Neutral Citation Number: [2011] IEHC 284

**THE HIGH COURT**

**2010 2136 SS**

**IN THE MATTER OF THE COURTS (SUPPLEMENTAL**

**PROVISIONS) ACT 1961 TO 1991**

**Between: -**

**DIRECTOR OF PUBLIC PROSECUTIONS**

**Prosecutor**

**and**

**NOEL FURLONG**

**Defendant**

**Judgment of Mr. Justice Garrett Sheehan delivered on the 9th day of June, 2011.**

**[I] INTRODUCTION**

[1.1] This is a consultative case stated by District Judge David Kennedy pursuant to s. 52 of the Courts (Supplemental Provisions) Act 1961 arising out of the prosecution of the defendant for an offence contrary to s. 13(3) of the Road Traffic Act 1994, as amended by s. 18 of the Road Traffic Act 2006.

**[2] FACTUAL BACKGROUND**

[2.1] On the 15th January 2009, the defendant was arrested on suspicion of drunken driving and brought to Waterford Garda Station where he was charged with the offence of refusing to give a breath specimen contrary to s. 13(3) of the Road Traffic Act 1994, as amended by s. 18 of the Road Traffic Act 2006, and bailed to appear at Waterford District Court on the 20th January 2009. He retained a solicitor to act for him who on making enquiries in relation to the case was informed that due to an administrative error the case would not be proceeding on the 20th January 2009 and that the prosecution would proceed by way of summons.

[2.2] Five months later on the 8th June 2009, the prosecuting Garda, Garda Rafter, applied to have eight summonses issued in connection with the defendant's arrest; seven summonses were returnable to New Ross District Court for the 8th September 2009 and the eighth summons was returnable for Waterford District Court. All summonses arose out of the same arrest on the 15th January 2009 and the summons returnable for Waterford District Court related to the same offence that the defendant was originally charged with on the 15th January 2009. It is not clear from the affidavits filed in this case nor from the written submissions what date the Waterford District Court summons was returned for. However this summons was not served on the defendant and neither the defendant, his solicitor nor the court were informed that a further summons arising out of the January arrest had issued.

[2.3] The seven summonses returnable for New Ross District Court were in respect of the following offences: - 1. driving under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle contrary to s. 49 (1) and (6) (a) of the Road Traffic Act 1961 as inserted by s.10 of the Road Traffic Act 1994 and as amended by s. 18 of the Road Traffic Act 2006; 2. driving without insurance contrary to s. 56(1) and (3) of the Road Traffic Act 1961 as amended by s. 18 of the Road Traffic Act 2006; 3. dangerous driving contrary to s. 53(1) (as amended by s. 51 of the Road Traffic Act 1968) and (2) (b) (as amended by s.18 of the Road Traffic Act 2006) of the Road Traffic Act 1961; 4. unauthorised use of a mechanically propelled vehicle without the consent of the owner contrary to s. 112 of the Road Traffic Act 1961 (as amended by s. 65 of the Road Traffic Act 1968) and as amended by s. 18 of the Road Traffic Act 2006; 5. failing to stop the vehicle on being so required by a member of An Garda Siochana contrary to s. 109(1) of the Road Traffic Act 1961 as amended by s. 6 of the Road Traffic Act 1968 and s.102 of the Road Traffic Act 1961 as amended by s. 18 of the Road Traffic Act 2006; 6. public order offence contrary to s. 6 of the Criminal Justice (Public Order) Act 1994; 7. driving without a licence contrary to s. 38 of the Road Traffic Act 1961 (as substituted by s. 12 of the Road Traffic Act 2006). The seven New Ross District Court summonses were adjourned on the 8th September 2009 to the 19th January 2010. On the 19th January 2010, the seven New Ross District Court summonses were struck out following submissions by the defendant's solicitor. Following this event, the prosecuting Garda disclosed that this was not the end of the matter and that there was a further summons in respect of the defendant. This was the Waterford District Court summons which was reissued on the 1st March 2010 and made returnable to Waterford District Court for the 8th July 2010.

