THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 72 JR]

BETWEEN

GEORGE ROSS

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Twomey delivered on the 3rd day of April, 2019

SUMMARY

1. This is a case involving a tragic accident in Killavullen, Fermoy, County Cork when Michael Murphy, a boy of 14 years of age, was killed when he fell onto the road out of a tractor being driven by an employee of the applicant ("Mr. Ross"). Arising out of that accident Mr. Ross was found guilty on the 2nd of October 2014 of an offence contrary to section 54(2) of the Road Traffic Act, 1961 (the "1961 Act"), namely allowing a defective vehicle to be driven which was a danger to the public. The defect in the vehicle was the fact that the left-hand door of the tractor was broken and could not be closed or locked. Instead, cable ties were used to secure the door shut.

2. The proceedings come before this Court because, arising from an inspection of the tractor by the Health and Safety Authority (the "HSA"), Mr. Ross is now being prosecuted under the Safety Health and Welfare at Work Act, 2005 (the "2005 Act") on the grounds that the tractor was an unsafe place of work as it had a defective lock on the left-hand door resulting in the door not being capable of being closed or locked. The criminal proceedings were adjourned to the sessions of Cork Circuit Criminal Court commencing on the 6th of February, 2018 for a trial date to be fixed.

3. However, on the 29th of January, 2018, Mr. Ross obtained leave from Noonan J. to apply for judicial review and, in particular, to seek an order prohibiting his trial at Cork Circuit Criminal Court for this workplace offence under the 2005 Act, in light of his previous conviction for the road traffic offence.

4. Mr. Ross claims that:

> • Based on the principle of *autrefois convict*, he has been convicted under the Road Traffic Act, 1961 and so should not be prosecuted a second time for what is the same or substantially the same offence, and that
>
> • He was convicted in October 2014 of an offence arising out of the same set of facts as the offence for which he is now due to be tried in 2019, and that it is an abuse of process for there to be sequential trials of Mr. Ross where the offences are on an ascending scale of gravity.

BACKGROUND FACTS

5. The District Court Conviction Order of 10th November, 2017 sets out the details of Mr. Ross's conviction under the 1961 Act as follows:

> "On the 23-Aug-2013 at KNOCKNACULLOTA KILLAVULLEN CORK public place IN THE SAID DISTRICT COURT AREA OF FERMOY while being the owner of vehicle registration number 02C3830 did allow the said vehicle to be driven while there was a defect affecting the said vehicle which was known to you or which you could have discovered by the exercise of ordinary care and which was such that the said vehicle while in motion was a danger to the public.
>
> Contrary to section 54(2) of the Road Traffic Act, 1961 provides the offence. Section 54(4) of the Road Traffic Act, 1961 (as amended by section 18 of the Road Traffic Act, 2006) provides the penalty."

6. The maximum penalty under s. 54(4) of the 1961 Act is €5000 and a prison sentence of 3 months. In the District Court, Judge Sheridan imposed a fine of €700 on Mr. Ross. It is relevant to note that young Michael was a son of an employee of Mr. Ross and the family lived in Mr. Ross' neighbourhood and was well known to Mr. Ross and so his death was a great tragedy for the entire community. It is also important to note that Mr. Ross was not driving the tractor at the time, rather an employee of his was the driver, and there was no suggestion that Mr. Ross had permitted Michael to be driven in the tractor. Despite the awful tragedy that has befallen Michael and his family, it seems that in light of these circumstances, the nature of the defect and the extent of Mr. Ross' moral, as distinct from legal, culpability for the accident, Judge Sheridan did not impose a custodial sentence on Mr. Ross.

