyre Square in Galway. He was subsequently charged with the following offences:

(a) Intoxication to such an extent as to give rise to a reasonable apprehension that he was a danger to himself or others, contrary to section 4 of the 1994 Act;

(b) The use of threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace might have been occasioned, contrary to section 6 of the 1994 Act; and

(c) Wilful obstruction of a Garda acting in the execution of his duty, contrary to section 19(3) of the 1994 Act.

6. During the course of his arrest, the applicant alleges that he was assaulted by a member of An Garda Síochána, specifically with a baton while travelling in the Garda patrol car. The applicant subsequently made complaints, in respect of this alleged assault, to the Garda Síochána Complaints Board ('the Board') on the 20th of November 2006 and the Garda Service Ombudsman Commission ('the Commission') on the 25th of May 2007. The applicant subsequently withdrew his complaint to the Board and continued to pursue that which he made to the Commission.

7. On the 25th of January 2008, the applicant appeared before the second named respondent, sitting at Galway District Court, in respect of the three charges. The applicant's solicitor applied to adjourn proceedings pending the outcome of the Commission's investigation, but the second named respondent refused such application and proceeded with the trial.

8. The applicant first pleaded guilty to the charges under sections 4 and 6 of the 1994 Act. Thereafter, the prosecution tendered evidence in respect of the charge under section 19(3) of the 1994 Act and concluded its case. A submission of no case to answer by the applicant's solicitor was rejected and the second named respondent proceeded to hear evidence on behalf of the defence.

9. During the course of the defence evidence, the second named respondent's attention was drawn to a medical report relating to injuries which the applicant had received during the course of his arrest. The second named respondent then ordered that the trial should not proceed any further until the completion of the investigation by the Commission. He further disqualified himself from hearing the matter in the future and adjourned the case for mention to the 7th of April 2008.

10. On the 7th of April 2008, the matter came before the first named respondent, sitting at Galway District Court, and the proceedings and orders of the 25th of January 2008 were outlined to her. The first named respondent decided that she would proceed with the matter in the form of a *de novo* hearing but indicated her intention to adjourn the proceedings to allow the Garda Superintendent to ascertain the Commission's position.

11. The applicant's solicitor then indicated that he had attempted to contact the Commission by facsimile on the 14th of March and the 4th of April, 2008. He further explained that no response was received to either of these transmissions. He indicated however to the Court that he understood from speaking to the investigating Garda in the case that the Commission was still considering the matter. The first named respondent nonetheless adjourned the matter for hearing

until the 12th of May 2008.

12. By facsimile dated the 9th of May 2008, the Commission informed the applicant's solicitor of its determination that the applicant's complaint was inadmissible under section 84 of the Garda Síochána Act 2005, in that it was not made within 6 months of the incident complained of.

13. On the 12th of May 2008, the applicant's solicitor outlined the position to the first named respondent who further adjourned the matter for hearing to the 2nd of July 2008.

14. By order dated the 9th of June 2008, the applicant was granted leave by Peart J. in the High Court to apply by way of judicial review for the following relief:

> (a) An order prohibiting the first named respondent from taking up or further dealing with the prosecution of the applicant in respect of the offences charged;
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> (b) An order of *certiorari* quashing the decision of the second named respondent made on the 25th of January 2008 in ceasing to proceed with the trial of the applicant, adjourning the matter until the 7th of April 2008 and disqualifying himself from dealing further with the trial of the applicant;
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> (c) An order prohibiting the third named respondent from proceeding with the prosecution of the applicant;
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> (d) A declaration that the effect of the order of the second named respondent made on the 25th of January 2008 was to acquit the applicant on the charge before the Court; and
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> (e) A declaration that the trial of the applicant on the 25th of January 2008 should have proceeded and that the orders made by the first and second named respondent in continuing to adjourn the matter were in breach of the doctrine of criminal estoppel and/or the principle of double jeopardy.

The applicant was also granted a stay on any further prosecution in respect of the charges, pending the determination of these proceedings.

II. The Submissions of the Parties

15. The applicant submits that his trial in respect of the offences charged had reached completion before the second named respondent, prior to the order which was made by the second named respondent adjourning the matter and disqualifying himself from hearing it any further. He submits that to hold a hearing *de novo* before the first named respondent would be a violation of the doctrine of criminal estoppel, a breach of the rule against double jeopardy and an affront to the ordinary principles of natural and constitutional justice

16. In particular, the applicant submits that if a fresh hearing were to be held before the first named respondent: the issues at hearing would be identical; the prosecution would have the benefit of having heard the applicant's defence and would be free to structure their submissions accordingly; and the applicant would be at risk of being convicted on foot of proceedings which had already been heard to conclusion before the District Court and in which no order convicting the applicant had been made.

