

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 502 J.R.]

BETWEEN

MARTIN KINSELLA

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 20th day of July, 2018

1. This is an application for an order of *certiorari* by way of judicial review quashing the order made by District Judge O'Donnell on 10th June, 2016 convicting the applicant of three offences arising from failure to pay fixed charge penalty notices as a result of which he had been prosecuted on Summons No. 1052437373, 1052437374 and 1052437375. The applicant was convicted and fined €150.00 on Summons 1052437373, €300.00 with two years to pay on Summons 1052437374 and the offence on Summons 1052437375 was taken into consideration. Recognisances were fixed at €450.00 in the applicant's own bond.

2. Leave to apply for judicial review was granted by Humphreys J. on the 28th July, 2016 on the following grounds:-

(a) Section 103(15) (sic) of the Road Traffic Act 1961 (as amended) provides that when a fixed charge penalty notice issues it should be presumed until the contrary is shown that an accused received the notice under the section to which the offence relates thereby placing an evidential burden on an accused person which requires a determination by a trial judge as to whether the accused has displaced the burden or rebutted the statutory presumption to the appropriate standard. It is claimed that the first named respondent erred in law and acted outside his jurisdiction by indicating that issues relating to the non-receipt of a fixed charge penalty notice were simply administrative matters and not matters which concerned the court.

(b) The first named respondent erred in law and acted outside his jurisdiction by indicating that he was not interested in administrative matters relating to the receipt of a fixed charge penalty notice and that his only concern was knowing whether the accused had tax or NCT on his vehicle at the appropriate time.

(c) The learned district judge acted in breach of fair procedures and natural justice by failing to engage with the submission made by the applicant's solicitor at the close of the applicant's case.

(d) The decision of the learned district judge was unreasonable, irrational and lacked proportionality and lacked the essential characteristics of a lawful order.

It is clear that the reference to s.103(15) was in error and should have referred to s.103(10) of the Act.

Background

3. On 19th July, 2015 at Con Colbert Road, Dublin, Garda Damien Duffy stopped a red BMW motorcar driven by the applicant which he then seized under s. 41 of the Road Traffic Act 1961 (as amended) because it was not displaying an NCT disc or a tax disc. On 30th July, 2015 a fixed charged penalty notice was issued to the applicant's address for failure to display a valid insurance disc, a valid tax disc and for using a vehicle in a public place without a NCT. These fixed charge penalty notices remained unpaid and summonses issued for these and other offences. These summonses were listed for hearing on 10th June, 2016 before District Justice O'Donnell at Court 46 at the Bridewell, Dublin.

Alleged Postal Difficulties

4. The applicant's solicitor Mr. Leader deposed in the grounding affidavit that he approached Garda Duffy before the hearing and explained difficulties which his client had in receiving his mail at his address about which he had complained to Dublin City Council. He stated that Garda Duffy informed him that he had no difficulty in believing that his client had not received the fixed charge penalty notices but indicated that he would allow District Judge O'Donnell to decide the issue.

5. Mr. Leader explained that he had prior experience of this difficulty with his client in a case which was heard on 8th June, 2016 in Court 44 at the Bridewell in respect of a speeding summons. This was also an offence that attracted a fixed charge penalty notice. He stated that the applicant had produced a letter from Dublin City Council acknowledging receipt of a complaint made regarding the condition of postal boxes at his address 28 Coultry Terrace, Ballymun, Dublin 11. This complaint was made to the council because the post boxes had been in a state of disrepair for several years and post had been constantly stolen and not reached its intended recipient. On that occasion the letter was shown to the prosecuting garda who applied to have the case struck out. The letter is dated 31st March, 2016 addressed to the applicant from the Senior Executive Officer in Housing Maintenance in respect of a problem as reported by the "tenant". The letter confirms that a call was logged on 31st March, in respect of a problem relating to a door on letterbox which was broken and complaining that "mail is being stolen". This letter was not produced in evidence during the course of the District Court hearing in respect of these summonses.

Section 103 of the Road Traffic Act 1961 (as amended)

6. The statutory provision in issue in these proceedings is s. 103 of the Road Traffic Act 1961 (as amended) which provides:-

"(2) Where a member of the Garda Síochána has reasonable grounds for believing that a fixed charge offence is being or has been committed by a person—

(a) if the member identifies the person the member shall serve or cause to be served personally or by post, on the person a notice under this section, ...

