Neutral Citation Number: [2009] IEHC 444

THE HIGH COURT

2006 1195 JR

BETWEEN

KEVIN TREACY

APPLICANT

AND

DISTRICT JUDGE DAVID ANDERSON

RESPONDENT

AND

KEVIN GROGAN AND THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTIES

JUDGMENT delivered by O'Neill J. on the 23rd day of July, 2009

The Applicant in these proceedings was given leave by this court, (Peart J.) to seek reliefs as set out in paragraph D sub paragraphs 1, 2, 3, 5 and 6 of the Statement of Grounds on the grounds set out in paragraph 9 of the same. These reliefs are in the following terms:

1. An order of certiorari by way of application for a judicial review to quash the rulings or orders made by the First-Named Respondent on 14th August, 2006 at Richmond District Court No. 51 in the hearing dealing with preliminary issues in the matter of Sgt. Kevin Grogan versus Kevin Treacy and which rulings or orders

(a) refused the Applicant's application that Garda witness Kevin Grogan be excluded from the court while his colleague, Deirdre Ryan, was giving evidence;

(b) unfairly frustrated the Applicant's efforts to properly cross-examine a Garda witness, Deirdre Ryan, regarding the purported service of a summons (and this is related to a ruling by the same Respondent on 19th June, the first hearing denying the Applicant a copy of the declaration of service of the same summons);

(c) refusing to consider and exhibit (Garda report via Dáil written answer 423) being handed up by Applicant to show the relevance of cross-examination questions;

(d) allow the DPP to represent Kevin Grogan and to substitute him as prosecutor although having no hand in the bringing of the charge;

(e) allow the DPP solicitor to wrongly maintain that the Courts Act 1991 had amended the Petty Sessions (Ireland) Act 1851;

(f) refused to allow the Applicant to read from or argue the statute (Courts Act 1991) being used in legal aid argument by the DPP solicitor;

(g) refused to state a case on the matter of service with regard to the Petty Sessions (Ireland) Act 1851 to the High Court;

(h) deemed service of the summons to be good;

(i) prevented the garda named on the summons, Kevin Grogan, from giving evidence and being cross-examined although he was available and ready for that purpose such that no sworn evidence of the complaint, charge or issuing of summons is as yet before the District Court and the preliminary issues arising therefrom have not been dealt with;

(j) demanded that the Applicant plead to charges not properly before the court and over which the court had no jurisdiction;

(k) proceeded with such undue haste that the Applicant had no time to follow what was happening and make application for a Gary Doyle Order;

(l) set the matter for hearing on the 10th October, 2006;

(m) in general denied the Applicant's right to a fair hearing.

2. An order for interim or interlocutory injunction placing a stay on further District Court proceedings in the matter of Sgt. Grogan v. Kevin Treacy arising from two summonses returnable for 19th June, 2006 (failing to stop careless driving) pending the decision of this High Court and any eventual appear therefrom.

3. An order of Mandamus such that the District Court will be directed to

(a) provide Applicant with a true copy of the declaration of service of the summons;

(b) heard sworn evidence in each charge prior to making any decision in relation to jurisdiction;

(c) allow the Applicant a proper and full hearing of the preliminary issues arising.

5. A recommendation that the Attorney General Scheme for legal costs be applied to assist the Applicant with the further conduct of the case which will seek to vindicate fundamental constitutional and other rights relating to fair hearing and trial and such that it will include the cost of one senior counsel.

6. Any further orders as may be urged by or on behalf of the Applicant during the hearing of these proceedings, and finally an order for costs.

Relief 6 on which much stress was laid by the Applicant as permitting him to seek initially an order of this court dismissing the two charges in question, the subject matter of the judicial review, and subsequently permitting him to seek an order of prohibition on any further prosecution of these charges, that was a matter in respect of which I was required to make a ruling and I refused to allow the Applicant to pursue the precise relief mentioned on the grounds that it should properly have been the subject matter of the initial application for leave and was not and therefore could not be introduced in this way. The grounds on which reliefs are sought are in paragraph (e) and there is no need for me to recite them here.

