Neutral citation number [2007] IEHC 12

THE HIGH COURT
JUDICIAL REVIEW

[2006 No. 430 JR

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND
HIS HONOUR JUDGE CON MURPHY AND ANTHONY JOYCE

RESPONDENTS

Judgment of Ms. Justice Dunne delivered on the 5th day of February, 2007

1. This case raises an interesting point as to the jurisdiction of the Circuit Court on appeal from the District Court to amend an order of the District Court in circumstances where the appellant seeks to withdraw his appeal and is permitted to do so by the Judge of the Circuit Court.

2. The background to this case is not in dispute to any significant extent. The second named respondent Anthony Joyce, appeared before the former President of the District Court, Judge Peter Smithwick, on 8th February 2005, charged with two offences, namely an offence of drunk driving contrary to s. 49(4) and (6)(a) of the Road Traffic Act, 1961 as amended by s. 23 of the Road Traffic Act, 2002 and an offence of braking a red traffic light contrary to s. 35(5) of the Road Traffic Act, 1994 and s. 102 of the Road Traffic Act, 1961 as amended by s. 23 of the Road Traffic Act, 2002.

3. Evidence of the matters complained of was given and having heard the evidence, the President of the District Court stated that he was convicting the second named respondent on the s. 49 charge, disqualifying him for a period of two years and fining him €250. The charge in relation to breaking the red light was stated to have been taken into consideration.

4. Following his conviction, the second named respondent appealed to the Circuit Court. The matter came on for hearing before the circuit Court on 26th June 2005. The orders of the District Court were not before Circuit Court and the matter was adjourned to obtain the orders.

5. At a subsequent hearing before the Circuit Court, two orders were produced. The orders pronounced in court by the President of the District Court were transposed on the written orders. In other words, the orders stated that the second named respondent was convicted and fined and disqualified from holding a driving licence in respect of the charge of breaking a red light and in respect of the drunk driving charge, it was stated that no written order was recorded.

6. On the production of the District Court orders, the appeal was adjourned again, this time to clarify precisely what orders were made in the District Court. On 23rd November 2005 it was indicated to the Judge of the Circuit Court that the applicant wished to apply for an amendment of the District Court orders. The Judge then presiding requested both sides to furnish written submissions in relation to the power to amend. Time was given for the delivery of written submissions.

7. It seems to be clear that on the 30th January, 2006 there was an argument as to whether the applicant's submission had been delivered in time and as to whether the second named respondent was still in time to deliver written submissions, the court was told on that date that the appeal was going to be withdrawn and the matter was adjourned to 15th February for mention only. Having said that, it is not entirely clear from the affidavits before this court why it was necessary in those circumstances to adjourn the proceedings to 15th February, for mention. Clearly on 30th January there were no written submissions from the second named respondent, the applicant wished to proceed to legal argument as to the jurisdiction of the Circuit Court to amend for the District Court orders and the second named respondent conveyed his intention to withdraw to appeal. I can only conclude that the matter was adjourned for the purpose of considering whether the orders could be amended notwithstanding the second named respondent's stated intention to withdraw the appeal. It is clear from the affidavits filed herein that on the 15th February, 2006, some discussion took place as to the entitlement of an appellant to withdraw his appeal and as to the entitlement of the applicant to seek to amend the District Court orders.

8. There is no dispute between the parties as to the entitlement of an appellant to withdraw an appeal. However, the contention of the applicant herein is that the Circuit Court Judge was obliged to consider the application to amend the District Court orders before acceding to the request of the second named respondent to withdraw the appeal. There is some slight divergence as to the precise sequence of events after the delivery of written submissions by the applicant. In the affidavit of Dara Robinson sworn herein on behalf of the second named respondent on the 18th June 2006 it is stated that the appeal was listed on 30th January 2006, for mention. On that occasion, the court was informed that the appeal was being withdrawn and it was ultimately listed "for mention only" to 15th February, 2006. Mr. Robinson also stated that the first named respondent commented in the course of what is described somewhat peculiarly as "oral argument" between the first named respondent and Mr. Henry, the solicitor on behalf of the applicant herein, that there existed a "time honoured practice" whereby an applicant could withdraw an appeal at the commencement of proceedings for various reasons. Mr. Robinson deposed that this was accepted by Mr. Henry as being the position. Mr. Robinson went on to depose that the first named respondent suggested that the power to amend arose "on the trial of an appeal and that the proceedings had not yet reached that stage".