(7) If a notice is served pursuant to subsection (2)(a) ... of this section, it shall ..., contain a statement to the effect that —

- (a) the person on whom it is served is alleged to have committed an offence specified in the notice,
- (b) the person may, during the period of 28 days beginning on the date of the notice, make a payment of a fixed charge of a prescribed amount as specified in the notice,
- (c) if the person does not make the payment specified in paragraph (b) of this subsection, during the periods so specified, the person may, during the period of 28 days beginning on the expiration of that period, make a payment of a fixed charge as specified in the notice of an amount 50 per cent greater than the prescribed amount referred to in paragraph (b) of this subsection, and
- (d) A prosecution in respect of the alleged offence will not be instituted during the periods specified in the notice or, if a payment so specified in accordance with the notice, is made during the appropriate period so specified in relation to the payment, at all..

(8A) The payment of a fixed charge shall not be accepted after the expiration of the period of 56 days beginning on the date of the notice concerned that was served or affixed under subsection (2) or served under subsection (5) of this section, as the case may be.

(9) Where a notice is served or affixed under subsection (2) ... of this section—

- (a) a person or the person to whom the notice applies may, during the period specified in the notice and in accordance with the notice, make a payment specified in the notice,...
- (c) a prosecution in respect of the alleged offence to which the notice relates shall not be instituted during the periods specified in the notice or, if a payment so specified is made during the period so specified in accordance with the notice, in relation to the payment, at all.

(10) In a prosecution for a fixed charge offence it shall be presumed until the contrary is shown that—

- (a) the relevant notice under this section has been served or affixed or caused to be served or affixed, and
- (b) that a payment pursuant to the relevant notice under this section, accompanied by the notice, duly completed (unless the notice provides for payment without the notice accompanying the payment), has not been made."

7. Though not relevant to the summonses in this case s. 44 of the Road Traffic Act 2010 which was commenced on 1st June, 2017 provides for the payment of a fixed charge on service of a summons. Section 44(1) provides that where a member of An Garda Síochána serves a person with a summons in respect of a fixed charge offence the member shall serve or cause to be served a s. 44 notice at the same time. Under s. 44(4) a person upon whom the notice and summons has been served may not later than 7 days before the date specified in the summons on which the person is required to appear in court make a payment of a fixed charge of the amount stated in the notice in the manner specified. If a person served with a summons accompanied by a s. 44 notice makes a payment of the fixed charge proceedings in respect of the alleged offence must be discontinued. The applicant lays particular emphasis on s. 44(10) which provides:-

"(10) Where a person is served with a summons accompanied by a s. 44 notice in respect of a fixed charge offence, it shall not be a defence for the person served with the summons to show that he or she was not served with a fixed charged notice in respect of the alleged offence in accordance with section 35."

The Hearing

8. The transcript of the short hearing before the District Court was exhibited in the course of this application. The following relevant exchange occurred:-

"Mr. Leader: Yes Garda Duffy said he sent a fixed penalty notice regarding these matters. There has been an ongoing situation with Mr. Kinsella's box, or post box rather. There was actually a matter in Court 44 on Wednesday, where Mr. Kinsella was charged with breaking the speed limit and the matter was struck out because he was able to produce a letter from Dublin City Council acknowledging that there has been an ongoing problem with his post box. He can give evidence to this judge, if you so require.

Judge: No. Nothing to do with this Court.

Mr. Leader: Yes and just ...

Judge: We have summons here, summons for no tax displayed and no NCT.

Mr. Leader: Yes, judge, but a fixed penalty notice was sent regarding those matters.

Judge: But, Mr. Leader notices are an administrative matter, I am dealing with three summons.

Mr. Leader: I understand judge but my ...

Judge: Now is he pleading guilty or not guilty?

Mr. Leader: Well he is pleading not guilty judge because he would have paid the fixed penalty notice.

Judge: That is not an excuse.

Garda Duffy: I am in a position to contend it, judge.

Judge: It is not an excuse.

Mr. Leader: Well judge he has a defence ...

Judge: We have summons for no tax displayed and no NCT. Now ...

Mr. Leader: Judge ...

Judge: Is he going to give evidence that he had tax and he had an NCT?

Mr. Leader: Well he can certainly give evidence that he did not receive the fixed penalty notice.

Judge: Now Mr. Leader you are not listening to me ...

Mr. Leader: I am totally ...

Judge: I am not interested in administrative functions; I am dealing with summons[es] that are listed before this Court ...

