Neutral Citation: [2014] IEHC 53

THE HIGH COURT

[2013 No. 837 SS]

IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT 1857, AS EXTENDED BY SECTION 51 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961

DIRECTOR OF PUBLIC PROSECUTIONS

(At the suit of Garda Keith O'Brien)

PROSECUTOR/RESPONDENT

AND

SLAVIKAS KUDRIACEVAS

ACCUSED APPELLANT

JUDGMENT of O'Neill J. delivered on the 7th day of February 2014

1. This application by way of notice of motion is for an order striking out the appeal by way of Case Stated herein on the grounds that the High Court has no jurisdiction to hear and determine that appeal because service of the signed Case Stated together with the notice in writing of that appeal was not served on the respondent in the manner required by s. 2 of the Summary Jurisdiction Act 1857 as amended (the Act of 1857).

2. The appeal by way of Case Stated relates to the conviction of the appellant for drunk driving in Navan District Court on 3rd October 2012. The initial notice of application to state a case was received by the gardaí on 16th October 2012. It is conceded by the respondent that this notice was in compliance with the requirements of s. 2 of the Act of 1857.

3. This motion to strike out the appeal is concerned entirely with the requirement in s. 2 of the Act of 1857 that the appellant must, within three days of receiving the signed Case Stated, transmit it to the High Court, having first given notice in writing of such appeal with a copy of the Case Stated and signed, to the respondent. The respondent says that there was not service of a signed copy of the Case Stated, nor a notice in writing of such appeal as required by s. 2 of the Act of 1857.

4. The Case Stated was signed by Judge Patrick McMahon in the District Court on 9th May 2013, in the presence of Ms. Niamh Tuite, the solicitor for the appellant, and Mr. Vincent M. O'Reilly for the respondent.

5. There is a conflict of evidence between these two solicitors as to whether or not a signed copy of the Case Stated was handed over by Ms. Tuite to Mr. O'Reilly in the District Court after the District judge had, apparently, signed the same. Ms. Tuite, on affidavit, avers that she had three copies of the Case Stated ready for signature by the District judge and all three copies were handed in and appeared to have been signed by the District judge, and when these were returned to her, she gave one of these to Mr. O'Reilly. Mr. O'Reilly acknowledges that he did receive a copy of the Case Stated in this way. In his affidavit, Mr. O'Reilly describes these events as taking place in Navan District Court. Ms. Tuite disputes this and says that whilst earlier appearances in relation to the Case Stated had occurred in Navan District Court, the final hearing on 9th May 2013, at which the District judge signed the Case Stated, occurred in Trim District Court. Nothing turns on this as it is accepted by all that there was a hearing in the District Court at which, in the presence of both solicitors, the District judge signed, or appeared to sign, a number of copies of the Case Stated.

6. Mr. O'Reilly, in his affidavit, exhibits the copy of the Case Stated which was given to him and on which, at the time, he wrote the words "*9/5/13 final document as signed*". That note, in my opinion, appears to corroborate Ms. Tuite's evidence that she handed over to Mr. O'Reilly in the District Court what both Mr. O'Reilly and Ms. Tuite believed, having witnessed the District judge sign a copy or copies of the Case Stated, was a copy of the Case Stated signed by the District judge. However, as is apparent, the copy of the Case Stated on which Mr. O'Reilly made the foregoing note is not, in fact, signed by the District judge, a fact which was not apparent to Ms. Tuite or Mr. O'Reilly at the time; both, I am sure, believing that the District judge had signed these copies of the Case Stated. Unfortunately, however, for whatever reason, it would appear that the District judge overlooked signing the copy which was handed to Mr. O'Reilly.

7. The respondent takes advantage of this position to submit that there was a failure to comply with that part of the requirement in s. 2 of the Act of 1857, which obliges the appellant within three days after receiving the Case Stated to:

> "*. . . transmit the same to the court named in his application, first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceeding in which the determination was given, herein-after called the respondent. . .*" [Underlining added]

8. Mr. Harte S.C. for the appellant submits that what the section requires is, not the giving of a Case Stated actually signed by the District judge, but rather a copy of the case so stated and signed, and his submission, this does not require that the actual copy given to the other party to the proceedings must be signed by the District judge.

