Neutral Citation Number: [2009] IEHC 555

THE HIGH COURT

2009 109 JR

Barry O'Brien

Applicant

And

The Special Criminal Court

And

The Director of Public Prosecutions

Respondents

JUDGMENT of O'Neill J. delivered the 11th day of December 2009

1. Relief sought

1.1 Leave was granted by this Court (Peart J.) on the 2nd February, 2009, to apply for *inter alia* the following reliefs by way of judicial review:-

1. An order of *certiorari* quashing the decision of the first named respondent made on the 28th January, 2009, to proceed with the trial of the applicant on the charge of membership of an unlawful organisation on the 6th April, 2004, contrary to s.21 of the Offences Against the State Act 1939, as amended by s.2 of the Criminal Law Act 1976, notwithstanding the defence application to adjourn the trial pending the outcome of proceedings currently before the courts in which the provisions of s.3(2) of the Offences Against the State (Amendment) Act 1972 are being challenged on the basis that they are invalid having regard to the Constitution of Ireland and the European Convention on Human Rights, such proceedings being entitled *D.P.P. v. Redmond*, commenced by way of plenary summons and currently at hearing before the High Court sitting at Dundalk, Co Louth and *D.P.P. v. Sean Connolly*, currently pending before the Supreme Court pursuant to a certificate granted by the Court of Criminal Appeal under s.29 of the Courts of Justice Act 1924.

2. Prohibition or an injunction restraining the respondents from proceeding with the trial of the applicant in respect of the aforesaid charge, until the final order has been made in the proceedings entitled *D.P.P. v. Redmond* and in the proceedings entitled *D.P.P. v. Sean Connolly,* or, in the alternative, until the outcome of the proceedings the subject matter of the plenary summons issued by the applicant herein.

3. A stay of proceedings in the trial of the applicant on the aforesaid charge.

2. Facts

2.1 The applicant was charged with the offence of membership of an unlawful organisation on the 6th April, 2004, contrary to s.21 of the Offences Against the State Act 1939 ("the Act of 1939") and has pleaded not guilty. His trial commenced before the Special Criminal Court on the 27th January, 2009, but was adjourned on that day due to the late disclosure of documents to the defence. Part of the evidence the prosecution intended to adduce was "*belief evidence*" pursuant to s. 3(2) of the Offences Against the State (Amendment) Act 1972 ("the Act of 1972"), which provides for the admission of evidence from a Chief Superintendent stating that he believes that the applicant was, at a material time, a member of an unlawful organisation. Counsel for the applicant, Ms. Murphy S.C., on the following day, made an application to the Special Criminal Court for a declaration as to the true construction of s.3(2) of the Act of 1972, which reads as follows:-

> *"Where an officer of the Garda Síochána, not below the rank of Chief Superintendent, in giving evidence in proceedings relating to an offence under the said section 21 [of the Offences Against the State Act 1939], states that he believes that the accused was at a material time a member of an unlawful organisation, the statement shall be evidence that he was then such a member."*

Ms. Murphy submitted to the Special Criminal Court that, on a true construction of the above section, it was the Chief Superintendent's statement of belief that constituted evidence of membership of an unlawful organisation and not the belief itself. This had the effect, she continued, of rendering the Chief Superintendent's evidence unchallengeable by cross-examination or otherwise and the evidence given under s. 3(2) of the Act of 1972 became a mere certification exercise.

2.2 The Special Criminal Court determined that the application was premature as no evidence had been put forward in the case. Ms. Murphy also applied for the trial of the applicant to be adjourned pending the outcome of two sets of plenary proceedings before the courts in which the validity of s. 3(2) of the Act of 1972 was being challenged. One case, *D.P.P. v. Redmond*, was being heard before the High Court and the other case, *D.P.P. v. Sean Connolly*, was pending before the Supreme Court pursuant to a certificate granted by the Court of Criminal Appeal under s.29 of the Courts of Justice Act 1924, as substituted by s.22 of the Criminal Justice Act 2006. In the Redmond case the plaintiff argues that the true construction of s.3(2) of the Act of 1972 is invalid having regard to the Constitution and in the *Connolly* case, the plaintiff contends that s. 3(2) of the Act of 1972, infringes the provisions of the European Convention on Human Rights and Fundamental Freedoms. The Special Criminal Court ruled, however, that it should proceed with the trial of the applicant, though it granted a short adjournment until the 3rd February, 2009, to enable the applicant to seek judicial review. Leave was granted on the 2nd February, 2009. Some time later, on 30th April, 2009, this Court (McMahon J.) dismissed the plaintiff's claim in the *Redmond* case (*Redmond v. Ireland and the Attorney General* [2009] I.E.H.C. 201). This judgment has been appealed to the Supreme Court.

