Neutral Citation Number [2009] IEHC 291

THE HIGH COURT

2008 10544 P

BETWEEN

DAVID MALONEY

PLAINTIFF

AND

IRELAND AND THE ATTORNEY GENERAL AND THE DIRECTOR OF PUBLIC PROSECUTION AND THE MEMBER IN CHARGE OF TALLAGHT GARDA STATION, SERGEANT JOHN CRIBBIN

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 25th day of June, 2009

The application
On this application the plaintiff seeks an interlocutory injunction restraining the third named defendant (the DPP) from proceeding with the trial of the plaintiff in the Dublin Circuit Criminal Court pending the determination of the issues raised in the substantive proceedings.

The primary relief claimed by the plaintiff in the substantive proceedings is a declaration that s. 30(1) of the Offences against the State Act 1939 (the Act of 1939) is repugnant to the Constitution "insofar as that under it one can be detained for up to 72 hours merely for possession of specified categories of information". The plaintiff also seeks a declaration that "in that regard" the provision is incompatible with Article 5 of the European Convention on Human Rights. There is also a claim for a declaration that the plaintiff's detention in issue was unlawful by virtue of the reliance of the fourth named defendant on s. 30(1) and on the plaintiff's alleged possession of information to ground his detention on 22nd January, 2008. The plaintiff also seeks an injunction restraining the DPP from adducing any evidence arising from the detention under s. 30(1) and from relying on inferences from the plaintiff's alleged silence during his period in detention in any trial.

The impugned provision
Section 30(1) of the Act of 1939 provides as follows:

> *"A member of the Gárda Síochána … may without warrant stop, search, interrogate, and arrest any person, or do any one or more of those things in respect of any person, whom he suspects of having committed or being about to commit or being or having been concerned in the commission of an offence under any section or sub-section of this Act or an offence which is for the time being a scheduled offence for the purposes of Part V of this Act or whom he suspects of carrying a document relating to the commission or intended commission of any such offence as aforesaid or whom he suspects of being in possession of information relating to the commission or intended commission of any such offence as aforesaid."*

Section 30 was amended by s. 10 of the Offences Against the State (Amendment) Act 1998 by the substitution for sub-s. (4) of s. 30 by sub.ss. (4), (4A), (4B) and (4C). The amendment provides for the extension of the period of detention from 48 hours as originally provided in s. 30 to 72 hours by making provision for an application to a Judge of the District Court for a warrant authorising detention for a further period not exceeding 24 hours after the expiration of the initial periods of 24 hours and 24 hours provided for in sub.s. (3) of s. 30.

Before considering in greater detail the manner in which it is alleged that

s. 30(1) is invalid having regard to the provisions of the Constitution in the plaintiff's statement of claim, I propose outlining the facts which give rise to the substantive proceedings and to this application in chronological order.

The facts and chronology
The arrest of the plaintiff on 22nd January, 2008 is described in the statement of the arresting Garda, Garda Mark Shortt, in the Book of Evidence to which I will refer later, which is exhibited on this application. Garda Shortt states that while working on a mobile patrol in the Tallaght area on 21st January, 2008 he received a call to respond to an "armed intruders on" call at a residence in that area. While on route to the call, he observed two males dressed in black clothing running along a residential road. The patrol car pursued the men and later Garda Shortt pursued one of the men on foot. He eventually caught up with him. He was the plaintiff. Garda Shortt arrested the plaintiff for a drug search under s. 23 of the Misuse of Drugs Act 1977 at 11.15pm. A search conducted by Garda Shortt's colleague on the route along which the two men had been chased resulted in the recovery of a shotgun in the front garden of a house. The plaintiff was taken to Tallaght Garda station where a thorough drug search proved to be negative. He was released from the s. 23 search at 00.15am on 22nd January, 2008. At that stage Garda Shortt was aware that two men had entered the house to which the "armed intruders on" call related "in aggravated circumstances, one armed with a handgun and the other armed with a shotgun" and that "two shots were discharged at the scene and the men fled on foot". At 00.18am on 22nd January, 2008 Garda Shortt brought the plaintiff to Belgard Walk where he arrested him under s. 30 of the Act of 1939 for possession of information in relation to a scheduled offence, namely, possession of a firearm at Tallaght. The plaintiff was detained and questioned.