7. The offence which Mr. Ross in now being charged with under the 2005 Act clearly arises from the same set of circumstances and from the same defective lock as is apparent from the Statement of Charges contained in the Book of Evidence against Mr. Ross, which states:

> "[…] you being an employer within the meaning of the Safety, Health and Welfare at Work Act, 2005, did fail to manage and conduct your undertaking in such a way as to ensure in so far as is reasonably practicable that in the course of the work being carried on, individuals at the place of work (not being your employees) were not exposed to risks to their safety, health and welfare, in that, you failed to maintain a Deutz Fahar Agroton 165 tractor registration number 02 C 3830, which said tractor being a place of work within the meaning of the said Act, in a condition that was safe and without risk to health, in particular, the lock keeper on the left hand side of the door of the tractor cab being fractured and distorted, such that the door could not be latched, closed or locked, being thus in breach of Section 12 of the Safety, Health and Welfare at Work Act 2005, and as a consequence a person, to wit, Michael Murphy, suffered personal injury and died.

Contrary to Section 77 (9) (a) of the Safety, Health and Welfare at Work Act, 2005."

8. Section 77(9)(a) states:

> "*Subject to paragraph (b),* if a person suffers any personal injury as a consequence of the contravention of any of the relevant statutory provisions by a person on whom a duty is imposed by sections 8 to 12 inclusive and 14 to 17 inclusive, the person on whom the duty is imposed commits an offence."

9. It seems clear that the relevant breach of duty in this case, which gives rise to a criminal offence as a result of s. 77(9)(a), is contained in s. 12 of the 2005 Act, which states that:

> "Every employer shall manage and conduct his or her undertaking in such a way as to ensure, so far as reasonably practicable, that in the course of the work being carried on, individuals at the place of work (not being his or her employees) are not exposed to risks to their safety, health and welfare."

10. Having set out the two offences which are at issue, it is next proposed to consider the law in relation to, first, the prohibition of trials generally and secondly, the grounds upon which Mr. Ross relies to seek the prohibition of his prosecution for a workplace offence in this case.

THE LAW

11. It is important to bear in mind that prohibiting a criminal trial is something which is only done in exceptional circumstances. The Supreme Court case of *Harris v. DPP* [2012] IESC 6 was a case in which the Supreme Court refused to prohibit prosecution on the grounds of delay under the 2005 Act regarding a fatal accident at work involving the applicant's lorry some five years after the accident. Macken J. stated at p. 18 that:

> "It is also important to recognise the exceptional nature of the remedy of prohibition in the context of the criminal justice process, a matter also considered in *Devoy v. D.P.P.*, supra., and mentioned in several other cases, including *D.C. v. D.P.P.* [2005] 4 I. R. 281, in which it was pointed out that prohibition is a remedy *"to be granted only in exceptional circumstances*". Kearns J. in *Devoy* at p.255 stated:-
>
> '... any court called upon to prohibit a trial must give due weight to the gravity and seriousness of the offence when exercising this jurisdiction. It must analyse the causes for delay with great care, weighing up and balancing the role of both the prosecution and the applicant and their respective contributions to delay. In this context not every delay is significant and not every delay warrants the description of being blameworthy to such a degree as to trigger an enquiry by the court under *P.M. v. D.P.P.* or *Barker v. Wingo*...."

Thus, in considering the circumstances of Mr. Ross' case, it will be necessary to bear in mind that he is seeking to prevent the prosecution of an offence, which is an exceptional remedy.

An accused cannot be tried for the same or substantially the same offence

12. In seeking this exceptional remedy, Mr. Ross relies on the case of *DPP v. Finnamore* [2009] 1 I.R. 153 at 171 as authority for the principle that a person cannot be tried a second time on "*the same offence or, substantially the same offence*" for which he was already tried.

13. The *Finnamore case* involved the issue of whether a charge under s. 3 of the Misuse of Drugs Act, 1977 criminalising drug possession, even for personal use, was a bar to a subsequent trial on a more serious offence under s. 15 of that Act, namely possession for the purposes of supply. Macken J. permitted the subsequent trial as she held that the two offences were not the same or substantially the same offences. At p 170 in her judgment, she states:

> "In *The People (Attorney General) v. Marchel O'Brien* [1963] I.R. 92, however, the Supreme Court was considering the issue of "the same offence" in the context of *autrefois acquit*. Kingsmill Moore J. in the course of his judgment at p. 96, referred to *R. v. Barron* [1914] 2 K.B. 570 and stated: -
>
> > "The same offence is given an elastic meaning. If all the elements necessary to constitute the first offence are also necessary ingredients in the second offence then the two offences are considered as being substantially the same. Thus an *acquittal* on a charge of common assault can be pleaded as *autrefois acquit* to an indictment for an assault causing actual bodily harm … for if a person has been *acquitted* of an assault this acquittal negatives the existence of the elements necessary for an aggravated assault. But if only portion of the ingredients to the first offence are requisite to the commission of the second offence the plea will not lie. Thus an acquittal on a charge of assault causing actually bodily harm could not provide the material for a plea of *autrefois acquit* on a charge of common assault. Similarly an acquittal on a charge of sodomy could not be pleaded as *autrefois acquit* in a charge of gross indecency between male persons, for there are elements required to be proved in a charge of sodomy additional to those required to prove a charge of gross indecency: *R. v. Barron*" (emphasis added).
>
> This very helpful and clear exposition serves two purposes. It makes clear why a plea in bar could arise in such a case of a prior acquittal. It also makes it clear precisely why, on the contrary, in the case of *autrefois convict*, the position is different, even if in some general respects the same principles can apply in both circumstances. It is easy to see that if a person has been acquitted of an offence whose essential ingredient has not been established, he cannot afterwards be convicted of a more serious offence, where the very same ingredient is also an essential element. If that essential element has caused the first acquittal, it cannot be revisited for the purposes of proving the second offence. On the other hand, in the case of *autrefois convict*, where an essential ingredient in the first offence has been proved, it does not automatically follow either in logic, or in law, that that is sufficient to sustain a plea in bar where the second offence requires additional elements to be established. Where, as here, possession of drugs is a necessary element in the s. 3 offence, had the accused been acquitted, there could not be a further charge in respect of possession with intent to supply or for possession with intent to supply drugs beyond a particular value, pursuant to ss. 15 or 15A. The essential element of possession not being established in the first case, the accused has been acquitted and that element, being essential also for the more serious charges(s) is equally missing. But where, as here, an essential further element, or elements, are required to be established, for the latter two charges under ss. 15 and 15A, the fact that the applicant has been convicted, as opposed to acquitted, of the s.3 possession of drugs offence, does not have as it's consequence that the same possession is sufficient to establish the s.15 or s.15A charges, or could lead lawfully to a successful plea in bar. In the present case, the Court accepts the prosecutor's submission that the offences under ss. 3 and 15A are not, on the

jurisprudence cited, the same offence or, substantially the same offence."

14. It will be seen therefore that in this Court's analysis, it will be necessary to consider the essential elements of the road traffic offence and the workplace offence to decide whether they are the same or substantially the same offences.

Sequential trials can amount to an abuse of process
15. In addition to his claim that he cannot be tried again for the same or substantially same offence, Mr. Ross claims that his trial for the workplace offence should have taken place at the same time as the road traffic offence. He claims that these two offences being tried sequentially over 4 years apart amounts to an abuse of process. For this claim he relies on the case of *Cosgrave v. DPP* [2012] 3 I.R. 666. That case involved Senator Liam Cosgrave who received political donations from Mr. Frank Dunlop. Mr. Cosgrave was convicted of making false declarations in respect of these political donations, but five years later he was charged with receiving corrupt payments, which arose from the same payments from Mr. Dunlop. The Supreme Court permitted the second trial to proceed although the offence arose out of the same circumstances, namely the receipt of payments from Mr. Dunlop, for which Mr. Cosgrave had been found guilty previously. Nonetheless, Mr. Ross relies on that decision and in particular on the judgment of Denham C.J, who gave the majority decision, which states at para. 47 that:

> "Thus, while there is a general rule, as described, that a prosecutor should combine in one indictment all the charges he intends to prosecute, and that there should be no sequential trials for offences on an ascending scale of gravity, the court also retains a discretion to protect the fair trial process against an abuse of process in all the circumstances. "

16. In the Cosgrave case, the majority in the Supreme Court decided that the trial was one which fell within the exceptions since Mr. Cosgrave knew for many years that there was a corruption allegation against him. The second reason for permitting the later trial of Mr. Cosgrave on corruption charges was because the Court accepted that it was relevant that the DPP considered it necessary to secure the prior prosecution and conviction of Mr. Dunlop and his agreement to give evidence against certain county councillors before initiating proceedings, for corruption, against those county councillors, including Mr. Cosgrave.