2.3 The applicant here seeks to quash the decision of the Special Criminal Court to refuse to adjourn the applicant's trial.

He also seeks prohibition or an injunction prohibiting the respondents from proceeding with his trial pending the determination of the *Redmond* and *Connolly* cases. Should the applicants in those cases be unsuccessful the applicant wishes to pursue his own proceedings in which he challenges the constitutionality of s. 3(2) of the Act of 1972, and s.29 of the Act of 1939, based on the proper construction of s.3(2) of the Act of 1972, and s.29 of the Act of 1939. In this regard, the applicant issued a plenary summons on the same date as leave was obtained in these proceedings. A statement of claim was filed on 13th July, 2009. Those proceedings encompass these constitutional challenges. At the hearing of this matter, Ms. Murphy explained that these challenges were not brought in advance of the applicant's trial because the points, as raised, only occurred to her subsequent to the beginning of the trial.

2.4 The other constitutional challenge that is made is against the validity of the search warrant which was issued in respect of the applicant's home on 6th April, 2004, pursuant to s. 29(1) of the Act of 1939, as substituted by s.5 of the Criminal Law Act 1976. That section provides:-

> *"29. (1) Where a member of the Garda Síochána not below the rank of superintendent is satisfied that there is reasonable ground for believing that evidence of or relating to the commission or intended commission of an offence under this Act or the Criminal Law Act, 1976, or an offence which is for the time being a scheduled offence for the purposes of Part V of this Act, or evidence relating to the commission or intended commission of treason, is to be found in any building or part of a building or in any vehicle, vessel, aircraft or hovercraft or in any other place whatsoever, he may issue to a member of the Garda Síochána not below the rank of sergeant a search warrant in relation to such place."*

2.5 The applicant wishes to challenge the above procedure whereby a search warrant is issued, on the grounds that it is contrary to natural justice for a search warrant to be issued in a criminal investigation by a person directly involved in the investigation. The applicant points out that the search warrant issued against him was issued by a Detective Superintendent who was involved with the investigation which led to his arrest.

3. Counsels' Submissions

3.1 Ms. Murphy submits that there is precedent for adjournments at the outset of trials pending the outcome of other cases dealing with similar issues. In this regard she referred to the case of *D.P.P. v. Sean Connolly* which had been adjourned before the Special Criminal Court pending the decision in *The People (D.P.P.) v. Binéad & Anor*. [2007] 1 I.R. 374 and which resumed after the decision in *The People (D.P.P.) v. Kelly* [2006] 3 I.R. 115 had been delivered. She also referred to the case of *Greygate Ltd v. Judges of the Cork Circuit* [2008 No. 192 J.R.] which was adjourned pending the outcome of the proceedings in *Waxy O'Connors Limited v. Judge Riordan* [2007 No. 1234 J.R.]. She submitted that criminal trials have been adjourned pending the outcome of constitutional challenges such as those in issue in *The People (D.P.P.) v. Power* (Unreported, Court of Criminal Appeal, 2nd July, 2007) and in *C.C. v. Ireland* [2006] 4 I.R. 1. She contended that the practice had developed, particularly in criminal cases, that where a serious legal issue arose in a particular case which was relevant to another case that the accused person in the other case could seek an adjournment pending the resolution of the issue. She submitted that if an applicant did not raise a point similar to that raised in other proceedings that he could be estopped at a future date from relying on it, even if the point was successful. This proposition, she submitted, was established in *A v. The Governor of Arbour Hill Prison* [2006] 4 I.R. 88 and was copper fastened in *Brennan & Others v. Governor of Portlaoise Prison* (Unreported, Supreme Court, 12th March, 2008). The balance of justice lay, she submitted, in granting prohibition or an injunction pending the resolution of the other proceedings.

3.2 As to the substantive point at issue, Ms. Murphy submitted that the previous jurisprudence on the correct interpretation of s. 3(2) of the Act of 1972, is based upon a misconception, in that, it has generally been assumed that the relevant evidence provided for in s. 3(2) of the Act of 1972, was the belief of the Chief Superintendent. However, she contended that the correct construction, based on a literal approach, must be that it is the statement of the Chief Superintendent which was the evidence. Such a construction had the result, in her submission, of creating unchallengeable evidence and that no purpose would be served by the defence enquiring into the basis for such a statement, given that the statement itself was the evidence. The right of the accused to cross-examine would thus be negated or removed in breach of Constitutional and Convention rights, she argued.

