Neutral Citation: [2014] IEHC 704

THE HIGH COURT

[2013 No. 737 SS]

IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT, 1857, AS EXTENDED BY SECTION 51 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT, 1961

BETWEEN/

DIRECTOR OF PUBLIC PROSECUTIONS
(at the suit of Sergeant Patrick Dowd)

PROSECUTOR/ APPELLANT

AND
ADAM ROCHE

ACCUSED/ RESPONDENT

JUDGMENT of Ms. Justice Iseult O'Malley delivered on the 18th day of March, 2014

Introduction

1. This is an appeal, by way of case stated on the application of the prosecutor, against a decision of District Judge Anne Watkin. The central issue in the case is whether she correctly exercised her discretion in refusing to allow the prosecution to re-open its case to give evidence as to the date of the making of a complaint under the provisions of the Petty Sessions (Ireland) Act, 1851.

Facts of the case

2. The accused appeared before the District Court on the 6th February, 2013, charged with an offence contrary to s.4(4) and (5) of the Road Traffic Act, 2010, alleged to have been committed on the 1st June, 2012. The charge was laid by way of a summons, annexed to the Case Stated, which was issued by a District Court Judge on the 8th August, 2012, under the Petty Sessions (Ireland) Act, 1851.

3. At the hearing, the prosecuting officer, Sergeant Dowd, gave evidence that he observed the driving of the accused and stopped him. A roadside breath test was administered and, having failed it, the accused was arrested. The District Judge was satisfied that the arrest was valid and no issue arises thereon in this case.

4. Garda Killian McAteer gave evidence as to the operation of the Evidenzer machine and the result of the test. Again, no issue arises on this evidence.

5. After the close of the prosecution case counsel for the accused sought a direction on the basis that there was no evidence that a complaint had been made to an authorised person within the six month period set out in s. 10 of the Act of 1851. He relied upon the judgment of Gannon J. in *DPP v. Sheeran* (unrep., 9th May, 1986) as authority for the proposition that the absence of such evidence was fatal to the prosecution.

6. It was pointed out on behalf of the prosecution that the date on the face of the summons was within the six month period. An application was made to reopen the prosecution case so that Sergeant Dowd, the prosecuting officer, could give evidence as to the date of his application for the summons. It was accepted on behalf of the prosecution that evidence of the making of the complaint within six months was essential.

7. Judge Watkin accepted a submission from counsel for the accused that his client

> "*was entitled to plead not guilty, proceed to trial, hear the evidence against him, test that evidence, and then raise legal submissions after the close of the prosecution case*."

8. Judge Watkin set out her decision in the Case Stated as follows: -

> "*I then considered my discretion to permit the prosecution to reopen its case. I referred to recent authority from the High Court which drew a distinction between matters of form and matters of substance and held that the discretion can be exercised in favour of permitting the prosecution to reopen its case where the evidence was of a formal or technical nature. In considering my discretion, I found that the question of the making of a complaint is one of substance rather than one of form because it is the making of the complaint that confers jurisdiction on the court. Whilst the submission made on behalf of the accused was one posited as an issue of defence rather than jurisdiction, insofar as the accused had argued that essential proof was missing from the prosecution case, I considered the absent evidence to be more than merely formal or technical evidence and I therefore exercised my discretion against allowing the prosecution to reopen its case*."

9. The summons was therefore dismissed.

10. The questions on which Judge Watkin seeks the opinion of this court are as follows:-

> *(1)* Was I correct in law in holding that the summons ought to be dismissed in circumstances where there was no evidence before me that a complaint had been made to a Judge of the District Court within six months from the date of the alleged offence?
>
> *(2)* Was I correct in law in exercising my discretion against allowing the prosecution to reopen its case, after it had formally closed, to call oral evidence that the complaint had been made to the District Court within the six months?
>
> *(3)* Was I correct in law in dismissing the case against the accused on the basis set out above?

