THE COURT OF APPEAL

(CIVIL)

Neutral Citation Number: [2017] IECA 214

Record No. 2016/20

Birmingham J.
Mahon J.
Hedigan J.

BETWEEN

JAMES CONOLLY

APPELLANT

– AND –

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Birmingham delivered on the 20th day of July, 2017

1. This is an appeal from a decision of the High Court (Humphreys J.) dated 14th December, 2015 refusing the appellant leave to seek judicial review. The decision, while initially *ex tempore*, was, at the request of the appellant incorporated into a written judgment delivered on 15th February, 2016.

2. The background to the case is a highly unusual one. This background is helpfully and succinctly summarised in the course of the written decision of the High Court.

3. The controversy has its origin in events that occurred on 11th December, 2008 at the Garda Boat Club premises at Islandbridge, Dublin. On that evening, members of An Garda Síochána approached a car that was in the car park of the boat club which was occupied by the appellant and a female. Some form of altercation ensued, certainly the Gardaí have so contended. Following an arrest at 10 pm approximately, the appellant was charged with the offence of using threatening, abusive or insulting behaviour in a public place contrary to s. 6 of the Criminal Justice (Public Order) Act 1994.

4. On 4th March, 2009, the appellant was charged with two further offences arising out of the Garda Boat Club incident. These were offences of obstructing a peace officer contrary to s. 19(3) and (4) of the Criminal Justice (Public Order) Act 1994 and the offence of offending modesty contrary to s. 18 of the Criminal Law Amendment Act 1935 as amended by s. 18 of the Criminal Law (Rape) (Amendment) Act 1990. These charges came before the District Court (Judge David McHugh) on 14th July, 2010. The charges were contested and the appellant was represented by solicitor and counsel. The appellant was convicted on all three counts however, the judge dealt with the matter by imposing a fine of €500 in respect of the s. 6 public order offence and the two other matters were taken into account. There was provision for the appellant to serve a sentence of 15 days imprisonment in default of payment of the fine. The appellant appealed to the Circuit Court where there was a full rehearing on 15th November, 2011, Her Honour Judge Margaret Heneghan, as she then was, presiding. The conviction was affirmed, though the penalty was modified in that the period of imprisonment to be served in default of payment of the fine was reduced to three days. It appears that, technically, the only matter before Judge Heneghan was the s. 6 Criminal Justice (Public Order) Act 1994 conviction.

5. The appellant was dissatisfied with the outcome of the proceedings in the Circuit Court and commenced judicial review proceedings (hereinafter referred to as "the first set of judicial review proceedings" [2012 No. 77 JR]) which were dismissed. He appealed to the Supreme Court (Appeal No. 60/2012) but was unsuccessful.

6. On 19th February, 2010, an event occurred which at first sight might seem completely unrelated to the present controversy but in fact was to influence significantly what subsequently occurred. Mr. Conolly was charged with what has been described as an "intoxication offence" alleged to have been committed on a completely different date He says that this offence was struck out but that 19 months later he received a further summons in respect of it. Judicial review proceedings were commenced (hereinafter "the second set of judicial review proceedings") raising issues in relation to abuse of process and undue delay. These proceedings were determined in favour of the appellant in the Supreme Court with an order made on 11th November, 2013. The relevance of this will emerge presently.

7. On 16th May, 2013, Mr. Conolly commenced a third set of judicial review proceedings ("the third set of judicial review proceedings") in which he sought to have the penal warrant relating to the Garda Boat Club matters deemed to be out of time [2013 No. 381 JR]. Leave was granted on 12th June, 2013.

8. On 26th July, 2013, there was a development in completely unconnected proceedings to which Mr. Conolly attaches significance. On that day, Hogan J. delivered a judgment declaring certain aspects of s. 18 of the Criminal Law Amendment Act, 1935 to be unconstitutional. These were aspects which dealt with the offences of causing scandal and injuring the morals of the community.

9. On 19th February, 2014, the Garda Boat Club incident was listed before the District Court, Judge John Lindsay presiding. This listing occurred notwithstanding that an appeal had been processed to conclusion. On this listing, Mr. Conolly was represented by a solicitor and it appears that the appellant's objective in arranging for the listing was to obtain information in relation to the penal warrant. What happened on that occasion was very surprising in that the convictions were set aside.

10. On 9th November, 2015, Mr. Conolly initiated the present proceedings in an attempt to find out why his convictions were aside. Mr. Conolly has indicated that his initial reaction to the turn of events in the District Court was one of surprise and pleasure.