3.3 With regard to the challenge to s. 29 of the Act of 1939, she submitted that the decision of the Supreme Court in *Dylan Creaven & Others v. Criminal Assets Bureau* [2004] 4 I.R. 434, was authority for the proposition that the power to issue search warrants must be exercised judicially and that this implies, she submitted, that it must not be issued in contravention of the principle of *nemo iudex in causa sua*. She cited the Canadian Supreme Court decision in *Hunter et al v. Southam Inc* [1984] 2 S.C.R. 145, in this regard and noted that the Supreme Court left over the issue of whether a garda involved in the investigation could issue a search warrant under s. 29 of the Act of 1939 in *The People (D.P.P.) v. Birney & Others* [2007] 1 I.R. 337, as it concluded that it did not have jurisdiction to adjudicate on that point.

3.4 Mr. McDermott B.L., for the second named respondent, submitted that the procedures adopted by the applicant were an abuse of the process of the courts. He argued that the applicant is not entitled to seek relief by way of judicial review during the currency of a criminal trial. He relied on the judgment of Carney J. in the High Court and that of O'Flaherty J. in the Supreme Court in the case of *Director of Public Prosecutions v. Special Criminal Court* [1999] 1 I.R. 60, in this regard. He also highlighted jurisprudence which supports the view that a criminal trial should be unitary in nature and should not be broken up by recourse to judicial review proceedings. In this regard, he cited *Byrne v. Grey* [1988] 1 I.R. 31; *Berkeley v. Edwards* [1988] I.R. 217; *Director of Public Prosecutions v. Windle* [1999] 4 I.R. 280 and *Blanchfield v. Harnett* [2001] 1 I.L.R.M. 193.

3.5 Mr. McDermott submitted that the issue of whether to adjourn a trial fell squarely within the discretion of a trial judge and he observed that, at the time the adjournment was sought, the applicant had not instituted plenary proceedings. In addition, he contended that the other cases the applicant wished to await the outcome of before proceeding with his own case were founded upon of an acceptance of the right to cross-examine the Chief Superintendent on his or her belief evidence. The application for an adjournment was premature, he submitted, in circumstances where no evidence had been adduced against the applicant. For the applicant to point to some cases where trials have been adjourned pending a constitutional challenge, was not, in his submission, a stateable ground of judicial review.

3.6 He further submitted that it was clearly the position that the applicant enjoyed a right to cross-examine the Chief Superintendent on his evidence as to his belief, and he relied on the *dicta* of Hardiman J in *A v. Governor of Arbour Hill*

Prison [2006] 4 I.R. 88 at p.165, to the effect that an applicant can only litigate issues based on his own particular facts and circumstances. He cited a series of cases where the constitutional validity of s. 3(2) of the Act of 1972, had been upheld and all these cases proceeded on the basis that the Chief Superintendent could be cross-examined. Those cases were *O'Leary v. The Attorney General* [1993] 1 I.R. 102 (in the High Court); *The People (D.P.P.) v. Kelly* [2006] 3 I.R.115 (in the Supreme Court); *The People (D.P.P.) v. Binéad & Anor.* [2007] 1 I.R. 374 (in the Court of Criminal Appeal) and in *Redmond v. Ireland and the Attorney General* [2009] I.E.H.C. 201 (in the High Court). He argued that as these cases proceeded on the basis that the correct construction of s. 3(2) of the Act of 1972, did permit cross- examination of a Chief Superintendent on the content of his belief evidence, the basis of the applicant's challenge in his plenary proceedings was wholly different and, therefore, these case are irrelevant to his challenge, and furthermore, the applicant's proposed construction of s. 3(2) of the Act of 1972, is contrary to the well settled construction of s. 3(2) and, therefore, demonstrably wrong. The applicant, should not, in his submission, be granted an order of prohibition or an injunction pending the outcome of proceedings in the other two matters. The case of *M.D. v. Ireland* [2009] I.E.H.C. 206, established, he contended, that the jurisdiction to injunct a trial pending a constitutional challenge should be used sparingly.

