



THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

Record No: CJA254/11

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

v

GIBSON BROTHERS (IRELAND) LIMITED

Respondent

Judgment of the Court (ex tempore) delivered the 15th day of February, 2015 by Mr. Justice Edwards

Background to the Appeal :

1. In this case the applicant seeks a review pursuant to s. 2 of the Criminal Justice Act 1993 as amended by the Court of Appeal Act 2014 (the Act of 1993, as amended) of two sentences comprising fines of €15,000 each, with two months to pay, imposed upon the respondent by Dundalk Circuit Criminal Court on the 19th of October 2011 following pleas of guilty by the respondent to counts 2 and 5, respectively, on an indictment containing nine counts, which pleas were acceptable to the Director of Public Prosecutions subject to the full facts of the case being opened to the court at sentencing, on the grounds that the said sentences were unduly lenient and represented a divergence from the norm. .

2. Count No 2 comprised the offence of failure as an employer to ensure so far as was reasonably practicable that persons not being employees were not exposed to risk to their safety, health or welfare, in breach of s. 12, and contrary to s. 77(9)(a), of the Safety Health and Welfare at Work Act 2005.

3. Count No 5 comprised the offence of failure as a project supervisor at the construction stage within the meaning of the Safety Health and Welfare at Work (Construction) Regulations, 2006 to include in the construction plan for the construction site specific measures concerning work which involves a particular risk in breach of Regulation 16(d) of the Safety Health and Welfare at Work (Construction) Regulations, 2006, and contrary to s. 77 (2)(c) of the Safety Health and Welfare at Work Act 2005.

4. The respondent has indicated an intention to substantively oppose the said application, should it be necessary for it to do so. However, the respondent has also raised a preliminary objection which, if upheld, would be dispositive of the entire matter.

The Preliminary Objection.

5. The respondent objects that compliance with the preconditions required by the Act of 1993, as amended, has neither been asserted nor proven. In particular, it has not been shown that the respondent was notified in the manner required by s.10(1)(d) of that Act, nor within the time-limit prescribed by s.2(2) of that Act. In support of the said objection the respondent relies upon the decision of this Court in *The People (Director of Public Prosecutions) v Patrick Monaghan (Drogheda) Limited* [2014] IECA 52.

Relevant Statutory Provisions

6. Section 2(2) of the Act of 1993, as amended, provides:

"2(2) An application under this section shall be made, on notice given to the convicted person, within 28 days [or such longer period not exceeding 56 days as the Court may, on application to it in that behalf, determine,] from the day on which the sentence was imposed."

7. Section s.10(1) of the Act of 1993, as amended, provides:

"10(1) a document required by section 2 or 4 of this Act to be given to a convicted person may, subject to subsection (3), be so given –

(a) by delivering it to him or to his solicitor,

(b) by addressing it to him and leaving it at his usual or last known residence or place of business or by addressing it to his solicitor and leaving it at the solicitor's office,

(c) by sending it by registered post to him at his usual or last known residence or place of business or to his solicitor at the solicitor's office, or

(d) in the case of a body corporate, by delivering it, or sending it by registered post, to the secretary or other officer of the body at its registered or principal office."

The basis of the preliminary objection

8. Counsel for the respondent has contended that the only means of notification to a convicted person who is a body corporate which is permitted by the statute is notification in accordance with s. 10(1)(d), i.e., by delivering it, or sending it by registered post, to the secretary or other officer of the body at its registered or principal office. In so submitting, counsel relies on paragraphs 20 and 21 of this Court's judgment in *The People (Director of Public Prosecutions) v Patrick Monaghan (Drogheda) Limited*, where we stated:

"20. It appears to the Court that the structure of s. 10 of the Criminal Justice Act 1993 provides for different modes of

service in respect of a convicted human person as opposed to a convicted body corporate. Section 10(1) of the Act of 1993 provides three modes of service for a convicted human person and one for a person convicted as a body corporate.

21. The Director submits that there are four methods available for service on a body corporate. The Court is unable to agree with that view and in light of s. 4 of the Interpretation Act 2005, it cannot be said that s. 18(c) overrides the clear meaning of section 10(1). Accordingly the Court's view is that the service of the notice of application for review of the respondent's sentence does not comply with s. 10(1)(d) of the Act of 1993 and holds that the application on behalf of the Director is statute barred."

