Neutral Citation: [2014] IEHC 448

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 722 J.R.]

BETWEEN

JOHN JOYCE

APPLICANT

AND

JUDGE PATRICIA McNAMARA AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

AND

[2012 No. 618 J.R.]

COLM AHEARN

APPLICANT

AND

DISTRICT JUDGE PATRICK BRADY AND THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE SUPERIOR COURTS RULES COMMITTEE

RESPONDENTS

JUDGMENT of Mr. Justice Birmingham delivered the 13th day of October 2014

1. These two cases, which raise similar if not quite identical issues, have been heard together and it appears appropriate to deliver a single judgment.

2. The background to each of these cases is as follows. In relation to the Ahearn case, on the 29th September, 2010, an incident involving a B.M.W. motor car, the property of Mr. Edward Gibney occurred at Aspen Park, Kinsealy, Dublin. In its aftermath, two men, one of them the applicant, Colm Ahearn were arrested and charged. Mr. Ahearn was charged with three offences. An offence under s. 15 of the Criminal Justice (Theft and Fraud Offences) Act 2001, an offence under s. 2 of the Criminal Damage Act 1991 and an offence contrary to s. 113 of the Road Traffic Act 1961, as amended. It is with this last charge that the present proceedings are concerned. On the 21st February, 2011, the applicant and the other person charged in relation to the incident in Kinsealy appeared at Swords District Court. In both cases the charges contrary to s. 15 of the Criminal Justice (Theft and Fraud Offences) Act 2001 were struck out and both accused pleaded guilty to the other two charges under s. 113 of the Road Traffic Act and s. 2 of the Criminal Damage Act 1991.

3. Following the entry of a guilty plea, the applicant was fined the sum of €750 in respect of the s. 113 charge and there was provision for a 90 day prison sentence in default of payment of the fine. The criminal damage charge was put back to a later date to allow an opportunity for payment of compensation.

4. On the 19th April, 2011, both applicants appeared in court. On that occasion the applicant did not have any compensation to offer and it appears there was some indication that compensation would not be forthcoming from him. So far as the other person who had been charged is concerned, the case involving him was, at his request put back to allow a further opportunity for payment of compensation. Judge Brady imposed on Mr. Ahearn a six month sentence, a fine of €500 and ordered payment of compensation of €792.34 and witness expenses of €200.

5. On the 27th April, 2011, the applicant lodged an appeal in relation to the criminal damage matter, but did not lodge an appeal in relation to the s. 113 charge. The criminal damage appeal resulted in a suspended sentence in the Circuit Court after compensation was paid.

6. On the 29th December, 2011, a committal warrant issued in relation to the s. 113 conviction the fine of €750 not having been paid.

7. In May/June 2012, the applicant, Mr. Ahearn was contacted by gardaí in relation to the warrant which had issued in respect of the s. 113 matter and the unpaid fine. At that stage Mr Ahearn consulted his solicitor, Mr. John Quinn, and it was at that point that it emerged for the first time that there was an issue in relation to the wording of the conviction order and the wording of the warrant.

8. The operative part of the conviction order which was subsequently transposed into the warrant was as follows:-

> "At the sitting of the Court at Swords Courthouse, North Street, Swords, Co. Dublin, in the Dublin Metropolitan District on the 21st February, 2011, a complaint was heard and determined that the above named accused of 13 Mount Drinan Crescent, Kinsealy Downs, Kinsealy, Dublin, on the 29th September, 2010, at Aspen Park Kinsealy Court, Kinsealy, Dublin, in the Dublin Metropolitan District did ***get into*** a mechanically propelled vehicle register No. 95 D 52490, the property of ***Edward Gibney*** while such vehicle was stationary. Contrary to s. 113 of the Road Traffic Act 1961 (as amended by s. 6 of the Road Traffic Act 1968 and s. 18 of the Road Traffic Act 2006) and the said defendant having pleaded guilty it was adjudged that the said defendant be convicted of said offence and pay a fine of €750 making a total sum of €750 within six months and in default of payment of the said sum within the said period that the said defendant be imprisoned in Wheatfield Prison for the period of 90 days unless the said sum be paid sooner."

9. The language of the conviction order and indeed the language of the subsequent warrant themselves reflect the language of the charge to which Mr. Ahearn pleaded guilty.

10. So far as the case in which Mr. John Joyce is the applicant is concerned, the background is that an incident occurred on the 16th October, 2011, at the premises of Celluplast Limited at Baldoyle Industrial Estate. In the aftermath of the incident, the applicant Mr. Joyce was charged with three offences, a charge contrary to s. 2 of the Criminal Damage Act 1991, and two charges contrary to s. 113 of the Road Traffic Act, these being charge sheet no. 12405193, relating to a mechanically propelled vehicle 06D76223 and charge sheet no. 12405225, relating to a mechanically propelled vehicle 04 KE 4407.