4. Decision

4.1 The well-settled jurisprudence makes it clear that an accused person may only come to this Court to seek judicial review during the currency of a trial in exceptional circumstances. In this regard I note, in particular, the following dictum of O'Flaherty J. in Director of Public Prosecutions v. Special Criminal Court [1999] 1 I.R. 60 at pp.88-89:-

> *"Counsel for the notice party submitted that judicial review did not lie in this case. The notice party had been arraigned and it was submitted that the trial had started and reliance was placed on the dictum of Ó Dálaigh C.J. in ThePeople (Attorney General) v. McGlynn [1967] I.R. 232 at p. 239:-*
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> *'The nature of a criminal trial by jury is that, once it starts, it continues right through until discharge or verdict. It has the unity and continuity of a play. It is something unknown to the criminal law for a jury to be recessed in the middle of a trial for months on end, and it would require clear words to authorise such an unusual alteration in the course of a criminal trial by jury.'*
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> *While this statement applies to criminal trials with a jury, it should be regarded as a precept that should, as far as practicable, be followed in respect of all criminal trials subject to the jurisdiction of courts to grant cases stated on occasion.*
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> *However, the situation that prevailed here is that while counsel for the prosecution had been invited by the court to 'open' the case, this was purely for the purpose of giving the members of the court an idea of what the case was about. Essentially, the ruling that was sought and given was by way of preliminary ruling before the trial was embarked upon.*
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> *I would endorse everything that Carney J. said about the undesirability of people repairing to the High Court for judicial review in relation to criminal trials at any stage (and certainly not during their currency) but, in the exceptional circumstances of this case, and having regard to the importance that there should be a definitive ruling on this matter of informer privilege, it was right that Carney J. should have entertained the application at first instance and for us to hear it on appeal."*

The statement made by Carney J. approved of by O'Flaherty J. above was as follows at pp.69-70:-

> *"It is unique in my experience that relief of this nature is being sought during the currency of a trial which remains at hearing. It cannot be emphasised strongly enough that an expedition to the judicial review court is not to be regarded as an option where an adverse ruling is encountered in the course of a criminal trial. I am undertaking this application for judicial review during the currency of the trial because a need has presented itself to urgently balance the hierarchy of constitutional rights including, in particular, the right to life. In the overwhelming majority of cases it would be appropriate that any question of judicial review be left over until after the conclusion of the trial."*

Fennelly J. (with whom Hardiman and McCracken JJ. agreed) in *C.C. v. Ireland* [2006] 4 I.R. 1 approved the foregoing dictum of Carney J. in the above case and found it to be applicable to applications made pending a criminal trial.

4.2 I am not satisfied that exceptional circumstances such as the kind which arose in *Director of Public Prosecutions v. Special Criminal Court* [1999] 1 I.R. 60, are present in the instant case. In that case, the exceptional circumstances at issue stemmed from what occurred during the criminal trial itself, events which could not have been known or predicted before the trial began. Also, the issue which arose necessitated a balancing of the most fundamental of all constitutional rights, *i.e*. the right to life, against the right of an accused to disclosure of certain documents, a balancing exercise which had to be determined before the trial could proceed any further. In contrast, the challenge this applicant wishes to make as to the constitutionality of s. 3(2) of the Act of 1972 is a challenge that could have been made in advance of his trial. Nonetheless, the applicant waited until the second day of his trial to raise the point concerning the proper construction of s.3(2) of the Act of 1972, though Ms. Murphy explains that this was because the point had only just occurred to her. I am satisfied that is a wholly inadequate explanation and cannot provide a proper basis for not proceeding with the trial of the applicant.

4.3 The foregoing conclusion of itself is sufficient to dispose of this application. Nonetheless, for the sake of completeness, I should consider the merit of the substantive points made by the applicant on statutory construction in the context of the injunction and prohibition sought, in determining whether the applicant has a fair case to be tried. In this regard, whilst I am in full agreement with the judgment of Clarke J. in the case of *M.D. v. Ireland* [2009] I.E.H.C. 206, this case must be distinguished from that case on the obvious basis that in that case, the proceedings raising the constitutional challenge were commenced well in advance of the criminal trial. Indeed, the pleadings were closed well in advance of the trial, notwithstanding delay on the part of the defendant in filing the defence. Here, the proposed constitutional challenge was only mentioned for the first time on the second day of the criminal trial. Insofar as the

adjournment was sought was to await the outcome of the other two cases, namely, *D.P.P. v. Redmond and D.P.P. v. Sean Connolly*, as the construction of s. 3(2) of the Act of 1972, upon which both of these case proceeded, was the very construction rejected by the applicant in this case, in my opinion, the final outcomes in those cases could not be relevant to the applicant's application for an adjournment of his trial and, hence, there was no basis for asserting that this Court should intervene by way of judicial review to quash the refusal of the adjournment.