17. Mr. Ross also relies on the statement of O'Donnell J. who was in the minority in that case, who observed at para. 143 that:

> "[…] a second trial on the same or similar facts is not always and necessarily oppressive, and there may in a particular case be special circumstances which make it just and convenient in that case".

Against that background of the foregoing legal principles, Mr. Ross' application for prohibition will be considered.

ANALYSIS

Is workplace offence the same/substantially the same as road traffic offence?
18. It is clear to this Court that the two offences under the 1961 Act and under the 2005 Act arise out of the same set of circumstances, namely a defective lock on a tractor door. However, this is not the same as saying that they are the same or substantially the same offence.

19. The offence under the 1961 Act is a road traffic offence, which is a minor offence and is triable summarily. The proofs that were required before Mr. Ross could be convicted of an offence under s. 54(2) of the 1961 Act were that he was:

- the owner of the tractor,
- allowed the tractor to be driven,
- with the existence of a defect,
- that was known or could be discovered through the exercise of ordinary care,
- and that therefore the tractor was a danger to the public.

20. The maximum penalty is €5,000 and a sentence of three months under s.54(4) of the 1961 Act.

21. On the other hand, the offence under the 2005 Act is a health and safety at work offence, which is a serious offence since it is an indictable and therefore Mr. Ross is entitled to be tried before a jury. The proofs that are required before Mr. Ross can be convicted under that Act are that:

- the accused is an employer,
- he failed to manage or conduct his undertaking in such a way as to ensure that persons were not exposed to risks to their safety,
- in the course of their work,
- that it was a place of work, and
- that harm was caused.

22. The maximum penalty is a fine of €3 million and a sentence of two years under s. 78 of the 2005 Act.

23. Thus, while it is clear that the two offences arose out of the same set of circumstances, it is also clear that they are very different offences, one being a road traffic offence and the other being an employer's offence under workplace legislation.

24. The qualitative difference between the two offences is highlighted by the fact that under the road traffic offence there is no requirement that any harm is actually caused to any person – the road traffic offence is simply allowing one's vehicle be driven with a defect which is a danger to the public. In contrast, the offence under the workplace legislation requires there to be harm caused to a member of the public. This qualitative difference between the two offences is further emphasised by the substantial difference between the maximum penalties provided for each offence. The road traffic offence, which does not require any actual harm to be caused to any person, carries a maximum fine of €5,000 and a maximum prison sentence of three months. The workplace offence,

which requires that harm actually be caused to a member of the public, carries a maximum fine of €3 million and a maximum prison sentence of two years.

25. Another qualitative difference is that under the road traffic offence the owner of the vehicle is liable for the defect in his vehicle. Under the workplace offence it is the employer who is liable if he fails to provide a safe place of work.

26. An alternative way to approach this issue is the way in which Kingsmill Moore J. did in the case of *The People v. O'Brien*, that is by asking whether the necessary elements to prove the workplace offence are also the necessary ingredients to prove the road traffic offence. This is not the case, since to take the most obvious example, for the road traffic offence it is not necessary to prove harm to a member of the public, while this is a necessary ingredient for the workplace offence.

27. For all these reasons, this Court is forced to conclude that, while undoubtedly the offences arose out of the same circumstances, the offence of allowing one's vehicle be driven with a defect which is a danger to the public is not the same or substantially the same offence as an employer who fails to provide a safe place of work which leads to injury to a member of the public. This is important as the test is not: do the two offences arise out of the same set of circumstances? Rather it is: are the two offences the same or substantially the same? In this Court's view, the answer to the latter question must be answered in the negative and so on this ground, this Court refuses to prohibit the prosecution of the workplace offence under the 2005 Act.