Mr. Leader: Yes, well he

Judge: For no tax displayed and no NCT.

Mr. Leader: Yes, judge but he has a defence opened to ...

Judge: There is no defence.

Mr. Leader: Judge I respectfully disagree.

Judge: So are you going to give evidence in relation to the tax being displayed and the NCT?

Mr. Leader: Well if you want Mr. Kinsella can give evidence regarding the fixed penalty notice, he ...

Judge: Mr. Leader there is no point in saying that again. I am not interested in the fixed penalty notices.

Mr. Leader: Well I don't think he can assist the court regarding these ...

Judge: So he is not going to give evidence then?

Mr. Leader: Well I can put it to him judge but I don't think he ...

Judge: Even the gulls are complaining.

Mr. Leader: Yes, as I say judge I don't think he can assist the court so he won't be giving evidence.

Judge: Right.

Mr. Leader: But ...

Judge: How long is the tax out?

Garda Duffy: Judge I don't have any record. I believe that the vehicle was purchased a short enough time after, well, before I stopped him, judge. However, there is other matters that came to my attention that led to the prosecution, judge.

Mr. Leader: Sorry judge I think Mr. Kinsella would like to give evidence as to I suppose reinforce what I have regarding the matter.

Judge: He's changed his mind?

Mr. Leader: Well he has judge so it would just be a very short evidence."

9. Garda Duffy gave short evidence of stopping the applicant on 19th July, 2015 at 2:30pm in a particular motor vehicle which he was driving. There was no NCT on the vehicle and no tax displayed. He said fixed charge penalty notices were issued in respect of these offences to the address that he supplied.

10. The applicant then gave evidence. He said he had the car on loan and was not sure whether it was taxed or had a NCT. He stated that he did not receive the fixed penalty notice and that had he done so he would have paid it. He was then cross-examined. He stated that he had bought the car three hours prior to being stopped but had not checked whether the NCT or tax were in order. He was asked to outline the "physical setup" of the address at which he lived and replied:-

"It is an apartment block, a council apartment block and I live on the top floor and right at the main front door to the street so about 2ft from the main street going by, there is post boxes there and they are all broke. I have had letters from the council and everybody else, it is broken a long time. I believe one of the guards there had everything for me that they agreed that the post boxes are broken and the matter that was taken was a tax matter."

He was then asked to refrain from giving hearsay evidence and whether he could give any evidence to the court notwithstanding the problems which he had in receiving post that "a fixed charge was not at least put into your post box and whatever happened after

that is a separate matter?"

11. Objection was taken to this question by Mr. Leader on the basis that the applicant could not possibly show one way or another that a fixed penalty notice was sent when he was not the one sending it or delivering it. When this question was described as ridiculous by Mr. Leader the judge replied "it is all ridiculous. Non-display of tax convict". Before sentence was imposed Mr. Leader reiterated the fact that his client would have paid the fixed penalty had he received the notices to which the judge replied that "of course he is going to say that ... that's nonsense".

The Rebuttable Presumption

12. It was submitted on behalf of the applicant that he was entitled to adduce evidence to the effect that he had not received the fixed charge penalty notices and that the learned District Judge was under an obligation to consider that evidence and decide whether the applicant had rebutted the statutory presumption provided under s. 103(10) before reaching a decision in the case. It is said that the judge erred in law and acted in excess of jurisdiction and in breach of natural justice and fair procedures in ruling that the evidence which the applicant wished to rely upon related to an administrative matter and was not relevant as a defence to the charges set out in the summonses. It was submitted on behalf of the respondent that the alleged non-receipt of a fixed charge penalty notice did not constitute a defence to the charges set out in the summonses. It was also submitted that the learned judge determined the real issue he had to consider namely whether or not the offences alleged had been committed and the facts related thereto had been established beyond reasonable doubt.

13. Counsel for the respondent relied on *DPP v. Kevin Tully* [2009] 7 JIC 1301, in which the appellant was convicted in the District Court driving in excess of the speed limit. The appellant claimed that he had not received the relevant fixed charge notice. It was held by His Honour Judge White (as he then was) that proof of posting of the notice as distinct from proof of its receipt would be sufficient to discharge the onus placed on a member of An Garda Síochána by s. 103(2)(a) of the 1961 Act.

