Neutral citation no. 2005 IEHC 277

THE HIGH COURT
JUDICIAL REVIEW

2004 No. 654 J.R.

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND
DISTRICT JUDGE FLANN BRENNAN

RESPONDENT

AND
MICHAEL BRIAN McGRADY

NOTICE PARTY

Judgment of Mr. Justice Murphy dated the 10th day of August, 2005.

1. Application
The Director of Public Prosecutions (DPP) applied for an order of certiorari by way of application for judicial review to quash the order of the respondent District judge sending Mr. McGrady, the notice party, forward for trial to the Circuit Court on two indictable offences and four summary offences.

The DPP also sought an order of *mandamus* by way of application for judicial review requiring the respondent to determine an application to send the notice party forward for trial to the Circuit Court on the indictable charges only.

An order extending time for the bringing of the application for leave to apply by way of judicial review was granted by Mr. Justice Quirke on 27th July, 2004.

The grounds on which the relief was sought were:

- the respondent erred in law in sending the notice party forward for trial on six charges, four of which related to offences which are triable in a summary fashion only;

- while s. 6 of the Criminal Justice Act, 1951 permits the addition of summary charges to an indictment once an accused person has been validly sent forward for trial there is no foundation in law for sending an accused person forward for trial on summary as well as indictable charges;

- the jurisdiction of the trial court to enter upon a trial on any charge depends upon a valid return for trial of the accused.

2. Evidence
The affidavit of Aonghus Dwane, a solicitor of the Office of the Chief Prosecution Solicitor, verified the statement of grounds, referred to the six charges and the book of evidence prepared in accordance with s. 6(1)(a) of the Criminal Procedure Act, 1967.

He says he was advised by counsel that while s. 6 of the 1951 Act made provision for the addition of summary charges to an indictment once a person has been sent forward for trial, it was contrary to law to send an accused person forward for trial on summary charges.

He said that the matter was listed before the Circuit Criminal Court in Dundalk on 14th January, 2004. Following legal argument in relation to which objection was taken by the notice party for the order sending him forward for trial on the ground that summary as well as indictable offences were included, the Circuit Court judge removed the case from the list.

Mr. Dwane said that he was advised that the appropriate manner with which to address the problem was to apply to have the order sending the notice party forward for trial quashed by way of judicial review. The effect of that order would be to require the District judge to determine an application to send the notice party forward for trial on the indictable charges only, leaving the summary charges standing adjourned in the District Court.

He says that papers were received by the Chief State Solicitor on 23rd March, 2004 and that it was not apparent from those papers which was the date for return for trial which it was thought mistakenly that the date was January, 2004. The matter was overlooked due to pressure of work in the office in the period from 23rd March, 2004 to 27th July, 2004, when the application was made for leave for judicial review.

The charges related to incidents on 18th August, 2002, including the unlawful taking of possession of a car without the consent of the owner and driving that car in a manner which was dangerous to the public whereby it caused serious bodily harm to the owner.

3. Statement of opposition
The notice party pleaded that the application was not made promptly or in accordance with Order 84, rule 21(1). Leave to apply was granted on 27th July, 2004, ten months after the making of the order returning the notice party for trial which was outside the period of six months.

There were no facts relied upon in the statement of grounds or verified in the affidavit which could be construed as "good reason" for extending the period within which an application might be made.

The allegations against the notice party related to an incident alleged to have occurred early in the morning of 18th August, 2002. If the application for judicial review were successful, the earliest trial date would be in January, 2005. The incident alleged to have occurred took place when some of the witnesses, including the alleged victim, had drink taken. The delay, therefore, in bringing the matter on for hearing would be prejudicial to the notice party.

4. Replying affidavit

The replying affidavit of Niall Lavery, solicitor for the notice party, referred to the matter first coming into the District Court on 14th June, 2003, following which a book of evidence was prepared and served on the notice party. On 18th September, 2003 an order was made directing the notice party be returned for trial before the Circuit Court on 7th October, 2003. It should then have been apparent that there was a defect in the notice of trial.

The matter was adjourned from that date to 14th January, 2004, when the case was removed from the list. There was no justifiable explanation for the delay from 18th September, 2003 to the date of the ex parte application on 27th July, 2004. The delay has unfairly prejudiced the notice party such as to render it impossible for him to receive a fair trial.