Sometime during the afternoon of 22nd January, 2008 an application was made on behalf of the plaintiff to the High Court (O'Neill J.) for an inquiry under Article 40 of the Constitution into the lawfulness of the plaintiff's detention and that a case be stated for the consideration of the Supreme Court on the question of the constitutionality of s. 30 of the Act of

1939 and that the plaintiff be admitted to bail pending the determination of the same. O'Neill J. directed the inquiry. At around 6.30pm that evening the plaintiff was produced in Court. Evidence was heard from

Garda Shortt and from Detective Inspector Pat Lordan, the Member in Charge, of the circumstances of the plaintiff's arrest. The Court heard legal argument. O'Neill J. concluded that the plaintiff's detention was lawful. He refused to state a case. An approved note of his ex tempore judgment has been put before this Court which records that, having outlined the evidence, which is consistent with what I have recorded, O'Neill J. stated as follows:

"8. The applicant was arrested under s. 30 because there was suspicion that he was in possession of information relevant to one of the relevant offences. However manifestly there is a likelihood at the very least that there was a suspicion that he was involved in the commission of such an offence. It is clear that there was a suspicion that he had information related to such offences. On the basis of the evidence I have heard the Gardaí must also have suspected him of being involved in the offences as well as merely being in possession of information in respect of same. Thus he is suspected of having information in respect of offences in which he was himself directly involved.

9. To my mind it is almost absurd, having regard to those facts, to suggest that the applicant's constitutional rights are in any sense breached under s. 30 where he has been arrested for being suspected of being in possession of information relating to an offence in which he was clearly implicated. That conclusion is more than sufficient to dispose of this application.

10. The submission made to me this afternoon that an innocent person who is in no way blameworthy and who is not withholding information is liable to be arrested under this provision, appeared on its face to be a compelling argument to justify the inquiry sought. However that fact scenario is not applicable in this case. The facts of this case cannot ground a challenge to the constitutionality of s. 30. To do so the applicant would have to assert the constitutional rights of somebody else. The applicant is not entitled to rely on the jus tertii. One cannot set up the position of other parties and seek to rely on their rights. So far as the rights of this applicant are concerned, the facts of this case can lead to only one conclusion therefore that the operation of the section is not repugnant to the Constitution and the detention is lawful. I am quite satisfied that the application should be refused."

After the hearing, the plaintiff was returned to Tallaght Garda Station. Questioning of the plaintiff was resumed. On 23rd January, 2008 at 22.32pm he was released from the s. 30 detention and was charged with burglary contrary to s. 13(1) and (3) of the Criminal Justice (Theft and Fraud Offences) Act 2001 and various offences under the Firearms Acts. He was detained overnight and brought to Tallaght District Court on the following morning, 24th January, 2008.

The progress of the prosecution thereafter has been as follows:

• On 12th July, 2008 the plaintiff was served with the Book of Evidence and was returned for trial to the Dublin Circuit Criminal Court.

• The matter was listed for mention in the Circuit Criminal Court on 30th July, 2008, 24th November, 2008 and 3rd February, 2009. On the last date, the Court was informed by the plaintiff's legal representative that these proceedings had been instituted. The matter was adjourned for mention to 1st July, 2009.

• On 1st April, 2009 the DPP brought an ex parte application seeking to have a trial date fixed as no application for a stay on the prosecution had been brought by the plaintiff. That application has been adjourned from time to time to await the outcome of this application.

These proceedings were initiated by a plenary summons which issued on 9th December, 2008. A statement of claim was delivered on 30th March, 2009. This application was initiated by a notice of motion which issued on 22nd April, 2009 returnable for 27th April, 2009. It was listed for hearing, and heard, on 18th June, 2009.