9. The basis upon which the applicant relies in relation to this matter is contained in s. 49 of the Civil Bill Courts Procedure Amendment (Ireland) Act, 1864, which provides as follows:-

> "If on the trial of any appeal (emphasis added) to any court of general quarter sessions of the peace in Ireland, or to the Chairman of the County, against any conviction or order made or pronounced by any Justice or Justices of the Peace, any objection shall be taken on account of any omission or mistake in the making or the drawing up of such conviction or order or any variance between the fact stated in such conviction or order on the evidence adduced in support thereof, and it shall be shown to the satisfaction of the court that sufficient grounds were in proof before the justice or justices making such conviction or order to have authorised the drawing up thereof free from the said omission or mistake, or that such variance is in some point not material to the merits of the case it shall be lawful for the court to amend such conviction or order on such terms as it shall think fit and to adjudicate thereon as if no such omission or mistake or variance had existed."

10. The jurisdiction of the Civil Bill Courts is now vested in the Circuit Court.

11. Counsel on behalf of the applicant referred to a number of decisions in which s. 49 of the 1864 Act has been considered. In the first of those cases, *The State (Attorney General) v. Judge Connolly* [1948] I.R. 176, the effect of s. 49 was considered by way of a preliminary issue. In the course of the judgment in that case Dixon J. Stated at p. 186 as follows:-

> "A further point argued was as to the effect of s. 49 of the Civil Bill Courts Procedure Amendments (Ireland) Act, 1864. Assuming, as conceded, that the conviction was bad in form, it was not, as I have held, the function or duty of the Circuit Court Judge, nor had he jurisdiction, to quash it on that ground. He had, in my view, two alternatives on the hearing of an appeal from such an order, which, notwithstanding its alleged defects in form, was a good order for the purposes of appeal and for the exercise of his jurisdiction to confirm, vary or reverse: see *The Queen v. Justices of Armagh*. He could have heard the appeal and, if necessary in the view which he took on the hearing, have made a substantive order of his own in a form which he had conceived to be good without amending the order under appeal, or he could have amended the order under appeal and confirmed, varied or reversed it... The latter course would have involved an enquiry by him, under s. 49 of the Act referred to, as to whether the Justice had had sufficient grounds in proof before him to have authorised the drawing up of an order free from omission or mistake. The section seems to me enabling, rather than mandatory, and may possibly have been intended to meet the case where it was necessary or desirable for some special reason to have a correct record of the order of the lower Court rather than simply to remedy the matter by a substantive order made in the appellate tribunal. However, this may be, the section clearly contemplates and confirms that the informality of the order under appeal is not to be used by itself as a ground for allowing the appeal; and, if it obliged the Circuit Court Judge to make the enquiry mentioned, he failed and refused to do so in the present case."

12. Relying on that particular case, counsel pointed out that that in that case the issue arose as a preliminary objection before any evidence was heard. It was also noted that there was no need to make an order under s. 49 if there was a full hearing of the appeal as the order of the Circuit Court would in those circumstances would be the substantive order. It was further argued that, relying on the authority of The State (Attorney General) v. Judge Connolly, one could deal with the matter as a preliminary issue if there was some special reason for having a correct record of the order of the Lower Court. It was submitted that in the present case there was such a special reason namely that if the appeal was withdrawn without an amendment under s. 49 that the second named respondent would escape all punishment in respect of the offence of which he had been convicted.

