

THE HIGH COURT

Janine Cleary

And

The Director of Public Prosecutions

2009 1167 JR

Applicant

Respondent

Judgment of O'Neill J. delivered on the 26th day of March, 2010.

1. Relief Sought

1.1 This Court (Peart J.) granted leave to the applicant on the 20th October, 2008, to apply by way of judicial review for the following relief:-

1. An injunction restraining the respondent from further prosecuting the applicant on foot of bill of indictment number DU0889/2008 currently pending before Dublin Circuit Criminal Court.

2. The Facts

2.1 On the 17th July, 2007, the applicant was served with a summons to appear in the Dublin Metropolitan District Court on the 12th September, 2007, to answer a complaint that she had assaulted a woman in a nightclub on the 31st May, 2005, contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997. The applicant had previously been arrested and interviewed by the gardaí on the 17th August, 2006 in respect of the incident. In a letter dated the 20th July, 2007 the applicant's solicitors requested the disclosure of various documents in advance of matter being listed before the Court including a copy of CCTV footage, if such footage existed.

2.2 On the 12th September, 2007, the applicant attended at the District Court with her solicitor and counsel. Garda George Tyrell represented the first named respondent. He indicated the respondent's consent to the summary disposal of the case. Under the terms of General Direction No. 1, issued pursuant to s. 8 of the Garda Síochána Act 2005, and which came into effect on the 1st February, 2007, the respondent directed that he elects for the summary disposal of certain offences, including any offence under s.3 of the Non-Fatal Offences Against the Person Act 1997, without submission of a Garda file although a garda is required to consider the submission of the file to the office of the respondent in certain circumstances. District Judge Smyth accepted jurisdiction to hear the case. Some documents were disclosed to the applicant and Garda Tyrell indicated that there was CCTV footage of the incident and that it would be disclosed in due course. The matter was adjourned to the 30th October, 2007, so as to facilitate the disclosure of the CCTV footage. The incident was alleged to have occurred in the hallway outside the cloakroom area in the nightclub.

2.3 On the 27th October, 2007 Garda Tyrell informed the applicant's solicitor that the CCTV footage from the nightclub in question was broken and that he was attempting to retrieve another copy of it. The matter came before the District Court again on the 30th October, 2007. Garda Tyrell applied for a six week adjournment to ascertain whether CCTV footage of the incident was available. The matter was duly adjourned until the 6th December, 2007. On that date a date for the summary trial of the applicant was fixed for the 7th March, 2008.

2.4 On that date the applicant attended Court again with her legal representatives. There was no appearance on the part of the respondent. Garda Tyrell, in his affidavit, sworn on the 16th April, 2009, averred that he made an error as to the entry of the date for hearing in his diary. The only description in the evidence of what occurred in Court on the 7th March, 2008, is contained in para. 13 of the applicant's affidavit, sworn on the 20th October, 2008:-

"13. On March 7th I attended court and was represented by counsel instructed by my solicitors. The court was presided over by District Judge Patrick McMahon. There was no appearance whatsoever by the respondent. When the case was called counsel asked that the case be dismissed as it was listed for hearing and there was no prosecution evidence. Judge McMahon acceded to that application and dismissed the case."

2.5 The order of the District Court, drawn up on the 6th October, 2008, stated inter alia:-

"It was ordered as follows:

the said complaint be dismissed"

2.6 A memorandum on the case and an investigation file was forwarded by the gardaí to the office of the respondent on the 14th May, 2008. Mr. Henry Matthews, Solicitor and Professional Office in the Directing Division of the office of the respondent outlined the view that was taken by his office at para. 4 of his affidavit sworn on the 11th May, 2009, as follows:-

"4. I say that the matter was very carefully considered within the office of the DPP. The view was taken that the Applicant had not been in peril of conviction in the original District Court prosecution and that the dismissal in the District Court was not on the merits. I say that a copy of the court summons for the hearing on March 7, 2008 was obtained by a solicitor within this Office and this clearly shows the order recorded on that summons as 'a dismiss for want of prosecution'. I beg to refer to a copy of such court summons upon which marked with the

letters HM-1, I have signed my name prior to the swearing hereof. A decision was taken to charge the Applicant with the same offence of assault causing harm under Section 3 of the Non-Fatal Offences Against the Person Act 1997. A decision was also taken to prosecute on indictment because of the seriousness of the alleged offence, that is, the alleged unprovoked nature of the attack, the use of a glass and the serious injuries caused to the complainant, who received 25 sutures and was left with a disfiguring scar.

