Neutral Citation: [2015] IEHC 25

THE HIGH COURT

JUDICIAL REVIEW

IN THE MATTER OF SECTION 5 OF THE SUMMARY JURISDICTION ACT 1857

[Record No. 2013/929 J.R.]

BETWEEN/

A. C.

Applicant

AND

JUDGE EAMON O'BRIEN

AND

THE DIRECTOR OF PUBLIC PROSECUTION

Respondents

JUDGMENT of Ms Justice Iseult O'Malley delivered the 21st day of January 2015.

Introduction

1. In this case the applicant seeks *inter alia* an order of *certiorari* quashing the order of the first named respondent refusing to state a case to this Court following a criminal conviction in the District Court; a declaration that the question of law which arose in the case and in respect of which the applicant desires to appeal by way of case stated is not merely frivolous, and an order of *mandamus*, compelling the first named respondent to sign and state a case for the opinion of this Court.

2. The central issue in the case concerns the fact that the applicant gave evidence on his own behalf, denied his guilt of the offences charged and was not cross-examined by the prosecution. Having heard submissions as to whether the court was therefore bound to accept the applicant's evidence, the first respondent adjourned the matter for consideration. He held against the applicant on the issue. After convicting the applicant, he refused to sign an appeal by way of case stated as to whether he had been correct in so doing, holding that the law on the issue was clear and that the request to state a case was frivolous.

Background facts

3. The applicant was charged with two offences - burglary contrary to s.12 of the Criminal Justice (Theft and Fraud Offences) Act 2001 and assaulting a peace officer contrary to s.19(1) of the Criminal Justice (Public Order) Act 1994. Both offences were allegedly committed on the 22nd October, 2011, at an address in Carlow. The applicant was then 14 years of age.

4. The trial took place on the 11th April, 2013, before the first respondent. It is not clear to this court why there was a delay of such magnitude in the processing of charges against a person of his age.

5. For the prosecution, evidence was given by Garda Maurice Mahon that he received a report that a burglary was in progress at a named address. He made his way there, and said that he was in a position to recognise both of the perpetrators of the burglary. He gave evidence that the applicant attempted to hit him in an effort to make good his escape. Nobody was arrested at the scene of the crime and there was no forensic evidence. The recognition evidence given by Garda Mahon was, therefore, the only evidence that implicated the applicant in the offences.

6. The applicant was arrested on the 3rd November, 2011, and detained pursuant to s.4 of the Criminal Justice Act 1984. He was interviewed on two occasions and the memoranda of the interview were adduced in evidence. During the interviews, the applicant answered every question and consistently denied being anywhere near the locus of the burglary, insisting that at the time of the offence (approx 02:45 on the 22nd October, 2011) he was at home in bed.

7. At the close of the prosecution case, an application for a direction of no case to answer was made on behalf of the applicant. This was refused by the learned trial judge.

8. The applicant gave evidence. He was asked one question in chief - whether he had "hand, act or part" in the offences described by the prosecution. He denied any involvement. He was then invited to answer all questions put to him in cross-examination. No questions were put.

9. At this point a further application was made on behalf of the defendant. This application was to the effect that the failure of the prosecution to put any question to the defendant left his evidence uncontroverted and hence it had to be accepted. Reliance was placed on the case of *Browne v Dunn* [1894] 6 R. 67 in support of the application. There was no application on behalf of the second respondent to recall the applicant for cross-examination.

10. The first named respondent directed that written submissions be prepared on the issue and the matter was adjourned to the 9th May, 2013 for further argument.

11. In submissions on behalf of the applicant, reliance was again placed on the judgments in *Browne v Dunn* [1894] 6 R. 67. This was a civil defamation action in which the witnesses called by the defendant were not cross-examined by the plaintiff. The applicant cited the following passage from the judgment of Lord Herschell LC:

> "*…it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a*

witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged and, then, when it is impossible for him to explain, as perhaps he may have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth."

12. Extracts from the speech of Lord Halsbury were also quoted as follows:

"To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to….

