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THE HIGH COURT

2009 1297 SS

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

The Director of Public Prosecutions (At the Suit of Garda Sean Maxwell)

Prosecutor/Appellant

And

Povilas Vaitkevicius

Accused/Respondent

Judgment of O'Neill J. delivered the 19th day of March 2010

1. Factual Background

1.1 On the 30th August, 2008, the accused was stopped at a checkpoint set up by the gardaí pursuant to s.4 of the Road Traffic Act 2006 ("the Act of 2006") and underwent a mandatory breath test, the result of which indicated the presence of alcohol in his system. He was then arrested and brought to Kilkenny Garda Station, where he provided another breath specimen. The alcohol content in that specimen exceeded the legal limit. He was duly charged with the offence of drunken driving contrary to s.49(4) and (6)(a) of the Road Traffic Act 1961, as inserted by s.10 of the Road Traffic Act 1994, as amended by s.18 of the Road Traffic Act 2006.

1.2 On the 26th February, 2009, the case came on for hearing before the District Court in Kilkenny. District Judge Harnett examined the written authorisation required for the setting up of the checkpoint pursuant to s.4 of the Act of 2006. A twenty four hour clock format was used. However, in the absence of a colon or full stop used between the first two digits and the last two digits the District Judge concluded that the statement of the time was meaningless and that, as a result, the authorisation was fatally flawed. The accused was acquitted. The prosecution requested a case to be stated to this Court by way of appeal. The accused intimated that he did not oppose the application.

1.3 On the 6th March, 2009, a notice of application to state a case was lodged by the prosecution with the District Court. The notice was sent to the accused's solicitors. By annotated note dated the 11th March, 2009, District Judge Harnett acknowledged receipt of the case stated and intimated that a draft case stated should be submitted in due course. The prosecution solicitor, Mr. Meaney, sent the draft case stated to the District Court and to the accused's solicitors, Burns Kelly Corrigan, by cover letter dated the 25th May, 2009. On the 11th June, 2009, the accused's solicitors wrote to Mr. Meaney stating that the draft had been furnished to their counsel and asked for time to take advice and instructions from their client with a view to making amendments to the draft. On the 15th of July 2009, Mr. Meaney avers that the defence told him that they had met with the accused and would not be showing cause because of the risk of exposure to costs. Mr. Meaney responded by letter dated the 17th July, 2009, noting the content of the conversation he had in previous days with them and advising that he had written to the District Court Clerk informing him that they had no amendments to suggest in respect of the case stated. In the District Court on the 21st July, 2007, Judge Harnett approved and signed the case stated in the draft form in which it was submitted. It was returned to Mr. Meaney by the District Court Clerk by cover letter dated the 29th July, 2009 and received by Mr. Meaney on the 30th July, 2009.

1.4 By notice of transmission dated the 31st July, 2009, the case stated was sent to Burns Kelly Corrigan by Mr. Meaney by post. Mr. Meaney forwarded the case stated to his town agents on the same date requesting them to lodge it in the High Court within three working days of when he had received it, i.e. by the 4th August, 2009. Monday the 3rd August, 2009, was a bank holiday. The case stated was date stamped as being filed in the Central Office of the High Court on the 4th August, 2009. The matter was in the Non Jury list for the 19th October, 2009, in this Court and a hearing date for the case stated, was fixed for the 9th of November 2009.

1.5 Following service of the case stated on the accused's solicitors, the complaint was made that the service effected was bad, that the case stated was out of time and that the High Court did not have jurisdiction to proceed with the case stated. Insofar as there was a concern about whether the case stated was filed in the High Court within the statutory time limit of three days from when it was received by Mr. Meaney, it is clear from the date stamp on the case stated that it was foiled on the 4th August, 2009, which was within the time limit. Even if it had not been filed within that time limit, O.122, r.7 of The Rules of the Superior Courts permits the Court to extend the time in that regard.

2. The Issue

2.1 The question that arises for determination by way of preliminary issue in these proceedings is whether it was necessary to serve a case stated personally on the respondent or was service on his solicitor sufficient to satisfy the requirements of s.2 of the Summary Procedure Act of 1857 ("the Act of 1857"), as amended, which governs the procedure for a case stated by way of appeal.