... ”

2.7 The applicant was arrested on the 25th June, 2008. She was charged with the same offence relating to the same incident of the 31st May, 2005, in a charge sheet of the 3rd July, 2008. The applicant appeared in the District Court on the latter date. The respondent was represented by a solicitor from the office of the Chief Prosecution Solicitor. The applicant was served with a book of evidence. Evidence of arrest, charge and caution was given. The District Court was then informed that the respondent had directed a trial on indictment. District Judge Lindsay gave an alibi warning in accordance with s.20 of the Criminal Justice Act 1984 and made an order that the applicant be returned for trial to the present sittings of Dublin Circuit Criminal Court. The applicant entered into a recognisance in the sum of €200.

2.8 On the 25th July, 2008, the applicant appeared at Dublin Circuit Criminal Court. Her case was adjourned to the 17th November, 2008. The applicant's solicitors then wrote by letter dated the 6th August, 2008, to the Chief Prosecution Solicitor's Office requesting the reasons for the reversal of the prosecution's earlier decision to prosecute the applicant summarily. That letter stated *inter alia*:-

"Previously Ms Cleary was prosecuted summarily for the same offence by way of summons bearing case number 2007/49568. During the course of those proceedings the DPP's consent to summary disposal was conveyed to the court. Subsequently on July 3rd 2008, the prosecutor indicated to the District Court that the DPP directed trial on indictment.

We would be obliged if you would disclose the reasons for the reversal of the earlier decision of the DPP and any new evidence which came to light which led to that decision being made."

No substantive response has been received by the applicant's solicitors in respect of this request, though an email of acknowledgment was sent.

2.9 The office of the Chief Prosecution Solicitor sent documents to the applicant's solicitors by way of disclosure by cover letter dated the 13th August, 2008. The letter also stated that the original CCTV footage from the nightclub was no longer available. These proceedings were instituted on the 20th October, 2008.

3. The Issues

3.1 The primary issue that arises for determination in these proceedings is to decide what is the legal effect of the order made by District Judge McMahon on the 7th March, 2008. Was it a dismissal on the merits leading to an acquittal thus creating a bar to the further prosecution of the applicant or was it a dismissal without prejudice thereby permitting the further prosecution of the applicant? The second issue that must be dealt with is that of delay. The final issue that arises is that of the alleged real risk that the applicant would not receive a fair trial due to the failure to preserve evidence in the form of the CCTV footage.

4. The order of the 7th March, 2008

Counsels' Submissions

4.1 Ms. O'Malley S.C., for the applicant, submitted that the current prosecution of the applicant on indictment was an abuse of process in circumstances where she has already been acquitted of the same charge. The order of dismissal of the District Court, of the 7th March, 2008, acted as a bar, in her submission, to the bringing of any further prosecution of the applicant on the same charge. She contended that the District Court Judge clearly had jurisdiction to bring the prosecution to an end in the absence of evidence from the prosecution. She relied on *Dixon v. Director of Public Prosecutions and Judge Hogan* (Unreported, *ex tempore*, High Court, Geoghegan J., 1st December, 1997) and *Director of Public Prosecutions v. Ní Chondúin* [2008] 3 I.R. 498 in this regard.

4.2 Ms. Brennan B.L., for the respondent, submitted that the applicant was never in peril of conviction in the District Court as there was no hearing on the merits of the case and the Court did not engage with the substantive issues in the case. In such circumstances she submitted that no plea of autrefois acquit could arise. She noted that in *Dixon v. Director of Public Prosecutions and Judge Hogan* (Unreported, *ex tempore*, High Court, Geoghegan J., 1st December, 1997) and in *Director of Public Prosecutions v. Ní Chondúin* [2008] 3 I.R. 498 that the prosecution had appeared before the cases were dismissed on their merits and she contrasted that with the instant case. In the United Kingdom, she noted that where the prosecutor was not present there was no right to plead double jeopardy, but that where the prosecutor was present but did not have his witnesses it could be pleaded. She quoted from paras. 4.142 and 4.143 from Archbold, *Criminal Pleading, Evidence and Practice* (Sweet & Maxwell, 2009) and she relied on the English authority of *Holmes v. Campbell* [1998] EWHC Admin 503 in this regard.

4.3 Ms. Brennan observed that the terms of the order of the District Court of the 7th March, 2008, did not state whether the dismissal was with or without prejudice but that O. 23, r. 3 of the District Court Rules 1997 provided that the only option available to a District Court Judge to dismiss a case when a prosecutor was not present was to "dismiss without prejudice." The order for dismissal made, she argued, must be interpreted in light of this rule.