No appeal was taken against the decision of O'Neill J. of 22nd January, 2008 within the time limited in the Rules of the Superior Courts. However, this Court was informed that on the day prior to the hearing, 17th June, 2009, the plaintiff initiated an application in the Supreme Court for an extension of time to appeal that decision.

The claim in the substantive action as pleaded

The plaintiff has outlined in his statement of claim what he understands to be the evidence arising from the s. 30 detention which the DPP intends to adduce, including forensic evidence which is alleged to link the plaintiff to a balaclava and gloves which were found in the vicinity of the spot at which the plaintiff was arrested and which, in turn, by forensic evidence are alleged to be linked to the house the subject of the burglary. The plaintiff has pleaded that he is prejudiced in the proposed criminal proceedings in that the evidence in question may be adduced by the prosecution and further in that inferences may be drawn under ss. 28, 29 and 30 of the Criminal Justice Act 2009.

The Articles of the Constitution which the plaintiff invokes on his plea that s. 30(1) is inconsistent with the Constitution are Article 38.1, Article 40.3.1 and Article 40.4.1. His challenge to s. 30 (1) is founded on the proposition that it permits the arrest and 72 hour detention of a person who is merely suspected of possessing information in relation to particular types of offences but is not suspected of having committed or being about to commit an offence, or of refusing to provide or concealing information regarding an offence, or of any wrongdoing, or of being in any way blameworthy or dangerous. The plaintiff anticipates that these proceedings will be defended on the basis that he does not have the requisite locus standi to maintain the proceedings. He contends that the fact of his arrest and the prospect that he may be convicted of serious offences on foot of his detention under s. 30(1) are sufficient to give him standing. He also contends that there is an overwhelming public interest in permitting the plaintiff to challenge the constitutionality of s. 30(1), in reliance on a passage in the judgment of Henchy J. in Cahill v. Sutton [1980] I.R. 269, which I will quote later. At the hearing, counsel for the plaintiff acknowledged that, unless he is successful on the "public interest" argument, he cannot maintain these proceedings.

Counsel for the plaintiff has laid particular emphasis, to the extent of pleading it in the statement of claim, on the approach adopted in the Report of the Committee to Review the Offences against the State Acts, 1939 – 1980 and Related Matters, which Committee was established under the chairmanship of the Honourable Mr. Justice Anthony J. Hederman and which report was published in 2002. One of the recommendations made by the Committee (at para. 7.50) is in the following terms:

> *"Insofar as s. 30(1) enables the Gardaí to arrest a person simply because they happen to have in their possession certain documents or information relating to actual crimes or the intended commission of offences under the 1939 Act or scheduled offences, it is unsatisfactory and ought to be changed. However, because the Gardaí already have powers to arrest under s. 30(1) persons who are reasonably suspected of having committed the scheduled offence under s. 9 of the 1998 Act, the Committee is of the view that power to arrest persons under s. 30(1) because they are believed to be in possession of information is no longer necessary and should be deleted."*

Earlier, the Committee had explained why it had considered s. 30(1) to be unsatisfactory. It was because, at face value, it appeared to permit the arrest of "totally innocent persons" simply because they might have witnessed events or chanced upon certain matters with the result that they came to be in possession of "information relating to the commission or intended commission" of a relevant offence. The Committee continued (at para. 7.45):

> *"Thus, for example, it seems to permit the arrest of a law-abiding member of the public who happened to chance upon paramilitary drilling in a local wood. As thus construed, this power not only appears to give rise to constitutional issues, but there would also be a serious doubt about the compatibility of this aspect of s. 30(1) with Article 5 of ECHR."*

Interlocutory injunction to restrain prosecution: the test

The parties are in agreement that, in determining whether it is appropriate to grant an interlocutory injunction to restrain a criminal prosecution pending the determination of proceedings in which the constitutionality of a statute relevant to the prosecution is challenged, the Court should approach the matter in the manner suggested by Clarke J. in his judgment delivered on 21st April, 2009 in D. (a minor) v. Ireland and Ors. [2009] IEHC 206. Clarke J. stated (at para. 4.5):

