

## THE HIGH COURT

## JUDICIAL REVIEW

## IN THE MATTER OF SECTION 52(1) OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT, 1961 AND

## IN THE MATTER OF ORDER 102, RULE 12 OF THE DISTRICT COURT RULES, 1997 AND

## IN THE MATTER OF ORDER 62 OF THE RULES OF THE SUPERIOR COURTS

[2005 No. 905 SS]

BETWEEN

CLARE COUNTY COUNCIL

APPLICANT

AND  
DEREK FLOYD

DEFENDANT

**Judgment of Mr. Justice Charleton delivered on the 19th day of January 2007.**

1. This is a consultative case stated referred to the High Court by Judge Mangan on 22nd October, 2004, from Ennis District Court, Co. Clare. Fundamentally, it concerns the interpretation of the criminal law doctrine of contemporaneity, which requires coincidence of the mental and external elements of an offence. The function of the criminal law is to concern itself only with the distinct criminal conduct of which the accused is charged, and not his general character. That is relevant to sentence only. A criminal offence may be committed in a moment or over a longer period of time. If the accused punches someone in the face, he is criminally liable for assault if he intends that blow during the moment it takes to deliver it. If a person attempts to swat a fly but accidentally hits a person, the absence of a coincident mental element means that the striking of the victim is not a criminal offence; that remains the principle notwithstanding that the accused is later delighted when he discovers that he has managed to hit the person he most dislikes in the eye.

2. This principle has led to some few difficulties of interpretation which point up the necessity for its subtle application. The commission of all criminal offences takes time. If the victim is kidnapped, the abduction by force will take more time than that required for a momentary assault. If the accused kills someone then it can be the case that a progressive series of acts is required which will eventually lead to the death of the victim. This could take some hours. Where the person kidnapped is held over a period of days, it is obvious that the nature of the offence requires the passage of time. It could be said that the kidnapping occurs once but the resultant false imprisonment takes place over a continuing period of time. The law therefore tends to draw distinction between a momentary offence and a continuing offence. An analysis of the facts will provide the answer as to whether the requirement that the mental element coincides with the external act has been met. Unlike in the instance of the man who accidentally swats an enemy, while intending to kill a fly, where an offence is continuous even if the mental element was not present at the start of the act, if it appears at any stage during its continued execution all the elements of criminal liability are in place. In *Fagan v. Metropolitan Police Commissioner* [1969] 1 Q.B. 439 the accused accidentally, or so he said, drove his car onto a policeman's foot but then deliberately left it there for a minute or two. His defence was that the act of assault and the intent never coincided. The Divisional Court held that the accused's conduct in driving the car onto the foot and leaving it there should be viewed as a continuing act; the fault element coincided when he realised what had happened and decided to leave the car where it was. The principle remains that the mental and external elements must coincide; *R. v. Hehir* [1895] 2 I.R. 709. Where an act is continuous it is easier to find that mental element in the behaviour of the accused. A homicidal assault which takes place over a period of time may be regarded, notwithstanding the existence of separate phases of it, as a continuing act. From the point where the accused has the intention to kill or seriously injure the victim criminal liability is established; *Attorney General's Reference (No. 4 of 1980)* [1981] 1 W.L.R. 705.

3. In practical terms, if an offence occurs in an instant, the charge must specify that it occurred at that instant. Usually that is done by the indictment specifying that on a particular day the accused, for instance, murdered the victim. If an offence continues over time, like false imprisonment, then the indictment is correct if it alleges that it occurs between two dates, or by picking any date in between. It can be the case that every time a man opens his business on a particular day and shuts it in the evening, he commits a distinct offence each day.

4. The second principle, applicable to the set of facts to which I shall shortly turn, is that charges should not be double. It should be possible to know from the nature of the way the charge is framed that the accused has been convicted of a single and distinct offence and not of various elements of bad conduct over a period of time. Charges are framed in order to avoid duplicity by making reference to specific dates or sometimes, with a view to giving the accused information, by describing the events. Through these two rules, the criminal law concerns itself with conduct and not with character.

**The Legislation**

5. Whether the mental element must coincide with the external commission of the crime at one particular instant of time only, or at any stage during the continuation of an offence is a matter of construction. The Planning and Development Act, 2000, was passed to consolidate most of the existing law in relation to that subject and to introduce several amendments. Part VIII deals with enforcement, s. 151 provides "Any person who has carried out or is carrying out unauthorised development shall be guilty of an offence."