…it would be a perfect outrage and violation of the proper conduct of a case at Nisi Prius if, after the learned counsel had declined to cross-examine the witness upon that evidence, it is not to be taken as a fact that… [the evidence was true].

…If [counsel] admits before the jury – as I say, by the absence of cross-examination, he does admit – that these statements are true, what is there for the jury?"

13. Reference was also made on behalf of the applicant to a decision of the Supreme Court of British Columbia in the case of *R. v. Christensen* [2001] BCSC 1196. The accused in a drunk driving prosecution had given evidence that a medical condition combined with defects in his car, rather than alcohol, were the cause of his driving. He was not cross-examined. The conviction was set aside. The following passage was relied upon:

"It is important to note that the criminal trial process operates in an adversarial system, wherein the prosecution and the defence more often than not produce contradictory evidence. It has been said that cross-examination is the most effective tool to test the truthfulness or the reliability of contradictory evidence. Thus, cross-examination is really at the heart of the adversarial system. In some cases, counsel for tactical reasons may refrain from cross-examining an adverse witness. In those circumstances, counsel must live with the consequences."

14. On behalf of the second named respondent it was submitted that the rule in *Browne v Dunn* [1894] 6 R. 67 could be summarised as follows:

"Simply put, when you have a witness on the stand during a trial and it is your intention to later in the trial, raise evidence that would contradict the witness, [it] is only fair to the witness that you give him/her notice of contrary evidence so that he/she might then have an opportunity of addressing it."

15. Reference was made to a decision of the Alberta Court of Appeal in *R. v. Werkman* 2007 ABCA 130 where Côté J.A said at para 7:

"The rule in Browne v Dunn requires that counsel put a matter to a witness involving the witness personally if counsel is later going to impeach the witness' credibility. Though it is not necessary to cross-examine upon minor details in the evidence, a witness should be provided with an opportunity to give evidence on 'matters of substance' that will be contradicted. The purpose of the rule is to ensure that parties and witnesses are treated fairly, it is not a general or absolute rule. The rule also has exceptions."

16. The second named respondent further submitted that the rule could only apply where a later witness gives evidence of a nature that was not put to the earlier witness. It did not apply to the sequence of the evidence in the instant case.

17. Without prejudice to this argument, it was noted that the judgments in *Browne v Dunn* [1894] 6 R. 67 referred to two situations where the rule did not apply. Lord Herschell said that there were cases in which notice of the intention to impeach the credibility of a witness

"…has been so distinctly and unmistakably given and the point upon which he is impeached and is to be impeached, is so manifest that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted."

18. Lord Morris, while concurring with the rest of the court on the result of the case, said that he did not wish to lay down any "*hard and fast*" rule as regards cross-examining a witness as a necessary preliminary to impeaching his credit.

"…I can quite understand a case in which the story told by a witness may have been of so incredible and romancing a character that the most effective cross-examination would be to ask him to leave the box."

19. It was therefore submitted that the rule did not apply where the relevant testimony was not credible.

20. The first named respondent gave his decision on the 11th July, 2013. He rejected the arguments put forward on behalf of the applicant, citing the case of *Flanagan v Fahy* [1918] 2 I.R. 361 and an article published in the Bar Review in 2006 entitled "*Putting the case against the Rule in Browne v Dunn*" by Hugh Kennedy BL. He also referred to a note in *Phipson on Evidence* suggesting that the rule might not apply in Ireland. In rejecting the application, the first named respondent held that the rule in *Browne v Dunn* did not apply. He then heard closing submissions and proceeded to convict the applicant.

21. Sentencing was dealt with on the 16th October, 2013 when the applicant was sentenced to nine months detention, suspended for two years. Following the conviction, the applicant applied to the first named respondent to state a case to the High Court

pursuant to the provisions of section 2 of the Summary Jurisdiction (Ireland) Act 1857. The respondent expressed the view that the law was clear, refused the application and signed a certificate of refusal to state a case pursuant to section 4 of the Summary Jurisdiction (Ireland) Act 1857 indicating that he considered the application to be "frivolous". He added to the certificate the words "In that the law is well settled".