13. Reference was also made to the decision in *The State (McLoughlin) v. Judge Shannon* [1948] I.R. 439 at p. 449 in which Davit J. stated:-

> "It was next contended that, the order of the District Justice being bad, the learned President of the Circuit Court had no power to amend it and make it good, or to make a good order in lieu thereof. It seems to me that when a defendant, aggrieved by a decision of a District Justice in a criminal case, takes an appeal therefrom to the Circuit Court he seeks, and obtains, a hearing of the case de novo . He, in effect, asks the Circuit Judge to hear the whole matter again and to substitute for the order made by the District Justice (of which he disapproves) the order of the Circuit Court (of which he hopes he can approve). He impliedly admits the jurisdiction of the Circuit Court to substitute its own order for that of the District Court. It would, I think, be a grave matter for appellants if it were held that the Circuit Court had no power to substitute its own order for that appealed from"

14. Counsel also referred to the decision in the case of *The State (Roche) v. Delap* [1980] I.R. 170 in which Henchy J. at p. 174 stated:-

> "Here the Circuit Court judge, by adjourning the part-heard appeal, declined to substitute his own order for the one which was the subject of the appeal and which he considered defective in form. I do not think he was correct in doing so. Once his appellate jurisdiction had been invoked, and especially when the appeal had been opened and the representative of the complainant had directed the judge's attention to his power at the end of the hearing to amend the defective order under appeal, there was only one course open to him, namely, to make a fresh order which would show jurisdiction and which would confirm, vary or reverse the sentence: (*The State (Attorney General) v. Connolly*)."

15. Counsel emphasised the use of the word especially in the course of that passage and argued that its use meant that the jurisdiction to amend a defective District Court order extends to circumstances other than when an appeal has actually been opened.

16. Two further points were raised by counsel on behalf of the applicant. It was noted that in the statement of opposition herein, the second named respondent had pleaded that this court should in its discretion decline to grant the reliefs sought herein on the basis that no steps were taken by way of application for judicial review in an attempt to obtain orders which did not contain the difficulties referred to in these proceedings. By way of response to that plea reference was made again to the decision in the case of *The State (Roche) v. Delap* in which Henchy J. stated at p. 173:-

> "However, it does not follow from this conclusion [i.e the order was defective] that *certiorari* should have issued. The prosecutor elected to appeal to the Circuit Court. There he allowed the appeal to be opened and did not contend that his conviction (as distinct from the sentence) was other than correct. While that appeal was pending, it was not open to him to apply for *certiorari*: see *R. (Miller) v.Justices of Monaghan* which shows that he should have elected either for appeal or for *certiorari*. It was not within the competence of the High Court to intervene by *certiorari* to quash a conviction and sentence when an appeal had not alone been taken to the Circuit Court but that appeal was actually in the process of being heard in that court."

17. In the basis of that authority, counsel of the applicant refuted the suggestion that the applicant should have sought judicial review.

18. The final matter referred to by counsel on behalf of the applicant was a suggestion made by Daragh Robinson in his affidavit sworn on behalf of the second named respondent herein to the effect that the errors in the order could have been dealt with by way of amendment under the slip rule. See the affidavit sworn herein on 25th August 2006. Two points are made in respect of this suggestion. The first point made by counsel is that nothing was referred to in the statement of opposition filed herein to indicate any reliance on the suggestion that the slip rule could be utilised. For that reason alone it was argued that the second named respondent could not rely on the suggestion that the slip rule should have been utilised and that in those circumstances the applicant was not entitled to relief by way of judicial review.

19. Perhaps the second point raised by counsel on behalf of the applicant is the more important one. Counsel expressed the view that the slip rule was not appropriate to deal with the facts of the present case given that the error contained in the orders is not a clerical mistake in the judgment or order or an error arising from any accidental slip or omission. I have to say that I fully accept this

point. It should be noted that counsel on behalf of the second named respondent did not place undue emphasis on that point.