6. Under s. 152 a planning authority may issue a warning letter to a person carrying out a development where they have either received a complaint or where they decide to act of their own motion. If the development is trivial the authority has the discretion not to issue a warning letter. Under s. 153 the authority may then investigate the matter, if it considers that necessary, and it may then decide to issue an enforcement notice. This is to be done "as expeditiously as possible". Representations may be made by the person to whom the warning letter is addressed and these should be taken into account. This procedure, however, is not a bar to subsequent criminal proceedings as s. 153(5) plainly states that a failure to issue a warning letter does not prejudice the issue of an enforcement notice. Such a notice is issued under s. 154 and is served on the person "carrying out the development". It takes effect as of the date of service. The particulars required by statute indicate that the enforcement notice must refer to the land concerned and then go on to indicate that no permission has been granted in respect of a development or that the development has not proceeded in conformity with the permission. The wording used in relation to these two situations all indicate a continuous course of action. If the development has commenced then the enforcement notice tells the recipient that it must cease. This implies that, of its nature, the development goes on over a period of time. If the development has commenced, but is not in conformity with the planning permission, then the enforcement notice indicates that it must proceed in conformity with the permission granted. From the

perspective of remedying apparent breaches, the enforcement notice will indicate what works are to be taken and these may involve "the removal, demolition or alteration of any structure and the discontinuance of any use and, insofar as is practicable, the restoration of the land to its condition prior to the commencement of the development". These are all indications of a continuous offence. Section 154(8) provides that a person who fails to comply with the requirements of a notice will be guilty of an offence. Under s. 155 an enforcement notice may be issued in cases of urgency, by-passing the previous procedures of complaint or decision and warning letter. Penalties are provided for under s. 156. This contemplates that there should firstly be a conviction and then, where that conviction is in place, a continuation constitutes an offence in itself. This will clearly, as the word implies, constitute a continued breach over time. The section therefore divides the offence by indicating it may be brought on a day by day basis:-

"156(2) Where a person is convicted of an offence referred to in subsection (1) and there is a continuation by him or her of the offence after his or her conviction, he or she shall be guilty of a further offence on every day on which the contravention continues and for each such offence shall be liable [the penalties are then specified]."

By s. 157 no warning letter or enforcement notice can issue and no proceedings for an offence under that part of the Act can commence when seven years have expired from the date of the commencement of the relevant unauthorised development.

7. On the basis of the foregoing, I have no hesitation in judging that a failure to comply with an enforcement notice is a continuing offence. The mental element required in a prosecution, and that would appear to be an intentional or reckless failure to comply with the requirements of an enforcement notice, must coincide with the external fault of carrying on an unauthorised development. That can happen at any stage while the unauthorised development is carried on or exists and so establish criminal liability.

### **The Case Stated**

8. Three summonses came before the learned district judge and these related to two separate enforcement notices. For the purpose of understanding the answer to the questions in the case stated I now give a truncated history of the various proceedings. The first two summonses both related to an enforcement notice which was served on 23rd October, 2002. In this enforcement notice Clare County Council asked the accused, Derek Floyd, to "cease unauthorised development and use of road for commercial haulage, decommission quarry operations on site and restore the site to a satisfactory condition and restore the road to its original width" at certain lands in Ballybran, Ogonnelloe in the County of Clare. The accused was represented by Mr. James Nash, a distinguished solicitor practising from Scariff in County Clare. This first summons was dismissed at Tulla District Court on 19th June, 2003. The judge dismissed it because he accepted an inventive argument from Mr. Nash that the prosecution, to succeed in proving this offence of breaching an enforcement notice had to show, as part of their proofs in court, that a letter of complaint in relation to the quarrying works had been received from a member of the public.

9. A second summons was then issued, based on the same enforcement notice, and was returned ultimately to Killaloe District Court on 17th November, 2003. The prosecutor then told the court that, on legal advice, Clare County Council was not proceeding with this summons. The case was dismissed with costs to the accused.

10. A new warning notice was issued on 18th February, 2004, in the appropriate form and this was ultimately heard on 17th May, 2004, at Killaloe District Court. The charge read:-

"That the accused Derek Floyd on the 25th day of March, 2004, did knowingly fail to comply with the requirements of an enforcement notice served on him by the prosecutor, on 18th day of February, 2004, in respect of lands at Ballybran, Ogonnelloe in the County of Clare, contrary to the provisions of s. 154(8) and s. 156(1)(b) of the Planning and Development Act, 2000."