The issue in the case

11. The parties are largely in agreement as to the relevant authorities and as to most of the relevant principles. It is accepted by both sides that a summons issued under the Petty Sessions (Ireland) Act depends for its validity upon a proper complaint having been made to a person authorised to receive it within six months of the alleged offence. It is further accepted that the issue is one for the defence to raise, rather than one for the prosecution to prove in all cases, and that it does not in that sense go to jurisdiction. Where they part company is on the question whether the prosecution should have been permitted to adduce such proof in the circumstances of the present case.

12. The appellant submits, in summary, that once the issue is raised the District Judge is obliged to inquire into it. Where that happens it is necessary for the prosecution to adduce evidence on the issue and the District Judge should permit that to be done.

13. The respondent submits that what happened here was a failure by the prosecutor, who was on notice that the case had to be proved fully, to adduce an essential proof before closing the prosecution case. The District Judge had in those circumstances, a discretion which was wholly within her jurisdiction and which was properly exercised.

Authorities

14. I propose to consider, firstly, the judgments dealing with the necessity to prove the initiation of a prosecution within six months.

15. The respondent relies in the first instance on the judgment of Hanna J. in *The State (Hempenstall) v. Shannon* [1936] I.R. 326. This concerned civil proceedings in the District Court and the central issue was the jurisdiction of that Court to award costs. The High Court, sitting as a divisional court, determined that issue but additional remarks were made by Hanna J. in relation to a jurisdictional point raised in the case about s. 78 of the Courts of Justice Act, 1924 and s. 10(4) of the Petty Sessions (Ireland) Act, 1851. The details of the argument are not of relevance here but the following passage is relied upon:-

> "*The answer to the argument is that this section [i.e. s. 10(4)] does not deal with "jurisdiction" as that word is used in sect. 78. The question whether an offence is committed within time is portion of the evidence which must be given by the State following a plea of not guilty. It is a matter of defence, not going to jurisdiction, in the strict sense of that term*."

16. Hempenstall has been considered in a number of more recent cases, the first of which is *Minister for Agriculture v. Norgro Ltd*. [1980] I.R. 155.

17. In *Norgro*, a submission had been made on behalf of the accused at the commencement of the hearing that the summons did not bear on its face any record of the date of issue, that the return date was more than six months after the date of the alleged offence and that there was therefore no proof that the proceedings had been instituted within the time limited by s. 10(4). The prosecution then sought to adduce evidence as to the date of issue but the District Judge considered that he had no jurisdiction to embark upon the hearing. Ruling in a case stated on the question whether the judge was correct in this view, Finlay P. said:-

> "*It is clear that this particular complaint was a complaint coming within the provisions of para. 4 of s. 10 of the Act of 1851 and that, if the complaint was not made and the summons was not issued within six months of the date of the alleged offence, that fact would afford a good defence to the defendants. However, the issue which arises on the Case Stated as a matter of law is whether that is a matter of defence to be raised by the defendants and determined by the District Justice upon evidence (as the complainant contends), or whether it goes to the root of the jurisdiction of the District Court to enter upon a hearing of the complaint. I am satisfied that the contention of the complainant is correct and that the time limit arising under s. 10 of the Act of 1851 is a matter of defence for the defendants and does not go to the jurisdiction of the District Court to entertain the summons…*
>
> *As the point was raised by the defendants, I am quite satisfied that the complainant should have been permitted to prove the date of the issue of the summons*."

18. Finlay P. also noted that if the question of a time limit went to the jurisdiction of the court, the difficulty would not have been solved by printing the date of issue on the summons since that would not have constituted evidence before the court. It would instead have been necessary in every case to prove the date as a preliminary matter.

19. In the 1985 case of *State (Byrne) v. District Judge Plunkett* (unrep., D'Arcy J., 1st July, 1985) counsel for the defendant had asked the Garda in the course of cross-examination when he had made the complaint. The Garda was unable to answer. The defence then called on the prosecution to prove when the complaint was made. The District Justice ruled that he did not require such proof, and declined to allow such evidence (which, it appeared, was available) to be called, because he considered that the date on the summons was sufficient. D'Arcy J. held that

> "*Whether or not a complaint was made, in relation to an alleged offence, within six months of the date of the alleged commission of the offence, within six months of the date of the alleged commission of the offence, is an essential matter and if the defence calls for evidence thereof from the prosecution then the prosecution must satisfy the court that a complaint was made within six months*."