11. On the 15th June, 2012, the applicant pleaded guilty to the two s. 113 charges and the criminal damage charge was struck out. A prison sentence of two months was imposed on charge sheet 12405225 and charge sheet 12405193 was taken into account. It was ordered that the sentence would run from the expiration of another sentence that the applicant, Mr. Joyce was serving.

12. The sentence has now been served in full and it appears that the sentence in question was served concurrently with another sentence or sentences.

13. The applicant's present solicitor John J. Quinn and Company has obtained a copy of the committal warrant. The operative part was in these terms:-

> "John Joyce of 7 Moyne Park, Moyne Road, Baldoyle, Dublin 13, was this day before the court at court No. 17 (CCJ) Criminal Courts of Justice, Parkgate Street, Dublin 8, in the Dublin Metropolitan District charged that on the 16th October, 2011, at Celluplast Unit 52B, Baldoyle Industrial Estate, Baldoyle, in said District Court area of the Dublin Metropolitan District did **get into** a mechanically propelled vehicle, register No. 04 KE 4407, the property of Ross Darcy, while such vehicle was stationary contrary to s. 113 of the Road Traffic Act 1961, (as amended by s. 6 of the Road Traffic Act 1968 and s. 18 of the Road Traffic Act 2006) and whereas the accused has been convicted of the said offence and ordered to be imprisoned for the period of two months to be served on the legal expiration of a sentence of five months imposed in Dublin Circuit Court on the 10th May, 2012.
>
> This is to command you to whom this warrant is addressed to lodge the accused John Joyce of 7 Moyne Park, Moyne Road, Baldoyle in Wheatfield Prison, there to be imprisoned by the Governor thereof for the period of the aforesaid sentence."

14. The language of the warrant reflects the language of the order drawn up and presented to the judge of the District Court for signature, though not, it seems signed by her, and both documents, that is to say the warrant and the order in turn reflect the language of the charge to which Mr. Joyce pleaded guilty.

15. It will be immediately obvious that the orders of convictions and the warrants in respect of both Mr. Ahearn and Mr. Joyce are defective. It goes without saying that getting into a mechanically propelled vehicle owned by another while it is stationary is not of itself an offence.

Arguments

16. On behalf of the applicants it is said that there are errors on the face of the record and that the failure to recite that the vehicles were got into without lawful authority or reasonable cause is a fundamental defect that is fatal to the efficacy of the documents in question.

17. Moreover, the applicants say that as these are cases involving recorded criminal convictions that they are entitled to orders quashing the convictions as of right or as it is put *ex debito justitiae* (out of the obligation of justice) referring in that regard to cases such *as State (Vozza) v. O'Floinn* [1957] I.R. 227 and *O'Keeffe v. Judge Connellan* [2009] 3 I.R. 643.

18. On behalf of the respondent it is said that any error that there is, is minor in nature and has caused no prejudice and it is pointed out that both applicants pleaded guilty to a charge couched in the terms that would later appear in the conviction orders and warrants and so it is said that they were estopped from now making any complaint about the wording that is repeated in the conviction order and warrant.

Conclusions

19. The challenged orders are not in the form that they ought to have been. So much is clear. Section 113(1) as amended provides as follows:-

> "A person shall not, without lawful authority or reasonable cause, interfere or attempt to interfere with the mechanism of a mechanically propelled vehicle while it is stationary or get on or into or attempt to get on or into the vehicle while it is so stationary."

20. There is no doubt that the charge sheet should have alleged that the accused got into the vehicle while stationary without lawful authority or reasonable cause and the conviction orders and warrants should likewise have contained a reference to the absence of lawful authority or reasonable cause. The question is whether the failure to do so is fatal.

21. In my view the fact that the charges and the subsequent orders and warrants refer to s. 113 of the Road Traffic Act 1961 (as amended by s. 6 of the Road Traffic Act 1968 and s. 18 of the Road Traffic Act 2006) is of significance. The applicants seek to diminish the significance of the statutory recitals, in part by saying the charge sheet might simply have recorded that the act occurred "contrary to the form of the statute in such case made and provided". However, in my view the focus has to be on the actual language of the charge sheets, the convictions and the warrants rather than on a language that might have appeared but did not. All of the documents in issue contain a specific reference to s. 113 of the Road Traffic Act 1961 and the subsequent amendments and these statutory provisions make clear that an offence is committed by getting into a stationary vehicle without lawful authority or reasonable excuse, but that it is, so far as relevant, only committed by getting into a stationary vehicle without lawful authority or reasonable excuse.