17. The third named respondent contends that the applicant's arguments to the effect that an injustice would be occasioned were his trial to proceed are unfounded. He submits that the doctrine of criminal estoppel has no place in Irish law and as such, the applicant is incapable of mounting any challenge based thereon.

18. In respect of the issue of double jeopardy, the third named respondent argues that the present case neither falls within the parameters of *autrefois convict* nor *autrefois acquit* and that the doctrine does not therefore have any application to the present case. In this regard, the third named respondent contends that the proceedings against the applicant were not determined on the 25th of January 2008, but rather were adjourned as had originally been requested by the applicant himself.

19. Finally, the third named respondent submits that there are no additional arguments in the applicant's favour arising under the general principles of natural and constitutional justice. The third named respondent concedes that there may be circumstances in which a series of inconclusive trials of an accused person, or an excessive number of adjournments giving rise to a sizeable period of delay, may amount to a breach of fair procedures but contends that no such injustice has occurred in the present case. In all the circumstances, the third named respondent argues that the trial of the applicant should be permitted to occur *de novo* as planned.

III. The Decision of the Court

(a) Criminal Estoppel

20. The issue of criminal estoppel is one which the Court may dispose of quite readily in light of the recent Supreme Court decision in *Lynch v. Moran* [2006] 3 IR 389. In that case, the applicant had been tried for manslaughter before the Circuit Criminal Court. During the course of the trial, the defence sought rulings in *voir dire* hearings in respect of the admissibility of certain evidence. The judge ruled against the applicant on these issues and held that the evidence was admissible. The jury, however, failed to reach a verdict and was discharged. The case was listed for rehearing. Prior to a new trial, at a call over hearing, the same judge ruled that these admissibility issues had already been determined at the first trial and that issue estoppel in favour of the prosecution applied. The applicant sought relief by way of judicial review, which was ultimately granted by the Supreme Court. Kearns J., delivering the unanimous judgment of the Court, held that issue estoppel was not capable of arising in favour of the prosecution and continued as follows at pages 409-410:-

> "Given that mutuality is at the heart of issue estoppel, and having regard further to the concept of "equality of arms" fostered by the [European Convention on Human Rights] and reflected in decisions of the European Court of Human Rights, it seems only logical and reasonable to hold in addition that, if issue estoppel can not operate in favour of the prosecution, it should not operate in favour of the defence by way of unreciprocated advantage

either. I would agree with the views expressed by Street C.J. in *R. v. Blair* [1985] 1 N.S.W.L.R. 584 that in any later criminal trial no question of issue estoppel can arise in relation to any of the rulings that may have been given by the trial judge at the aborted trial. Here I would invoke in support the "notional onlooker" referred to by Hardiman J. in *The People (Director of Public Prosecutions) v. O'Callaghan* [2001] 1 I.R. 584, whose sense of fairness in the operation in the criminal justice system must be kept in mind. A simple example of one sided issue estoppel may illustrate the point. If, for example, in a first trial for rape, a statement made by an accused is ruled inadmissible and if in that same trial the judge also rules that the complainant may be cross-examined about her prior sexual history, could the application of issue estoppel in favour of the accused on both matters in a retrial be regarded either favourably or as fair by such a notional onlooker, notably when the complainant on the one hand would thereby be denied the opportunity to challenge the propriety of a critical ruling made against her in the previous trial while the accused in contrast would enjoy the benefit of a possibly incorrect ruling in his favour to exclude a statement in which he may have admitted the offence? I think the answer would have to be in the negative.

I see no reason grounded in public policy for granting an accused an unreciprocated advantage if issue estoppel does not operate mutually. In truth, a disservice is done to the integrity and reputation of the criminal process if the scales of justice may be seen by the notional onlooker or by the public at large as forever tilted in favour of an accused and forever tilted against the State. In my opinion, the extension of a consideration of "tenderness" in this regard to an accused, as so described by Brennan J. in *Rogers v. The Queen* (1994) 181 C.L.R. 251, is not warranted having regard to all the other rights he properly enjoys under our criminal justice system.

Having reached the conclusion that issue estoppel has no role in Irish criminal proceedings, either in favour of the prosecution or the defence, it follows that the appeal herein should be allowed and that the order made by the Circuit Court Judge should be quashed."