14. In addressing the presumption under s. 103(10), the learned judge relied upon an extract from McGrath on *Evidence*, para. 2-103 at p. 58 which states:-

"In the case of a mandatory evidential presumption, it suffices to defeat the operation of the presumption if the party against whom the presumption operates adduces evidence as to the non-existence of the presumed fact, i.e. it merely places an evidential burden on the opposing party to adduce some evidence that the presumed evidence does not exist"

15. The learned judge held that proof of posting the notice as distinct from proof of its receipt would be sufficient to discharge the onus placed on a member of An Garda Síochána under s. 103(2)(a) of the Act quoted above. Although the specific issues that arise in this case were not argued in *Tully* the learned Circuit Judge was satisfied that the prosecution could rely on the certificate of posting without any further proof such as the evidence of the person posting the notice. In addressing the effect of the non-receipt of a fixed penalty notice by the accused, the learned judge stated:-

"It is clear from the provisions of Section 103(7)(d) of the Act that the effect of the service of a Fixed Penalty Notice is to postpone a prosecution for a specific period of time to allow the fixed penalty to be paid, and if it is so paid no prosecution will follow. If not, once a District Court Summons has been issued in accordance with the Courts (No. 3) Act 1986, and the complaint is made within the relevant statutory period, the non receipt of a Fixed Penalty Notice is not an automatic bar to the Judge proceeding with the trial. If the essential proofs required for the offence are established the trial Judge can convict. The fact that penalty points increase, when a Court conviction arises, is not of itself a bar to conviction. There always remains vested in the Court, the discretion not to proceed to conviction if basic unfairness arises."

16. It is submitted by the applicant that the learned District Judge was precluded from hearing the charges set out in the summonses unless he was satisfied beyond reasonable doubt that the fixed penalty notice had been served and that the presumption as to service once challenged by the physical evidence was not rebutted. White J. in *Tully* stated that the effect of the service of a fixed penalty notice is to postpone a prosecution for a specified period to allow for the penalty to be paid. The prosecution followed if it was not paid. It is clear that a summons may issue and if duly served, may be heard and determined by the court. White J. clearly stated that the non-receipt of a fixed penalty notice was not an automatic bar to the hearing of the charges set out in the summonses.

17. The purpose of a fixed penalty notice is to provide an erring motorist with a quick and efficient method of acknowledging his wrongdoing and submitting to a lesser penalty than that which might be imposed after conviction. In doing so the motorist also avoids prosecution and the recording of a potential conviction for a criminal offence. The provisions of s. 103(7) and (9) are intended to ensure that a person who is served with a fixed penalty notice is afforded the opportunity within the prescribed period to pay the penalty and in that period of grace, he may not be prosecuted for the offences. If the penalty is paid, he may not be prosecuted at all. If the penalty is unpaid a summons may issue based on an appropriate complaint. Once the summons had been duly served, the matter comes before the court which is vested with full jurisdiction to hear and determine the charges. The court's jurisdiction is based on the charges set out in the summons which issued on the basis of a complaint duly made.

18. It is incorrect to state that the history of the fixed penalty notice is irrelevant to the trial of the charges set out in the summons. The statute clearly contemplates that the motorist charged with a fixed charge notice offence is entitled to raise the issue of the non-service of the notice or the payment of the charge before the court. The evidential burden of establishing that the charge was paid or the notice was not served was dealt with by way of presumption which is a legislative evidential tool to be deployed in the course of the trial. The existence of the provision itself demonstrates that the matters subject to the presumption may be raised in the course of the trial. Section 103(10) entitled the learned judge to presume until the contrary is shown that a relevant notice has been served or caused to be served and that a payment pursuant to the relevant notice accompanied by the notice duly completed, has not been made. Thus, the accused would be entitled to advance evidence that the penalty had been paid and that therefore the prosecution should not have been initiated at all and the summons dismissed. It seems to me that in those circumstances, the payment of the penalty within the prescribed period would afford a full defence to the charges laid not because the acts alleged had not been committed but because the payment was made. Similarly, an accused may claim that the summons was wrongly initiated within the time allowed for the payment of the penalty and that he is therefore entitled to succeed on the basis that the prosecution should not have been initiated during the course of the prescribed period. It is in this sense that White J. stated that:-

"There always remains vested in the Court, the discretion not to proceed to conviction if basic unfairness arises."