[2.4] The defendant contends that to allow the prosecution to proceed with this summons in the circumstances of this case amounts to an abuse of process. When the matter came on for hearing at Waterford District Court, Judge Kennedy heard evidence and submissions in relation to the application that this amounted to an abuse of process.

[2.5] The defendant's solicitor argued that a case stated to the High Court was necessary for its opinion as to whether an. abuse of process had occurred given the particular facts in this case. The District Judge reserved his decision on the said complaint pending the determination of this case stated. The opinion of the High Court was respectfully sought on the following questions: -

> 1. In the peculiar circumstances of this case, was the application to reissue the Waterford District Court summons an abuse of process?
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> 2. Is a Garda permitted to bring a simultaneous prosecution for drink driving *simpliciter* and refusal to provide a specimen in two different court areas arising from the one arrest and relying on the same facts in relation to each charge?
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> 3. Should the Waterford case proceed given that a delay of eighteen months occurred between the initial alleged incident and the service of the reissued summons?

4. Was it correct that the prosecuting Garda did not inform the District Judge in New Ross that he had issued another summons arising from the same alleged incident and arrest returnable to a different court area?

5. In all the circumstances of this case, has District Judge Kennedy jurisdiction to proceed to full hearing of same?

**[3] SUBMISSIONS ON BEHALF OF THE DEFENDANT**
[3.1] Counsel for the defendant stated that the ultimate question to be determined was whether an abuse of process had occurred in this case.

[3.2] In relation to question one, whether in the peculiar circumstances of this case, was the application to reissue the Waterford District Court summons an abuse of process, counsel argued that the circumstances culminating in the reissuing of the summons amounted to an abuse of process and relied upon the case of *The State (at the Prosecution of Robert Trimbole) v. The Governor of Mountjoy Prison* [ 1985] 1 I.R. 550 in this regard. Counsel also noted the principle that in a consultative case stated it is open to the Court to decide on issues of abuse of process and relied upon the *Director of Public Prosecutions v. O Donnell [1995] 2 I.R. 294 and the Director of Public Prosecutions v. Cronin* (*Ex tempore*, High Court, Geoghegan J., 25th July, 1994). Counsel argued that the reissuing of the summons amounted to an abuse of process as the prosecuting Garda did not have a bona fide intention to prosecute as indicated by a lack of reasonable attempts to serve the summons. The first intimation of the eighth summons was after the first seven had been struck out and it was not reissued until some two months after that. Counsel contended that it was not open to the prosecuting Garda to have another charge in relation to the same arrest in abeyance until after the other seven summonses were struck out. The subsequent application to renew the summons amounted to an abuse of process. The holding mechanism by the prosecuting Garda was a breach of the defendant's right to trial in due course of law and fair procedures.

[3.3] In relation to question two, whether a Garda is permitted to bring a simultaneous prosecution for drink driving *simpliciter* and refusal to provide a specimen in two different court areas arising from the one arrest and relying on the same facts in relation to each charge, counsel argued that such an instance is permissible once the prosecuting Garda has a bona fide intention to prosecute both matters. Counsel argued that no such bona fide intention existed on the prosecuting Garda's behalf.

[3.4] In relation to the third question, whether the Waterford case should proceed given that a delay of eighteen months occurred between the initial alleged incident and the service of the reissued summons, counsel for the defendant relied upon the case of *Cormack v. Director of Public Prosecutions & Farrell v. Director of Public Prosecutions* [2008] I.E.S.C. 63 as authority for the applicable standard in delay cases. Counsel for the defendant argued that a delay of eighteen months between the issuing and serving of the summons amounted to an unconscionable delay and the defendant suffered prejudice by virtue of this delay.

[3.5] In relation to the fourth question, whether it was correct that the prosecuting Garda did not inform the District Judge in New Ross that he had issued another summons arising from the same alleged incident and arrest returnable to a different court area, counsel for the defendant conceded that this issue in itself goes to jurisdiction and no procedural requirement to do so exists. Counsel argued, however, that this goes towards the issue of determining whether an abuse of process had indeed occurred.

[3.6] In relation to the fifth question, whether the District Judge has jurisdiction to proceed to a full hearing in all the circumstances of this case, counsel for the defendant argued that the abuse of process deprives the District Judge of jurisdiction to hear the matter and relied upon the case of the *Director of Public Prosecutions v. O Donnell* [1995] 2 I.R. 294 in this regard.