22. Leave to seek judicial review was granted on the 11th November, 2013. In summary, the applicant claimed in his statement of grounds that since there was no reported decision on the correct application of the rule in this jurisdiction and since the rule had been applied in "many other cases," the first named respondent erred in law in ruling that the issue was frivolous and erred in law in refusing to sign the case stated. The applicant further claimed that, in so refusing, the first named respondent "breached the applicant's right to natural and constitutional justice and strayed beyond jurisdiction".

23. The second named respondent has opposed the application. It is maintained that the determination of the first named respondent, that the proposed case stated was frivolous, was reasonable and within his jurisdiction. He had convicted the applicant on the basis of the evidence and it was not open to the latter to use the case stated procedure to challenge that.

24. It was argued that there was no factual or legal basis for the application of the rule contended for by the applicant. The rule, even if it applies in Ireland to the same extent as in the United Kingdom (which was denied by this respondent) would not have precluded the first named respondent from convicting the applicant.

25. The respondent has also raised an argument as to the propriety of judicial review as a remedy having regard to the provisions of s.5 of the Summary Jurisdiction (Ireland) Act, 1857.

The Summary Jurisdiction Act, 1857

26. This legislation, as extended by s.51 of the Courts (Supplemental Provisions) Act, 1961, provides the procedure whereby a party who is dissatisfied with the determination of a District Judge on a point of law may apply to the Judge to state a case to the High Court. Pursuant to s.4 of the Act, the Judge may refuse to state a case if of the opinion that the application is "merely frivolous". On request, he or she must then sign a certificate of refusal.

27. Section 5 of the 1857 Act provides that, in the case of refusal, the appellant may apply to the High Court

> *"upon an affidavit of the facts for a rule calling upon [the judge] to show cause why such case should not be stated; and the said Court may make the same absolute or discharge it…"*

28. Appeal by way of case stated under the Act requires the appellant to abandon his or her right of appeal to the Circuit Court.

29. The power of the High Court to form its own view whether or not an application was "merely frivolous" was established in the case of *State (Turley) v Ó Floinn* [1968] 1 IR 245. The applicant had been convicted of using a premises for public dancing without the requisite licence. The President of the District Court refused to state a case on the ground that his decision was based entirely on the facts. On an application under s.5, O'Keefe P. held that there were at least five "real questions of law". In relation to the operation of s.5, he said as follows:

> *"this section appears to me to enable the High Court to form its own opinion on whether the facts warrant consideration by the High Court by way of appeal or not. In the present case I am of opinion that the evidence in the District Court raised questions of such complexity than an appeal by way of Case Stated was fully warranted…"*

30. On appeal this approach was upheld by the Supreme Court, with the statement that

> *"There is a statable question of law to be decided, and the prosecutor is entitled to have it ruled on a case stated to the High Court."*

31. In considering what might constitute a frivolous application for a case stated, Keane C.J. said in the case of *Fitzgerald v DPP* [2003] 3 IR 247 at p. 253

> *"Since s.2 is designed to facilitate an appeal by a person dissatisfied with the District Judge's determination as being "erroneous in point of law", a District Judge might well consider a request for a Case Stated as frivolous, if there is no conceivable ground on which his determination could be so described. Section 4 seems plainly intended to ensure that the power to appeal to the Superior Courts on the ground that the determination was erroneous in law is not abused by litigants pursuing pointless appeals with no prospect of success and consequences in both costs and delay."*

32. The Chief Justice gave as an example a hypothetical case where there was unchallenged evidence that a defendant was travelling at over 100 m.p.h. in a 40 mile area. He continued:

> *"…No doubt there are issues of fact as simple as that which can, with some semantic juggling, be converted into questions of law. There may also be occasions, as Hardiman J. points out in his judgment, when a question of law may clearly arise, but the application for a case stated could still be regarded as frivolous, for example, where it has already been the subject of a case stated and a determination by the High Court or this court….*
>
> *…A decision that it is frivolous may be on the ground that no question of law arose or, that if a question of law did arise, it would, depending on the circumstances, be a pointless waste of time to grant the request for a case stated."*

