Neutral Citation Number: [2011] IEHC 208

THE HIGH COURT

2010 1078 JR

BETWEEN

WILLIAM RYAN

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

AND

JUDGE KATHERINE DELAHUNT

RESPONDENTS

FIONA RYAN

NOTICE PARTY

JUDGMENT of Kearns P. delivered on the 20th day of May, 2011

This is an application for judicial review in which the applicant seeks:-

(i) An order of *certiorari* quashing the order of the second-named respondent of the 20th July, 2010, fixing the 2nd November, 2010 as the trial date of the applicant for the charges in Bill No. 00524/2009;

(ii) An order of prohibition, by way of an application for judicial review, restraining the first-named respondent from seeking to prosecute the applicant and the notice party by way of a single trial;

(iii) An injunction, by way of an application for judicial review, restraining the first-named respondent from seeking to prosecute the applicant and the notice party by way of a single trial;

(iv) A declaration that the first-named respondent acted otherwise than in accordance with the principles of natural and constitutional justice and/or otherwise than in accordance with law by seeking to have the trials of the applicant and his wife tried together;

(v) A declaration that the first-named respondent acted otherwise than in accordance with the principles of natural and constitutional justice and otherwise than in accordance with law and otherwise than in accordance with fair procedures with the result that the applicant was precluded from receiving a trial in accordance with Article 38.1 of the Constitution of Ireland and Article 6 of the European Convention of Human Rights.

(vi) An order pursuant to the Rules of the Superior Courts, Order 84 Rule 20 (7) staying the trial of the applicant in respect of the charges set out, or originally set out in Bill No. 00534/2009 pending the determination of this application.

(vii) Such further or other order as this Honourable Court shall deem fit.

(viii) An order for costs.

BACKGROUND FACTS

On the 13th September, 2007, the applicant was arrested, detained and questioned in respect of offences alleged to have occurred on the 4th September, 2007. It is alleged that, while in prison, the applicant got angry with a prison nurse and that the notice party went to Walkinstown in order to ascertain the prison nurse's address, which she then passed on to another party. It is alleged that on the morning of 4th September, 2007, the car of the nurse and that of her mother were deliberately burned out.

The second-named respondent states that evidence intended to be led includes a recording of a call on the prison phone from the applicant to the notice party wherein the applicant indicates that he wants a job done, an eyewitness account of a neighbour who described a woman fitting the notice party's description inquiring as to the address of the nurse, mobile calls between the notice party's mobile phone and a mobile phone located near the prison, some admissions made by the notice party about having ascertained the nurse's address and more limited admissions from the applicant indicating a level of disgruntlement with the prison nurse. There are no admissions as to the actual crime alleged. The applicant and the notice party are both charged with arson and the applicant is also charged with the unauthorised use of a mobile phone in prison.

On the 19th January, 2009, the applicant was charged with three offences arising out of the alleged incident, namely 2 counts of the arson and one of possession of a phone in a prison. He was brought before the District Court in custody and an application for bail was refused. He was remanded from time to time until the 12th March, 2009, when a Book of Evidence was served. On that day he was sent forward by Order of the District Court, to the then present sittings of Dublin Circuit Criminal Court.

The notice party was also charged with offences arising out of the alleged incident and was given station bail. A Book of Evidence was served on her on the 12th March, 2009. Although the District Court Judge purported to send her forward on that date, no valid order to that effect was made.

On the 8th April, 2009, the cases of both the applicant and the notice party were re-entered before the District Court on the basis that the documents had not been transmitted to the Circuit Court within the 10 days permitted by law. However, on that day, on a review of the District Court file, it was agreed between the parties that the applicant's case had been transmitted within time and the case was not mentioned. The notice party's case was also listed for that day and no order was made in respect of her charges,

although it was noted that the return for trial had not been signed by the trial judge.

The applicant was not produced before the Circuit Criminal Court in the then present sittings and he was released pursuant to an application brought under Article 40.4.2 of the Constitution. Although the return for trial was raised as an issue at that hearing, no finding was made in that regard.