**[4] SUBMISSIONS ON BEHALF OF THE PROSECUTOR**
[4.1] Counsel for the prosecution submitted that the ultimate question to be determined by this Court was not whether an abuse of process arose in this case but rather whether the District Judge has jurisdiction to proceed with the hearing of the charge. In the course of the hearing, counsel accepted that all eight summonses could have been dealt with together and brought in one location. It was counsel's view that all of the questions posed in this case could be addressed by applying the fundamental principle that, absent a clear abuse of process or a violation of constitutional rights, the learned District Judge was entitled to deal with the charge before him provided the accused was present and provided the Court had jurisdiction. Counsel criticised the reliance placed by counsel for the defendant upon the cases of the *Director of Public Prosecutions v. O'Donnell* [1995] 2 I.R. 294 and the *Director of Public Prosecutions v. Cronin* (*Ex tempore*, High Court, 25th July, 1994) and noted that no definition of an abuse of process is offered in either judgment.

[4.2] Counsel, therefore, interlinked question one, relating to whether an abuse of process had occurred, with question five, relating to jurisdiction, as the starting point for his oral submissions and submitted that a summons is merely a vehicle to bring a person to court and any defect on a summons can be cured once the person is present in court. Counsel noted only three circumstances in which a court can strike out a charge; (i) if a court does not have jurisdiction; (ii) if the manner in which a person is brought to court is unconstitutional; and (iii) where an abuse of process has occurred. Counsel acknowledged that it was the third arm of this argument, i.e. where an abuse of process has occurred, that was being pursued by counsel for the defendant. Counsel stated that there was very little authority relating to this issue in this jurisdiction and referred to the United Kingdom case of *R v. Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 A.C. 42 as the leading authority in the matter which identified that abuse of process can arise in two ways. First, a trial may be stayed on the grounds of abuse of process for factors such as delay or pre-trial publicity such that the accused person can no longer get a fair trial. Second, if there are any other circumstances which are of such a nature that it would offend the Court's sense of justice and propriety to put the accused person on trial. The first set of circumstances envisaged in *Bennett* does not arise in this jurisdiction as such matters are addressed here by way of injunction or prohibition proceedings designed to secure a restraint of the trial. Counsel submitted that to succeed in an abuse of process application in this jurisdiction a defendant must show that the process by which he was brought before the Court, or the manner in which the prosecution case is being conducted, was or is such as to offend the Court's sense of justice and propriety.

[4.3] It was counsel's contention that an abuse of process necessarily involves culpable behaviour of some kind on the part of an agent of the State and relied upon the judgment in the *Director of Public Prosecutions v. Nevin* [2003] 3 I.R. 321 as authority for the proposition that there must be some consciously wrongful conduct on the part of a member of An Garda Síochána or some other agent of the State. Counsel submitted that in the present case there is no evidence of consciously wrongful conduct on the part of any member of An Garda Síochána. Counsel further distinguished the present case from the cases of *O'Donnell* and *Cronin* on the basis that in those cases summonses were obtained even though no decision had yet been made as to whether the defendants should be charged or in relation to the offences with which they should be charged. In the present case, the summonses related to charges which it was intended to bring against the defendant. Counsel argued that there was no evidence to suggest that the summonses were sought solely in order to remain within a statutory time limit, to circumvent some other legal requirement or to violate the legal or constitutional rights of the defendant and therefore no abuse of process had occurred in this case.

[4.4] In relation to the second question, counsel submitted that there has never been any general prohibition on charging a person with two separate offences arising from the same incident even though it would be legally possible to be convicted on only one of those offences. Counsel relied upon *R. v. Fernandez* [1997] 1 Cr. App. R. 123 and *O'Leary v. Cunningham* [1980] 1 I.R. 367. Counsel submitted that this question is essentially moot as the answer to it could not affect the District Judge's jurisdiction as any deficiency in the summons could be cured by the presence of the defendant in court.