21. It is clear from the decision in *Lynch*, therefore, that the concept of issue estoppel in criminal trials has no basis in Irish law. As such, it is unnecessary to consider the arguments advanced by the applicant on this point in any further detail.

(b) Double Jeopardy
22. In considering the applicant's arguments based on the rule against double jeopardy, the Court has the benefit of extensive guidance from a number of recent Supreme Court decisions on the point. In *Registrar of Companies v. Anderson* [2005] 1 IR 21, the Supreme Court considered the theoretical foundations and practical effect of the rule against double jeopardy. Murray C.J. stated as follows at page 26:-

"It has for a long time been a principle of the common law that a person cannot be prosecuted and punished for an offence of which he has already been acquitted or convicted. This is commonly referred to as the rule against double jeopardy. It is a rule which applies to the prosecution of criminal offences. The rule, or what also might be called the notion, of double jeopardy is not normally relied upon in express terms in the sense that if a person is prosecuted for an offence arising out of the same breach of the law or the same essential ingredients for which he has previously been tried and either convicted or acquitted, his defence to the second prosecution will be based on the pleas of *autrefois acquit* or *autrefois convict.* If either plea is successful the prosecution may proceed no further. I suppose if a prosecution was initiated against a person for an offence for which he had previously been prosecuted and was awaiting trial, he or she might well invoke the rule of double jeopardy in a general sense but the fundamental basis for resisting the second prosecution would be grounded more on an abuse of process or that the court concerned with the second prosecution had no jurisdiction to deal with the matter when another court was already seized with an existing prosecution for the same offence."

23. It is clear therefore that the central ingredient of any invocation of the rule against double jeopardy is either a previous conviction or a previous acquittal in respect of an offence possessing the same essential ingredients. This proposition was further emphasised in the Supreme Court decision of D.S. v. Judges of the Circuit Court [2008] IESC 37. In that case, the Court held that two previous trials for a series of sexual offences, which had ended without resolution when the jury failed to reach a verdict, neither amounted to *autrefois convict* nor *autrefois acquit*. Denham J. stated the following:-

"*Autrefois convict* refers to a situation where an accused was formerly convicted of the crime in issue. It enables a plea, and a decision if true, that he has already been tried and convicted of the same offence before a court. An accused may not be retried for an offence for which he has already been tried and convicted, and he may not be put in jeopardy of such a trial.

Autrefois acquit refers to a situation where an accused was previously acquitted of the crime in issue. Similarly, an accused may not be retried for an offence for which he has already been tried and acquitted, and he may not be put in jeopardy of such an occurrence.

Neither principle applies to this case. The applicant has neither been acquitted nor convicted of the offences in issue. There was no final verdict in the previous trials."

24. Applying these principles to the present case, I cannot accept that the proposed *de novo* hearing of the case against the applicant would amount to a violation of the rule against double jeopardy. The applicant himself sought to have the proceedings before the second named respondent adjourned pending the resolution of the Commission's investigation. This was something which was ultimately done by the second named respondent of his own volition, albeit at a later stage in proceedings. The crucial point, however, is that the District Court never reached, nor purported to reach, any finding as to the guilt or innocence of the applicant. Put quite simply, the proceedings have not been concluded and as such, a plea of *autrefois convict* or *autrfois acquit* can not avail.

(c) Natural and Constitutional Justice
25. As has been outlined above, it is clear from the decision in D.S. that the mere fact that an applicant has been previously subjected to one or more unresolved criminal trials will not, of itself, be sufficient grounds to prohibit any

further prosecution in respect of the offences alleged. However, there may be special circumstances. In D.S., Denham J. explained the position as follows:-

"[T]here is no firm rule as to the number of potential trials. In each case all the circumstances require to be considered.

However, a long standing practice that two full trials ending in disagreement by a jury may be a circumstance in which a further trial may not be commenced, may be a sound basis from which to review all the circumstances. Such a convention has inherent wisdom. The Oireachtas has made no rule as to the number of trials possible, but has chosen the route of an independent decision-maker, in the form of the Director of Public Prosecutions, and has given to him the power to determine when a prosecution should be brought. Thus primarily it is the Director's decision. This does not exclude the duty of the Court to protect due process.