> *"In summary, I am satisfied that a court, asked to stay criminal proceedings pending a constitutional challenge, must consider the following matters:-*
>
> *(a) Whether a fair case to be tried has been made out as to the validity of the statute concerned including a consideration of whether any successful challenge would materially affect the pending criminal proceedings;*
>
> *(b) If so (given that it is difficult to see that damages could be an adequate remedy) where the balance of convenience lies affording a very significant weight indeed to the need to ensure that laws enjoying the presumption of constitutionality are enforced; but*
>
> *(c) Also considering any special or unusual countervailing factors which might render it disproportionate to require the criminal trial concerned to go ahead immediately, including having due regard to the possibility of minimising any effect on the proper progress of criminal litigation."*

It is important to recognise that Clarke J. set out that test having made it clear that the application of the test only arises where the Court is satisfied that it has jurisdiction to entertain constitutional proceedings in advance of the criminal trial. Having referred to the first decision of the Supreme Court in C.C. v. Ireland [2006] 4 I.R. 1, given on 12th July, 2005, Clarke J. stated (at para. 4.4):

> *"It is clear that the court retains a jurisdiction, in an appropriate case, to entertain such proceedings in advance of the criminal trial to which it is, principally, directed but that this practice should not be the norm and should only be followed in appropriate cases."*

There is disagreement between the parties as to whether this is an appropriate case, and I will return to that issue later.

A crucial factor in dealing with the first prong of the test in the D. case, whether a fair case to be tried has been made out as to the validity of the statute concerned, is whether the plaintiff has locus standi to maintain a constitutional challenge to s. 30(1). As counsel for the DPP expressly requested that the Court should determine this issue, I propose to deal with it first.

Locus Standi
In Cahill v. Sutton, Henchy J. set out the primary rule as to standing in an action challenging the constitutionality of a statute in the following passage (at p. 286):

> *"The primary rule as to standing in constitutional matters is that the person challenging the constitutionality of the statute, or some other person for whom he is deemed by the court to be entitled to speak, must be able to assert that, because of the alleged unconstitutionality, his or that other person's interests have been adversely affected, or stand in real or imminent danger of being adversely affected, by the operation of the statute."*

The passage from the judgment of Henchy J. on which the plaintiff bases his case preceded that passage. When one considers how Henchy J. applied the primary rule to the circumstances of the plaintiff in Cahill v. Sutton, it becomes very obvious that the argument being advanced on behalf of the plaintiff here is based on a misunderstanding of the true import of the passage relied on. However, before considering that passage it is worth putting it in context.

Having stated that the issue of standing was dealt with as an issue in a constitutional case for the first time in East Donegal Co-Operative v. The Attorney General [1970] I.R. 317 and having referred to the observations made in the judgment of the Supreme Court in that case as to how locus standi has been determined in other jurisdictions, Henchy J. stated (at p. 282):

> *"… in other jurisdictions the widely accepted practice of courts which are invested with comparable powers of*

reviewing legislation in the light of constitutional provisions is to require the person who challenges a particular legislative provision to show either that he has been personally affected injuriously by it or that he is in imminent danger of becoming the victim of it. The general rule means that the challenger must adduce circumstances showing that the impugned provision is operating, or is poised to operate, in such a way as to deprive him personally of the benefit of a particular constitutional right. In that way each challenge is assessed judicially in the light of the application of the impugned provision to the challenger's own circumstances."