The notice party brought judicial review proceedings, seeking an order quashing her return for trial as not being a valid order. These proceedings commenced in April 2009 and a stay was placed on the criminal proceedings relating to her pending the determination of the judicial review.

The applicant's case was listed before the Circuit Criminal Court for the first time on 1st May, 2009 as Bill No. 524/2009. Issue was taken as to whether there was a valid return for trial and that issue was decided by O'Donnell J. on the 11th May, 2009. Judgment was given on the 28th May, 2009, holding that the applicant's return for trial was valid and that he was properly before the Circuit Criminal Court. The matter was adjourned until the 12th June, 2009 when the applicant was admitted to bail and was remanded on bail to the 12th October, 2009.

On the 12th October, 2009, counsel for the applicant informed the court that a jury would be required and a trial date of the 16th February, 2010 was fixed. The case was listed as Bill No. 524/2009. The first-named respondent was represented in court when the trial date was fixed, but counsel for the first-named respondent sought to re-mention the matter before the second-named respondent in the absence of and without notice to the applicant. The second-named respondent refused to hear any submissions as neither the applicant nor his legal team were present.

On the 19th October, 2009, this Court quashed the return for trial of the notice party and ordered that the matter be remitted to the District Court. That application was not contested by the first-named respondent.

On the 18th December, 2009, the first-named respondent re-entered the applicant's case in the Circuit Criminal Court seeking to vacate the trial date fixed for the 16th February, 2010. That application was opposed by the applicant and was adjourned until the 14th January, 2010 for legal submissions.

The notice party was listed for the first time in the Circuit Criminal Court on the 18th February, 2009 on Bill No. 1381/09.

On the 14th February, 2010 the second-named respondent, having heard the submissions of both parties, vacated the trial date on the basis that she would let the prosecution have one mistake and that if she had known that there was a co-accused she would not have set a trial date. The applicant submits that no finding was made by the second-named respondent as to whether she had jurisdiction to join the applicant and notice party on a single indictment in the circumstances of the case nor whether the two accused should have a single trial. The matter was adjourned until the 2nd March, 2010 to fix a new trial date.

On the 2nd March, 2010 a new trial date of 8th November, 2010 was fixed in respect of the applicant. The notice party sought a further mention date. On the 18th March, 2010 a trial date of the 2nd November, 2010 was fixed in respect of the notice party.

On the 20th July, 2010 the first-named respondent again re-entered the applicant's case before the Circuit Criminal Court to change his trial date to the effect that he and the notice party would be tried together. Objection was taken to this course of action, but the second-named respondent refused to hear any further legal submissions and vacated the applicant's trial date and fixed it for the 2nd November, 2010.

Application for leave to take the within proceedings was made on the 28th July, 2010 and was granted on the 29th July, 2010.

There is one Book of Evidence in this case for the applicant and the notice party. The first-named respondent states that it was always their intention to try both the applicant and the notice party together, as the charges all arise from the same incident and that the applicant and notice party were aware of this intention. The first-named respondent also submits that the trial is complex, involves 36 witnesses and mobile telephone mast evidence, and could take at least two weeks to run.

DELAY

The applicant was obliged at all times not to delay in bringing this application for judicial review. Order 84 Rule 21 of the Rules of the Superior Court 1986 provides as follows:-

> "(1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is certiorari, unless the Court considers that there is good reason for extending the period within which the application shall be made."

On the 14th January, the second-named respondent, having listened to submissions from both parties, indicated that she would not have set a trial date for the accused had she known that there was a co-accused. On the 2nd March, 2010, the second-named respondent indicated that both accused would get the same trial date and that any application for separate trials should be made to the trial judge. On the same day, the applicant was given the 8th November, 2010 as his trial date on the application of his counsel. When the notice party came before the second-named respondent on the 18th March, 2010, the prosecution gave the wrong trial date, namely the 2nd November, 2010. However, the second-named respondent expressed the intent on the 18th March, 2010 that both accused be tried together on the same date. Application for leave to take the within proceedings was made on the 28th July, 2010 and was granted on the 29th July, 2010.