19. I am also satisfied that the basic "unfairness" referred to includes any unfairness that arises from the initiation of a prosecution in respect of failure to pay a fixed penalty notice in respect of which the accused claims not to have received the notice in

circumstances which were outside his control such as the vandalism of his post box. I am not satisfied that it is appropriate simply for a trial judge to take the view that the issue of service of a fixed penalty notice is simply an administrative matter and of no relevance at all to the prosecution of the offences laid in the summonses. An accused is entitled to adduce evidence to the effect that he has not been served with the fixed penalty notice and did not therefore have the opportunity to discharge the fixed penalty within the prescribed period and that consequently it would be unfair if he were to be convicted without having been afforded the statutory opportunity to pay the fixed penalty. The evidential rule applicable to how that matter may be canvassed is contained in section 103(10). It may be that a trial judge would find that the facts set out in the summons were proven and convict the accused notwithstanding such submissions but he must entertain the submission and hear the evidence. The issue may also be relevant to the penalty to be imposed if the accused is convicted and might reasonably, in appropriate circumstances provide a basis upon which a trial judge might mitigate the penalty to reflect the fact that the accused did not have the opportunity to pay the lesser sum at an earlier stage due to circumstances beyond his control. Alternatively, a trial judge might conclude that it would be entirely unfair to record a conviction against an accused who has successfully raised an issue as to service of the fixed penalty notice and dismiss the charge. I am satisfied that this is the "discretion" contemplated in White J's judgment in the *Tully* case which is vested in the trial judge in relation to this issue and in that sense provides what may in some cases amount to a defence resulting in the dismissal of the charge. However, this does not preclude the trial judge from determining that he ought not to exercise his discretion if the facts constituting the ingredients of the offences are established beyond reasonable doubt and proceed to convict.

20. I am satisfied that these issues were matters of defence to be considered by the trial judge (see by analogy *Minister for Agriculture v. Norgro* [1980] I.R. 155) but I am not satisfied that a failure to prove service of the notice deprives the court of its jurisdiction to hear and determine the charges.

21. At the trial, the trial judge must permit the accused to raise these issues by way of defence and cross examine and adduce such evidence as is relevant to them. The failure to permit the accused to address these issues and their dismissal as irrelevant administrative matters deprived his solicitor of the opportunity to defend him to the fullest extent. It may be that in many cases, the issue will be more relevant to the penalty to be imposed than provide a successful defence to the charges but in that respect each case depends on its own circumstances.

22. The court is, therefore, satisfied that the learned judge erred in law in failing to permit the applicant's solicitor to cross examine and make submissions in respect of the consequences for his client of the non-receipt as alleged of the fixed penalty notices in respect of the offences set out in the summonses. Though the learned judge at a later stage heard evidence from the applicant in respect of these difficulties as set out at para. 10 above, his evidence in respect of the matter was described as ridiculous by the learned trial judge in a manner which indicates having regard to his previous observations and conclusions that the issue of service or non-receipt of the fixed penalty notice was an administrative matter and irrelevant to the decision which he ultimately made to convict the applicant. He did not engage at all with the submissions made in the context of the 'discretion' described by His Honour Judge White in *Tully*. Furthermore, I am satisfied that he also failed to consider at all or in any reasonable way the applicant's submissions and evidence as to non-receipt of the fixed penalty notices at the sentencing stage following conviction. When the solicitor sought to reiterate the fact that his client would have paid the fixed penalty had he received the notices, the learned trial judge dismissed that as "nonsense". While the learned judge might have been entitled notwithstanding such evidence and submissions to proceed to conviction and impose the penalties actually imposed in the case, his failure to consider the defence submission and evidence fully and properly in the normal course of the procedure applicable to a criminal trial and in accordance with the rules of evidence as envisaged and set out in s. 103(10) for that purpose, constitutes, in my opinion, a breach of fundamental fairness which resulted in a trial that was not in accordance with law.

23. Accordingly, I would grant an order of *certiorari* and return the matter to the District Court for hearing before a different judge of the District Court.

24. In reaching this conclusion I have considered whether the rulings made by the learned judge might be regarded as rulings made in the normal course of a criminal trial as to the relevance or admissibility of evidence. I am satisfied that they were not. While in one sense the ruling that the issue of service was an administrative matter and therefore irrelevant to the issues in the trial could be regarded as a ruling made within jurisdiction which could be the subject of further challenge on appeal or by way of case-stated on a point of law, nevertheless I am satisfied that the learned judge went much further in this case and indicated that the accused was not entitled to conduct or put forward the defence outlined and raise issues of service of the notices which ought to have been considered as matters of defence to the charges or at least relevant to mitigation of penalty if convicted.