The position therefore is that no organ of state has set a limit on the number of trials which may be prosecuted. Rather, each organ of state retains to itself its power and duty, to be exercised in all the circumstances of each case. The Court's duty is to protect due process. The test to be applied is whether there is real risk of an unfair trial. As Finlay C.J. stated in *Z. v. Director of Public Prosecutions* [1994] 2 I.R. 476, at p. 506:-

> "This Court in the recent case of *D. v. Director of Public Prosecutions* unanimously laid down the general principle that the onus of proof which is on an accused person who seeks an order prohibiting his trial on the ground that circumstances have occurred which would render it unfair is that he should establish that there is a real risk that by reason of those circumstances … he could not obtain a fair trial."

In each case there should be a balance sought between competing public interests. While protecting the public interest in prosecuting an accused, the integrity of the trial process also requires protection, guarding against the inherent dangers of repeat trials. A third trial may not *per se* be a breach of a trial in due course of law. All the facts of each case require to be considered."

26. In essence therefore, it seems that an applicant seeking to prohibit a trial following one set of previously unresolved criminal proceedings must demonstrate some form of special prejudice arising as a result of the renewed efforts to prosecute. The primary argument of the applicant in the present case is that it would be unjust to permit the prosecution in the present case to bring the case against him again, having had the benefit of hearing the entirety of his defence. In *McNulty v. Director of Public Prosecutions* [2009] IESC 12, Hardiman J. considered such an argument. He reached the following conclusions:-

> "The applicant's entitlement to […] relief arises, he says, from the proposition that the learned trial judge's decision on the issues raised as to the admissibility of the evidence of the search of his premises was demonstrably wrong in law. That fact, in turn, makes it inequitable to try him again and inequitable for the Director of Public Prosecutions to take advantage of the second trial to mend his hand by the deployment of evidence which he did not consider necessary at the first trial. Moreover the necessity for evidence, for example that there was oral testimony before the learned District Judge who issued the warrant - only came to the Director's attention because of the argument adduced by the defence at the first trial.
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> Once the defendant has been returned for trial, the Circuit Court, (to which he was returned) remains seized in the matter until the trial ends in either conviction or acquittal or the moving party, the Director, enters a *nolle prosequi*.
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> The trial process may involve two or more hearings for a number of reasons. The jury may disagree, as happened in this case and happens not infrequently. Or the first jury may be discharged for one reason or another. In either event the prosecution may bring the case on again for trial before a separate jury unless the defendant can show that such a step would be oppressive.
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> Where there is a second trial, neither side is bound to approach the case in the same way that they approached the first trial. New witnesses may be called, or witnesses called on the first occasion may be omitted. Almost every trial, especially if it proceeds to the point where the defendant is given in charge to the jury, will develop in a way which could not be wholly predicted before it started. Each side will have learnt a good deal more about the other side's case. A witness who looked very impressive on paper may appear to some disadvantage in giving oral evidence, cross-examination may put an entirely different complexion on certain evidence, and legal argument, where there is any, may reveal weaknesses in the case of either side in the way they address certain topics, which had not previously occurred. It is perfectly legitimate for either the prosecution or the defence to adapt to these discoveries by looking again at how it will present its own case. Where there is a second trial, almost inevitably, each side will know more about the other side's case than it did when the first trial started.
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> I do not consider that it is in any way oppressive of the other side for a party or his advocates to deploy more or different evidence on a second trial. It would be a wholly artificial exercise to say that because something had not occurred to the prosecution (or defence) for the first trial it could not benefit from the knowledge and information that that trial had given to them. It would be a wholly unrealistic form of gamesmanship to hold that because the prosecution had not thought it necessary to prove a particular fact of the first trial, they were stuck with that decision at a retrial.
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> This is not to say that there could not be circumstances where it would be oppressive of a party to permit the other to change front in a particular way as between two trials. But that is a matter for the judge presiding at the second trial and not for judicial review."

27. In the present case, it seems to me that there are no special circumstances in existence which would render it an injustice to require the applicant to meet the charges against him for a second time. The mere fact that the parties will be better acquainted with some of their opponent's likely submissions does not amount to an affront to the principles of natural and constitutional justice.

IV. Conclusion

28. In light of the foregoing, it is clear that the proposed trial of the applicant would not expose him to a risk of conviction for an offence for which he has previously been either convicted or acquitted. No such determination was reached by the second named respondent at first instance. Furthermore, the conduct of the prosecuting authorities has not been such as to amount to a breach of the applicant's rights to natural and constitutional justice. No additional arguments arise under the doctrine of criminal estoppel which has been held by the Supreme Court to have no role in Irish law. I will therefore refuse the relief sought.