Is the prosecution of the workplace offence an abuse of process or oppressive?
28. On the 2nd of October, 2014 Mr. Ross was convicted in the District Court under the 1961 Act. Throughout 2015, Mr. Ross was aware that the HSA was conducting an investigation in relation to the circumstances of the accident and that the HSA had possession of his tractor for this purpose. On the 14th of June, 2015, Mr. Ross was advised that additional evidence had come to light and he was invited to an interview, which invitation he declined on the 18th of June, 2015 on foot of legal advice. During 2015, he sought the return of his tractor on a number of occasions but on each occasion he was informed that it was subject to an ongoing investigation. The tractor was finally returned to Mr. Ross on the 17th of February, 2016 and prior to its return, on 25th of January, 2016, the HSA offered him the opportunity to inspect it, which he declined. Some 14 months later, on the 13th of April, 2017, the file was sent to the DPP. A summons issued on the 22nd of August, 2017 and was served on Mr. Ross in September 2017 and the Book of Evidence was served on the 22nd of October, 2017.

29. In the *Cosgrave case*, Denham C.J analysed whether there was an abuse of process in the following manner (at 704):

> "In analysing whether the current charges are an abuse of process I consider the following to be relevant matters:-
>
> (i) In all the circumstances of the case the State had a valid reason for not prosecuting the applicant for corruption in 2004. It had justifiable reasons for not calling Frank Dunlop as a witness until Frank Dunlop himself was prosecuted and convicted for corruption offences. In the Electoral Act charges Frank Dunlop was a witness. In the matter of the corruption charges Frank Dunlop was an accused. Thus, both sets of charges could not be dealt with identically. Before the first respondent could rely on Frank Dunlop's evidence in the prosecution of the applicant for corruption charges, the criminal liability of Frank Dunlop under the corruption allegations had to be determined. It was only after Frank Dunlop's criminal trial had been determined that he could be a prosecution witness in the current charges.
>
> (ii) There is no duty on the first respondent to inform a person of a potential prosecution. Nor is there a duty on the first respondent to disclose information to a potential accused which is relevant to a future potential prosecution.
>
> (iii) The facts upon which the Electoral Act offences and the corruption offences are based are different.
>
> (iv) The Electoral Act offences and the current charges are different in nature, degree and moral turpitude. As discussed earlier, the failure to declare on a donation statement that he had received a donation exceeding €500 is not the same or of a similar character as a charge that he corruptly received a payment.
>
> (v) The applicant knew of corruption allegations made against him at the time of the prosecution for the Electoral Act offences. These allegations were put to him by members of the Criminal Assets Bureau during an interview on the 3rd March, 2004. In the memorandum of the interview the applicant answered three of the questions put to him by the Garda Síochána in the following terms:-
>
> "I never received a corrupt payment from Frank Dunlop."
>
> Thus, the applicant was aware of corruption allegations against him, although he did not know of written statements alleging corruption.
>
> I am satisfied that it is not an abuse of process to prosecute the applicant on the current charges. In the special circumstances it was just and appropriate for the first respondent to await the prosecution and conviction of Frank Dunlop before prosecuting the applicant on the current charges, upon which Frank Dunlop will be a key witness. In all the circumstances there is no real risk of an unfair trial. Thus, I would not prohibit the trial of the applicant on the current charges."

30. Thus, in considering whether the prosecution of the workplace offence amounts to an abuse of process, the following issues are relevant (some of which are similar to the issues which were relevant to in the *Cosgrave case*):

> • The State only got possession of the tractor after the District Court prosecution and carried out a dismantling of the tractor and its inspection by, *inter alia*, a UK based metallurgist, who has prepared a Statement of Evidence for the Circuit Court trial and an engineer employed by the tractor company SAME Deutz Fahr UK who has also prepared a Statement of Evidence for the Circuit Court trial. Thus, the evidence and, as previously noted the proofs, for the road traffic offence are different from the workplace offence. In addition, as noted hereunder, this investigation/inspection led to new evidence coming to light.
>
> • As in the *Cosgrave case*, there was no duty on the HSA to advise Mr. Ross of the potential prosecution under the 2005 Act, but like the applicant in the Cosgrave case, he must have known that a prosecution was at least a possibility, if not a probability, when a letter was sent by the HSA to his solicitor dated 7th July, 2015 which stated:
>
> "I refer to a telephone conversation with your client Mr George Ross on 18th June 2015. Following further

investigation into this accident new evidence has come to the fore. I advised Mr. Ross that I would like to put some further questions to him under caution and allow him an opportunity to address these issues should he so wish. On the 23rd June 2015 Mr Ross contacted me stating that, following legal advice he did not wish to give any further statements. Can you confirm that this is the case?"