Humphreys J. in the course of his judgment wryly, but entirely aptly it might be thought, commented that one might think that this was a case of a gift horse which ought not to have been looked in the mouth.

11. On 9th April, 2014, which was, of course, after the appellant's District Court convictions had been set aside, Hogan J. delivered judgment in the cases of *McInerney v. DPP* and *Curtis v. DPP* [2014] IEHC 181. In the course of that judgment, he declared the remaining portion of s. 18 of the 1935 Act, which dealt with the offence of offending modesty, to be unconstitutional.

12. On 12th May, 2015, the appellant sought a declaration in the Circuit Court that a miscarriage of justice had occurred. Her Honour Judge Berkeley took the view that she had no jurisdiction to deal with the application.

13. On 9th November, 2015 the appellant commenced the present proceedings.

14. According to the statement of grounds, the reliefs sought were:-

> (i) That the DPP inform the appellant on what grounds his criminal conviction was overturned in Court 16 of the Criminal Courts of Justice on 19th February, 2014 in that the Court did order on that day: "Allow appeal. Reverse conviction and order of the District Court."
>
> (ii) That, if this Court finds there has been a miscarriage of justice as defined in the Criminal Procedure Act 1993 (or under any other Act of the Oireachtas, or article in the Constitution, as the case may be) and if the Court has the authority, that this Court do order that a certificate of miscarriage of justice be issued to the applicant and that it order that compensation be paid to the applicant in an amount to be determined.

15. The application for leave came before Humphreys J., who directed that the application should be made on notice. On 14th December, 2015, having listened to the DAR (Digital Audio Recording) and having heard the parties, including the DPP who was represented by counsel, he refused to grant leave. The applicant subsequently requested a written statement and in response, a written judgment was delivered dated 15th February, 2016.

16. In the course of the proceedings before Humphreys J., counsel on behalf of the DPP explained that the issue raised in the second judicial review proceedings was whether there was an abuse of process in relation to the intoxication offence which had initially been struck out but then had been reissued. She says that subsequently, confusion arose and this saw the Supreme Court order in relation to the alleged abuse of process regarding the intoxication offence incorrectly being placed on the District Court file in relation to the charges at issue in the Garda Boat Club proceedings. She says that this gave rise to a misunderstanding which led to the reinstatement of the applicant's appeal and to it being allowed. Counsel contended and indeed now contends that the confusion that arose benefitted the applicant and that he can have no complaint.

17. Humphreys J., having accessed the DAR, said it was clear as to why the conviction was overturned. It was overturned because there was confusion in the system as between the offence which was the subject of the second judicial review i.e. the intoxication offence and those that were the subject of the first and third judicial reviews i.e. the Garda Boat Club offences. The judge commented that the applicant benefitted from the confusion and that in essence, his appeal was reinstated and was then allowed by mistake. He says that in those circumstances, there was no injustice and that there was no basis upon which to extend time. He took the view that the proceedings were out of time in that the application was not made within three months after the making of the order complained of. Moreover, the first relief sought being the request for reasons, had been substantially satisfied in the course of the hearing.

The reasons for the removal of the conviction

18. In exchanges with the Court, Mr. Conolly appeared to accept that he does know the reasons why his conviction was removed but he is suspicious and sceptical about the reasons that he has been provided with. In my view, even assuming in favour of the appellant that a request for reasons could appropriately be the subject of a judicial review application in circumstances such as these, it is absolutely clear that reasons have been provided. This is put beyond doubt by the actions of the appellant who exhibits the court transcript of the 19th February, 2014 which leaves no room for doubt but that there was confusion about the effect of the Supreme Court order. In my view, even allowing for the fact that the threshold for the granting of leave is a low one, it has not been crossed in relation to this aspect of the case.

Miscarriage of justice certificate

19. I turn then to the question of a miscarriage of justice certificate. It must be said immediately that Mr. Conolly faces formidable obstacles and indeed, that seems to be recognised by him. His claim for relief in the statement of grounds stipulates that he wants the Court to issue a miscarriage of justice certificate "if the Court has authority to do so". The starting point for consideration of this issue is the Criminal Procedure Act 1993. Section 2 of that Act provides as follows:-

