Neutral Citation: [2013] IEHC 487

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 989 J.R.]

BETWEEN

MICHAEL RICHARDS AND LIAM BYRNE

APPLICANTS

AND

HIS HONOUR JUDGE JAMES O'DONOHOE AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice Birmingham delivered the 8th day of November 2013

1. In this case the first named applicant is seeking an order by way of *certiorari* quashing the decision of the first named respondent made on the 20th November, 2012, to discharge or reverse an order made earlier by him on that day which had allowed a District Court appeal. Leave having been granted by the late Feeney J. on the 10th December, 2012. The second named applicant is named as a party to the proceedings in a situation where he was approved by the District Court to act as an independent surety. Recognisance having been fixed in the amount of the applicant's own bond of €100 together with an independent surety of€500 (€100 of the €500 to be lodged in cash). However, no particular relief has been sought by the second named applicant.

2. The background to the present application is that the first named applicant was charged by Sgt. Maureen Burke in relation to two offences that he is alleged to have committed on the 22nd September, 2011, at Oliver Bond House. Specifically he was charged with an offence contrary to s. 3 of the Non-Fatal Offences against the Person Act 1997, the allegation being that he assaulted Gda. Mark Dennehy causing him harm and in addition he was charged with the offence of wilful obstruction of Gda. Patrick Martin, a peace officer acting in the execution of his duty contrary to s. 19(3) of the Criminal Justice (Public Order) Act 1994, as amended.

3. The first named applicant pleaded guilty to the charges and on the 9th October, 2012, was sentenced to nine months' imprisonment on the offence contrary to the Non-Fatal Offence against the Person Act and the public order offence was taken into consideration. Recognisances were set in the event of an appeal and as I have indicated the second named applicant was approved as an independent surety. Recognisances were entered into and the first named applicant was admitted to bail pending the determination of the appeal.

4. The first named applicant's appeal was listed for hearing at 10.00 a.m. on the 20th November, 2012, in the Dublin Circuit Criminal Court. Ms. Anne Collins, solicitor, was prosecuting the case on behalf of the second named respondent and Mr. John Quinn, solicitor, instructed counsel to appear on behalf of the first named applicant. On the day in question, 87 cases were listed before the first named respondent and all of these were being prosecuted by Ms. Collins. The appeal of Michael Richards was listed at no. 12 of 50 cases that had been listed for 10.00 a.m.

5. When the case was called at 10.00 a.m. there was no member of An Garda Síochána present to give evidence. In these circumstances the first named respondent allowed the appeal. It seems that a number of cases were called at 10.00 a.m. where the prosecuting garda was not present and in these cases too, the appeals were allowed by the presiding judge. In the case of the first few appeals where there was no member of An Garda Síochána present, Ms. Collins sought to have the cases allowed to stand until later in the list and argued for this, but this was refused by the presiding judge. In a situation where her request to allow matters stand was unsuccessful she did not press this argument in later cases where the same situation arose and so no specific request to this effect was made seeking to put the appeal of Mr. Richards back until later in the list.

6. At approximately 10.30 a.m. Sgt. Burke came to court. However, opportunities for discussions or consultation with Ms. Collins were limited as the solicitor was involved with the balance of the list. The list ran on until approximately 1.30 p.m. and at that stage during a 30 minute break Ms. Collins received instructions from the Office of the second named respondent that she should apply to have the case re-entered. When the court sat again at 2.00 p.m. Ms. Collins made that application. She did so in a situation where she was aware that counsel who had appeared for the first named applicant would be in court to deal with another unconnected matter. Counsel, who it must be made clear was present only by chance, objected to the application and pointed out that the appeal had been finalised that morning with the charges being dismissed and that the first named applicant had left court on that basis.

7. There is some element of disagreement as to what happened next. It is clear that the first named respondent inquired as to the nature of the offence that was the subject of the appeal and that Ms. Collins informed the court that the offence was a s. 3 assault against a member of An Garda Síochána where a sentence of nine months' imprisonment had been imposed. On behalf of the respondents it is said that the first named respondent "vacated" his earlier order and adjourned the appeal until the 18th December, while on behalf of the applicant it is contended that what happened was that "the appeal was reinstated and adjourned to the 18th December at 10.00 a.m. for mention, with a direction that the garda was to notify the accused".