Affidavits were sworn in the proceedings on 9th October, 2006, that affidavit verifying the Statement of Grounds which exhibits the transcript of the proceedings in the District Court the subject matter of these judicial review proceedings. Further affidavits were sworn by the Applicant on 5th April, 2007, 21st May, 2007, 25th July, 2007. Also an affidavit was sworn by Karen Treacy, the Applicant's wife, on 21st May, 2007. This affidavit appears to be in identical terms to that sworn by the Applicant on the same date.

A Statement of Opposition was filed by the Second-Named Notice Party, the Director of Public Prosecutions, on 2nd March, 2007. The Respondent has not filed a Statement of Opposition and has taken no part whatsoever in these proceedings.

As can be seen from the Statement of Grounds the judicial review proceedings arose out of District Court proceedings which took place on 19th June, 2006 and 14th August, 2006 in which the Respondent was the presiding judge. As is apparent in the proceedings which took place on 19th June, 2006, the Applicant sought to challenge the service of summonses on him in respect of two road traffic charges which are alleged to have occurred on 27th October, 2005. Initially on 19th June, 2006 the Applicant contended that the information on the summons was false, namely that the first Notice Party had backdated the information on the summons so as to conceal that the summons was issued after 5th May, 2006. At that point the Respondent pointed out that the declaration of service on the summons said that they were served on 29th May, 2006. On this happening, the Applicant indicated that he wished to challenge the service of the summons. A Garda Galvin and a Garda Deirdre Ryan were mentioned as the servers of the summonses in question. In any event the proceedings were adjourned to 6th July, 2006 to enable the Applicant to pursue the matter presumably by having in court the summons servers to give evidence. Although it was not explained I infer that the matter was further adjourned from 6th July, 2006 to 14th August, 2006.

On 14th August, 2006 Garda Deirdre Ryan was called to give evidence by the prosecution. She gave evidence of having served the summons on the Applicant outside Court 53 at 10:45 am on 31st May by tipping the Applicant with an envelope containing the summonses after her attempt to hand the summons to the Applicant had failed. Thereafter the Applicant cross-examined Garda Ryan. It is quite clear from the cross-examination that the Applicant did not challenge the fact that it was Garda Ryan who served the summons in question. He did not challenge the time or place or manner of service as had been sworn to by Garda Ryan. Notwithstanding that, the cross-examination ranged over a variety of topics that induced the Respondent to intervene to restrain the cross-examination to relevant matter. It is quite clear from the transcript that the interventions of the Respondent in this regard were entirely proper and timely and did not at all unfairly restrict the Applicant in his cross-examination of Garda Ryan. In due course when the cross-examination was finished, the Applicant intimated that he wished to make an application or submission and the matter was put back to 2:00 o'clock for that purpose. On resumption at 2:00 o'clock, the Applicant was asked by the Respondent if he wished to give evidence but he declined to do, instead proceeding within an application for a case stated. Having heard the Applicant and the solicitor for the DPP, Mr. Dean, the Respondent refused to state a case. Having so done, the Respondent went on to fix a date for the hearing of the charges and the date fixed was 10th October, 2006.

In the light of the facts revealed by the transcript, in my view the grounds advanced in the Applicant's Statement of Grounds cannot be sustained. Having carefully considered the conduct of the proceedings in the District Court by the Respondent, I am quite satisfied that there was no want of fairness to the Applicant. Every judge is entitled to control proceedings to ensure that the Rules of Evidence are observed and that the proceedings are confined to relevant matter.

In this respect the interventions of the Respondent to restrain the cross-examination of Garda Ryan were entirely appropriate as it was apparent, and indeed as the various matters raised were probed it became even more apparent, that the issues sought to be explored by the Applicant had no relevance to the matter in issue, i.e. the service of the summons, and the inferences arising therefrom as to the date of issue of the summons.

The refusal of the Respondent to state a case cannot be impugned in these judicial review proceedings. The purpose of a case stated is to obtain the opinion of the High Court on a point of law. If the law on the legal question that arises is well settled, there is no need for a case stated. In this case the Respondent refused a case stated for that very reason. In my opinion that conclusion was made within jurisdiction, was manifestly correct and cannot be reviewed by this court.