9. I am of opinion that there is merit in Mr. Harte's submission. The section requires that the District judge state and sign a case, and having so done, that the appellant must, within three days, "*transmit the same to the court named in the application*". Thus, it is envisaged that the original Case Stated will be transmitted to the High Court. The section does not seem to envisage or place any obligation on a party on the District judge to bring into existence several signed copies of the Case Stated, and therefore, in my opinion, the obligation on the appellant to give a notice in writing of such appeal "*with a copy of the case so stated and signed*" does not necessitate the giving of a copy actually bearing the signature of the District judge, but merely a copy of that Case Stated which has been stated and signed by the District judge.

10. I am satisfied, therefore, that the absence of the signature of the District judge on the copy given to Mr. O'Reilly is not a breach of the requirements in s. 2 to give "*a copy of the case so stated and signed*".

11. The respondent next submits that no notice of the appeal was ever given as required by s. 2 of the Act of 1857, where it says:

> "*. . . first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceeding in which the determination was given, herein-after called the respondent*."

12. There is no doubt that no separate notice in writing was given by the appellant to the respondent with a copy of the Case Stated or otherwise. Initially, a notice was served applying for the Case Stated and this was served on the respondent, but apart from that, no further notice was given.

13. Mr. Harte S.C. submitted that s. 2 permitted the application for a Case Stated to be made *ex parte*, no notice being required in that regard by section 2. Notwithstanding that provision for such a notice has been made in the District Court Rules, that requirement does not arise from s. 2 of the Act of 1857. As only one notice in the overall procedure was required by s. 2, he submitted, that requirement was satisfied by the notice, given initially seeking the Case Stated, which promptly indicated on the part of the appellant, the taking of the appeal by way of Case Stated, which was the essential requirement under section 2.

14. In addition, Mr. Harte submitted that the Case Stated itself was ample notice of the appeal, for the purposes of the notice to be given under s. 2 and the title of and First Recital of the Case Stated making it clear that an appeal by way of Case Stated is taken by the appellant.

15. In my opinion, the requirement contained in s. 2 to "*transmit the same to the courts named in his application, first giving notice in writing of such appeal . . .*" necessarily requires that this notice can only arise and be given after the Case Stated has been received by the appellant. It may, to many, appear excessively technical or downright superfluous that there should be a further notice of the appeal, at this stage of the procedure, having regard to the original notice applying for the Case Stated; the normal process of settling the Case Stated which, as in this case, usually involves a considerable amount of negotiation between the parties leading to the signing of the Case Stated by the District judge, all of which, generally from the point of view of the appellant indicating that the appeal by way of Case Stated is taken and is progressing.

16. However, it cannot be forgotten or overlooked that the case is stated by the District judge, and whilst it is common practice for the parties to draft the Case Stated, the terms of it are ultimately determined by the District judge within his sole discretion. That being so, there always remains the possibility that an appellant may be dissatisfied with the terms of the Case Stated, and for that reason, or indeed, any other reason, might not wish to proceed further with the appeal. Hence, in my view, there is the requirement as stated in s. 2 of the Act for a notice of the appeal in writing to be given after a receipt by the appellant of the Case Stated.

17. This requirement is integral or essential to compliance with the terms of section 2.

18. It is well settled that there must be strict compliance with these requirements, and if there is not, the High Court will not have jurisdiction to embark upon a hearing of the Case Stated. In the cases of the *DPP v. Patrick O'Connor and DPP v. Niamh O'Connor* (judgment delivered on 9th May 1983) in which Finlay P. (as he then was) delivered judgment on 9th May 1983, having reviewed the authorities, said the following:

> *"It was decided by the Supreme Court in the case of Thompson v. Curry [1970] I.R. p. 61 that the observance of the sequence of events required by s. 2 of the Act of 1857 was a condition precedent to the exercise by the High Court of its jurisdiction to hear a Case Stated pursuant to that section. It follows, in my view, from this decision that the High Court has not got power to dispense an appellant from compliance with the sequence of events provided by the section, no such statutory power being contained in the Act of 1857 nor in any amending Act, and there being no such general inherent power in the court . . ."*

19. The learned President (as he then was) then went on to review the number of authorities that had been cited to him, and having done so, said the following:

> *"As I indicated in my decision in Nangles case, I am satisfied that the terms of procedural provisions in a statute such as this must be construed with reference to the intention of the statute, and with particular reference the objective which the procedural provisions of the statute clearly seek to achieve. It is clear in this case that the solicitor for the respondents can have been under no real misapprehension as to the purpose of the service of documents upon him on 11th January 1983. In a sense, therefore, the preliminary objection taken on behalf of the respondents does not go to the merits of this case but that does not mean that it is without merit in law. If I were satisfied that the statute conferred on me any discretion with regard to the compliance by the appellant with the terms of the section, I would unhesitatingly exercise that discretion in favour of the appellant and against the respondents. Being the statutory condition and provision, however, I am satisfied that I have not got any such general discretion. It seems to me to do violence to the meaning of the phrase 'notice in writing of such appeal' to interpret a letter merely enclosing a copy of the Case Stated and seeking an endorsement of acceptance of service on it as such notice. The request and information contained in the letter as distinct from the position that arose in Nangles case conveys no further or other information to the respondents than does the transmission to them of a copy of the Case Stated. It was true, as was contended on behalf of the appellant, that a solicitor receiving such documents could easily infer that it was the intention of the appellant to proceed with the appeal. It is equally true, however, that a solicitor receiving a copy of the Case Stated without any other document would reach the same conclusion.*
>
> *I have therefore decided and I am forced to hold that the appellant has not complied with the provisions of the Act of 1857 and this court has, accordingly, got no jurisdiction to entertain the appeal by way of Case Stated."*

20. In the *O'Connor* cases, the Case Stated had been accompanied by a letter which the learned President found inadequate for the purposes of the section. In this case, the appellant is in a somewhat weaker position, there being nothing in writing at all giving notice of the appeal subsequent to the receipt of the Case Stated.

21. In this respect, I am quite satisfied that the Case Stated itself cannot be the notice of appeal because what is required in the notice is to give notice of the fact that the appeal by way of Case Stated is, having received the Case Stated, going ahead.

22. As mentioned by Finlay P. in the *O'Connor* cases, the Supreme Court in *Thompson v. Curry* [1970] 1 I.R. at 61, held that the observance of the sequence of events required by s. 2 of the Act of 1857 was a condition precedent to the exercise by the High Court of its jurisdiction.

23. There can be no doubt that in the many cases that have arisen in relation to the requirements of s. 2 of the Act of 1857, the draconian nature of the extraordinarily short time period provided for in s. 2 has attracted much judicial discontent, because being a

statutory provision, its clear terms could not be relieved against when the evidence clearly established that the requirements of the Act had not been met. This was expressed in graphic terms by Budd J. in the *DPP v. Canavan* [2007] 3 I|.R. at p. 163, as follows:

> *"It may also serve as a warning of the pitfalls and oubliettes which were created by some nineteenth century legislation. These anachronistic procedural hurdles may be well known in legal circles but from a survey of the many cases in the reports since 1857, it becomes quite clear that the stringent time limits set out in this section are a legal heffalump-trap for the unwary. This is particularly so with regard to service on the respondent of notice in writing of such appeal with a copy of the case so stated and signed (by the District Court Judge), having to be notified to the other party to the proceeding in which the determination was given, hereinafter called 'the respondent'. The snag is that the moving party, called 'the appellant', shall, within three days after receiving such case, transmit the same to the court named in his application, but first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceeding in which the determination was given, hereinafter called 'the respondent'. Over the centuries time after time in these islands appellants have been caught out by this pitfall and disappeared into an oubliette created by this strict time limiting prerequisite. No doubt the reasoning for this stringent time limit is that the accused/respondent has probably left the District Court thinking joyfully that he has been acquitted before the District Court and accordingly the matter of the prosecution against him for driving while allegedly having an amount of alcohol in his body over the prescribed limit has been concluded happily from his point of view. The need for stringent time limits is explained by the fact that the respondent is under the impression that he has been acquitted and so it is imperative that he be notified expeditiously. . ."*

24. In 2009, the Oireachtas intervened with a relieving provision in the form of s. 45 of the Criminal Justice (Miscellaneous Provisions) Act 2009, which states as follows:

> *"45.— Section 2 (as extended by section 51 of the Courts (Supplemental Provisions) Act 1961) of the Summary Jurisdiction Act 1857 is hereby amended by the insertion after 'such Case' of 'or such longer period as may be provided for by Rules of Court'.*