33. In *Cullen v District Judge McHugh* [2013] IEHC 44 Hedigan J. had considered and rejected each of the grounds which the applicant wished to raise. Having referred to Turley and to Fitzgerald, he said:

> *"Since, as cited above, this Court may itself consider whether the case warrants an appeal, I consider that, even where the High Court believed that the application did give rise to a point of law but that it would be a pointless waste of time to grant a request for a case stated, it should refuse the request."*

34. He therefore refused to make an order under s.5 of the Act.

The decision in DPP v Burke [2014] IEHC 483

35. Very shortly before this matter came on for hearing Baker J. delivered judgment in *The Director of Public Prosecutions v Burke*

[2014] IEHC 483. Since it is agreed by the parties that this case is of significance to their submissions in relation to the issue, it is perhaps best to summarise it before dealing with the parties' submissions.

36. Briefly, the controversy in the case arose from the fact that the prosecution called a witness for the purpose of proving one particular matter but who went on to give evidence exculpatory of the accused. She was not a hostile witness in the legal sense, since the exculpatory material was contained in the statement she had given to the Gardaí. No application was made to treat her as hostile and therefore, obviously, she could not be cross-examined or otherwise impugned by the prosecution. In a consultative case stated, the District Judge asked whether she was entitled to prefer the evidence of other prosecution witnesses as against the unchallenged evidence of this witness.

37. The arguments in the High Court appear to have centred both on the content of the rule claimed to have been established in *Browne v Dunn* [1894] 6 R. 67 and on its status as an authority in Irish law. The uncertainty on the latter issue arose from the Irish case of *Flanagan v Fahy* [1918] 2 I.R. 361 and in particular part of the judgment of Ronan L.J.

38. *Flanagan v Fahy* [1918] 2 I.R. 361 was an action to establish a will, where the defendants contended that the will was a forgery. A witness named Ryan gave direct evidence on behalf of the defence, implicating the plaintiffs in the forgery. He was cross-examined as to his propensity for drunkenness and violence, and in relation to his reasons for hostility to the plaintiffs, obviously with a view to demonstrating that he was lying. However, it was never specifically put that evidence was a fabrication. The defence was permitted, against objection, to call Ryan's employer to give evidence that Ryan had told him the same story at the proximate time.

39. The jury found in favour of the defendant and the Court of Appeal refused to grant a new trial. The *ratio* of the case was that the evidence was properly admitted to rebut the implicit allegation of fabrication motivated by personal hostility. In the course of his judgment Ronan L.J. commented that if there had been no cross-examination of Ryan, the whole of the employer's evidence would have been inadmissible. He went on:

> *"But in England this would not have been the only result. The settled law and practice there is that, if you do not cross-examine a witness, so as to give him an opportunity of explaining and justifying his evidence or any part thereof, you are taken to have accepted the evidence in respect of which you have not so cross-examined…It is stated in the leading text-books, and was dealt with in the House of Lords in the case of Browne v Dunn. This difference of practice must be considered in applying the English case. I say nothing as to how far Browne v Dunn governs the Irish Courts."*

40. Ronan L.L. went on to find that the cross-examination was designed to ensure, by not putting the direct allegation, that evidence of the prior consistent statement would not be admitted but that it had failed in that regard.

41. Having comprehensively considered these authorities; the position in England and the article by Mr. Kennedy referred to by the first named respondent in this case, Baker J. rejected the argument that a party is deemed to accept evidence not challenged by him.