Mr. Nash then argued that the case had already been heard, that the court had no jurisdiction to determine the offence alleged and that the accused should be acquitted again by reason of having been acquitted on the first enforcement notice and the first summons at Tulla District Court on 19th June, 2003.

11. Essentially the argument of Mr. Nash has been repeated before this court. It is well summarised at para. 31 of the written submissions on behalf of the accused as follows:-

"It is further submitted that there is no provision within the 2000 Act for the issue of further Enforcement Notices in the event of an acquittal in respect of an offence created under the Act. It is submitted that this omission of a specific power to issue further enforcement notices in respect of a particular development in circumstances where a prosecution in respect of that development has been dismissed must have been intended by the legislature in circumstances where the possibility of continuing offences was clearly within the contemplation of the Oireachtas. In the absence of an express statutory power within the Act which provides for the issuing of further enforcement notices in relation to a particular alleged unauthorised development, in the event of an acquittal on the merits on foot of a first enforcement notice in respect of the same alleged unauthorised development, it is submitted that the prosecutor has no power to issue such further notices."

12. In reply, the prosecutor claims that the apparent acquittal of the accused on 19th June, 2003, was not a dismissal on the merits of the case and that it therefore did not operate as a bar to any future proceeding. Secondly, even if that argument is not accepted, the prosecutor argues that an examination of the two enforcement notices clearly shows that the first one, which was the subject of two separate summonses, relates to a period which was earlier than, and completely different to, the date mentioned in the second enforcement notice and hence in the third summons.

13. Arising from this, the learned district judge had asked for the advice of the High Court on two questions as to whether:-

1. Clare County Council are entitled, in the light of the Orders made at Tulla District Court on 19th June, 2003 and at Killaloe on 17th November, 2003, to bring a prosecution against Derek Floyd in relation to an alleged failure by him on 25th March, 2004, to comply with the requirements of the enforcement notice of 18th February, 2004?

2. Have I jurisdiction to hear and determine the offence alleged by Clare County Council against Derek Floyd in the summons issued on 23rd April, 2004, in the light of the orders made at Tulla District Court on 9th June, 2003 and at Killaloe District Court on 17th November, 2003?

### **Decision**

14. My advice to the learned district judge is as follows. I do not agree with the inventive submission made by Mr. James Nash, Solicitor, that the prosecution must prove either that the planning authority made a decision of its own motion, or on foot of a letter from a member of the public, nor need they prove, if it arises, a warning letter before the issue an enforcement notice. These administrative requirements are not elements of the offence. This is made plain by s. 155 of the Planning and Development Act, 2000, which allows for the administrative mechanisms of the Act to be by-passed in cases of urgency. Nonetheless, the offence remains the same. The proofs required by the prosecution encompass the service of the enforcement notice and evidence of an unauthorised development or one not in accordance with a planning permission. The mental element may be inferred from evidence establishing the control of the accused over the development in question. If there is an issue as to letters, complaints or decisions prior to the enforcement notice, that may, on request, be dealt with in correspondence prior to the trial. Administrative law remedies, and not criminal ones, would apply to that. The prosecutor has argued that the accused was never at hazard of being convicted of the offence because the failure to prove a letter of complaint from a member of the public removed jurisdiction of the learned district judge. I do not agree with that submission. The District Court was at liberty to either accept the submission of Mr. Nash or to reject it. Having accepted it, the accused was acquitted. If he had rejected it then it would have been within the competence of the accused to decide to give evidence or to decline to give evidence. If he declined to give evidence, or gave evidence which was rejected, there may have been sufficient evidence relating to the enforcement notice and the continuation of the unauthorised development beyond the date stated on which it should stop to allow him to convict the accused. He decided to acquit the accused. This was a decision that the learned district judge was entitled to make. It was a decision on the merits of the case.

15. The next issue is as to whether the charge which the accused is currently facing, based on the second enforcement notice and the third summons, constitutes the same crime for which he was previously charged. It is undoubtedly the case that a man cannot be tried for a crime in respect of which he has been previously been acquitted; *Connolly v. DPP* [1964] AC 1254: this decision was approved by Gannon J. in *The State (Patrick Brady) v. District Judge Michael J. McGrath* (Unreported, High Court, 25th May, 1979). There are useful propositions of law within the case, as set out by Lord Morris of Borth-y-Gest at p. 1305 of the report. At proposition 4 he states:-

"that one test as to whether the rule applies is whether the evidence which is necessary to support the second indictment, or whether the facts which constitute the second offence, would have been sufficient to procure a legal conviction upon the first indictment either as to the offence charged or as to an offence of which, on the indictment, the accused could have been found guilty".