Henchy J. observed that the general, but not absolute, rule of judicial self-restraint has much to commend it. It ensures that normally the controversy will rest on facts which are referable primarily and specifically to the challenger, thus giving concreteness and first hand reality to what might otherwise be an abstract or hypothetical legal argument. He went on to outline the countervailing considerations which militate against allowing any citizen, regardless of personal interest or injury, to bring proceedings to have a particular statutory provision declared unconstitutional on the ground that such approach would generally be undesirable and not in the public interest. The case would tend to lack the force and urgency of reality. There would be a risk that the person whose case has been put forward unsuccessfully by another might be left with a grievance that his claim was wrongly or inadequately presented. Later Henchy J. pointed to the hazard that, if the courts were to accord citizens unrestricted access, regardless of qualification, for the purpose of getting legislative provisions invalidated on constitutional grounds, this important jurisdiction would be subject to abuse, a point which had been made by O'Higgins C. J. in his judgment at p. 276. Henchy J. observed that the working relationship that must be presumed to exist between parliament and the judiciary in the democratic scheme of things postulated by the Constitution would not be served if no threshold qualification were ever required for an attack in the Courts on the manner in which the Legislature has exercised its lawmaking powers and he presented a picture of the havoc which could be wreaked by opponents of a particular piece of legislation.

The passage from the judgment of Henchy J. on which the plaintiff relies is preceded by the comment that a citizen has little reason to complain if, in the normal course of things, he is required, as a condition to invoking the court's jurisdiction to strike down the law for having been unconstitutionally made, with all the dire consequences that may on occasion result from the vacuum created by such a decision, to show that the impact of the impugned law on his personal situation discloses an injury or a prejudice which he has either suffered or is in imminent danger of suffering. The passage invoked by counsel for the plaintiff is to be found at p. 285. In it Henchy J. stated:

"This rule, however, being but a rule of practice must, like all such rules, be subject to expansion, exception or qualification when the justice of the case so requires. Since the paramount consideration in the exercise of the jurisdiction of the Courts to review legislation in the light of the Constitution is to ensure that persons entitled to the benefit of a constitutional right will not be prejudiced through being wrongfully deprived of it, there will be cases where the want of the normal locus standi on the part of the person questioning the constitutionality of the statute may be overlooked if, in the circumstances of the case, there is a transcendent need to assert against the statute the constitutional provision that has been invoked. For example, while the challenger may lack the personal standing normally required, those prejudicially affected by the impugned statute may not be in a position to assert adequately, or in time, their constitutional rights. In such a case the court might decide to ignore the want of normal personal standing on the part of the litigant before it. Likewise, the absence of a prejudice or injury peculiar to the challenger might be overlooked, in the discretion of the court, if the impugned provision is directed at or operable against a grouping which includes the challenger, or with whom the challenger may be said to have a common interest—particularly in cases where, because of the nature of the subject matter, it is difficult to segregate those affected from those not affected by the challenged provision."

There have been cases since 1980 in which exceptions to the primary rule as to standing have been recognised. For example, counsel for the DPP referred to the decision of the Supreme Court in Society for the Protection of Unborn Children (Ire) Ltd. v. Coogan [1989] I.R. 734, in which the Supreme Court acknowledged that in respect of a threat to the unborn child there could never "be a victim or potential victim". However, it is quite clear from the manner in which Henchy J. applied the primary rule in Cahill v. Sutton that the invocation of a jus tertii does not bring a litigant within the exceptions to the primary rule.

In Cahill v. Sutton the plaintiff was seeking a declaration that s. 11(2)(b) of the Statute of Limitations, which stipulated that the limitation period within which an action claiming damages for breach of contract which contained an element of damages for personal injuries could be brought was three years from the date on which the cause of action accrued, was unconstitutional because it did not contain a saver in relation to a cause of action which was not discoverable within the ordinary three year limitation period. In the case of the plaintiff, Mrs. Cahill, as Henchy J. pointed out at p. 280, such a saver would have availed her nothing because at all material times she was actually aware of all of the facts necessary for making the claim she wished to pursue, which was a claim for medical negligence. The argument advanced on behalf of Mrs. Cahill was that a person to whom the saver would apply, if it had been enacted, could claim that without it s. 11(2)(b) was unconstitutional. Henchy J. characterised that argument as follows (at p. 280):

"Therefore, the plaintiff is seeking to be allowed to conjure up, invoke and champion the putative constitutional rights of a hypothetical third party, so that the provisions of s. 11, sub-s. 2 (b), may be declared unconstitutional on the basis of that constitutional jus tertii—thus allowing the plaintiff to march through the resulting gap in the statute."

