THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 1008 J.R.]

BETWEEN

STEPHEN BENNETT

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Miriam O'Regan delivered on the 19th day of March, 2019

Issues

1. On the 21st September 2017 at the District Court, Court 2, Criminal Courts of Justice, Parkgate Street, Dublin 7 Judge Flann Brennan convicted the within applicant of an offence under s. 12(1) of the Water Services Act, 2007 and imposed a fine on the applicant. Thereafter by way of statement of grounds and grounding affidavit of the applicant respectively dated the 18th December 2017 (leave was also afforded on that date) the applicant has sought orders to the effect that s. 12(1) of the 2007 Act aforesaid is incompatible with the Constitution and the European Convention on Human Rights, together with an order of *certiorari* quashing the conviction imposed as aforesaid.

Brief background

2. The incident the subject matter of the conviction occurred on the 4th November 2014. It was argued that the within applicant and other individuals obstructed GMC Sierra employees from installing water meters at 13 Villa Park Road, Dublin 7 by obstructing the truck carrying the relevant employees and equipment and further by obstructing the water meter. When the relevant workers attempted to work on the water meter it is argued that the applicant jumped up and down on the water meter and was subsequently arrested.

3. Evidence was given before the District Court on the 20th and 21st September 2017. Following completion of the State's evidence against the applicant in respect of the within and other offences counsel for the applicant submitted that s. 12(1) of the 2007 Act was a strict liability offence by virtue of the plain meaning of the wording of same, and there was no defence permitted and accordingly it was an absolute liability offence. It was indicated that the applicant wished to put his right to protest as a defence but same was not available. The court was asked to rule as to whether or not *mens rea* was a defence within s. 12 and as to whether or not the applicant was entitled to rely on the defence of a right to protest. In the circumstances, the applicant's counsel asked that a ruling be made that the applicant had no case to answer. By way of response submissions, it was argued that the right to protest was not unlimited and nothing had been put forward by the applicant in evidence and therefore the issue did not arise.

4. The District Judge having considered the matter ruled that he was satisfied that there was evidence of offences before him and he was not satisfied that he should direct himself at that stage in relation to any of the charges. Following such ruling the judge offered counsel for the applicant an opportunity to consider and take instructions however this opportunity was declined and it was indicated that the applicant would not be going into evidence. Accordingly, no evidence was tendered on the date in respect of the incident complained of in the summonses on behalf of the applicant.

5. Section 12(1) of the 2007 Act provides that:

> "(1) A person who obstructs or interferes with—
>
> (a) the exercise by a water services authority or any other prescribed person of powers vested in it or him or her under, or by virtue of, this Act, or
>
> (b) the compliance by any person, including the owner or occupier of a premises, with the provisions of this Act or of any notice, direction or order issued under it,
>
> commits an offence."

6. Under s. 8 of the 2007 Act it is provided that a person who commits an offence *inter alia* under section 12 (1), is liable on summary conviction, to a fine not exceeding €5,000, or imprisonment for a term not exceeding 3 months, or both, or on conviction on indictment, to a fine not exceeding €15,000, or imprisonment for a term not exceeding 5 years, or both.

7. The applicant states that because of the extent of the fine the offence under s. 12(1) cannot be said to be minor or regulatory in nature. In the statement of grounds and indeed the grounding affidavit of the applicant and submissions tendered on behalf of the applicant bearing date the 12th February 2019 the applicant complained that *mens rea* was not a component of the offence in s. 12(1) as there is nothing mentioned about *mens rea* in the particular provision. A further complaint is made that because of lack of words such as "intentionally" or "knowingly" no element of *mens rea* arises. At the hearing, however the applicant acknowledged that *mens rea* would be a presumed ingredient of the offence. Oral submissions were to the effect that the provision was not clear as to the defences available and therefore unconstitutional – because the nature of the defences which might be maintained were not enumerated then there was a lack of clarity.

8. The above argument is difficult to understand given that at p. 8 of the applicant's submissions reference is made to an ECHR decision of *Sunday Times v. United Kingdom (No. 1)* ECHR 6538/74 in which case at para. 49 it was indicated that it was the court's opinion that certainty is highly desirable however in its train it sets a rigidity and the law must be able to keep pace with changing circumstances.

> "Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."

At p. 8 of the submissions reference is made to the case of *Brend v. Wood* [1946] 62 TLR 462 where Lord Goddard cautioned that the court should always bear in mind that unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of the crime that the court should not find a man guilty of an offence unless he has a guilty mind.

9. The applicant in submissions acknowledges that the presumption of *mens rea* was endorsed in the Supreme Court decision *People (DPP) v. Murray* [1977] IR 360.

10. The respondent argues that the scope of an offence and any defence to it is worked out on a case by case basis and indeed EU law allows for the prescribing of various rights including the right to protest.

11. In *Nicol and Anor. v. United Kingdom* ECHR 32213/96 stated that "having regard to the risk of disorder arising from the persistent obstruction by the applicant of the fishermen as they attempted to carry out a lawful pastime, the court does not find the action of the police in arresting the applicants and removing them from the scene of the demonstration to have been disproportionate."