Decision

4.4 Section 14(1) of the Courts Act 1971, as amended by s. 20(b) of the Criminal Justice (Miscellaneous Provisions) Act 1997, expressly precludes, in any legal proceedings, looking to any record relating to a decision of a District Court Judge other than an order. Section 14(1) reads:

"14. (1) In any legal proceedings regard shall not be had to any record, relating to a decision of a judge of the District Court in any case of summary jurisdiction, other than an order which, when an order is required, shall be drawn up by the District Court clerk and either—

(a) signed by the judge who made the order, or

(b) affixed with the seal of the District Court in respect of the District Court Area in which the order was made or, where the order was made by a judge of the District Court sitting in the Dublin Metropolitan District, affixed with the seal of that District,

or a copy thereof certified in accordance with rules of court."

4.5 Order 23 rule 3 of the Rules of the District Court 1997 deals with the failure on the part the prosecutor to appear in the context of a summary trial. It provides:-

"3. Where the accused (or his or her representative) is present at the required time and place and the prosecutor (or his or her representative) is not present, the Court may strike out, dismiss without prejudice or adjourn the hearing of the complaint."

The meaning of this rule is clear and unambiguous. If the District Court wishes to dismiss a case on the basis of the prosecutor's failure to appear it may only do so on a without prejudice basis.

4.6 The English authority of *Holmes v. Campbell* [1998] EWHC 503, relied on by the respondent, is directly on point. There, a hearing date for a trial was fixed for the 12th November, 1997, before Magistrates sitting at Workington. However, the prosecutor, due to inadvertence, failed to appear on that date. The accused person applied to the Magistrates to exercise their power under s.15 of the Magistrates Courts Act to dismiss the informations, which they did. The High Court ruled that this dismissal did not amount to a dismissal on the merits and that it was not open to the accused to plead *autrefois acquit*. Smedley J., in concluding that there was no acquittal on the merits followed a test approved of by the Court of Appeal in *R. v. Dabhade* [1993] Q.B. 329. The relevant part of Smedley J.'s judgment reads as follows:-

"He [Counsel for the applicant] drew our attention to the decision of the Court of Appeal in *R v. Dabhade* [1993] Q.B. 329... Mr. Bradley argues that when we have regard to the dissenting judgment of Lush J in *Haynes v. Davis* [1915] 1 KB 332 the suggestion that *autrefois acquit* applies to the decision to dismiss on 12th November fails two of the three tests which Lush J there set out. That dissenting judgment was expressly approved by the court in *R v. Dabhade* and Wright J. in giving the judgment of the court quotes from the passage at page 338 where those three tests are set out.

'It has been constantly laid down, perhaps in somewhat different terms, that there are three conditions which must be fulfilled before the plea of *autrefois acquit* can be successfully raised, those three conditions being stated in *Russell on Crime*, vol ii, p.1982. There the author, after saying that 'at common law a man who has once been tried and acquitted for a crime may not be tried again for the same offence if he was 'in jeopardy' on the first trial,' proceeds as follows: 'He was so 'in jeopardy' if (1) the court was competent to try him for the offence; (2) the trial was upon a good indictment, on which a valid judgment of conviction could be entered; and (3) the acquittal was on the merits, i.e. by verdict on the trial, or in summary cases by dismissal on the merits, followed by a judgment or order of acquittal.' I quite agree that 'acquittal on the merits' does not necessarily mean that the jury or the magistrate must find as a matter of fact that the person charged was innocent; it is just as much an acquittal upon the merits if the judge or the magistrate were to rule upon the construction of an Act of Parliament that the accused was in law entitled to be acquitted as in law he was not guilty, and to that extent the expression 'acquittal on the merits' must be qualified, but in my view the expression is used by way of antithesis to a dismissal of the charge upon some technical ground which had been a bar to the adjudicating upon it.'

There is no doubt that the court sitting on 12th November was competent to try the accused for the offences. However, in light of section 15, in the absence of the prosecutor, that court had no power to convict them. The only options were to adjourn or dismiss. To that extent, therefore, in my judgment, the accused on that occasion were not in jeopardy if, by that word, is meant 'at risk of conviction by the court whose decision is under consideration' which is what I understand it to mean. Similarly, in my judgment, on the facts in this case, there was no acquittal on the merits."

4.7 This case is persuasive authority for the proposition that there can be no dismissal on the merits in the event of the prosecution not turning up in Court on the date a case has been listed for hearing. In *Director of Public Prosecutions v. Ní Chondúin* [2008] 3 I.R. 498 the prosecution was present. There had been repeated adjournments at the instance of the prosecution, including a "peremptory" adjournment and there was clear evidence that there was a dismissal on the merits in the District Court, as noted by MacMenamin J. at p.514:-

"[66] In a situation of ambiguity, there is a duty upon a prosecutor to require the court explicitly to state the nature of the dismissal in a criminal case. In this context it was hardly necessary. The learned District Judge had stated that she wanted the prosecution to 'end there' i.e. simply to dismiss the proceedings. This is what she did. Even looking to the surrounding circumstances I do not consider that any other interpretation is open. The proceedings were to be dismissed finally."