In applying the primary rule, Henchy J. stated (at p. 286) that Mrs. Cahill's case had "the insubstantiality of a pure hypothesis". He acknowledged that she would benefit in a tangential or oblique way in that, if the provision were declared unconstitutional, the consequential statutory vacuum would enable her to sue. However, that was an immaterial consideration in view of her failure to meet the threshold qualification of being in a position to argue, personally or vicariously, a live issue of prejudice in the sense which had been indicated.

The argument being advanced by the plaintiff in this case by reference to the bystander who may have witnessed the commission of an offence and who is arrested and detained pursuant to the power contained in s. 30(1) of the Act of 1939 is analogous to the argument advanced in Cahill v. Sutton by reference to the position of the person wishing to pursue a medical negligence action whose cause of action was not discoverable within the ordinary limitation period. For the reasons set out by the Supreme Court, the plaintiff's challenge to the constitutionality of s. 30(1) cannot be mounted

on the basis of a constitutional jus tertii, no more than the challenge of Mrs. Cahill to s. 11(2)(b) could.

The reliance by counsel for the plaintiff on the decision of the High Court (Keane J.) in O'Mahony v. Melia [1989] I.R. 335 is also misconceived. There, in judicial review proceedings, the applicants successfully challenged the constitutionality of s. 15 of the Criminal Justice Act 1951, as substituted by s. 26 of the Criminal Justice Act 1984, which permitted a Peace Commissioner to remand a person charged with an offence brought before him either in custody or on bail. Keane J., as he then was, held that those provisions conferred on the Peace Commissioner powers of a judicial nature in a criminal matter and, accordingly, were invalid having regard to the provisions of the Constitution. The applicants also sought an order of certiorari quashing the orders of the Peace Commissioner. It is clear from reading the judgment that the objective of the applicants was to have the detention declared unlawful with a view to having statements they made while in such unlawful custody deemed inadmissible at their trial.

Keane J. found that the applicants were challenging the statutory provisions on the basis that they themselves had been adversely affected by their operation. He stated as follows (at p. 340):

> *"It is beyond argument in the present case that the applicants were detained in purported pursuance of the legislation the validity of which is now challenged. It could not conceivably be suggested in these circumstances that no rights of theirs were 'broken, endangered or threatened' if the legislation is in truth invalid. What the consequences may be of any such infringement of the rights in question can only be determined in criminal proceedings yet to be heard. I accordingly conclude that the applicants have the necessary locus standi to challenge the relevant legislation."*

Unlike the applicants in O'Mahony v. Melia, whose challenge to the impugned legislation was based on the factual circumstances of their detention, the plaintiff's challenge is not so based, but is based on a hypothetical scenario unconnected with the factual circumstances of his detention.

As O'Neill J. stated in his ex tempore judgment, the fact scenario which forms the basis of the plaintiff's contention that s. 30(1) is invalid does not apply to the plaintiff's detention. The plaintiff is not a person who was arrested and detained as a person merely suspected of being in possession of information relating to the commission or intended commission of an offence.

Accordingly, I find that the plaintiff has not demonstrated that he has the locus standi to challenge the constitutionality of s. 30(1) on the basis he contends. Therefore, he has not established that there is a fair case to be tried as to the validity of that provision having regard to the provisions of the Constitution. On that basis alone, the plaintiff's application must be dismissed.

Other points raised by the DPP
Apart from submitting that the plaintiff has not made out a fair case to be tried, counsel for the DPP submitted that the plaintiff's application should be dismissed on a number of other grounds.