In *Mary Kenneally v. the DPP* (High Court, 18th May, 2010), Hedigan J. stated as follows:-

> "The obligation to move promptly for prohibition is of particular importance in criminal matters. Any delay in determining criminal charges is to be deprecated. Order 84, r. 21 of the Rules of the Superior Courts requires an application, such as this, to be made within three months from the date when grounds for the application first arose and, in any event, promptly. The applicant had knowledge of the fact the sample had not been retained at the very latest on 28/05/2009. This application was made on 15/09/2009, some three and half months after that date. It might be possible to argue that they ought to have known the sample would not be retained from the very beginning. However, taking the date of their knowledge as 28/05/2009, this application is out of time. In any event, the delay between 28/05/2009 and two days prior to the trial could not be described as prompt action. In a case such as this, action should have been taken immediately. Any delay of any kind needs the clearest explanation. No explanation is provided for the delay in question. This application, therefore, fails, on either the three month requirement or the requirement to act promptly."

The applicant submits that it was only on the 12th July, 2010, when he learned that the first-named respondent was again going to apply to the second-named respondent seeking to vacate either the notice party's trial date or the applicant's trial date and to have the applicant and the notice party tried together. The applicant claims that, up until that date, two separate trial dates had been fixed and he was not on notice that he would be tried together with the notice party. However, the applicant does not address the first-named respondent's allegation that the second-named respondent had expressed her intention that the applicant and the notice party would be tried together on the 18th January, 2010, again on the 2nd March, 2010 and yet again on the 18th March, 2010.

In the circumstances, no explanation has been given by the applicant for the lack of promptness in pursuing this judicial review application. Clearly, it has long been the intention of the second-named respondent that the applicant and the notice party would be tried on the same date. She expressed such intention on at least three separate hearing dates and it was only due to a mistake as to the correct trial date on the part of the prosecution that separate trial dates were set. The applicant should not be allowed to rely on such mistake to vitiate a claim of delay where he was on notice of the respective intentions of both the first-named respondent and the second-named respondent. The applicant was aware of the second-named respondent's intention to try him and the notice party together from the 14th January, 2010 and so has failed to bring his application either promptly or within the six month time period specified by Order 84, rule 21(1).

PROVISION OF INDICTMENT
The applicant complains that the first-named respondent failed to provide an indictment despite multiple requests for same. An application was made to the second-named respondent on the 14th January, 2010 for a direction that the first-named respondent provide a copy of the indictment to the applicant. Although the second-named respondent made no order in relation to the application, the applicant submits that the second-named respondent was on notice of the fact that an indictment was being sought by the applicant.

In March 2010, counsel for the applicant sought a copy of the indictment from the first-named respondent and was told that this would be provided. The indictment was not received by the applicant and counsel for the applicant sent two e-mails to the first-named respondent on the 19th March and the 14th April of the same year. The first-named respondent again failed to respond to these requests. Counsel for the applicant subsequently approached counsel for the first-named respondent and was told that the solicitor for the applicant would have to formally request an indictment.

It is accepted that the first-named respondent is under an obligation to lodge and serve an indictment as soon as may be after an accused is returned for trial to the Criminal Court. Although the court is critical of the approach of the first-named respondent in this regard, the applicant has again failed to identify any specific prejudice which has resulted from this omission.

JURISDICTION TO TRY THE APPLICANT AND NOTICE PARTY TOGETHER
The applicant submits that he and the notice party are not co-accused as there are two separate returns for trial made more than seven months apart. The applicant claims that it was represented to the second-named respondent that both had been returned together and that the only reason that they had become separated was because the notice party brought judicial review proceedings. The applicant further submits that the first-named respondent has not pleaded any jurisdictional basis on which the applicant and notice party can be joined on the one indictment.