For anyone to be told that they were to be interviewed '*under caution'* would be a very concerning development and in addition, Mr. Ross was expressly told that new evidence had been uncovered, and therefore he must have known at this stage in mid-2015 that a prosecution was, if not likely, at least possible.

• One of the reasons Mr. Ross claims that it is an abuse of process for him to be prosecuted now is because, after a conversation he had with Mr. Gerard McSweeney of the HSA in March 2016, Mr. Ross believed that the investigation was at an end. However, Mr. McSweeney has averred that during this conversation in March 2016, he did not tell Mr. Ross, or imply, that the prosecution was at an end. In any case, it seems a factor in Mr. Ross' belief that the prosecution was at an end must have been his pre-existing belief that the prosecution was at an end. This is because Mr. Ross avers at para. 10 of his supplemental affidavit dated the 19th of July, 2018 that the reason he refused the offer to inspect the tractor on the 25th of January, 2016 was because neither he nor his solicitor believed at that stage that a prosecution was likely. However, there is no evidence to support these beliefs, particularly since only a few months previously the HSA had sought to interview him on caution in light of new evidence. Accordingly, it is no surprise then, even if Mr. McSweeney said nothing to Mr. Ross in March 2016 to suggest that the prosecution was at an end, as he avers, that Mr. Ross believed after that conversation that the prosecution was at an end, since that was his pre-existing belief from before that conversation.

• Like the *Cosgrave case*, and as noted previously, the facts/proofs of the two offences are different.

• As in the *Cosgrave case*, the two charges are different in nature (a road traffic offence v. a workplace offence), different in degree (a summary offence v. an indictable offence) and different in moral turpitude (no injury to a person v. death of a young boy).

• Mr. Ross knew in mid-2015 that a prosecution was possible, if not probable. For this reason (and notwithstanding the extent of Mr. Ross' moral culpability which is likely to be equally relevant to any workplace offence), Mr. Ross should not have been surprised that the death of a young boy might lead, at a minimum, to further investigation and perhaps a charge, in addition to the minor traffic offence of permitting a defective vehicle to be present in a public place, of which he has been found guilty.

CONCLUSION

31. This is a case where an apparently minor act/omission of tying closed a tractor door (with a defective lock) has led to the truly tragic death of a young boy. For this reason, the degree of moral culpability of Mr Ross for the death of young Michael is very different from other deaths that appear before our courts, since Mr. Ross, although the owner of the tractor, was not driving the tractor at the time and is not accused of allowing the boy in the tractor. For this reason, it is perhaps understandable that Mr. Ross might bring these proceedings to prohibit what he views as his 'second' trial for owning a tractor with a defective lock. Indeed, while a claim, that the four-year delay in the trial of the second offence, amounts to blameworthy prosecutorial delay justifying prohibition, was not pursued by Mr Ross (and in any case it is this Court's view that the delay case it did not justify prohibition), it nonetheless would have been preferable if the proceedings for the workplace offence had been prosecuted more quickly.

32. However, while Mr. Ross should not have had the prospect of this trial hanging over him for four years, the interference by the courts in the prosecutorial process by means of prohibition is a power which is only exceptionally used and this Court is of the view that the law on *autrefois convict* and abuse of process is not such as to justify the prohibition of Mr. Ross' trial for a workplace offence. Undoubtedly however, the precise circumstances of the alleged offence and the degree of Mr. Ross' moral culpability for the tragic death will be carefully considered by the Court hearing the trial.