20. D'Arcy J. then referred to the decision in *Norgro*, agreed with it and added:

> "*… to say that the six month time limit is a matter for defence does not mean that it is a matter which counsel for the defence must seek to prove negatively and which the prosecution can ignore. The prosecution must prove their case. There are some cases in which the prosecution must prove every aspect of their case without being called upon to do so. There are some cases such as this where it is open to the defence to call on the prosecution to prove something. It is clear that the fact that a complaint has been made or the date on which such a complaint was made is a matter wholly within the knowledge of the prosecution. An accused person could not possibly know when the complaint was made. To say that something is a matter for defence means that it is a matter to be raised by the defence. When the matter raised is a matter peculiarly within the knowledge of the prosecution then it is up to the prosecution to call evidence of that fact or matter. When this matter was raised by the defendant's counsel in the lower court I say firmly that the prosecution should have proved it*."

21. This passage was cited with approval by Denham J. giving the judgment of the Supreme Court in *Duff v. Mangan* (1994) 1 I.L.R.M. 91. It was also noted that since the issue was one for the defence to raise, the question did not become an issue for the court until it was raised. At that point the court was obliged to hear evidence and determine the issue.

22. In *DPP v. Sheeran*, Gannon J. was considering a case where the summonses before the District Court had been issued outside the six month limit but evidence was adduced that the relevant complaint had been made, and other summonses issued although not acted upon, within the time. After reviewing the authorities, he set out a summary of the fundamental points established by them in the form of ten points. The respondent in the instant case relies on two of them, being

> "*…5. The summons itself does not afford proof of the fact that a complaint was made*.

> *…9. In the trial of an offence coming within section 10(4) of the Petty Sessions (Ireland) Act 1851 it is a matter of proof that a complaint was made within six months from the commission of the offences alleged*."

23. *Norgro* was again considered, and affirmed, by the Supreme Court in *Director of Public Prosecutions (Nagle) v. Flynn* [1987] I.R. 534, where the Court held that, since the issue was a matter of defence, there was no bar to raising it for the first time on appeal in the Circuit Court.

24. In *Curley v. The Governor of Arbour Hill Prison* [2005] 3 I.R. 308, the applicant was a prison officer who sought to restrain a disciplinary process that, he alleged, had been commenced outside the applicable time limits. The case was made by reference to the Prison (Disciplinary Code for Officers) Rules 1996 as interpreted by a "Memorandum of Understanding". The primary issue in the case was whether the Memorandum could be said to have altered the legal effect of the Rules. However, in giving the judgment of the Court, Hardiman J. also considered the nature of the issue raised where a defendant or respondent relies on a time limit. He noted that a contention that a plaintiff or complainant is out of time was a matter of defence.

> "*In summary prosecutions it has long been held that a failure to demonstrate compliance with the general six month time limit for the institution of a prosecution is a matter for the defence to raise, but if successfully raised entitles the defendant to a dismiss*."

25. Having referred to *Hempenstall, Attorney General v. Conlon* [1937] I.R. 762 and *Norgro*, Hardiman J. went on to point out that

> "*A consequence of these findings, of course, was that if the complainant could not prove that he had complied with the time limit, the defendant would be entitled to a dismissal. But if the matter was simply the subject of a finding of no jurisdiction, it would be open to the complainant to come again assuming that, having been alerted to the difficulty, he could prove on the second occasion that he had complied with the time limit*."

26. In *Payne v. Brophy* [2006] 1 I.R. 560, the applicant's arguments concerned alleged defects in the summons not related to the time limit. The respondent took the view that the applicant's attendance in court cured all defects. In granting an order of *certiorari*, Clarke J. held that where an issue as to the validity of a summons is raised by the defendant before the District Court

> "*[I]t is incumbent upon the District Judge concerned to enter into an inquiry for the purposes of ascertaining the following matters:-*
>
> (1) *whether the defects complained of are such as go to the jurisdiction of the court or are merely technical or procedural in nature;*
>
> (2) *where it is possible that the defects complained of may be sufficiently fundamental to go to the jurisdiction of the court then it will be necessary, in accordance with Duff v. Mangan [1994] 1 I.L.R.M. 91, to hear evidence to enable the District Judge to ascertain whether the court has jurisdiction;*
>
> (3) [omitted]"

27. Finally, the court was referred to the *ex tempore* judgment of Hedigan J. delivered on the 8th May, 2013, in *Moroney v. Finn*, where the approach of Clarke J. in *Payne* was followed.