4.8 In *Dixon v. Director of Public Prosecutions and Judge Hogan* (Unreported, ex tempore, High Court, Geoghegan J., 1st December, 1997) the prosecuting garda was present in the District Court but was without his witnesses. Geoghegan J. made a finding that the case could not go on before the District Judge. He concluded that the order made by the District Court was a dismissal on the merits. In both of these cases, this Court was satisfied on the evidence of what occurred in the District Court that the intended effect of the District Court order was a dismissal on the merits.

4.9 No such evidence exists in these proceedings. In essence, the evidence is such that the accused and her legal representatives appeared in Court and applied for a dismissal based on the absence of the prosecution, which was

granted. There was nothing to persuade the District Court that the prosecution either had no case or that it was unable to make out its case. The failure of the prosecution to turn up on one occasion would have merely indicated a mishap such as occurred, the appropriate response to which is provided for in the District Court Rules, namely a dismiss without prejudice, a strike out or an adjournment.

4.10 I infer from this that the District Court Judge intended to dismiss the case in the manner as contemplated by O. 23, r.3 of the Rules of the District Court 1997, *i.e.* a dismiss without prejudice. In adopting this approach, I am persuaded that the foregoing passage from the judgment in *Holmes v. Campbell* [1998] EWHC 503 is a correct statement of the law.

5. Delay

Counsels' Submissions

5.1 Ms. O'Malley submitted that leave was sought within three months of the return for trial, of the 3rd July, 2008. In relation to the missing CCTV footage, she submitted that the applicant only became aware of the fact that it was missing in the letter of the 13th August, 2008, from the office of the Chief Prosecution Solicitor. The three month time limit in respect of that ground, she contended, must run from the 15th August, 2008, the date on which that letter was received by the applicant's solicitors. She added that the order of the District Court to dismiss was only drawn up on the 6th October, 2008, and that the applicant was right to wait to inspect that order before instituting these proceedings. She noted that leave was sought within two weeks of that order being drawn up.

5.2 Ms. Brennan argued that the applicant did not institute these proceedings within the three month time limit prescribed by O.84 r.21 of the Rules of the Superior Courts 1986 or promptly as required by the Rules of the Superior Court. She contended that the cause of action in respect of double jeopardy arose on the 25th June, 2008, the date the applicant was charged for the second time. The proceedings were not instituted, however, until the 20th October, 2008.

Decision

5.3 The substantive issue in this case, in my opinion, turned on the content of the order of the District Court of the 7th March, 2008. Therefore, I am satisfied that it was reasonable to wait to institute these proceedings until that order was made available on the 6th October, 2008. There was no failure on the part of the applicant to act promptly in circumstances where the applicant was engaged in correspondence with the respondent over the long vacation, before the proceedings were commenced. I am satisfied that there was no delay on the part of the applicant in commencing these proceedings.

6. Missing evidence

Counsels' Submissions

6.1 Ms. O'Malley submitted that there was a real risk of an unfair trial in the absence of the CCTV footage from the nightclub. Ms. Brennan highlighted Garda Tyrell's averment in his affidavit that the footage of the area covering the coat desk/dance floor area was of poor quality and of no evidential value and that the other piece of footage related only to the doorway of the club. She argued that the applicant had not demonstrated that the loss of the footage would lead to the risk of an unfair trial.

Decision

6.2 This aspect of the case was not strenuously pressed by the applicant at hearing. There is, in my opinion, little merit in this argument, in any event. The incident took place in the cloakroom area. The CCTV footage in question related to footage contained in two videotapes from two different cameras. The affidavit of Garda Tyrell indicates that one of the cameras covered the front door area. The footage from this camera is neutral and is not indicative of anything relevant. The other camera showed the area between the coat desk and the dance floor. Garda Tyrell averred that he could not make out any assault from that footage. This evidence, if elicited from Garda Tyrell at the trial, would tend to assist the applicant. In these circumstances I must conclude that there is no risk the applicant would face an unfair trial because of the loss of the CCTV footage.

7. Conclusion

7.1 For the reasons outlined above I must refuse the relief sought. In reaching this conclusion I have also been influenced by the fact that the applicant has made inculpatory admissions to the gardaí. The Supreme Court in *McFarlane v. Director of Public Prosecutions* (No. 2) [2008] I.E.S.C. 7 (Unreported, Supreme Court, 5th March, 2008) expressly stated that a court should be entitled to have regard to the fact that admissions were made in the course of an investigation, in the context of the balancing exercise necessary to determine whether an order of prohibition should be granted.