20. Mr. McQuaid made submissions on behalf of the second named respondent contending that it was appropriate for the first named respondent to have allowed the second named respondent to withdraw his appeal, thus rendering the applicant's application to amend the orders of the District Court moot. His main point was that there had been no "trial of an issue" so that even if it was wrong to have allowed the appeal to be withdrawn, the power to amend, under s. 49 had not arisen and could not be invoked. Counsel placed emphasis on the fact that the order of the Circuit Court dated 30th January, was one adjourning the appeal for mention only. In those circumstances he argued that there could have been no trial of an appeal on 15th February 2006, given that the matter was ultimately listed before the first named respondent for mention only.

21. In making that submission counsel considered that the meaning of a case listed could "for mention" as distinct from a case listed "for trial". In this context he referred to the absence of relief by way of judicial review during the currency of a trial. He referred in this context to the decision in the case of *DPP v. The Special Criminal Court* [1999] 1 I.R. at p. 89 in which O'Flaherty J. adopted the dictum of O'Dhalaigh C.J. in *The People Attorney General v. McGlynn* [1967] I.R. 232 in which it was stated :-

> "The nature of a criminal trial by jury is that, once it starts, it continues right through until discharge or verdict. It has the unity and continuity of a play. It is something unknown to the criminal law for a jury to be recessed in the middle of a trial for months on end, and it would require clear words to authorise such an unusual alteration in the course of a criminal trial by jury."

22. O'Flaherty J. then stated:-

> "While this statement applies to criminal trials with a jury, it should be regarded as a precept that should, as far as practicable, be followed in respect of all criminal trials subject to the jurisdiction of the courts to grant cases stated on occasion."

23. Thus counsel argued that the characteristics of a trial bear no resemblance to the characteristics of a listing "for mention". The point was made that if one took the word trial as used in the section and gave it its ordinary meaning, then and only then could the power of amendment arise. If any other meaning was intended, he argued that the section would have provided for the power of amendment to arise at any stage of the proceedings but that was not done.

24. He indicated that when the matter was before the court on 30th January 2006, Her Honour Judge Linnane who had ordered the preparation of written legal submissions, did not hearing the application of amendment of the District Court orders. She simply adjourned the matter for mention only until 15th February 2006.

25. As I have already pointed out, it is somewhat difficult to be certain as to what occurred on 30th January, 2006. According to the affidavit of Gareth Henry sworn on 19th July, 2006, it is stated that after an initial argument about whether or not the applicant's written submissions were delivered on time, he indicated that he would be opposing any application to adjourn the legal argument to another date and it was then that it was indicated on behalf of the second named respondent that the appeal was being withdrawn. Mr. Henry stated that the matter was then adjourned for legal argument.

26. In the second replying affidavit of Daragh Robinson is stated that on 30th January his client instructed him that wished to withdraw the appeal. This was "indicated" to Judge Linnane. She then adjourned the matter for mention only to 15th February 2006. She did not hear the application to amend at that stage. It is not entirely clear to me from the affidavits at whose behest the matter was so adjourned and with what view in mind. It is also not entirely clear whether or not the Circuit Court was asked on 30th January 2006, to hear the application to amend after it was indicated that the second named respondent wished to withdraw his appeal. What is clear is that notwithstanding the giving of that indication, the appeal was not struck out but was adjourned for mention only.

27. Counsel emphasised that the withdrawal of an appeal is a unilateral act and that the court cannot stop anyone from withdrawing an appeal. Equally once an individual has withdrawn an appeal the court cannot continue to deal with the matter. Reference was made to the specific provisions of s. 30(4) of the Road Traffic Act 1961 which provides:

> "Where
>
> > (a) A notice of appeal has been lodged in a case in which a consequential, ancillary or special disqualification order has been made,
> >
> > (b) The order has been suspended or postponed pending the appeal, and
> >
> > (c) The appellant has given notification in writing that he wishes to withdraw the appeal,
>
> The suspension or postponement of the order shall be regarded as having terminated immediately before the day on which the notification was given and the period of disqualification shall begin on that day."