The decision to fix the date for the hearing was the inevitable outcome of the decisions already taken in the proceedings which now cannot be impugned and hence this decision too cannot be displaced by this court.

The foregoing conclusions would be sufficient to dispose of the issues raised in the Applicant's Statement of Grounds were it not for an extraordinary turn of events which occurred at the outset of the hearing of the judicial review application on 7th November, 2008. At the start of the hearing, the Applicant sought to file a fresh affidavit. The affidavit in question

appeared to have been sworn on 7th November, 2007 and furthermore it was stated just beneath the jurat that the affidavit had been filed on 7th November, 2007. However, the Applicant accepted that the affidavit had been sworn on 7th November, 2008, the day of the hearing case. In paragraphs 5, 6 and 7 of this affidavit it was averred as follows:

> "5. Amongst those rights was my right to have a McKenzie friend. In the middle the hearing of preliminary issues on 14th August, 2006 at a certain point in the hearing, Judge Anderson nodded to the gardaí who were present in the court and eight gardaí approached my McKenzie friend and seized him physically. They removed him from the courtroom into a Garda car and transported him to a prison where he was detained without bail for approximately three weeks. One of the gardaí took all of my McKenzie friend's notes and belongings which included notes that were prepared jointly by him and me for my case being heard by Judge Anderson. Judge Anderson allowed this to happen without comment. During the recess I returned to the court. After seeing my McKenzie friend being put in the Garda car, I was totally shaken by what had transpired and I was fearful for my own safety and the safety of my pregnant wife who was present in the court. Referring to the incident, I asked Judge Anderson for protection which he denied stating he did not have power to make such an order. I was of necessity forced to continue that afternoon without my McKenzie friend and so denied due process in law. I was denied equality of arms (where each party must be afforded a reasonable opportunity to present his case, including his evidence) which is enshrined in Article 6 of the European Convention on Human Rights. As a lay litigant I was denied any semblance of fair balance vis-à-vis my opponents who were represented by professional legal counsel. In addition, per force my fundamental constitutional rights enshrined in Article 40 of the Constitution were violated.
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> 7. The removal of my McKenzie friend on 14/08/06 deprived me of my notes on many other preliminary issues I had intended raising."

Notwithstanding the lateness of the application to file this affidavit, that is the affidavit of 7th November, 2008, and because of the serious nature of the allegations made, for the integrity of the administration of justice I permitted the filing of the affidavit. This necessitated the adjournment of the hearing. I directed that the proceedings and this affidavit be served on the Respondent. In due course a fresh date was fixed for 26th February, 2009. An affidavit was sworn by the Applicant on 11th November, 2008 and filed on the same day. At paragraphs 4 and 5 of that affidavit the following averments are made:

> "3. There was no allegation made in lines 2, 3 and 4 of paragraph 5 of my affidavit dated 7th November 2007 of any wrongdoing by Judge Anderson.
>
> 4. The words in lines 2, 3 and 4 of paragraph 5 were intended to convey and do convey a description of two events in the District Court on 14th August 2006, two events that happened sequentially. They were not intended to convey and they do not convey in that the second event was the consequence of the first. As pointed out in the judicial review hearing, if something happens after one event it cannot be assumed that this first event caused the second event. Such a fallacy is known as post hoc non propter hoc or "after this" does not mean "because of this".
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> 5. There was no allegation either intended or written in the words "at a certain point in the hearing Judge Anderson nodded to the gardaí who were present in the court and eight gardaí approached my McKenzie friend and seized him physically." As stated in the judicial review hearing "I am not alleging that the nod of the judge caused the gardaí to do what they did." I further add that I am not alleging that the nod of the judge was ever intended to have such an effect."

An affidavit was sworn on 4th December, 2008 by Vincent Dean, the solicitor in the Office of the Director of Public Prosecutions who had appeared in the District Court on 14th August, 2006. An affidavit was sworn also on 4th December, 2008 by Garda Padraic O'Mara of Ballyfermot Garda Station. A further affidavit was sworn by Padraic Taylor, also a solicitor in the Office of the Director of Public Prosecutions who had carriage of this judicial review application and three others taken by the Applicant.