25. Thus, the full amended provision now reads as follows:

> *". . . within three days after receiving such case, or such longer period as may be provided for by Rules of Court, transmit the same to the court named in his application, first giving notice in writing of such appeal with a copy of the case so stated and signed to the other party in the proceedings in which the determination was given hereinafter called 'the respondent' . . ." [Emphasis added]*

26. The question which arises on this application is whether or not this amendment to s. 2 entitles the appellant in this case to relief, where it is clear, that but for this new statutory provision his case had fallen foul of the procedural requirements in s. 2 and this court would have to decline jurisdiction to hear the Case Stated.

27. Section 45 of the Act of 2009, clearly provides for the extension of time for the doing of all the procedural requirements in s. 2 of the Act of 1857, but the jurisdiction to grant such extensions of time appears to be contingent upon the making of Rules of Court in that regard. It is commoncase that no such rule or rules have been introduced by the Rules Making Committee of the Superior Courts. It was submitted by Mr. Harte that as s. 45 had unambiguously given to the High Court a jurisdiction to enlarge time, and notwithstanding the absence of Rules of Court, that jurisdiction was there. Specifically, it was submitted that the Oireachtas, having legislated for extensions of time under s. 2 to be provided for in Rules of Court, this engaged the undoubted jurisdiction contained in O. 122, r. 7 of the Rules of the Superior Courts which gives this court jurisdiction to enlarge or abridge the times set out in the Rules or fixed by any Order enlarging time, for doing any act or taking any proceeding upon such terms as the court may direct.

28. In the absence of an express provision in the Rules of Court relating specifically to s. 2 of the Act of 1857, in my opinion, s. 45 of the Act of 2009 is expressed in sufficiently general terms as to include provision already made by Rules of Court for the enlargement of time. I have no hesitation in construing the phrase "*or such longer period as may be provided by Rules of Court*" on a literal construction as encompassing existing Rules, when, to do otherwise would postpone the jurisdiction given under s. 45 indefinitely until express Rules would be made, which would have the consequence of defeating the legislative provision for an indefinite period of time. I am fortified in this view, by the fact that s. 45 of the Act of 2009, by order of the Minister for Justice, Equality and Law Reform of 25th August, 2009 (S.I. No. 330 of 2009) was brought into force and effect, just one month after 21st July, 2009, the date on which the Act was passed by the Oireachtas. It is plainly obvious, that it was not intended by the Oireachtas, that the relieving measure contained in the amendment of s. 2 of the Act of 1857 by s. 45 of the Act of 2009, could not take effect until new Rules expressly relating to s. 2 of the Act of 1857 were made. If that be so, it necessarily follows that it was intended by the Oireachtas that the reference in s. 45 to the Rules of Court, was a reference to the existing Order 122(7).

29. Accordingly, I am satisfied that the time period of three days provided in s. 2 of the Act of 1857 can be enlarged under O. 122, r. 7 of the Rules of the Superior Court by virtue of s. 45 of the Act of 2009.

30. The question which next arises is whether such an enlargement of time can, in this case, provide any relief to the appellant.

31. Ms. Brennan B.L. for the respondent submits that the amendment effected in s. 45 has no impact on the situation in this case, that this legislation makes no change with regard to the sequence of events mandated in s. 2 of the Act of 1857, and particularly the requirement for a notice in writing of the appeal to be served with a copy of the case so stated and signed prior to the transmission to the High Court. The Case Stated in this case was promptly transmitted on 9th May 2013 *i.e.* on the same day as it was signed by the District judge and received by the appellant and well within the three days provided for under s. 2 of the Act of 1857.