28. Relying on this section the point was made that the Director of Public Prosecutions has no input whatsoever into whether or not an appeal may be withdrawn.

29. Counsel then referred to the decision relied on by counsel for the applicant. He sought to distinguish the case of *The State (Attorney General) v. Judge Connolly* referred to above because in that case the respondent had taken on the mantel of judicial review and had quashed the order of the District Court when the appeal was listed before him. Again he distinguished the case of the *State (Roche) v. Delap* because in that case the appeal had been opened, evidence had been given and the matter was then adjourned part heard.

30. Finally counsel described the error in this case as a clerical error, one which had not been spotted in time by the applicant and an error which was an error within the jurisdiction of the court, such that judicial review did not lie in respect thereof.

31. By way of response counsel on behalf of the applicant pointed out that when the applicant became aware of the error it was considered appropriate to apply to amend the District Court orders relying on the provisions of s. 49 of the 1864 Act. It was not contended that the right of the appellant to withdraw his appeal was being fettered in any way. Counsel also submitted that the error in law was the decision expressed by the first named respondent that he did not have jurisdiction to deal with the matter.

Consequently a declaration has been sought in the proceedings to the effect that he had such jurisdiction. It was pointed out that the application to amend the defective orders was made in the first instance by the applicant herein before any indication had been given that the appeal was being withdrawn. Accordingly, the argument was that that application should have been considered prior the withdrawal of appeal.

Conclusions

32. It is clear from the affidavit sworn in this case that having been convicted, the second named respondent, as was his right, appealed his conviction to the Circuit Court. Order 41, r. 1 of the Rules of the Circuit Court provides as follows:-

> 1. When an appeal is taken from any decision of the District Court in accordance with the rules of the said court, the clerk of such court shall transmit to the County Registrar:
>
> …
>
> (ii) in criminal cases:
>
> (a) a certified copy of the conviction or order, …

It appears that it was only upon sight of the original orders that the error in this case was noted.

33. In the course of argument herein, counsel on behalf of the second named respondent placed much reliance on the distinction between a matter listed for trial and a matter listed for mention only. The fact that this matter was listed for mention only before the first named respondent on 15th February, 2006, cannot be conclusive of the question as to whether there was a trial of an appeal. It is possible for a trial having commenced to be adjourned for mention only for a particular reason. There may be limitations on the period of adjournment particularly in a criminal case before a jury but that does not mean that a case cannot be adjourned for mention only. What is clear, however, is that the fact that something has been adjourned for mention only does not mean that a trial of an appeal has not commenced. In this case the matter first came before the Circuit Court on 26th June, 2005. It was thereafter adjourned for the production of the District Court orders and for the purpose of written submissions to be furnished in relation to the jurisdiction of the Circuit Court to amend an order of the District Court under the provisions of s. 49 of the 1864 Act. Given that that is so, it seems to me to be difficult to argue that the appellate jurisdiction of the Circuit Court was not engaged. In that regard it is instructive to consider again the Supreme Court decision in the case of *The State* (*Roche v. Delap*) and the judgment of Henchey J. therein. Apart from the two passages referred to above, Henchey J. stated at 173 as follows:-

> "It was not within the competence of the High Court to intervene by *certiorari* to quash a conviction and sentence when an appeal had not alone been taken to the Circuit Court but that appeal was actually in the process of being heard in that court."

34. Henchey J. then went on to note as follows:-

> "I have no doubt that the Circuit Court judge was actuated by worthy motives when he adjourned the hearing of the appeal to enable the prosecutor to move for *certiorari* in the High Court. Nevertheless, I think it was not a proper exercise of his appellate jurisdiction."