At the outset of the resumed hearing, the Applicant on 26th February, 2009 sought to introduce two further affidavits, one his own and the other that of Karen Treacy, the Applicant's wife, both sworn on 23rd February, 2009. In paragraphs 3 and 4 of the affidavit of Karen Treacy the allegation made in paragraph 5 of the affidavit of the Applicant sworn on 7th November, 2008 was in substance repeated. Paragraph 6 of the affidavit of the Applicant sworn on 23rd March, 2009 repeats the allegation but without any reference to the Respondent. I allowed the Applicant to introduce these affidavits.

As was readily apparent there was a conflict of fact between the affidavits of Garda O'Mara and Mr. Dean and the affidavit of the Applicant and his wife as to what happened on 14th August, 2006 in relation to the allegation of the Applicant that his McKenzie friend, Eoin Rice, was removed from the court. To resolve this conflict, cross-examination of the deponents on their affidavits was necessary and for that purpose at the request of the Applicant Mr. Dean and Garda O'Mara and Mr. Taylor were available for cross-examination. The Applicant was in court but his wife was not available to come to court during the day. This necessitated a further adjournment of the case. The cross-examination of Mr. Dean did proceed as he was likely to be unavailable at a later date.

In due course the matter came on again for hearing in May of 2009 when Mrs. Karen Treacy was presented for cross-examination. Unfortunately as soon as the cross-examination began, Mrs. Treacy was suddenly taken ill, collapsed and was removed by ambulance to hospital. As a consequence the case had to be adjourned again. Finally the matter came on for hearing on 16th and 17th July 2009 when Mrs. Treacy, Garda O'Mara and Mr. Taylor were cross-examined on their affidavits.

Having carefully considered the affidavits filed, the transcript of the proceedings in the District Court on 19th June, 2006 and the transcript of the proceedings in the District Court on 14th August, 2006 and the answers given by the witnesses cross-examined, I have come to the following conclusions on the disputed facts relating to the events in the District Court on this date.

Firstly I cannot but be concerned about the delay of two years, in excess of two years from the commencement of these proceedings on 9th October ,2006 until 7th November, 2008 before there was any intimation or suggestion concerning the allegation that emerged in paragraphs 5, 6 and 7 of the Applicant's affidavit sworn on 7th November, 2008 to the effect initially that the Respondent had by a nod signalled to the gardaí to arrest Eoin Rice, the Applicant's McKenzie friend, in court in front of the Respondent while sitting in court and thereafter to remove him together with the Applicant's papers in the case with the result that the Applicant was deprived of evidence in the case and the assistance of his McKenzie friend. At the very least it is extraordinary that this allegation emerged at such a late stage in the proceedings, *i.e.* on the morning of the full hearing. I am mindful in this regard that the Applicant in an affidavit sworn on 11th November, 2008 sought to distance himself from the clear import of the allegation concerning the Respondent by the pedantic assertion that "*post hoc non propter hoc*". At paragraph 5 of this affidavit the Applicant does unequivocally say:

> "I am not alleging that the nod of the judge caused the gardaí to do what they did."

I will return to this matter later. I accept the evidence of Garda O'Mara that he arrested Eoin Rice in the corridor away from the courtroom on foot of a warrant issued by Judge Mary Fahey in the District Court in Galway in 2004 for the arrest of Eoin Rice in connection with a public order offence. He became aware of the existence of the warrant as a result of a perfectly lawful and indeed reasonable search in relation to Eoin Rice on the Garda Pulse system. Having become aware of the warrant and knowing or believing that Eoin Rice would be in court on the day in question, he rightly took the view that it was his duty as a member of An Garda Síochána to execute the warrant having regard to the fact that Eoin Rice was resident outside the jurisdiction and was not a national of this State. I believe Garda O'Mara when he says that he did not know whether or not Eoin Rice would be returning to the court and hence he felt obliged to effect the arrest before he left the building as otherwise there was a risk that he would elude the execution of the warrant. accept Garda O'Mara's evidence that because of Eoin Rice's history of resistance to authority he, Garda O'Mara, perceived a real risk that Eoin Rice might resist arrest and hence three or four other gardaí had been alerted to assist if needs be. believe Garda O'Mara when he tells me that no request was made by Eoin Rice or the Applicant for the return of papers used in the District Court case and I am quite satisfied that no protest or complaint in regard to these papers was made at the time.