First, it was submitted that, as the plaintiff had never taken any steps to advance any appeal from the decision of O'Neill J., so that that decision was final and conclusive, these proceedings constitute a collateral attack on the decision of O'Neill J. and are an abuse of process. As I have come to the same conclusion as O'Neill J. came to on the question of locus standi, it is unnecessary to express any view on that submission. If it were, in my view, the decision of the Supreme Court in Application of Woods [1970] I.R. 154 invoked by counsel for the plaintiff would not necessarily entitle the plaintiff to pursue in these proceedings an issue which had been decided on a final and conclusive basis in the earlier Article 40 inquiry proceedings. The passage from the judgment of Ó Dálaigh C.J. in Application of Woods on which counsel for the plaintiff relied (at p. 162) applies when a second application for habeas corpus is brought by an applicant where, on an earlier application, his detention has been held not to be unlawful. The existence of the decision on the first application does not preclude the applicant from later raising a new ground even though that ground might have been, but was not, put forward on the first application. In these plenary proceedings the plaintiff has not raised any new ground for asserting that his arrest and detention pursuant to s. 30(1) of the Act of 1939 on 22nd January, 2008 was unlawful.

Secondly, it was submitted on behalf of the DPP that the equitable relief of injunction should be refused because the plaintiff has been guilty of gross and unexplained delay in bringing this application. If it were the case that the plaintiff had made out a fair case to be tried, delay or laches would be a factor to be weighed in the balance in applying the second and third criteria outlined by Clarke J. and the chronology outlined earlier would be of significance. However, it does not arise in view of the finding I have made that a fair case has not been made out.

Thirdly, it was submitted that, as the objective of the proceedings is to bring about a situation where evidence obtained as a result of the s. 30 detention would be deemed to be inadmissible at the trial of the plaintiff, the plaintiff's application is misconceived. It was submitted that there is a long line of authority to the effect that, in the context of a pending criminal trial, it is inappropriate to bring separate proceedings with a view to seeking to obtain advance rulings from this Court as to matters bearing on the admissibility of evidence at the trial. Further it was submitted that the fact that the challenge to the admissibility of evidence is based on a constitutional challenge to legislation does not alter the principle.

There are undoubtedly cases, as counsel for the plaintiff pointed out, in which the Superior Courts have made determinations in proceedings challenging the constitutionality of relevant statutory provisions where a criminal trial is pending. A recent example is the decision of the Supreme Court in Osmanovic v. Director of Public Prosecutions [2006] 3 I.R. 504, where the constitutionality of the statutory penalty for customs offences was at issue. On the other hand, as I adverted to in referring to the decision of Clarke J. in the D. case, an essential consideration in a case where it is sought to restrain the prosecution of criminal charges pending a constitutional challenge is whether it is appropriate for the Court to entertain such proceedings at all. In the C.C. case, on which Clarke J. based his conclusion that this Court retains a jurisdiction, in an appropriate case, to entertain a constitutional challenge while a criminal trial is pending, Fennelly J. stated (at p. 54):

> *"It is … quite inappropriate and a usurpation of the function of the court of trial for an accused person – or the prosecution, for that matter – to seek advance rulings from the High Court as to how any legal provisions should be interpreted in the course of a pending trial. It happens that the present case concerns a trial pending in the*

Circuit Criminal Court. … The proper forum for the determination of legal matters arising in the course of trial is the trial court itself, subject to appeal to the Court of Criminal Appeal."

However, Fennelly J. found that exceptional circumstances prevailed in the C.C. case, in that, at first instance, the trial Judge had ruled on the matters in issue and the Circuit Criminal Court might have felt bound by the views of the trial Judge. Further, the views of the trial Judge might also have been considered binding in other cases. In those circumstances, Fennelly J. stated that the Supreme Court should entertain the appeal, which happened.

In this case, the fact that the plaintiff has not established that he has locus standi to maintain the challenge to s. 30(1) obviates the necessity to consider whether this would be an appropriate case in which to entertain the challenge while the criminal prosecution is pending.

Order
There will be an order dismissing the plaintiff's application.