3. Section 2 of the Summary Procedure Act 1857

3.1 Section 2 of the Act of 1857, as extended by s.51(1) of the Courts (Supplemental Provisions) Act 1961, states as follows:-

" After the Hearing and Determination by a Justice or Justices of the Peace of any Information or Complaint which he or they have Power to determine in a summary Way, by any Law now in force or hereafter to be made, either Party to the Proceeding before the said Justice or Justices may, if dissatisfied with the said Determination as being erroneous in point of Law, apply in Writing within [fourteen] days after the same to the said Justice or Justices, to state and sign a Case setting forth the Facts and the Grounds of such Determination, for the opinion thereon of the … High Court …; and such Party, hereinafter called 'the Appellant', shall, within Three Days after receiving such Case, transmit the same to the Court … first giving Notice in Writing of such Appeal, with a Copy of the Case so stated and signed, to the other party to the proceeding in which the Determination was given, herein-after called 'the Respondent.'"

3.2 Section 51(4) of the Courts (Supplemental Provisions) Act 1961 provides that the term "*party*" means any person who was entitled to be heard and was heard in the proceedings in which the determination in respect of which an application for a case stated is made.

4. Decision

4.1 The accused relies on the case of *Director of Public Prosecutions (Daniel Murphy) v. Michael Regan* [1993] I.L.R.M. 335 in support of his contention that the case stated should have been served personally on him. A preliminary issue arose in that case as to whether the case stated could no longer be entertained by reason of an alleged failure of the appellant, the Director of Public Prosecutions, to have served the respondent personally with the time limits laid down by statute for serving the case stated. O'Hanlon J. observed that the case stated was not served on the respondent, Mr. Regan, but on a firm of solicitors that had represented him in the District Court. Also, in that case, the transmission of the case to the High Court did not take place within the three day period prescribed by s.2 of the Act of 1857. O'Hanlon J. referred to earlier authorities concerning *inter alia*, on whom service must be effected pursuant to s. 2 of the Act of 1857 at pp.338-340:-

"The time limits specified by s. 2 of the Summary Jurisdiction Act 1857 and in other statutes, have been considered in a number of decided cases.

…

In Hill v Wright (1896) 60 JP 312 the court addressed the specific provisions of s. 2 of the Summary Jurisdiction Act 1857, and held that the court had no jurisdiction to hear an appeal against the decision of the justices by way of case stated unless the appellant had given notice in writing of appeal together with a copy of the case to the respondent — such notice having been sent in that case only to the respondents' solicitors and not to the respondents themselves.

It was held by Russell CJ (Wright J concurring), that service on the solicitors who had represented the respondents in the court below, and who had actually assisted in drawing up the case for appeal, was not sufficient, and that the requirements of the statute had not been complied with.

The court was referred to their previous decision in Syred v Carruthers (1858) 22 JP 399, where they had held that the statute was satisfied when the appellant within three days of his obtaining the case from the justices, sought to find the respondent but could not do so, and within the said three days gave notice to the solicitors who represented the respondent before the magistrate, and after the expiration of the three days gave notice to the respondent, who did not object. Wright J said, however, that the fact that the court held that in the special circumstances of that case, service on the solicitor was sufficient, was 'strong to show that under other circumstance personal service is necessary'.

Next came the decision of the Irish King's Bench Division in Clarke v M'Guire [1909] 2 IR 681 where notice of the appeal with a copy of the case stated were served on the solicitor who had appeared for the respondent before the justices. The respondent had disappeared from the country and every reasonable effort had been made to serve him personally but without success. It was held by Palles CB, Andrews and Boyd JJ concurring, that the service was sufficient to give the court jurisdiction to hear the case. Palles CB held that to decide otherwise would be to act contrary to what had been decided in Lord Massareene's case, and to the principle in Carruthers' case.

S. 2 of the Act of 1857 again came up for consideration before the High Court and Supreme Court in the case of Thompson v Curry [1970] IR 61, when it was held by Davitt P in the High Court and by the Supreme Court on appeal from his decision, that the observance of the sequence of events required by s. 2 of the Act of 1857 was a condition precedent to the exercise by the High Court of its jurisdiction.

In that case the appellant transmitted the case stated to the High Court and afterwards, within three days after transmitting the case stated, gave notice thereof to the other party to the proceeding. This procedure was sanctioned by O. 62, r. 5, of the Rules of the Superior Courts, but this provision in the Rules was held to be ultra vires the Rules Committee.