Discussion

28. On behalf of the appellant, Mr. Kieran Kelly BL says that the effect of the authorities is that the prosecution does not have to prove when the complaint was made unless the issue was raised. It is not otherwise a substantive part of the case, since it is immaterial to the merits. If it is raised, then the prosecution must be given the opportunity to deal with it by calling appropriate evidence.

29. On behalf of the respondent, Mr. Conor McKenna BL agrees that the issue is a matter for the defence but, relying on *Hempenstall and Sheeran*, argues that it is nonetheless an essential proof for the prosecution. It was not something to be raised as a preliminary point, precisely because it did not go to jurisdiction. Nor had the defence contested the validity of the summons. The prosecution in this case was on notice that it had to prove its case fully and failed to do so.

30. It seems to me that having regard to the authorities, the difficulty with the defence argument is that it involves disregarding the distinctions between "essential proofs" and "matters of defence".

31. The concept of an essential proof relates to matters which must be established by the prosecution in all cases in which there is a plea of not guilty. In such a case it will always be necessary to prove the ingredients of the offence and the requisite participation of the accused. If the prosecution cannot prove these matters the accused cannot be convicted. It may be that some aspects of a case can be dealt with on foot of concessions by the defence, who may, for example, accept that the offence was committed (but not that it was committed by the accused), or concede the lawfulness of an arrest or of a chain of custody of evidence. Where there is no such concession, the prosecution is correctly described as being on full proof of these aspects.

32. However, where something is a matter of defence only, it is clear that the prosecution bears no onus in relation to it unless it is raised as an issue. If it is not, and no evidence is called by the prosecution in relation thereto, the validity of a conviction will not be affected by the lack of evidence on the issue. *Hempenstall* and the cases which approved it do not bear a contrary meaning – the second sentence of the passage quoted from *Hempenstall* must be read in conjunction with the third. Nor can point 9 of Gannon J's decision in *Sheeran* be taken as contradicting all the authorities in which it is clearly stated that the matter is one of defence.

33. It is also worth emphasising the difference in consequence, in the event of a failure by the prosecution, between an essential proof and the question of compliance with the time limit. As Hardiman J. pointed out in *Curley*, a dismiss for failure to prove the initiation of the prosecution within time would not be a bar to a subsequent trial if the prosecution were in a position to remedy the lack of evidence. This can be contrasted with a dismiss on the basis of a failure to meet an "essential" proof, which would lead to a dismiss on the merits without the possibility of the prosecution mending its hand and coming again.

34. The question then is – what does it mean to say that the issue is one that the defence must raise? In my view to "raise" an issue regarding the time limit means to raise it specifically. It is not sufficient to say simply that the prosecution is on full proof, since the issue is not one relating to an essential proof of the case and the prosecution does not, therefore, bear an onus of proof in relation to it unless it is raised. None of the authorities cited support the proposition that the issue may be "raised" other than expressly. In

other words, the defence must call on the prosecution to prove that the time limit was complied with.

35. If this is correct, then I think that it would probably follow that the defence should raise the issue before the prosecution has closed its case. However, the case was not argued on this basis and I do not wish to be taken as deciding the point. For the purposes of this judgment, therefore, I will accept that the defence was entitled to raise the matter at the conclusion of the prosecution case. However, having regard to the nature of the issue (since it *relates* to jurisdiction) and to the authorities cited above, it seems to me that at whatever stage it is raised, the judge is obliged to enquire into it and determine the issue. The prosecution will then be entitled to call evidence if it can. The question does not, in my view, turn on the distinction between substance and form – those concepts, in the context of deciding when the prosecution can re-open its case, relate to the merits and evidence in the case itself.

36. I therefore propose to answer the question posed in the case stated as follows:

(1) No.

(2) No.

(3) No.