12. In an earlier case *Lucas v. United Kingdom* ECHR 39013/02 dealing with Articles 10 and 11 of the Convention the court indicated satisfaction with the fact that protests can constitute expressions of opinion within the meaning of Article 10 and the arrest and detention of protesters can constitute interference with that right. However, in order for interference to be justified under Article 10 it must be proscribed by law, pursue one of the legitimate aims listed in the second paragraph of that provision and be necessary in a democratic society, that is, proportionate to the aim pursued.

13. It is clearly unassailable both under the European Convention of Human Rights and within the Irish adversarial system that the nature of the defences which might be available in respect of any particular offence would be dealt with on a case by case basis rather than inserted in the legislation creating the offence.

***Locus standi*/abuse of process**

14. There is a wealth of jurisprudence in this jurisdiction to the effect that in order to establish locus standi to challenge the Constitutionality of any particular piece of legislation

> a. the attack cannot be made on a general or hypothetical basis (see para. 196 of A. v. Governor of Arbour Hill Prison [2006] 4 IR 88);
>
> b. if a party is not prejudiced nor in imminent danger of suffering any prejudice no *locus standi* arises (*Norris v. A.G.* [1984] IR 36;
>
> c. that a court will only enter upon the question of constitutionality if necessary for the determination of an issue before it (*The State (Woods) v. A.G.* [1969] IR 385 at p. 399).

15. On the basis, aforesaid it is argued that the applicant has no locus standi in the within constitutional challenge given that he determined in advance of the District Judge even making his ruling that he would not go into evidence and in fact did not tender any evidence to the court. Furthermore, the only evidence tendered by the applicant to this court is contained in his grounding affidavit where he recites the sequence of events and at para. 9 states that he opted not to give evidence in the course of the hearing on the basis that s. 12(1) did not entitle him to rely on any defence to the charge in any event. No defence to the charge was therefore given to either the District Court or indeed this court.

16. In the circumstances of the within matter it seems to this court that it is clear that the applicant does not have *locus standi* to mount the constitutional challenge made and indeed the reference above to the ECHR establishes that a protest in certain circumstances is unlawful and not including the details of a defence in a statute is not unusual or to be condemned.

Failure to give reasons

17. The applicant argues that fair procedure was not adhered to by the District Court in its failure to give reasons as to why the ruling sought by the applicant *vis-à-vis* the *mens rea* and strict liability offence was not addressed.

18. In the first instance the argument made by the respondent to the effect that it is highly unusual that it would be the defence that would state that no defence is available is unusual, is in my view well made. The respondent argues that in fact the nature of the submission made was an invitation to the District Court to hold that the offence was a strict liability offence and in any event the question was wholly academic in the absence of any evidence before the court. The respondent argues that the procedure employed by the applicant was an abuse of process and in effect a set up to enable him to institute the within judicial review proceedings.

19. The respondent also argues that there was no request following the ruling for the judge to deal specifically with issue of a strict liability defence or to give reasons for his ruling and when a brief adjournment was offered to the applicant this was refused. The ruling was sought at a time when the evidence before the court was to the effect that there was a protest involving blatant illegality.

20. In *Kenny v. District Judge Coughlin and the DPP* [2014] IESC 15 Denham C.J. indicated that the degree and extent to which a decision of the District Court must be explained by giving reasons will depend in turn on the nature and circumstances of the case. When the matter was before the High Court prior to the appeal to the Supreme Court O'Neill J. described the application as being on weak and unstatable grounds and was of the opinion that the terse response of the District Court judge was readily understandable and unequivocally showed that the District Court judge accepted the evidence of the prosecution. O'Neill J.'s decision was ultimately upheld in the Supreme Court on the basis that the Supreme Court was satisfied that when the District Judge said he was accepting the evidence of the prosecution that was sufficient reason.

21. Significantly the respondent argues that in *Kenny* the applicant sought reasons for the ruling of the District Judge but no further reasons were forthcoming unlike in the instant matter when no reasons were sought.

22. I am satisfied that the *Oates v. Brown and the DPP* [2016] 1 IR 481 is of no avail to the applicant in the instant circumstances and can readily be distinguished because of what was termed the unusual features of the case where the relevant DJ ignored the request for reasons, laboured under an unfortunate misapprehension as to the state of the law and made cryptic comments in respect of such misunderstanding.

23. In the Court of Appeal decision *Connors v. Faughnan and Anor* [2017] IECA 196 the law on the issue of reasons before the District Court was summarised including that there may be cases so straightforward that merely indicating that the evidence is sufficient to satisfy the court that there is a case to answer will be adequate reasoning.

24. I am satisfied that in the instant circumstances there was no want of fair procedure by the ruling given by the District Court where the applicant had sought to dismiss the claim against him in circumstances where it was not in fact argued that the case had not been made out but rather on the basis that there was no defence. Following the ruling there was no application for stated reasons or indeed inviting the District Court to address specifically the assertion by the applicant that there was no defence.

25. Given that the starting point would be that there is a presumption of constitutionality (see *Pigs Marketing Board v. Donnelly (Dublin) Ltd* [1939] IR 413 at p. 417). The asserted submission on behalf of the applicant before the District Court was more in the nature of highly unusual statement as against the applicant himself and in the absence of evidence of the applicant the District Judge was in no position to make a finding or a ruling to an extent greater than the actual ruling made. It seems entirely inappropriate to complain of no reasons before this court when in fact no reasons were sought before the District Court.

Conclusion
26. For the reasons above all the reliefs sought by the applicant are refused.