16. On this issue I have found the decision of the Supreme Court in *Dublin Corporation v. Francis Flynn* [1980] I.R. 357 to be particularly helpful. That case concerned s. 34 of the Local Government (Planning and Development) Act, 1963. That section mirrors the one currently under consideration. The Supreme Court held that the prosecution must prove the making and service of the relevant enforcement notice under the section and that thereafter, upon conviction, offences may be charged on a daily basis for a continuance of the breach. Henchy J. offered the following observations at pp. 362-363 of the report:-

"Whether a statute has made an act or default a continuing offence, meriting repeated prosecutions, depends not on the use of a special verbal formula but on whether the statutory provision, properly interpreted, indicates an intention to that effect. It is not necessary that the offence be designated expressly as a continuing offence. Usually it will be sufficient if a penalty is provided for each day on which the prohibited act or default takes place, as occurs in s. 34, sub-section 5. It is true that in s. 24, sub-s. 3, Parliament both designated the contravention as a continuing offence and provided for a recurring penalty for each day of contravention. But a continuing offence would have been created none the less if the express nomination of a continuing offence had been omitted from s. 24, sub-s. 3, as it has been omitted from s. 31, sub-s. 8, and s. 35, sub-s. 8, of the Act of 1963, and s. 26, sub-s. 5, of the Local Government (Planning and Development) Act, 1976, as well as from s. 34, sub-s. 5, of the Act of 1963.

The judge considered that an offence under s. 34, sub-s. 5, of the Act of 1963 is a "once and for all offence." I do not think so. The characteristic of such an offence is the fixing of a single penalty for a single or composite act or default. That is not what s. 34, sub-s. 5, has done. It has laid down a fine not exceeding £50 for each day, following the accused's first conviction, on which he is in default in regard to any of the specified requirements of an enforcement notice. Such an offence is necessarily a continuing one; it is committed afresh on each day on which the accused is in default and a conviction must impose a fine for each day of default: see *Westropp v. Commissioners of Public Works* [1896] 2 I.R. 93 and *Tyrell v. Bray U.D.C* [1957] I.R. 127. If s. 34, sub-s. 5, creates only a single offence, the penalty for a massive and continued breach of planning requirements would be only a single fine of a maximum amount which is scarcely sufficient to deter the breach. I do not think the wording of s. 34, sub-s. 5, permits the attribution of such an intention to Parliament. Support for the conclusion that s. 34, sub-s. 5, has created a continuing offence (for the repetition of which successive prosecutions will lie) is to be found in the fact that the corresponding provision in the English planning code has also been interpreted to that effect: see *R. v. Chertsey Justices, Ex p. Franks* [1961] 2 Q.B. 152 and *St. Alban's District Council v. Harper (Norman) Autosales* (1977) 76 LGR 300."

17. It follows that once a conviction occurs a prosecution may be brought on each and every day on which the unauthorised development continues in existence. An unauthorised development therefore is a continuing offence in itself. It happens every day the accused opens for business, in a change of use case, or every day the development continues, in the case of buildings or land. Because Clare County Council chose a different date for the second enforcement notice on which to focus their proofs in respect of the continuation of the alleged unauthorised development by the accused, this does not constitute a trial for the same offence in respect of which the accused has been acquitted by the learned district judge on 19th June, 2003. Nor could it be the case that the evidence to be heard in respect of the summons currently before the learned district judge would be the same as the two previously issued in respect of the other enforcement notice. Of necessity, that evidence will be different. It will deal, as to the material part, with proof that the unauthorised development continued after the day specified in the enforcement notice for its cessation. Once the dates as between the two enforcement notices are different, two separate offences are alleged and the principle of *autrefois acquit* can have no application. Echoing the words of Henchy J., I would regard it as wrong to construe an Act in such a way as would allow an offender to maintain an unauthorised development merely by reason of his acquittal in respect of a summons issued for an offence on one particular day, or a continuation thereafter on one particular occasion. That is not the law.

18. I would therefore answer the questions posed by the learned district judge as follows:-

1. Clare County Council is entitled to bring a prosecution against the accused in relation to an alleged failure by him on 25th March, 2004, to comply with the requirements of an enforcement notice of 18th February, 2004.
2. The learned district judge has jurisdiction to hear and determine the said offence and it is not part of the elements of the offence, in that regard, to show that the existence of a complaint, or an investigation of any kind, leading to a

warning letter, or a warning letter in itself, prior to the issue of an enforcement notice under s. 154 of the Planning and Development Act 2000.