8. Sgt. Burke, I should explain, has stated in her affidavit that she was notified of the appeal on the 19th November, 2012, by phone, from whom she does not state and was told that the case was listed for the following day at 11.00 a.m. and that she ought to be there for 10.30 a.m. It was in those circumstances that she arrived at 10.30 a.m. approximately but discovered that the appeal had been allowed earlier in her absence.

9. In relation to the disagreement as to whether the earlier order was vacated or whether the appeal was simply reinstated, I have been provided with two orders. The first drawn up on the 3rd December, 2012, recites:

> "And ***whereas*** on the hearing of an appeal on the 20th November, 2012, the Circuit Court Judge ordered as follows:

Appeal Ref: A: 2012/5349 ***adjourn to the 18th December, 2012 at 10.00 a.m. in Circuit Court 16 in the Criminal Courts of Justice***".

A second order exhibited in the course of a supplemental affidavit recites as follows:

> "And ***whereas*** on the hearing of an appeal on the 20th November, 2012, the Circuit Court Judge ordered as follows: Appeal Ref: A: 2012/5349 ***allow appeal and assign legal aid to John Quinn, solicitor***. There being an application by the State before the Court on the same day after the prosecuting Sergeant arrived late to Court, the Court ordered as follows, ***reinstate appeal and adjourn to the 18th December, 2012, at 10.00 a.m. for mention***".

Submissions

10. On behalf of the first named applicant it is submitted that on the morning of the 20th November, 2012, the first named respondent dismissed the charges against him. The orders purportedly made during the afternoon were made without jurisdiction and at a time when the first named respondent was *functus officio*. It is said that in purporting to act as he did during the afternoon, the first named respondent acted without jurisdiction. If, contrary to the submissions of the applicant, the first named respondent did have jurisdiction to reinstate the appeal then the manner that this was done, which was that the order was made without notice to the applicant, was contrary to the principles of fair procedures and natural justice.

11. On behalf of the second named respondent, it is said that the first named respondent was entitled to act as he did, because the matter was still in the breast of the court and it is said that there was no breach of fair procedures. There was no substantive decision adverse to the first named applicant and all that happened was that his appeal was adjourned.

12. The first named applicant has relied on the case of the *State (Dunne) v. Martin* [1982] I.R. 229. However, it must be said that the facts of that case were quite different. In particular, in that case in a situation where the appeal to the Circuit Court was originally dismissed on the 1st December, 1980 and the order of the District Court affirmed and the Circuit Court Judge had purported to permit the matter to be reinstated on the 15th December, the line of jurisprudence dealing with the matters still in the breast of court had no application.

13. Of potentially greater relevance is the case of *Kennelly v. Cronin and Others* [2001] 4 I.R. 292. In that case the first named respondent was charged with murder and the second and third named respondent were sureties for him. In that case, the judge in the District Court struck out the charges in a situation where he was given to understand that the book of evidence that ought to have been available was not ready, the matter having been listed peremptorily against the State. In actual fact the book of evidence was ready and in those circumstances the respondent was rearrested and recharged on the same day. When the matter was brought before the court the solicitor for the first named respondent, requested the District Court Judge to re-enter the earlier original charge sheets. He did so because this course of action would allow his client to remain on bail, whereas if the fresh charge sheets became operative it would have been necessary for him to be remanded in custody and for him then to apply again for bail in the High Court.

14. When the matter came before the Supreme Court, the distinction was drawn between the position of the first named respondent and the second and third named respondents. So far as the first named respondent was concerned, he was the one who through his solicitor had applied to have the original charge re-entered and having done so he could not be heard to say that he was not bound by his bail and that his bail could not be estreated. However, so far as the sureties were concerned the position was quite different. Their involvement appeared to have come to an end when the charges were struck out as the accused had observed his obligations up to that point. However, at a later stage the reinstatement of the charges had the effect of re imposing obligations on them, without notice to them and this was seen as contrary to fair procedures.