The applicant relies on *Conlon v. Kelly* [2002] 1 I.R. 10, where the D.P.P. sought to have a number of counts which were on two separate indictments consolidated into one indictment so that they could be tried together. The indictments were consolidated in the Circuit Criminal Court, but that Order was quashed by the Supreme Court. Fennelly J. stated as follows:-

> "[Section 5 of the Criminal Justice Act 1924] does not permit amendment by combining counts from separate indictments based on separate returns for trial. It implies that an indictment has already been framed out and, as envisaged by the Act of 1967, this follows a single return for trial. The criminal process from return for trial onwards attaches central importance to the indictment. It formulates the charge upon which the accused is to be tried. Any change in the indictment, once it has been preferred, requires statutory authority. There is, in my view, no statutory authority for the 'consolidation' of two indictments of the sort which occurred here."

Conlon is, however, distinguishable from the instant case. *Conlon* concerned a single accused, at whose retrial the prosecution added eight unrelated charges against different persons. The case at hand concerns two separate accused persons, and the charges arise out of the same set of facts. Further, the applicant was granted leave on grounds alleging unfairness because he and the notice party had been listed for trial together, whereas the Court in *Conlon* was concerned with other matters.

The first-named respondent submits that it is well settled that different defendants can appear on single indictments. The first-named respondent relies heavily on Professor Walsh's work *Criminal Procedure* (Round Hall, 2002), and several extracts therefrom are instructive.

Referring to *R v. Assim* [1966] 2 QB 249, Professor Walsh states as follows:-

> "Sachs L.J. giving the judgment of a five-judge Court of Appeal found that joinder of offences or offenders are matters of practice over which the court has inherent power to formulate its own rules, except to the extent that it is restrained by statute or statutory rules. After an extensive review of the authorities on the correct practice with respect to the joinder of offenders charged with separate offences in separate counts, Sachs J. (as he then was) concluded that joinder is appropriate if the offences are so closely related by time or other factors that the interests of justice are best served by a single trial."

Professor Walsh goes on to quote the following passage from *Assim*:-

> "Where… the matters which constitute the individual offences of the several offenders are upon the available evidence so related, whether in time or by other factors, that the interests of justice are best served by their being tried together, then they can properly be the subject of counts in one indictment and can, subject always to the discretion of the court, be tried together."

At paragraph 15.48, Professor Walsh states as follows:

> "It is worth noting that since the rules governing the joinder of offenders on a single indictment are a matter of judicial practice as opposed to statutory authority, errors in the application of the rules amount to an irregularity in the proceedings but do not deprive the court of jurisdiction."

In *Attorney General v. Joyce & Walsh* [1929] I.R. 526, the Court of Criminal Appeal stated as follows:-

> "Where, as in the present case, persons jointly indicted plead not guilty, the trial Judge may direct that they be separately tried if, in his opinion, separate trials are desirable in the interests of justice. The trial Judge has a discretion in the matter which must be exercised judicially. The exercise of such discretion may be reviewed by this Court, and a re-trial directed, if we are satisfied that a refusal to direct separate trials has resulted in a miscarriage of justice."

As both the applicant and the notice party were validly returned for trial, it is within the jurisdiction of the Circuit Criminal Court to try them. The decision whether to try them separately or together is a matter squarely within the trial judge's discretion. The matters raised by the applicant are matters for the trial court and are not amenable to judicial review. There has been no jurisdictional deficiency or exceptional unfairness in the case at hand. The matter shall be remitted to the trial judge, who is the appropriate person to determine the issue of joinder of the applicant and notice party.

CONCLUSION

I dismiss the within application. Firstly, the applicant has failed to bring his application promptly. Secondly, the applicant has failed to point to any prejudice caused by the omission on the part of the first-named respondent to provide a copy of the indictment to him. Finally, it is a matter solely for the trial judge whether the applicant should be tried together with the notice party, and this Court is not willing to interfere with the inherent jurisdiction of the trial court.