Having regard to the proceedings that had taken place as set out in the transcript in the morning and in the afternoon, it is difficult to see what papers of any consequence could have been involved. Certainly no evidential papers were included for the simple reason that apart from the summons and the envelope containing it or copies of these, no other papers were relevant to the case in respect of which the proceedings were concerned. In the afternoon the Applicant made his application without any difficulty insofar as papers were concerned and notably did not make any complaint in that regard to the Respondent or seek any adjournment because of any difficulty caused by the arrest of Eoin Rice.

I am quite satisfied that the arrest of Eoin Rice took place in the manner described by Garda O'Mara and not as alleged by the Applicant and his wife. In this regard, the evidence of Mr. Dean, which I accept, supports the evidence of Garda O'Mara. He emphatically rejected the suggestion that the arrest took place in the courtroom. The transcript which everybody who was involved on 14th August, 2006 agrees is an accurate record of the proceedings is revealing in this regard. At page 22 line 18 the following is said by the Applicant:

> "Before the recess, I returned to this court and made application."

In my view the clear inference to be drawn from this is that the events that caused the Applicant to return to the court occurred away from the court. Later at lines 25 to 27 the following is said by the Applicant:

> "My McKenzie friend was hauled off by Garda O'Mara who is not here, Garda Rellins and eight gardaí from Ballyfermot immediately on leaving this court."

A clear inference from this statement is that the arrest of Eoin Rice took place outside of the courtroom. In spite of all the affidavits that have been filed in these proceedings, an amazing omission is any affidavit from Eoin Rice deposing to these events. Furthermore notwithstanding the fact that all of the deponents were made available for cross-examination, the Applicant took advantage of the fact that a formal order directing his cross-examination was not made and after a break to consider the matter, he refused to submit to cross-examination.

In resolving the disputed issues of fact in that case, I am entitled to take these matters in account. I have come to the conclusion that I must reject in its entirety the evidence of the Applicant and of Karen Treacy as to how and where the arrest of Eoin Rice was accomplished. Having regard to the manner in which the allegations of the Applicant in this regard came into the case at a late stage and the disingenuous manner in which the Applicant sought to resile from the allegation made concerning the Respondent once the seriousness of it was made apparent to him, I regretfully am compelled to the conclusion that these allegations of the Applicant were a deliberate fabrication.

As alluded to earlier it is quite clear from the transcript that no evidence was taken amongst the papers in Eoin Rice's rucksack. Secondly, it is equally clear that the Applicant was not at all disadvantaged by the absence of Eoin Rice in continuing as he did with the proceedings in the afternoon without any indication of difficulty being given to the Respondent in this regard. Also in this regard it must be borne in mind that the proceeding in the District Court on 14th August, 2006 was a preliminary step of a procedural nature and not the hearing of the substantive charges. I am therefore satisfied that I must dismiss the Applicant's case in it entirety.

Before concluding, I should refer to the Applicant's gratuitous and wholly unsubstantiated and unwarranted attack on the professional integrity of Ms. McDonagh S.C. This attack which was to the effect that Ms. McDonagh was misleading the court and had a propensity to so do was repeated in a number of affidavits and in the cross-examination of Mr. Taylor. It was patently obvious at all stages of the proceedings that this assertion by the Applicant was groundless and wholly unwarranted. Ms. McDonagh as an eminent member of the Inner Bar should not in the discharge of her duty to her client

and the court as an advocate in a public trial in open court have to endure this kind of baseless attack. In my view the making of attacks of this kind on advocates discharging their onerous duties in open court is not just an assault on the individual so attacked but also an assault on the integrity of the administration of justice, the proper function of which is imperilled by such events. Seeing the matter in this way, I intervened during the cross-examination of Mr. Taylor to restrain the Applicant from persisting with it.