15. This case was central to the submissions made by both sides and it is necessary to consider the judgments in some detail. However, before drawing attention to passages in the judgments which appear to be in point, it is necessary to explain the context in which the matter came before the Supreme Court. Having re entered the original charge sheets in the District Court, the accused and first named respondent, Mark Cronin, was remanded on continuing bail on a number of occasions up to and including the 10th March, 1999, when his bail was revoked and he was remanded in custody. This was in a situation where the respondent was in breach of the bail terms.

16. Thereafter, the applicant made an application to Limerick District Court to estreat the recognisance entered into by the respondents and to forfeit the monies lodged by the first named respondent, Catherine Cronin, in the sum of €10,000. On behalf of the respondents and more specifically on behalf of the second and third named respondents it was contended that the recognisance that had been entered into had expired and became a spent force when the charge sheet was struck out on the morning of the 18th November, 1998 and that they could not be revived by the subsequent re-entering of the charge sheet. In particular it is pointed out that the respondents, Marie Cronin and Catherine Cronin, were not present in the District Court on the 18th November and had not participated in any way or in any way consented to what had happened. When the question of estreatment came before the Circuit Court, the Circuit Court Judge stated a case for the Supreme Court posing three questions as follows, which are reflected at p. 297:-

> "(a) Did the recognisance entered into by the respondent dated the 26th August, 1998, expire and become a spent force for all intents and purposes on the 18th November, 1998, when charge sheet no. 334 of 98 of Henry Street was struck out by the District Court Judge at Limerick District Court?
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> or
>
> (b) Was the said recognisance revived and did it become binding in every respect as against the respondent Mark Cronin from the granting of the application made on his behalf to have the said charge sheet re-entered?
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> (c) Was the said recognisance revived and did it become binding in every respect as against the respondents Marie Cronin and Catherine Cronin when the said charge sheet was re-entered, notwithstanding the fact that they had no notice of the application to re-enter the charge sheet and were not present in the District Court at the relevant time and did not play any part in the proceedings?"

17. All three judges in the Supreme Court were in agreement that the questions should be answered A. Yes, B. Yes and C. No. However, some differences in approach emerge. McGuinness J. in the course of her judgment indicated that it was necessary to look in some detail at what had actually occurred in Limerick District Court. She commented that the order in that case did not on its face make any mention of vacating the previous order and in her view the wording of the order did not imply such a vacation. The wording in question was as follows:-

> "It was adjudged as follows:
>
> That the charges be struck out. On subsequent application by Mr. Ted McCarthy, solicitor, for accused it was directed that the said charges be re entered by consent ..."

18. McGuinness J. was of the view that the order set out two distinct and separate actions by the judge. First it was adjudged *simpliciter* that the charges be struck out and it was then stated specifically that it was directed that the charges be re-entered and the judge then ordered that the accused be remanded on continuing bail. At p. 303 she commented:-

> "In logic, I would accept the submission of counsel for the second and third respondents that if the judge wished to vacate his original strike-out order, it was open to him to do so, but that if he did so, there would be no need to re-enter the charges as they would still be in existence "

19. The disagreement between the parties in the present case as to whether the Circuit Court Judge vacated his earlier order is referable to the treatment by McGuinness J. of this issue. I am not convinced that a great deal turns on the precise language used by the Judge in the Circuit Court, but insofar as there is a disagreement I would accept what has been said by Ms. Collins and Sgt. Burke, who unlike Mr. Quinn who has sworn the affidavit on behalf of the applicant, were present in court. McGuinness J. referred to the oral submissions and to the fact that the main plank of the argument on behalf of the applicant was that any perceived "gap" between the strike out order and the order of re-entry was closed by the fact that all matters in question took place on one day, during a single sitting of the court. Dealing with that issue she commented at p. 303:-

> "While I accept that orders may well be altered by a judge in this way during the course of the day's session, either an application by a party, or on his own motion, I find it hard to accept that this practice is truly analogous to the course of events in Limerick District Court on the 18th November, 1998."