[4.5] In relation to the third question, whether the Waterford charge should proceed given that a delay of eighteen months occurred between the initial alleged incident and the service of the reissued summons, it was submitted that the matter is entirely governed by *Cormack v. Director of Public Prosecutions* & *Farrell v. Director of Public Prosecutions* [2008] I.E.S.C. 63. In cases where delay is alleged, the defendant must show there has been blameworthy delay on the part of the prosecution and show some form of tangible prejudice or disadvantage as a result of that blameworthy delay. Counsel for the prosecution stated that this might consist of some factor which means that the defendant runs a risk of not receiving a fair trial or that he or she has suffered stress or anxiety to a degree which exceeds that normally experienced by any defendant facing trial. Counsel concluded that any delay in the present case would not be sufficient in duration or impact to warrant the striking out of the charge. Furthermore, the courts, including the Supreme Court in *Cormack v. Director of Public Prosecutions* & *Farrell v. Director of Public Prosecutions,* have consistently held that there is no standard or tariff period for this purpose. All depends on the circumstances of the individual case and the degree of prejudice or disadvantage which the defendant can show. Counsel stated that there did not appear to be any evidence to that effect in the present case and the Waterford charge should proceed despite the interval of eighteen months between the alleged commission of the offence and the reissue of the summons which was shortly followed by the first appearance in court.

[4.6] In relation to the fourth question, whether it was correct that the prosecuting Garda did not inform the District Judge in New Ross that he had issued another summons arising from the same alleged incident and arrest returnable to a different court area, counsel for the prosecution argued that this is entirely irrelevant to the central question of whether the District Judge has jurisdiction to hear the case which is before him. The defendant stands charged before Waterford District Court with a single offence and the only issues to be determined are whether the judge of that Court has jurisdiction to hear it and whether there are any significant vitiating factors which point to the conclusion that, notwithstanding the presence of jurisdiction, the case should nonetheless be dismissed because of the chain of events leading to the defendant being summoned before Waterford District Court. Counsel for the prosecution submitted that there was no such vitiating factor present in this case.

**[5] DISCUSSION & DECISION**

[5.1] The decision in the cases of the Director of Public Prosecutions v. O Donnell [1995] 2 I.R. 294 and the *Director of Public Prosecutions v. Cronin* (*Ex tempore*, High Court, 25th July, 1994) prove to be instructive in determining the matter currently before this Court. In *O'Donnell*, Geoghegan J. held that on the evidence before him, the trial judge had been entitled to come to the conclusion that the issue of the first set of summonses was an abuse of the process of the Court and that the second set of summonses was, in consequence, invalid. In *Cronin*, the High Court held that an initial application for the issue of summonses made solely to prevent the statutory period of six months running out and to enable the prosecution to decide for what precise offence the defendant should be summonsed in due course was invalid and amounted to an abuse of process.

[5.2] In the particular circumstances of this case, it is clear that all of the summonses could have been dealt with together. All charges could have been brought in one location and no excuse can be proffered for proceeding in the manner in which the prosecuting Garda did. Furthermore, the manner in which this case was effectively split into two hearings resulted in an unjustifiable expense on State resources also. No justification has been offered for the failure to inform the defendant of the existence of the eighth summons. This is unfair to the point of the accused being entitled to have the subsisting charge against him struck out. Counsel for the prosecution acknowledged that the matter was not dealt with in an ideal way but argued that it remains to be tried and is not such as to justify the Court in dismissing this charge. This Court must disagree with the submissions of counsel for the prosecution in this regard. It cannot be permissible for the prosecution to split the charges in this manner and it results in profound unfairness to the accused. The facts belie the contention that the Waterford District Court charge was the main charge as it was not reissued until two months after the striking out of the other seven summonses from the New Ross District Court. The accused faced two hearings arising out of the same arrest. Irrespective of the interpretation employed in relation to these events, the result is the same; it is unfair to the accused to proceed in this way.

[5.3] Having considering all of the issues raised in this matter and the case law opened to me, it is clear that in the particular circumstances of this case, the application to reissue the Waterford District Court summons was an abuse of process and District Judge Kennedy does not have the jurisdiction to proceed to a full hearing of this case. In light of having answered question one and question five it is unnecessary for me to consider the additional questions posed to the Court.