22. No one has been prejudiced or misled by the omitted recitals. No one can be in any doubt about what the judge of the District Court did and intended to do. In a situation where the reference to the statutory provisions in conjunction with the facts recited can leave no room for any doubt as to what was alleged and what was admitted, I do not believe that the admitted drafting errors in fact give rise to an error on the face of the record and accordingly I would decline to quash the challenged instruments.

23. Lest I be wrong in my view that the defects do not amount to errors on the face of the record, I should address briefly the question of whether if, the form of order amounted to an error on the face of the record, that the convictions would then be quashed *ex debito justitiae*.

24. The high water mark of the case for the applicants is to be found in the case of *State (Vozza) v. O'Floinn*, a decision endorsed in emphatic terms in *O'Keeffe v. Judge Connellan*. However, the nature of the complaints has to be considered. In *Vozza* orders of both the District Court and Circuit Court were made without jurisdiction, in a situation where Mr. Vozza was never informed of his right to have the amended charge of stealing, as distinct from attempted stealing, dealt with by judge and jury. In *O'Keeffe v. Connellan*, there was first of all the fact that the applicant was sent forward by the judge of the District Court, without a preliminary examination and that situation would seem to have been compounded by the actions of the D.P.P. in the Circuit Court when the situation first came to light, who first indicated that he would be seeking to quash the return for trial and would be asking the Circuit Court not to proceed with sentence and then had a change of heart. By any standards these are matters of real substance and stand in marked contrast to the drafting inadequacies in issue in the present cases. In the present cases, the errors identified did not mislead or prejudice anyone. The situation therefore, is comparable with that considered by Hogan J. in *G. v. Judge Murphy* [2011] IEHC 359 (Unreported, High Court, Hogan J., 20th September 2011), in which an order returning the applicant to the Circuit Court to determine the issue of fitness to be tried, appeared to contain a number of errors on its face. Hogan J. commented as follows at para. 21:-

> "Second, there can be no doubt as to what the District Judge both did and what she intended to do. All parties perfectly understood what had been proposed when she gave an *ex tempore* ruling sending the applicant forward to the Circuit Court for the fitness to plead issue to be determined. Thus, for example, in her grounding affidavit, Ms. Binchy, solicitor for the applicant, states that it was 'confirmed by Ms. Farrell (the prosecuting solicitor) that the DPP wanted the case to be sent forward for the fitness to be tried issue to be determined'. No real disadvantage accrued to the applicant or his legal advisers by reasons of these errors. Even if, therefore, these errors can be justly characterised as being errors on the face of the record (as distinct from some form of harmless or insubstantial error), I do not think that any useful purpose would be served by quashing the orders in question given the absence of any real prejudice to the applicant: see by analogy the comments of Finlay P. in *The State (Coveney) v. Special Criminal Court* [1982] I.L.R.M. 284, 289."

25. I appreciate that Hogan J. was not dealing with a final conviction, but notwithstanding that point of distinction the remarks of Hogan J. are very much in point. In this case where the errors, if they are errors, are not fundamental and could reasonably be described as *harmless and insubstantial*, to use the language of Hogan J., where the applicants by their pleas of guilty have contributed to the situation that has developed, it seems to me that if there is any discretion to refuse relief, that it is clearly a case where the discretion should be exercised in that direction and I would exercise the discretion, which I am satisfied I have, to refuse relief.

26. Because the issue was the subject of some comment during the course of argument, I think I should say that had I concluded that I had no alternative but to quash the orders under challenge, I would have taken the view that it was not a case where costs should follow the events. The applicants had pleaded to charges couched in the language that they were now criticising and thereby contributed to the situation that developed. Having created, or certainly contributed to a very significant extent to the situation that developed, it would not have been appropriate that the applicants should benefit from an order for costs.

27. Mr. Quinn, solicitor for the applicants in the course of supplemental affidavits commented that although the applicants had legal representation in the District Court, that so far as he was aware, no lawyer having any involvement in representing the applicants had noticed any difficulty with the charges as laid. He goes on to say that even if such a difficulty had been noted, that there would have been no obligation as a matter of law, on such a representative to draw such a matter to the attention of the District Court. While in general, Mr. Quinn is correct that the primary duty is on the prosecution to ensure the charges are validly drawn, I do not believe that it is correct that it would be good practice to enter a plea of guilty, take the benefits of that plea, and keep the error spotted in reserve. If such a strategy was followed it would likely have consequences in terms of costs.

28. I would like to add one final comment. In the Ahearn case, the Superior Court Rules Committee was named as a respondent. This was in a situation where the applicant intended to argue that O. 84, r. 21(3)(b) of the Rules of the Superior Courts went outside the scope of pleading and practice and procedure generally and amounted to a substantive and impermissible restriction on the rights of access to the courts. However, in a situation where the respondents did not argue that the application was out of time or that the applicant should be refused an extension if required by reference to the terms of the amended rules the issue has not featured in the hearing before me and I do not propose to address the issue.