She said that it seemed to her that there was a clear gap in time between the strike out order and the re-entry order. That gap is significant precisely because, during that time the first named respondent was no longer an accused person before the court, but was a free man, and as a consequence, his recognisance and those of his bails persons were discharged. In her opinion an alteration or later change of mind by the Judge, even on the same day, could not retrospectively undo those facts. The re-entry of the charge was a fresh step by the court which brought about a new situation. Geoghegan J. agreed with the answers proposed by McGuinness J. in her judgment, but made clear that he was doing so in the context of the views which he had expressed in his judgment. In that context the following comments are of some significance. At p. 306, Geoghegan J. observed:-

> "Counsel for the applicant and counsel for the second and third respondents have each made erudite arguments as to the jurisdiction or otherwise of the District Court Judge to do what he did and as to the effects of what he did. My avoidance of any detailed treatment of these arguments is not intended as any disrespect but rather, because I think it dangerous to broaden the scope of the case unnecessarily. All sorts of contingencies happen in a District Court every day of the week. There are many circumstances in which District Court Judges reinstate struck out proceedings, rightly or wrongly. The District Court is a court of record and until an order made on a particular day has become the final record of the court, it cannot in all circumstances be assumed that a spoken order is the final disposal of the proceedings and, thereby in a case such as this, rendering a recognisance a spent force. Perhaps I should more accurately say that this may not necessarily be the effect in all cases of a 'strike out' followed by a reinstatement. I see no reason to regard 'in the breast of the court' jurisdiction, referred to in the judgment of McGuinness J. and more fully elaborated upon at pp. 202 and 203 of O'Connor's '*The Irish Justice of the Peace*' Vol. 1 (2nd ed.) as outdated or no longer applicable. I am reinforced in that view by the reliance on it by Davitt P. in *The State (Kiernan) v. de Burca* [1963] I.R. 348 at p. 357."

20. Fennelly J. commented as follows at p. 308:-

> "With regard to the answer to the third question, I agree with McGuinness J. In reality, the central point in the case is that the second and third named respondents were entitled to be heard before they could be bound anew by the re-entry of the charges. That is a point in common between the judgments of McGuinness and Geoghegan JJ. I would simply add that I believe that, in the ordinary way, an order of a District Court Judge can indeed be recalled and altered in the course of the sittings in the circumstances mentioned in the applicant's submissions. That was not the problem here. It clearly could have been done, so long as the bailspersons were permitted to be heard."

21. It seems to me that "the breast of the court" line of jurisprudence remains part of Irish law, and that accordingly, the first named respondent did have jurisdiction to change his mind. There remains for consideration whether the manner in which the appeal was revived, to use that neutral expression, offended the principles of natural justice. Clearly, it is possible to envisage changes in mind so radical that it would be absolutely essential that the parties would be given a further opportunity to be heard. A decision to impose an immediate custodial sentence when earlier the decision had been in favour of a non-custodial disposal is one that comes to mind.

22. The present situation is, in my view, less clear cut. On one view there has been a radical change of position in that the first named applicant went from a position where the appeal brought by him had been allowed, to one where the appeal as again pending and no substantive decision had been taken in relation to it. On the other hand it seems to me that the applicant having pleaded guilty in the District Court and having had a sentence imposed on him was entitled to appeal and his entitlement was to have his appeal considered on its merits. He was not entitled to have his appeal allowed, because the prosecuting garda was late due to inaccurate information being conveyed in a telephone call.

23. I do no believe that this is a case where one can lose sight of the practicalities of the situation. Many thousands of cases are listed in the District Court every month and a great number of District Court appeals are listed also. The sheer volume of cases involved guarantees that- with the best will in the world, things will sometime go wrong and it seems to me proper and indeed necessary that the District Court, and on appeal the Circuit Court be in a position to respond to such situations as they arise. However, when consideration is being given to vacating an earlier order made that ought not happen without the party in whose favour that earlier order was made - and who would be adversely affected if the order was altered- being given an opportunity to be heard. I would expect that ordinarily that could happen both informally and expeditiously. However, it does seem to me that the beneficiary of the earlier order must have an opportunity to uphold that earlier order and argue against variation. It seems to me that fair procedures require no less.

24. Having regard to the views that I have formed, I will discuss with counsel what form the order should take.