9. It was submitted that the form of notification relied upon by the applicant, namely delivery to the offices of the respondent's solicitors, on the 28th day after the day on which the sentences at issue were imposed, of a notice purporting to be that required by s. 2(2) of the Act of 1993, as amended, where a legal secretary received it and completed an endorsement purporting to indicate acceptance of service on behalf of the said firm in their capacity as solicitors for the respondent, was not a permitted form of notification under the Act, and could not be relied upon as a sufficient form of notification for the purposes of s. s. 2(2) of the Act of 1993, as amended.

The response to the preliminary objection.

10. The applicant, while accepting that there was not notification in accordance with s. 10(1)(d) of the Act of 1993, as amended, contends that in circumstances where a secretary in the respondent's solicitor's offices had accepted service of the relevant notice, and had endorsed in writing the firm's acceptance of service, the respondent company must be regarded as being estopped from denying that it was properly notified. This Court was urged to exercise inherent jurisdiction to deem service good in the particular circumstances of the case.

The Court's Decision

11. In an *obiter dictum* in the *Patrick Monaghan (Drogheda) Limited* case this Court expressed some reservations as to whether it could in fact exercise inherent jurisdiction to deem service, other than as expressly provided for in the statute, to be good service of the required notice. Giving judgment on behalf of the Court, Sheehan J stated (at para 22):

"22. The Court also wishes to point out that it is not ruling definitively on the question of whether or not it has a discretion in this matter arising out of its inherent jurisdiction. The Court is of the view that it would appear to be questionable whether in light of specific statutory provision which the Court has held to apply, that there is a capacity for it to waive that aside by relying on or invoking an inherent jurisdiction. However, whether inherent jurisdiction exists or not, is something that this Court is not going to now endeavour to rule on definitively. It is sufficient for the Court to say that, having regard to its ruling, it would not be appropriate even if there were some such jurisdiction for the Court to apply it in the particular circumstances of this case and accordingly the application falls to be dismissed on the ground of inadequate service."

12. There is nothing in the circumstances of the present case that tends to assuage the reservations which this Court has previously expressed. We consider that in circumstances where the Oireachtas has expressly provided for a particular form of service in the case of corporate bodies, even if the Court were to assume that it does have the suggested inherent jurisdiction, there would have to be the clearest evidence of acquiescence or waiver of the statutory requirements before the Court could intervene.

13. While applications for s. 2 reviews are becoming more common, they are still far from routine even in the case of convicted human persons, still less in the case of corporate defendants against whom prosecutions are a comparative rarity.

14. It might be one thing if the document had been accepted by a qualified solicitor who could be expected to recognise the import of doing so, and particularly the actual solicitor dealing with the respondent's case, but the fact that the document was accepted by a legal secretary is another thing entirely. It cannot be presumed or inferred that the legal secretary in question would have understood the full implications for the respondent of accepting service of the purported notice, nor is there any basis for inferring that she had ostensible much less actual authority to do so.

15. The notice document in this case was not something akin to a routine procedural notice such as a Notice of Motion seeking discovery or some other form of interlocutory relief in civil proceedings. Neither was it an originating document of the type that solicitors would routinely be prepared to accept service of on behalf of their clients. In such instances clerical staff at a solicitors firm might well be regarded as having ostensible authority to accept service. However, there is nothing routine at all about the prosecution's right to seek a review of a sentence in an indictable matter.

16. The jurisdiction to review such a sentence on the grounds of alleged undue leniency is an extra-ordinary jurisdiction. It represents a relatively recently created statutory exception to the long established common law rule that the prosecution has no right to appeal either conviction or sentence in a criminal case. Such an application will, if successful, have potentially profound implications for a convicted person. The Oireachtas, in creating the said extraordinary jurisdiction, has seen fit to limit its scope and confine it to sentences following upon a conviction on indictment, and also to make the lawfulness of its invocation subject to two express statutory preconditions, i.e., the giving of notice to the convicted person in a specified manner and within a specified time. The Courts should not lightly facilitate the setting at naught of express legislative requirements. Its justification would require the clearest and most manifest acquiescence by the convicted person. The evidence in this case does not approach the cogency of that which would be required.

17. In the circumstances the Court is disposed to uphold the respondent's preliminary objection.