> "(1) A person—
>
> (a) who has been convicted of an offence either—
> (i) on indictment, or
>
> (ii) after signing a plea of guilty and being sent forward for sentence under section 13 (2)(b) of the Criminal Procedure Act, 1967 , and who, after appeal to the Court including an application for leave to appeal, and any subsequent re-trial, stands convicted of an offence to which this paragraph applies, and
>
> (b) who alleges that a new or newly-discovered fact shows that there has been a miscarriage of justice in relation to the conviction or that the sentence imposed is excessive,
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> may, if no further proceedings are pending in relation to the appeal, apply to the Court for an order quashing the conviction or reviewing the sentence.
>
> (2) An application under subsection (1) shall be treated for all purposes as an appeal to the Court against the conviction or sentence.
>
> (3) In subsection (1)(b) the reference to a new fact is to a fact known to the convicted person at the time of the trial or appeal proceedings the significance of which was appreciated by him, where he alleges that there is a reasonable

explanation for his failure to adduce evidence of that fact.

(4) The reference in subsection (1)(b) to a newly-discovered fact is to a fact discovered by or coming to the notice of the convicted person after the relevant appeal proceedings have been finally determined or a fact the significance of which was not appreciated by the convicted person or his advisers during the trial or appeal proceedings.

(5) Where—

(a) after an application by a convicted person under subsection (1) and any subsequent re-trial the person stands convicted of an offence, and

(b) the person alleges that a fact discovered by him or coming to his notice after the hearing of the application and any subsequent re-trial or a fact the significance of which was not appreciated by him or his advisers during the hearing of the application and any subsequent re-trial shows that there has been a miscarriage of justice in relation to the conviction, or that the sentence was excessive,

he may apply to the Court for an order quashing the conviction or reviewing the sentence and his application shall be treated as if it were an application under that subsection."

The repeated references to "the Court" will be noted. "The Court" is defined in s. 1 as meaning the Court of Criminal Appeal but in ss. 2 – 5 and 7, as modified by s. 6, as also including the Court Martial Appeals Court. Since the establishment of the Court of Appeal the reference now is to the Court of Appeal. The High Court to which Mr. Conolly brought his application does not have any role whatever in issuing certificates in relation to miscarriage of justice.

20. That is not the only difficulty that Mr. Conolly faces. The section applies to convictions on indictment or to cases of persons sent forward on signed pleas of guilty. Mr. Conolly does not fall into either category. The further difficulty is that the section applies to those that "stand convicted", Mr. Conolly does not stand convicted.

21. In these circumstances, the appellant has focused on s. 9 and suggests that this provision stands alone and avails him. I cannot agree. In my view, and here I would go further than the trial judge, it is clear that the 1993 Act does not deal with summary offences. In these circumstances, Mr. Conolly says before this Court that the 1993 Act is unconstitutional as it discriminates against those convicted of summary offences and in favour of those convicted on indictment. That is not an argument that can be advanced at this stage. In any event, even if it could be, it would not avail Mr. Conolly. The role of the Court would be confined to deciding whether the 1993 Act was unconstitutional. The Court would have no role in drafting amended and expanded legislation which is what Mr. Conolly would require.

22. Even more fundamentally, I cannot see how it can be suggested that any newly discovered fact establishes that there has been a miscarriage of justice. Mr. Conolly was charged with three offences in the District Court, the effective order convicting him and imposing a penalty was made on the s. 6 public order charge with the remaining two charges taken into consideration. The District Court hearing took place in July, 2010, three years before the first judgment of Hogan J. in relation to s. 18 of the Criminal Law Amendment Act 1935. In a situation where the effective order was made on the s. 6 public order charge, and where the s. 18 matter was merely taken into consideration in the District Court and where it was the s. 6 public order charge which was appealed to the Circuit Court, I cannot see how Mr. Conolly could hope to establish that the decisions of Hogan J. meant that there was a newly discovered fact revealing that there had been a miscarriage of justice. Almost by way of an aside, the appellant has asserted in the course of his oral presentation that s. 6 of the Criminal Justice (Public Order) Act 1994 is impermissibly vague and unconstitutional as a result. This was not an issue that featured in the High Court and no pleadings have been delivered mounting a challenge to the constitutionality of s. 6 and this Court, in my view, cannot now consider the issue.

23. In deference to the many arguments raised by the appellant, I have sought to engage with the issues that he has identified. However, I am conscious that the judge indicated that he was refusing the application in the High Court primarily on the basis that it was made more than three months after the making of the order complained of. On the basis that his complaint relates to the events of 19th February, 2014, it is clear that by no stretch of the imagination could it be suggested that the proceedings were commenced promptly or within three months. I do not believe that there are any good grounds for extending time and this provides a further basis for refusing relief.

24. In summary then, I would dismiss the appeal.