35. Henchey J. then went on to quote the passage from the judgment of Davitt J. in the case of *The State (McLoughlin v. Shannon)* and to recite in a passage upon which considerable reliance was placed by counsel for the applicant as follows:-

> "Once his appellate jurisdiction had been invoked, and especially when the appeal had been opened and the representative of the complainant had directed the judges attention to his power at the end of the hearing to amend the defective order under appeal, there was only one course open to him, namely, to make a fresh order which would show jurisdiction and which would confirm, vary or reverse the sentence…"

36. It seems to me to be clear that the second named respondent herein had invoked the appellate jurisdiction of the Circuit Court. Counsel for the applicant pointed out that in his judgment in that case Henchey J. had referred specifically to the fact that in that case the appeal had been opened and the representative of the complainant had referred to the power of the judge to amend a defective order under appeal. In the present case Gareth Henry, in his affidavit sworn herein on 7th April, 2006, expressly averred as follows:-

> "The appeal duly came on for hearing before the Circuit Court on 21st June, 2006. At that point the order made by the District Judge in relation to the s. 49 charge was not before the court and the matter was adjourned."

37. Subsequently two orders were produced to court signed by the current President, Judge Malone, for and on behalf of Judge Peter Smithwick, who had retired. Given that averment, which is not contradicted in any way, it seems to me to be clear that the trial of the appeal had indeed commenced. Obviously no evidence had been heard but nonetheless I can only conclude that the trial of the appeals had commenced. On the production of the orders it became clear that there was an error and it was sought to amend the orders under s. 49 and the court required written submissions in that regard. The fact that no evidence had been heard at that stage does not in my view mean that the trial had not been commenced and it is quite clear that the appellate jurisdiction had been invoked. In those circumstances it seems to me that the first named respondent was not correct in concluding that he had no jurisdiction to entertain the application to amend under s. 49 by reason of the desire of the second named respondent to withdraw the appeal. Indeed, it seems to be the case that the 1st named respondent did not permit the applicant to make any argument as to the jurisdiction of the Circuit Court to consider any application for an amendment of the District Court orders.

38. Both sides accept that an appellant can withdraw an appeal and reference has been made to S.30(4) of the Road Traffic Act, 1961 which deals expressly with a pre-hearing withdrawal in writing of an appeal but in the present case, the appeal had been listed, opened, adjourned on a number of occasions to obtain the relevant orders, to clarify the relevant orders, to have written submissions prepared in relation to the application to amend and this process has taken a number of months.

39. In the circumstances I am satisfied that the appellate jurisdiction of the Circuit Court has been invoked. I am of the view that the passage from the judgment of Henchy. J. referred to above is particularly apposite, namely:

> "Once his appellate jurisdiction had been invoked, and especially when the appeal had been opended and the representative of the complainant had directed the judges attention to his power at the end of the hearing to amend the defective order under appeal, there was only one course open to him, namely, to make a fresh order which would show

jurisdiction and which would confirm, vary or reverse the sentence…"

40. Finally, I think it is helpful to consider the passage from the judgment of Dixon J. in the case *The State (Attorney General) v Judge Connolly* referred to above and relied on by Counsel for the applicant. That was a case in which the question of an amendment pursuant to s. 49 of the 1864 Act, arose as a preliminary issue before any evidence was heard. It was noted in that case that case that the judge could not have heard the appeal and made a substantive order or he could have amended the order under appeal. In the present case, the option of proceeding to hear the appeal did not arise given the indication of the withdrawal of the appeal. However, I do not see the basis on which it could have been concluded that there was no jurisdiction to amend the order. It would have necessitated carry out an inquiry as described in the judgment of Dixon J. but there was no reason why that could not have been done. In the course of the passage referred to from the judgment of Dixon J., reference was made to the "special reason" to have a correct record of the order of the lower court. It seems to me that this is precisely the sort of case in which such special reasons has arisen.

41. In the circumstances, I am satisfied that the 1st named respondent was in error in concluding that he had no jurisdiction to consider the application to amend once it was indicated that the 2nd named respondent wished to withdraw the appeal. I am allowing the application.