> *"In my view the proposition is more narrow: a party not testing evidence by cross-examination leaves it open to the trier of fact to treat the evidence as determinative, and uncontroverted evidence carries a particular weight which may tip the balance in the case."*

42. In answer to a question by the learned District Judge in that case as to whether she was entitled to prefer the evidence of prosecution witnesses whose evidence was challenged by the accused over the uncontradicted evidence of the witness in question, Baker J. set out the following principles (at paragraph 52):

> *a) In closing submissions or argument a party may not impeach the credibility of a witness if that witness's evidence has not been tested in cross-examination;*
>
> *b) Ipso facto a person who does not cross-examine evidence is faced with the prospect that the evidence is heard by the trial judge or jury and is untested.*
>
> *c) There is no requirement that evidence be cross-examined, but by not cross-examining evidence the evidence goes to the fact finder as untested and uncontradicted evidence.*
>
> *d) Untested and uncontradicted evidence carries greater weight than tested contradictory evidence.*
>
> *e) It is not the function of any rule of law to direct the court to accept evidence merely on account of the fact that it has not been tested. The court must hear all of the evidence before it and is entitled to weigh the evidence, including unchallenged evidence, against the evidence as a whole adduced at the trial.*
>
> *f) A trial judge or jury is not compelled as a matter of law to accept evidence because it is not challenged. Unchallenged evidence is part of the evidence at trial and the fact that it is unchallenged gives it somewhat greater weight, but does not direct a particular result.*

Submissions on behalf of the applicant

43. In relation to the procedural issue, it is pointed out on behalf of the applicant that these proceedings refer in the title to s.5 of the Summary Jurisdiction Act, 1857. Reference is also made to O.84 r.18, which provides that an application for an order of mandamus must be brought by way of a judicial review application. This was the procedure adopted in *Turley* and in *Cullen*.

44. On the substantive issue – whether the question sought to be raised in a case stated by the applicant was frivolous – it is submitted that, notwithstanding the judgment of Baker J., the authorities are not settled.

45. Counsel has referred to *McGrath on Evidence* (1st Ed., 2005) at pp. 90-91, which treats the case of *Browne v. Dunn* [1894] 6 R. 67 as establishing a rule applicable where a party intends to call contradictory evidence and/or to impeach the credibility of the witness in closing argument. Reference was also made to the following passage, at p. 46, in *Heffernan on Evidence* in Criminal Trials:

> *"…where a party intends to contradict a witness's evidence-in-chief by calling a rebuttal witness, the party must first lay a foundation in cross-examination. The requirement that the cross-examining party puts his case to the witness furthers the policy of judicial economy within the adversarial trial but it is also driven by fair trial concerns: counsel must*

cross-examine the witness about the matter in question so as to afford the witness an opportunity to refute or explain the alleged contradiction.

46. However, in the next paragraph the author continues:

> *"The rule is beset with uncertainties including doubt over the fundamental question whether it applies in criminal proceedings. Kennedy has criticised the contemporary Irish courts for slavish adherence to the rule. Among the difficulties he cites in a criminal context is the challenge of reconciling the rule with the absence of any general duty of disclosure on the defence and the entitlement of the accused to remain silent at trial."*

47. It is submitted that the facts in *Burke* were very different, and indeed were "at the far end of the spectrum" to those of the instant case and that *Christensen* was not cited. In any event, on the analysis of Baker J. there is still an applicable rule, even if it is in this jurisdiction a modified version, and the learned District Judge therefore erred in law in holding that no rule applied.

48. It is also submitted that there is no inherent conflict between the judgments in *Burke* and *Christensen*.

49. On the facts of the case, it is submitted that, firstly, the applicant was not given the opportunity to deal with the recognition evidence of the Garda. Secondly, there was nothing inherently incredible in his evidence and failure to cross-examine him was tantamount to acceptance of his evidence. Thirdly, although there is no evidence as to what the prosecuting officer said in closing argument, it must be assumed that he impugned the credibility of the applicant.

Submissions on behalf of the second named respondent
50. In the statement of opposition, it is pleaded that the conviction of the applicant followed a full and fair hearing. It is said that the first named respondent convicted the applicant on the basis of the evidence and his assessment thereof. He then acted reasonably in determining that the application to appeal by way of case-stated was frivolous and he was entitled to refuse to state a case in such circumstances. The judge acted *intra vires* and in accordance with law and the applicant is not entitled to an order of *certiorari* quashing that determination.

51. Without prejudice to the foregoing it is pleaded that there is no factual or legal basis for any application of what is described by the applicant as the rule in *Browne v Dunn* and even if that rule applied in Ireland to the same extent as in the United Kingdom, which is denied, it would not have precluded the first named respondent from convicting the applicant notwithstanding a failure by the prosecution to cross-examine him on his denial of involvement.