5. Submissions of the Applicant
5.1 Mr. Tom O'Malley, Barrister-at-law on behalf of the DPP, referred to the amendment to the Criminal Procedure Act, 1967, by virtue of s. 4A(1) of the Criminal Justice Act, 1999. That provides for the accused to be sent forward for trial as follows:

> "4A.-(1) Where an accused person is before the District Court charged with an indictable offence, the court shall send the accused forward for trial to the court before which he is to stand trial (the trial court) unless –
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> (a) the case is being tried summarily
>
> (b) the case is being dealt with under s. 13, or
>
> (c) the accused is unfit to plead."The reference to the case being dealt with under s. 13 is to minor offences capable of being tried summarily.

Sub-section (2) of the amendment provides that the accused shall not be sent forward for trial under sub-s. (1) without the consent of the prosecutor and where a prosecutor refuses, then the District Court must strike out the proceedings against the accused in relation to that offence. (sub-s. (3))

5.2 Counsel referred to *Nevin v. Judge Timothy Crowley and the D.P.P.* [2001] 1 I.R. 113. In that case the applicant had been brought back to court after conviction when he had said to the prosecuting garda, on leaving the courtroom, "I knew you would get me and you got me". The garda brought the applicant back to court and gave evidence as to what the applicant had said. The District Judge made an order imposing a six month sentence on the applicant and also disqualified him from driving for two years. The applicant contended that his solicitor and counsel did not have adequate opportunity either to cross-examine the garda on this evidence or to make submissions in mitigation. He sought *certiorari* and claimed a want of fair procedures in that a substantial increase in a custodial sentence was imposed in the absence of his legal representatives and that the District judge had taken material into account which was not relevant to the charge.

The High Court granted an order of *certiorari* quashing the conviction and refused to make an order remitting the order to the District Court on the basis that the applicant would be entitled to plead autrefois acquit where the matter remitted.

The DPP appealed to the Supreme Court which affirmed the order of the High Court. The Supreme Court held that the mere existence of a right to appeal could not be an obstacle to the grant of an order of certiorari. The District judge should have expressly asked the applicant whether he wished to consult his legal advisers, or should have invited those advisers to make submissions to him. In failing to do this there was failure to respect the fundamental principle of a fair hearing. Having regard to the breach of constitutional justice, the acquiescence of the prosecution, the passage of time and the nature of the offence, the High Court was correct in exercising its discretion to refuse to remit the matter to the District Court.

5.3 Counsel for the DPP in the present case submitted that, notwithstanding the delay, there was sufficiently good reason, at leave stage, for granting the remedy sought, there had been some uncertainty as to the appropriate manner of dealing with a number of cases about the same time and in the same geographical area. An unsuccessful attempt to apply the slip rule was made. It was submitted that the appropriate date for time to run was the date on which the Circuit Court judge removed the case from the list on 14th January, 2004 and the delay to 27th July, 2004 was explained by the difficulties that had arisen in a number of other cases and the pressure in the office of the Chief Prosecution Solicitor.

Counsel also submitted that the notice party faced serious charges and that there was no limitation period on the prosecution of indictable offences. Moreover, the notice party had not been able to point to any specific ground on which he would be prejudiced by reason of any delay in the processing the judicial review proceedings. The alleged ground of possible prejudice was not something which could be attributed in any meaningful way to the delay in the judicial review proceedings.

6. Submissions of the Notice Party
Mr. Roderick O'Hanlon S.C. submitted that the application to extend the time for leave was misleading insofar as it did not refer to the matters being before the Circuit Court in October, 2003. The issue was clearly alive to the DPP at that stage. Good reasons as required by *Ó Domnhail v. Dun Laoghaire Corporation* posited an objective test which would explain delay and offer a reasonable explanation therefor.