4.4 On the constitutionality of s. 3(2) of the Act of 1972, the case the applicant makes as to the true construction of that provision may be regarded as surprising and novel given the various challenges to that section in the past. Ms. Murphy advances the argument that the correct construction of s. 3(2) of the Act of 1972, is that the evidence of the Chief Superintendent is his or her statement and not his or her belief and that the cross-examination of the Chief Superintendent would be superfluous in those circumstances. In my judgment, this construction is, patently, wrong. If that construction was correct, then the evidence would comprise of an oral statement alone which, once uttered, would became ephemeral and, in effect, cease to exist, or at the very least incapable of being captured in any tangible form. In fact, the only tangible physical discernable relic of the statement is the record made by those present of the content of the statement. Unless s. 3(2) of the Act of 1972 is to be construed in an absurd way, the content of the statement, that is, the expression of the Chief Superintendent's belief, must be regarded as the evidence. Fennelly J. in *The People (D.P.P.) v. Kelly* [2006] 3 I.R. 115 at pp.130-131 set forth an instructive description of the nature of the evidence given under s.3(2) of the Act of 1972 in the following terms:-

> *"42. This is evidence of a quite exceptional kind. Whether or not an accused person is a member of an unlawful organisation is a question of fact. The Chief Superintendent gives evidence not of fact but of belief. His belief does not have to be based on direct knowledge of the involvement of the accused in the unlawful organisation in question. It is patently based on statements of others, whether inside or outside the force. It is probably frequently based on intelligence available to An Garda Síochána. That is precisely what is permitted by the section. Such evidence, if given openly, would infringe the hearsay rule, an objection which is circumvented by the section. The Chief Superintendent simply says what his belief is. "*

4.5 It is to be noted that Ms. Murphy candidly acknowledged that the statement of grounds did not include a challenge based on the traditional construction of s. 3(2) of the Act of 1972. The only basis for the constitutional challenge sought to be made is this novel construction of s. 3(2) of the Act of 1972, which only occurred to Ms. Murphy on the second day of the trial. As this construction is contrary to all well-settled authority from the Supreme Court and this Court, and is patently wrong, it is quite clear that there is no realistic basis for the constitutional challenge to s. 3(2) which this applicant seeks to maintain and, therefore, in my opinion, there is not a fair question to be tried.

4.6 The second ground of challenge, based on s.29 of the Act of 1939 was not mentioned at all in the course of the criminal trial but has been raised for the first time in these proceedings. In *The People (D.P.P.) v. Birney & Others* [2007] 1 I.R. 337, the Court of Criminal Appeal expressed the opinion that a correct construction s. 29(1) of the Act of 1939 is to the effect that an investigating Chief Superintendent may issue a warrant. At pp.372-373 of the judgment of the Court, delivered by Hardiman J., is the following passage:-

> *"111 This court is of the view that the court correctly decided that The People (Director of Public Prosecutions) v. Owens [1999] 2 I.R. 16 is not an authority for the proposition that a search warrant issued pursuant to the provisions of s.29 of the Act of 1939 must be issued by a Superintendent independent of the investigation in respect of which the search warrant is required. In the course of the submissions before the Special Criminal Court it had been argued that if s.29 of the Act of 1939 did not require that such a warrant be issued by an independent authority, then the section is unconstitutional. In support of this contention the court was referred to a Canadian decision, Hunter v. Southam Inc. [1984] 2 S.C.R. 145. The court ruled correctly that it had no jurisdiction to adjudicate on the constitutionality of s.29 and this court is in no different position.*
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> *112 This court is likewise satisfied that the wording of s.29(1) of the Act of 1939 is clear and unambiguous. For the applicant's contention to be correct, it would be necessary to read into the words of the statute a proviso that the Superintendent concerned should not be one involved in the particular investigation. This court can see no basis for so doing. Accordingly this court does not accept the submissions on behalf of the first applicant in this regard."*

4.7 Although the issue has not been determined by the Supreme Court, in the instant proceedings, the determination of the matter is immaterial given that, if s.3(2) of the Act of 1972, is not amenable to challenge by the applicant and continues to operate as it has done in the past, the question of whether or not the warrant is valid and the admissibility of the fruits of the search becomes of little consequence and, indeed, in this context, the applicant's case on s. 29 of the Act of 1939, was not pressed.

4.8 As to the adjournment sought, it is well-settled that the courts enjoy a wide discretion as to whether to grant an adjournment or not. I am satisfied that in the instant case, the first named respondent, when asked to adjourn the trial on the second day, was well within its discretion in refusing that application, in particular when no evidence had been given. Indeed, the court itself observed that such an application was premature. I find it impossible to disagree and have no hesitation in concluding that there is no basis demonstrated in these proceedings for interfering by way of judicial review with that decision.

5. Conclusion

5.1 For the reasons set out above, I must refuse the reliefs sought in these proceedings.