52. It is further pleaded that insofar as it has any applicability to summary criminal proceedings in Ireland, which is denied, the rule in *Browne v Dunn* is directed at procedural fairness and merely provides that an individual should be confronted with any contradictory evidence that is being relied upon and intended to be adduced by the cross-examiner. The rationale of the rule is that a witness should be granted the opportunity to explain and clarify his/her position and/or version of events before any contradictory version be put forth. In the instant case all the prosecution evidence was called and adduced before the applicant testified and the rule is inapplicable.

53. As a procedural matter it is pleaded that the applicant is not entitled to judicial review relief because he has not pursued alternative remedies and in particular he has not invoked s.5 of the Summary Jurisdiction Act, 1857. It is submitted that the applicant does not have leave to seek an order under s.5.

54. In submissions it was argued that the fundamental question raised by the applicant has been answered in *Burke*, with the result that there is no legal obligation to accept evidence that has not been the subject of cross-examination.

55. It is further submitted that the decision of the first named respondent in the trial was based on the fact that he believed one witness rather than the other. He rejected the legal proposition put to him on the basis of his view of the law, which was demonstrated to be correct in B*urke*. The applicant should therefore have appealed the conviction.

Discussion and Conclusions
56. I consider that the first named respondent may have erred in law in holding the request for a case stated to be frivolous on the basis that the law in this jurisdiction was "well settled" – the issue was by no means so clear-cut. *Flanagan v Fahy* [1918] 2 I.R. 361 was far from definitive on the question, and it was the only Irish authority. It is, in this court's experience, the general practice of advocates to act on the principle that what is not cross-examined upon may be held to be admitted and that, indeed, is one of the criticisms that Mr. Kennedy makes of the *Browne v Dunn* rule.

57. However, the question whether the rule applies in Ireland was fully addressed with the delivery of the judgment in *DPP v. Burke* [2014] IEHC 483. It may be arguable that Burke did not raise the *Browne v Dunn* issue in its pure form. The latter case was concerned with the effect of a *decision* not to cross-examine a witness, while in Burke the controversy arose because a prosecution witness gave evidence which the prosecution could not, in the circumstances, make the subject of cross-examination. However, the analysis of Baker J. is, at the very least, persuasive, and I see no reason to disagree with it. I therefore respectfully adopt as applicable to the facts in this case the principles set out in paragraph 42 above.

58. The "fair procedure" arguments do not appear to me to carry a great deal of weight in the circumstances of this case. There is no doubt but that each side knew the case it would be meeting. It is incorrect to assert that the applicant was not given an opportunity to deal with the evidence of Garda McMahon – his own counsel could have asked him to do that, rather than simply asking him to deny his guilt.

59. Many witnesses, particularly young persons, may not be good at giving a coherent, sequential narrative in their evidence in chief but may be better able to deal with cross-examination. It may be that both sides adverted to this possibility in adopting the course that they did. Each took a risk in so doing. The risk taken by the prosecution was that it gave the applicant's evidence a greater weight, and should have prevented the making of imputations against the credibility of the applicant in closing submissions. The defence also took a risk, by not engaging with the Garda's recognition evidence head-on and thereby leaving open the possibility that the Garda's more detailed evidence would be found convincing.

60. There is no evidence as to what, if anything, the prosecuting officer said in closing and I do not think it is open to me to speculate as to whether he impeached the credibility of the applicant – if he did, he had very little to go on - or whether he was in a position to highlight the credibility of his own witness by reference to the normal factors relevant to visual identification.

61. In the circumstances I consider that an order directing the first named respondent to state a case at this stage would, in legal terms, be pointless. I think it only fair to stress that I would have been of a different view had the judgment in *Burke* not been delivered after the applicant had brought these proceedings.

62. For the sake of completeness I should say that I cannot find fault with the mode of proceedings. The documents in the case were, at all times, headed with a reference to s.5 of the Act and the orders sought were not inconsistent with it.