He referred to *Dawson v. District Justice William Hamill* [1991] 1 I.R. 213, per Finlay C.J. in relation to remittal to the District Court for reconsideration. The Chief Just held, at 215, that:

> "The main grounds on which this part of the appeal were brought are that the remittal was unfair and onerous to the plaintiff by reason of the delay in proceeding with the case in a proper manner; that it is a long time since the happenings of the events and, on the particular facts, the matter falls to be dealt with too long after the alleged occurrence. Secondly it is objection that, by proceeding with the case in an improper manner, the prosecution had brought about a situation in which it is fully aware of the plaintiff's defence. The third objection is that, if the case is remitted, the plaintiff's costs of the hearing in the District Court which has already taken place and extended over two days, would have been entirely thrown away. Finally, it was submitted that the plaintiff has not in any way contributed to the incorrectness of the procedure which caused the quashing of the order of the District Court and on the contrary opposed the incorrect procedure which led to that.
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> I have carefully considered all these submissions and I have considered the conditions on the other side; the question which really remained as the major question in the District Court was of course this question not only of what occurred in the course of the trial but whether, having regard to the provisions of the Road Traffic Act, 1968, and the requirements for notice or awareness immediately or very shortly after the happening of an incident, it was proper that the plaintiff

should have been tried. Bearing in mind all these considerations and in the interest of justice, I am satisfied that the discretion should have been exercised against a re-trial or a continuance or a remittal of the trial. In these circumstances I would allow the appeal and would reverse the order, in that regard, of the High Court. The other matters carefully and fully set out in the judgment of the High Court judge are, of course, undisturbed by this order." (at 216)

7. Decision of the Court

7.1 The first issue to be determined by the court relates to the application being made outside the time limited by the Rules of the Superior Courts, that is six months from the date of the decision in respect of an order for *certiorari.*

The DPP had sought relief to extend time for the bringing of the application for leave to apply. Leave to apply was granted for all of the reliefs including the order extending time.

Application for review was made on 27th July, 2004. This was without the six month period from the date that the matter was taken out of the list on 14th January, 2004. It was over nine months from the date of the order returning for trial on 18th September, 2003. The date of the return for trial was 7th October, 2003.

The notice party complained that the full facts were not disclosed in the affidavit grounding the application. In particular, the notice party complained that no reference was made to the matter being before the Circuit Court.

The affidavit of Aonghus Dwane, sworn on 27th July, 2004, refers, at para. 6, to the matter being listed before the Circuit Criminal Court in Dundalk on 14th January, 2004. Mr. Lavery's replying affidavit of 8th October, 2004 says, at para. 5, that the matter was first returned to the Circuit Court sitting in Dundalk on 7th October, 2003 and was adjourned by the presiding judge to the next sessions, being the sessions that commenced on 14th January, 2004. He further says that there was no justifiable explanation for the delay from 18th September, 2003 to the date of the *ex parte* application on 27th July, 2004.

There is, of course, an explanation given in the affidavit of Mr. Dwane that the papers were received by the office of the Chief Prosecution Solicitor on 23rd March, 2004, and that it was not apparent from same which was the date of the return for trial. It was mistakenly thought that the applicant had been returned for trial only in January and that the matter was overlooked due to pressure of work in the office.

It is the view of the court that this explanation was justifiable.

It does not seem that the Circuit Court was misled with regard to the date for the return for trial.

The court is of the view that the notice party has not shown a degree of prejudice which would deprive the applicant of an extension of time.

Accordingly, the court will extend the time for the making of the application.

7.2 There is an onus of the District Judge to see that an accused is not subjected to the risk of injustice (Henchy J. in *The State (Healy) v. Donoghue* [1976] I.R. 325 at 349).

It does not seem to this court that the decision of the learned Circuit judge to remove the case from the list following legal argument over jurisdiction exposed the notice party to any risk of injustice, nor was a want of fair procedure.

I have carefully considered *Nevin v. Judge Timothy Crowley* [2001] 1 I.R. 113. The circumstances of that case differ substantially from those pertaining to the present case. There was no want of fair procedures, no absence of opportunity to consult with legal advisers or to cross-examine prosecution witnesses.

The applicant seeks to quash the respondent's order of 18th September, 2003 of which charges 1 to 4 related to summary offences. Section 6 of the Criminal Justice Act, 1951 does not permit an accused person to be sent forward for trial on summary charges.

In the circumstances the applicant is entitled to an order of certiorari as sought in para. (i) of the motion herein.

The remaining charges are indictable. The applicant is entitled to an order of mandamus in relation thereto as sought in para. (ii) of the motion herein.