Neutral Citation: [2013] IEHC 444

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 150 J.R.]

BETWEEN

KENNETH CULLEN

APPELLANT

AND

DISTRICT JUDGE DAVID McHUGH AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

Judgment of Mr. Justice Hedigan delivered on 16th day of April, 2013.

1. In these proceedings the applicant challenges:

(1) the criminal damage conviction recorded against him in the District Court; and

(2) the refusal by the District Judge to permit him appeal that conviction by way of case stated.

The background to this application is succinctly set out in the pleadings herein and in the submissions provided by both parties to the case. I will not rehearse them again in this judgment.

2. The issues which arise in this application are as follows:

(a) was there any evidence before the District Court that the applicant caused damage to the door in question;

(b) was the presumption provided by s. 7(2)(a) of the Criminal Damage Act 1991 set aside by reason of the charge sheets having named the person to whom the property allegedly belonged;

(c) was the presumption of no authority to damage provided by s. 7(2)(b) rebutted by the evidence of the applicant in the District Court;

(d) did the specification in the charge sheet of the quantum of damage at €20 require the Gardaí to prove the amount of damage at €20;

(e) was the District Judge correct to refuse to state a case on the basis that it was frivolous?

Evidence of damage

3. The evidence of Garda Steers, who was not cross-examined, was that he and his colleague had attended the *locus in quo* earlier in the day. The sliding door in question was then in good working order. He states that they saw the applicant pulling at the door. They observed the door had broken free from its rail. It was hanging loose. The applicant himself in his affidavit admits to kicking the door but pleads the door regularly slipped out of its rails.

Damage is defined by s. 1 of the Criminal Damage Act 1991 as, *inter alia*, ". . . dismantle, whether temporarily or otherwise, render inoperable, or unfit for use or prevent or impair the operation of . . .".

Knocked off its rails, albeit quickly replaced thereon by the Gardaí, clearly amounts to damage to the door. There was not only relevant evidence of this before the District Court, there was in fact compelling evidence.

Section 7(2)(a) presumption

4. Section 2 of the Criminal Damage Act provides that it is an offence to damage the property of another. Section 7(2)(a) provides that in a prosecution under s. 2, it is unnecessary to name the owner of the property and it shall be presumed until the contrary is shown, that the property belongs to another.

This presumption is a mandatory one. It shall be presumed. That presumption on a literal reading of the Act may only be set aside by showing the contrary. That has not been shown and thus the presumption must stand. The fact the charge sheet specifies a named person and that person's ownership is not proved in Court cannot change the presumption. Insofar as it is evident of anything, it is that the property belonged to another.

It cannot be gainsaid but that every element of an offence must be proved beyond reasonable doubt. See *Woolmington v. DPP* [1935] AC 462. It is however clear that there are many examples in Irish law where the legislature has transferred by way of rebuttable presumption to an accused, the burden of proof of an element of an offence. *See DPP v. Rostas and Maughan* [2012] IEHC 1. Insofar as the applicant claimed to rent the premises with his partner up to the day in question, that does not suffice to remove the presumption of ownership as there was evidence before the court that he was aware he was no longer welcome at the premises. He had in fact been removed earlier that day by the Gardaí. Moreover, he gave Gardaí at the scene a different address.

Was the presumption in s. 7(2)(b) of no authority to damage rebutted?

5. The same evidence as immediately above disposes of this point. His mere rental of the property does not rebut a presumption against no authority to damage. Even were this not so, as noted above, he no longer considered the premises his home, having already been removed therefrom and having given the Gardaí at the scene a different address.

Did the Gardaí need to prove the quantum of damage
6. The Act provides that any damage to the property of another is criminalised. Whether the damage is great or small the offence is constituted where there is property, it belongs to another and it is damaged. The fact the charge sheet measures the damage at a particular level where such particularisation is not necessary does not amend the act.

The Refusal to state a case
7. The District Judge's refusal to state a case was certified by him as being because he considered the application frivolous. The applicant herein seeks an order under s. 5 of the Summary Jurisdiction Act 1857 requiring the first respondent to show cause why there should not be a case stated.

In *State (Turley) v. Ó Floinn*, Ó Caoimh P. held that the High Court when considering such an application may consider whether on the merits it is frivolous. The High Court may form its own opinion on whether the facts warrant consideration by it by way of appeal.

I have already considered each of the grounds above and rejected them. Since, as cited above, this Court may itself consider whether the case warrants an appeal, I consider that, even where the High Court believed that the application did give rise to a point of law but that it would be a pointless waste of time to grant a request for a case stated, it should refuse the request. See *Fitzgerald v. DPP* [2003] 3 I.R. 247.

As I have rejected each of the grounds sought to be raised, I must therefore also refuse this application for an order under s. 5.