…

In Crowley v McVeigh [1990] ILRM 220 Blayney J in the High Court had to consider the position which arose where personal service of the case stated had not been effected within the time prescribed by s. 2 of the Act of 1857, but had been served within time on the solicitor who had acted for the respondent in the District Court and numerous efforts had been made by the gardaí to effect personal service on the respondent within the three-day period. Ultimately, some days after the statutory period had expired, personal service was effected on a woman with whom the respondent had been living, and who undertook to give the documents to the respondent.

A copy of the draft case stated had been sent to the respondent's solicitor while it was in course of preparation

and he had replied that he had received no further instructions from the respondent after the District Court hearing, nor did he expect to receive any further instructions whether to accept service of documents or otherwise. Upon receipt of the perfected case stated, the solicitors' response was the same and he returned the documents to the appellant's solicitors. However, on the hearing of the appeal by way of case stated, the respondent was represented by the same solicitor, and also by counsel who argued that there was no jurisdiction to entertain the case stated by reason of the failure to observe the statutory time limits.

It was held by Blayney J that where it had not been possible for the appellants to serve a copy of the case stated on the respondent within the terms of s. 2 of the Summary Jurisdiction Act 1857, but every possible effort had been made to serve him, service upon the solicitor who acted for the respondent in the District Court, within the three-day time limit prescribed by the section was sufficient. He held that on the facts every possible effort had been made to serve the case stated upon the respondent. He commented on the fact that the solicitor's retainer had not been discharged. He concluded that Clarke v M'Guire was correctly decided and that he should follow that decision."

4.2 This line of authority demonstrates that personal service is required to satisfy s.2 of the Act of 1857 but that service on a respondent's solicitor may suffice in circumstances where a respondent cannot be found, after diligent effort, for the purpose of service, after the initial proceedings in which he is represented. O'Hanlon J., having regard to the above, made a finding that no effort had been made to effect personal service in the case before him. He concluded that the entitlement of the appellant to treat the solicitor who had represented the respondent in the District Court proceedings as his agent for the purpose of receiving and accepting service of the case stated and notice of appeal on his behalf as being "*open to serious question*" . Although the first firm of solicitors who had represented the respondent in the District Court had participated in the formulation of the case stated, it was noted that the respondent had discharged his professional costs to the first firm of solicitors, that it had been indicated by that firm to the appellant that it did not have instructions from the respondent and that the solicitor from that firm averred in his affidavit that on the date of service on him that he had no instructions from the respondent. O'Hanlon J. concluded as follows at p.342:-

"In these circumstances it appears to me that it was unwise on the part of the appellant to consider that service of the documentation on the solicitors in question would satisfy the requirements of the statute, with no apparent effort being made to serve the respondent personally. I think it would extend the scope of the previous decisions considerably were I to hold that service effected was sufficient, and I believe I have no power to do so."

4.3 In this case the correspondence exhibited in the affidavit of Mr. Meaney sworn on the 9th December, 2009, indicates that the accused's solicitors took his instructions on the prosecution's draft of the case stated and indicated to the District Court and the prosecution on his behalf that he did not wish to make any amendment to the draft as submitted. It is quite clear that no attempt was made to effect personal service of the case stated on the respondent, no doubt because of the active involvement of his solicitor in the process of preparation of the case stated. That notwithstanding, s.2 of the Act of 1857, as considered in the cases reviewed in the judgment of O Hanlon J., as quoted above, requires personal service unless that cannot be effected, despite diligent effort, within the time limit.

4.4 Like O'Hanlon J. I too must apply the law as correctly stated in the foregoing cases and must conclude that the service of the case stated in this case did not satisfy the requirements of s.2 of the Act of 1857. Accordingly, this Court does not have any jurisdiction to embark on a hearing of the case stated. The inevitable result, therefore, is that I must dismiss the case stated and affirm the order of the District Court. Like O' Hanlon J. I do so with reluctance as it is clear, and indeed the respondent intimated a lack of resistance to the appellant's case on the case stated, that the decision of the learned District Judge could not be upheld as correct in law. I too would echo the sentiment expressed by O'Hanlon J. in the last sentence of his judgment to the effect that the Oireachtas should consider that rigid statutory time limits for procedural matters should be framed so as to give the courts some discretion to extend them in an appropriate case.