32. It is to be noted that O. 62, r. 1 of the Rules of the Superior Court makes a provision in relation to the transmission of the Case Stated to the Central Office of the High Court in terms similar to those in s. 2 of the Act of 1857, as follows:

> *"1. Every case stated by a Justice of the District Court under the Summary Jurisdiction Act, 1857 (20 and 21 Vic. c. 43) shall be transmitted to the Central Office by the party requesting the case within three days after receiving such case."*

33. Notwithstanding the absence of any statutory provision prior to s. 45 of the Act of 2009 permitting an extension of the three-day period provided for in s. 2 of the Act of 1857, nonetheless, the Supreme Court in the case of *Attorney General v. Shinivan* [1970] 1 I.R. at p. 66, held that the provision in O. 62, r. 1 of the Rules of the Superior Courts 1962 which corresponds exactly with O. 62, r. 1 in the current Rules, had the effect of enabling recourse to O. 108, r. 7 of the 1962 Rules which corresponds to O. 122, r. 7 in the current Rules, so that the three-day period for the transmission of the case to the High Court could be extended.

34. Section 45 permits time to be extended for all of the procedural requirements set out in s. 2 and not just the transmission of the case to the High Court in respect of which, as discussed above, there already was provision for the enlargement of the three-day time limit under Rules of Court.

35. There is already a time limit of fourteen days for the making of the application to the District judge to state a case, this time limit having been introduced by s. 51 of the Courts (Supplemental Provisions) Act 1961. As the time limit for the transmission of the case to the High Court is already subject to enlargement by virtue of O. 62, r. 1 in conjunction with O. 122, r. 7 as *per* the decision of the Supreme Court in the *Shinivan* case, the only other requirement of s. 2, which prior to the Act of 2009 was subject to the rigid three-day time limit, was the giving of notice in writing of the appeal with a copy of the case so stated and signed.

36. If the appellant is given an extension of time for giving the notice in writing, there is still the problem of the correct sequencing of the requirements in section 2.

37. As discussed earlier, s. 2 requires that after the receipt by the appellant of the Case Stated, he must serve the notice in writing with a copy of the case so stated and signed, but before transmission of the case to the High Court. With commendable promptness, the appellant, without having served a notice in writing, transmitted the case to the High Court on the same day that it was received by him, namely, 9th May 2013. For an extension of time for the giving of notice to have any effect, it would be necessary to undo or treat as a nullity the transmission of the case to the High Court on 9th May 2013, and to provide an extension of time for a fresh or a new transmission of the case to the High Court. All of the cases, and in particular, *Thomson v. Curry*, stress the necessity for the sequence of events set out in s. 2 to be correctly followed in order to invoke the jurisdiction of the High Court to hear a Case Stated. The final question for decision in this case is whether, under the jurisdiction given in the Act of 2009 to enlarge time, can this court afford to an appellant time to do what is required by s. 2 in the correct sequence, notwithstanding that there was a partial compliance with s. 2 insofar as the case stated was transmitted within three days, but overall a failure to comply with s. 2 within the time prescribed under section 2. The partial compliance in question, namely the transmission of the Case Stated to the High Court because it was done without notice first being given to the respondent, was in terms of s. 2 an invalid compliance and can, therefore, rightly be regarded as a nullity so that for the purpose of availing of the relieving provision introduced by s. 45 of the Act of 2009, the appellant's situation can be dealt with as if no step post the receipt by the appellant of the signed Case Stated, had been taken apart from the giving of a copy of the Case Stated to the respondent. Although a copy of the signed Case Stated was given, it was not given with a notice of the appeal. To ensure strict compliance with s. 2, the enlargement of time envisaged by me would include the service of the notice of appeal, with a copy of the Case Stated, as signed.

38. In this case, the appellant suffered the wholly undesirable fate, in common with many appellants before, of falling into the trap created by the extraordinarily short statutory time limit provided in s. 2 of the Act of 1857. In her anxiety to ensure that the case was transmitted within the three days, the solicitor for the appellant understandably overlooked the other and prior requirement of notice in writing, believing that that had already been accomplished. The interests of justice are not well served if an obviously carefully crafted Case Stated, raising issues of substance as agreed between both parties, is because of draconian and anachronistic procedural requirements, excluded from the jurisdiction of this court so that the appellant is to be repelled *in limine*, his cause unheard. Section 45 of the Act of 2009 was enacted to address this wholly undesirable situation by providing relief in the form of a jurisdiction to enlarge time under the Rules of Court, for the doing of what was required under section 2.

39. Accordingly, I would extend the time for the service on the respondent of the notice of appeal with a copy of the Case Stated as required by s. 2 and I would further extend time for transmission immediately thereafter of the case to the High Court.

40. For the reasons set out above, I refuse the relief claimed in the notice of motion.